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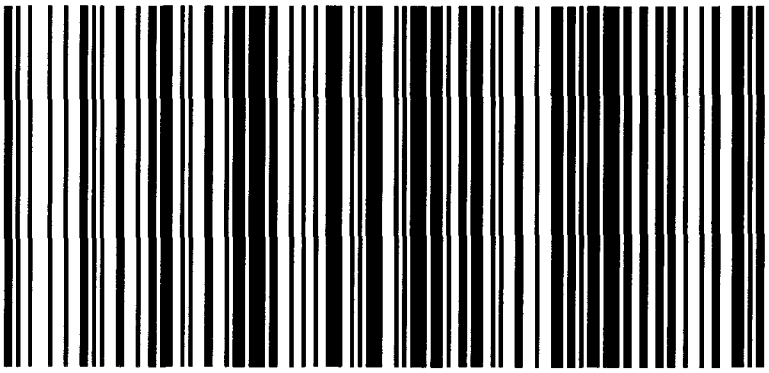

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[Superior Court Case No. C-8263737]

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

ALAMEDA BELT LINE ,

Plaintiff and Appellant,

vs.

CITY OF ALAMEDA,

Defendant and Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF CALIFORNIA, COUNTY OF ALAMEDA
HONORABLE HON. JON S. TIGAR

APPELLANT'S OPENING BRIEF

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First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A118596 Division Five

Case Name: Alameda Belt Line v. City of Alameda

Please check the applicable box:

☐ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

☑ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. BNSF Railway Company	50% owner Alameda Belt Line
2. Union Pacific Railroad Company	50% owner Alameda Belt Line
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

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INTRODUCTION

The Alameda Belt Line ("ABL") appeals a judgment awarding the City of Alameda specific performance of a 1924 option, allowing the City to "purchase" all of ABL (with assets, particularly real property, conservatively exceeding $20 million) for less than $1 million.

The City had a contractual option to purchase ABL's "belt line railroad including all extensions thereof" and exercised it in 1999. This Court noted in an earlier appeal in this case: "[t]he language of the option greatly narrows and defines the property in issue..." and called for extrinsic evidence to help resolve whether "the right of repurchase might refer either to all newly acquired lands, or only to the tracks themselves and not the land underneath those tracks." *Alameda Belt Line v. The City of Alameda* (2003) 113 Cal.App.4th 15, 25.

But where the trial court went off track, so to speak, was in failing to conform the option property, as this Court had anticipated, to what the parties agreed in 1924, instead undertaking a hindsight driven analysis of what "makes sense" today. Without founding that interpretation on the language in the agreement, the trial court awarded the City everything ABL owned in 1999, far more than the parties bargained for in 1924.

Financially unable to develop its own municipal freight railroad to serve the industrial waterfront as San Francisco had, the City of Alameda contracted in 1924 to sell its "existing railroad" on Clement Avenue between Broadway and Grand Streets. ("Agreement"; Ex. 523) The City conveyed its tracks and an interest allowing operation of a railroad over the City's street, but retained City ownership of the street beneath the railroad. (Ex. 523, 641) The buyers were two long haul railroads, Western Pacific and The Atkinson, Topeka and Santa Fe ("ATSF"), who would form a new entity to transfer rail cars from the long hauls to industrial users within Alameda, to be known as

the Alameda Belt Line, a corporation. (Ex. 523)

The Agreement spelled out a plan to take the existing tracks in Clement and extend the line further west "over, along and upon" certain precisely described streets and private "rights of way." (Ex. 523, para. 1) Repetitively using these significant words, the contract describes the right to use the rails whether in a street or "over" privately owned property. It never mentions ownership of the fee title beneath that right.

Among the contract details, the City negotiated for a limited option, allowing the City to unwind the sale if ever it wanted to take over rail operations. (Ex. 523, para. 14) It allowed the City to purchase, "at any time," "said belt line railroad including all extensions thereof" – the "extensions" both being defined in the Agreement "over, along, upon" certain streets and private rights of way, and having a precise meaning in railroad contracts. (Ex. 523, paras. 1, 14)

But in arguing for specific performance, the City led the trial court into error; it did not limit the option to what the parties bargained for, the line of the railroad as extended "over, along, upon" City streets and privately owned property – language evidencing an easement, consistent with the interest the City had conveyed in Clement. Instead, the Judgment awarded the City everything ABL owned -- all real property (easement and fee interests), improvements, tenements, fixtures, apparatus, equipment, appliances, personal property, tangible and intangible, trackage rights agreement, franchise agreements, licenses, leases, rents and income, and other items. (JA 1532-1533) None of which is mentioned in the option.

The question presented is this: did the 1924 Agreement reserve to the City the right to purchase the entire Alameda Belt Line company, including its real property over which the rails were operated, or was the option narrowly drawn to mean tracks and the right to use an easement over a precisely identified route (the "belt line railroad"), which is all the City sold in

the first place. That is a legal question based on the Agreement's words and undisputed documentary evidence.

The trial court could have reached two plausible outcomes:

One. The intent of the parties, as expressed in the Agreement, excludes the possibility that the City was purchasing all ABL assets; it was only buying the belt line railroad -- tracks and the right to use them "over, along and upon" public and private rights of way;

or

Two. What the parties' intended in 1924, to allow the City to purchase the belt line railroad to serve industrial users, could not be enforced in 1999 when the belt line railroad had ceased operation, parts of the right of way had been sold off, and there were no industrial users left.

And that last point bears emphasis; this case has zero to do with the City purchasing the belt line railroad to serve industrial users -- the original option purpose. The nub of this case involves title to the 22-acre former railyard, as well as other remaining ABL real estate. In January 1999, ABL, having ceased operations, contracted, with City consent, to sell its railyard for nearly $18 million. (Ex. 28) But in November 1999, the City blocked that sale by exercising the option. (Ex. 16) The upshot, if the judgment stands, is the City will acquire the former railyard plus other ABL land for $966,027. (JA 1531) This is a real estate deal for the City -- and what a deal it is.

Neither the contract language, nor the parties' intent, nor the surrounding circumstances lead to the conclusion the trial court reached: that the City was entitled to purchase everything the corporate ABL owned, rather than just the trackage and right of way identified in the Agreement. Ignoring the contract's limiting language, the Court pushed everything on the table into the City's pile. Its rationale: ABL's property was all necessary to serve industrial users when it was used for rail purposes, so the drafters must have

intended the option to include it all. (JA 1464-1467) This hindsight reasoning ignores the language limiting the option to tracks and use, and survives even after the belt line railroad had shut down and industrial customers had moved away. The trial court converted the option for the rail line over City and private rights of way into the right to purchase all of ABL's property. Neither the 1924 contractual language nor surrounding circumstances bears that out as the drafters' intent.

FACT STATEMENT

In interpreting the scope of the City's option, the words the contracting parties chose are the principal focus. And since there are no witnesses alive to testify to the parties' intent, this is largely an ancient records case. The facts and circumstances surrounding the Agreement are derived from contemporaneous documentary exhibits and are undisputed. Following execution of the Agreement, ABL applied for and received authority from the California Railroad Commission ("CRC") and the Interstate Commerce Commission ("ICC") to acquire the City's existing railroad line and construct the planned extensions thereto. The record before these Commissions provides relevant historical background.

The Agreement and the historical exhibits refer to locations along the belt line railroad as important markers in understanding the drafters' intent. Attached to the end of this brief is a map [Ex. 602], prepared by the City, that shows on three sequential pages the railroad's route and properties it crosses. The railroad begins on sheet 3 at the intersection of Broadway and Clement, spills over to sheet 2 to Grand Street and is identified in red as the "City of Alameda's Railroad as of 1924." From there (still on sheet 2), ABL extended the railroad to swing south on an "S" curve along Grand and then west along Buena Vista. It then swung north again along Sherman Street and then west (through the large green cross-hatched property) past Webster (now on sheet 1) all the way to Main.

The green cross-hatched parcels are land that ABL continued to own at the time the City exercised its option. (RT. 174-175, 388, 404) The large green swath between Sherman (sheet 2) and Constitution (sheet 1) is the 22-acre railyard that inspired this lawsuit. (RT. 394) Also in green are several smaller parcels ABL owns. (RT. 174-175, 388, 404)[1]

---

[1] A couple of minor corrections were made to the exhibit at trial (RT. 393-394) The blue dashed line between Hibbard and Sherman that appears to be a rail track, is not; it depicts a planned Clement extension. (RT. 244, 395)

A. Historical Background

At or near the end of Woodrow Wilson's first term, the 30,000 residents of Alameda found their city with much promise but little to show for it. In contrast, the port of Oakland, directly across the San Antonio Estuary opening out to the San Francisco Bay, had developed with considerable industry, using both rail and water, and was served by the three major transcontinental railroads -- Western Pacific, Southern Pacific and ATSF. (Ex. 610, ABL 19795-96)

Even though the Southern Pacific (but not the other two carriers) had been in Alameda for 61 years and served the entire island, Alameda's industrial waterfront remained largely undeveloped. (Ex. 610, ABL 19795-96; Ex. 202 ABL 19702-03) West of Grand to Webster Street, there were about 400 acres on which there were a few industries, including Alaska Packers and Encinal Terminals. (Ex. 610, ABL 19795) West of Webster, there were 500 undeveloped acres owned by the University of California and about 5000 acres of partially submerged land that could be reclaimed from the Bay. (Ex. 610, ABL 19795)

In an effort to jump-start development, the city laid about 6300 feet of track in Clement Avenue from the east end of the northern waterfront westerly to Grand Avenue, what it called a "belt line," to serve the few industries there. (Ex. 615, ABL 19876-77) The City contracted with Southern Pacific to operate it. (Ex. 604, ABL 19156) The city's "ideal solution" was to one day extend the railroad and operate it similar to the situation in San Francisco where its switching railroad was publicly owned and operated. (Ex. 604, ABL 19177; Ex. 615, ABL 19879) But Alameda was unable to finance the project. (Ex. 604, ABL 19157; Ex. 607 ABL 19681; Ex. 615, ABL 19877)

The driving force behind Alameda's push for industrial rail

development in the early 1920s was the decision by Encinal Terminals and Alaska Packers, large shipping and packing concerns, to locate along Alameda's northern waterfront. (Ex. 615, ABL 19877) Encinal Terminals built a $400,000 warehouse and was prepared to spend several million more developing the area, but its investments were contingent upon service by all three transcontinental railroads. (Ex. 610, ABL 19797, Ex. 611 19807) Though Southern Pacific was already serving the waterfront, Encinal went to ATSF and Western Pacific and convinced them that this was an expanding area. (Ex. 605, ABL 19213) Encinal then pressed the City for an immediate expansion of the belt line to serve its development. (Ex. 604, ABL 19157) Hoping to maintain its monopoly, Southern Pacific offered to buy the existing belt line and refused to cooperate in any shared ownership with the other railroads. (Ex. 615, ABL 19877) Alameda found itself at the center of competitive maneuvering by the three transcontinental railroads and pressured by Encinal to make a deal happen.

