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SAVE PETALUMA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

SAVE PETALUMA, Petitioner, v. CITY OF PETALUMA, Respondent; SAFEWAY, INC., and DOES 1-20, Real Party in Interest.	**CASE NO.:** **VERIFIED PETITION FOR WRIT OF MANDATE; ELECTION TO PREPARE THE RECORD OF PROCEEDINGS** **(Code Civ. Proc., 1094.5; Pub. Resources Code, §§ 21168, 21168.5, 21167.6, subd. (B)(2).)** **JUDGE:** **DEPT.:**

INTRODUCTION

1. This case arises from a decision by Respondent City of Petaluma ("City" or "Respondent") to approve a 16-dispenser Safeway fuel station at the corner of South McDowell Boulevard and Maria Drive ("Fuel Center" or "Project") in the City of Petaluma. The City Council was faced with a Hobson's choice: it could protect the health of Petaluma residents, but doing so would risk bankrupting the City—as repeatedly threatened by the Project applicant, Safeway, Inc. ("Safeway" or "Real Party in Interest"). Confronted with this intolerable dilemma, the City Council took the understandable but unlawful action of approving the Project without requiring an environmental impact report ("EIR") under the California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq. ("CEQA")).

2. The proposed Fuel Center, with 16 pumps, would dispense approximately 8.5 million gallons of gasoline and diesel fuels per year, which is commonly identified as "throughput." The California Air Resources Board ("CARB") advises that a fuel station with a throughput of greater than 3.6 million gallons per year should have a setback of at least 300 feet to sensitive uses such as homes, daycare centers and schools. Flagrantly disregarding CARB guidance, the Project would be located approximately 60 feet upwind from no fewer than two different daycare centers and an elementary school, and with the nearest homes just 80 feet downwind. Thus, the Fuel Center would have an 80 percent smaller buffer distance that CARB recommends, despite more than doubling the minimum gas throughput triggering a 300-foot buffer.

3. The proposed Fuel Center's massive throughput volume, coupled with its extreme close proximity to sensitive receptors, means that the Project would result in significant human health impacts to nearby City residents, children and teachers. Leading air quality experts performed a detailed health risk assessment and concluded that the health risk at sensitive receptors was more than five times above the relevant CEQA significance standard.

4. In light of these disturbing health risk implications, and other potentially significant unaddressed environmental impacts, the City Council on December 3, 2018 voted unanimously to require an EIR for the Project before it would consider approval. But Safeway,

an entity wholly owned by a private equity firm managing more than $40 billion in assets, did not take no for an answer.

Figure 1: 70-year residential exposure isopleth. Orange is 50 increased cancer risk; blue is 30 increased cancer risk; yellow 10 increased cancer risk; green is 5 increased cancer risk.

5. Safeway proceeded to engage in an unprecedented campaign of intimidation, threats and harassment of City councilmembers, and even staff. Based upon multiple Public Records Act requests on 46 "respondents" including councilmembers, planning commissioners, planners and other City staff and committee members, Safeway purported to gather evidence showing that six out of the seven councilmembers were impermissibly biased against the Project and could not lawfully vote on it. Safeway's legal counsel also wrote letter after letter alleging that the City would be subject to "tens of millions of dollars of damage" if it did not approve Project without an EIR. To apparently prove that its repeated threats were not idle, Safeway's legal counsel even submitted a draft complaint for damages to the City that Safeway asserted would be filed and served immediately if the City did not approve the Project without an EIR. As if all that was not enough, Safeway's counsel finally threatened legal action against the

various councilmembers in their individual capacities, stating, "[Y]ou will be required to retain your own counsel in the event that this matter proceeds to litigation."

6. Safeway's campaign of intimidation continued through the City Council's final decision at its meeting on April 1, 2019. During public comment, Safeway's counsel brazenly threatened that "[t]he only outcome where the property owner and Safeway do not aggressively pursue legal recourse, including the fast-tracking of discovery and depositions, is if the council" approved the Project that night without requiring an EIR.

