A "BRIEF" GUIDE TO TODAY'S HEARING

The judge had over 200 pages of briefs as well as voluminous exhibits to review for today's hearing so, as wordy as this eight-page guide may be, we can claim with some justification that this is a "brief" guide to the issues you will hear discussed in court today. If you later want to immerse yourself in further details, you can find links to all of it on our website nocoalinoakland.info under Learn More-Court Documents.

Today Judge Chhabria will hear competing motions for summary judgment in the lawsuit brought by developer Phil Tagami against the City of Oakland. The judge could decide the case in favor of one side or the other or decide that there are factual disputes requiring the case to go to trial. Trial is currently set to begin on Tuesday, January 16, and may take over three weeks.

Background

Developer Phil Tagami has a 66-year lease on the West Gateway, a 34-acre plot of City-owned land near the foot of the Bay Bridge, on which he plans to build a marine export terminal to be operated by Terminal Logistic Solutions, a wholly owned subsidiary of Bowie Resource Partners, a mining company with coal mines in Utah. In 2014, Tagami and his partner Mark McClure negotiated in secret with a former Goldman Sachs investment banker based in Utah to arrange for financing and construction of a $250 million coal export facility on this site.

Artist's rendition of a bulk commodities terminal to be built at the West Gateway site near the Bay Bridge toll plaza

In July 2016, the Oakland City Council voted unanimously to bar the storage and handling of coal on this property in accordance with the development agreement's provisions allowing new regulations to protect community health and safety. Despite this and despite the overwhelming opposition of city residents, labor unions, faith groups, and community organizations, Tagami insists he has the right to ship coal and the City has no right to interfere.

The West Gateway is a small corner of the overall 310-acre former Oakland Army Base redevelopment project. Nearly half a billion dollars of public money has been spent to tear down old structures, install new utilities and roads, and ready the land owned by the City of Oakland for new productive uses. While development proceeds on the rest of the land, development of

the West Gateway has been paralyzed since the revelation of the developers' secret plans to ship millions of tons of Utah coal through Oakland each year.

OBOT sued the City in December. Nearly 2,000 individuals and 100 organizations have signed an open letter calling on Tagami to drop his lawsuit and find another safer, healthier, and more sustainable use for the West Gateway. Individuals and organizations can sign on to the open letter by visiting No Coal in Oakland's website at nocoalinoakland.org. No Coal in Oakland's email address is nocoalinoakland@gmail.com.

Today, the Court will first hear argument on motions for summary judgment and, then, if the judge does not grant either side summary judgment in full, he will conduct a pretrial hearing to discuss how the trial, due to start next week, will be conducted.

OBOT's motion for summary judgment argues that the Ordinance and its application to the West Gateway "violates the Constitution, is preempted by federal statutes, and the City's application of that Ordinance breaches the Development Agreement between the City and OBOT as a matter of law."

Not so, say the defendants. Because we agree with the City's arguments, we'll deal with OBOT's motion by analyzing the opposite motions brought by the City and the Intervenors.

The City's Motion

Oakland's ban on coal storage and handling does not violate the agreement between the City and developers

The City's legal argument focuses first on OBOT's claim that the ban on storage and handling of coal at the West Gateway violated the 2013 Development Agreement (DA) between the City and the developers. The City acknowledges that, under the DA, OBOT was free to develop a marine export terminal subject to the City land use laws that existed in 2013, but points to a provision in the DA that explictly permits the City to apply new laws to protect health and safety if certain conditions are met.

Specifically, in section 3.4.2 of the DA, the City reserved the right to apply new laws if, after a public hearing and based on substantial evidence, the Council found that "a failure to do so would place existing or future occupants or users of the Project [or] adjacent neighbors … in a condition substantially dangerous to their health and safety." The City contends that these conditions were met.