B. Overview of the 1924 Agreement

Negotiations between the City, Encinal and the railroads resulted in the 1924 Agreement between the City, the Western Pacific and the ATSF. (Ex. 523) Western Pacific and ATSF would form a new corporation, the Alameda Belt Line which would purchase the City's existing tracks over Clement and extend them westerly over other streets and private rights of way to serve the industrial waterfront. (Ex. 523) To encourage Southern Pacific to join with them, the drafters provided an option allowing it to later purchase a proportional share of the corporation. (Ex. 523, para. 3) Finally, the Agreement included an option for the City to purchase the tracks it had sold, plus the defined extensions the parties agreed would be constructed. (Ex. 523, para. 14)

C. The Contractual Details

In this tripartite contract, Western Pacific and ATSF agreed to organize a new corporation known as "ALAMEDA BELT LINE" [the company (as opposed to the "line of railroad") being consistently referenced in all capital letters], for the acquisition, construction and operation of a belt line railroad to serve the industrial area and water front of said City,

> "...**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 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 co-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 ALAMEDA BELT LINE." (Ex. 523, para. 1; emphasis added)

The corporation was set up with five directors, two chosen by each railroad, and the fifth by the City. (Ex. 523, para. 2) The railroads were to equally share ownership and financial obligations. (Ex. 523, para. 3)

The Agreement at Paragraph 3 provided an option for Southern Pacific to later acquire a one-third stock ownership interest in the corporation by,

> "paying for such stock a sum of money equal to its proper prorata of the cost to the then carrier owners to the date of such acquisition of the organization of said ALAMEDA BELT LINE, and the acquisition, extension, and construction of **all property owned then by it**, including all additions and betterments, together with interest thereon at the rate of six per cent per anum from the time of investment." (Ex. 523, para. 3; emphasis added)

The parties agreed to a $30,000 purchase price for the City's existing railroad which amounted to the tracks in Clement. (Ex. 523, para. 4) There was no real property conveyed; instead in February 1925, the City granted ABL a Franchise which expressly gave ABL "the right to use ... portions of [City] streets, alleys, highways and properties" for 50 years. (Ex. 641)[2] The parties also agreed that: "ALAMEDA BELT LINE will, as soon as possible after its organization, construct the proposed extension to said City's existing railroad westerly to Webster Street, and it will construct the extension

---

[2] After that Franchise expired in 1975, the City adopted another ordinance extending ABL's "right to use" the City streets through 2005. (Ex. 547)

westerly therefrom as rapidly thereafter as industrial expansion warrants." (Ex. 523, para. 6)

As Western Pacific and ATSF already had barge accessible facilities on the Oakland side of the estuary [Ex. 615, ABL 19876], the Agreement provided them an option to construct a freight ferry slip on the Alameda side to be served by ABL's railroad. (Ex. 523, para. 8) Paragraph 12 explained the ownership of the freight ferry connection:

> "Said railroad track running from Clement Avenue northerly along Grand Street, if constructed, and **also the spur tracks and freight ferry slip at the northerly termination of said Grand Street shall not be deemed a part of the aforesaid belt line railroad, or be included as part of the property of said ALAMEDA BELT LINE,** but said railroad track, spur tracks and freight ferry slip shall be and remain the exclusive property of the party or parties exercising the option...." (Ex. 523, para. 12; emphasis added)

Further, the Agreement included details about what ABL could charge [Ex. 523, para. 13] and finally, in Paragraph 14, set forth the City's option:

> "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." (Ex. 523, para. 14)

D. The Regulatory Hearings

The Agreement was subject to CRC and ICC approval, and because of Southern Pacific's aggressive opposition, extensive hearings were held on the economics of opening Alameda to Western Pacific and ATSF when Southern Pacific already (and arguably adequately) served the City. (Ex. 615, ABL 19878-80) Certain testimony touched on points at the heart of the instant dispute, particularly the parties' understanding of "extensions" and the City's option.

In its ICC Brief, the City defined its "plan" which is important to understanding "extensions":

> "The orders and authorizations sought by Alameda Belt Line, The Western Pacific Railroad Company and the Atchison, Topeka and Santa Fe Railway Company are all in full accord with a **plan** arranged by the City of Alameda and the two companies last named for the acquisition of said city's existing railroad and its extension and operation by the Alameda Belt Line....**The plan is fully set forth in a contract entered into by the City of Alameda with said two railroad companies under date of December 15, 1924**...." (Ex. 210, ABL 20069; emphasis added)

Mr. Angellotti for Western Pacific described the situation:

"**The present existing line of the railroad** is

> something like 6900 feet in length ... and **it is proposed to be extended** ...to a point on Buena Vista Avenue just to one side of the property of the Encinal Terminals, carried along Buena Vista Avenue over to the Liberty Ship Yards, across there to a point on the Bay, and also from that line westerly to the waters of the Bay of San Francisco." (Ex. 193 ABL 19133-34; emphasis added)

Mr. Matthews, representing both the City and Encinal characterized it as follows:

> "First, **the City of Alameda is the owner of certain railroad trackage 6900 feet in length, projected as a belt line railroad** intended to serve the waterfront of Alameda and the contiguous industrial areas. The city finds it impossible by reason of the financial burden entailed **to extend that trackage** in accordance with a long matured plan or to engage in its operation." (Ex. 211, ABL 20133; emphasis added)

On July 14, 1925, the CRC Decision described the existing belt line and the proposed extension:

> "The route and termini of **the proposed line of railroad to be acquired and the extensions thereof** are as follows:
>
> (A) **Existing belt line**:
>
> Beginning at a point 188 feet, more or less, easterly of the intersection of the center line of Clement avenue and Broadway; thence by a single track along the center line of Clement avenue in a westerly direction and crossing all intervening streets to a point in Clement avenue at the westerly line of Grant street, a distance of 6364.5 feet.

(B) **Proposed extension**:

> 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 northerly 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 1000 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." (Ex. 506, p. 3; emphasis added)[3]

The Hearing Examiner's report and ICC Decision explained that ABL applied to the ICC for a certificate that the public convenience and necessity require **the acquisition of the existing "line of railroad"** and "**the construction of an extension of said line of railroad** in a westerly and northerly direction to a proposed car ferry slip at the foot of Morton Street (if produced), with a further westerly extension to the shore line of San Francisco Bay, a distance of 14,600 feet." (Ex. 611, ABL 19802; Ex. 615, ABL 19876; emphasis added)

In discussing the proposed extensions in conjunction with

[3]This page of Ex. 506 is attached at the end of this brief.

other types of tracks, the ICC decision stated:

> "To secure funds for the acquisition of the existing line and for the construction of the proposed extensions, with the necessary spur, industrial, team, switching and side tracks, the Belt Line proposes to issue the total amount of common capital stock authorized by its charter, namely $500,000, consisting of 5,000 shares of the par value of $100 each." (Ex. 615, ABL 19878)

In the hearings, the parties' representatives mentioned the City's option but without substantive discussion of what the "buy back" right included:

Alameda City Manager Hickok stated that it "would be protected in the future by having the power to buy back the property." (Ex. 604, ABL 19157) The City's objectives included the "privilege of acquiring the railroad back." (Ex. 604, ABL 19157) "[W]e 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." (Ex. 604, ABL 19177)

Mr. Angellotti for Western Pacific:

> "They were insistent also that the city should have the right to repurchase the road if in the future it was found advisable by the people to make the necessary investment, and they were finally able to effect the arrangement ..." (Ex. 607, ABL 19682)

Mr. Foulds for Southern Pacific:

> "And look at this contract. I want to say, they talk about shrewdness here; this is very shrewdly drawn. It provides that the city of Alameda may, at any time, buy back this belt line and its extensions, for the original cost..." (Ex. 609, ABL 19727)

City's Brief to the ICC:

> "Moreover, 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 to do so." (Ex. 620, ABL 20071; Ex. 210, ABL 20071)

The Railroad Commission report and the ICC Decision:

"The City reserves **the right to purchase the Belt Line's railroad** at any time upon paying therefore the original cost, plus the cost of any additional investments and extensions" (611, ABL 19806; Ex. 615, ABL 19877; emphasis added)

Mr. Matthews for the City:

"[I]t is provided that the City of Alameda shall have the right to repurchase at any time to make it certain that in the future that if at any time it shall desire to **get this service** it shall have the right to do so." (Ex. 211, ABL 20134; emphasis added)

The CRC and ICC approved ABL's application. On January 16, 1926, the ICC concluded: "It is hereby certified, that the present and future public convenience and necessity require (a) the acquisition by the Alameda Belt Line **of the line of railroad** and (b) the construction by it **of the extensions of said line of railroad** in Alameda, County, Calif....." (Ex. 615, ABL 19880; emphasis added)

E. Post Approval Construction

Work began immediately. On December 4, 1928, an ATSF engineer reported:

"The track in Clement Street which was purchased from the City is 6251.65 feet long....

"During the months of December 1926 and January 1927, the line was extended from Minturn Street west to the foot of Sherman

Street, thence to the west line of Webster Street, a total distance of 8030 feet.

