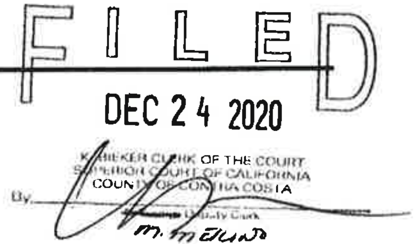
IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
Department 33



Phillips 66 v. Richmond (N20-0460)

Levin Richmond Terminal v. Richmond (N20-0464)

ORDER AFTER HEARING

Petitioner Phillips 66 Company (case no. MSN20-0460) and Petitioners Levin Richmond Terminal Corporation, Richmond Pacific Railroad Corporation and Levin Enterprises, Inc. (case no. MSN20-0464) each filed a writ against Respondents, the City of Richmond and the City Council of the City of Richmond. The matters were heard on October 8, 2020 and taken under submission. After reading the briefs, reviewing the record and considering oral argument, the Court **denies both writs.**

In 2020, the Richmond City Council approved Ordinance No. 05-20 N.S., which bans the storage and handling of coal and petroleum coke (petcoke) within the City limits after a three year period. The City Council found that the Ordinance was necessary to protect the public health, safety, and welfare, and that the three year delay struck a balance between protecting public health and giving businesses sufficient time to transition. Finally, the City Council found that the Ordinance was not a project under the California Environmental Qualities Act (CEQA), and, even if it was a project, it was categorically exempt. (AR 00004-13.) The City also filed a Notice of Exemption. (AR 00002-3.) Petitioners timely filed challenges to the Ordinance.

I. CEQA

A. Is the Ordinance a Project Under CEQA?

Standard

Whether the Ordinance is a CEQA project is a question of law "to be decided on 'undisputed data in the record on appeal.' " (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1198; see also, *Muzzy Ranch, supra*, 41 Cal.4th at p. 382.)

"[A] proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur. Consistent with this standard, a 'reasonably foreseeable' indirect physical change is one that the activity is capable, at least in theory, of causing. (Guidelines, § 15064, subd. (d)(3).). Conversely, an indirect effect is not reasonably foreseeable if there is no causal connection between the proposed activity and the suggested environmental change or if the postulated causal mechanism connecting the activity and the effect is so attenuated as to be 'speculative.' [Citations.]" (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1197.)

Petitioners have convinced the Court that the Ordinance banning coal and petcoke from Richmond could cause some indirect physical changes to the environment.

Phillips 66 may need to use a port that is farther away from its refinery, adding 430,000 or 2,200,000 truck miles per year. While the Benicia port may be an option, it is not certain that Benicia has capacity to handle Phillips 66's pet coke and thus, it is reasonably foreseeable that Phillips 66 will be required to use a port farther away, which will increase the number of miles its trucks will drive and thus add to road congestion and air pollution.

Similarly, while Wolverine may be able to use the Long Beach terminal for its coal at a similar distance that is not certain. Any other terminal will require Wolverine's coal to travel a longer distance to reach a port. (Whether Japan could switch to lower quality coal and reduce demand for Wolverine's coal is too speculative to be included in this analysis.)

Thus, the Court finds that the Ordinance constitutes a project under CEQA as it is reasonable foreseeable that the Ordinance could cause indirect physical changes on the environment.

B. If the Ordinance is a Project, is it Exempt?

The next step is to determine if the Ordinance is exempt from CEQA. "If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary. [Citation.] The agency need only prepare and file a notice of exemption [citation], citing the relevant statute or section of the CEQA Guidelines and including a brief statement of reasons to support the finding of exemption [citation]." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380.)

The City filed a notice of exemption stating that the Ordinance was exemption from CEQA based on the Class 7, Class 8 exemptions, as well as the common sense exemption. (AR 00002-3.) If the City's determination was proper then no further environmental review is necessary and the CEQA portion of this writ must be denied.

1. Categorical Exemptions

Standard

"Because a categorical exemption is premised on a finding that the class of projects does not have a significant effect on the environment, " 'an agency's finding that a particular proposed project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment. [Citation.] On review, an agency's categorical exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects.' " (*Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 219–220 (*County of Marin*), quoting *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115 (*Davidon Homes*).)" (*Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863, 873-874.)

