SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

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| ALAMEDA BELT LINE, a California corporation,<br>Plaintiff,<br>v.<br>THE CITY OF ALAMEDA, a municipal corporation, et al.,<br>Defendants. | Case No. C-826373<br><br>**STATEMENT OF INTENDED DECISION** |
| AND RELATED CROSS-ACTION. | |

In this case, defendant and cross-complainant the City of Alameda seeks to enforce a 1924 contract that gives it the right to repurchase the Alameda Belt Line Railroad in Alameda for terms set forth in that agreement. Plaintiff Alameda Belt Line contends the contract is not enforceable. Having considered the papers filed by the parties, the arguments made at the hearing, and any evidence admitted thereat, and good cause appearing, and for the reasons set forth below, the court now finds that the parties' contract is enforceable and that the City of Alameda is entitled to repurchase the railroad for the sum of $966,027.

## I. FACTUAL BACKGROUND

In 1918, the City of Alameda ("the City") approved and then constructed a "belt line" railroad from the site of the Miller-Sweeney (Fruitvale) Bridge for a distance of approximately 1.2 miles. (Trial Exhibit ("Exh.") 600.) The City never operated it; initially, the

Southern Pacific Railroad operated the railroad under an "informal license" arrangement. (Exh. 604.)

Thereafter, faced with a growing industrial base, the City concluded that it needed to expand the belt line railroad. (Id.) Since it could not pay for the expansion itself, it looked for a private entity to take over the railroad. (Exh. 700, section 1 (Hickok testimony), ABL 19156-19157; Exh. 700, Section 4 (WP/ATSF joint brief), ABL 20081.) On September 16, 1924, the City authorized entering into an agreement to convey the belt line to Western Pacific Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, pursuant to City Ordinance 259, adopted by the City Council. (Exh. 650.)

On December 15, 1924, the parties signed the agreement authorized by Ordinance 259 ("the 1924 Agreement"). (Exh. 523.) It is this contract, the 1924 Agreement, which is at the heart of this case.

The 1924 Agreement provided that WP and ATSF were to form a new company, Alameda Belt Line ("ABL"), to operate the belt line, and that ABL would buy the existing beltline railroad from the City for $30,000. (Exh. 523). One fundamental purpose of the 1924 Agreement as a whole was to allow ABL to extend and operate a belt line railroad that the City had already built. (See, e.g., Exh. 622 (testimony of Allan P. Matthew on behalf of the City of Alameda) at ABL 20132-33.)[1]

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[1] ABL was created by WP and ATSF for the sole purpose of operating the belt line. All officers of ABL were also executives of the parent companies. (Reporter's Transcript ("R.T.") 4/24/06 111:9-19; 112:1-19.) ABL's economic value to its parent railroads was the linkage

The parties' current dispute focuses on Paragraph 14[2] of the 1924 Agreement, which provides as follows:

> Said City shall have the right at any time hereafter to purchase said belt line railroad including all extensions thereof, for a sum equal to the original cost, together with the cost of any and all additional investments and extensions made therein by said ALAMEDA BELT LINE, provided, that said City shall give at least one year's previous notice of its intention to do so by ordinance to that effect; and provided that at the same time it purchases from the parties of the first part, or either of them, as the case may be, the branch railroad, extensions and spur tracks referred to in the twelfth section hereof.
>
> It is agreed that said ALAMEDA BELT LINE will keep an accurate account of the cost of additional investments and extensions, and file a verified report thereof annually with the City Clerk of said City, similar to the report filed with the Railroad Commission. It is further agreed and understood that the term "investments" as herein used shall not include the cost of upkeep and repairs.

Other portions of the 1924 Agreement are also relevant here. Paragraph 9 of the 1924 Agreement gave ABL the right to use a certain parcel of City-owned land in exchange for the payment of rent. The rent was adjustable every ten years in accordance with the then-existing value of the property. Thus, the 1924 Agreement shows that the parties knew at the time of signing that the land on which the railroad operated might increase in value. Nonetheless, the parties did not provide in Paragraph 14 for any revaluation of the land or the physical assets of the railroad if and when the City exercised its

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between the short haul and long haul routes and service. (Exh. 700, § 2 (report of ICC Examiner Davis), ABL 19811.)

[2] The court refers to the numbered parts of the 1924 Agreement as "Paragraphs" consistent with the parties' usage in this litigation. The 1924 Agreement also uses the term "Section."

repurchase option.

Also, the 1924 Agreement provided for the payment of interest to ABL either when another railroad wanted to purchase an ownership interest in ABL, (Exh. 523, ¶ 3) or when the consummation of the City's sale of the belt line to ABL was unreasonably delayed after payment of the $30,000 (Exh. 523, ¶ 4). Nonetheless, the parties did not provide for the payment of interest if and when the City repurchased the railroad pursuant to Paragraph 14.

After the 1924 Agreement was signed, the Alameda Belt Line commenced operations and began expanding. ABL was a "belt line"or "switching" railroad. A switching railroad performs its services within a defined geographical area. (R.T. 4/24/06 44:27-45:46:3.)[3] Rather than transport cars from one point to another, ABL performed "switching services of loaded inbound and outbound railroad freight cars for different industries." (R.T. 4/24/06 42:6-8.) The rail line included a switching yard where ABL had twelve extensions of its main line, a switching operation, and ABL's offices. (R.T. 4/25/06 14:8-16:1.) ABL either received loaded freight cars from other carriers, and transferred them to industrial customers in Alameda, or received loaded freight cars from those customers, and transferred them to national rail carriers for further transport. (R.T. 4/24/06 42:9-21.)

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[3] A belt line railroad is distinguished from a "line haul" railroad, which performs point-to-point service, such as from Los Angeles to Chicago. (R.T. 4/24/06 44:15-26.)

All of ABL's services were confined to the City of Alameda. (R.T. 4/24/06 42:9-15.) As the manager of ABL testified, "The cars come into Alameda, and that is where they end up until they leave." (R.T. 4/24/06 44:27-45:3.) ABL's services include storing the cars in Alameda until they were ready to be transferred to a line-haul railroad. (R.T. 4/24/06 45:4-5.) The bulk of the physical work of ABL consisted of switching cars in the rail yard. (R.T. 4/24/06 50:19-17; 66:18-24; 92:26-93:8.)[4] The workload was measured by the number of rail cars that were switched. Without the railyard, ABL simply could not have performed its essential function of switching cars. (R.T. 4/24/06 92:26-93:8.)

The Board of Directors of Alameda Belt Line nominally consisted of representatives of the parent railroad companies and the City Manager of Alameda. In practice, however, the City Manager was not treated as a manager. (R.T. 4/25/06 43:28-45:19.) Thus, even though ABL's Phil Copple, ABL's long-time manager and an ABL employee for 37 years, communicated with the board on matters of "significant importance to ABL," (R.T. 4/25/06 47:12-17), when he sent correspondence to the "board," he sent copies only to the representatives of the parent railroad companies, and not to the City of Alameda representative. (R.T. 4/25/06 43:28-45:7; Exh. 585.) Consistent with that practice, when he sent a letter to the "board"

[4] ABL employees also referred to the rail yard interchangeably as the switching yard, the main yard, and the classification yard. (R.T. 4/25/06 10:19-11:3.)

recommending the sale of the 22-acre parcel that was formerly the switching yard, he sent the letter only to the President and Vice-President of ABL, and not Alameda's City Manager. (R.T. 4/25/06 47:1-11.)

The Alameda Belt Line ceased operation on November 10, 1998. (R.T. 4/25/06 48:6-8.)

In January 1999, ABL and Sun Country Beltline, LLC entered into an agreement for ABL to sell its rail yard. (Exh. 28.) The sale of the rail yard property was approved by ABL's board of directors, including James Flint, the City Manager and the representative of the City on the board. (Exh. 33.)

On October 6, 1999, City staff filed a report with the City Council stating that ABL had cut back operations and sold parcels of its property. (Exh. 600 at p. 2.) On November 2, 1999, based on the staff recommendation, the Alameda City Council adopted Ordinance 2817 and notified ABL of its intention to repurchase the remaining 2.61 miles of the belt line. (Id.; Exh. 533.)

On November 2, 1999, the City gave ABL a one-year notice of the City's intent to exercise the City's repurchase right. (Exh. 533.) Rather than consummate the repurchase of the railroad contemplated by Paragraph 14 of the 1924 Agreement, on May 11, 2000, ABL filed this lawsuit.

## II. LEGAL ANALYSIS

In this lawsuit, ABL seeks to invalidate the City's exercise of the repurchase right contained in Paragraph 14 of the 1924 Agreement. In support of its position, ABL raises several challenges to enforcement of Paragraph 14: that the 1924 Agreement is too uncertain as to the property to be transferred; that it is too uncertain as to price; that the agreement has become unenforceable by the passage of time; that it has become unenforceable by the application of the doctrines of frustration of purpose and supervening impracticability; that the City is estopped from enforcing its rights under Paragraph 14; and that the City has waived its rights.

As set forth below, the court has carefully considered each of these arguments and the evidence in support of them. The court concludes that ABL has failed to show that the 1924 Agreement should not be enforced for any of these reasons, and that judgment should be entered for the City.

### A. The 1924 Agreement Is Not Uncertain As To The Property To Be Transferred

The 1924 Agreement describes the property to be transferred as "said belt line railroad including all extensions thereof." (Exhibit 523 ¶ 14.) ABL contends that because the phrase "extensions thereof" is not defined in the contract, there is nothing in the 1924 Agreement to establish definitively what property the parties intended to include within the phrase "extensions thereof," and that the parol evidence received at the trial is inadequate to resolve this

uncertainty. Consequently, goes the argument, the 1924 Agreement is not enforceable.