"During the years 1925, 1926 and 1927 the carrier constructed at its own expense tracks to serve the Alaska Packers Association and Encinal Terminals, a total of 22,700.6 feet.

"During the years 1927 and 1928 the Belt Line constructed for classification and storage yard 31,453.7 feet of track; also a team track 431.8 feet long." (Ex. 70)

F. Operation of ABL 1925-1998

Over the years, ABL operated the railroad to provide switching services for the two transcontinental railroads for loaded inbound and outbound freight cars, rearranging and delivering them to different industries exclusively within Alameda. (RT. 79) Although in the late-1940s, ABL went so far as to calculate a price under the Paragraph 3 Southern Pacific "buy in" option [Ex. 529, 530], Southern Pacific never exercised that option.

The industrial waterfront grew somewhat as hoped. (RT. 87) But the 5000 acres of partially submerged land that the drafters hoped would grow with industry never developed commercially because the U.S. Navy assumed control over the entire west end of the island for the Alameda Naval Air Station. (RT. 87, Ex. 602)

Also, over the years, ABL bought and sold real estate as needed. (Ex. 548, 549) In addition to the City Franchise giving ABL the right to use portions of City streets, alleys, highways and properties [Ex. 641], ABL acquired both easements and fee interests in private land to extend the railroad. (Ex. 548, 549) By 1927, ABL acquired land for its railyard between Sherman and Webster. (Ex. 665, ABL 01450-55) Ultimately, the main lead

track entered the yard at Sherman, and there were 12 yard tracks that ABL's railroad used for switching cars. (RT. 170-171) The main line exited the yard at Webster and extended west to the Navy. (RT. 172) In 1943, ABL acquired an additional 6.894 acres for the railyard. (Ex. 236A, p.5) In the 1970s, ABL formally applied to the ICC and received permission to abandon the line west of Webster which served the Navy. (Ex. 162, RT. 90)

By the 1990s, the northern waterfront had changed. Industrial properties were being converted to residential and commercial uses. (RT. 113-119) Industry was leaving Alameda eliminating the need for the belt line. (RT. 101-107) As land was no longer needed, ABL sold it. (RT. 116-120) In January 1998, ABL notified the City that it had ceased operations at its railyard, and rails had been removed from Sherman Street. (Ex. 29, 228, 229; RT. 108-109) Tracks were removed from the railyard by the middle of 1999. (RT. 140-141)

The 22-acre former railyard was listed for sale. (Ex. 34, ABL 24777-78) ABL's directors, including the City Manager, Mr. Flint, unanimously consented to a sale. (Ex. 33) The only two customers left were Pennzoil and Alameda Liquid Bulk Terminal which could be serviced on the line's eastern end or by truck. (Ex. 34, ABL 24778; RT. 11-113) By November 1998, ABL's railroad switched its last car and ceased operations. (RT. 142)

In January 1999, ABL accepted an offer to purchase its former railyard property from Sun Country Beltline LLC for $17.7 million. (Ex. 28) Sun Country planned to build 200 residential units. (RT. 255) But by November 1999, the City exercised its option: "The City Council...hereby gives notice to Alameda Belt Line Corporation that it will on December 4, 2000, purchase the belt line railroad, including all extensions thereof." (Ex. 16) Sun Country ultimately cancelled its deal in 2003 as a result of this litigation. (RT. 257)

The Exhibit 602 map (attached) depicts the real property ABL continues to own. The parcel of land along Atlantic Avenue between Main and Constitution (sheet 1 of 3) was that portion of the right of way subject to abandonment proceedings in the 1970s. (Ex. 162) Just east of that parcel is an intervening piece of property, between Webster and Constitution, sold by ABL which now contains a Starbucks and Walgreens. (RT. 117-118) East of Webster is the former railyard (the large green parcels on sheets 1 and 2), which is divided into a 15.983 acre parcel on the south and a 6.894 acre parcel acquired in 1943 to the north. (Ex. 602; Ex. 236A, p.5) There are three other remaining parcels: at the intersections of Buena Vista and Sherman, Buena Vista and Grand, and Grand and Eagle. (Ex. 602) All tracks have been removed except for the tracks in Clement the City originally conveyed. (RT. 90, 205)

STATEMENT OF THE CASE

Instead of acceding to the City's option, ABL filed a Complaint for Declaratory Relief; Injunctive Relief and Inverse Condemnation. (JA 1-25) The City cross-complained for Anticipatory Breach of Contract, Specific Performance, Constructive Trust and Declaratory Relief. (JA 30-38) The trial court sustained ABL's demurrer to the City's specific performance claim [JA 39-40], and the City twice amended its cross-complaint to cure other defects. (JA 41-58, See, Second Amended Cross-Complaint as operative pleading)

In January 2002, ABL and the City filed cross-motions for summary adjudication, each seeking to hold the Agreement, on its face, determinative. (JA 74-94, 94-132) The trial court denied the City's motion and granted ABL's, finding that the option was not sufficiently definite to be enforceable under the statute of frauds. (JA 245-249) The court entered judgment for ABL, and the City appealed. (JA 251-254)

In November 2003, this Court reversed on two points. *Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15. (JA 255-267)

First, this Court decided that the parties, at the time of contracting, did not need to own or definitively identify the land to be included in the option to satisfy the statute of frauds. After-acquired property could be included in a conveyance without violating the statute of frauds' description requirement. *Id.* at 21-23.

Second, on the question of contractual certainty, this Court ruled that extrinsic evidence must be considered to determine (1) what constituted "extensions" within the meaning of the Agreement ["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 option. If ABL acquired other property for nonrailroad purposes, such property would not fall within the option..." *Id.* at 25], and (2)

whether the right to acquire "the belt line railroad including all extensions thereof" referred only to the tracks themselves or included the land underneath and around them." *Id.* at 24-25.

> "[W]e see two steps in the interpretation of the agreement entered into between the City and ABL. First, extrinsic or parole evidence may be considered to ascertain the parties' meaning of the words 'extensions thereof' when they entered into 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 parole 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." *Id.* at 25.

Trial commenced in April 2006. As noted, much of the extrinsic evidence was documentary and undisputed.

ABL called three witnesses. First, it called Phil Copple, a longtime employee/superintendent of ABL's railroad, who described operations from 1967 to 1998. (RT. 78-81; 76-249) Copple's testimony that the trial court found significant included this exchange on cross-examination regarding "extensions":

> Q. And Mr. Copple, in rail parlance, "extensions" mean where new track is laid by a railroad, correct?
>
> A. I would say the extension of the track, yes.
>
> Q. And in your experience and understanding in your 50 years in the railroad, that extensions of track include those 13 tracks you said in the railyard, correct?
>
> A. If you would consider them extensions,

yes.

Q. Well, you testified in deposition that you considered the tracks in the railyard as extensions, correct?

A. Yes.

Q. And you are still of that opinion today, correct?

A. Yes.

Q. So I think, if I recall correctly, that there was the main track in the yard, correct?

A. Main lead into the yard, yes.

Q. Okay. Main lead. Then there was 12 extension tracks in the railyard?

A. Twelve yard tracks, yes. (RT. 170-171)

This discussion continued later:

Q. Mr. Copple, I don't believe I asked you in terms of – that based upon your knowledge and experience with 50 years in the railroad industry, the term 'extensions,' also includes spur tracks, is that correct?

A. Yes.

Q. And extensions, meaning your – based upon your knowledge and experience, the extensions means any place when new railroad tracks were placed?

A. Where tracks are extended.

Q. Yes. Basically putting down new track, correct?

A. Yes. (RT. 220)

ABL also called developer Michael Valley, who testified about

the Sun Country deal [RT. 250-266], and former ABL employee, Joseph Pattison, who testified about winding up the railroad in 1998. (RT. 356-373) Finally, on the issue of option price if the City prevailed, ABL called Jennifer Ziegler, CPA, who tallied ABL expenditures over the years ($2,799,258.26) and added interest from the expenditure date, totaling $28 million. (RT. 285-286) She did not form an opinion of the option price under Paragraph 14 [RT. 349], noting that the financial reports called for in Paragraph 14, from which the price was to be gleaned, did not exist. (RT. 276) This was consistent with Copple's testimony that ABL never filed with the City the verified financials called for in Paragraph 14. (RT. 126)

The City called four witnesses. First, Assistant City Engineer Barrantes testified as the preparer of Exhibit 602 (see map attached) which showed ABL's remaining property. (RT. 388) The City called Paul Benoit, a former city official, who testified that the City has been looking at transit related improvements using the former belt line corridor. (RT. 423-424)

The City called Thomas Crowley, a railroad accounting expert. (RT. 444-568) He was asked to calculate an option price under Paragraph 14. (RT. 462) He did so using financials ABL filed with the ICC, since the reports called for in Paragraph 14 were never prepared. (RT. 479-481) His opinion of the option price was $966,027. (RT. 505) Of particular note to the trial court [JA 1465-1466] were Crowley's statements about "extensions":

> "[T]he 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 can get that at any point in time in the past, you can get that time approved [sic] and when it came time to construct or purchase, you didn't have to go back for reapproval of the report." (RT. 486; emphasis added)

The trial court also cited this testimony [JA 1465]:

"Q. And the railyard in terms of extensions of its -- I think we had testimony that there was main track and 12 extension tracks being part of the railroad and extensions, betterments, would it not?

