



AGENDA REPORT

Community Development

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| DATE: | January 18, 2022 |
| TO: | Mayor Butt and Members of the City Council |
| FROM: <i>(List all relevant/responsive staff persons)</i> | Lina Velasco, Director of Community Development James Atencio, Senior Assistant City Attorney |
| Subject: <i>(This will appear on the agenda)</i> | Amendments to Richmond Municipal Code (RMC) Article 15.04.615 to extend amortization period for nonconforming land uses related to the storage and handling of coal and petroleum coke to December 31, 2026 (PLN21-427) |
| FINANCIAL IMPACT: | There is no direct impact to the General Fund related to adopting this ordinance. However, if approved, this action would settle on-going litigation and could result in cost savings from having to defend the City in the litigation. |
| PREVIOUS COUNCIL ACTION: <i>(List all dates items were heard or council action took place)</i> | January 21, 2020, and February 4, 2020 |
| STATEMENT OF THE ISSUE: | In February 2020, the City Council adopted Ordinance No. 05-20 N.S. ("Ordinance") adding new 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 making conforming amendments to the RMC for internal consistency. The Ordinance required existing land uses to cease storing and handling coal and petroleum coke by the end of a three-year amortization period, with the possibility of an extension. The Levin-Richmond Terminal Corporation, the owner of the sole known existing facility affected by the Ordinance; Phillips 66 Company; and Wolverine Fuels Sales, LLC (together, the "Companies"), filed five lawsuits challenging the |

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| | <p>Ordinance. As part of a settlement agreement to resolve the litigation, the City agreed that staff would present to the Planning Commission and City Council an ordinance amending RMC Article 15.04.615 to extend the amortization period for the cessation of existing coal and petroleum coke storage and handling uses until December 31, 2026, for consideration and possible adoption. Under the settlement agreement, if the Council decides to adopt the amendment, then the Companies would dismiss the litigation, waive any right to seek an extension of the amortization period, and promptly implement a series of additional dust control measures to mitigate dust emissions from their operations. If the Council decides to adopt the amendment, it must first determine whether the amendment is subject to or exempt from the California Environmental Quality Act (“CEQA”).</p> |
| <p>RECOMMENDED ACTION: (This will appear on the agenda)</p> | <p>INTRODUCE an ordinance (first reading) amending Richmond Municipal Code Sections 15.04.615.050.C and 15.04.615.010.B to extend the amortization period for existing nonconforming land uses related to coal and petroleum coke storage and handling and require the discontinuation of all such uses by December 31, 2026; and; DETERMINE that the ordinance is exempt from the California Environmental Quality Act (“CEQA”) because it is not a Project under CEQA (CEQA Guidelines section 15378) and because it is exempt from CEQA pursuant to CEQA Guidelines sections 15301 (existing facilities exemption), 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) – Community Development Department (Lina Velasco 510-620-6841).</p> |

DISCUSSION:

Background

In 2019, several years after coal and petroleum coke exports through the City of Richmond began to dramatically increase, the Council directed staff to propose an ordinance prohibiting new and phasing out existing land uses related to coal and petroleum coke storage and handling. On February 4, 2020, the City Council approved

Ordinance No. 05-20 N.S. (“Ordinance”), adding Article 15.04.615 to the Richmond Municipal Code (“RMC”), prohibiting the storage and handling of coal and petroleum coke within the City effective March 5, 2020, and providing a 3-year “amortization period” for continued storage and handling of coal and petroleum coke at existing facilities.

At the time the Ordinance was adopted, and at present, the Levin-Richmond Terminal (“Levin” or the “Levin Terminal”) is the only known existing facility in the City of Richmond that stores and handles coal and petroleum coke. The coal stored and handled by Levin is received by rail from Wolverine Fuels, LLC (“Wolverine”), in Utah, and the petroleum coke stored and handled by Levin is received by truck from Phillips 66 Company (“Phillips 66”) in Rodeo, California.

In March 2020, Levin, Wolverine, and Phillips 66 (together, the “Companies”) filed a total of five lawsuits—three in the United States District Court for the Northern District of California and two in Contra Costa County Superior Court—alleging, among other claims, that the Ordinance violates constitutional protections, is federally preempted, and violates the California Environmental Quality Act (“CEQA”). On August 27, 2020, the Northern District granted in part and denied in part the City’s motions to dismiss the complaints filed by Levin, Wolverine, and Phillips 66. Three months later, the Northern District provisionally granted the State of Utah’s motion to file a complaint in intervention in the litigation on the side of Levin, Wolverine, and Phillips 66. The litigation in federal court is ongoing.