The primary focus of ABL's argument is that the railyard is neither an "extension" nor an "investment," and therefore that portion of ABL's real property cannot be included in any definition of the property to be acquired. The court concludes that the railyard is an "extension" of the Alameda Belt Line, subject to the repurchase option in the 1924 Agreement.

The first reason for this conclusion is that the railyard was an essential part of the Alameda Belt Line railroad, and therefore to include it in the contract is consistent with the fundamental purpose of the contract. ABL's primary function was the switching of freight cars, and this activity could only be conducted in its railyard. Since one purpose of the repurchase option - and, according to ABL, the only purpose - was to give the City the ability to operate the belt line if it chose, it simply would make no sense to exclude from the repurchase option the asset that was most central to its operation. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code § 1641.

The second reason the court finds that the railyard qualifies as an "extension" is that both parties' witnesses expressed that view. Phil Copple, ABL's long-time manager and an ABL employee for 37 years, testified that ABL employees considered "extensions" to refer to wherever new track is laid by a railroad. (R.T. 4/25/06 14:26-28.)

Thus, "extensions" includes anywhere new tracks are laid, including the 13 tracks located inside the rail yard. (R.T. 4/25/06 15:1-9; R.T. 4/25/06 64:16-21.)

The testimony of the City's railroad accounting expert, Thomas D. Crowley, was to the same effect. (R.T. 5/1/06 43:11-46:26.) Crowley is the president of L.E. Peabody & Associates, a firm that specializes in railroad accounting. (R.T. 5/1/06 2:6-17.) He testified that "extensions" as used in the ICC Uniform System of Accounts[5] refers to the land and the fixed improvements of a railroad. As Crowley testified, "the key point of an extension is the land and fixed improvements provided and arranged for in the original plan." (R.T. 5/1/06 44:16-24.) The definition of extensions remains consistent today. (R.T. 5/1/06 45:3-10.) Thus, according to Crowley, the ABL rail yard (including its land, main track and 12 extension tracks) "would be either an extension or addition betterment." (R.T. 5/1/06 43:11-46:26.)

In short, there is no substantial dispute in the evidence regarding the meaning of the term "extension," and common sense dictates that the railyard be included in the repurchase because it is central to the operation of the belt line.[6]

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[5] The "ICC" refers to the Interstate Commerce Commission. The ICC has a specialized system of accounting that is used in the railroad industry.

[6] This point is valid regardless of whether the City desires to operate the belt line as a going concern or not. The point is simply that the railyard is integral to the asset that is being repurchased.

**B. The 1924 Agreement Is Not Uncertain As To Price**

ABL next contends that the 1924 Agreement is uncertain as to the price to paid by the City, and that none of the parol evidence admitted at the trial cures this defect. The court finds that the purchase price under the 1924 Agreement is certain, and that the price is $966,027. This amount was established by Crowley's testimony. (R.T. 5/1/06 63:1-9.)

In reaching his conclusions, Crowley reviewed the following documents: the Authorities for Expenditures (AFE) prepared by ABL as part of its ongoing operations, which described its investments and other expenditures in detail; ABL's trial balance sheets and annual balance sheets; ABL's income tax returns; and the correspondence produced in discovery in this case. Crowley also relied on searches performed by his firm, L.E. Peabody, at the federal archives in College Park, Maryland, that "produced a number of missing ABL annual reports that allowed us to complete our analysis" (R.T. 5/1/06 21:4-23:4) and a review of records from the California Railroad Commission. (R.T. 5/1/06 22:25-23:1.)

To support his testimony, Crowley testified that the key words and phrases in the 1924 Agreement were "investments," "extensions" and "repairs." (R.T. 5/1/06 26:6-10.) He testified regarding the meaning of investments, extensions and repairs based on mandatory railroad accounting definitions and rules as prescribed by the ICC. (Exh. 626.) Crowley testified that while the ICC definitions changed over the years, most notably in 1943, none of the changes was material in

regard to the terms used in the repurchase provision of the 1924 Agreement. (R.T. 5/1/06 26:26-33:16.)

Crowley also relied on the annual reports filed by ABL with the ICC. (R.T. 5/1/06 35:21-36:11.) These reports had to be verified by the chief controller of the railroads, and "included an accurate account of the cost of additional investments and extensions on a year-by-year basis." (R.T. 5/1/06 39:14-21.) Investments as defined in the ICC Uniform System of Accounts meant investments minus retired property in 1924. (R.T. 5/1/06 40:13-41:1; 42:4-43:2.) Once an investment is retired, "it is removed from the books of the carrier because the carrier no longer has claim on the value of that asset." (R.T. 5/1/06 43:3-10.)

In his calculation of the repurchase price, Crowley took into account retirements because the (1) ICC regulations required net investment which is always "net of retirements or retrials" (R.T. 5/1/06 66:27-67:9), (2) this is required in the railroad industry and (3) ABL used net of retirements in calculating investments (relying on ABL's calculation of the same in 1948). (R.T. 66:19-68:15.)

ABL contends that Crowley's testimony cannot establish the purchase price in the 1924 Agreement because he did not rely on reports filed with the City, as required by the 1924 Agreement, because ABL never filed any. The court finds this argument unconvincing, for two reasons. First, the failure to file verified reports with the City was ABL's, not the City's. ABL cites no authority, and the court is aware of none, that would permit ABL now

to use its failure to comply with one term of the contract to excuse its compliance with another. Second, the court finds that the reports ABL filed with the ICC constituted the "report[s] filed with the Railroad Commission" identified in Paragraph 14. The extrinsic evidence is undisputed that ABL filed its annual reports there, and that the ICC was the "Commission" with jurisdiction over ABL. Third, the manifest purpose of this provision was to make sure that the repurchase option price was determined according to the accounting rules by which ABL is usually governed. Crowley's use of ICC reports accomplished that goal.

ABL also complains that Crowley included "betterments and additions" in calculating the purchase price, and did not include any property that had been retired and sold off by ABL. The only evidence cited in support of the first point is the language in Paragraph 3 of the 1924 Agreement that permits another railroad to invest in ABLT by paying a pro rata share of the cost of "additions and betterments." ABL contrasts this language with Paragraph 14, which does not contain the phrase "additions and betterments."

The court finds this argument unpersuasive. First, Paragraph 14 requires the City to pay the cost of any "additional investments." ABL fails to identify any portion of Crowley's suggested repurchase price that qualifies as an "addition or betterment" and not as an "investment." Thus, even if the court were to accept ABL's distinction, it would have no effect on the outcome. Second, although ABL is correct about the difference in language, ABL fails to explain

how its proffered interpretation furthers any sensible goal of the contract or of either party to the contract. It is clear from the language of Paragraph 14 that the parties' intent was to fully compensate ABL for its investments in constructing the belt line railroad if the City decided to repurchase the railroad. Crowley's inclusion of "addition or betterment" is consistent with that goal.

Third, ABL's own accounting expert, Jennifer Ziegler, attributed no particular meaning to the word "investment" in her own calculation of the repurchase price, either in relation to the 1924 Agreement or to the use of that term within the railroad industry. (R.T. 4/26/06 19:6-25; 20:6-9.) In fact, even though she was aware that the term "investment" might be disputed in the case, she never obtained a definition of the term prior to completing her work. (R.T. 4/26/06 23:13-24:6.) In the absence of a clear definition, she simply "add[ed] up the cash that went out the door." (R.T. 4/26/06 24:15-23.) ABL's position at the trial that the repurchase price could be calculated in this way undermines the argument in its post-trial brief that Crowley's calculations are inconsistent with the 1924 Agreement.

ABL further objected to Crowley's testimony was that he removed "retirals" or "retirements" in calculating the repurchase price. Retirals are assets that ABL had taken off its books because they were no longer in use, or because they were sold. An example of a retiral is the property that ABL sold Encinal Real Estate in 1996 for approximately $1.7 million. ABL objects that this deduction is not authorized by Paragraph 14.

This objection does not persuade the court. First, it only makes sense that the City would not have to pay for assets that are no longer in existence. To do otherwise would be irrational. Second, the record shows that ABL itself interpreted the 1924 Agreement as Copple did. ABL's own practice was to deduct retirals when valuing its assets for repurchase. (See Exhs. 529, 530, 531, 683.) Paragraph 3 of the 1924 Agreement permitted another railroad to invest in ABL in exchange for a contribution of a pro rata share of the investments in the railroad. In 1948-50, ABL had discussions concerning a potential investment pursuant to this paragraph. Significantly, ABL deducted retirals in its calculations of the potential investment, even though Paragraph 3 does not refer to retirals. (Id.) ABL also deducted retired property from the accounting of its assets that it submitted to the ICC, as required by ICC accounting rules. (R.T. 5/1/06 40:13-41:1; 42:4-43:2.)

**C. The 1924 Agreement Is Not Made Unenforceable By The Passage of Time**

ABL contends that the City did not exercise its repurchase option within a reasonable time, and therefore the option became unenforceable.

"[W]here [an] option agreement is silent as to the time for exercising the option, the optionee must exercise his option within a reasonable time." Lohn v. Fletcher Oil Co. (1940) 38 Cal. App. 2d 26, 31. "What is a reasonable time for the exercise of an option by the

optionee depends upon the facts and circumstances of the particular case." Id. at 32.

ABL contends that the passage of time destroyed the purpose of the option. According to ABL, the purpose of the option was to permit the City to operate a beltline railroad. Prior to the exercise of the option, ABL pulled up much of the track on which the railroad operated, and discontinued its switching operations. Thus, if the purpose of the repurchase option was solely to permit the City to operate a beltline railroad, this argument would have some force.

There is no evidence, however, that the parties intended to limit repurchase agreement in this way, and the unambiguous language of the 1924 Agreement itself lends no support to ABL's *post hoc* construction. Certainly, one reason for the repurchase agreement was to allow the City to operate the beltline if it chose. (Exh. 700, § 1 (Hickok testimony), ABL 19177.) Nowhere in the contract, however, is the City's repurchase right *conditioned* on its doing so.[7] Moreover, the only reason the City sold the railroad to ABL was to allow ABL to operate it. The fact that ABL has ceased performing this function is not a good reason to excuse ABL from its contractual obligations.