In 2015, the City began a public hearing process under section 3.4.2 to consider whether to impose new regulations to prevent substantially

dangerous health and safety conditions. The City's brief sums up what happened next:

> Throughout the nearly yearlong process, the City provided multiple opportunities for OBOT, its supporters, and the public to offer evidence and comments. The City and third parties submitted extensive, substantial evidence showing that the storage and handling of coal and petcoke at the Terminal would create substantially dangerous health and safety conditions. The conditions include both emissions of fugitive coal dust containing fine particulate matter, toxins, and heavy metals–in a West Oakland community already disproportionately impacted by pollution–as well as fire and explosion risks. In response, OBOT only offered unsubstantiated contentions, aspirational assurances, and contradictory claims that the Terminal plans were so uncertain that the City should not bother evaluating the health and safety impacts.

Weighing in favor of the ban on coal storage and handling were extensive testimony and a number of expert reports analyzing the Terminal's health and safety impacts. Recounting the voluminous evidence presented during the City's process, the City argues that its ban on coal handling and shipping was based on "more than enough substantial evidence" and that the court should look no further or consider the testimony of expert witnesses dredged up by OBOT after the City's hearing process came to an end.

Oakland's ban is not preempted by federal laws

The City also argues for dismissal of Tagami's claims that the City's action is preempted by three federal laws–the Interstate Commerce Commission Termination Act (ICCTA), the Hazardous Materials Transportation Act, and the Shipping Act of 1984. Federal preemption is based on the Supremacy Clause of the Constitution under which federal law takes precedence over state law and can deprive state and local governments from jurisdiction in areas that are deemed exclusively controlled by federal law.

ICCTA regulates the business and operation of the rail industry and contains an explicit preemption provision barring state and local governments from regulating "transportation by a rail carrier." OBOT argues that Oakland's refusal to allow Bowie to ship coal by rail to Oakland where it can be loaded onto ships bound for Asia constitutes impermissible regulation under this provision. The City responds that its ordinance was carefully crafted to regulate the "Owner or Operator of a Coal or Bulk Material Facility" and to prohibit "Storing and Handling" of coal at such a facility. It doesn't restrict what the Union Pacific and BNSF railroads or

any other rail carrier may transport through Oakland, which the City concedes would be beyond its powers.

The City also disputes the claim that the Hazardous Materials Transportation Act preempts the City's ban on storage and handling of coal. The act expressly preempts only those state and local laws that impose conflicting shipping requirements on substances designated as "hazardous material" by the Secretary of Transportation. The City argues that, because the act does not designate or regulate coal or petcoke as "hazardous," the preemption provision doesn't apply.

The Shipping Act of 1984 regulates agreements between ocean common carriers and marine terminal operators, with a focus on prohibiting certain discriminatory acts. Unlike ICCTA and the Hazardous Materials Transportation Act, the Shipping Act contains no express preemption clause. OBOT has advanced a novel claim that the City's ban on coal is discriminatory. The City argues that a health and safety regulation on storing and handling a potentially dangerous commodity that applies equally to all operators and carriers "simply gives no rise to an 'unreasonable' preference or prejudice."

Sierra Club/SF Baykeeper's Motion

The motion filed by Sierra Club and SF Baykeeper, defendant intervenors in the case, targets OBOT's third major claim–that the Oakland's ban on coal handling and storage violates the Commerce Clause of the United States Constitution.

The Commerce Clause simply grants Congress the power to regulate commerce between the states, but it has long been interpreted to imply that states may not unjustifiably discriminate against or burden the interstate flow of articles of commerce. This doctrine is referred to as the "dormant Commerce Clause." As with many constitutional doctrines, the courts have set up a series of tests to determine whether a given action by a state or local government violates the dormant Commerce Clause.

Oakland's ban does not violate Commerce Clause

The intervenors argue that the City's ban on coal storage and handling passes each of the tests and characterize OBOT's arguments as "a futile struggle to fit a square breach of contract peg into any of the round holes of dormant Commerce Clause jurisprudence."

The first test courts apply in dormant Commerce Clause cases is whether the Ordinance "directly regulates" or "discriminates against" interstate commerce. The intervenors explains that "direct regulation" means "application of a state statute to commerce that takes place wholly outside

of the State's borders" such that "the practical effect of the regulation is to control conduct beyond the boundaries of the State." Oakland's ban only applies to coal storage and handling activities taking place within the City of Oakland.