A. Yes

[Objection]

Q. It would be classified as an additional investment?

A. Yes. That would be either an extension or addition betterment." (RT. 488)

Finally, the City called its former planning director, Colette Meunier, who testified about the planning hurdles a potential buyer would have confronted to build 200 homes on the former railyard. (RT. 635-642)

Following trial, the court granted the City's motion to add a claim for specific performance to conform to proof at trial. (JA 1332) The court then issued a Statement of Intended Decision, finding the Agreement enforceable and that the City is entitled to all ABL's property for $966,027. (JA 1335-1357) ABL objected to the Statement of Intended Decision [JA 1358-1371], the City responded [JA 1382-1395] and the Court conducted a hearing. (RT. 10/2/2006, 1-42) On November 13, 2006, the court filed its Statement of Decision. (JA 1457-1481)

The trial court entered Judgment on February 7, 2007 [JA 1483-1487] but had to vacate that Judgment on February 28, 2007 with continuing disputes over the form of the deed ABL would be required to provide. (JA 1526) Over ABL's objection to a grant deed (only a quitclaim deed should be required), the court filed a Judgment on April 23, 2007, granting specific performance and requiring ABL to provide a grant deed to all remaining ABL property in exchange for $966,027. (JA 1529-1533)

The Judgment awarded the City everything ABL owned -- all real property (fee and easements), improvements, tenements, fixtures, apparatus, equipment, appliances, personal property, tangible and intangible, trackage rights agreement, franchise agreements, licenses, leases, rents and income, and other items. (JA 1532-1533)

On May 3, 2007, the City served Notice of Entry of Judgment. (JA 1535-1601) On May 18, 2007, ABL filed a Notice of Intention to Move for New Trial. (JA 1669-1671) That motion was briefed [ABL: JA 1672-1690; City: JA 1691-1702], argued [RT. 7/2/2007, 1-6] and denied [JA 1704].

ABL appealed. (JA 1719)

ISSUE PRESENTED FOR REVIEW

Although the trial involved a number of issues (such as the validity of Crowley's price calculation, etc.), this appeal is limited to the dispositive issue involving what property or property interest the drafters intended to include within the meaning of the Agreement's option language and the legal implications that flow therefrom.[4] The trial court avoided substantive discussion of the Agreement's words. But that is where the analysis must begin, and therein lies the clearest error.

The goal of this litigation must be to determine the intent of the parties to the 1924 Agreement and to enforce it. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.Inc.* (1968) 69 Cal. 2d 33, 38. Because the parties' intent at the time of contracting is the key (Civ.Code § 1636), the surrounding circumstances are often critical to an understanding. (Civ.Code §1647)

First, in the years leading up to 1924, Alameda recognized that if it wanted the industrial development the Port of Oakland enjoyed, expansion of rail service on the waterfront was necessary. The industrial developers pressed the City for rail expansion as a condition to development. Second, the City was unable to finance this project and was in no position to go beyond the original track it had laid 6 years earlier. In order to realize the area's development potential, it needed to attract the entities more experienced and financially capable of exploiting the possibilities. And third, the decision to cede ownership of the limited rail the City had constructed would be difficult and political. To hedge its bet and appease critics, the City needed the ability to change its mind and unwind the deal whenever it wanted, upon

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[4] The decision not to appeal Crowley's methodology on the "price" is not a concession that calculation was legally correct. Crowley used a 2005 enterprise value for ABL, the corporation, based on the remaining assets on ABL's balance sheet. (RT 555-556) His figure bore no relationship to the cost of investments in the existing "belt line railroad including all extensions thereof" as described herein.

reimbursing the venture for the costs incurred in the expansion.

The carefully drafted Agreement by these sophisticated parties fit the bill. The City relieved itself of responsibility for the rails and turned things over to a corporate venture comprised of two major railroads (with a provision for the third to join). The new venture would reimburse the City's investment and retain ownership and operation. With the expanded rail service, industries could expand their operations. But if the City ever changed its mind, it could unwind the deal and repurchase the railroad.

A. The Basic Interpretational Rules

A number of rules are applicable to help determine the meaning and intent of people who have long since died.

The cardinal requirement is that, if it is possible to determine the intention of the parties from within the "four corners" of the document, then that intention controls. *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-22; Civ.Code §§ 1638, 1639.

Other applicable rules are that the entire document is to be read together, with each part helping to interpret the others, and doubts being resolved in favor of an interpretation which gives meaning to all parts of the document, rather than rendering some void or meaningless. Civ.Code §§ 1641, 3541, *Parks v. Gates* (1921) 186 Cal. 151, 154.

Extrinsic evidence may also be important in determining the intent of the contract's drafters, as the Supreme Court explained in a triumvirate of decisions authored almost as a set by Chief Justice Traynor.[5] These cases explained how the parol evidence rule worked, when extrinsic evidence should be admitted, how extrinsic evidence could be used, and how

[5] This seems all the more important in a case like this where the evidence consists of undisputed documents (regulatory and corporate records) from eighty years ago.

the trial court rulings dealing with extrinsic evidence should be reviewed on appeal. *Masterson v. Sine* (1968) 68 Cal.3d 222; *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Riggin Co. Inc.,* (1968) 69 Cal.2d 33; *Delta Dynamics, Inc. v. Arioto* (1968) 69 Cal.2d 525.

> "A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability that our language has not attained." *Pacific Gas & Elec. Co.,* 69 Cal.2d at 37.

Following this Court's instruction that extrinsic evidence may shed light on the meaning of "extensions" and whether the option included just the tracks or also the land underneath them, the trial court admitted, without objection, considerable extrinsic documentary evidence. That evidence also informs the issue of whether the purpose of the option was frustrated and the option should be deemed unenforceable.

B. The Standard of Appellate Review

This case was tried on undisputed, written evidence, mostly early 20th-century regulatory and corporate records. To appellate courts, interpretation based on the document itself or on non-conflicting extrinsic evidence is an issue of law decided, de novo.

> "Where no competent extrinsic evidence has been introduced, the interpretation is one of law, and the appellate court will give the writing its own independent interpretation....Where competent extrinsic evidence has been introduced but is not in conflict, the trial judge's inferences from it are not binding on the appellate court; as in the ...situation [where there is no extrinsic evidence], the appellate court will make an

> independent determination of the meaning. [Citations, including *Parsons v. Bristol Dev. Co.*, (1965) 62 Cal.2d 861, 866.]" 1 Witkin, Summary of California Law, Contracts §681 at 615 [9th Ed. 1987].

No deference is owed the trial court's reading of old documents which the appellate courts are equally competent to interpret. De novo review is warranted to enforce the bargain made and intended by the City and the two railroads long ago.

I.
THE CITY BARGAINED FOR THE RIGHT TO REACQUIRE THE TRACKS AND AN EASEMENT TO OPERATE A MUNICIPAL RAIL LINE.

A. The original plan of "extension" is limited to the line of railroad described in the Agreement.

Paragraph 14 provides the City "the right at any time hereafter to purchase said belt line railroad including all extensions thereof..." Both sides agree that "said belt line railroad" is defined in the Agreement as the City's existing railroad in Clement that ABL was purchasing for $30,000. This case therefore turns on what was meant by "extensions"; what did the City have the right to purchase? Was it ABL, the corporation? Was it all of ABL's property? Or something less?

The trial court concluded that all of ABL's property falls within the option, drawing no distinction between the corporation (ABL), the railroad and rights it had purchased from the City, and other property it came to own. Yet it is critical to understand that the Agreement did not equate the "belt line railroad including extensions" with ABL itself.

In Paragraph 1, the "ALAMEDA BELT LINE" is defined as the new corporation, and this definition is carried in capital letters throughout the Agreement. Paragraph 1 provides the new corporation would acquire and expand the "belt line railroad" with extensions as specifically set forth in sub paragraphs a through c, "over, along and upon" the specified streets and private rights of way. The Agreement makes clear ABL would own and expand the "belt line railroad" – but they are not the same.

In turn, the Agreement at Paragraph 14 gives the City the option to repurchase "said belt line railroad including all extensions thereof" made by the "ALAMEDA BELT LINE." If the drafters meant the option to include the whole company or all the property it owned, they would have used

"ALAMEDA BELT LINE" or "all property of ALAMEDA BELT LINE," rather than "said belt line railroad including all extensions thereof." As discussed below, the broad right to purchase the company and all its property is what the parties included in Southern Pacific's option in Paragraph 3 – a stark and intentional contrast to the limited option the City bargained for in Paragraph 14.

As this Court noted in the first appeal, "[t]he language of the option greatly narrows and defines the property in issue, in so far as it limits the City's right to repurchase the original railroad and its 'extensions thereof.'" 113 Cal.App.4th at 25. The court recognized the question is what the parties meant by "extensions" and that it would require consideration of extrinsic evidence. 113 Cal.App.4th at 25.

The July 14, 1925 CRC Decision defined what the parties understood by "extension." (See page attached to end of the Brief) It explicitly limited the meaning of "extension" geographically to the physical line of railroad:

> "The route and termini of **the proposed line of railroad to be acquired and the extensions thereof** are as follows:
>
> **(A) Existing belt line**:
>
> Beginning at a point 188 feet, more of less, easterly of the intersection of the center line of Clement avenue and Broadway...etc.
>
> **(B) Proposed extension:**
>
> 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 ...etc." (Ex. 506, p. 3; emphasis added)

Similarly, the ICC Decision explained that ABL applied for a certificate that the public convenience and necessity require the acquisition of the existing "line of railroad" and "the **construction of an extension of said line of railroad** ...." (Ex. 615, ABL 19876; emphasis added)

According to the CRC and ICC, "extension" was the very precisely described "line of the railroad," i.e., the main line and did not include ancillary side tracks, yard tracks, switching tracks, or necessarily the land underneath or adjacent to them like the railyard.

As well, according to the City's expert Crowley, the term "extensions" in railroad parlance included the land and fixed improvements provided and arranged for in the "original plan." For that, Crowley relied upon the ICC 1914 regulations [Ex. 690, p. 9][6]:

> Q. So the regulations that we are talking about are mandated by the United States Congress, and those same terms are contained in paragraph 14 as set forth in the definitions prescribed by the ICC, correct?
>
> A. That's correct.
>
> Q. And at the time, in terms of the work you have done, these were accepted and understood in railroad terms as contained in paragraph 14 of the 1924 agreement, correct?

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[6] The ICC 1914 definition of "Extension" stated:

> "The land and fixed improvements provided for and arranged for in the original plan for the construction of extensions to the main lines, additional branch lines, and extensions of branch lines." (Ex. 690, p.9)

And although the ICC refers to an extension including the "land," this would more appropriately be stated as "the interest in land;" as discussed below, only an easement or right of way was described in the "original plan."