The City successfully defended the two state-court cases before the Contra Costa County Superior Court. In January 2021, Levin appealed one of the two state-court cases to the Court of Appeal, where it is currently pending.

In early 2021, the City, Levin, and Wolverine participated in a mediation before the Honorable Elizabeth D. Laporte, a retired federal judge, and engaged in subsequent settlement discussions for several months. In connection with the settlement discussions, the City’s representatives, including Councilmembers Jimenez and Martinez, have observed operations at the Terminal. As a result of these discussions, the City and the Companies entered into a settlement agreement on November 12, 2021, to potentially resolve the litigation. A copy of the agreement is attached hereto as Attachment 2.

The Settlement Agreement

The settlement agreement provides that City staff will present a specific amendment to RMC Article 15.04.615 to the Planning Commission and City Council for their consideration. If adopted, the proposed amendment would extend the amortization period for existing uses related to coal and petroleum coke storage and handling from March 5, 2023, to December 31, 2026. The Council retains complete discretion whether to approve, disapprove, or modify the proposed amendment.

If the Council adopts the proposed amendment (see Exhibit A of Attachment 1) exactly as set forth in the settlement agreement, then the Companies would be required to

dismiss the litigation with prejudice. Further, Levin would waive its ability to seek an extension to the amortization period—meaning that there would be no possibility that coal and petroleum coke storage and handling would continue in the City beyond December 31, 2026.

Provided that the Council adopts the proposed amendment, the settlement agreement also requires the Companies to promptly implement a series of additional dust control measures to reduce pollution from their operations during the amortization period. For example, the Levin Terminal would, among other things, (1) install a canopy over conveyors used to unload coal from trains; (2) install additional wind fences to reduce wind-blown dust emissions from coal stockpiles; (3) increase the height of barriers blocking petroleum coke operations from the wind; (4) add additional water misters to reduce dust emissions from coal stockpiles and unloading facilities; (5) suspend shiploading operations if 30-minute average wind speeds exceed 18 miles per hour, a threshold that is half the current threshold; and (6) expand sweeping operations to prevent fugitive dust from leaving the facility. Additionally, Wolverine would apply an additional binding agent to blanket the top of each rail car transporting coal to the Levin Terminal to reduce dust emissions during transportation of the coal, including through the City. The settlement agreement allows the City to inspect the Levin Terminal to ensure that Levin is complying with these terms.

Finally, as part of the settlement agreement, the Companies would also agree not to challenge the City's adoption of the proposed amendment. And, if another party should challenge the proposed amendment, Levin would pay for the City's costs incurred in defending the proposed amendment.

The settlement agreement eliminates litigation risk and uncertainty. While the City believes its positions are meritorious, an adverse decision at the Northern District of California or on appeal could delay the cessation of coal and petroleum coke storage and handling in Richmond for several years or even indefinitely. Even if the City were to successfully defend the litigation, the current Ordinance allows Levin to seek an extension of the amortization period. Under the current Ordinance, the City *must* grant such an extension if Levin can show it is warranted to avoid an unconstitutional taking. Thus, absent the settlement agreement, it is uncertain whether coal and petroleum coke storage and handling will cease on March 5, 2023, the current end of the amortization period. In contrast, if the Council decides to adopt the proposed amendment, the settlement agreement dictates that coal and petroleum coke storage and handling *will* cease on December 31, 2026, with no possibility of an extension.

The settlement agreement also requires additional dust control measures that will yield meaningful reductions in pollution while coal and petroleum coke operations are still continuing. The additional wind barriers, water misting, dust suppressants, and operational changes—including a requirement that shiploading operations halt when average wind speeds exceed 18 miles per hour, compared to the current 35 mile-per-hour threshold—would not be implemented absent the settlement agreement. Further, the requirement that Wolverine add an additional dust suppressant to its rail cars to reduce dust emissions from coal *transported* through Richmond would benefit

neighborhoods along the rail route in addition to neighborhoods near the Levin Terminal.

