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July 10, 2019

VIA E-MAIL [patrick@semlawyers.com] AND
FIRST CLASS MAIL

Patrick Soluri
SOLURI MESERVE
510 8th Street
Sacramento, CA 95814

Re: *Save Petaluma v. City of Petaluma, et al.*
Sonoma County Superior Court Case No. SCV-264378

Dear Mr. Soluri:

We represent Respondent City of Petaluma ("City") and Real Party in Interest Safeway Inc. ("Safeway") in the above-referenced litigation filed by your firm on behalf of Petitioner Save Petaluma challenging the Safeway Petaluma gas station project (the "Project"). We write to follow up on our July 9, 2019 telephone call with you regarding the case.

On our July 9th call, I informed you that the City and Safeway were planning to file a Joint Demurrer to the Verified Petition for Writ of Mandate ("Petition") for failing to state a cause of action pursuant to Code of Civil Procedure ("CCP") section 430.10 as well as a Special Motion to Strike the Second Cause of Action pursuant to CCP section 425.16 (the "Anti-SLAPP" statute). I indicated that our telephone call served as our meet and confer obligation under CCP section 430.41 and provided you with references to our supporting legal authorities. I also offered to provide a written summary of those authorities. This letter provides such authority as well as responds to our conversation regarding the administrative record and settlement conference.

1. Legal Authority In Support of Demurrer to Petition

As to the Petition's First Cause of Action alleging violation of the California Environmental Quality Act ("CEQA"), the Petition is fatally deficient, both procedurally and substantively. The Petition was filed more than 9 months after the applicable limitations expired on this cause of action and is barred by the statute of limitations. (Public Resources Code § 21167(b),(e); *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307; *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32; and *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481.)

Further, Petitioner did not exhaust its administrative remedies by failing to appeal the Planning Commission's approval of the Project's mitigated negative declaration to the City

Council. As a result, Petitioner is barred from legally challenging that action now and urging preparation of an environmental impact report ("EIR") instead. (Public Resources Code §§ 21177, 21151(c); Petaluma Environmental Review Guidelines § 9.9.0; *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577; and *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442.)

Substantively, Petitioner's claims fail because the City lacks discretion to order an EIR for the Project. (Public Resources Code § 21080(b); *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80; and *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924.) Courts have granted demurrers without leave to amend in similar circumstances when the petition failed to allege facts sufficient to show that the approvals in question were of a discretionary nature so as to implicate CEQA. (*See, e.g., Adams Point Preservation Society v. City of Oakland* (1987) 192 Cal.App.3d 203 and *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (1975) 51 Cal.App.3d 648.)

The Petition's Second Cause of Action alleges that certain statements made by Safeway improperly influenced the City Council, ultimately resulting in the Council's alleged failure to provide a fair hearing. This cause of action likewise fails for both procedural and substantive grounds. Petitioner failed to exhaust its administrative remedies by not raising this claim in the administrative proceedings below, as required. (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124; *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533; and *Attard v. Board of Supervisors of Contra Costa County* (2017) 14 Cal.App.5th 1066.) The Second Cause of Action also fails to state any cognizable claim for denial of a fair hearing on the merits. (*See, e.g., Nasha v. City of Los Angeles* (2014) 125 Cal.App.4th 470 and *Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233.)

In addition, because the Second Cause of Action arose out of protected activities and Petitioner cannot show by "competent and admissible evidence" a probability that it will prevail on the merits, we also informed you that the City and Safeway plan to file an Anti-SLAPP motion to that cause of action. (CCP § 425.16; *Sonoma Media Investments, LLC v. Superior Court* (2019) 34 Cal.App.5th 24, 37.) As I mentioned, if the City and Safeway are compelled to file such a motion, the moving parties will seek an award of attorneys' fees and costs pursuant to CCP section 425.16(c)(1).

2. Petitioner's Election to Prepare the Administrative Record

Notwithstanding your client's election to prepare the administrative record (filed May 6, 2019), you indicated that you have taken no steps to obtain the requisite documents from the City, many of which are and have been since filing of your client's election request, available on the City's website. We urge you to proactively obtain the documents and prepare the draft administrative record as your client elected to do. As you know, the Petitioner has 60 days from

June 20, 2019 to prepare the record, which is subject to the City's certification of accuracy. (Public Resources Code § 21167.6(b).)

If you fail to diligently and timely prepare the administrative record, the City and/or Safeway will pursue judicial relief, including, but not limited to, seeking recovery of costs for preparation of the record and/or a compliance order and sanctions. (Public Resources Code § 21167.6; CCP § 128; *LandWatch San Luis Obispo County v. Cambria Community Services District* (2018) 25 Cal.App.5th 638; and *Citizens for Ceres v. City of Ceres* (2016) 3 Cal.App.5th 237.) Your reference to *Coalition for Adequate Review v. City & County of San Francisco* (2014) 229 Cal.App.4th 1043, wherein the First Appellate District reversed a trial court order denying the recovery of supplemental record preparation costs to a public agency, does not support your position that petitioner has no obligation to prepare the record after it elected to do so.

3. Scheduling of Settlement Conference

Finally, on yesterday's call we confirmed that representatives of Petitioner, the City, and Safeway along with their respective counsel were available for the mandatory CEQA settlement conference on August 1, 2019 at 10:00 a.m. When I indicated that we intended to schedule the conference for Petaluma City Hall, you stated that you and your client would participate by phone and asked for authority that the conference had to be held in person. Public Resources Code section 21167.8 states that the public agency shall file and serve "a notice setting forth ***the time and place*** at which all parties shall ***meet*** and attempt to settle the litigation." (Emphasis added.) The statue then makes multiple references to the "settlement meeting" wherein "***the parties shall meet and confer*** regarding anticipated issues to be raised in the litigation and . . . attempt in good faith to settle the litigation and the dispute which forms the basis of the litigation." (Public Resources Code § 21167.8 [emphasis added]; *see also* Sonoma County Superior Court, Local Rule 4.6 [requiring that the date, time, and location of the mandatory settlement conference be set forth on the settlement conference statement].)

In accordance with the above, and on the City's behalf, we will file and serve a Notice of Settlement Conference for August 1, 2019 at 10:00 a.m. at Petaluma City Hall, 11 English Street, Petaluma, California, 94952. We remind you that the failure of any party to participate in the litigation settlement process may result in the imposition of sanctions by the Court. (Public Resources Code § 21167.8(e).)

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Please let us know no later than Monday, July 15, 2019 if your client will dismiss the Petition with prejudice, in whole or in part, thereby obviating the need to file the Demurer and/or Anti-SLAPP motion. Alternatively, please let us know no later than Monday July 15th if you have any contrary authority to indicate that the Petition is legally sufficient and/or can be amended to cure the legal insufficiencies outlined above.

Feel free to contact me or Dave Lanferman with any questions regarding this correspondence.

Very truly yours,

RUTAN & TUCKER, LLP

Matthew D. Francois

MDF:cm

cc: Client, *via email*
Jordan Green, *via email*
David Lanferman, *via email*