"In reviewing for substantial evidence...our task 'is not to weigh conflicting evidence and determine who has the better argument.' [Citation.]" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 [stated in the context of a CEQA EIR review].)

Substantial evidence includes "facts, reasonable assumptions predicated on facts, and expert opinion supported by facts" and is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines § 15384 (14 CCR 15384).) Substantial evidence does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts …." (CEQA Guidelines § 15384.)

Class 7 and 8

"Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to *assure the maintenance, restoration, or enhancement of a natural resource* where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption." (14 CCR §15307 (emphasis added).) Natural resources does not appear to be defined by statute or the CEQA Guidelines.

"Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, *to assure the maintenance, restoration, enhancement, or protection of the environment* where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption." (14 CCR §15308 (emphasis added).) "Environment" includes "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Pub Resources Code § 21060.5.)

Generally speaking, actions that remove existing wildlife protections are not part of Class 7 or 8. (See, e.g. *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 707.) While actions that increase protections for natural resources are often included in class 7 and/or 8. For example, in *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, the court found that an ordinance regulating and then phasing out the land application of sewage sludge fell within the class 8 exemption. (*Id.* at 476.) The record included evidence of the hazards in applying sewage sludge to agricultural land. The evidence in the record was primarily focused on the

general hazards of sewage sludge and not on a specific problem currently existing in the county. (*Id.* at 475-476.)

Here, the Ordinance will protect air quality. There is substantial evidence that coal and petcoke dust are harmful to human health based on a number of scientific studies and reports. (AR 02072-73 (addressing coal and petcoke); AR 01986 (addressing petcoke); AR 01792-1802 (addressing coal); AR 01914 (addressing coal); AR 02487 (addressing coal).) Although, there is some question about what size of dust is *most harmful*, there appears to be no argument that in general coal and petcoke dust are harmful to air quality. The Ordinance bans the storage of coal and petcoke within the City of Richmond. This ban will eliminate any new sources of coal and petcoke and thus, will prevent more coal and petcoke dust from entering the air the City of Richmond. The Court finds there is substantial evidence that the Ordinance maintains, restores, enhances and/or protects the environment and falls within the class 8 exemption.

The parties discuss whether the evidence shows that coal and petcoke dust is coming from the Levin Terminal. Both sides offered studies and expert opinions on whether coal and petcoke dust are escaping the Levin Terminal (or perhaps escaping during transportation). However, the Court's reading of the Class 8 exemption is that evidence that coal and petcoke dust are currently escaping the Levin Terminal is not required. The Class 8 exemption includes "protection" and "maintenance" of the environment and here, banning substances that are known to be harmful is sufficient evidence that the Ordinance will protect the environment.

For these reasons, the Court finds that the City properly determined that the Ordinance is covered by a Class 8 exemption. Given this finding, the Court did not reach a decision on the Class 7 exemption.

Exceptions

"As to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2008) § 5.71 p. 5-61 (rev. 3/14).)" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.)

A common exception to the categorical exemptions is the unusual circumstances exception. The unusual circumstances exception requires two considerations. "A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, under our reading of the guideline, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.' [Citation.]" (*Berkeley Hillside, supra,* 60 Cal.4th 1086, 1105.)

" '[U]nusual circumstances' are those that (i) 'differ from the general circumstances of the projects covered by the particular categorical exemption' and (ii) 'create an environmental risk that does not exist for the general class of exempt projects.' [Citation.]" (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 869; see also *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1024 [" '[W]hether a circumstance is "*unusual*" is judged relative to the *typical* circumstances related to an otherwise typically exempt project.' "].) Unusual circumstances can be established "by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location." (*Berkeley Hillside, supra,* 60 Cal.4th at 1105.)

"[T]he standard governing whether there are unusual circumstances is deferential to the entity's determination, but the standard governing whether there is a reasonable possibility that the activity will have a significant effect on the environment is not." (*Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, 457.)

Petitioners have the burden of showing an exception to the categorical exemption. This requires Petitioners to show (1) there are unusual circumstances and a reasonable possibility of a significant effect due to that unusual circumstance or (2) the project will have a significant environmental effect. Petitioners have not met either requirement.