"[T]he ordinance does not have the effect of controlling conduct beyond the boundaries of the State. It does not regulate any product or conduct outside the city limits, let alone in other states. It does not regulate transportation of coal across state lines or even within Oakland; in fact, since it was enacted, coal trains have continued to run undisturbed through the City." - *Sierra Club/SF Baykeeper Brief*

The intervenors also challenge OBOT's claim that the city's ordinance "discriminates against" interstate commerce or favors in-state interests. Quoting the United States Supreme Court, they explain that "the modern law of … the dormant Commerce Clause is driven by concern about 'economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." The ordinance banning coal storage and handling protects no in-state competitors of out-of-state coal companies.

OBOT's discrimination argument hinges on an exception in Oakland's ban on coal storage and handling for non-commercial facilities using small amounts of coal or coke for "personal, scientific, recreational, or incidental use" and on-site manufacturing facilities that use coal or coke "as an integral component in a production process." OBOT complains that this exemption is a "blatant form of economic protectionism." Intervenors respond, "Oddly, OBOT's argument appears to be that the Ordinance benefits these local entities at the expense of OBOT–*another local entity*. But the Ordinance does not favor these entities at OBOT's expense (or anyone else's) because the undisputed evidence shows that these entities all *consume* coal or petcoke, and thus do not *compete* with marine terminal landlord OBOT or any out-of-state coal producers."

The motion then tackles OBOT's final dormant Commerce Clause argument, namely, that the City's ordinance "unduly burdens" interstate commerce by interfering with national uniformity in railroad operations. This claim is based on a separate prong of dormant Commerce Clause analysis that applies even if a state or local law does not "directly regulate" or "discriminate against" interstate commerce.

"The Ordinance has nothing to do with regulating railroads, and thus does not burden uniformity in national railroad operations," say the Intervenors. The Ordinance "provides only that an '*Owner of a Coal or Coke Material Facility*' may not '(4) Load, unload, transload, or transfer any Cole or Coke … or (5) Otherwise Store or Handle any Coal or Coke." The intervenors

say that "the Ordinance could not be clearer in exempting railroads from its ambit" pointing to a further provision in the Ordinance that explicitly states that the Ordinance does not regulate transportation of coal or coke by train or marine vessel through Oakland.

The intervenors cite undisputed evidence that 18 months after the Ordinance was enacted, coal trains that occasionally ran through Oakland continue to do so and that Bowie, which owns TLS and wants to export coal via the Terminal, continues to ship Utah coal through other California ports without interference from Oakland's ban on coal storage and handling.

"Because the Ordinance does not burden interstate commerce, and any theoretical burden is outweighed by the Ordinance's putative public health benefits, the Court should grant Defendants' motion for summary judgment on this claim."

If the judge fails to grant summary judgment to either side, the trial will begin in district court on January 16, 2018.

In addition to briefs filed by the parties, amicus briefs in support of the City were filed by State Attorney General Xavier Becerra on behalf of the State of California and Center for Biological Diversity (CBD) on behalf of the West Oakland Environmental Indicators Project, Asian Pacific Environmental Network, Communities for a Better Environment, No Coal in Oakland, and CBD.

The Pretrial Conference

If the judge decides that the case needs to go to trial, the hearing on summary judgment motions will be followed by a pretrial conference at which various matters related to the trial of the case will be discussed. On January 3, the parties submitted a Joint Pretrial Conference Statement laying out many of the details of how they expect the trial to proceed, including the list of witnesses who will appear.

The witnesses named are Phil Tagami, president and CEO of California Capital & Investment Group ("CCIG") which owns OBOT; Mark McClure, vice president of CCIG; Morgan Mordomi, project manager of CCIG; Claudia Cappio, assistant city administrator, City of Oakland (retired December 2017); Patrick Cashman, former project manager for the Oakland Army Base Project, City of Oakland; Doug Cole, project manager, City of Oakland; Sabrina Landreth, city administrator, City of Oakland; Darin Ranelletti, deputy director of planning, City of Oakland; Jerry Bridges, president and CEO, Terminal Logistics Solutions; Crescentia Brown, employee of Environmental Science Associates (consultant to the

City of Oakland); Victoria Evans, employee of ESA; James Wolff, chief financial officer of Bowie Resource Partners.

