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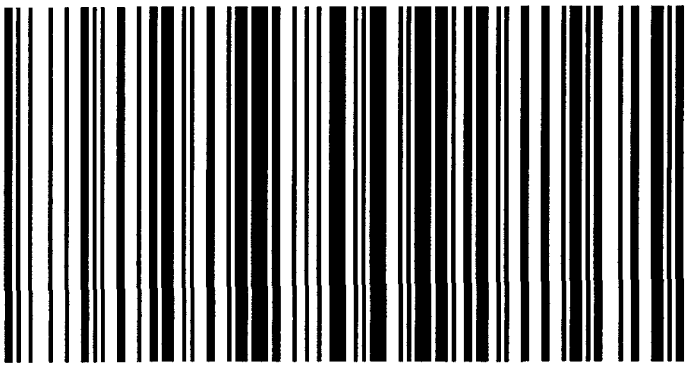

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1st Civil No. A118596
[Superior Court Case No. C-8263737]

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 REPLY BRIEF

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Court of Appeal
State of California
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.

Signature of Attorney/Party Submitting Form

Printed Name: Dean E. Dennis
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Party Represented: Plaintiff and Appellant Alameda Belt Line

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

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To recall for the Court, there are two aspects to ABL's appeal. The first argument assumes the Paragraph 14 option is enforceable but focuses on (1) the property covered by the option, and (2) the depth of the interest in the property (ie., fee or easement). The City's brief considers this dispute as an all or nothing proposition – it gets everything the railroad owned in fee simple absolute. The City's brief is written as if ABL adopts the same all or nothing approach – the City receives nothing. That is not correct. We acknowledge the City optioned the existing line of railroad as extended but question what property is included within the term "extensions." We also question whether the option described as "over, along and upon" property included a fee interest or merely an easement. And if the City optioned an easement to operate industrial rail, whether that easement has been extinguished by non-use (the City has no intention or ability to operate industrial rail), and the property is no longer burdened by it.

Under our second argument, the option is unenforceable due to frustration of purpose. Both the purpose of the Agreement, to serve the industrial waterfront, and the subject of the option, a belt line railroad, no longer exist. Without that foundation for the contract, the contracting parties' intent cannot be achieved and enforcing the option no longer makes sense.

We have appended a copy of the 1924 Agreement to this brief.

I. Sharpening the Issue: Paragraph 14 did not option a broadly defined "railroad" and all its properties; as this Court instructed, it provided a limited right to repurchase the line as extended.

At the outset of this case, ABL asserted a classic application of the statute of frauds: the parties in 1924 needed to describe within the 1924 Agreement exactly what property was covered by the Paragraph 14 option, so as to guard against property being conveyed 75 years later that the contracting parties had not intended to include. This proved particularly important in this case because the City of Alameda was exercising an option, not for land at fair

market value, but for about 5% of the property's market price. Overlay that with the fact that the City was not buying ABL's land to rail serve industrial users, as the 1924 Agreement contemplated, but to acquire the 22-acre former railyard as real estate speculation after the industry had moved away. If this was not the deal the contract drafters intended in 1924, the result was grossly unfair to ABL. The trial court agreed and granted summary judgment.

This Court reversed, rejecting ABL's statute of frauds argument and holding that the property description in the 1924 Agreement, vague as it was, provided enough of a "means or a key" so that, with extrinsic evidence, the court should be able to glean what property the parties' intended to option. *Alameda Belt Line v. The City of Alameda* (2003) 113 Cal.App.4th 15, 24-25. This Court expressed some hope that the answer would be found in reports ABL was to file with the City each year. *Id.* at 25. But as best we can tell from the historical record, ABL never filed the reports, and the City never insisted upon them. (RT 126, 276)

This Court framed the issue for trial, and its instruction from the first appeal is the logical starting point:

> "[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.*'** [Italics are this Court's] Only the original property, or new lands or other property **acquired to provide 'extensions' of the operations of the original railroad**, would seemingly be covered by the repurchase option." **[¶]..."[E]xtrinsic or parol evidence may be considered to ascertain the parties' meaning of the words 'extensions thereof' when they entered into the contract."** *Alameda Belt Line v. The City of Alameda, supra,* 113 Cal.App.4th at 25 (emphasis added).

Both sides agree on what constituted the original railroad. The question is what the parties meant by "extensions *thereof.*" The words the

parties chose in the 1924 Agreement and the facts and circumstances surrounding the contract, as it was approved by the California Railroad Commission and Interstate Commerce Commission, contain powerful evidence that something far narrower than "all the property ABL would ever own in the future" was intended by the option. This Court recognized the limiting language has a purpose – if "all property" was intended, the contract would have said so.

For $30,000, ABL purchased from the City, trackage "over, along and upon" City streets and then agreed to "extend" that line of rail "over, along and upon" other City streets and private rights of way along a line described in Paragraph 1 of the Agreement. (Ex. 523, paras. 1, 14) That was "said belt line, including all extensions thereof" as the parties understood it in 1924, and that was what the City could buy back for the "original cost" plus the cost of the "additional investments" incurred for those extensions, when and if ABL fell short in serving the growing industrial users of Alameda's waterfront.

These are the critical points for this Court's consideration. The 1924 Agreement (and Exh. 506, p. 3) identified with specificity an "Original Plan" to extend the City's original line "over, along and upon" particular streets and private rights of way. (Ex. 523) Our opening brief presented two issues underscoring the significance of key words used in the Agreement but ignored by the trial court.

The first issue arises from the Original Plan on which the parties hinged their deal. The City's own expert defined an "extension" as an improvement that was part of the Original Plan. (RT 486) The City's brief contradicts and tries to explain away this testimony from its expert. (Resp. Br. pp. 40-41, 55, 58-61) And the trial court never dug in on this issue because it accepted the City's argument that if ABL owned property, it was included in the option; end of discussion.

The second issue focuses on the descriptive and significant defining language the parties used to identify the interests the City could repurchase "over, along and upon" other properties. This easement language led this Court in the first appeal to question whether the right of repurchase of the "extensions thereof" might refer either to land or only to the tracks themselves and not the land underneath those tracks. *Alameda Belt Line v. The City of Alameda, supra,* 113 Cal.App.4th at 25. The City's Brief chooses not to address the "over, along and upon" language.