ABL also complains that the exercise of the option 75 years after the contract was signed is unreasonable because "the value of the rail

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[7] It would be difficult to enforce such a term, even if it existed. For example, nothing in ABL's interpretation of the 1924 Agreement would stop the City from acquiring the railroad on Day One, operating it for one day, and then closing it down on Day Two. What would happen under those circumstances is not before the court, however, because the 1924 Agreement contains no such limitation.

yard has increased exponentially." ABL Post-Trial Brief at 25:10. As set forth earlier, the contract shows that ABL knew the property might increase in value, and it knew it could include a provision for revaluation of the property or for the payment of interest, as it had done elsewhere in the contract. It chose not to. It may be, as the Southern Pacific Railway's counsel observed at the time the contract was signed, that the repurchase provision in the 1924 Agreement was "very shrewdly drawn." (Trial Exhibit 700, Section 3 (argument of E.J. Foulds), ABL 19727.) That fact, however, is not enough to prevent its enforcement.

That many years have elapsed since the signing of the 1924 Agreement also does not change this analysis. It is not uncommon to have a contract in the railroad industry that is 99 years in duration. There have been contracts of 900 or even 1000 years in length. Long-term agreements in the railroad industry spanning decades in length are common. (R.T. 5/1/06 16:18-17:2.)

**D. The Option Is Not Made Unenforceable By The Doctrines of Supervening Impracticability Or Frustration of Purpose**

Section 261 of the Restatement Second of Contracts provides, "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." This section expresses the doctrine of supervening impracticability. Similarly,

Section 265 of the Restatement provides: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." This section expresses the doctrine of frustration. ABL contends that the doctrines expressed in these Restatement provisions excuse its compliance with the repurchase option in the 1924 Agreement.

Under the doctrine of supervening impracticability, the court may relieve a party of his duties under a contract "if performance has unexpectedly become impracticable as a result of a supervening event." (Rest.2d Contracts § 261, com. a.) The doctrine applies in a variety of different factual scenarios; examples include the supervening death or incapacity of a person necessary for performance, the supervening destruction of a specific thing necessary for performance, and the supervening prohibition or prevention by law. (Id.) Common to these scenarios, however, is something that is not present here - the supervening occurrence of something that prevents performance. Here, there is nothing preventing performance by either the City or ABL. The City is prepared to tender the consideration required by Paragraph 14 and, if the contract is so construed, ABL is in a position to sell the railroad to the City. ABL's performance has not become "impracticable."

The doctrine of frustration does not apply here, either.

Frustration is an affirmative defense, and ABL bears the burden of proof. The comment to the Restatement section cited by ABL note three requirements for application of the doctrine:

> First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

(Rest.2d Contracts § 265, com. a.)

The dominant purpose of the 1924 Agreement as a whole was to allow ABL to extend and operate a belt line railroad that the City had already built. (See, e.g., Exh. 622 (testimony of Allan P. Matthew on behalf of the City of Alameda) at ABL 20132-33.) Thus, ABL is correct that when ABL ceased switching operations in 1998, the 1924 agreement lost some of its purpose. But the operation of a beltline railroad was an assumption of the *agreement as a whole*, not of Paragraph 14 in isolation. When ABL ceased switching operations in 1998, ABL stopped serving the purpose that had allowed it to purchase the belt line railroad in the first place. That does not suggest that ABL's performance of the 1924 Agreement was "frustrated" as set forth in the Restatement. If anything, it suggests that the equities favor the

City's exercise of the repurchase option in Paragraph 14.

**E. The City Is Not Equitably Estopped From Exercising Its Rights Under the Option**

The doctrine of equitable estoppel, or "estoppel by conduct" is codified in Section 623 of the Evidence Code. Section 623 provides:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

The California Supreme Court, in Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297, set forth the elements for a claim of equitable estoppel:

> Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

(Id. at 305.) The doctrine of equitable estoppel applies to a public agency "only in those special cases where the interests of justice clearly require it." (Imperial Beach v. Algert (1962) 200 Cal. App. 2d 48, 52.)

Here, ABL has not even established that it was damaged by City Manager Flint's vote in favor of the Sun Country transaction at an ABL board meeting, much less the "exceptional conditions" that would warrant application of equitable estoppel against the City. Id. ABL

never treated the City of Alameda City Manager as a real member of the board of directors. ABL knew, or should have known, from its prior dealings with the City that action by the City Council would be necessary to modify the parties' obligations under the 1924 Agreement. (R.T. 4/25/06 31:17-34:16; 35:7-14; Exhs. 547, 641, 648, 649.) Most importantly, ABL did not establish the detrimental reliance that is essential to an estoppel claim. It attempted to sell its property to a private developer, but that deal fell through and the contract of sale is no longer in force. Events have simply restored ABL to the *status quo ante*.

**F. The City Did Not Waive Its Right To Repurchase ABL**

ABL contends that when Flint gave his approval to the Sun Country transaction as a member of the ABL board, he waived the City's rights under the 1924 Agreement.

"'Waiver' has been repeatedly defined as 'the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances indicating an intent to waive.'" (Panno v. Russo (1947) 82 Cal. App. 2d 408, 412 [citations omitted].) The court finds no waiver here.

First, there is nothing in the record to indicate that Flint intended to foreclose the City of Alameda from exercising its repurchase option if it was able to do so prior to the completion of the Sun Country transaction. There also is no evidence that the ABL

board considered the 1924 Agreement during the negotiations or approval of the Sun County transaction.

Second, as City Manager, Flint did not have the authority to waive the City of Alameda's rights under the 1924 Agreement. "No government, whether state or local, is bound to any extent by an officer's acts in excess of his authority." (Barchett v. City of Newport Beach (1995) 33 Cal.App.4th 1472, 1479 [quoting Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1563-1564].) "One who deals with the public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his peril to ascertain the extent of his powers to bind the government for which he is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted." (Id.)

Here, Flint did not have the power to waive the City's rights under the 1924 Agreement, and his assent to the Sun Valley transaction therefore did not act as a waiver. Because Alameda is a charter city, the charter governs as the constitution for the city. (Harman v. City and County of San Francisco (1972) 7 Cal.3d 150, 161 [a city charter represents the supreme law of the city]; see also Cal. Const., Art. 11, § 5.) The Alameda City Charter delegates certain limited powers to the city manager. The Charter makes clear that the city manager functions only pursuant to Council directive. The manager's authority is "to administer and execute policies and undertakings formulated by the Council." (Exh. 563, § 7-2(A).) Moreover, the city manager may

only "recommend" measures and policies to the Council. (Exh. 563, § 7-2(F).) Likewise, the City Charter sets forth the only procedures by which the Council may act. "The Council shall act by ordinance, resolution or motion . . . ." (Exh. 562, § 3-8.) Here, as the Charter makes clear, the city manager was empowered only to execute a directive of Council, which directive must have been accomplished through a legislative act. At no time did the City Council delegate authority to the city manager to act to amend or waive the City's rights under Ordinance 259 or the 1924 agreement, change the repurchase obligations, or waive any other right on behalf of the City.

## III. DISPOSITION

1. The court finds that the 1924 Agreement is valid, and the City of Alameda is entitled to specific enforcement of its terms. Alameda Belt Line is ordered to sell the belt line railroad to the City of Alameda for the sum of $966,027,[8] subject to any required proceedings before the Surface Transportation Board.

2. ABL's request for an injunction is denied.

3. Judgment shall be entered for the City of Alameda and against Alameda Belt Line. The City is ordered to prepare a judgment in conformity with this Statement of Decision. The City is entitled

[8] During trial, the parties agreed that there was no dispute about the land subject to the repurchase option in Paragraph 14, except for their disagreement about whether the railyard was an "extension." If further action is required on the court's part to make the judgment enforceable, the parties can inform the court pursuant to Rule of Court 232.

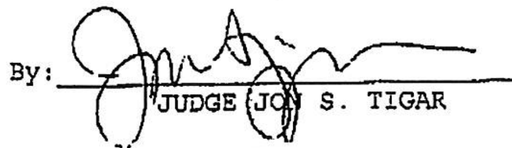
to recover its costs.

This Tentative Decision shall be the court's Statement of Decision unless within ten days either party specifies controverted issues or makes proposals not covered herein.

SO ORDERED.

DATED: August 8, 2006

ALAMEDA COUNTY SUPERIOR COURT

By: 

JUDGE JON S. TIGAR

***NEWS INFORMATION***

Release: IMMEDIATE, August 8, 2006

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City Prevails in Alameda Belt Line Case

The City of Alameda has prevailed in defending a decades-old agreement which allows it to buy back 40 acres of land from a railroad at the original price. In an order issued today, Alameda County Superior Court Judge Jon Tigar ruled that the 1924 contract between the City and Alameda Belt Line "is enforceable and that the City of Alameda is entitled to repurchase the railroad for the sum of $966,027." The City originally sold the property for $30,000 with a provision that the railroad must sell it back at that cost plus the cost of any additional investments and extensions, if the City chose to buy it back. A trial before Judge Tigar was held earlier this spring on claims by the railroad that the agreement is not legally enforceable.

The judge ruled in favor of the City on every one of ABL's arguments. The central issues addressed by the Court are ABL's assertions that 1) the 1924 agreement is too uncertain to be enforced, 2) the 1924 agreement was too vague in its formula for calculating the sales price, 3) the

*See City Prevails– 2.*

agreement became unenforceable by the passage of time, 4) the City cannot operate a railroad on the route, and the contract is unenforceable for that reason, 5) the City waived its rights to repurchase the property by consenting to railroad decisions in 1998 to sell the switching yard.