7. Safeway's threats were heard loud and clear by the Council, which thereafter went into closed session for approximately 30 minutes to discuss "anticipated litigation" and then reemerge for a prompt vote on the Project. The Council reversed its prior vote on December 3, 2018 requiring an EIR, and instead voted 5 – 1 to approve the Fuel Center without an EIR, despite the documented significant health and other environmental impacts.

8. Confirming the impact of Safeway's threats on the Council, Councilmember Fischer posted the following statement to her webpage on April 2, 2019: "City Council denied the appeal to stop the construction based on the threat of lawsuit from Safeway, and no city funds to fight this lawsuit. Safeway gas station will be built."

9. While the City Council's concern about maintaining fiscal solvency is certainly understandable in light of Safeway's repeated threats of crushing litigation fees and "tens of millions of dollars of damages," the City's actions are unlawful and must be set aside. The record supports a fair argument of significant environmental impacts requiring preparation of an EIR.

10. Further, the City prejudicially abused its discretion by taking action on the Project based on impermissible considerations. The City Council's deliberation on whether to approve the Project and require an EIR were based on the anticipated litigation costs associated with each action, and whether the City would be indemnified from those costs. The City also ignored its own municipal code by taking the legal position that it had no authority to modify, condition or deny the Project based on human health and safety concerns.

11. Land use and environmental decisions, particularly those with human health implications, should not and cannot be based upon strong-arm threats of crushing litigation costs by deep pocketed project applicants. Intervention by the Court, which Safeway cannot threaten and intimidate like it did the City Council, is necessary to maintain the rule of law and protect the residents of Petaluma.

PARTIES

12. Petitioner SAVE PETALUMA ("Petitioner") is an unincorporated association of Petaluma residents that was formed after the City's approval of the Project in order to maintain the present action. Members of Petitioner include JoAnn McEachin, Andriann Saslow, Rebecca Carpenter, and Eugenia Praetzel. Ms. McEachin, Ms. Saslow and Ms. Carpenter all reside in close proximity to the Project site. Ms. Praetzel is a teacher at McDowell Elementary School, which is located approximately 60 feet away from the Project site.

13. Respondent CITY OF PETALUMA ("City" or "Respondent") is a municipal corporation, organized under the law of the state of California, and exercising local government power including land use authority. The City has a population of approximately 60,000 residents and its General Fund budget is approximately $46,000,000. As the CEQA "lead agency" for the Project, the City is responsible for preparation of an environmental document that describes the Project and its impacts and, if necessary, evaluates mitigation measures and/or alternatives to lessen or avoid any significant environmental impacts.

14. Real Party in Interest SAFEWAY, INC. ("Safeway" or "Real Party") is a Delaware corporation authorized to do business in the state of California. While previously a public corporation, Safeway is now privately owned by Cerberus Capital Management, a private equity firm that has more than $40 billion in assets under management. Safeway is the applicant seeking discretionary entitlements for the Project at issue in this action.

15. Petitioner is unaware of the true names and capacities of Real Parties in Interest DOES 1 through 20, and therefore names such Real Parties in Interest by fictitious names. Petitioner is informed and believes, and based on such information and belief, alleges that the fictitiously named Real Parties in Interest are also responsible for the actions described in this

Petition. When the true identities and capacities of DOES 1 through 20 have been determined, Petitioner will seek leave from the Court to amend this Petition to insert such identities and capacities.

FACTUAL BACKGROUND

The Project, Project Site and Surrounding Properties

16. The Fuel Center is proposed for the corner of South McDowell Boulevard and Maria Drive in the City of Petaluma ("Project Site"). The Project Site is currently occupied by a large occupied commercial building. The Project includes demolition of the existing commercial building and replacing it with a Fuel Center with 16 fuel dispensers.