A. "Extensions" must be in the "Original Plan."

Testimony by the City's expert, Mr. Crowley, is unequivocal (and certainly not disputed) that under railroad industry usage "extensions," as used in the 1924 Agreement, must have been outlined in ABL's "Original Plan." (R.T. 486 ["[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."])

The "Original Plan" is set forth in Paragraph 1 of the 1924 Agreement. (Ex. 210, ABL 20069 ["The plan... is fully set forth in a contract...under date of December 15, 1924."]) The City's Brief affirms that point. (Resp.Br. p. 55) There is no mention of a railyard or ancillary real estate in the Original Plan as described in the 1924 Agreement. (Ex. 523) There is also no evidence or testimony that "extensions" could be later augmented beyond what was contemplated in the Original Plan.

Even the City concedes, if improvements were not in the Original Plan, they were not "extensions" but rather "additional investments." (Resp.Br. p. 41) And consistent with nothing about a railyard being contained in the Original Plan, we explain in our Opening Brief that in 1924 "extensions" in railroad industry usage did not, by definition, include ancillary

property such as railyards or spur tracks. *Detroit & M. Ry. Co v. Boyne City, G. & A.R. Co.* (1923) 286 F. 540, 542. (See AOB p. 34)

As the City noted: "Crowley provided testimony on the definition, meaning and usage of the terms in Paragraph 14 in the railroad industry." (Resp.Br. p. 20) Crowley explained the 1924 Agreement's terms were standard and accepted railroad industry terminology. (Resp.Br. p. 21) And on the definition of "extensions," Crowley could not be clearer:

> "**[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 City's Brief states: "Crowley testified that 'extensions' as used in the ICC Uniform System of Accounts refers to the land and the fixed improvements of the railroad. (III-RT 485:11-486:13; Exhibit 690, slide 9.)" (Resp.Br. 23) But this reference fails to cite the very next question, and Crowley's answer clarifying the point:[1]

> "Q. And 'extensions' meaning the land and fixed improvement, correct?
>
> "A. **"Well, the key point of an extension is the land and fixed improvement provided and arranged for in the original plan."** (RT 486, ll. 14-18; emphasis added.)

So Crowley was insistent on emphasizing the connection between "extensions" and the "original plan." But when the critical question

[1] The trial court, by the way, made this very same mistake in the Statement of Decision. [JA 1465]

was put to him -- whether the railyard could be classified as an extension -- Crowley balked. When asked whether the railyard was an extension, he testified only that it would be an "extension" [presumably if it was included in the Original Plan] or "addition betterment" [ie., if it came along later after the Original Plan.]:

> "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)

The trial court relied heavily on this testimony, and it led directly to the error below. (JA 1465)

The reason for Crowley's intentional ambiguity is the railyard could not possibly be an extension unless it was in the Original Plan. But Crowley was never squarely asked if the railyard was in the Original Plan. And indeed, the only evidence on point -- the 1924 Agreement -- indicates that the railyard was not part of the Original Plan. (Ex. 523)

At one point, the City shockingly even disavows Crowley's testimony that the "key point" of an extension is that it be "provided and arranged for in the original plan":

> "As the trial court understood, the City has the right to purchase all extensions constructed by ABL **regardless of whether the extension was in the original plan of extension as outlined in Paragraph 1 of the 1924 Agreement.** (VI-JA 1464-1467)." (Resp.Br. p. 55; emphasis added.)

How the City reaches that conclusion is mystery.

According to the City: "ABL presented no evidence to contradict the statements by Crowley and Copple that the railyard is an extension." (Resp.Br. p. 23) Indeed, ABL presented no witness testimony on the point because the evidence is in the words the parties chose. Extensions must be in the Original Plan which is clearly set out in the Agreement. There is no mention of a railyard. If the railyard was later included as an "addition betterment" and added to the balance sheet as an "investment," it became part of the railroad's property, but was not an "extension" within the meaning of the 1924 Agreement and Crowley's own testimony.

The conceded possibility that the railyard could be held by ABL other than as an "extension" (ie., as an "addition betterment"), illuminates the trial court's failure to differentiate between property interests, and to instead push all property interests into the option.

To construe the option as tightly drawn as ABL suggests may appear overly technical and constraining. But railroad language in 1924 was both technical and constraining. The drafters, both sides agree, were sophisticated railroad lawyers familiar with the precision of railroad industry usage. (Resp.Br. p. 41) They used terminology like "extensions" and "Original Plan" because, as Crowley points out, those terms had particular, specialized meaning. (RT 472-474)

Moreover, take a look at the parties' intent in 1924 -- something the trial court was bound to do, but never did. [See AOB pp. 42-43; "[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. C. § 1636)] What may seem illogical in the hindsight of 2008 was so very clear in 1924. The whole idea of the Alameda Belt Line was contested by the competing national railroads at the highest levels. (Exs. 506, 610, 615, 619, 624) The City, in contrast, was not well-funded. (Ex. 604, ABL 19177, Ex. 615, ABL 19879)

The lavish railyard, as it grew to be, was not within the drafters' contemplation or the language they chose in 1924 -- only the line of rail, as extended. The City likely wanted a repurchase option for political cover, but with only the minimum expense needed to operate the railroad to serve the industrial waterfront should it be absolutely necessary to exercise the option. It therefore agreed to repurchase the original line plus the planned "extensions thereof" "over, along and upon" certain rights of way. The City surely hoped it would never be forced to repurchase and operate the line, and indeed it never was. After receiving decades of benefit from industrial growth, and only after industry had left Alameda in the face of growing suburban housing and Bay Area office-tech development along the City's waterfront, did the City pursue the remaining railyard as a speculative land deal and exercise its all-but-forgotten option to its extreme financial advantage.

B. "Over, along, upon," the Agreement's appurtenance language indicating an easement, is ignored by the City.

Although the City agrees the Original Plan is described in Paragraph 1 of the 1924 Agreement [Resp.Br. p. 55], it ignores the important "over, along and upon" language of that Paragraph. California courts have repeatedly determined these words as appurtenance language indicating an easement:

> "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.)" *City of Manhattan Beach v. Superior Court* (1996) 13 Cal. 4th 232, 244.

(emphasis added.)