"I'm delighted with the Court's decision in this case," said Mayor Beverly Johnson. "It has always been the City's position that the belt line is an important asset and the rights of Alameda should be honored."

The Court noted that ABL knew the property might increase in value, and demonstrated that it knew how to include a revaluation requirement if it so desired. Judge Tigar also noted that the passing of time did not render the agreement subject to change. "It is not uncommon to have a contract in the railroad industry that is 99 years in duration. There have been contracts of 900 or even 1000 years in length. Long-term agreements in the railroad industry spanning decades in length are common," the decision stated.

#

2009 WL 1744543
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
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California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, First District, Division 5, California.

**ALAMEDA** BELT LINE, Plaintiff and Appellant,
v.
CITY OF **ALAMEDA**, Defendant and Respondent.

No. **A118596.** | ( **Alameda** County Super. Ct. No. C-826373-7). | June 22, 2009.

**Attorneys and Law Firms**

Dean Ewell Dennis, Hill, Farrer & Burrill, Los Angeles, CA, for Defendant and Respondent.

Teresa L. Highsmith, Office Of The City Attorney, **Alameda**, CA, Michael William Stamp, Monterey, CA, Thomas J. Trachuk, Oakland, CA, for Plaintiff and Appellant.

**Opinion**

BRUINIERS, J. [*]

***1** In this matter we address the interpretation, enforceability and scope of a repurchase option negotiated 85 years ago between a municipality and two national railroad companies. The central focus of the dispute is whether a 22-acre parcel of what is now particularly valuable real property, acquired subsequent to the execution of the agreement, is subject to the option, and whether the option remains enforceable. In a prior reported decision (***Alameda** Belt Line v. City of **Alameda*** (2003) 113 Cal.App.4th 15 (***Alameda** Belt Line* )) we reversed a grant of summary judgment in favor of the plaintiff after the trial court originally found the option to be unenforceable, and remanded for consideration of parol evidence to ascertain the meaning of certain contractual terms, and to then determine, guided by that evidence, whether the real property in issue is subject to the option. (*Id.* at p. 25.) On remand, after a non-jury trial, the court found the option terms sufficiently definite and certain to permit enforcement, and found the disputed property to be subject to the option. Judgment was entered in favor of the City of **Alameda** (City), requiring appellant to convey the disputed property and other assets of appellant. We will affirm.

**BACKGROUND**

The underlying historical facts are essentially undisputed. A "belt line" railroad track was built by the City in 1918 to serve industries on the east end of the island's northern waterfront. The track, which was initially operated by Southern Pacific Railroad under an "informal" license arrangement with the City, connected the industries to line-haul (long distance) railroads. The rail line began at the Miller-Sweeney (Fruitvale) Bridge, which connects **Alameda** to Oakland, and traveled west along Clement Avenue for 1.2 miles.

Thereafter, the City decided that it needed to extend the belt line railroad to serve a growing industrial base and promote development along the waterfront. Because it needed to secure private financing for the extension and because it wanted to provide all three transcontinental railroads direct access to the belt line railroad, the City entered negotiations with the railroads.

In 1924, the City entered into an agreement (1924 Agreement or Agreement) with Western Pacific Railroad Company (Western Pacific) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) to extend and operate the belt line railroad. Western Pacific and Santa Fe agreed to form a new company, **Alameda** Belt Line (ABL), which would purchase the existing belt line railroad from the City for $30,000, extend the railroad along a specified route, and operate the railroad. The City reserved a right to repurchase the railroad and its extensions at any time on one year's notice at a price based on cost. That repurchase right or option, which appears in Paragraph 14 [1] of the 1924 Agreement, is at the heart of the parties' dispute. It provides:

"Said City shall have the right at any time hereafter to purchase said belt line railroad *including all extensions thereof,* for a sum equal to the original cost, together with the cost of any and all *additional investments and extensions* made therein by said [ABL], provided, that said City shall give at least one year's previous notice of its intention so to do by ordinance to that effect; and provided that at the same time it purchases from the parties of the first part, or either of them, as the **case** may be, the branch railroad, extensions and spur tracks referred to in the twelfth section hereof.

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***2** "It is agreed that said [ABL] will keep an accurate account of the cost of additional investments and extensions, and file a verified report thereof annually with the City Clerk of said City, similar to the report filed with the Railroad Commission. It is further agreed and understood that the term 'investments' as herein used shall not include the cost of upkeep and repairs." (Italics added.)

The acquisition and extension of the belt line railroad received required regulatory approvals after hearings before the Interstate Commerce Commission (ICC) and the California Railroad Commission (Railroad Commission). The regulatory filings, and related hearing testimony, described the proposed expansion and "extensions" of the railroad. After approval, Western Pacific and Santa Fe then formed ABL, and the new company purchased the existing railroad from the City. ABL extended the railroad south for about two blocks along an S-curve from the intersection of Clement Avenue and Minturn Street to the intersection of Hibbard Street and Buena Vista Avenue. The railroad then continued west on Buena Vista Avenue for several blocks, and turned north along Sherman Street (which merges with Atlantic Avenue), where it entered the east end of a 22-acre rail yard or switching yard (the Rail Yard). ABL also built track running west from the Rail Yard along Atlantic Avenue (now Ralph Appezzato Memorial Parkway) to the former **Alameda** Naval Air Station.

The Rail Yard contained 13 tracks, including the main line that entered from Sherman Street and 12 switching or yard tracks. In the Rail Yard, inbound rail cars arriving from line-haul (long distance) railroads were separated and reordered for delivery to industrial customers, and outbound rail cars from those industries were reordered for delivery to the line-haul railroads. Switching was the main function of the belt line railroad, which performed all of its operations within the City of **Alameda**.

Beginning in the 1970s, ABL began to decrease its operations and remove track. The railroad also sold some of its real property. In November 1998, the railroad completely ceased operations and by the middle of 1999, the only track left was on Clement Avenue.

As of 1999, ABL's real property consisted of six areas of land scattered along the route of the former rail line. The company owned two areas of land south of Clement Avenue where the railroad extension had made its S-curve south from the original railroad to Buena Vista Avenue. [2] The company also owned property northeast of the intersection of Buena Vista Avenue and Sherman Street, where the extension turned north from Buena Vista Avenue along Sherman Street to enter the Rail Yard. The company owned the Rail Yard, its most valuable piece of property, as well as a 74 square foot parcel on Sherman Street near the Rail Yard. Finally, it owned property along former Atlantic Avenue where the spur track to the naval air station once ran (Atlantic Avenue Property). ABL no longer owns the rights to run a rail line along the entire former route of the belt line railroad; it has sold some property along the route and has lost the easements it formerly owned to run track over some property owned by others.

***3** In January 1999, ABL and Sun Country Beltline, LLC entered into an agreement for the sale of the Rail Yard for potential residential development at a price of $17.7 million. On November 2, 1999, the **Alameda** City Council passed an ordinance notifying ABL of its intention to exercise its rights under Paragraph 14 of the 1924 Agreement and repurchase the belt line railroad and "all extensions thereof" in one year.

***Initial Trial Court Proceedings***

On May 11, 2000, ABL filed a complaint seeking a judicial declaration that the City's repurchase right under Paragraph 14 of the 1924 Agreement was null and void; an injunction requiring the City to cease its efforts to obtain ABL and its property without paying just compensation; and just compensation for the taking and damaging of its property. The City filed a cross-complaint. As amended, the cross-complaint alleged causes of action for anticipatory breach of contract, constructive trust and declaratory relief, which asked the court to declare that Paragraph 14 of the 1924 Agreement was enforceable. [3]

In March 2002, the trial court granted summary adjudication to ABL on its declaratory relief cause of action: "The Court finds as a matter of law that the alleged repurchase option i[s] not sufficiently definite in order to be a valid and enforceable option under the statute of frauds. [Citations.] The Court notes that the language in Paragraph 1 of the Agreement sets out in considerable detail the description of what was originally conveyed, including the land areas involved. However, the alleged repurchase option does not provide a description which is itself definite and certain, or which fulfills the test of reasonable certainty by furnishing the 'means or key' by which the description may be made certain and identified with its location on the ground." The court issued a judgment for

ABL, ruling that the summary adjudication order effectively disposed of all of the issues in the action, and the City appealed.

***Prior Appeal***

In November 2003, this court vacated the trial court's orders. (***Alameda*** *Belt Line, supra,* 113 Cal.App.4th at p. 18.) We defined the issue on appeal as "whether extrinsic or parol evidence coming into existence *after* the execution of a written agreement may be considered in order to satisfy the statute of frauds, and render the agreement sufficiently certain to be enforceable." (*Ibid.*)

On the statute of frauds issue, we held "the contractual language, 'said belt line railroad including *all extensions thereof,*' (italics added) is a sufficient 'means or key' by which extrinsic or parol evidence could be used to define the property which is the subject of the option. According to the City, ... '... [t]he conveyance documents for the original railroad and later acquired property for the extensions make the property to be conveyed identifiable, and in compliance with the statute of frauds.' ... [S]uch evidence, together with the contractual language, could be considered as a means or key to satisfy the statute of frauds." (***Alameda*** *Belt Line, supra,* 113 Cal.App.4th at p. 22, applying *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769 & *Love v. United States* (E.D.N.C.1994) 889 F.Supp. 1548.)

***4** On the certainty issue, we wrote: "We agree the repurchase option in this **case** is somewhat unusual, since it sought to include not only the original railroad, but also property that was to be acquired in the future for 'extensions thereof.' However, this unusual feature does not necessarily make the 1924 agreement fatally uncertain. The language of the option greatly narrows and defines the property in issue, insofar as it limits the City's right to repurchase the original railroad and its 'extensions *thereof.*' (Italics added.) Only the original property, or new lands or other property acquired to provide 'extensions' of the operations of the original railroad, would seemingly be covered by the repurchase option." (***Alameda*** *Belt Line, supra,* 113 Cal.App.4th at p. 25.)

