July 19, 2016

Via Electronic Mail
cityclerk@oaklandnet.com

Oakland City Council
1 Frank Ogawa Plaza, 3rd Floor
Oakland, CA 94612

Re: Proposed Ordinance Prohibiting the Storage and Handling of Coal and Coke at Bulk Material Facilities or Terminals in the City of Oakland

Dear Council President McElhaney and Honorable Council Members:

I am writing on behalf of the Sierra Club, West Oakland Environmental Indicators Project, San Francisco Baykeeper, Asian Pacific Environmental Network and Communities for a Better Environment regarding the City of Oakland's proposed Ordinance prohibiting the storage and handling of coal and coke at Bulk Material Facilities or Terminals throughout the City of Oakland. First, the environmental groups appreciate and commend the Council's leadership in protecting the public health and safety of the community and those that work at the port facility. The Ordinance is part of the City Council's continuing efforts to provide a safe and healthy environment for current and future generations. The community groups also take this opportunity to respond to some of the issues raised in the June 27, 2016 letter sent by Stice & Block, LLP on behalf of the Oakland Bulk and Oversized Terminal, LLC ("OBOT").

A. THE CITY DID NOT DEPRIVE OBOT OF DUE PROCESS

OBOT argues that it was denied due process by the timing of the City's release of the draft Ordinance, draft Resolution, Staff Report and ESA Report. OBOT argues that the City's release of the these documents on Friday morning prior to the Special Meeting violated its due process rights. OBOT, however, provides no legal basis for this claim, let alone any citation to legal authority. OBOT fails to mention that the City fully complied with the City's notice requirements as set forth in OMC § 2.20.070C, which provides that "if a special meeting is called for a Monday, notice shall be deemed timely made if the filing, posting and distribution requirements… are made no later than 12:00 pm (noon) on the preceding Friday."

OBOT's due process claim does not challenge the adequacy of the Ordinance or claim that the Ordinance violates any substantive due process rights. Thus, OBOT

appears to assert that it was denied procedural due process. Procedural due process requirements, however, apply to government actions that are adjudicatory or administrative in nature, and do not apply to actions that are legislative in nature such as the ordinance before the Council. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306, 313; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) If state law defines an act as a legislative, it will not give rise to procedural due process claims. (*San Francisco Tomorrow v. City & County of San Francisco* (2014) 229 Cal.App.4th 498, 529.) Thus, as a matter of law, the City did not violate any substantive due process in considering the Ordinance.

B. THE PROPOSED ORDINANCE DOES NOT INFRINGE UPON ANY VESTED RIGHTS

While a development agreement creates a vested right and prevents an agency from applying newly enacted ordinances, the California Supreme Court has recognized that a development agreement may contain a provision for future regulations. In *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1193, n. 6, the Court identified such limitations:

> [D]evelopment Agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. ***Unless otherwise provided in the agreement***, the rules, regulations, and official policies governing permitted uses, density, design, improvements, and construction are those in effect when the agreement is executed.

OBOT asserts that the Ordinance impairs its vested rights as provided in the Development Agreement. In making this argument, OBOT discusses various provisions in Section 3.4.1 of the Development Agreement regarding future regulations. OBOT, however, ignores the first sentence of section 3.4.1 which states that except as otherwise specifically provided in the Development Agreement, including section 3.4.2. Section 3.4.2 provides:

> Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by the City after the Adoption Date, if such application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health and safety."

In agreeing to the Development Agreement, OBOT agreed to future regulations based upon health and safety of the occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them. This provision limits and prohibits any claim to a

vested right if the newly enacted ordinance is based on health and safety considerations and supported by substantial evidence. As demonstrated by substantial evidence in the record before the Council, the handling, storage, and transloading of coal and coke creates a substantially dangerous condition to the health and safety of occupants of the project and adjacent neighbors. Thus, the Ordinance, which applies not just to the OBOT, but citywide, clearly falls within Section 3.4.2.

It should also be noted that nothing in the Development Agreement confers a right to export coal or coke from the OBOT. The 2012 Development Agreement describes the bulk terminal development as "a ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo." (LDDA, Section C.1.) It did not, in any way, guarantee the shipment of coal, and indeed, at the time the development agreement was being finalized, lead developer Phil Tagami assured the public that coal would not be a part of the commodity mix at OBOT. Additionally, in the Transportation Corridor Improvement Funds (TCIF) application for the project, the bulk terminal is described as "for movement of commodities such as iron ore, corn and other products brought into the terminal by rail… [t]he terminal would also accommodate project cargo such as windmills, steel coils and oversized goods." (Amended TCIF Baseline Agreement, August 22, 2012, at p. 31.) Based upon the foregoing, OBOT's claim that the Ordinance impairs vested rights is without merit.