If ABL had acquired a fee interest in the land under the main line, the City asks why it should be limited to purchasing an easement. (Resp.Br. pp. 52-53) First, that is what the Agreement provides and railroad contracts and deeds for railroad rights of way have been traditionally construed as granting an easement. *Id.,* 13 Cal.4th at 240. Second, the City raises the issue of what is "necessary" for the belt line [Resp.Br. p. 49] without acknowledging that a right of way or an easement is all that is necessary for the City to operate the rail line. The drafters would have been well satisfied with the easement. After all, the City's original grant to ABL was similarly limited to the right to operate "over, along and upon" City streets and property and with the sole purpose of ensuring industrial rail. (Ex. 523, para. 1, Ex. 641)

Moreover, the truth is, the City did not exercise the option in order to operate a railroad on either a fee or an easement. The City exercised the option to own and control the 22-acre railyard. The fact that the City only bargained for an easement over the main line of the rail is strong evidence that the parties did not bargain for an option that includes the fee interest in the 22-acre yard.

II. The option includes the City's right to repurchase the original railroad and its 'extensions thereof' – not all additional investments ever made by the railroad.

The Paragraph 14 option is divided in two parts: (1) the property included in the option [the original line and extensions thereof] and (2) how to calculate the option price ["for a sum equal the original cost, together with the cost of any and all additional investments and extensions made therein..."] (Ex. 523) The City argues that since "'all additional investments' is listed in addition and separate from 'all extensions,'" all of the property ABL ever "invested" in must be included. (Resp.Br. p. 52) But in order to find the meaning the City suggests, the Court would need to move portions of Paragraph 14, cutting language from the "price" section and pasting it into the "property" section. Courts do not rewrite agreements, and interpretations which are not reasonable are to be rejected. Civ. Code §§ 1643, 3542; *Cohn v. Cohn* (1942) 20 Cal. 2d 65, 70.

The drafters chose to have Paragraph 14 start with a description of the property covered by the option, then followed by the sum to be paid for it. The words "cost of any and all additional investments and extensions made therein" describe the price or "sum" to which this language directly refers. If the parties intended the "cost of any and all additional investments" to augment the property to be included, those words would precede the price or sum description. Why would the drafters put the words "for a sum equal to" in the middle of a list of properties rather than at the end of the list? Those words define the "sum" and do not augment the property. Any other reading makes no sense.

The phrase, "for a sum equal to the original cost," corresponds to the $30,000 cost of original line. And the phrase "together with the cost of any and all additional investments and extensions made therein" corresponds to the anticipated additional cost of the "extensions thereof." The term "investment" cannot stand alone nor be moved in the sentence from the price

description to the property description. The Agreement did not give the City the right to purchase any "investment" the railroad ever made -- only those related to the "extensions."

Still, the City persists in arguing that all "investments" must be included even though Paragraph 14, as interpreted by this Court's first decision, limited the City's repurchase right to the original line plus "extensions."

According to the City:

> "The evidence was uncontradicted. The railyard is an additional investment to the belt line railroad (111-RT 488:15 - 489:1) The railyard was included by ABL in its investment calculations on ABL's financial statements [citation] and remained an investment on ABL's books." (Resp.Br. p. 55)

All that may be true, but was the railyard an extension? The City adds the following unfounded conclusions:

> "[E]ven if the railyard was not included in an ICC-approved extension, the City has the right to purchase the railroad, 'including any and all' additional investments in the railroad, including railyards." (Resp.Br. p. 55)

This would only follow if the City is correct – that it had the right to repurchase the "railroad" and all its future acquisitions, not just the existing and specifically described belt line plus its extensions. Still, the City persists:

> "Then the term 'railroad' was not just a term for an isolated piece track, but rather meant all railroad properties..." (Resp.Br. p. 49)

That certainly blows a hole in this Court's interpretation that "[t]he language of the option greatly narrows and defines the property in issue" to "the original railroad and its 'extension thereof.'" 113 Cal. App. 4th at 25. Indeed, the City makes no pretext of conforming to this Court's ruling.

In pointed contrast to the narrowly defined language of the

option this Court discerned in the first appeal and Crowley's testimony about the importance of the Original Plan, the upshot of the City's Brief is to include everything that falls within the broadest definition of "railroad." According to the City, this Court should simply focus on the right to buy back the "railroad" which means all property the railroad had or had later acquired [Resp. Br. pp. 44-55] -- not just the line of the railroad as it then existed and its extensions "over, along, upon" certain rights of way as limited by the 1924 Agreement. The City contends all "investments" by ABL are included under the option whether or not those investments were in the Original Plan and thus constituted "extensions:" "These additional investments – including the railyard – were part of the railroad." (Resp. Br. p. 50)

The City continues:

> "The new belt line railroad to be developed by ABL was to include the City's original existing rail line **as well as other investments, including extensions and other necessary assets. In short, 'said belt line railroad' referenced in Paragraph 14 is not limited to the rail line acquired from the City...but rather a new, larger railroad to be developed by ABL, which would include the original rail line and also other properties.**" (Resp.Br. pp. 44-45; emphasis added)

And later on in the City's Brief:

> "Thus, the term **'railroad'** was not just a term for an isolated piece of track, but rather **meant all railroad properties, including yards, grounds, switches, side tracks, etc.** A 'railroad' includes all the investments necessary to operate a common carrier railroad, such as ABL's railroad. By stating that the City had the right to purchase 'said belt line railroad,' **the 1924 Agreement gave the City the right to purchase the property of the railroad used or necessary for the belt line.**" (Resp.Br. p. 49; emphasis added)

And even more directly, the City argues:

> "[T]he definition of a railroad included the mainline used by the railroad, as well as all supporting facilities and infrastructure, including switches and railyards used or necessary to operate the railroad... **[T]he 'belt line railroad' included the mainline track, spurs, switching tracks, railyards, and all investments classified under ICC rules.**" (Resp.Br. p. 55; emphasis added)

If the Agreement had optioned the broadly defined concept of a "railroad" and all the properties it owned, the City would win that point (although not necessarily the frustration of purpose argument). But that argument directly conflicts with what this Court found the Agreement says in the first appeal. The option is narrow. The option is limited. The option is precise. And the option covers only the existing railway and the anticipated future extensions the parties knew were spelled out in the Original Plan. The City argues its case as if the Paragraph 14 option encompasses as much as the Southern Pacific option in Paragraph 3 which does not contain the same narrow descriptions of property and interests therein. (See AOB p. 38)

If the drafters had intended to include all property of the railroad, that was easy enough to describe. Instead, they limited the scope of the option based on the language the parties selected. How does the City analytically get from "said belt line railroad, including all extensions thereof" to "the mainline track, spurs, switching tracks, railyards, and all investments classified under ICC rules?" (Resp.Br. p. 55) Neither the specific option language, nor the larger Agreement, nor the terms of art therein fairly construed, nor the description in the California Railroad Commission Decision [Ex. 506, p. 3], nor even the City's own expert, explicitly or implicitly includes the railyard or other ancillary properties within the scope of Paragraph 14. That vastly changes the analysis from the City's focus on repurchasing a "railroad" and everything that goes with it, to the limited line of railroad the parties intended to include by the specific words they chose in

1924.