The City did not make a specific finding on the unusual circumstances exception and therefore, the Court's review of this exception is somewhat limited. (See, *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, 457-458.) Where there is an implied finding that the unusual circumstances exception does not exist, "to affirm such an implied determination, the court must assume that the entity found that the project involved unusual circumstances and then conclude that the record contains no substantial evidence to support either (1) a finding that any unusual circumstances exist (for purposes of the first element) or (2) a fair argument of a reasonable possibility that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment (for purposes of the second element)." (*Id.* at 458.)

The record here does not contain substantial evidence that any unusual circumstances exists. The record includes some evidence that the Ordinance will require customers to reroute their coal and petcoke to other facilities. However, the rerouting of a substance is not an unusual circumstance when that substance is banned from a specific location. This appears to be a normal effect of such a ban, not an unusual effect.

In addition, the record does not include substantial evidence that there is a fair argument of a reasonable possibility that the purported unusual circumstances will have a significant effect on the environment. While there is some evidence that the Ordinance will have *some* effect on the environment, the evidence does not show there will be a *significant* effect. In addition, much of the evidence is speculative.

Phillips 66 explains that if it is required to use the Pittsburg terminal it will involve an additional 430,000 truck miles per year and the Stockton terminal will involve an additional 2,200,000 truck miles per year. The record does not include evidence of the increased traffic congestion or how much fuel will be used or how air quality will be effected. (AR 01768-1769, 01523-1524.) The increase in truck miles does not appear to be a significant environmental effect.

Wolverine has offered letters explaining that in order to continuing shipping its coal abroad it will be required to use another, more distant, facility. Wolverine speculates that it might even use a facility in a less environmentally-conscious marine terminal. But Wolverine

offers no evidence of what other terminals are available (and the City suggests the Long Beach terminal is actually closer). Nor has Wolverine shown that the distance will be significant. Wolverine's argument that it will be forced to use a less environmentally-conscious marine terminal is speculative. Wolverine also suggests that it may not be able to ship its coal abroad and counties, such as Japan, will use lower-quality coal. Again, there is no evidence of this point. (AR 01525-1526, 03341-3343.)

The Court finds that the record supports the City's implied finding that unusual circumstances exception does not applies here.

Petitioners also argue that the cumulative impact exception applies. "[T]he 'cumulative impact' exception in subdivision (b) of Guidelines section 15300.2 provides that a public agency may not rely on a categorical exemption 'when the cumulative impact of successive projects of the same type in the same place, over time is significant.' [Citation.]" (*Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 220.) In support of this argument, Petitioners point to opposition to coal in Oakland. This argument was not sufficiently raised in the moving papers, nor is there enough evidence in the record of the current situation in Oakland. Finally, from what the Court can tell, there was an attempted coal ban in Oakland that has been invalidated by a federal court. (AR 00099.) Petitioners have not shown that there are other CEQA projects that the Court should consider as part of a cumulative impact and have not met their burden of showing this exception applies.

2. Commonsense Exemption

"A project that qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt under what is sometimes called the 'commonsense' exemption, which applies '[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment' (CEQA Guidelines, § 15061, subd. (b)(3)). (See generally *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 113–118.)" (*Muzzy Ranch Co., supra,* 41 Cal.4th at 380.) The commonsense exemption acts as something of a "catchall" provision, since a project that "qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt" if it fits within the terms of this

exemption. (*Ibid.*) (While some courts refer to this as the "common sense" exemption, this Court uses the term "commonsense" exemption, which follows the usage in *Muzzy Ranch.*)

The Court need not reach the commonsense exemption since it finds that the Ordinance meets a Class 8 exemption. The Court has included the standard for this exemption, however, as a contrast to the standard for a categorical exemption since there appeared to be some conflation of the two different standards.

III. Non-CEQA: Police Power

Petitioner's argue that the Ordinance is an improper exercise of the City's police power and a violation of the Richmond City Charter and Municipal Code.