A. They are. They are very unique to railroad accounting and railroad practices. (RT. 471-472)

Crowley concluded: "**the original plan is the key to an extension**" because if the anticipated construction is in the "original plan" the carrier did not need additional regulatory approval. (RT. 486)

According to the City's ICC filing, the "original plan" was described in the Agreement:

> "The orders and authorizations sought by Alameda Belt Line, The Western Pacific Railroad Company and the Atchison, Topeka and Santa Fe Railway Company are all in full accord with a **plan** arranged by the City of Alameda and the two companies last named for the acquisition of said city's existing railroad and its extension and operation by the Alameda Belt Line....**The plan is fully set forth in a contract entered into by the City of Alameda with said two railroad companies under date of December 15, 1924** ...." (Ex. 210, ABL 20069; emphasis added)

And in Paragraph 1 of the Agreement, the "extensions" are specifically described as a line of railroad with precise locations of the main track with almost the identical description used by the CRC and ICC:

> "to serve the industrial area and waterfront of said City...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....etc." (Ex. 523, para. 1; emphasis added)

There is nothing in the regulatory decisions or the "original plan" as set forth in the Agreement that would indicate "extensions" included any tracks or land outside the line of the railroad precisely described therein. This Court, in the first appeal, noted that "[o]nly 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 option." 133 Cal.App.4th at 25. It then stated the obvious: "If ABL acquired other property for nonrailroad purposes, such property would not fall within the option..." *Id.* But just as true would be this conclusion: "If ABL acquired property for railroad purposes but not within the agreed-upon extensions, such property would not fall within the option..." The point is, property ABL acquired over the years that was not included within the precise definition of "extension" in Paragraph 1 was not within the option.

B. In 1924, the Interstate Commerce Act distinguished between the "extension of a line of railroad" and ancillary trackage, including switching tracks.

The specialized meaning given "extensions" in the railroad law in 1924 was set out in *Detroit & M. Ry. Co v. Boyne City, G. & A.R. Co.* (1923) 286 F. 540, which considered the effect of Interstate Commerce Act sec. 1, paras. 18, 19, 20 and 22. Sections 18, 19 and 20 required a carrier, when undertaking an "extension of its line of railroad," to obtain ICC approval. Under Paragraph 22, approval is not needed to construct "spur, industrial, team, switching or side tracks located or to be located wholly within one state, or of street, suburban, or interurban electric railways..." because these are not "extensions." The court wrote:

> "[T]he rights of the parties hereto depend upon the question whether, on the one hand, the proposed construction of these new tracks by the defendant would constitute 'the construction of spur, industrial, team, switching or side tracks,' or 'whether, on the other hand, such construction by defendant would be 'the extension of its line of railroad... If, then, such track would be a spur track [or industrial, team, switching or side tracks], defendant is entitled to proceed with its construction without a certificate from the Interstate Commerce Commission. If, however, such track is an 'extension' or a 'new line' of railroad, plaintiff is entitled to the injunction sought." Id. at 542.

Later cases have also held that development of a railyard is not a "line of railroad" or "an extension of a line of railroad" within the meaning of the Act. See *Nicholson, Bruckerhoff et al., v. Missouri Pacific Railroad Co.* (1982) 366 I.C.C. 69, and cases collected therein. "Extensions" as of 1924 was a specific term, meaning construction on the "line of railroad" and did not include ancillary trackage or real estate.

C. "Extensions," as described in the Agreement, are not only limited geographically to the line of railroad, they are also described "over, along, upon" various public and private "rights of way." These words, then and now, reveal the option included only an easement and not the underlying fee.

The trial court ruled the option included whatever interest ABL owned in any property at the time of exercise -- no matter that the City's original conveyance was only a limited interest (tracks and a Franchise in Clement). Using the same limited use language, the Agreement describes the "extensions" of rail traveling "over and along" other streets and "over and along private rights of way." The law is clear as to the import of these words.

In *City of Manhattan Beach v. Farquhar* (1996) 13 Cal.4th 232, 244, the Supreme Court considered the meaning of "right of way" in railroad parlance, relying upon *Highland Realty Co. v. City of San Rafael* (1956) 46 Cal.2d 669, 678:

> "the 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."

The *Farquhar* court continued:

> "[W]hen the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.' [citations]" 13 Cal.4th at 240-241.

See also, Civ.Code §801 [right of way is a servitude and may be attached to other land as an easement.]

Farquhar further discussed the importance of appurtenance language like "over, along, upon":

> "The deed further recites that 'the 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.) **This language in the nature of an appurtenance appears to limit the railway to a right of passage and exclude title to the land beneath.** (See *Highland Realty Co. v. City of San Rafael* (1956) 46 Cal.2d 669, 678.)" 13 Cal. 4th at 244. (emphasis added.)

The "original plan," as set forth in Paragraph 1, is peppered with appurtenance language indicating an easement. It describes a "line of the existing railroad, belonging to the City of Alameda on Clement Avenue." For these tracks and the right to use them over the City's street, the ABL paid $30,000.

The City does not contend ABL acquired the fee title to the land in Clement. In fact, the City granted ABL a Franchise, which expressly gave ABL "the right to use ... portions of [City] streets, alleys, highways and properties," for 50 years. (Ex. 641) When that Franchise expired, the City adopted another ordinance extending it. (Ex. 547)

If the City did not sell any more than the trackage in and right to use its "streets, alleys, highways and properties," what gave the City the right to "repurchase" a greater interest when the tracks passed over private property ABL owned? The option makes no distinction between property interests; it only describes the rail and the right to use it.

And what about the rest of the "original plan" describing the "extensions"? Paragraph 1 talks about "in addition thereto, **over, along and upon** those certain streets in said City particularly described as follows, to wit," the same language *Farquhar* held limited the conveyance to an easement. That language is followed by three subparagraphs. The first describes an additional track in Clement "parallel and operating in conjunction with the City's existing track thereon..." The second describes the westerly route

from the end of the City's line "**over and along** private **rights of way** and intervening streets southerly and westerly to Buena Vista Avenue near Hibbard Street"; thence "***over and along*** *the sidewalk area on the northern* side of Buena Vista Avenue westerly from Hibbard to a point between Benton Street and Bay Street," thence "continuing westerly **over other private rights of way and crossing all intervening streets** to the western side of Webster Street." This last clause describes the line passing through the railyard between Sherman and Webster.

In all of the paragraph 1 "original plan" description there is no indication that "said belt line railroad including extensions thereto" was meant to include fee title to land underlying the tracks, let alone title to all the ancillary real estate ABL owned. The repeated appurtenance language indicates the opposite; no fee interests were included in the option.

D. Other Parts of the Agreement Confirm the Limited Nature of the City's Option.

1. Southern Pacific Option

Paragraph 3 allowed Southern Pacific to acquire an equal stock interest in ABL by,

> "paying for such stock a sum of money equal to its proper prorata of the cost to the then carrier owners to the date of such acquisition of the organization of said ALAMEDA BELT LINE, and the acquisition, extension, and construction **of all property owned then by it**, including all additions and betterments, together with interest thereon at the rate of six per cent per anum from the time of investment." (Ex. 523, para. 3; emphasis added)

In differentiating this option from the City's option, the drafters were clear Southern Pacific would have to pay its share of the total cost of "ALAMEDA BELT LINE," the company. Southern Pacific would pay for "the acquisition, extension and construction of all property owned then by it." This is far more inclusive than the City's right to purchase the "belt line railroad including all extensions thereto." If the drafters meant the City's option to include the company and all its property, they would have used the defined term "ALAMEDA BELT LINE," not "said belt line railroad including all extensions thereof."

The drafters were describing two distinct rights: one to buy tracks and the right to use them; the other an interest in all the company's property. The parties knew how to describe an "all inclusive" option if that was intended; but the City's option was more narrow. The Judgment awarding all ABL property ignores that limitation.

2. The Freight Ferry Option

In Paragraph 12, the drafters in this option (involving a proposed spur going north) carefully differentiated between the limited description of the belt line railroad, which the City had the option to acquire, and the rest of ABL's property:

> "Said railroad track running from Clement Avenue northerly along Grand Street, if constructed, and also the spur tracks and freight ferry slip at the northerly termination of said Grand Street **shall not be deemed a part of the aforesaid belt line railroad, or be included as part of the property of said ALAMEDA BELT LINE....**" (Ex. 523, para. 12; emphasis added)

The trial court ruling equates the belt line railroad with all ABL property. It is hard to imagine why the drafters would have carefully differentiated between the "belt line railroad" and "the property of said ALAMEDA BELT LINE" if the two were the same.

E. The trial court erred by including in the option any property interests geographically outside the line of railroad as well as ABL's fee interest in the underlying land.

The described "original plan" of extension did not include land outside of or adjacent to the described line of railroad. The City never optioned anything other than the railroad itself – the sole object was the right to use and operate the rail "over, along and upon" streets or privately owned land.

The real estate that prompted this lawsuit is the former railyard. There is nothing in the 1924 Agreement about a railyard. There is nothing in any regulatory descriptions of extensions about a railyard. There is nothing in the option about an intention to include any and all land ever used for railroad purposes. And there is nothing in the Agreement implicating the fee ownership of land beneath the right to operate the rail.

Yet the trial court gave the City everything ABL owned, including land outside the defined "extensions" and fee ownership beneath the rails – far beyond the City's 1924 conveyance that the option was designed to unwind. The trial court commented that this case presents a "windfall" for whichever party prevails. (RT. 27) But where is the windfall if ABL keeps property it acquired that was not included within the plan envisioned and agreed to when the deal was signed? How is it a windfall if ABL retains fee ownership of its land subject to the City's right to operate a rail (what the City conveyed in 1924)?

As an obvious example, 6.894 acres (the northerly strip – Ex. 602) of the railyard were not acquired until 1943. [Ex. 236A, p.5; 602] How could this land, acquired 20 years later, ever have been part of the "original plan" the term "extensions" is limited to?

1. The court should not re-write words the parties chose to include (and *not* to include) in the option. The intent as it then existed controls.

Even though the trial court acknowledged that "extensions" is ambiguous [JA 1464] and even though there was nothing about a railyard in the Agreement's "original plan" or the regulatory descriptions of "extensions," the trial court found "extensions" included all ABL property.