The trial court's Judgment is as broad as possible, awarding 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)

There are, according to the City, no limits to what the City could acquire. That is the measure of how the City and trial court went off-track.

III. The City's Statement of Facts affirms that the critical facts and circumstances surrounding the 1924 Agreement and thereafter are undisputed.

Although the parties argue for different results, the contract language, the facts and circumstances that informed it, and the testimony given to clarify it, are not in dispute. On these critical points, the City's Brief concurs with ABL or, at the very least, is silent:

- After constructing the initial phase of a belt line railroad, the City entered this deal because it was financially unable to further develop the belt line to serve the growing industrial needs of the Alameda waterfront. (Ex. 604, ABL 19177, 19157; Ex. 607, ABL 19681; Ex. 615, ABL 19877, 19879))

- The City conveyed to ABL only its original tracks and the rights to operate "over, along, and upon" the City streets. (Ex. 523, para. 1) It retained ownership to the land beneath the streets. (Ex. 641)

- ABL extended the line according to the Original Plan in Paragraph 1 of the Agreement, first west to Sherman, then to Webster, then ultimately to the Naval Air Station. (Ex. 70)

- Ancillary to that line of railroad, ABL later developed a 15-acre switching yard and added nearly 7 additional acres to the yard in 1943. (Ex. 665, ABL 01450-55, Ex. 236A, p. 55) It owned that yard land in fee. (Ex. 602)

- ABL ceased operations in Alameda west of Webster in the 1970s. (Ex. 162, RT 90) ABL ceased operations on the rest of the line in

November 1998, a year before the City exercised the option, because there were only two industrial customers left at the far eastern end of the line that could be serviced by truck. (RT 142, Ex. 34, ABL 24778; RT 111-113) Portions of the line were sold off. (RT 116-120) Tracks were pulled up. (RT 140-141) There was no business left for a belt line railroad. (RT 101-107)

- The City's option exercise amounts to nothing more than a real estate deal. There is no longer any need for a belt line railroad, or switching tracks or a railyard. (Ex. 29, 228, 229; RT 108-109) The City fights for its option because it wants to "purchase" ABL's land for something approximating 5% or its fair market value. (Ex. 28)

The City's brief does augment ABL's Fact Statement by noting that during the year following the Agreement, when approval of the ABL was before the Interstate Commerce Commission and the California Railroad Commission, there were references to a "classification yard" in the reported decisions. (Resp.Br. pp. 12-15) But the City misstates the evidence by describing the CRC and ICC decisions as identifying the yard as an "extension" ["[t]hose extensions 'to extend the line' expressly include a classification yard..." and "the ICC Decision also described the 'classification yard' (railyard) as an 'extension' of the belt line railroad..."]. (Resp.Br. pp. 12, 14)

To be clear, the references the City cites did not describe the "classification yard" as an "extension." (Ex. 506, p. 3; Ex. 615, ABL 19878-19879) When discussing the cost to ABL, the ICC and CRC identified (1) the cost of constructing the extensions, and, separately, (2) the cost of other items like a yard, scales, water and oil facilities, engine houses, etc. (Ex. 506, p. 3; Ex. 615, ABL 19878-19879) In Ex. 506, p. 3, for example, the "proposed

extension" is specifically described; it does not reference a classification yard. Below, where a classification yard is mentioned, it is in conjunction with the cost. The classification yard was an anticipated investment, but it was not an "extension." The classification yard was always grouped with these other property improvements, separate from, not with, "extending" the line. *Id.* And the references were always made when discussing the money to be spent, not what was included within the meaning of "extensions thereof." *Id.*

The point is made by use of the conjunctive in the City's argument about the railroads' ICC brief:

> "The applicants' [railroads'] brief stated that ABL would be expanding operations with the 'necessary extensions' and the 'construction of the necessary yard tracks and facilities for the storage of cars and handling of traffic.'" (Resp.Br. 14 citing Ex. 624, ABL 20100)

Turning to the witness testimony at trial, the City claims ABL employee Copple testified the "extensions included trackage, grade crossing protection, signal houses and the land underneath the trackage." (Resp.Br. 18 citing 1-RT 209:19-211:14; 220:11-21.) That conclusion cannot be gleaned from the cited testimony. To the extent the Copple testimony did touch on extensions, it is dealt with in Appellant's Opening Brief at 20-21 and 43-44. The City raises nothing new.

The City claims the map prepared for trial by City engineer, Mr. Barrantes, Exhibit 602, "showed the properties purchased by ABL **to extend the railroad**." (Resp.Br. 19; emphasis added) In truth, the map shows all properties owned by ABL, including those, like the railyard, that were not part of the Original Plan and therefore not "extensions" within the meaning of the 1924 Agreement. (Ex. 602; RT. 388)

Finally, with respect to its railroad accounting expert, Mr. Crowley, the City spends five pages recounting his testimony. (Resp.Br. pp. 20-25) It is clear from both the City's brief and Crowley's testimony itself that

Crowley's principal purpose was to calculate the "repurchase price" using ABL's various books and records to the extent he could obtain them. On the repurchase price issue, there was a conflict of expert testimony, and ABL did dispute the price calculation at trial. See AOB pp. 22, 25, n. 4. But on appeal ABL does not contest the price assuming the City had the right to buy everything; there is no "battle of experts." Crowley's other testimony, unrelated to the repurchase price, is undisputed.

IV. The City's brief confirms there is no conflicting extrinsic evidence on the meaning of "extensions thereof" to preclude de novo review.