"We begin with the well-established principle that under the California Constitution a municipality has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare. [Citatoins.]... As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible. [Citations.]" (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 455.) "When a county's action 'is challenged as not being a valid exercise of police power, all presumptions favor its validity, and it will be upheld unless its unconstitutionality clearly and unmistakably appears.' [Citation.]" (*San Diego County Veterinary Medical Assn. v. County of San Diego* (2004) 116 Cal.App.4th 1129, 1135.)

"[A] party challenging the facial validity of a legislative land use measure ordinarily bears the burden of demonstrating that the measure lacks a reasonable relationship to the public welfare. [Citations.]" (*California Building Industry Assn., supra,* 61 Cal.4th at 455-456.)

"The ultimate issue was whether the ordinance was substantially related to the public welfare. The public welfare inquiry ' "'should begin by asking whose welfare must the ordinance serve." ' [Citations.] The court must then identify competing interests and, finally, decide ' "whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests." ' [Citation.]" (*Arcadia Development Co. v. City of*

Morgan Hill (2011) 197 Cal.App.4th 1526, 1538; see also, *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607.)

Here, the Ordinance is designed to benefit the health of the residents in Richmond by banning the storage of harmful substances within the City. The public interest here is in protecting the residents of Richmond from exposure to harmful substances. The record provides evidence that coal and petcoke dust are harmful to human health. (AR 02072-73 (addressing coal and petcoke); AR 01986 (addressing petcoke); AR 01792-1802 (addressing coal); AR 01914 (addressing coal); AR 02487 (addressing coal).) The record also provides evidence that coal and petcoke dust is being found in the City of Richmond, outside the Levin Terminal. (AR 00061-66 (McCrone Associates report); AR00319-321, 00331-333, 03186-3198, 03346-3361, 03370-3377 (Microvision Northwest reports); AR 01753-1763 (Brown, Katz, Walsh paper).) Petitioners have provided competing evidence that the coal and petcoke dust is not caused by storage at the Levin Terminal. (AR 01621-1647; 02983-3009, 03423-3426 (Sonoma Technology reports).) However, the City was not required to accept Petitioners' evidence when there was evidence to the contrary. What the record shows is that reasonable minds could differ about whether harmful dust was leaving the Terminal area. Thus, the record supports the City's position that the Ordinance will benefit the public by removing a source of harmful dust. Protecting the health of the residents of Richmond represents a strong public interest.

The competing interests here are those of the Petitioners and non-party Wolverine. These interests appear to be monetary. Phillips 66 will likely spend more money in transporting its petcoke to another terminal, but the amount of money is unknown. Wolverine will need to find a new terminal that will ship its coal, which may or may not result in increased costs depending on the distance to the new terminal and the costs associated with using that terminal. Levin's interest appears to be the strongest as it has presented evidence that the Ordinance may put it out of business because it will be unable to covert to other uses before the ban on coal and petcoke takes effect. (AR 00127-28; 02976-2978; 03085-03115.)

Although the economic effect of this Ordinance may cause hardship to the Petitioners, particularly Levin, and Wolverine, it was reasonable for the City to put the health of the

residents of Richmond first. Given these competing interests, the Court finds that the Ordinance represents a reasonable accommodation of the competing interests.

Finally, Petitioners' argument that the City should have considered a less restrictive alternative is misplaced. The question is not whether the Ordinance is required or whether more restrictions on the storage of coal and petcoke, rather than a ban, would adequately accommodate the conflicting interests. Instead, the question here is whether reasonable minds could differ about the propriety of this Ordinance. (See, e.g. *Big Creek Lumber Co. v. County of San Mateo* (1995) 31 Cal.App.4th 418, 429.)

Petitioners also argue that the Ordinance is in violation of the City's charter and Municipal Code. The Richmond City Charter gives the City power "[t]o exercise police powers and make all necessary police and sanitary regulations… ." (City Charter, Art. II §1(6).) When changing zoning rules, the Richmond Municipal Code requires the Planning Commission to make a finding that "[t]he proposed amendment is necessary for public health, safety, and general welfare or will be of benefit to the public." (RMC 15.04.814.050.)

