PLANNING COMMISSION Item # 3

AGENDA REPORT

July 18, 2019

PLANNING & BUILDING SERVICES DEPARTMENT

PREPARED BY: Lina Velasco, Director of Planning and Building Services
James Atencio, Assistant City Attorney

SUBJECT: COAL AND PETROLEUM COKE ORDINANCE (PLN19-159)

LOCATION: Citywide

CEQA: The proposed ordinance is not a Project and is therefore exempt from CEQA pursuant to CEQA Guidelines section 15378. Additionally, the proposed ordinance is exempt from CEQA pursuant to CEQA Guidelines sections 15307 (action to protect natural resources), 15308 (action to protect the environment), and/or 15061(b)(3) ("Common Sense" exemption where there is no reasonable possibility of a significant effect on the environment).

PROPOSAL:

Over the past year, the City has been receiving increased resident complaints about coal and petroleum coke dust. Storage and handling of coal and petroleum coke results in fugitive emissions of particulate matter that is hazardous to health. The City of Richmond has the authority under its police powers to prohibit new undesirable land uses and phase out existing undesirable land uses. Staff will present a draft ordinance that would prohibit new land uses and phase out existing land uses related to the storage and handling of coal and petroleum coke within the City of Richmond.

RECOMMENDED ACTIONS:

ADOPT a Resolution recommending to the City Council adoption of an ordinance (1) adding Article 15.04.615 to the Richmond Municipal Code ("RMC") to prohibit new land uses and phase out existing land uses related to the storage and handling of coal and petroleum coke, and (2) making conforming amendments to the RMC to ensure that it is internally consistent.

DISCUSSION:

Background

On December 18, 2018, Councilmember Martinez sponsored an item requesting staff to study a potential draft ordinance that would prohibit the storage and handling of coal and petroleum coke within the City, as well as proposes an amortization period for nonconforming uses that would result from the adoption of such an ordinance. The Council unanimously approved said direction to staff. In addition, on April 23, 2019, the Mayor sponsored an item requesting that the Planning Commission review certain proposed amendments to the Zoning Ordinance that would remove the storage and handling of coal and petroleum coke from the list of uses conditionally allowed in certain industrial zones. This item was unanimously approved by the Council. Therefore, staff is proposing a modified ordinance for the Planning Commission's consideration that addresses the two policy items adopted by the Council regarding coal and petroleum coke.

A few years ago, coal and petroleum coke exports through the City of Richmond began to dramatically increase. Reports in local media state that exports increased from 176,000 metric tons of coal and 322,000 metric tons of petroleum coke in 2013 to 698,000 tons of coal and 511,000 metric tons of petroleum coke in the first half of 2017.[1] Most, if not all, of these volumes appear to pass through one facility, the Levin-Richmond Terminal.[2] Nearby residents have complained of major increases in coal being stored and blowing off of this facility and local media reports show images of or describe "massive" piles of coal or petroleum coke exposed to the elements at the Levin-Richmond Terminal. *See* Julie Small, *Coal Train Dust Worries Richmond Residents* (June 22, 2015); Andria Borba, *Port of Richmond Sees a Spike in Coal Exports*. The Levin-Richmond Terminal's coal and petroleum coke storage and handling practices were also the subject of a lawsuit brought by San Francisco Baykeeper in 2012 under the Clean Water Act.

The City has received numerous complaints from nearby residents about coal dust from the Levin-Richmond Terminal, which they have found collecting on their homes and nearby streets. In 2018, Mayor Tom Butt, with assistance by Daniel Butt Law Office, conducted a study based on samples provided voluntarily by residents in the southwest part of Richmond. These samples were analyzed by the McCrone Associates, Inc., an analytical laboratory in Illinois with expertise in identifying particulate matter, including coal.[3] Of seven samples tested, five tested positive for coal.

Additional information regarding the health impacts of coal and petroleum coke is included in Appendix A (Attachment 2).

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[1] Janis Hashe, *While Oakland is Worried About Getting Coal, Richmond is Covered in It* (2018).
[2] *See* Julie Small, *Coal Train Dust Worries Richmond Residents* (June 22, 2015).
[3] McCrone Associates Inc. Examination of Samples from Richmond, California for Coal Dust. Re: McCrone Associates Project MA63996(November 9, 2018).

Current Local Regulations and Recent City Efforts

At present, the Richmond Municipal Code (RMC) allows some storage and handling of coal and petroleum coke. For example, the RMC defines "Chemical, Mineral, and Explosives Storage" as the "[s]torage and handling of hazardous materials including but not limited to: bottled gas, chemicals, minerals and ores, petroleum or petroleum-based fuels, fireworks, and explosives." RMC § 15.04.104.020. Chemical, Mineral, and Explosives Storage is permitted after review and approval of a conditional use permit in the Industrial, Light (IL); General Industrial (IG); and Water-Related Industrial (IW) districts of the City. RMC § 15.04.204.020.

In 2015, the Richmond City Council adopted Resolution No. 48-15, which adopted a City policy to prohibit using city-owned property for the storage or export of coal or petroleum coke. This resolution also included a non-binding statement that the Council opposes the transportation of coal and petroleum coke through densely populated areas. The City Council also adopted a related resolution requesting that the Bay Area Air Quality Management District ("BAAQMD") regulate the storage and handling of coal and petroleum coke.

Additional information regarding the City's ability to regulate coal and petroleum coke handling and storage through its police powers and similar actions taken by other cities is included in Appendix A.