Where competent extrinsic evidence has been introduced to interpret a contract, but is not in conflict, the trial judge's inferences from it are not binding on this Court which must make an independent determination of the meaning. *Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 866. The City kicks off its Argument section by contending: (1) the meaning of "extensions" can be ignored; the City can prove its case by simply identifying the railroad's property [Resp.Br. pp. 30-32], and (2) the trial court's interpretation of Paragraph 14 is supported by substantial evidence and subject to that standard of review, although their brief does not identify any conflicting extrinsic evidence on the meaning of extensions.

A. The City first misidentifies this Court's instruction as a mere effort to identify the railroad's property.

In describing this Court's decision in the first appeal, the City initially argues that since extrinsic evidence can identify the land boundaries in question (ie., the railroad's property can be "defined"), the judgment should be affirmed. (Resp.Br. pp. 30-32) This, of course, begs the question this Court left open after the first appeal: what property did the parties in 1924 intend to include within the meaning of the option? What did "extensions thereof" mean, and what property did it include? The City's argument is consistent with its position that if property was owned by the broadly defined "railroad" as of the exercise, it is included in the option. This is the fundamental difference between the parties in the reading and interpretation of the Agreement and this Court's decision. The City's position is directly at odds with what this Court instructed.

B. The City fails to identify any extrinsic evidence on the meaning of "extensions" that is conflicting.

The City paints the trial court decision with a very broad brush [Resp.Br. pp. 32-38] but never addresses the critical question of whether any extrinsic evidence on the meaning of "extensions" is in conflict.

The City first tries to create the impression of a "battle of the experts" by describing the testimony of ABL's expert Jennifer Ziegler, as being offered to "contest and counter the testimony to be presented by the City's expert, Thomas Crowley, on the meaning and application of the terms in Paragraph 14." (Resp.Br. pp. 33-34) But ABL offered Ziegler's testimony on only one point: the calculation of the price to be paid assuming Paragraph 14 included all the railroad property. (RT 285-286) There is a reason why the City cites no testimony from Ziegler on the "meaning and application" of "extensions." She gave none. As the City correctly points out, she is an accountant not a railroad expert. (Resp.Br. pp. 18, 34). There were conflicting opinions between Ziegler and Crowley on the price to be paid -- but that issue is not appealed. There is no expert conflict on the meaning of "extensions."

According to the City, it "presented the maps (Exhibit 602) and deeds (Exs. 548, 549) of the railroad property including the extensions." (Resp.Br.p. 36) But that statement again begs the question of what property is legally included within "extensions."

Continuing with its generalized approach, the City also argues it presented Crowley, "who provided a comprehensive analysis of the ABL property described under Paragraph 14, the extensions and betterments, the historical and accounting setting for the repurchase provision, and the basis for classifying the belt line property under Paragraph 14." (Resp.Br. p. 36) As a basis for that conclusion it cites 128 pages of Crowley testimony and eight exhibits. (Resp.Br. p. 36) No specifics.

The City then references the trial court's conclusions citing as support the trial court's own Statement of Decision -- not specific evidence:

> "The court found that Crowley's approach, analysis and definitions were persuasive and consistent with ABL's own records, the history of the proceedings, and the intent of the parties and the purpose of the 1924 Agreement as a whole. (VI-JA 1465-1471.) The court found that the railyard was an extension included under Paragraph 14. (VI-JA 1464-1467.)" (Resp.Br. p. 36)

And the City continued its argument, citing only the Statement of Decision, not evidence, for support:

> "The record of the 1924-1926 proceedings was consistent with the testimony of Crowley that the railyard was part of the property subject to purchase under Paragraph 14. ABL's acquisition and construction of the belt line railroad included the construction of the proposed extensions, including the railyard. (VI-JA 1465-1470)" (Resp.Br. pp. 37-38)

When boiled down, the only evidence supporting the City's contentions on the meaning of "extensions" is that cited by the trial judge in its Statement of Decision on three pages: VI-JA 1464-1466. And that is the very evidence addressed by ABL in its Opening Brief -- (1) the Agreement, (2) the facts and circumstances at the time it was made, (3) the contemporaneous documentary evidence in the ICC and CRC proceedings, (4) Copple, and (5) Crowley's statements that "extensions" must be identified in the Original Plan and his hedge on whether the railyard is an extension. Nothing more. There is no conflicting evidence anywhere in the record on the meaning of "extensions" and the property to be included.

We do not question Crowley's credibility, he just never said what the City claims. And on the meaning of "extensions," we concur with Crowley on the need to look to the Original Plan as expressed in the words of

the Agreement. The City's statement -- "[t]he credibility of expert witness testimony is a question of fact [Resp.Br. p. 38]" -- while correct in theory, has no application to this case.

This Court should consider the evidence de novo.

V. The City misses the point on frustration of purpose: by the time it exercised the option no industrial waterfront was left for the railroad to serve.

The parties spelled out the 1924 Agreement's purpose at the outset:

> "Said parties of the first part...will at once organize a corporation to be known as ALAMEDA BELT LINE, for the acquisition, construction and operation of a belt line railroad **to serve the industrial area and waterfront of said City...**" (Ex. 523, para. 1)

As clearly stated, and as indicated by all extrinsic evidence, the purpose of the Agreement was to serve the industrial waterfront with rail so that Alameda would attract investment from business like the Encinal Terminals [which would not have been built without the Agreement (Ex. 195, ABL 19157)], would grow and prosper, and be able compete with the Oakland and San Francisco ports. The City's repurchase right furthers that overarching purpose: if ABL failed to adequately serve the industrial users, the City could step in and do so. The option, indeed the contract as a whole, founded on one assumption: that industrial customers would remain in the City and would continue to need rail service.

At the City's urging, the trial court lost sight of this expressed purpose, and it cast the "purpose" as "allow[ing] ABL to extend and operate a belt line railroad that the City had already built." (JA 1476) Respondent's Brief adds its self-interested view of the Agreement's purpose: "the principal purpose of the parties making the contract was for an extended belt line railroad *with a right of repurchase.*" (Resp.Br. p. 66; emphasis added) But these expressions of "purpose" by both the trial court and the City merely review the contract terms; neither the extension of the railroad nor the purchase option speak to the contract's true *purpose*: "to serve the industrial area and waterfront of said City." (Ex. 523, para. 1)

Like the trial court, the City tries to rationalize its argument on equitable principles. "Here the City performed its part of the bargain by conveying its railroad to ABL..." (Resp.Br. p. 63) Actually, ABL *purchased* the existing belt line for $30,000. The City continues: "ABL received the benefit of the bargain; ABL cannot claim that ABL's purpose was substantially frustrated." (Resp.Br. p. 63) Of course, the City received the benefit of the bargain as well. ABL faithfully operated for many years, all the while fulfilling the contract's purpose. Alameda was thus served by all three transcontinental railroads, and the industrial waterfront of Alameda (and as a result the City) grew and prospered exactly as planned.