First, the trial court found that the railyard came to be central to the railroad's function, and thus if the option's purpose was to allow Alameda to operate a railroad, the parties must have intended to include the yard as an extension. (JA 1464-1465) The court calls this "common sense": "evidence admitted in the trial and common sense dictate that the railyard be included in the repurchase because it is central to the operation of the belt line." (JA 1466-1467) While this may seem "sensible," it is divorced from any language anywhere in the Agreement or the extrinsic evidence.

The Statement of Decision never confronts the words the parties chose or the relevant contemporaneous extrinsic evidence. "Extensions" must be included in the "original plan," and the City flatly stated *that the original plan is "fully set forth in the Agreement."* The Agreement says nothing about a railyard, nor did the parties include language like "and any other property necessary for rail operations" or "all property then owned by ABL." The words the drafters chose cannot be stretched to encompass the trial court's rationale.

Had the parties wanted "extensions" to include more, they would have said so. They did provide an all inclusive option for Southern Pacific. (Cf. Ex. 523, para.3) That right to buy a pro rata share of the company and all its property, when compared to the limited language in the City's option (trackage over line of railroad and the right to use it) points to an important difference in contractual intent: the sole object of the City's option is the right to operate the rails.

This was an intentional choice that makes sense based on the circumstances in 1924. The City likely wanted to limit its acquisition rights to what it thought it might possibly afford (trackage over line of railroad and the right to use it which is all that it sold) rather than to require it to purchase all that ABL had by then acquired. It wanted back the essential railroad. To commit to an "all or nothing" purchase of an unknown future would have been municipally unrealistic.

Second, the trial court elevated the railyard's importance with the benefit of hindsight (the yard's contribution to the switching operation as it grew over the years) rather than placing itself in the shoes of the drafters in 1924, thus violating the fundamental rule that a contract is to be "interpreted as to give effect to the mutual intention of the parties **as it existed at the time of contracting.**" Cal. Civ.Code § 1636; emphasis added. *Thomas v. Buttress & McCellan, Inc.* (1956) 141 Cal.App.2d 812, 816-817 ["intention is to be ascertained from the words used in the contract, construed in light of the facts and circumstances surrounding the parties at the time it was made, and not in the light of subsequent unforeseen facts and circumstances..."]; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 645-646; *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 666.

As of 1924, the City had constructed and Southern Pacific had been operating the belt line railroad for six years. It had high hopes but no real knowledge of how industry might grow in Alameda. Even though, years later, the railyard might be an important, even essential, part of rail operations, that is not a reason to include the land in an option when the drafters did not. The trial court may have wished the drafters had the foresight to include the ancillary land and underlying fee title within the reach of the option language; but the fact is, they did not.

The problem with allowing hindsight and common sense to re-write agreements is further illuminated by the trial court's inconsistent use of

it. The trial court uses a rationale (the railyard was necessary to the switching operation so it must have been included) to allow the City to purchase the yard, but at the time of the exercise the railroad no longer existed and the City had no intention of ever operating the belt line to switch cars for the industrial users. This seems intuitively wrong despite the court's rationalization: "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 described by the contract." (JA 1467, n.7) While that may have been apparent after 80 years of operational history, that is still no basis for the court to rewrite the contract to include property not made part of the deal.

2. The trial court's narrow analysis of extrinsic evidence and modern witness testimony 80 years later is flawed.

The trial court also found that the railyard was an extension because, in the court's analysis, witnesses on both sides at trial expressed that view. (JA 1465) But the Copple and Crowley testimony is less significant than the court implies.

According to the court, Phil Copple, the railroad's longtime manager, testified that he considered "extensions" to refer to whenever new track is laid by the railroad; "[t]hus, 'extensions' includes...the 13 tracks located inside the railyard." (JA 1465, citing RT. 170-171)

How Copple's statement in 2006 (that he considered an extension to be whenever new track is laid) has any relevance to what the parties intended in 1924 is a mystery. Copple was an operations guy not a legal expert on the definition of railroad terms as used in 1924. Copple was not involved in the negotiations in 1924. "Extensions," as defined in the "original plan," and the words the parties chose are the proper starting points -- not the backdoor "admission" of a railroad employee more than eighty years after the fact. Under the trial court's "Copple rationale," if ABL's

railroad had decided in 1990 to lay rail in a direction the "original plan" never contemplated, that would be an "extension" and included in the option. Copple's grasp of "extensions" may reflect his own pragmatic understanding, but it is not legally correct and not found in the Agreement.

The trial court also relied upon Mr. Crowley's statement that "the key point of an extension is the land and fixed improvements provided and arranged for in the original plan" [JA 1466, citing RT. 486] but fails to discuss whether there is anything in the "original plan" about a railyard or other fee interest in land; there is not. The court simply moves on: "[t]hus, according to Crowley, the ABL railyard (including its land, main track and 12 extension tracks) 'would be either an extension or addition betterment.'" (JA 1466, citing RT. 488)

Mr. Crowley was the City's railroad accounting expert witness, and his testimony was carefully nuanced and evasive. "Extensions" and "addition betterments" are two different things. (Cf. Crowley Ex. 690, pp. 10-11) The yard might be described as an addition or betterment, but it cannot be an "extension," a term whose meaning the drafters understood. Neither Crowley, the court, nor anyone else has ever explained how a railyard could be part of the original plan when the original plan "set forth in full in the Agreement" does not mention it.

Finally, citing one snippet of extrinsic evidence from the ICC, the trial court found: "evidence contemporaneous with the execution of the contract also supports this construction of 'extension' by referring to 'the construction of the proposed extensions, with the necessary spur, industrial, team, *switching,* and side tracks.'" (JA 1466, citing Ex. 624, ABL 19878; emphasis from the court) But the context of that statement is important. The paragraph discussing funding for the proposed extensions and the funding of ancillary tracks is not defining extensions:

> "To secure funds for the acquisition of the existing line and for the construction of the

> proposed extensions, with the necessary spur, industrial, team, switching and side tracks, the Belt Line proposes to issue the total amount of common capital stock authorized by its charter, namely $500,000, consisting of 5,000 shares of the par value of $100 each." (Ex. 615, ABL 19878)

We also know that in 1924 the Interstate Commerce Act did not include spur, industrial, team, switching and side tracks within the definition of extensions. Period. *Detroit & M. Ry. Co v. Boyne City, G. & A.R. Co., supra,* (1923) 286 F. 540, 542.

Moreover, the very decision the court quotes explained that ABL applied to the ICC to (a) acquire the existing "line of railroad" and (b) for "the construction of **an extension of said line of railroad...."** (Ex. 615, ABL 19876; emphasis added) The same is true of the CRC Decision that carefully segregated and described the "proposed extension." (Ex. 506) There is no reference in any contemporaneous documents to ancillary tracks being included in "extensions." And the Interstate Commerce Act flatly contradicts it.

The Statement of Decision does not grapple with the Agreement's language at all. It does not recognize that the original plan is set forth therein or that the extensions referred to in the option are described in Paragraph 1 "over, along and upon" public and private "rights of way." All of that goes undiscussed. Instead, using "common sense," the trial court included the Alameda Belt Line, wherever its railroad went, whatever it acquired, and whatever it had left. It made the City's option as broad as Southern Pacific's. It unhinged the option from the Agreement's words and its express limitation to the existing "belt line railroad including all extensions thereto."

F. When the ABL ceased operations and removed the tracks, the purpose for the option expired and any contingent easement created was extinguished.

The upshot here is that Paragraph 14, by its carefully chosen language, provided an option to acquire an easement to continue to operate on the line of the railroad, as extended, in the event the City wanted to serve the freight switching needs of the waterfront. But by the time it exercised its option, the purpose for the option (indeed the entire Agreement) had ended and the trackage had largely been removed with the City's knowledge and/or consent. Even the City would concede that it does not intend to serve industrial users as they have all moved away and much of the industrial area has been replaced with housing and office parks. When the purpose for a railroad easement ceases to exist, by non-use or use outside its limitations (i.e., non-railroad purposes), the easement is extinguished, and the property is no longer burdened by it. *Concord & Bay Point Land Co. v. City of Concord* (1991) 229 Cal.App.3d 289, 295.

Since the City possessed an option for an easement (i.e., use of the right of way to serve the industrial waterfront), and since by 1999, the purpose for that easement had ended, operations had ceased and tracks had been pulled up, the easement was extinguished and there was nothing left for the City to option.

II.
ALTERNATIVELY, SINCE THE PURPOSE FOR THE OPTION NO LONGER EXISTS, IT IS UNENFORCEABLE.

The parties in 1924 agreed the City could purchase the operating railroad over, along, upon the described route. What Alameda attempted to enforce in 1999 was entirely different. There was still a corporation called Alameda Belt Line that owned real estate. But there was no longer an operating "belt line railroad." It had shut down. Its customers had left town.

For decades, both parties enjoyed the Agreement's mutual benefits. Through no fault of either party, the reason for the Agreement no longer existed. Rail operations had ended, and the parties found themselves exactly where they started.

The Restatement addresses that situation:

> "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 Contract, § 265, com. a.)

Cutter Labs, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 314-15 ("elements of [the frustration] doctrine are as follows: performance 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.") (emphasis in original); *United States v. Grayson* (9th Cir. 1989) 879 F.2d 620, 624 ("the frustration of purpose doctrine is only applicable when '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.'").

During closing argument, as counsel detailed ABL locations that ABL had sold off, the Court stated:

> "THE COURT: I have come to very few conclusions regarding the ultimate disposition of this case, but I will say as to that one point, if I'm -- if I got it accurate, the point you are addressing, I think ABL has the better of that argument. I just think that either ABL is correct, that the purpose matters, that the purpose of land matters, in which case there is no dispute that it's not being used as a railroad, or that the City of Alameda is correct, that they can buy it for whatever reason they want, and in which case the purpose is totally irrelevant. I understand that there is some discussion within the City of Alameda about reestablishing light rail, or having it be open space, or whatever else. But I just don't understand that that can be of any legal significance." (RT. 704-705)

The court correctly asked whether the purpose of the Agreement matters, and in the Statement of Decision provided this answer:

> "[T]he 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. [citation] 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 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." (JA 1476)

The court dismisses the frustration defense because ABL removed tracks, closed the railyard, etc. But ABL's railroad did not remove rails on a whim. It removed the rails as its customers closed and discontinued shipping. ABL did not destroy or frustrate the purpose of the 1924 Agreement, which might give rise to equities favoring the City. It was frustrated by occurrences outside of either party's control.