Summary of Proposed Ordinance

The proposed ordinance establishes a prospective prohibition on the storage and handling of coal and petroleum coke throughout the City of Richmond, with certain exceptions. The ordinance also phases out existing allowed uses of land involving the storage and handling of coal and/or petroleum coke. "Storage or Handling" is defined in the ordinance as "to allow or maintain any pile, including without limitation covered and uncovered piles, piles located above ground, underground, or within containers, or to load, unload, stockpile, or otherwise handle and/or manage, temporarily or permanently, coal and/or petroleum coke." Any land use that fails to comply with the prohibition or phase-out provisions is declared to be an unlawful nuisance subject to the abatement procedures in the RMC.

Enacting these provisions is within the City of Richmond's authority under its police power. The provisions are reasonably related to the legitimate legislative purpose of protecting the public from the hazards of fugitive dust emissions from coal and petroleum coke. Prohibiting and phasing out land uses involving the storage and handling of coal and/or petroleum coke will decrease the opportunities for the public to be exposed to particulate emissions from coal and/or petroleum coke piles.

To comply with legal restrictions on the City's ability to regulate interstate commerce, the ordinance does not regulate the transportation of coal and/or petroleum coke,

including through the City of Richmond or to or from a facility where coal or petroleum coke is stored or handled.

The ordinance also contains an express exemption from its prohibitions for certain non-commercial uses in which persons store or handle small amounts of coal or petroleum coke. The exempt non-commercial uses are: residential, educational, scientific, recreational, religious, or cultural uses. These uses are deemed to be small enough that they are not likely to contribute to public health problems.

For non-exempt facilities that lawfully store or handle coal and/or petroleum coke prior to the effective date of the ordinance, otherwise known as nonconforming uses, the ordinance establishes an amortization period of three years during which their storage and handling activities may continue. Such facilities are prohibited, however, from expanding the extent or scope of their coal and/or petroleum storage and handling activities during that time. An amortization period of three years was selected because three years provides a sufficient amount of time for the owners of nonconforming uses to recover investments specific to coal and/or petroleum coke storage and handling and to transition their operations to other commodities.

At the end of the three-year amortization period, nonconforming uses must either discontinue their nonconforming activities or apply for an extension of the amortization period. The availability of extensions is intended to ensure that (1) any owner of nonconforming uses who can demonstrate that three years is an insufficient period of time to recover their investments have an appropriate opportunity to do just that, and (2) the City is striking the proper balance between private property rights and the City's interest in protecting the public from the health hazards of coal and petroleum coke storage and handling.

The Planning Commission would evaluate applications requesting extensions after conducting a duly noticed public hearing and considering all documentary and oral evidence and testimony submitted prior to the end of the hearing. An amortization analysis is required to be prepared by an expert selected by the City, at the applicant's cost. The Planning Commission is directed to grant an extension of the amortization period if it finds, based on substantial evidence, that an extension is necessary to (a) prevent an unconstitutional taking of property without compensation or (b) to avoid a violation of state or federal law. In reaching its decision on an application for an extension, the Planning Commission shall consider a variety of factors, including, where applicable:

- The applicant's costs of acquiring the property and his or her reasonable investment-backed expectations at the time the property was acquired;
- The present actual or depreciated value of the affected property and improvements with and without the nonconforming land use;
- The total length of time the nonconforming land use has existed and the remaining useful life of the nonconforming land use;

- The applicant's investments in the nonconforming land use and whether and to what extent the applicant will have recouped those investments before the conclusion of the amortization period;
- The salvage value of any improvements that may be used for purposes other than the nonconforming land use;
- The remaining value and allowed uses of the property after discontinuing the nonconforming land use;
- Whether the nonconforming land use interferes with the use and enjoyment of land of nearby property owners or residents, or interferes with or threatens the public health, safety, and welfare of the community;
- The extent to which the nonconforming land use on the property is incompatible with surrounding land uses and properties; and
- Any other factor the Planning Commission reasonably determines is related to determining whether the investment in the nonconforming land use has been recovered.

The Planning Commission's decision regarding an extension of the amortization period may be appealed to the City Council.

Finally, in the event that a property owner—other than an owner of a nonconforming use—contends that the ordinance affects an unconstitutional taking of property without compensation when applied to his or her property, the ordinance establishes a process for requesting exceptions. If the Planning Commission finds, based on substantial evidence, that application of the ordinance would constitute a taking of property, and that the requested exception would allow continued land uses to the minimum extent necessary to avoid such a taking, the Planning Commission shall grant an exception to any provision of the ordinance. The ordinance further directs the Planning Commission that the ordinance shall not apply to the extent that its application violates the constitution or laws of the United States or the State of California.

Proposed Ordinance's Relation to Known Affected Properties

The City is currently aware of one property that currently stores and handles coal and petroleum coke and would likely become a nonconforming use if the ordinance is adopted. This property is the Richmond-Levin Terminal. The Richmond-Levin Terminal has long handled numerous bulk commodities other than coal and only recently commenced handling large amounts of coal and petroleum coke. Accordingly, it is neither the purpose nor the anticipated effect of the ordinance to shut this facility down. Rather, staff has proposed the three-year amortization period to ensure that the facility has ample opportunity to replace the quantities of coal and petroleum coke that it has recently begun to handle with other bulk commodities. City staff has reached out to the owners of the Richmond-Levin Terminal in connection with the proposed ordinance, and staff toured the facility.

Based on (1) the nature of the initial investment in the property, (2) the considerable amount of time that the property owners have had to recoup their initial investment, and

(3) the suitability of the property to profitably store and handle bulk commodities other than coal and/or petroleum coke, City staff believe that the three-year amortization period provided in the ordinance will be appropriate. Further, the terminal, like any other nonconforming use under the ordinance, will be able to apply for an extension to allow its use to continue for longer than three years if it believes that the amortization period is insufficient to allow it to recoup its coal- and petroleum-coke-specific investments and transition to other commodities.