17. In the Project review period, Safeway indicated that the Fuel Center's throughput would be limited to 8.5 million gallons of gasoline and diesel per year. Safeway refused to disclose to City officials and the public what this throughput meant in terms of total vehicles per day served by the Project. On information and belief, the Project would serve approximately 2,000 vehicles per day.

18. The Project Site is bounded by commercial retail to the north and west; single-family residential to the south, across South McDowell Boulevard; and institutional and recreational uses to the east, across Maria Drive. Sensitive receptors are nearby. These include:

- ***4Cs Petaluma Child Development Center***, located at 401 South McDowell, 60 feet away;
- ***North Bay Children's Center***, 405 South McDowell Boulevard, 60 feet away, located at the northeast corner of South McDowell and Maria Drive;
- ***McDowell Elementary School***, 421 South McDowell Boulevard, 60 feet away;
- an associated ***recreational playfield*** 60 feet away; and
- ***residences*** along South McDowell Boulevard, 80 feet away.

19. The North Bay Children's Center provides comprehensive high-quality child care and early education programs and includes an on-site garden. The 4Cs Petaluma Child Development Center, located in an adjacent building immediately across Maria Drive from the Project site, also provides high-quality child care. The McDowell Elementary School covers

kindergarten (4 years old) to sixth grade and has approximately 255 students and 16 teachers. The campus is shared with Petaluma Adult School and the McDowell Family Resource Center, and hosts "lunchtime boys' and girls' soccer leagues" as well as before-and after-school activities. The school also provides extensive outdoor activities.

Impacts of the Project

20. The operation of fuel dispensing stations results in emissions of criteria air pollutants and toxic air contaminants ("TACs") from vehicle exhaust, fuel storage tanks, refueling, and tanker truck deliveries of fuels. Emissions from gasoline refueling and gasoline deliveries present special concern because they result in fugitive emissions from dispensing pumps, vents, and spills. These emissions include a number of TACs, including benzene—a potent carcinogen. CARB considers benzene as one of the highest risk air pollutants it regulates, finding that near-source exposures for large gasoline dispensing facilities can be significant and exceed district health risk thresholds. CARB is particularly concerned with the emergence of very high gasoline throughput at large retail or wholesale outlets. The Project, with its 16 fuel dispensers, is one of these facilities.

21. Numerous peer-reviewed, scientific studies that have linked residential and school proximity to gas stations to an increased risk of adverse health outcomes, including cancer and, specifically, leukemia in children.

22. CARB's established land use guidance to cities and counties is to locate gasoline stations with a throughput of 3.6 million gallons more than 300 feet away from sensitive receptors such as homes, daycare centers and schools. Safeway flouted that guidance by asking the City to approve its proposed Project with a throughput of 8.5 million gallons a mere 60 feet from the nearest sensitive receptors.

23. Safeway claimed that CARB's recommended setback distances are outdated because they were developed using emission factors developed in 1999 and, since then, advancements have occurred that would reduce emissions. However, a recent peer-reviewed scientific study by M. Hilpert, A. M. Rule, B. Adria-Mora, and T. Tiberi, "Vent Pipe Emissions from Storage Tanks at Gas Stations: Implications for Setback Distances," dated September 24,

2018 ("Hilpert Study") confirms exactly the opposite. The Hilpert Study actually measured, for the first time, gasoline station vent pipe benzene emissions and found, "Recorded vent emissions factors were 10 times higher than estimates used to derive setback distances for gas stations." The Hilpert Study also noted California's stricter air emissions regulations, and concluded, "Current CARB setback distances might be adequate for gas stations in California but less so for the other 49 US states." Thus, the CARB recommended distances remain necessary to protect human health.

24. Safeway further prepared a health risk assessment ("HRA") suggesting that CARB's guidance is somehow incorrect because the health risks to these sensitive receptors are in fact less than significant under the accepted standard of 10 increased cancer risks. Independent preeminent experts reviewed Safeway's HRA in order to determine whether it employed proper methodologies and accurately characterized the Project's risk to human health. These experts included Phyllis Fox, PhD, PE, and Ray Kapahi, BSC, M. Eng. Dr. Fox's work, in particular, has figured prominently in seminal CEQA cases such as *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344 and *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 90.