The City entered into the 1924 Agreement to expand the existing belt line to spur industrial development which it could not afford, and to ensure competition and avoid a monopoly Major Hickok testified that the City negotiated the option to operate the belt line railroad should the need arise:

> "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 by the fact that we were not able to finance it, so we considered that this solution which we have now have arrived at is perhaps not quite so ideal but still 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."** (Ex. 195, ABL 19177; emphasis added).

Hickok testified that Encinal Terminals would not have been built if the City could not have assured the builders of competitive rail service. (Ex. 195, ABL 19157)

There was no contemporaneous discussion of meeting other City needs. Nor was there discussion of what would happen if industrial rail

service ceased. The option founded on one assumption: that industrial customers would remain in the City and would continue to need rail service.

Copple testified that in the late 1960's ABL's railroad operated 24 hours a day, had 30 employees, owned four locomotives, and served 15 industries. (RT. 88, 93) By the late 1990's, the railroad had reduced its work force to 8, owned one locomotive, had two customers, and had eliminated its switching crews. (RT. 94, 103, 110)

Copple testified that as industries left, the railroad removed tracks from service. In 1975, ABL obtained ICC approval to abandon the tracks along Atlantic to the Navy. (RT. 90, Ex. 162) Later, ABL removed: tracks along Constitution [RT. 98-99]; tracks at the end of Morton [RT. 99]; spur tracks in Clement [RT. 100]; and tracks in Sherman, Hibbard, and Grand [RT. 104]. The City required ABL to construct new curbs, streets and gutters when it removed these tracks. (RT. 104-106)

Copple testified that Del Monte, the railroad's largest customer, moved to San Jose [RT. 103], and he removed the railyard from service. (RT. 106; Ex. 228) All tracks were removed from the yard. (RT. 102) The railroad's last switch occurred on November 10, 1998 -- a year before the City exercised its option. (RT. 359) By early 1999, the vigorous railyard was a vacant lot.

Finally, the City itself recognized the demise of the railroad. The City agreed to the sale of property at Webster and Constitution, which severed the Atlantic portion of the line from the railyard and the rest of the railroad [RT. 117-118]; requested that ABL remove tracks [RT. 127; Ex. 171]; agreed to the sale of the railyard to Sun Country [Ex. 33]; well-understood ABL's closure of the railyard and removal of the tracks [Ex. 34, 29]. The City presided over the closure of the belt line railroad fully aware that it was no longer needed.

The City negotiated for rail service, not to purchase ABL's

remaining assets. The City introduced no evidence it intends to operate an industrial railroad. It argued that the City can exercise the option to purchase any real property owned by ABL and use it for any public purpose, and the trial court agreed. But there is no "belt line railroad" to convey and no reason for one in the future. The basic assumption of the Agreement and the option has disappeared. The fundamental reason for both parties entering the Agreement has been frustrated. What is left is a real estate play. Pure and simple.

CONCLUSION

The court below failed to follow this Court's initial take on the contract language: "[t]he language of the option greatly narrows and defines the property in issue..." 113 Cal.App.4th at 25. It gave the option the most expansive reading possible.

Working with the words the drafters chose leaves no room to conclude "extensions" varied from the line of the railroad that they described. Every bit of extrinsic evidence confirms this.

The City sold existing tracks and granted use of its streets. It optioned the right to run a railroad over, along and upon, those streets and private rights of way, if necessary. It could have cared less about ABL's interest in the underlying land (fee or easement). It wanted that railroad to serve its industry.

Why should the City get more than it gave?

Why should it get this real estate bonus, unrelated to its investment, when that was far from anyone's contemplation?

And based on hindsight, "common sense" and the contention that this was somehow ABL's fault?

This case should be set back on track. This Court should find the option limited to an easement that has been extinguished – or frustrated.

The 1924 drafters would have appreciated that their words mattered.

March 14, 2008

Hill, Farrer & Burrill LLP

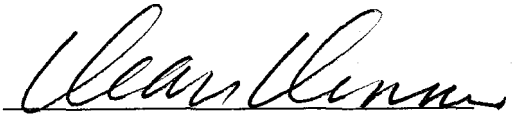
By: 

Dean E. Dennis
Attorneys for Plaintiff and Appellant
ALAMEDA BELT LINE

HFB 786131.1 B8730068

CERTIFICATE OF COMPLIANCE

I Dean E. Dennis, attorney for Attorneys for Plaintiff and Appellant Alameda Belt Line, certify that the foregoing brief is prepared in proportionally spaced Garamond 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 13,914 words long.



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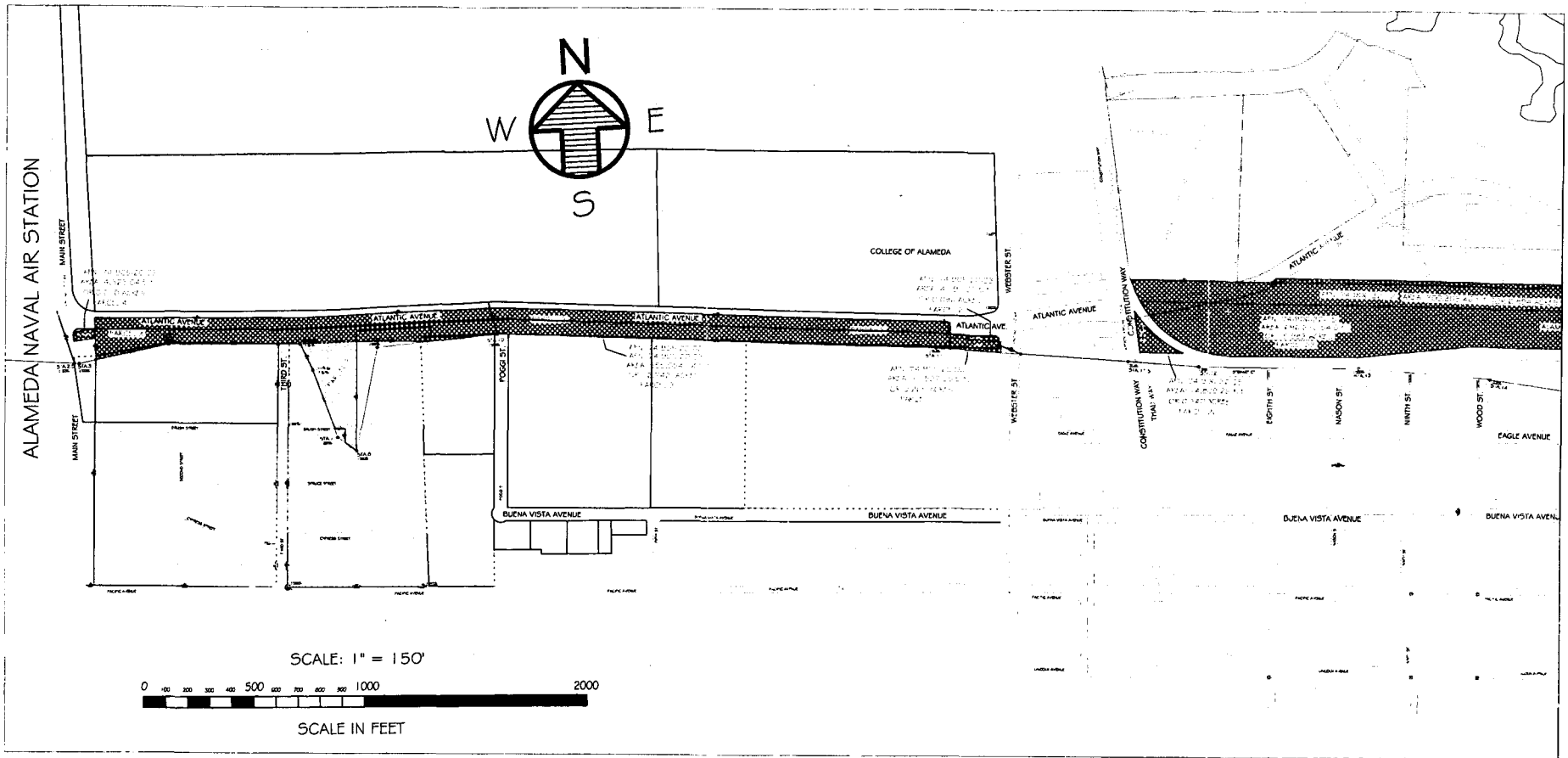