Moreover, ABL has never claimed that "*ABL's* purpose was substantially frustrated." The *contract's* purpose has been frustrated by outside forces. The fact is, over 75 years, the City changed from a backwater swamp to an industrial powerhouse and then again from an industrial town to a bedroom community. Industry ultimately moved away. There was no longer a need for the belt line railroad. The City evolved in ways the contract drafters could never have predicted. The expressed purpose for the Agreement "to serve the industrial area and waterfront of the City" no longer has meaning. And the City's repurchase right – to serve industrial users if ABL fails to do so -- no longer has meaning. The City has never argued (nor can it as a practical matter) that it intends to operate a belt line railroad to serve industrial users. In fact, the very subject matter of the option -- "a belt line railroad" -- no longer exists. Both sides agree, operations at ABL ended in November 1998 – a year before the City exercised its option. (Resp.Br. p. 17)

The rest of the City's equitable argument turns on the idea that it was "ABL's voluntary act to cease operations." (Resp.Br. p. 67) The trial court also intimated this misperception. (JA 1476) But ABL did not drive the industrial business away. ABL removed its line from service gradually in response to industry leaving -- not the other way around. (See AOB p. 51)

If there was industry left to serve, ABL would be serving it. But it is gone.

Moreover, this transformation did not happen overnight. ABL began taking its line out of service as far back as the 1970s when the line west of Webster was formally abandoned. (Ex. 162, RT 90) Pieces of real estate were sold off and approved for commercial or residential development by the City. (RT 116-120) The City knew when large industry left town. It was not blindsided by this. In that sense, it presided over the closure of the railroad. It did not exercise the option while industry was leaving to try to turn things around. It accepted, perhaps even supported, the transition. Instead, it waited to exercise the option until the railroad was boarded up. And now the City wants to purchase ABL's remaining real estate at a highly discounted price, not to "serve the industrial area," but to put the property to other uses. To claim that this was the result of ABL's "voluntary" decision to shut down is plainly wrong.

When the true purpose of the contract and how it gradually eroded are exposed, the City has only the contact terms as its bedrock argument: "The Agreement does not provide that the City may purchase the railroad 'only while trains are in service.' Instead, the parties used the phrase 'at any time.'" (Resp.Br. p. 67) It continues: "The City's purchase right - a material part of the 1924 Agreement – remains a legal right of the City under the express terms of the Agreement. ABL has no basis to deprive the City of the City's rights under the contract." (Resp.Br. p. 63) To do so, the City argues, would "add contractual provisions that were not negotiated by the parties or made part of the 1924 Agreement." (Resp.Br. p. 64)

But that is precisely what the frustration of purpose doctrine is designed to do. In situations where it is clear that the contract so depended on given circumstances that it would make no sense if those circumstances changed, the court is empowered to nullify the contract, notwithstanding the contractual terms and regardless of whether performance remains possible.

Cutter Labs, Inc. v. Twining (1963) 221 Cal.App.2d 302, 314-315.

The outcome is clear even under the City's tests:

City: The purpose must be so completely the basis of the contract that without it the transaction would make no sense. (Resp.Br. p. 66)

Is there any doubt that the existence of a developed industrial area was necessary to support the freight rail service?

City: The frustration must be so severe that it is not fairly to be regarded within the risks that the party assumed under the contract. (Resp.Br. p. 66)

There is no evidence that the drafters ever contemplated industry in Alameda might disappear and be replaced by commercial and residential development. All impetus in 1924 was in the opposite direction.

City: Non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. (Resp.Br. p. 66)

There is no evidence indicating the drafters ever considered what would happen if industry moved away – they surely never thought that would happen or that the City would be able to exercise the repurchase option in the absence of industrial users to serve.

Adopting a frustration of purpose defense is consistent with the keystone of contractual interpretation in this state: courts must give meaning to and enforce the intent of the parties if possible. (Cal. Civil C. §1636) Had the drafters possessed the foresight to predict that after 75 years industry in Alameda would disappear, would they have welcomed Alameda acquiring all of the railroad's land, including a 22-acre rail yard for real estate speculation and all for the original acquisition costs? Would the drafters have supported a sale for 5% of fair market value knowing that industry had moved away and the City no longer would operate the belt line railroad? The option was not designed as a "gotcha" windfall. A drafter reaction like, "you've got to be kidding," is far more probable.

VI. ABL seeks reversal and/or remand to conform the property subject to the option, as envisioned by this Court in the prior appeal, or a reversal recognizing a frustration of purpose.

To be clear, ABL respectfully seeks a ruling from this Court as follows:

An interpretation of "extensions thereto," consistent with the evidence, requiring reversal and remand to limit the option property to the main line of the railroad outlined in the Original Plan described in Paragraph 1 of the 1924 Agreement "over, along and upon" public and private rights of way. And a determination that any easement has been extinguished under *Concord and Bay Point Land Co. v. City of Concord* (1991) 229 Cal. App. 3d 289, 295, [See AOB p. 46] since operation of industrial rail is neither contemplated nor possible.

Alternatively, recognition that without industry for the railroad to serve, the purpose of the 1924 Agreement has been frustrated, and giving effect to the original intent of the parties does not allow the City to exercise an option completely dependent on the existence of that purpose.

Conclusion

Even without the statute of frauds, judicial interpretation of Paragraph 14 should conform to the parties' intent and guard against any property conveyance the drafters did not intend include. Close attention to either the words the drafters chose or frustration of the contract's purpose supports reversal.

The parties intended to option a line of railroad -- the existing railroad and "extensions thereof" – "over, along and upon" certain public and private rights of way, so that the City could operate and serve industry along the Alameda waterfront should ABL somehow fail.

Crowley explained that "extensions" must be described in the Original Plan. ABL and the City agree that the Original Plan is outlined in Paragraph 1 of the 1924 Agreement. (Resp.Br. p. 55) From the words they carefully chose, there is no indication the parties meant to option the "railroad" and everything it might own. And there is nothing in the Original Plan about the ancillary real estate such as the 22-acre railyard much less the fee ownership rather than the right to operate a rail "over, along and upon" it. Unless we stretch the parties' words beyond the precise meaning the parties gave them, the Judgment cannot stand.