25. Dr. Fox and Ray Kapahi both peer-reviewed Safeway's HRA and also performed their own independent HRA for the Project. Dr. Fox and Ray Kapahi identified numerous methodological flaws in Safeway's HRA that resulted in dramatically under-estimating the Project's health risk to sensitive receptors in the immediate area. Dr. Fox and Ray Kapahi confirmed these findings through their own HRA that disclosed health risks many times above the accepted significance standard of 10 increased cancer risks. Many nearby homes are within the area of greater than 50 increased cancer risks.

26. The Project will also result in potentially significant impacts related to transportation and traffic safety. The Mitigated Negative Declaration ("MND") prepared for the Fuel Center predicted that the Project would generate 210 am peak hour and 276 pm peak hour trips, but did not disclose how many total trips per day would be generated. Even without disclosing total daily vehicle trips, the Project's high volume of vehicle trip generation raises

transportation and safety concerns. Transportation expert Larry Wymer, T.E., peer reviewed the MND's traffic studies and identified several defects. Among other defects, Mr. Wymer's review noted that the traffic study assumed an unrealistic trip distribution through the Project driveways. This concealed the Project's potentially significant project impacts at various intersections and roadways, some of which are already operating with unacceptable delay under baseline conditions.

27. The large number of vehicles visiting the Fuel Center in close proximity to the daycare centers and elementary school would also result in potentially significant traffic and safety hazards. Neighbors, parents and teachers provided fact-based observations of safety concerns associated with increased activity at the South McDowell Boulevar/Maria Drive intersection. These comments recounted experiences of school families, teachers and residents who routinely use this intersection to access facilities at the South McDowell Elementary School, services at the Safeway Shopping Plaza and nearby recreational amenities. These public commenters described incidences of both vehicle/pedestrian collisions as well as near collisions that would not be captured in the collision record. The Fuel Center would significantly increase vehicle activity at this intersection and also increase the number of pedestrians due to children, teachers and residents accessing the proposed kiosk for snacks and drinks. In short, the Project may significantly increase the risk to safety in the immediate area including, but not limited to, school children, pedestrians, ballpark activities, and school bus loading.

28. The Fuel Center's close proximity to the daycare centers and elementary school also result in significant impacts in the areas of hazardous materials. The Project would include demolition of an existing large commercial building that is known to contain asbestos at concentrations up to 35 percent. Unless adequately mitigated, construction dust containing asbestos could pose a significant health risk to children and teachers located across the street and downwind from the Project.

29. Operation of the Fuel Center would include the routine use and transport of massive quantities of hazardous materials including gasoline. Gasoline storage and dispensing facilities contain hazardous materials, including liquid fuels as well as gas vapors that create

potential hazards to the daycare centers and elementary school located literally across Maria Drive from the Project Site. These potential hazards include the release of hazardous materials at the Project site. Furthermore, emissions of vapor and small spills of liquid fuels would routinely occur in the course of normal Fuel Center operations. Though individually small, the cumulative effect of these small releases can result in a hazard when occurring close to sensitive receptors such as daycare centers or a school.

The Project's Requested Approval

30. The Project required a site plan and architectural review ("SPAR") approval from the City. The SPAR is a discretionary entitlement issued by the City that expressly includes the authority to "approve the project as applied for, approve the project with modifications, or disapprove the project" under section 24.010, subdivision (G) of the City's implementing zoning ordinance ("IZO").)