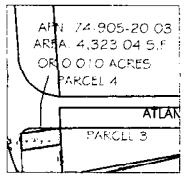

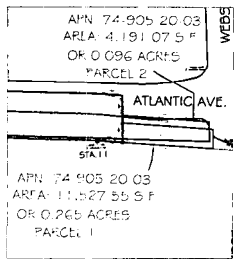

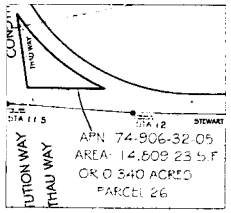

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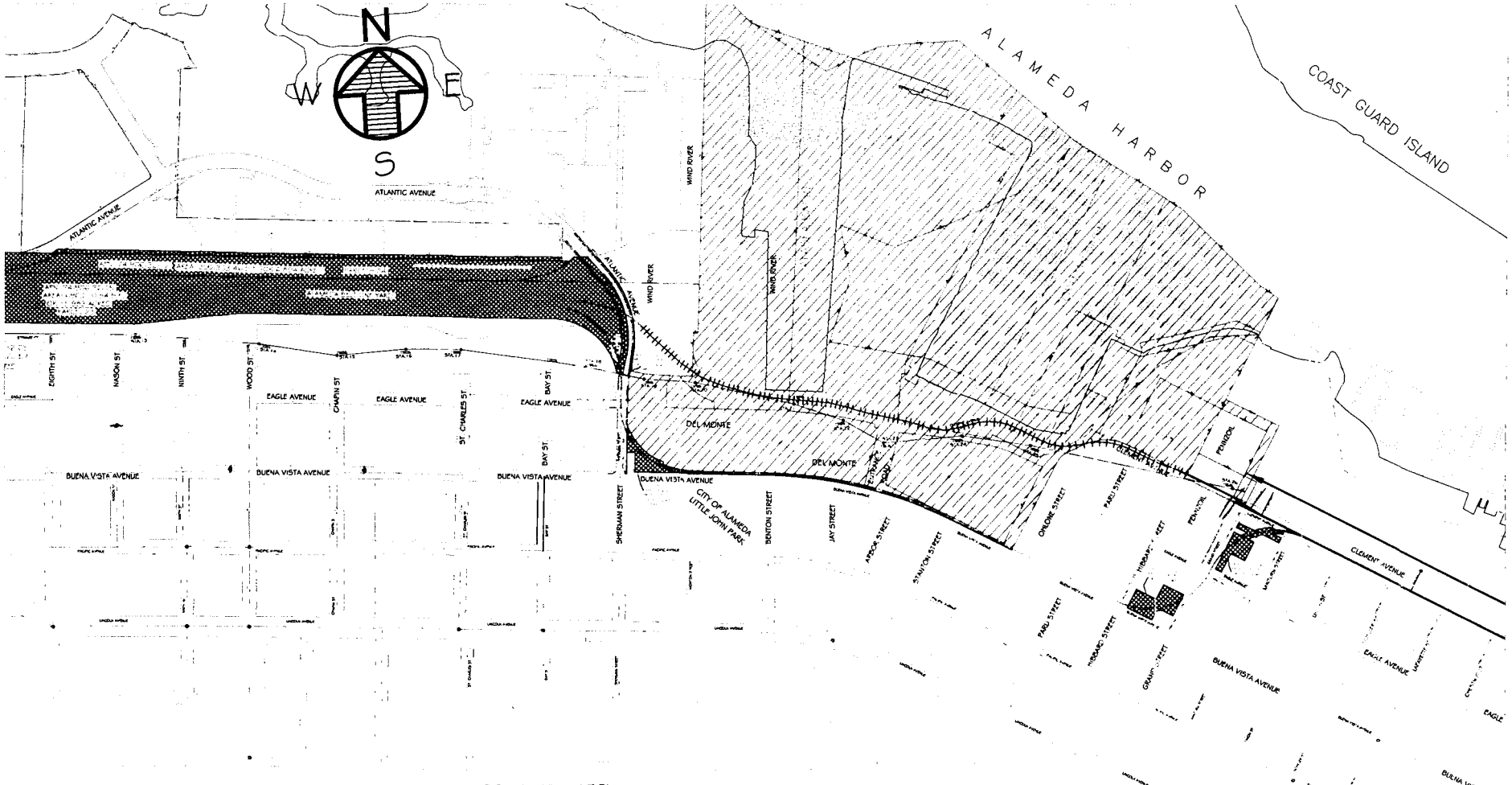

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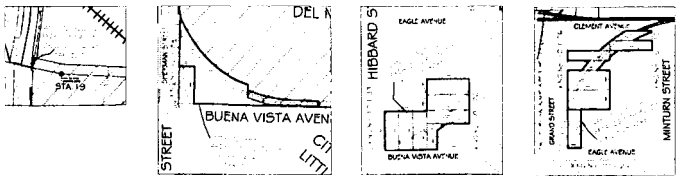

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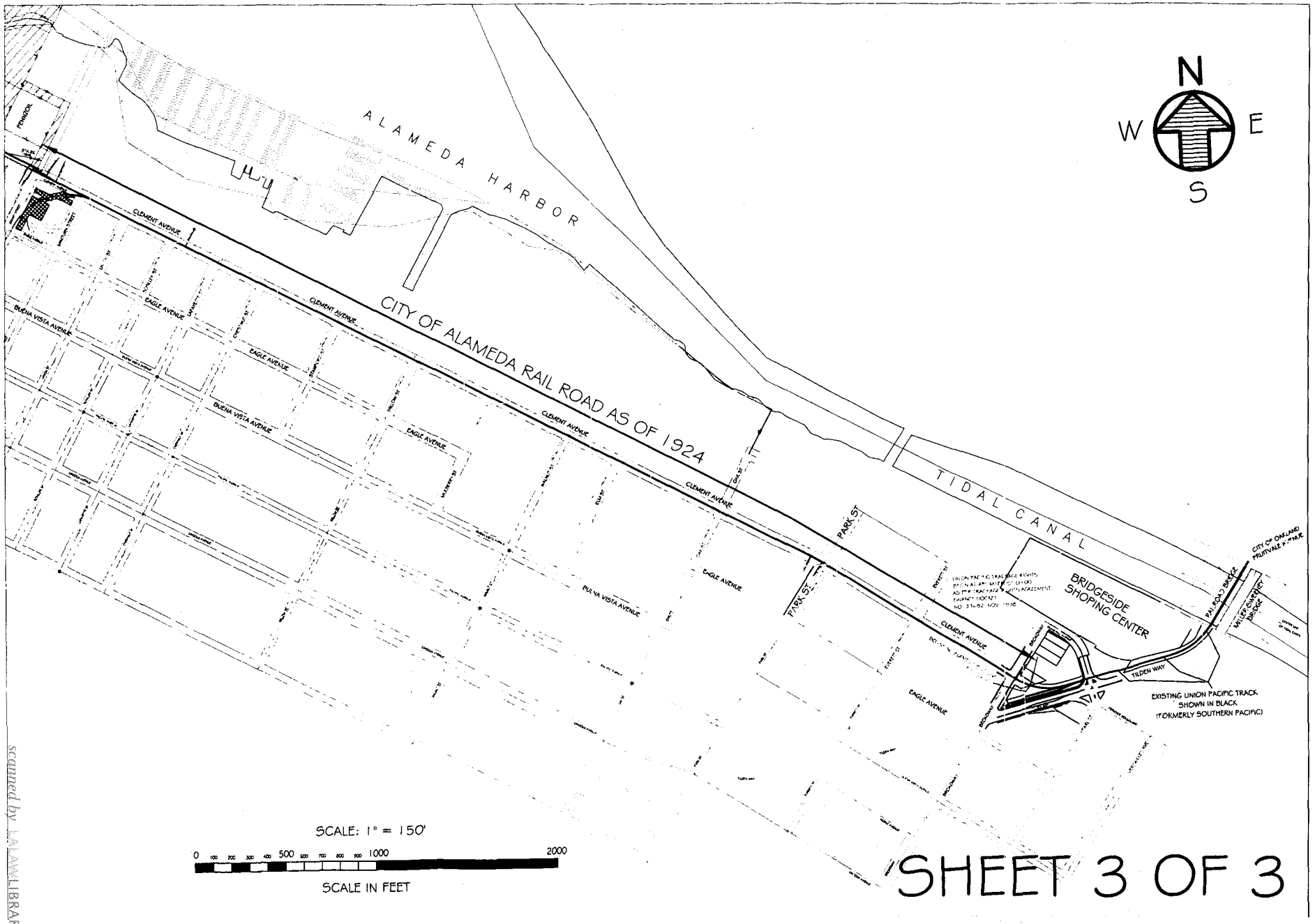

SHEET 3 OF 3

Fe Railway Company, hereinafter called the Santa Fe, have caused Alameda Belt Line to be incorporated and that the purpose of such corporation is to operate a belt line railroad within the boundaries of the city of Alameda and to serve the industrial area and waterfront of said city by the acquisition for the sum of $30,000 from the city of Alameda of an existing belt line railroad and extend and operate the same to serve the industrial area and waterfront in said city. The route and termini of the proposed line of railroad to be acquired and the extensions thereof are as follows:

(A) Existing belt line:

Beginning at a point 188 feet, more or less, easterly of the intersection of the center line of Clement avenue and Broadway; thence by a single track along the center line of Clement avenue in a westerly direction and crossing all intervening streets to a point in Clement avenue at the westerly line of Grand street, a distance of 6364.5 feet.

(B) Proposed extension:

Beginning at a point in 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 northerly 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 1000 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.

As stated, the Alameda Belt Line has agreed to purchase from the city of Alameda the belt line railroad for $30,000. The company estimates that it will have to expend $389,018.35 to extend the line which it intends to purchase from the city in a general westerly direction from a connection with the existing track of the city's railroad in Clement avenue near Minturn street to the westerly line of Webster street, including the line to a proposed freight ferry slip to be located on the estuary of San Antonio; with interchange track on Clement avenue between Broadway and Park street, and also classification yard, track scales, water and oil facilities, and engine houses, and that an expenditure of $75,527.23 is necessary in extending the line in a general westerly direction from the westerly line of Webster street to the shore line of San Francisco Bay. The total estimated expenditure of the Alameda Belt Line is reported at $494,545.58. The testimony shows that this expenditure will be incurred as soon as the industrial development warrants the same.

The Alameda Belt Line asks permission to issue all of its stock forthwith, but requires the subscribers of such stock to make an initial payment equal in amount to 10 per cent only of the par value of the shares issued. The balance of the stock subscription is to be paid when called

PROOF OF SERVICE

I, Lisa Robertson, declare:

I am a resident of the state of California and over the age of eighteen years, and not a party to the within action; my business address is Hill, Farrer & Burrill LLP, One California Plaza, 37th Floor, Los Angeles, California 90071-3147. On March 14, 2008, I served the within documents:

APPELLANT'S OPENING BRIEF

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed **Federal Express** envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

Thomas J. Trachuk
Dang & Trachuck
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Hon. Jon S. Tigar
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Oakland, CA 94612

Also Served Via Electronic Mail
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California Supreme Court
300 South Spring Street
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(Four Copies)

Teresa L. Highsmith
City of Alameda
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Alameda, CA 94501
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 14, 2008, at Los Angeles, California.

Lisa Robertson
Lisa Robertson

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