This is especially true since the City never pursued the option while ABL was operating, but waited until after industry had left town and ABL's operations had ceased before attempting to cherry-pick the real estate. The option's purpose was frustrated, and the subject of the option, a "belt line railroad," no longer existed.

ABL requests reversal and/or remand as prayed for herein.

DATED: November 14, 2008

Hill, Farrer & Burrill LLP

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

HFB 832370.1 B8730068

CERTIFICATE OF COMPLIANCE

I, Dean E. Dennis, attorney for Plaintiff and Appellant ALAMEDA BELT LINE, certify that the foregoing Reply 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 8,285 words long.

Dean E. Dennis

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THIS AGREEMENT, made the 15th day of December, 1924, by and between THE WESTERN PACIFIC RAILROAD COMPANY, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, railroad corporations doing business in the State of California, parties of the first part, and the CITY OF ALAMEDA, a municipal corporation of said state, party of the second part, hereinafter called the "City",

W I T N E S S E T H:

FIRST: Said parties of the first part, subject always to authorization by the Interstate Commerce Commission of the United States and the Railroad Commission of the State of California, in so far as any such authorization is essential in any matter covered by this agreement, will at once organize a corporation to be known as ALAMEDA BELT LINE, for the acquisition, construction and operation of a belt line railroad to serve the industrial area and water front of said City, by steam or other lawful motive power, over, along and upon the line of the existing railroad belonging to the City of Alameda, on Clement Avenue between Broadway and Grand Streets in said City, and, in addition thereto, over, along and upon those certain streets in said City particularly described as follows, to-wit:

(a). Beginning at a point in the existing track on Clement Avenue in said City at or near the western line of Broadway, thence by a single track westerly, parallel and operating in conjunction with the City's existing track thereon to a point near the eastern line of Park Street;

(b). Beginning at a point in the existing track on Clement Avenue near Minturn Street thence by a single track on an "S" curve over and along private rights of way and intervening streets southerly and westerly to Buena Vista Avenue near Hibbard Street; thence by a single track over and along the sidewalk area on the northern side of Buena Vista Avenue westerly from Hibbard Street to a point between Benton Street and Bay Street; thence by a single or double track curving northerly and westerly over private rights of way and intervening streets to a point north of Eagle Avenue and continuing westerly over other private rights of way and crossing all intervening streets to the western side of Webster Street at or near the so-called "segregation line" in said city;

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(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.

Said parties of the first part and each of them agree to use all reasonable diligence and effort to obtain all necessary authorizations from all official bodies and officers having jurisdiction over the matter and said city agrees to give them all reasonable assistance in connection therewith.

SECOND: Said ALAMEDA BELT LINE will be organized as a corporation of the State of California and its general policies and management will be directed and controlled by a board of five directors, consisting of two members to be chosen by The Western Pacific Railroad Company, two by The Atchison, Topeka and Santa Fe Railway Company, and one who shall be the City Manager of the City or other person designated by the council of the City. In case one or more connecting rail-carriers should hereafter acquire an interest in said ALAMEDA BELT LINE as hereinafter provided, the number of directors shall be changed so that each carrier stockholder shall have an equal number of directors not exceeding two. Each carrier party to this contract, as well as each connecting rail carrier acquiring an interest in said belt line, shall cause one share of the stock of said belt line to be issued or transferred to said City Manager or such other designated person, so that he may be qualified to act as such director and as occasion arises the said qualifying shares shall be, on the City's demand, transferred on the books of the belt line to the City's representative on said Board of Directors for the time being, but the carriers shall pay all assessments on said stock and receive the dividends on said stock.

The words "connecting rail-carriers" as used in this contract shall be deemed to mean only such connecting railroads, respectively, as shall have a main line of not less than two hundred and fifty miles in length.

THIRD: Said The Western Pacific Railroad Company and said The Atchison, Topeka and Santa Fe Railway Company, their

successors or assigns, will each contribute an equal sum of money for, and will at all times own and retain, an equal number of shares of the capital stock of said ALAMEDA BELT LINE; provided, however, that should the Southern Pacific Company, or any other one or more connecting rail-carriers operating in the vicinity of Alameda, hereafter desire to join and participate in the ownership, management and operation of said belt line railroad, and secure an equal interest therein, it or they may do so by acquiring a stock interest therein equal in amount of shares to that of each of the then existing carrier owners of stock therein (to the end that the stock interest of each carrier owner in said ALAMEDA BELT LINE shall be the same in amount), 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 annum from time of investment. And the parties of the first part hereby agree that in such event they will do all things necessary to invest such connecting rail-carrier so desiring to join in the ownership, management and operation of said belt line railroad, with ownership of said amount of stock upon the terms hereinbefore stated, it being distinctly understood, however, that such connecting rail-carrier shall make itself subject to and a party to all of the terms and provisions of this agreement relative to said ALAMEDA BELT LINE, as well as to all obligations of the existing carrier owners therein with regard to the conduct and management of the affairs of said ALAMEDA BELT LINE.

FOURTH: Said City hereby agrees to sell and convey to said ALAMEDA BELT LINE, to be used and operated in connection with said Belt Line Railroad, said City's existing railroad in

Clement Avenue, between Broadway and Grand Streets in said City for the sum of THIRTY THOUSAND DOLLARS ($30,000.00), and upon the written acceptance of this contract by said ALAMEDA BELT LINE, and upon the payment of said sum to said City, with interest thereon at the rate of six (6) per cent per annum from and after May 1, 1925, in the event that the consummation of said purchase be delayed beyond such date by any fault or neglect on the part of either of the parties of the first part, or said ALAMEDA BELT LINE, to execute and deliver to said ALAMEDA BELT LINE a good and sufficient conveyance of all said existing railroad.

FIFTH: Said ALAMEDA BELT LINE will, as soon as possible after its organization, construct the additional track on Clement Avenue, as aforementioned, in the two blocks immediately east of Park Street, and will move the existing track now owned by said City so that when the other track is constructed both tracks will be an equal distance on either side of the center line of said Avenue. Said additional track shall be used as an inter-change track. In the event that Southern Pacific Company becomes a co-owner in said ALAMEDA BELT LINE as hereinbefore provided, and it is then found that said interchange track is no longer necessary to the operations of the parties of the first part or either of them, said interchange track will be taken up and abandoned.