Other Amendments for Consistency

The ordinance will also modify the definition of "Chemical, Mineral, and Explosives Storage" to expressly remove coal and petroleum coke from the definition.

GENERAL PLAN CONSISTENCY

The proposed ordinance is consistent with and supports the goals outlined in the Health and Wellness Element of the City's General Plan. For example, the ordinance supports Goal HW9: Improved Environmental Quality. Under this goal, the City will "[c]ontinue to support projects that improve the quality of built and natural environments to support a thriving community and to reduce disparate health and environmental impacts, especially to low-income and disadvantaged communities. Clean air, water and soil, and a healthy eco-system are critical for human development and contribute to reduced toxic exposure, incidence of disease and environmental degradation." The proposed ordinance supports this goal by reducing particulate matter emissions and toxic exposure, thus promoting clean air and reducing the pollution burdens borne disproportionately by individuals living and working near certain industrial areas.

ENVIRONMENTAL REVIEW:

The proposed ordinance is exempt from the California Environmental Quality Act ("CEQA"). First, it is not a Project under CEQA and is therefore exempt pursuant to CEQA Guidelines section 15378. Second, it is exempt from CEQA pursuant to CEQA Guidelines sections 15307 (action to protect natural resources), 15308 (action to protect the environment), and/or 15061(b)(3) ("Common Sense" exemption where there is no reasonable possibility of a significant effect on the environment).

CONCLUSION:

Staff is recommending that the Planning Commission adopt draft Resolution No. 19-29 recommending that the City Council adopt the proposed ordinance (1) adding new Article 15.04.615 to the Richmond Municipal Code ("RMC") prohibiting the storage and handling of coal and petroleum coke as a land use, (2) making conforming amendments to the RMC to ensure that it is internally consistent, and (3) establish a three year amortization period to phase out any existing uses that would become nonconforming uses as a result of this ordinance.

Attachments:

1. Draft Resolution
   Exhibit A- Draft Coal and Petroleum Coke Regulations
2. Appendix A – Additional Information/Background

cc: Richmond-Levin Terminal
Richmond Neighborhood Coordinating Council
Council of Industries
Sierra Club

PUBLIC NOTICE AND APPEAL PERIOD:

Public notification consisted of publishing a legal notice in the local newspaper. Please be advised that this is a recommendation item and cannot be appealed.

ATTACHMENT 1

RESOLUTION NO. 19-29

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF RICHMOND RECOMMENDING THAT THE CITY COUNCIL OF THE CITY OF RICHMOND ADD ARTICLE 15.04.615 PROHIBITION OF THE STORAGE AND HANDLING OF COAL AND PETROLEUM COKE, AND AMEND SECTION 15.04.104.010 WAREHOUSING, STORAGE, AND DISTRIBUTION DEFINITION OF THE RICHMOND MUNICIPAL CODE

WHEREAS, some communities in the City of Richmond are disadvantaged and disproportionately bear the burdens of health-related impacts caused by sources of pollution emitted by various industrial uses and other activities. The California Environmental Protection Agency has identified several census tracts within the City of Richmond as disadvantaged communities disproportionately burdened by and vulnerable to multiple sources of pollution; and

WHEREAS, uncovered coal and petroleum coke piles emit particulate matter (PM10) and fine particulate matter (PM2.5 or smaller) when exposed to wind. Fugitive particulate emissions can also occur when coal or petroleum coke is unloaded from trucks, ships, railroad cars or other containers to storage piles, or when coal or petroleum coke is transferred from storage piles to trucks, ships, railroad cars or other containers. Coal contains toxic heavy metals, including mercury, arsenic, and lead; and petroleum coke contains heavy metals and high levels of sulfur. Exposure to these toxic heavy metals is linked to cancer and birth defects; and

WHEREAS, coal is highly combustible, which poses risks to the health and safety of persons residing, working, or playing nearby, as well as to public safety personnel who would respond to coal fires. Coal fires at storage piles and shipping facilities are difficult to control, requiring fire personnel with specialized equipment and training. Toxic air pollutants released by coal fires would be similar to the toxic pollutants released by coal-fired power plants, but without treatment by emission control systems. Emissions from coal fires include fine particulate matter and metals, including mercury. Persons in close proximity to coal fires could experience both acute and chronic health impacts; and

WHEREAS, exposure to fine particulate pollution has been linked to increased deaths and illnesses due to cardiovascular and respiratory conditions. The World Health Organization and United States Environmental Protection Agency have linked particulate pollution, including from coal and petroleum coke, to significant health problems; and

WHEREAS, storing, loading, unloading, stockpiling, and/or otherwise handling coal and/or petroleum coke, temporarily or permanently, in the City of Richmond, is associated with and/or causes health and safety impacts in humans, including without limitation due to fugitive coal dust, which the American Lung Association considers to be a source of particulate matter that is dangerous to breathe, which the World Health

Organization describes (including silica and asbestos) as responsible for most occupational diseases due to airborne particulates, and which results in dangerous health and safety conditions to the nearby population, as well as to workers and visitors in and near such facilities; and

WHEREAS, storing and/or handling coal and/or petroleum coke can negatively impact the environment, including because coal and petroleum coke dust and leachates can pollute waterways, often with long-lasting impacts, and impact and contaminate sensitive habitat within the City; and