The parties intend to call the following expert witnesses: Lyle Chinkin, OBOT's expert on air quality; Dr. Andrew Maier, OBOT's expert on health impacts; Dr. Ali Rangwala, OBOT's expert on potential fire and explosion hazards; James Dillman, OBOT's expert on rail operations; David Buccolo, OBOT's expert on coal-related rail operations; Steven Sullivan, City's expert on rail operations; Dr. Maximillian Auffhammer, City's expert on economics, Dr. Carlos Fernandez-Pello, City's expert on fire and explosion risks; Dr. Andrew Gray, City's expert on air quality; Dr. Ranajit Sahu, City's expert on air quality; Dr. Nadia Moore, City's expert on health impacts. Dr. Zoe Chafe, epidemiology consultant to the City of Oakland; Edward Liebsch, HDR; and Marcel Veilleux. Cardno, will testify concerning reports they prepared.

The City intends to call John Monetta, project manager, City of Oakland, and Heather Klein, planner, City of Oakland, to authenticate the record before the City Council. OBOT opposes their appearance at trial because neither was named on initial disclosures early in the court proceedings.

All told, unless the judge limits the case, the parties estimate that the case will take 12 court days to try. Judge Chhabria's standing order states that trials generally take place on weekdays except Thursdays so the 12 court days would take 3 weeks. Conflicts with other items on the court's calendar might require the trial to take much longer to complete.

The City is represented by City Attorney Barbara J. Parker, Otis McGee, Jr., and Colin Troy Bowen of the Oakland City Attorney's office and outside counsel Kevin D. Siegel, Gregory R. Aker, Timothy A. Colvig, and Christopher M. Long of Burke, Williams & Sorensen LLP.

The Sierra Club and SF Baykeeper are represented by Colin O'Brien, Adrienne Bloch, Heather M. Lewis, and Marie E. Logan of Earthjustice and Sierra Club is represented by in-house counsel Jessica Yarnall Loarie and Joanne Spalding, Loyola law professor Daniel P. Selmi, and James M. Finberg and Stacey M. Layton of Altshuler Berzon LLP.

OBOT is represented by Robert P. Feldman, David Myre, Eliyahu Ness, Meredith M. Shaw, and Stephen Swedlow of Quinn Emanuel Urquhart & Sullivan, LLP.

Some Faces In Court Today

United States District Judge Vince Chhabria is the judge assigned to this case for all purposes—from hearing preliminary motions through trial. Judge Chhabria was appointed by President Obama and confirmed by the Senate in 2014.

Representing Sierra Club and San Francisco Baykeeper:

Colin O'Brien of Earthjustice was recognized as the 2013 "Conservationist of the Year" by the Northern Alaska Environmental Center for his work to protect air quality in the Arctic and in Fairbanks, Alaska.

Representing Sierra Club:

Jessica Yarnall Loarie of Sierra Club has played a leading role for over five years in legal battles fought by the Sierra Club in its "Beyond Coal" campaign.

Representing City of Oakland:

Kevin D. Siegel of Burke, Williams & Sorensen LLP is the principal outside counsel representing the City of Oakland. Prior to joining Burke, Siegel was a Deputy City Attorney for the City of Oakland.

Representing OBOT LLC:

Robert Feldman is a trial attorney at Quinn Emanuel, the second richest law firm in the United States with average partner earnings in excess of $4 million per year. Quinn Emanuel's attorneys not only proudly represent the interests of the 1%; they're in the 1%! Feldman advises Sen. Dianne Feinstein on federal judicial appointments.

Representing the People of Oakland:

Never stop fighting for a clean, healthy, economically viable and sustainable use for our publicly owned waterfront!

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