C. THE ORDINANCE IS NOT PREEMPTED BY FEDERAL LAW

OBOT continues to assert that any regulation of the storage, handling and transloading of coal and/or coke is preempted by Federal law. To this end, OBOT relies upon its September 21, 2015 submittal to the City which included a Memorandum dated September 8, 2015 from Venable, LLP. OBOT's preemption argument was previously addressed in Earthjustice's September 21, 2015 letter. As previously noted by the undersigned groups, while the Interstate Commerce Commission Termination Act (ICCTA) preempts many state and local laws regarding rail traffic, such preemption does not reach local regulation of activities not integrally related to rail service. *CFNR Operating Co. v. City of American Canyon*, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003); *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F.Supp.2d 1186, 1198-90 (E.D. Wash. 2000) (ancillary railroad operations" such as truck transfer facilities are not subject to federal preemption). The Ordinance clearly falls within the City's authority to regulate ancillary operations. This is made abundantly clear from the plain text of the Ordinance. (See Section 8.60.040(B).) Section 8.60.040, which identifies the prohibited activities applies only to the ancillary facilities and does not involve or regulate any rail activity. (*Id*.) The Staff Report also addresses the fact that the Ordinance does not regulate the transportation or coal or coke by train or marine vessel, through the City of Oakland or to or from a Coal or Coke Bulk Material Facility. (Staff Report at p. 6.) Thus, neither the Ordinance's plain language nor its effect supports OBOT's claim of preemption.

D. SUBSTANTIAL EVIDENCE SUPPORTS THE CITY'S ADOPTION OF THE ORDINANCE

An agency's decision is supported by substantial evidence if the record contains relevant information that a reasonable mind might accept as sufficient to support the agency's conclusion. See *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 572. Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. Under the substantial evidence test all reasonable doubts are resolved in favor of the agency's determination. *Id*.

OBOT asserts that ESA's Report does not rise to the level of substantial evidence as all of the materials in the record are mere speculation and opinion. OBOT further asserts that the ESA Report is premised on the Basis of Design submitted by OBOT and since the design is not final, any conclusions or opinions are speculative. First, OBOT ignores the fact the Council action is a legislative enactment that applies citywide. This is not a quasi-adjudicatory action considering a development application where the application must be complete. There is no application for development as the Ordinance governs zoning to protect health and safety issues.

Second, OBOT ignores the language in the first paragraph of the ESA Report's Executive Summary that its analysis applies to any facilities that propose the handling, storage, and transloading of coal and petroleum coke and that the proposed OBOT was used as an illustrative example of such a facility. (See ESA Report, ES-1.) Thus, the opinions and conclusions expressed in the ESA Report apply to the activities of the handling, storage and transloading of coal and coke, whether such activities take place at the proposed OBOT or another location.

A review of the ESA Report also demonstrates that it is not based upon speculation or unsupported opinions. Instead, the ESA Report relies upon expert opinions and letters within the administrative record regarding health effects. ESA Report at pp 5-1 to 5-21.) It also relies upon information and studies from expert agencies. (*Id.* at pp. 6-1 to 6-4.) The ESA Report's section of Health Effects cites to the numerous studies and comment letters within the administrative record. As for Safety Effects, the ESA Report relies upon numerous studies and reports within the administrative record and well as documented occurrences of coal dust explosions. Thus, there is no doubt that substantial evidence supports the ESA Report and its conclusions.

Additionally, OBOT's comment letter ignores the expert reports already within the administrative record as well as the most recent expert report prepared and submitted by Zoe Chafe, PhD, MPH, entitled *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).* The Chafe Report goes into great detail about the health effects from coal dust and coke dust, all of which is supported by facts and studies

referenced in the report. Thus, the Chafe Report also serves as substantial evidence to support the Ordinance.

Finally, OBOT's letter ignores the mountain of substantial evidence already within the record. (See ESA Report, Appendix 1.) Appendix 1 to the ESA Report lists the comment letters submitted by governmental agencies, environmental and other organizations, and individuals, many of whom are experts in air quality and health effects associated with coal dust and coke dust.

The extensive documentation in the administrative record in this matter clearly constitutes substantial evidence to support the Ordinance. While OBOT may disagree with and dispute the conclusions contained in the ESA Report, such disagreement does not constitute a basis for finding that substantial evidence does not support the Ordinance. (See *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1069.)

E. THE ORDINANCE IS NOT ARBITRARY AND CAPRICIOUS

OBOT argues that the Ordinance is arbitrary and capricious asserting that it is not legal and not supported by substantial evidence. OBOT continues to misunderstand the Ordinance in that it applies to any and all such proposed facilities and is not based specifically on OBOT. In order to enact an ordinance protecting public health and safety, an agency need not have a specific and defined project before it. Such ordinances are within the inherent authority of a local jurisdiction unless otherwise preempted by state or federal law. As for OBOT's claim that substantial evidence does not support the City's enactment of the ordinance, OBOT continues to focus on its particular project and the ESA Report as discussed above.

OBOT also asserts that the ESA Report is based upon speculation as to whether the project would result in a substantially dangerous condition. Again, OBOT mischaracterizes the action as consideration of a development application and not a zoning ordinance. OBOT also mischaracterizes the ESA Report and its conclusions. The ESA Report carefully discusses the Health Effects, Safety Effects, as well as greenhouse gas emissions and climate effects. The ESA Report identifies the health effects associated with exposure to coal dust and coke dust. These health effects apply to neighboring communities as well as workers. Moreover, the analysis and conclusions based in part by research conducted by the US EPA and other governmental agencies. As such, substantial evidence supports the Ordinance.

CONCLUSION

As stated above, the environmental and community groups appreciate and support the Council's continuing efforts to protect public health and safety. Enactment of the Ordinance support the economic revitalization of Oakland while protecting the

environment, including the health and safety of the residents of Oakland. The Ordinance serves as one more example of Oakland's leadership in protecting the climate and developing a green economy that serves and protects all of the residents.

Sincerely,

Donald B. Mooney
Attorney

cc:
Mayor Schaaf
Claudia Cappio, Oakland City Administrator