WHEREAS, a 2017 study by the National Bureau of Economic Research has estimated that, in addition to the social costs of particulate pollution from burning coal, storage and handling creates PM2.5 pollution that generates additional local health costs of about $183 per ton of coal stored; and

WHEREAS, city staff has received complaints from members of the community regarding fugitive coal dust from existing facilities that store and handle coal; and

WHEREAS, the Richmond City Council has already banned coal from City-owned marine terminal facilities, but there are currently no local regulations prohibiting coal or petroleum coke storage and handling at privately-owned facilities; and

WHEREAS, the Richmond Planning Commission finds that the storage and handling of coal and petroleum coke is not a desired land use; and

WHEREAS, existing regulations are inadequate to address the health and environmental problems resulting from coal or petroleum coke storage and handling; and

WHEREAS, Article XI, Section 5 of the California Constitution provides that the City, as a home rule charter city, has the power to make and enforce all ordinances and regulations with respect to municipal affairs, and Article XI, Section 7, empowers the City to enact measures that protect and promote the health, safety, and/or welfare of its citizens; and

WHEREAS, Article II, Section 1, Paragraph 6 of the Charter of the City of Richmond states that the City shall have and exercise police powers, make all necessary police and sanitary regulations, and adopt ordinances and prescribe penalties for the violation thereof; and

WHEREAS, on July 18, 2019, the Planning Commission held a duly and properly noticed public hearing to consider a recommendation to the City Council on the proposed amendments to Chapter 15.04 of the Richmond Municipal Code, incorporated herein by reference; and

WHEREAS, the Planning Commission has considered the agenda report, all public comments, and the proposed amendments to Chapter 15.04 as set forth in Exhibit A of this Resolution and the applicable provisions of the Richmond Municipal Code ("the Record").

NOW THEREFORE BE IT RESOLVED, that the Planning Commission hereby recommends that the City Council adopt an ordinance adding Article 15.04.615 and amending Section 15.04.104.010 (Amendments to Chapter 15.04) of the Richmond Municipal Code prohibiting the storage and handling of coal and petroleum coke, based on the following findings required per RMC Section 15.04.814.050:

A. The proposed amendment is consistent with the General Plan.

Supporting Statement of Fact: *Criteria Satisfied.* The proposed ordinance is consistent with and supports the goals outlined in the Health and Wellness Element of the City's General Plan. For example, the ordinance supports Goal HW9: Improved Environmental Quality. Under this goal, the City shall "[c]ontinue to support projects that improve the quality of built and natural environments to support a thriving community and to reduce disparate health and environmental impacts, especially to low-income and disadvantaged communities. Clean air, water and soil, and a healthy eco-system are critical for human development and contribute to reduced toxic exposure, incidence of disease and environmental degradation." The proposed ordinance supports this goal by reducing particulate matter emissions and toxic exposure, thus promoting clean air and reducing the pollution burdens borne disproportionately by individuals living and working near certain industrial areas.

B. The proposed amendment is necessary for public health, safety, and general welfare or will be of benefit to the public.

Supporting Statement of Fact: *Criteria Satisfied.* Particulate matter, including from coal and petroleum coke, has long been linked to significant adverse health effects in adults and children.[1] Particles that are PM_{10} or smaller are of particular concern, because particles of that size may enter the lungs.[2] Numerous governmental and public health organizations—including the World Health Organization and the U.S. Environmental Protection Agency—have concluded that coal- and petroleum-coke-related particulate pollution can cause serious respiratory conditions.[3] In studying the health effects of particulates linked to coal and petroleum coke, the South Coast Air Quality Management District ("SCAQMD") staff found a relationship between daily levels of PM_{10} and acute respiratory hospital admissions for children. Further, SCAMQD staff found that "each 10 micrograms per cubic meter increase of PM_{10} is correlated with a 2-3% increase in asthma."[4] Particulate pollution from coal and petroleum coke can also have significant cardiovascular health impacts. The American Heart Association issued a statement in 2010 concluding that exposure to PM2.5 or smaller over a few weeks could increase the risks of death from cardiovascular disease. Exposure of longer duration increases the risk more significantly, and can reduce life expectancies by up to

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[1] Joel Schwartz, et al., Abstract: *Health effects of outdoor air pollution* (1996).
[2] EPA, *Health Effects of Petroleum Coke.*
[3] Tim Driscoll et al., World Health Organization, *Occupational airborne particulates* (2004); U.S. EPA, *Health and Environmental Effects of Particulate Matter.*
[4] SCAQMD, Staff Report for Proposed Amended Rule 1158 – Storage, Handling and Transport of Coke, Coal and Sulfur (1999).

several years.[5] Studies have also found that particulate pollution, including pollution related to coal, has led to increased mortality rates and high environmental and health costs. In one study, researchers concluded that a 10% increase in PM2.5 pollution led to a 1.1% increase in average adult mortality rates and a 6.6% increase in average infant mortality rates.[6] That study estimated, based on those figures, that the environmental costs of storing one ton of coal was $183—more than four times the average price a power plant paid for coal at the time of the study. Coal and petroleum coke exports through the City of Richmond have dramatically increased in the past few years. Most, if not all, of this exports pass through the Levin-Richmond Terminal. The City has received numerous complaints from residents that live near the Levin-Richmond Terminal about coal dust collecting on homes and nearby streets. The proposed ordinance is necessary for public health and safety as it will reduce particulate matter emissions and toxic exposure from coal and petroleum coke storage, thus promoting clean air and reducing the pollution burdens borne disproportionately by individuals living and working near certain industrial areas.

C. The proposed amendment has been reviewed in compliance with the requirements of the California Environmental Quality Act.