We also provided guidance for proceedings on remand: "In summary, we see two steps in the interpretation of the agreement entered into between the City and ABL. First, extrinsic or parol evidence may be considered to ascertain the parties' meaning of the words 'extensions thereof' when they entered the contract. Second, guided by this evidence, it could be determined with certainty whether the real property in issue here is subject to the repurchase option of the agreement. We do not yet know what will be concluded, in light of the extrinsic or parol evidence. We only rule that the order granting summary judgment against the City should be vacated, in order to allow for further proceedings consistent with the views expressed in this opinion." (***Alameda*** *Belt Line, supra,* 113 Cal .App.4th at p. 25.)

***Proceedings on Remand***

On remand, a bench trial commenced in April 2006.[4] In addition to consideration of the documentary historical record, two witnesses testified as to the meaning of the language used in the 1924 agreement. Phillip Edward Copple, superintendent of the ABL railroad from 1970 until it ceased operations in 1998, described the railroad's operations and its process of shutting down. He also testified about his understanding of certain terms as used in the railroad industry, including the term "extension."

The City's expert witness, Thomas D. Crowley, an economist with 35 years of experience consulting on railroad transportation accounting and contract issues, testified that several of the key terms in Paragraph 14 of the 1924 Agreement, including "extensions" and "investments," had fixed meanings in the context of railroad accounting and financial transactions at the time the Agreement was drafted, which have not changed since that time. The terms were defined in the ICC's Uniform System of Accounts, an accounting system that all railroads were required to follow in their reports to the ICC and the Railroad Commission.

The crux of Crowley's testimony was that the "investments" reported in ABL's annual corporate reports and in its regulatory filings encompassed all of the property subject to the City's repurchase right under Paragraph 14 and established the repurchase price for that property.[5] ABL kept track of its cumulative "investment" in the railroad in its annual reports and regulatory filings. The figure was regularly adjusted to add the cost of new investments and deduct the original cost of investments that had been retired (i.e., sold or otherwise disposed of). It included the cost of extensions, but not the cost of repairs. As of December 31, 2005, the "investment" figure was $966,027. Crowley testified that the figure included the cost of all property covered by Paragraph 14 of the 1924 Agreement,[6] but he did not specifically identify which property of ABL (e.g., particular parcels of

land or specific interests in those parcels) was covered by the investment figure.

***5** The trial court enforced the repurchase option, ordering ABL to sell the City "the belt line railroad" for $966,027. As relevant to this appeal, the court ruled that Paragraph 14 of the 1924 Agreement was sufficiently certain to be enforceable, that the Rail Yard was an " 'extension' as that term was used in the Agreement," and further that the option was not unenforceable under the doctrine of frustration of purpose. The court entered judgment for the City and attached a detailed description of the property covered by the sale. The property description included all of the real property then owned by ABL, including the Rail Yard, as well as the company's interest in a trackage agreement and certain railroad equipment. ABL moved for a new trial on grounds not renewed on appeal, and the court denied the motion.

## DISCUSSION

ABL raises three issues on appeal. First, it argues that the Rail Yard cannot be considered an "extension" as that term is used in the Agreement, contending that only the track extensions immediately planned in 1924 to provide expanded industrial service, and which were then specifically approved by the ICC and the Railroad Commission, were contemplated by the parties as "extensions." Second, it argues that, as to property which is within the scope of the repurchase option, the City's right is limited to acquiring an easement to operate a municipal rail line over such land, and that any such easement rights were extinguished by the cessation of the belt line railroad's operations. Finally, ABL argues that the Paragraph 14 repurchase right is unenforceable under the doctrine of frustration of purpose. We reject all of ABL's arguments and affirm the judgment of the trial court.

### *I. Standard of Review*

ABL insists that we must review de novo, focusing on the "undisputed, written evidence." The City contends that we must give appropriate deference to the findings of the trial court based on its consideration of the extrinsic evidence presented, applying the substantial evidence standard.

Our standard of review depends on whether there was a conflict in the extrinsic evidence admitted to assist in interpretation of the Agreement. When there is no material conflict in the extrinsic evidence, the court interprets the contract as a matter of law. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 (*City of Hope); Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.) This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439; *Parsons,* at p. 866, fn. 2.) "Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. (*Parsons* [, at p. 865]....) But when ... ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact ... (*Warner Constr. Corp. v.. City of Los Angeles* (1970) 2 Cal.3d 285, 289 ['since the interpretation of the crucial provisions turned on the credibility of expert testimony, the court did not err in submitting the construction of the contract to the jury'] )." (*City of Hope,* at p. 395, fn. omitted.)

***6** Once extrinsic evidence is considered, the ultimate construction placed upon ambiguous language is therefore subject to differing standards of review, depending upon the parol evidence used to construe the contract. Factual findings based on conflicting evidence must be sustained if supported by substantial evidence, and we review conclusions of law based on those findings de novo. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1268 & fn. 4.)

### II. *Principles of Contract Interpretation*

In construing the 1924 Agreement, we apply general principles of contract interpretation. "The overriding goal of contract interpretation is to give effect to the mutual intention of the parties at the time of contracting, 'so far as the same is ascertainable and lawful.' (Civ.Code, § 1636.) Faced with contract language that is reasonably susceptible to more than one meaning, certain general rules of contract interpretation come into play to aid the court in resolving the ambiguity. (See *id.* § 1637.) To begin with, the words of a contract are to be understood in their ordinary and popular sense unless the parties use them in a technical sense or 'a special meaning is given to them by usage....' (*Id.* § 1644.) Technical words generally are interpreted 'as usually understood by persons in the profession or business to which they relate....' (*Id.* § 1645.)[¶] ... [¶] ... Indeed, where there is a fixed and established usage and custom of trade, the parties are presumed to contract pursuant thereto. (*Reely v. Chapman*

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(1960) 177 Cal.App.2d 260, 262 ...; see Civ.Code, § 1655.) Thus, courts can rely on usage and custom to imply a term where the contract itself is silent in that regard.

"Extrinsic evidence on all these circumstances and matters can be offered where it is obvious that a contract term is ambiguous, but also to expose a latent ambiguity. 'The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37....)" (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1240-1241 (*Southern Pacific* ).)

**III. *The Rail Yard Is Subject to the Repurchase Option***

The trial court found that the Rail Yard was an "extension" within the meaning of the phrase "said belt line railroad including all extensions thereto" in Paragraph 14 and thus was covered by the City's repurchase right. The City urges us to affirm that ruling or, in the alternative, to hold that the repurchase right includes "investments" in the railroad and that the Rail Yard is such an investment. We agree with the trial court's finding that the Rail Yard was an "extension" covered by the repurchase right and hold, in the alternative, that the Rail Yard was an "investment" covered by the repurchase right.

**A. *Extensions***

***7** ABL argues the trial court's ruling on whether the Rail Yard was an "extension" within the meaning of Paragraph 14 is subject to independent rather than substantial evidence review since Crowley's testimony was the only extrinsic evidence offered on the issue and his testimony and credibility were undisputed. It further argues that Crowley's testimony necessarily excludes the Rail Yard from the definition of an "extension."

ABL focuses on Crowley's testimony that an "extension" is the " 'land and fixed improvements provided and arranged for in the original plan for the construction of extensions of existing main lines, additional branch lines, and the extensions of existing branch lines.' " Crowley added that "the key point of an extension is the land and fixed improvement provided and arranged for in the original plan. The original plan is the key to an extension. If you have, as part of the approval process for building a road or buying equipment, a plan to extend, ... you didn't have to go back for reapproval of the report." Relying on this testimony, ABL argues that "extensions" are limited to the "original plan" for extension as described in Paragraph 1 of the Agreement and in the ICC and Railroad Commission orders.

There are two difficulties with this argument. First, ABL's own witness, Copple, testified on cross-examination that the term "extensions" as used within his experience in the railroad industry, would include any place that new tracks were put down, and he testified that all 13 tracks in the Rail Yard were "extensions." Second, as discussed infra, the evidence does not establish that the "original plan" is as narrowly constrained as ABL contends.

ABL argues that Copple's testimony on the issue was irrelevant because he "was an operations guy[,] not a legal expert on the definition of railroad terms as used in 1924," and was not involved in the 1924 negotiations. Copple, however, had more than 35 years of experience in the railroad industry, most of it working as a superintendent for ABL, and he regularly used the ICC Uniform System of Accounts on which Crowley based his expert testimony. Crowley testified that the meaning of "extension" had not materially changed since 1924. Therefore, Copple's testimony was competent evidence of the meaning of "extensions" in the 1924 Agreement.

To the extent that ABL argues that Copple's testimony is inconsistent with that of Crowley on the definition of "extensions," any such conflict in the extrinsic evidence would be subject to review on the substantial evidence standard and the trial court's determination is more than adequately supported by the record.

To the extent that we review "undisputed" parol evidence and the inferences to be drawn from that evidence de novo, we would also find that the Rail Yard is included within the property covered by the Paragraph 14 repurchase option as an "extension."

Paragraph 1 of the Agreement describes a route that includes the Rail Yard. Paragraph 1(b) describes an extension path south from Clement Avenue along an S-curve to Buena Vista Avenue, west along Buena Vista Avenue to Benton Street (near Sherman Street), north from Buena Vista Avenue to a point north of Eagle Avenue, "and continuing westerly over other private rights of way and crossing all intervening streets to the western side of Webster Street...." The Rail

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Yard lies north of Buena Vista and Eagle Avenues to the west of Benton Street, and it extends west all the way to Webster Street. Moreover, subdivision (c) of Paragraph 1 includes "such other streets and rights of way in said City, the right to use which shall have been lawfully granted to said [ABL]." ABL does not explain why this broadly inclusive language is not also part of the "original plan" within the ICC definition of "extension." As ABL itself notes, the City contemporaneously identified the parties' "plan" as the "plan ... set forth in [the] contract entered into ... December 15, 1924," not as the plan set forth in Paragraph 1(b) of the contract.