SIXTH: Said 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 westerly therefrom as rapidly thereafter as industrial expansion warrants.

SEVENTH: Said City, through its City Council, will grant said ALAMEDA BELT LINE all the necessary franchises over, across and along all the streets of said City which are necessary and convenient for the proper construction and operation of said belt line, including all necessary franchises for the maintenance and operation of the existing railroad now owned by said City;

provided that on Buena Vista Avenue in said City, from Hibbard Street to a point between Benton and Bay Streets, the railroad of said ALAMEDA BELT LINE shall run on a single main track along the sidewalk area on the northerly side of said avenue, with the necessary industry spurs leading northerly therefrom.

EIGHTH: In addition to the construction and operation of a belt line railroad as aforesaid, said parties of the first part, or either of them, may, at their option, within two years from the date of this agreement, construct a railroad track for their own use and benefit, to be operated by steam or other lawful motive power, over, along and upon those certain streets in said City of Alameda particularly described as follows:

> Beginning at a convenient point in the existing track on Clement Avenue at or near Minturn Street, thence westerly and northerly on a single or double track over and along private rights of way to Grand Street, and thence northerly along Grand Street to the proposed freight ferry slip referred to in the next paragraph.

Said parties of the first part, or either of them, may, at their option, within two years from the date of this agreement, construct a freight ferry slip on the property now owned by the City at the north end of Grand Street in accordance with the plans shown on the plat annexed hereto marked Exhibit "A" and made a part hereof, and said City agrees that in case said option is exercised it will lease said property to said parties of the first part, or either of them, as the case may be, for a term of twenty-five (25) years with option of renewal to said parties or party, for a further term of twenty-five (25) years, said ferry slip to have rail connection with the railroad track on Grand Street connecting with the belt line railroad on Clement Avenue.

NINTH: As rental for the use of the necessary land of said City at the north end of Grand Street, in the event of the exercise of their optional right to such lease, said parties of the first part, or either of them, as the case may be, will pay said City a yearly rental or sum of Twelve Hundred Dollars

($1,200.00), payable annually in advance commencing with the date possession is taken of the land, provided that said yearly rental shall be equitably adjusted at the end of each ten year period thereafter according to the then value of said property in an unimproved condition, as compared with its present value, and if said parties, or party,and said City are unable to agree, such question of then value as compared with present value shall be submitted to arbitration, said parties or party, as the case may be, to designate one arbitrator, and the City to designate a second arbitrator, and said two arbitrators to designate a third arbitrator, and the parties hereto will accept the decision of a majority of the arbitrators so designated as finally determining the question.

TENTH: If the option to locate a freight ferry slip at foot of Grand Street is exercised by said party or parties the party or parties exercising such option will construct a standard pile wharf for the exclusive use of said City at the north end of said Grand Street, said wharf to be the full width of said Grand Street and to extend into the San Antonio Estuary as far as the pierhead line, all according to plat hereto annexed marked Exhibit "B" showing the plan of said wharf. Said wharf, when constructed, shall be the sole property of the City.

ELEVENTH: If said option beforementioned is exercised, said party or parties exercising the option will construct a spur track line from Grand Street into the corporation yard of the street department of the City, and pay all the expenses incidental to moving the present buildings on said corporation yard resulting from the construction of said freight ferry slip and tracks leading thereto.

TWELFTH: Said railroad track running from Clement Avenue northerly along Grand Street, if constructed, and also the spur tracks and freight ferry slip at the notherly 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, and in case the Southern Pacific Company, or any other connecting rail-carrier or carriers, shall hereafter purchase an interest in said ALAMEDA BELT LINE, it or they shall not be charged for any part of the cost of said railroad track, spur tracks and freight ferry slip. However, if the belt line railroad should be repurchased by the City as hereinafter provided, it is understood and agreed that the City, as a part of the same transaction, will acquire by purchase from said parties of the first part, or either of them, as the case may be, all said railroad track and spur tracks up to, but not including, the freight ferry slip, for a sum equal to the original cost thereof plus the cost of all additions and betterments.

THIRTEENTH: (a) It is agreed that any carrier participating in the ownership, management and operation of said ALAMEDA BELT LINE will absorb the switching charges of the belt line railroad on any carload freight which may be transported by such carrier on line haul transportation, in all cases where the revenue accruing for such line haul transportation amounts to such minimum revenue as may from time to time be provided in the tariffs of such carrier as the minimum revenue which it shall receive in making absorptions of switching charges at San Francisco or Oakland, California.

(b) The carriers will cause the ALAMEDA BELT LINE to join them in the publication of rates for movements of less than car load freight between industries located on its line and the freight houses or concentration sheds of the owning carriers on such freight received or delivered in connection with a line haul movement of the owning carrier, such rates and regulations to conform, as nearly as may be, to those concurrently in effect in the City of Oakland.

FOURTEENTH: 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 so to do by ordinance to that effect; and provided that at the same time it purchases from the parties of the first part, or either of them, as the case may be, the branch railroad, extensions and spur tracks referred to in the twelfth section hereof.

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.

FIFTEENTH: It is fully understood that the carrying into effect of this agreement by the parties of the first part is dependent upon the approval and authorization of the Interstate Commerce Commission of the United States and the Railroad Commission of the State of California, as well as upon said parties obtaining the franchises and rights (including rights of way) essential to full performance by them; provided, that if the purchase of the existing railroad of the City by said ALAMEDA BELT LINE shall not have been consummated within eighteen (18) months from the date of this agreement, this agreement, at the option of either of the parties of the first part or the City, may be declared and become null and void.

IN WITNESS WHEREOF, said parties have hereunto caused these presents to be signed, sealed and executed by their proper

respective officials, first duly authorized.

THE WESTERN PACIFIC RAILROAD COMPANY,

By _____ President.

Attest: _____ Secretary.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

By _____ President,

Attest: _____ Secretary.

Parties of the first part.

CITY OF ALAMEDA,

By _____ Mayor,

Attest: _____ City Clerk,

Party of the second part.

_____
City Attorney

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 November 14, 2008, I served the within documents:

APPELLANT'S REPLY 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.

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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 November 14, 2008, at Los Angeles, California.

Lisa Robertson
Lisa Robertson

HFB 789105.1 B8730068

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