Finally, the settlement agreement would provide the Levin-Richmond Terminal with additional time to transition to other, less polluting commodities. By facilitating this transition, the settlement agreement would lead to the retention of jobs at the Levin-Richmond Terminal and corresponding economic benefits. Settling the litigation could also save the City hundreds of thousands of dollars in attorneys' fees that could otherwise be required to bring the lawsuits to trial.

Summary of Proposed Ordinance

The proposed ordinance consists of the proposed amendment contained in the settlement agreement. The proposed ordinance would amend RMC Section 15.04.615.050.C to extend the amortization period and require the discontinuation of nonconforming land uses by December 31, 2026, rather than March 5, 2023. The proposed ordinance would also amend RMC Section 15.04.615.010.B to be consistent with the amended Section 15.04.615.050.C.

Public Comments:

Prior to or at the Planning Commission hearing held on December 2, 2021, the Planning Commission received a letter from Chris Schaeffer, President and CEO of Levin Enterprises, Inc. In the letter, included here as Attachment 3, Mr. Schaeffer stated that the Levin Richmond Terminal Corporation, Richmond Pacific Railroad Corporation, and Levin Enterprises, Inc. support the proposed amendments of Article 15.04.615. considered by the Planning Commission on December 2.

PLANNING COMMISSION RECOMMENDATION

On December 2, 2021, the Planning Commission held a public hearing to consider whether to recommend the adoption of the proposed ordinance. After taking public testimony and comment, the Planning Commission voted unanimously to adopt Resolution No. 21-23 (see Attachment 4), recommending that the City Council adopt the proposed ordinance (see Attachment 1).

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 proposed 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 because the additional dust control measures it would trigger would reduce 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 and rail lines. Further, the proposed ordinance supports this goal by eliminating the risk that the phase-out of coal and petroleum coke storage and handling would be invalidated in litigation and thus never take effect.

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 15301 (operation, permitting, or minor alteration of existing private facilities involving negligible or no expansion of existing or former use), 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).

The proposed ordinance is exempt under the existing facilities exemption because its effect would be to permit the continued operation and minor alteration (the latter to implement the dust control measures described above) of a single existing use—coal and petroleum coke storage and handling at the Levin-Richmond Terminal—for a limited duration. The existing use would not be expanded—indeed, under the terms of the current Ordinance, existing nonconforming uses may not increase the amount of coal or petroleum coke stored or handled beyond average annual amounts stored or handled prior to the Ordinance’s effective date, nor may they expand the footprint of such operations. RMC 15.04.615.050.D.

The proposed ordinance is also exempt as an action to protect natural resources and the environment because the additional dust control measures that it would trigger would reduce particulate matter pollution in Richmond’s neighborhoods and San Francisco Bay. By increasing physical wind barriers; adding binding agents, including suppressants and additional water misting; suspending coal and petroleum coke unloading operations during high- and moderate-wind events; increasing sweeping of areas near coal and petroleum coke operations; and implementing other dust control measures detailed in the settlement agreement, the proposed ordinance would decrease fugitive dust emissions that harm human health and marine habitats. Further, there is currently a risk that pending litigation challenging the existing Ordinance would succeed, and coal and petroleum coke storage and handling would continue indefinitely; or, alternatively, that Levin would apply for and receive an extension to the amortization period to continue coal and petroleum coke storage and handling for an indeterminate number of years. The proposed ordinance is exempt as an action to protect the environment and natural resources because, in addition to the dust control measures it would trigger, it would eliminate litigation risk and uncertainty and guarantee that coal and petroleum coke storage and handling operations in the City *will* stop at a definite time. For the same reasons, the proposed ordinance is exempt under the common sense exemption.

CONCLUSION:

Staff is recommending that the City Council adopt the proposed ordinance amending Sections 15.04.615.050.C and 15.04.615.010.B to extend the amortization period for existing nonconforming land uses related to coal and petroleum coke storage and handling and require the discontinuation of all such uses by December 31, 2026.

DOCUMENTS ATTACHED:

Attachment 1 – Draft Ordinance
Exhibit A – Proposed Ordinance Amendments in Redline
Attachment 2 – Settlement Agreement
Attachment 3 – Letter from Levin Enterprises, Inc.
Attachment 4 – PC Resolution No. 21-23

cc: Richmond-Levin Terminal