***8** The ICC and Railroad Commission decisions also include the location of the Rail Yard in their descriptions of the proposed extension of the belt line railroad. The Railroad Commission decision describes the "proposed extension" in terms similar to those of Paragraph 1(b) of the 1924 Agreement, including a path from a point north of Buena Vista Avenue and Benton Street and 1,000 feet south of the estuary, thence "in a general westerly direction over private rights of way and crossing all intervening streets to the westerly side of Webster street...." Similarly, the ICC decision broadly identified the "extension" to include a "westerly extension [from the existing railroad] to the shore line of San Francisco Bay," which includes the location of the Rail Yard.

Moreover, the regulatory agency decisions included the cost of the Rail Yard in the anticipated costs of the venture, using language that appears to include the Rail Yard in the proposed extension. The Railroad Commission decision authorized the issuance of stock to cover the expenses of the project, which it described as the cost "to extend the line ... to the westerly line of Webster street, including ... [a] classification yard, [7] track scales, water and oil facilities, and engine house." Similarly, the ICC decision identified the costs of the project as "the cost of the proposed extension ... together with ... classification yard, track scales, water and oil facilities, and engine houses." While somewhat ambiguous, these passages do not, as ABL argues, clearly *segregate* the costs of "extensions" from other costs of the railroad such as the Rail Yard.

In sum, even if we were to assume that "extensions" refers only to extensions identified in an "original plan" for the belt line railroad, ABL's narrow view of the "original plan" for the extension is not supported by the evidence.

ABL argues that a definition of "extension" that includes the Rail Yard is inconsistent with statutory and **case** law that distinguishes between "extensions," which require regulatory approval before construction, and spur, industrial, team, switching or side tracks, which do not. (See *Detroit & M. Ry. Co. v. Boyne City, G. & A.R. Co.* (1923) 286 F. 540, 542, 547 [applying Transportation Act, 1920, c. 91, § 402, 41 Stats. 456, 477, ¶¶ 18-22]; *Nicholson v. Missouri Pacific Railroad Co.* (1982) 366 I.C.C. 69 [applying successor statutes]; see also *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.* (1926) 270 U.S. 266, 270 [applying Transportation Act, 1920, c. 91, § 402, 41 Stats. 456, 477, ¶ 18].) Because the Rail Yard contained switching tracks, ABL contends that it cannot be an "extension" under this **case** law. However, the Rail Yard also contained the main track of the belt line railroad, which (as described in Paragraph 1 of the 1924 Agreement and the agency decisions) ran through the Rail Yard and continued west over the Atlantic Avenue Property. Moreover, we find that the ancillary tracks are "investments" in the original railroad and its extensions.

**B. *Investments***

***9** Even if we were to assume that the Rail Yard was not an "extension" within the meaning of Paragraph 14, we would conclude that the Rail Yard is covered by the repurchase right as an "investment."

ABL argues that "said belt line railroad including all extensions thereof" defines the property the City had the right to repurchase, and the term "investments" as used in the subsequent phrase "a sum equal to the original cost, together with the cost of any and all additional investments and extensions made therein by said [ABL] ..." is used only to define the price for the covered property without expanding the scope of the covered property.

ABL does not, and could not, argue that the City must pay for "investments" in property it does not have the right to repurchase, an interpretation we would find unreasonable. Rather, it argues the "additional investments" included in the cost (and property covered by the option) are limited to "additional investments" in the original railroad and its extensions (as ABL would narrowly define them), and do not include any other investments in the railroad. ABL does not identify or quantify its "additional investments" in the original railroad and what it would consider "extensions thereto," but it clearly argues they do not include the Rail Yard. [8]

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As we explain, according to the usage of the parties, "investments" in "road" property such as the extensions had a broad meaning that included the Rail Yard. Crowley testified that "investments" had a fixed meaning that was "accepted," "understood" and "standard" in railroad transactions when the parties drafted the 1924 Agreement. ABL concedes that the drafters of the 1924 Agreement were sophisticated railroad attorneys, who would have been familiar with the established usage of the industry. As noted previously, "Parties are presumed to contract pursuant to a fixed and established usage and custom of the trade or industry." (*Southern Pacific, supra,* 74 Cal.App.4th at p. 1244 [faulting trial court for excluding expert testimony on the meaning of terms as used in railroad transactions].)

The Uniform System of Accounts defines "investment" as " '[t]he cost of original road, original equipment, road extensions, additions and betterments.' " "Road" refers to the rail and *all of the assets that are below the wheels* of the train. "Addition" refers to "[*a*]*dditional facilities,* such as additional equipment, tracks ..., buildings, bridges, and all other structures; additions to such facilities, such as extensions to tracks, buildings, and other structures...." (Italics added.) An "addition" may also be called an "additional investment." Moreover, when "investments" were broken down into subcategories in ABL's books and reports, "road property investments" (which would include investments in the original railroad and its extensions) included "land, rails, ties, ballasts, [¶] ... [¶][b]ridges, buildings, *yards,* all those sorts of things," according to Crowley. (Italics added.) In short, the Rail Yard was an "investment" in the railroad and its extensions.

***10** The second half of Paragraph 14 tends to confirm this interpretation. In order to "keep an accurate account of the cost of additional investments and extensions," Paragraph 14 required ABL to file an annual verified report of those costs "similar to the report filed with the Railroad Commission." The Railroad Commission report conformed to the Uniform System of Accounts. Therefore, it can be inferred that the drafters intended the Paragraph 14 annual reports to identify the costs of "investments" as those terms are defined in the Uniform System of Accounts as well. Under that accounting system, "investments" include the Rail Yard.

ABL argues that we held in the prior appeal that the property included in the repurchase right was limited to the original railroad and extensions thereof and did not include additional investments. ABL's misreads our opinion. The issue before us in the prior appeal was whether the repurchase right was written such that, with the assistance of extrinsic evidence, the property subject to the option could be determined with sufficient specificity and certainty to satisfy the statute of frauds and contract law. (***Alameda*** *Belt Line, supra,* 113 Cal.App.4th at p. 18.) In that context, we wrote, "The language of the option greatly narrows and defines the property in issue, insofar as it limits the City's right to repurchase the original railroad and its 'extensions *thereof.*' (Italics added.) Only the original property, or new lands or other property acquired to provide 'extensions' of the operations of the railroad, would seemingly be covered by the repurchase option." (*Id.* at p. 25.) The next sentence demonstrates that the distinction we were drawing was not between extension tracks and ancillary tracks or facilities of the railroad (e.g., the Rail Yard), but between railroad and nonrailroad property: "If ABL acquired other property for nonrailroad purposes, such property would not fall within the option to repurchase." (*Ibid.*) Simply stated, we did not decide what property the parties intended would be subject to the Paragraph 14 option "to purchase said belt line railroad together with extensions thereof." We left that determination to the trial court on remand. We expressly acknowledged that the extent of *railroad* property included in the repurchase option should be determined on remand with reference to extrinsic evidence: "As to the contention that the right of repurchase of the 'extensions thereof' might refer either to all newly acquired lands, or only to the tracks themselves and not the land underneath those tracks, we again point out that extrinsic evidence might be considered to aid in the resolution of this asserted ambiguity." (*Ibid.*)

**C. *Consistency with Other Contractual Provisions***

ABL next argues that an interpretation of Paragraph 14 that includes the Rail Yard in the property covered by the repurchase right would be inconsistent with other parts of the 1924 Agreement. It is axiomatic that a contract is to be construed as a whole, each clause helping to interpret the other. (Civ.Code, § 1641; Code Civ. Proc., § 1858.)

***11** Paragraph 3, which describes Southern Pacific's option to buy into ABL, requires Southern Pacific to pay the prorated cost of "all property owned" by ABL. [9] ABL argues that the drafters would not have used different language to describe the property covered by the City's repurchase right ("said belt line railroad including all extensions thereof") and the interest covered by Southern Pacific's option ("all property owned

then by [ABL]") unless they intended the phrases to have different meanings. Paragraph 12 refers in the disjunctive to "said belt line railroad, or ... the property of" ABL. [10] ABL argues the drafters would not have used both phrases unless they had different meanings. ABL contends that the trial court construed "said belt line railroad including all extensions thereof" to be synonymous with all of ABL's property, thus rendering ineffective the drafters' careful choice of language. (See Civ.Code, § 3541; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 750, p. 840.)

We disagree with ABL's premise that the trial court construed "said belt line railroad including all extensions thereof" to refer to all of ABL's property. [11] The trial court construed the paragraph to encompass the railroad, its extensions (including the Rail Yard), and all additional investments in those assets. The fact that the extent of that property was coterminous with the extent of company's entire property (i.e., the fact that ABL owned no *other* property) did not render the Agreement's references to "all property" of ABL meaningless. The contract was written in 1924 to apply to multiple possible future contingencies. Had Southern Pacific exercised its right to buy into ABL under Paragraph 3 and had ABL at that time owned property other than the original railroad, its extensions and additional investments therein, Southern Pacific would have been entitled to purchase a prorata share, at a prorata cost, of *all* of the property of ABL (with the exception of the ferry slip and tracks expressly excepted in Paragraph 12). The fortuity that ABL, as of the time of this litigation, did not own any property other than the belt line railroad and extension property does not reflect any inconsistency in interpretation of the Agreement, nor in the determinations made by the trial court. [12]

### IV. *Easements or Fee Interest in Land*

ABL argues that, as to real property under the railroad, the description of the proposed extension of the railroad in Paragraph 1 of the 1924 Agreement implicitly limits the City's repurchase right to easements permitting the City to run tracks over the land. Specifically, it argues that phrases like "over, along and upon" and "rights of way" in Paragraph 1 (and in the Railroad Commission description of the proposed extension) [13] indicate that any real property interest in the "extension" described in Paragraph 14 is limited to an easement, just as the real property interests conveyed to ABL with respect to the existing railroad and with respect to extensions that would travel over City streets were limited to easements (the franchises described in Paragraph 7 and conveyed pursuant to a contract that was admitted at trial). [14]

***12** According to the expert testimony presented at trial, however, the railroad terms used in Paragraph 14 include any and all land interests ABL owned below its tracks or as investments in the railroad. Crowley testified that "road" property refers to the rail and all assets below the wheels of the train. He defined "extensions" as including both "land and fixed improvements." He testified that "investments" included rail yards. Paragraph 14, which is the section of the Agreement that directly describes the City's repurchase option, uses the terms "extensions" and "investments" without qualification as to the extent of the land interests involved.