Petitioners argue that the record here does not support a finding that the Ordinance is *necessary* for public health, safety, and general welfare. The key issue here is what the meaning of necessary is in this context. Petitioners argue that necessary should be interpreted in the strict sense to mean "absolutely needed" or "indispensable… essential... that cannot be done without". (Phillips 66 Brief p. 23.) While the City argues that necessary should be interpreted to mean "useful" rather than indispensable.

In *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 671 the California Supreme Court considered the meaning of "necessary" used in a city's charter. The Court noted that the term "necessary" is a word susceptible of various meanings and can be interpreted to mean "absolute physical necessity or inevitability" or "only convenient, useful, appropriate". (*Ibid.* at 671 (quoting *Westphal v. Westphal* (1932) 122 Cal.App. 379, 382).) When determining which meaning to assign to necessary, the Court looked at the context of the rest of the city's charter's provision. (*Id.* at 672.) The Court found that an interpretation of necessary meaning "convenient, useful, appropriate, suitable, proper or

conducive" could be harmonized with the surrounding provisions, while a stricter interpretation could not. (*Id.* at 672.)

Here, the City Charter requires a finding "[t]he proposed amendment is necessary for public health, safety, and general welfare or will be of benefit to the public." (RMC 15.04.814.050.) Interpreting necessary in a strict sense would not be consistent with the end of the clause which only requires a finding that the Ordinance "will be of benefit to the public". A less strict interpretation of necessary would harmonize this provision. The Court finds that "necessary" in this context means convenient, useful, appropriate, suitable, proper or conducive. The Court also finds that the record supports the City's finding that the Ordinance is convenient, useful, appropriate, suitable, proper or conducive for public health, safety, and general welfare.

The City's Charter supports the Court's finding. The Charter gives the City power to "make all necessary police and sanitary regulations" and "[t]o exercise police powers". Thus, this provision of the Chart gives the City the police powers plus the additional power to make all necessary police and sanitary regulations. The City Charter also states that "this grant of power is to be liberally construed for the purpose of securing the well being of the municipality and its inhabitants." (City Charter, Art. II §1(24).) Thus, paragraph 24 supports an interpretation that the Charter is intended to give the City more power, not less, as it relates to the well being of its residents.

Petitioners point to the Rules of Construction for the Zoning section of the Municipal Code, which says that "[t]he ordinary meaning of terms applies." (RMC 15.04.102.020(A).) This section does not help Petitioners. First, the legal definition of "necessary" has been interpreted in a variety of ways over the years. (See, e.g. *San Francisco Fire Fighters Local 798, supra,* 38 Cal.4th at 671.) Second, even if the Court were to focus on the dictionary definition of "necessary", it has changed over the years. For example, in *Westphal,* a case from 1932, the court noted that one dictionary meaning of necessary included "reasonably convenient, and the authorities therein cited emphasize the flexibility of the word." (*Westphal, supra,* 122 Cal.App. 379, 382.) If the Court were to focus on the dictionary definition of "necessary" it would focus on the definition that existed when this provision was adopted. " ' "The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted." '

[Citation.]" (*People v. Fair* (1967) 254 Cal.App.2d 890, 893.) Petitioners have not provided the history of this provision, nor have they shown that the dictionary definitions of "necessary" when this provision was adopted.

IV. Non-CEQA: Spot Zoning (Levin only)

Levin also challenges that Ordinance as illegal spot zoning because Levin is the only property in Richmond harmed by this Ordinance.

" 'The "rezoning of property, even a single parcel, is generally considered to be a quasi-legislative act' thus 'subject to review under ordinary mandamus." The standard for review of a quasi-legislative act is whether the action was "arbitrary or capricious or totally lacking in evidentiary support." [Citations.]' [Citations.]" (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1309.) "The party challenging a zoning ordinance as arbitrary or capricious bears the burden of producing sufficient evidence from which the trier of fact may conclude that the ordinance is unreasonable and invalid. [Citation.]" (*Ibid.*)

A challenge based on spot zoning requires a two-part analysis. First, there must be spot zoning, which occurs when a "parcel of property is subject to *more or less restrictive* zoning than the surrounding properties." Second, where this is spot zoning "the court must determine whether the record shows the spot zoning is in the public interest." (*Foothill Communities Coalition, supra,* 222 Cal.App.4th at 1307.)