31. The City has authority to approve, modify, or deny a SPAR application based on broad considerations, as the IZO explains:

> 1. It is the intent of this Section that any controls be exercised to achieve a satisfactory quality of design in the individual building and its site, appropriateness of the building to its intended use, and the harmony of the development with its surroundings. Satisfactory design quality and harmony will involve among other things:
>
> a. The appropriate use of quality materials and harmony and proportion of the overall design.
>
> b. The architectural style which should be appropriate for the project in question, and compatible with the overall character of the neighborhood.
>
> c. The siting of the structure on the property, as compared to the siting of other structures in the immediate neighborhood.
>
> d. The size, location, design, color, number, lighting, and materials of all signs and outdoor advertising structures.
>
> e. The bulk, height, and color of the proposed structure as compared to the bulk, height, and color of other structures in the immediate neighborhood.

(IZO, § 24.010, subd. (G)(1).)

32. In exercising its discretion on a particular project's harmony with its soundings or its siting as compared to other structures in the neighborhood, the IZO grants the City authority to consider the "public health, safety, and general welfare" and also "to impose more stringent

requirements . . . necessary to promote appropriate land use and development, environmental resource protection, and the other purposes of this Zoning Ordinance." Section 1.040 of the IZO provides:

> Minimum requirements. The provisions of this Zoning Ordinance shall be minimum requirements for the promotion of the public health, safety, and general welfare. When this Zoning Ordinance provides for discretion on the part of a City official or body, that discretion may be exercised to impose more stringent requirements than set forth in this Zoning Ordinance, as may be determined by the review authority to be necessary to promote appropriate land use and development, environmental resource protection, and the other purposes of this Zoning Ordinance.

33. The IZO vests the City with authority to approve, modify with conditions, or deny a SPAR application based on environmental, human health and safety considerations.

The City's Administrative Proceedings and Safeway's Campaign of Intimidation

34. The City's planning commission reviewed the Project at a meeting on May 8, 2018. The commissioners expressed concerns related to the traffic analysis, including pedestrian uses and safety, and air quality impacts. After receiving public comments and discussing the item, the matter was continued to June 26, 2018.

35. On June 26, 2018, the planning commission adopted the MND and approved the requested SPAR for the Project. The decision was not unanimous; the vote was 4 – 3 in support of approval. During that hearing, Safeway's counsel threatened that "any further delays would expose the city to a risk of litigation and damages." This prompted Planning Commissioner Diana Gomez to respond:

> You can see how this has been a very emotional and adversarial proceeding tonight, which is very unusual for our Planning Commission. And I gotta say, Mr. Francois, I was appalled as a fellow attorney that you would come bully this council, this commission. Really. It was appalling to me to say that if we don't do something that you think we should do that you're going to initiate litigation against the city. I can't, it's beyond my belief that an attorney would do that. And, yeah, that's coming from an attorney. So just, that, that attitude set the tone for the evening which is very unfortunate and disappointing.

36. Consistent with the requirements of IZO section 24.070, JoAnn McEachin submitted a timely appeal of the planning commission's actions, and which was filed on behalf

of the McDowell Elementary School, Little League Children, and East Petaluma Residents, and included 15 additional signatures from members of the public ("Administrative Appellants").

37. The Administrative Appellants thereafter retained counsel, and submitted additional legal analysis and expert evidence supporting the administrative appeal on September 14 and 17, 2018. Safeway also submitted extensive materials. The City Council twice continued the appeal hearing in order to give staff time to respond to the submissions.

38. The City Council heard the administrative appeal on December 3, 2018, which was a *de novo* consideration of the Project. The Council considered the extensive expert and lay testimony provided by Administrative Appellants, Safeway and other members of the public. The staff report for that hearing noted, "Various comment letters have been submitted from members of the public, the vast majority of which express opposition to the project on a number of grounds including air quality/ health risks, safety, and circulation/traffic, while a few express support of the project." Upon considering all the evidence, the City Council found that substantial evidence in the record supported a fair argument of significant environmental impacts and therefore voted unanimously not to adopt the MND and to instead require a full EIR before considering whether to approve the Project.

39. Undeterred, on January 2, 2019, Safeway submitted a letter to the City purporting to document multiple violations of the Brown Act by the City concerning its hearing on December 3, 2019, and demanding that the City Council vacate its decision and conduct another hearing. The City acceded to this demand by letter dated January 22, 2019.