ABL argues that phrases such as "over, along and upon" in Paragraph 1's description of the proposed extension *limit* the repurchase right to an easement over the land. This argument fails for several reasons. First, the argument depends on the premise that the City's repurchase right is limited to the original railroad and the extension described in the "original plan," which is described in Paragraph 1. We have already held (a) that there is a conflict in the evidence about whether "extension" as used in Paragraph 12 is limited to an extension described in an "original plan"; (b) the "original plan" is not narrowly defined in Paragraph 1 (see subd. (c)) or in the ICC and Railroad Commission decisions approving the acquisition and expansion of the railroad; and (c) the repurchase right includes "investments" in addition to the original railroad and its extension lines.

Second, even if we accept that the repurchase right is limited to the property described in Paragraph 1, ABL has not demonstrated that phrases such as "over, along, and upon" limit the land interests to easements. Citing **cases** that interpret railroad deeds, which are relevant because they apply the same rules of interpretation as applied to the interpretation of any contract (*City of Manhattan Beach v.* ***Superior Court*** (1996) 13 Cal.4th 232, 238 (*Manhattan Beach* )), ABL urges us to apply a " 'general rule ... that "in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee. [Citations.]" ' " (*Id.* at p. 240, citing *Highland Realty Co. v. City of San Rafael* (1956) 46 Cal.2d 669, 678.) A full reading of *Manhattan Beach* demonstrates that the Supreme Court has not endorsed the quoted "general rule." Immediately after the sentence

quoted by ABL, the court inserted a footnote in which it distinguished *Highland Realty* and stated, "In the context of this **case**, it is ... unnecessary to assess whether it remains the 'general rule' that the grant of a railroad right-of-way conveys only an easement." (*Manhattan Beach,* at p. 240, fn. 7.) The court also cited *Machado v. Southern Pacific Transportation Co.,* which holds "there is no preference for construing a grant to a railroad as an easement instead of a fee." (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 355-356, 360-361 (*Machado* ), cited in *Manhattan Beach,* at p. 240, fn. 7.) A subsequent Court of Appeal decision agreed with *Machado* on this point. (*Severns v. Union Pacific Railroad Co.* (2002) 101 Cal.App.4th 1209, 1216 ["references to a right-of-way do not suggest an easement"]; see also *id.* at p. 1217.) The "general rule" advanced by ABL, therefore, has little support in California **case** law.

***13** *Manhattan Beach* further observed that "courts have also concluded 'the term "right of way," when applied to railroads, canals, and similar instrumentalities, has no exact, well-defined meaning, but often is susceptible of a twofold signification. It is used indiscriminately to describe, not only the easement, or special or limited right to use another person's land, but as well the strip of land itself that is occupied for such use. This, at any rate, is the **case** when the term is used with respect to railroads. [Citations.]' [Citations.]" (*Manhattan Beach, supra,* 13 Cal.4th at pp. 241-242, citing *Concord & Bay Point Land Co. v. City of Concord* (1991) 229 Cal.App.3d 289, 295 ["A right-of-way, of course, may be an easement to pass over land, but the term 'is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it,' " quoting Black's Law Dictionary (5th ed.1979) p. 1191].)

In sum, *Manhattan Beach* applied no general rule of interpretation to the "rights of way" language in the deed before it. On the contrary, it began with the legal presumption that a deed conveys a *fee simple* title absent contrary evidence, and emphasized that " ' "Every transaction must be considered individually." [Citation.]' [Citations.]" (*Manhattan Beach, supra,* 13 Cal.4th at pp. 242-243.) One of the features of the deed before it, which suggested conveyance of an easement, was language that it conveyed a " 'right of way for the construction, maintenance and operation of a steam railroad, [*is*] *upon [,] over and along the following tract and parcel of land* ' and *over and through* the lands of grantors....' (Italics added.)" (*Id.* at p. 244.) The court stated that the quoted language "in the nature of an appurtenance appears to limit the railway to a right of passage and exclude title to the land beneath." (*Ibid.*) However, the language was by no means determinative. (*Ibid.;* see also *Machado, supra,* 233 Cal.App.3d at pp. 359-360 [the phrase " 'over and across the land of the grantor' ... seems to suggest, *but does not require,* construction as an easement, rather than a fee," italics added].) The court concluded that other language in the deed combined with extrinsic evidence of the parties' intent indicated that the deed conveyed a fee interest rather than an easement. (*Manhattan Beach,* at pp. 235, 238-239, 243-246.)

Similarly, we conclude that the railroad terms "extension" and "investment," which are used without qualification in the paragraph of the 1924 Agreement that describes the City's repurchase option, indicate that any and all land interests owned by ABL as "extensions" of or "investments" in the railroad are covered by the purchase right. The "appurtenance" and "right of way" language in Paragraph 1 does not clearly convey a different intent and thus does not alter our interpretation of the repurchase right.

***14** Because we do not agree with ABL's argument that the City's repurchase option as to land owned by ABL was limited to the purchase of an easement, we need not address its argument that such easements have been extinguished by the end of the railroad's operations. ABL certainly does not contend that its *own* interest in any of the property covered by the judgment is limited to an easement that has been extinguished.

### V. *Frustration of Purpose*

ABL argues that, under the doctrine of frustration of purpose, the Paragraph 14 repurchase right is no longer enforceable because the purpose for the option no longer exists.

The doctrine of frustration of purpose applies when "[p]erformance remains possible, but the *fundamental reason of both parties* for entering into the contract has been frustrated by an unanticipated supervening circumstance, thus destroying substantially the value of performance by the party standing on the contract." (*Cutter Laboratories, Inc. v. Twining* (1963) 221 Cal.App.2d 302, 314-315 (*Cutter Laboratories* ).) As stated in the Restatement Second of Contracts, "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence

of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." (Rest.2d Contracts, § 265.)

The doctrine does not apply here. First, the principal purpose of the contract has not been substantially frustrated. Clifton E. Hickock, City Manager for the City of **Alameda** in 1924, testified during regulatory hearings that the objectives of the Agreement were "that all three [transcontinental railroads] be given access [to the belt line railroad] ... that the railroad must be extended at once, that the City of **Alameda** should be relieved of the immediate expense, and that we should have the privilege of acquiring the railroad back." The purpose of the Agreement was carried out for 74 years: Western Pacific and Santa Fe formed ABL, which purchased and extended the belt line railroad and operated it for 74 years. The City's exercise of its repurchase right is also consistent with the purpose of the Agreement.

ABL attempts to narrowly define the purpose of Paragraph 14 of the Agreement as an option to permit the City to repurchase the railroad solely in order to operate it as a municipal belt line railroad. Although Paragraph 14 in no way conditions the City's repurchase option on any particular use of the property, ABL cites testimony by City Manager Hickock during the regulatory hearings as extrinsic evidence to impose such a restriction. In response to a question about whether the City was attempting to create a situation "comparable to that existing along the water front of San Francisco where the State Belt Railroad serves as a neutral agency for all line haul carriers," Hickock replied, "The ideal solution from the City of **Alameda's** standpoint would have been for us to extend the railroad ourselves and to operate it similarly to what is done in San Francisco, but we were prevented from doing [so] by the fact that we were not able to finance it, so we considered that this solution ... attains similar results, particularly as we have the right at any time upon a year's notice of buying back the railroad and taking it over and operating it as a municipality." This testimony demonstrates that the City contemplated that it might exercise its repurchase right for the purpose of acquiring and operating the railroad itself. However, it does not establish that this was the *only* purpose of the repurchase option. Elsewhere in the record of the regulatory proceedings, the City described the repurchase right generally as a way to protect its unspecified interests. Testifying specifically about the purposes of the contract, Hickock testified that "the City of **Alameda** would be protected in the future by having the power to buy back the property ." The City's brief to the Railroad Commission stated that "the contract reserves to the City the right to repurchase the belt line and its extensions if at any time in the future it should be deemed advisable so to do." These statements indicate that the repurchase right was intended to *generally* protect the City's interests, possibly by allowing it to regain control of the public property it turned over to ABL, as well as any other property acquired by ABL to operate a belt line railroad in the public interest. ABL has not shown that the purpose of repurchasing the property in order to operate a municipal belt line railroad was "so completely the basis of the contract that, as both parties underst [oo]d, without it the transaction would make little sense." (Rest.2d Contracts, § 265, com.(a).)

***15** Second, the ceasing of railroad operations was not an "unanticipated supervening circumstance," the "non-occurrence of which was a basic assumption on which the contract was made." (*Cutter Laboratories, supra,* 221 Cal.App.2d at p. 315; Rest.2d Contracts, § 265.) The expansion of the belt line railroad was an inherently uncertain venture. The parties hoped that the extension of the belt line railroad would encourage industrial development on the waterfront, which would increase the City's tax base and generate transportation revenues for the parent railroads. However, an increase in development was not guaranteed, nor was there any guarantee the industry, once developed, would stay in **Alameda** forever. The Agreement had an indefinite term and the ancillary franchise agreement between ABL and the City had an initial term of 50 years, which was extended another 25 years. Long-term contracts are common in the railroad industry. The loss of industry and of the need for the railroad were within the risks the parties assumed when they entered into the contract.