"The essence of spot zoning is irrational discrimination. *Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1536 described spot zoning: ' "Spot zoning occurs where a small parcel is restricted and given lesser rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an 'island' in the middle of a larger area devoted to other uses. ... Even where a small island is created in the midst of less restrictive zoning, the zoning may be upheld where rational reason in the public benefit exists for such a classification." ' (Citations omitted.)" (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268-1269; see also *Foothill Communities Coalition, supra,* 222 Cal.App.4th at 1311.)

Levin argues the Ordinance constitutes spot zoning because Levin is the only facility in Richmond that stores and handles coal and petcoke and thus, is the only facility affected by this Ordinance. (AR 00050.) Levin also points out that there are other sources of particulate emissions in Richmond that are not regulated by the Ordinance. (AR 01488-1492.)

The Ordinance applies to properties in Richmond. (AR 00009-13.) Thus, the Ordinance is not spot zoning as it treats all properties in Richmond the same. Levin's point that it is the only property currently effected by this Ordinance is perhaps a fact relevant to other potential challenges to this Ordinance, but it does not show that there is spot zoning here.

V. Record

Levin (with Phillips 66 joining) has filed a motion related to the contents of the record in this case. Levin seeks to modify the record by striking certain documents from the record and adding other documents. In addition Levin makes several evidentiary objections to documents in the record

A. Motion to Strike and Augment the Record

The Court will limit the record to documents that were submitted to the City on or before February 5, 2020. The Ordinance was approved February 4, 2020 and the Notice of Exemption was filed February 5, 2020.

Levin's request to strike portions of the record is denied. The Court sees no basis for striking any of the documents from the record.

Levin's request to augment the record is denied. The first three documents are dated after February 5, 2020 and thus, were not part of the City's decision making process. The final document is dated in 2019, however, there is no indication that it was provided to the City before February 5, 2020 and Levin has not explained why this letter could not have been provided to the City during its review of the Ordinance.

Levin failed to make specific evidentiary objections to specific documents and thus, the Court cannot provide specific rulings. However, Levin's general objections to documents in the

record based on hearsay, lack of foundation, expert opinion and being more prejudicial than probative are overruled.

B. Requests for Judicial Notice

The Court grants the joint supplemental request for judicial notice of the City's charter and portions of the Municipal Code. These documents are proper for judicial notice and relate to the non-CEQA portion of these proceedings.

Phillips 66's requests for judicial notice numbers 2 and 3 are granted as matters appropriate for judicial notice and properly part of the record. Request number 1 does not appear to be a matter appropriate for judicial notice.

The parties' other requests for judicial notice are denied as either irrelevant, not properly part of the record or are matters not subject to judicial notice. The Court would take judicial notice of filings in a companion federal case in certain situations (such as res judicata), but such situation does not exist here.

IT IS SO ORDERED.

Dated: December 24, 2020

Steven K. Austin
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT - MARTINEZ
COUNTY OF CONTRA COSTA
MARTINEZ, CA 94553
(925) 608-1000

CLERK'S CERTIFICATE OF MAILING

CASE TITLE: PHILLIPS 66 VS CITY OF RICHMOND

CASE NUMBER: MSN20-0460 - CIVIL

THIS NOTICE/DOCUMENT HAS BEEN SENT TO THE FOLLOWING ATTORNEYS/PARTIES:

RONALD E VAN BUSKIRK
4 EMBARCADERO CENTER, 22ND FLO
POB 2824
SAN FRANCISCO CA 94126-2824

ROBERT S PERLMUTTER
396 HAYES STREET
SAN FRANCISCO CA 94102-4421

I am a Clerk of the Court indicated below and am not a party to this cause. On the date below indicated, I served a copy of the attached document(s) by depositing a true copy in the mail in a sealed envelope with postage prepaid, at MARTINEZ, California addressed as above indicated.

TITLE OF DOCUMENT SERVED: ORDER AFTER HEARING (10/08/20)

DATE MAILED: 12/24/20

CLERK OF THE COURT

BY:

M. MERINO
Deputy Clerk of the Court