Supporting Statement of Fact: *Criteria Satisfied.* The proposed ordinance is exempt from the California Environmental Quality Act ("CEQA"). First, it is not a Project under CEQA and is therefore exempt pursuant to CEQA Guidelines section 15378. Second, it is exempt from CEQA pursuant to CEQA Guidelines sections 15307 (action to protect natural resources), 15308 (action to protect the environment), and/or 15061(b)(3) ("Common Sense" exemption where there is no reasonable possibility of a significant effect on the environment).

D. For a change to the Zoning Maps, that the subject property is suitable for the uses permitted in the proposed zone in terms of access, size of parcel, relationship to similar or related uses, and other relevant considerations, and that the proposed change of zoning district is not detrimental to the use of adjacent properties.

Supporting Statement of Fact: *Criteria Satisfied.* The proposed amendments to not involve a zoning map change. The Zoning Amendments are only changes to the Zoning Ordinance text.

NOW THEREFORE BE IT RESOLVED, that the Planning Commission hereby recommends to the City Council adoption of an ordinance adding Article 15.04.615 and amending Section 15.04.104.010 of the Richmond Municipal Code, attached to this Resolution as Exhibit A, prohibiting the storage and handling of coal and petroleum coke.

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[5] Robert Brook, et al., *Particulate Matter Air Pollution and Cardiovascular Disease: An Update to the Scientific Statement from the American Heart Association* (2010).
[6] Akshaya Jha & Nicholas Muller.

I HEREBY CERTIFY that the foregoing Resolution was adopted by the Planning Commission of the City of Richmond at a regular meeting held on July 18, 2019.

Ayes:

Noes:

Absent:

Abstain:

_____

Andrew Butt
Planning Commission Vice-Chair

Approved as to Form:

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James Atencio
Assistant City Attorney

Attachment: Exhibit A: Draft Article 15.04.615 and amended Section 15.04.104.010

Article 15.04.615 PROHIBITION OF THE STORAGE AND HANDLING OF COAL AND PETROLEUM COKE

15.04.615.010 Purpose

A. This Article is intended to protect and promote the health, safety, and welfare of the City's citizens, visitors, and workers by reducing the release of pollutants into the environment as a result of coal and petroleum coke storage and handling. This Article is also intended to reduce the public health, safety, and welfare impacts (including, without limitation, adverse impacts to property values, aesthetics, and economic interests) caused by the storage and handling of coal and petroleum coke.

B. This Article bans the establishment and/or expansion of storage and handling of coal and/or petroleum coke throughout the City of Richmond, with certain exceptions. The Article also phases out existing allowed uses of land involving the storage and handling of coal and petroleum coke, by providing a three-year amortization period for such existing allowed uses to transition to other lawful uses and materials. This amortization period is intended to strike a proper balance between protecting the public from the health hazards of coal and petroleum coke storage and handling, while also protecting existing jobs and providing sufficient time for businesses to transition.

C. This Article is not intended to, and shall not be interpreted to regulate or applied to prohibit the transportation of coal and/or petroleum coke, for example, by train or marine vessel, including without limitation through the City of Richmond or to or from a coal or petroleum coke storage and handling facility.

15.04.615.020 Definitions

As used in this Article, the following terms have the following meanings:

A. "Coal" means a solid, brittle, carbonaceous rock classified as anthracite, bituminous, subbituminous, or lignite by the American Society for Testing and Materials ("ASTM") Designation D388-77.

B. "Petroleum Coke" means a solid carbonaceous residue produced from a coker after cracking and distillation from petroleum refining operations, including such residues produced by petroleum upgraders in addition to petroleum refining.

C. "Coal or Petroleum Coke Storage and Handling Facility" means an existing or proposed site or facility, including all contiguous land, structures, other appurtenances, and improvements thereon, or any part thereof, where coal or petroleum coke is or may be stored or handled.

D. "Effective Date" means the date that Ordinance No. ____-__, adding Article 15.04.615 to the Richmond Municipal Code, took effect.

E. "Owner or Operator" means any person who has legal title to any coal or petroleum coke storage and handling facility; who has charge, care, or control of any coal or petroleum coke storage and handling facility; who is in possession of any coal or petroleum coke storage and handling facility or any part thereof; and/or who is entitled to control or direct the management of any coal or petroleum coke storage and handling facility.

F. "Store or Handle, or Storing or Handling, or Storage or Handling," means to allow or maintain any pile, including without limitation covered and uncovered piles, piles located above ground, underground, or within containers, or to load, unload, stockpile, or otherwise handle and/or manage, temporarily or permanently, coal and/or petroleum coke.

15.04.615.030 Prohibition on storage and/or handling of coal or petroleum coke

The storage and handling of coal and petroleum coke at a coal or petroleum coke storage and handling facility is prohibited in all zoning districts.

15.04.615.040 Exemptions

The following non-commercial uses are exempt from the provisions of this Article 15.04.615: residential, educational, scientific, recreational, religious, or cultural uses in which persons store or handle small amounts of coal or petroleum coke.

15.04.615.050 Amortization Period for Nonconforming Uses

A. Notwithstanding any provision in this Code to the contrary, this Section shall apply to all lawful existing land uses that do not conform with the requirements of Section 15.04.615.030 of this Code as of the effective date.

B. As used in this Section, "nonconforming land use" means any coal or petroleum coke storage and handling facility in existence prior to the effective date.

C. Except as otherwise provided in this Section, all nonconforming land uses shall be discontinued within three years after the effective date. The three-year period after the effective date shall be referred to as the "amortization period."