Third, the change in circumstances has not substantially destroyed the value of the City's performance under Paragraph 14 of the Agreement. (*Cutter Laboratories, supra,* 221 Cal.App.2d at p. 315.) In fact, the value of the City's performance is unaffected. The repurchase price ABL would have received for the property if the City had intended to use it to operate a municipal belt line railroad is exactly the same as the price it will receive under the trial court's order: the original costs of the railroad, its extensions, and additional investments. Other parts of the Agreement demonstrate that the parties anticipated that property values might substantially increase, thus instilling significant value in the City's right to repurchase property at cost. Paragraph 9, which established the rent ABL would pay for City land if it constructed the ferry slip pursuant to Paragraph 8, provided that the rent

would "be equitably adjusted at the end of each 10-year period ... according to the then value of said property in an unimproved condition, as compared with its present value, and if said parties, or party, and said City are unable to agree, such question of then value as compared with present value shall be submitted to arbitration...." The arbitration provision recognizes that the property values might increase substantially, thus causing a dispute the parties would have difficulty resolving among themselves. In Paragraph 14, however, the repurchase price is set at cost, not at fair market value. It can be inferred that the parties anticipated that the value of the property acquired by ABL to extend the railroad might substantially increase before the City exercised its repurchase option, and agreed that the City, as part of its benefit of the bargain under the Agreement, would capture that increase in value by paying only cost for the property. The increase in property value was "within the risks ... assumed under the contract" by ABL. (Rest.2d Contracts, § 265, com. (a).)

## DISPOSITION

***16** The judgment is affirmed. The City of **Alameda** shall receive its costs on appeal.

We concur: JONES, P.J., and SIMONS, J.

Footnotes

* Judge of the Contra Costa County **Superior Court**, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Consistent with the usage of the parties and the trial court, we refer to the numbered parts of the 1924 Agreement as paragraphs, although the Agreement itself uses the term section.

2 This area included property in the city block bounded by Clement Avenue, Grand Street, Eagle Avenue and Minturn Street and property in the block bounded by Eagle Avenue, Grand Street, Buena Vista Avenue and Hibbard Street.

3 The City conditioned its prayer for relief on any orders or required proceedings of the federal Surface Transportation Board (Board). ABL argued that the Board had exclusive jurisdiction over all railroad ownership issues and the trial court lacked jurisdiction to approve the City's acquisition of the railroad. In December 2005, the City filed a verified notice of exemption with the Board pursuant to title 49 Code of Federal Regulations, section 1150.31 to acquire the belt line railroad from ABL. In April 2006, the Board denied ABL's request for a stay of the notice and held that the **superior court** had jurisdiction to determine the rights and obligations of the parties under the 1924 Agreement. In June 2006, the trial court granted the City's motion to amend its second amended cross-complaint to conform to proof and, "as a result of the April 3, 2006 Surface Transportation Board ruling," to add a cause of action for specific performance. So amended, the cross-complaint sought an order that ABL unconditionally convey "the belt line railroad and all extensions thereof" to the City.

4 Before trial, the court granted summary adjudication to the City on ABL's claim for inverse condemnation (just compensation).

5 The annual verified reports of "the cost of additional investments and extensions" required by Paragraph 14 of the Agreement were never filed by ABL.

6 The second proviso of the first paragraph of Paragraph 14-"provided that at the same time it purchases ... the branch railroad, extensions and spur tracks referred to in the twelfth section hereof"-refers to a ferry slip extension that was never built by the parent companies of ABL and thus is not covered by the City's exercise of its repurchase right.

7 Copple testified that ABL's Rail Yard could be called a "classification yard."

8 We note that ABL called CPA Jennifer Zeigler to testify at trial on the question of the option exercise price. She testified only as to ABL's total expenditures over the years of operation (approximately $28 million), which would presumably encompass all "investments" during that period, including the cost of the Rail Yard.

9 Paragraph 3 of the Agreement gave Southern Pacific an option to buy into ABL by purchasing an interest equal to that of the other parent railroads at "its proper prorata of the cost to the then carrier owners to the date of such acquisition of the organization of said [ABL], and the acquisition, extension, and construction of *all property owned then by it,* including all additions and betterments." (Italics added.)

10 Paragraph 12 of the Agreement refers back to Paragraph 8, which provided that one or both of the parent railroads had the option of constructing a freight ferry slip, spur track, and connecting track from the original railroad on Clement Avenue over land leased to it or them by the City. Paragraph 12 provided that, if constructed, the track and ferry slip would "not be deemed a part of the aforesaid belt line railroad, or be included as part of *the property of said [ABL].*" (Italics added.)

11 The parties dispute whether the trial court's judgment in practical effect orders ABL to sell all of its property to the City. ABL contends it does, but the City represents (without citation) that not all corporate property was included in the judgment. We shall assume for purposes of argument that the real property covered by the judgment is all of the real property ABL owns.

12 In the trial court, ABL argued that the Atlantic Avenue property should not be included in the property covered by Paragraph 14. ABL does not clearly raise this argument on appeal. It generally "question [s] what property is included within the term 'extensions' " and also whether any land interests "included a fee interest or merely an easement." It seeks a ruling that the City recover nothing, based in part on its argument that the repurchase right is limited to easements in its real property and all such easements have been extinguished. It does not identify what property should be included in the option if we reject its easement argument.

Assuming ABL contends on appeal that the Atlantic Avenue Property is not included in the option, we reject the argument on the merits. First, Copple testified that the track that ran over the Atlantic Avenue Property "was an extension from the rail yard." Second, the property is included in the Railroad Commission's description of the proposed extension, which included a path from a point north of Buena Vista Avenue and Benton Street and 1,000 feet south of the estuary, thence "in a general westerly direction over private rights of way and crossing all intervening streets to the westerly side of Webster street [the rail yard] ... and continuing westerly over private rights of way and crossing all intervening streets to the shore line of San Francisco Bay...." The ICC decision similarly wrote that the "extension" included a "westerly extension [from the existing railroad] to the shore line of San Francisco Bay," and specifically referred both to an "extension from the present westerly terminus [of the existing railroad] to the west line of Webster Street" and to a "further extension from the west side of Webster Street to the shore line of San Francisco Bay." Crowley also testified that "purpose" (or plan) of the 1924 Agreement was "to extend those [existing] railroad landing tracks out to the San Francisco Bay." Alternatively, the track along Atlantic Avenue was ancillary track that constituted an "additional investment" in the original railroad and its extensions. Copple testified that the track was spur track.

13 Paragraph 1 provides in relevant part: "*over, along and upon* the line of the existing railroad belonging to the City of **Alameda**, on Clement Avenue between Broadway and Grand Streets in said City, and, in addition thereto, *over, along and upon* those certain streets in said City particularly described as follows, to-wit: [¶] (a). Beginning at a point in the existing track on Clement Avenue in said City at or near the western line of Broadway, thence by a single track westerly, parallel and operating in conjunction with the City's existing track thereon to a point near the eastern line of Park Street; [¶] (b). Beginning at a point in the existing track on Clement Avenue near Minturn Street thence by a single track on an 'S' curve *over and along* private *rights of way* and intervening streets southerly and westerly to Buena Vista Avenue near Hibbard Street; thence by a single track *over and along* the sidewalk area on the northern side of Buena Vista Avenue westerly from Hibbard Street to a point between Benton Street and Bay Street; thence by a single or double track curving northerly and westerly *over private rights of way* and intervening streets to a point north of Eagle Avenue and continuing westerly *over other private rights of way* and crossing all intervening streets to the western side of Webster Street at or near the so-called 'segregation line' in said city; [¶] (c). And also such other streets and *rights of way* in said City, the right to use which shall have been lawfully granted to said [ABL]." (Italics added.)

The Railroad Commission decision describes the extension as follows: "Beginning at a point in the existing track on Clement Avenue near Minturn street; thence by a single track on an 'S' curve *over and along* private *rights of way* and intervening streets southerly and westerly to Buena Vista avenue at Hibbard Street; thence westerly *along* the northern side of Buena Vista avenue to a point thereon between Benton street and Bay street; thence by a single or double track curving northerly *over private rights of way* and intervening streets and continuing in a northerly direction to a proposed freight ferry slip on the estuary of San Antonio; and also running from a convenient point on said proposed line located about 1,000 feet southerly from said proposed freight ferry slip, in a general westerly direction *over private rights of way* and crossing all intervening streets to the westerly side of Webster Street at or near the so-called 'segregation line,' and continuing westerly *over private rights of way* and crossing all intervening streets to the shore line of San Francisco Bay, a distance of 14,600 feet, more or less." (Italics added.)

By way of comparison, the ICC decision describes the extension as continuing from the original railroad "in a general ... westerly and northerly direction to a proposed car-ferry slip at the foot of Morton Street (if projected), with a further westerly extension to the shore line of San Francisco Bay, a distance of 14,600 feet."

14 Based on our review of the record, it appears that ABL did not raise this specific argument below. It may have been deterred by the trial court's rulings in its statement of intended decision and final statement of decision that "[d]uring trial, the parties agreed that there was no dispute about the land subject to the repurchase option in Paragraph 14, except for their disagreement about whether the railyard was an 'extension.' " The court cited statements by ABL's counsel as a concession that there was no dispute about what land was subject to the repurchase option. We read counsel's statements as concessions about ABL's *ownership* of the property that had been identified by the City, but not a concession that the property was included in the repurchase option. Therefore, we address ABL's easement argument on the merits.

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