D. Nonconforming land uses shall not increase the amount of coal or petroleum coke stored or handled in a calendar year beyond the average amount of coal or petroleum coke stored or handled annually at the coal or petroleum coke storage and handling facility in the three years prior to the effective date. Nonconforming land uses shall not expand the footprint of coal or petroleum coke storage or handling activities at the coal or petroleum coke storage and handling facility.

E. Within two months of the effective date, the Zoning Administrator shall use reasonable efforts to identify and provide notice to all owners or operators of any

coal or petroleum coke storage and handling facility informing them that they must do either of the following: (a) discontinue any nonconforming land use before the conclusion of the amortization period; or (b) apply for an extension of the amortization period pursuant to sub-section F of this Section. Failure to receive notice from the Zoning Administrator shall not excuse an owner or operator from compliance with the provisions of this Section.

F. Any affected owner or operator of a nonconforming land use may apply to the Planning Commission for an extension of the amortization period on a form provided by the Director pursuant to Section 15.04.803.020. The affected owner or operator shall pay any applicable fees established pursuant to that Section. Applications for an extension of the amortization period shall be submitted no later than 12 months prior to the end of the amortization period. The Planning Commission shall conduct a duly noticed public hearing to consider the application for extension of the amortization period within a reasonable time after the application has been deemed complete by the Zoning Administrator.

1. "Limited Notice (Type B)" shall be provided pursuant to Section 15.04.803.070 of this Code not less than 24 calendar days prior to the date of the hearing.

2. In deciding whether to extend the amortization period, the Planning Commission shall consider all documentary and oral evidence and testimony submitted prior to the conclusion of the hearing. As part of the application, an amortization analysis shall be prepared, at the applicant's expense, by an expert retained by the City, prior to Planning Commission consideration.

3. The Planning Commission shall grant an extension of the amortization period if it finds, based on substantial evidence, that such extension is necessary to prevent an unconstitutional taking of property without compensation or to avoid a violation of state or federal law. Any extension so granted shall be the minimum necessary to prevent such impairment or violation. In no event shall the Planning Commission grant any extension if it finds that continuing the nonconforming land use would constitute a public nuisance under Civil Code sections 3479 and 3480.

4. The Planning Commission's decision shall be based upon the following factors, where applicable:
   a. The cost to the applicant of acquiring the affected property and the applicant's reasonable investment-backed expectations at the time the property was acquired;
   b. The present actual or depreciated value of the affected property and improvements with and without the nonconforming land use;
   c. The total length of time the nonconforming land use has existed and the remaining useful life of the nonconforming land use;

d. The applicant's investments in the nonconforming land use and whether and to what extent the applicant will have recouped those investments before the conclusion of the amortization period;
e. The salvage value of any improvements that may be used for purposes other than the nonconforming land use;
f. The remaining value and allowed uses of the property after discontinuing the nonconforming land use;
g. Whether the nonconforming land use interferes with the use and enjoyment of land of nearby property owners or residents, or interferes with or threatens the public health, safety, and welfare of the community;
h. The extent to which the nonconforming land use on the property is incompatible with surrounding uses and properties; and
i. Any other factor the Planning Commission reasonably determines is related to determining whether the investment in the nonconforming land use has been recovered.

5. The owner or operator requesting the extension shall have the burden of demonstrating that it is entitled to an extension under sub-section F above. The Planning Commission's determination under this sub-section may be appealed to the City Council in the same manner as prescribed in Section 15.04.803.140 of this Code.

K. Nothing in this Section is intended to affect or restrict the City's authority to immediately terminate, discontinue, or abate any land uses found to be a nuisance, or that are otherwise operating unlawfully, including a nonconforming land use. This Article does not create or confer any vested rights.

15.04.615.060 Violations; Declaration of a Nuisance; Abatement

Any land use that fails to comply with or violates any provision of this Article is hereby declared to be an unlawful nuisance. Any land use declared to be a nuisance pursuant to this Section may be subject to the abatement procedures established in Section 15.04.815.040 and Chapter 9.22 of this Code.

15.04.615.070 Exceptions; Procedures

A. The provisions of this Article shall not be applicable to the extent, but only to the extent, that they would violate the constitution or laws of the United States or of the State of California.

B. In the event a property owner contends that the application of this Article effects an unconstitutional taking of property without compensation, the property owner may request, and the Planning Commission shall grant, an exception to application of any provision of the Article if the Planning Commission finds, based on substantial evidence, that both (1) the application of any aspect of the Article would constitute an unconstitutional taking of property, and (2) the exception will

allow continued land uses only to the minimum extent necessary to avoid such a taking; provided, however, that in the case of nonconforming uses, the procedures set forth in Section 15.04.615.050.F shall govern. The property owner shall have the burden of demonstrating that it is entitled to an exception under this sub-section. The Planning Commission's determination under this sub-section may be appealed to the City Council in the same manner as prescribed in Section 15.04.803.140 of this Code.

15.04.615.080 Non-applicability to Transportation of Coal and/or Petroleum Coke

Notwithstanding anything to the contrary contained in this Article, this Article is not intended to and shall not be interpreted to regulate the transportation of coal and/or petroleum coke, for example, by train or marine vessel, including without limitation through the City of Richmond or to or from a coal or petroleum coke storage and handling facility.

15.04.615.090 Conflicting Provisions

Where a conflict exists between the requirements in this Article and applicable requirements contained in other provisions of this Code, the applicable requirements of this Article shall prevail.

Conforming Amendments to Richmond Municipal Code

Section 15.04.104.010 of the Richmond Municipal Code is hereby amended, in pertinent part, as follows (added text shown in underline):

Chemical, Mineral, and Explosives Storage. Storage and handling of hazardous materials including but not limited to: bottled gas, chemicals, minerals and ores, petroleum or petroleum-based fuels, fireworks, and explosives. Notwithstanding the foregoing sentence, the storage and handling of coal and petroleum coke is prohibited in accordance with Article 15.04.615 to the Richmond Municipal Code, except as expressly provided therein.

ATTACHMENT 2

APPENDIX A

Health Effects of Coal and Petroleum Coke

Coal is a solid, brittle, carbonaceous rock that is often burned for fuel. Due to its brittle nature, coal fractures when it is moved or handled, creating large amounts of coal dust. The dust may be emitted even from stationary piles of coal, becoming dislodged from the piles by air movement. Coal dust includes small particles that may become suspended in the air. This particulate matter is called PM_{10} or $PM_{2.5}$, depending on its size (smaller than 10 microns or 2.5 microns in diameter, respectively—many times smaller than a single strand of human hair).[1] Coal dust contains many of the elements in coal itself, including toxic heavy metals such as mercury, arsenic, and lead.[2]

Petroleum coke (also known as "petcoke") is a solid carbonaceous residue produced from a coker as a result of petroleum refining operations. Like open piles of coal, open piles of petroleum coke generate fugitive dust emissions containing particulate matter, including PM_{10}.[3] Petroleum coke also contains carcinogenic heavy metals, including arsenic, mercury, lead, and vanadium.[4]

Particulate matter, including from coal and petroleum coke, has long been linked to significant adverse health outcomes in adults and children.[5] Particles that are PM_{10} or smaller are of particular concern, because particles of that size may enter the lungs.[6]

Numerous governmental and public health organizations—including the World Health Organization and the U.S. Environmental Protection Agency—have concluded that coal- and petroleum-coke-related particulate pollution can cause serious respiratory conditions.[7] In studying the health effects of particulates linked to coal and petroleum coke, the South Coast Air Quality Management District ("SCAQMD") staff found a relationship between daily levels of PM_{10} and acute respiratory hospital admissions for

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[1] Zoe Chafe, *Analysis of Health Impacts and Safety Risks and Other Issues/Concerns Related to the Transport, Handling, Transloading, and Storage of Coal and/or Petroleum Coke (Petcoke) in Oakland and at the Proposed Oakland Bulk & Oversized Terminal* (June 22, 2016); Akshaya Jha & Nicholas Muller, *Handle With Care: The Local Air Pollution Costs of Coal Storage* (May 2017).

[2] Viney Aneja et al., *Characterization of particulate matter (PM_{10}) related to surface coal mining operations in Appalachia* (2012).

[3] US EPA, *Health Effects of Petroleum Coke.*

[4] Janis Hashe, *While Oakland is Worried About Getting Coal, Richmond is Covered in It* (2018).

[5] Joel Schwartz, et al., Abstract: *Health effects of outdoor air pollution* (1996).

[6] EPA, *Health Effects of Petroleum Coke.*

[7] Tim Driscoll et al., World Health Organization, *Occupational airborne particulates* (2004); U.S. EPA, *Health and Environmental Effects of Particulate Matter.*

children. Further, SCAMQD staff found that "each 10 micrograms per cubic meter increase of PM_{10} is correlated with a 2-3% increase in asthma."[8]

Particulate pollution from coal and petroleum coke can also have significant cardiovascular health impacts. The American Heart Association issued a statement in 2010 concluding that exposure to PM2.5 or smaller over a few weeks could increase the risks of death from cardiovascular disease. Exposure of longer duration increases the risk more significantly, and can reduce life expectancies by up to several years.[9]

Studies have also found that particulate pollution, including pollution related to coal, has led to increased mortality rates and high environmental and health costs. In one study, researchers concluded that a 10% increase in PM2.5 pollution led to a 1.1% increase in average adult mortality rates and a 6.6% increase in average infant mortality rates.[10] That study estimated, based on those figures, that the environmental costs of storing one ton of coal was $183—more than four times the average price a power plant paid for coal at the time of the study.

The City of Richmond's industrial heritage means that it has been uniquely and disproportionately burdened by air pollution impacts, including from the storage and handling of coal and petroleum coke. Additionally, some communities in Richmond are economically disadvantaged. The California Environmental Protection Agency has identified various census tracts within the City of Richmond as disadvantaged communities disproportionately burdened by and vulnerable to multiple sources of pollution.[11]

Coal storage also represents a fire safety hazard. Coal is highly combustible, and can begin burning without a separate ignition source, particularly when it is stored in a pile.[12] Coal fires at storage piles are more difficult for public safety personnel to control, and suppressing them requires special techniques and preparations. Coal fires can release toxic air pollutants, including particulate matter and heavy metals.

Legal Framework

The California Constitution gives cities the power to "make and enforce within [their] limits all local, police, sanitary and other ordinances and regulations not in conflict with

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[8] SCAQMD, Staff Report for Proposed Amended Rule 1158 – Storage, Handling and Transport of Coke, Coal and Sulfur (1999).
[9] Robert Brook, et al., *Particulate Matter Air Pollution and Cardiovascular Disease: An Update to the Scientific Statement from the American Heart Association* (2010).
[10] Akshaya Jha & Nicholas Muller.
[11] *See* CalEnviro Screen 3.0 Map. Available at https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30.
[12] OSHA, *Firefighting Precautions at Facilities with Combustible Dust* (2013).

general laws." Cal. Const., art. XI, § 7. This power, known as the police power, is broad. With its exercise, cities are free to regulate or ban prospective unwanted uses of land, provided that the regulations are rationally related to a legitimate governmental interest. *See Terminal Plaza Corp. v. City & County of San Francisco* (1986) 177 Cal.App.3d 892, 908; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 711 ("'[T]he outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis.'") (quoting *Jackson Court Condominiums v. City of New Orleans* (5th Cir. 1989) 874 F.2d 1070, 1077).

As a general rule, zoning regulations may not compel *immediate* removal of a lawful existing business or use. *Hansen Bros. Enters., Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 552. Thus, subject to certain exceptions, property owners have a vested right to continue lawfully existing uses despite new zoning regulations prohibiting those uses. These uses are referred to as nonconforming uses.

Where a nonconforming use is undesirable, a city may require its elimination provided the owner is given an opportunity to come into compliance during a reasonable amortization period commensurate with the investment involved in the nonconforming use. *National Advertising Co. v. County of Monterey* (1970) 1 Cal.3d 875, 877-78. Courts have long recognized amortization periods—designated periods of time in which a nonconforming use is allowed to continue so that the owner may recover the value of his or her investment in the use—as valid tools to balance the competing interests of a landowner's property rights and a local agency's need to implement zoning changes to benefit public health and welfare. *Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 460; *see also Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1402 (concluding that an amortization period is relevant to the analysis of whether property has been "taken" without just compensation); *Naegele Outdoor Advertising, Inc. v. City of Durham* (4th Cir. 1988) 844 F.2d 172, 176 (same).

Summary of Litigation related to Oakland's Coal Ban Ordinance

Staff is aware that, in 2018, a federal district court invalidated the City of Oakland's resolution attempting to apply its coal ban ordinance to the Oakland Bulk & Oversized Terminal, LLC ("OBOT") proposed bulk cargo shipping facility.

In staff's view, and based on input from the City Attorney's office, the Oakland case does not raise any grounds for concern about the legality of the proposed Ordinance here. While there are some similarities between the ordinance adopted by the City of Oakland and the draft amendments, the Oakland court did not invalidate Oakland's coal ban ordinance or even address the legality of that ordinance.

Instead, the Oakland case turned solely on the fact that the City of Oakland had previously entered into a development agreement allowing OBOT to build and operate a

bulk cargo shipping terminal. The development agreement froze in place the regulations and ordinances existing at the time the agreement was signed. The City was thus prohibited from applying any later-adopted regulations—such as the coal ban—unless it could provide "substantial evidence" that failure to apply the new ordinance to the proposed terminal would pose a "substantial danger" to the health or safety of Oakland residents.

The Court found that the Oakland failed to make such a showing and thus held that the City Council's resolution attempting to retroactively apply its coal ban ordinance to the OBOT facility violated the development agreement. While OBOT also challenged the validity of Oakland's coal ban ordinance, the Court specifically declined to address those claims, and it left the city's coal ban ordinance in place.

Here, the City of Richmond has not entered into a development agreement with the owner of the Levin Terminal or any other owner or developer of a proposed bulk shipping terminal. Thus, the proposed Ordinance is not subject to the heightened "substantial danger" standard applied in the Oakland case. Instead, the City's action is governed by the usual broad and deferential standards applicable to the City's exercise of its police power, as explained above. Thus, the factors that contributed to the outcome of the Oakland litigation are not present here.

It also bears noting that unlike the Oakland ordinance—which immediately terminated existing uses related to coal and petroleum coke storage and handling—the proposed Ordinance here provides for an amortization period of three years (with the possibility of an extension). During that three-year period, existing uses may transition their operations to bulk commodities other than coal and recoup their investments. As noted above, this provision provides additional protection in the event of any legal challenge.

Proposed Ordinance's Relation to Known Affected Properties

The City is currently aware of one property that currently stores and handles coal and petroleum coke and would likely become a nonconforming use if the ordinance is adopted. This property is the Richmond-Levin Terminal. The Richmond-Levin Terminal has long handled numerous bulk commodities other than coal and only recently commenced handling large amounts of coal and petroleum coke. Accordingly, it is neither the purpose nor the anticipated effect of the ordinance to shut this facility down. Rather, staff has proposed the three-year amortization period to ensure that the facility has ample opportunity to replace the quantities of coal and petroleum coke that it has recently begun to handle with other bulk commodities. City staff has reached out to the owners of the Richmond-Levin Terminal in connection with the proposed ordinance, and staff toured the facility.

The Levin Metal Company acquired the terminal property from the Parr-Richmond Terminal Company in 1981. The prior owners, the Parr-Richmond Terminal Co., had secured a conditional use permit to operate a scrap metal processing and storage facility in 1965. In 1981 and 1982, the new owners of the property applied for conditional use permits ("CUPs") to modernize the terminal facility. A 1981 staff report noted that the terminal had handled a variety of commodities in the past, including chrome ore, coal, bonemeal, iron ore pellets, railroad rails, and lumber. Although coal was listed as a past commodity, it appears that little or no coal was being stored at the facility at the time the CUP application was submitted. Concern was thus expressed by several members of the public that the proposed modernization could potentially lead to the storage and handling of coal at the facility.

In response to these concerns, the Planning Commission attached a condition of approval requiring the permit be reviewed again the following year. See December 2, 1982 Planning Commission Agenda Report (File CU 81-30) ("The condition [requiring review after one year] was attached by the Commission as a result of the public hearing in which four persons expressed concern that modernization would lead to the loading and unloading of coal."). Although the CEQA determination for the CUP had stated that "[c]hanges in existing commodities or bulk would require additional consideration," (see December 3, 1981 Planning Commission Agenda Report (File CU 81-30), there is no indication in the permitting file that further CEQA review was undertaken to review additional storage and handling of coal.