40. Immediately following the City's agreement to hold a new hearing on the Project, Safeway ramped up its campaign of threats and intimidation. The next day, on January 23, 2019, Safeway submitted a 37-page letter to the City laying out various grievances, which included 13 pages describing the purported bias by six of the seven councilmembers as well as its various legal theories supposedly justifying damage claims. The asserted legal theories included procedural due process, substantive due process, equal protection, taking, and unlawful interference with contractual relations. Safeway closed its letter by threating, "[W]e respectfully

urge you to deny the Appeal or abstain from acting on it. . . . Any other action would expose the City to litigation and liability for damages and attorneys' fees."

41. Safeway's strategy of claiming bias by councilmembers was informed and encouraged by its experience in the City of Sacramento. There, the city council upheld a citizen group's appeal of a conditional use permit for an analogous 16-dispenser Safeway fuel station. Safeway's legal counsel, Rutan & Tucker, represented the developer in Sacramento and filed a lawsuit challenging the city's denial of the requested Safeway fuel station use permit. In January 2018, the trial court found that one councilmember had demonstrated an unacceptable probability of actual bias and issued a peremptory writ of mandate. (*Petrovich Development Company v. City of Sacramento*, Sacramento County Superior Court, case number 34-2016-80002289.) It was widely reported that the City of Sacramento, with an estimated population of 501,000 residents and General Fund budget of approximately $588,000, expended on the order of $800,000 in legal fees to defend that action, which is now on appeal in the Third Appellate District.

42. Safeway submitted another letter on January 28, 2019, arguing that "even more evidence has come to light underscoring that the City decision-makers and Staff are not neutral and unbiased, as the law requires."

43. On January 28, 2019, the City held its public hearing to cure the Brown Act violations alleged by Safeway to have occurred on December 3, 2018. Safeway's campaign of alleging bias was partially successful as Councilmembers Kearney and Miller recused themselves. The remaining councilmembers voted to uphold the resolution requiring an EIR for the Project, but with the express understanding that the Council would thereafter vote to reconsider that action. The purpose of this procedure was to timely comply with the Safeway's claimed Brown Act violation but also give City staff time to address a new case, *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2019) 31 Cal.App.5 180, that Safeway claimed prevented the City from considering anything other than design-related issues in its SPAR and, by extension, CEQA review for the Project.

44. Safeway's campaign of intimidation continued. Safeway submitted another letter on February 11, 2019, setting forth various additional complaints regarding how the City was handling the appeal hearing process, repeating that "Safeway is also cognizant of its rights to Due Process and Equal Protection and has voiced its concerns on these matters to the City."

45. Safeway submitted yet another letter on March 3, 2019, stating, "Since our January 24, 2019 and January 28, 2019 letters even more evidence has come to light underscoring that the City decision-makers and Staff are not neutral and unbiased as the law requires."

46. To emphasize that its threats were not idle, on or about March 3, 2019, Safeway also submitted to the City a draft "Verified Petition for Writ of Mandate and Complaint for Declaratory Relief and Damages." That same day, Safeway's counsel orally represented to the City Attorney on March 3, 2019, that he was authorized by Safeway to file the petition and complaint the next day if the City Council voted to require an EIR on the Project.

47. The Council held a hearing on its reconsideration motion on March 4, 2019. The Council took public testimony but continued further consideration and Council action until April 1, 2019. In response, Safeway both intensified its campaign of intimidation and also added an element of deception.

48. Safeway submitted yet another letter on March 27, 2019, which included a 17-page analysis of how all of the councilmembers except Councilmember King were impermissibly biased against the Project. No longer content to rely on threats against the City, however, Safeway expressly threatened to sue the councilmembers <u>in their individual capacities</u> if they voted to require an EIR for the Project, stating in relevant part:

> We strongly encourage the Mayor and newly elected Councilmembers that publicly voiced opposition to the Project during their campaigns to seek independent legal advice on this issue given that the City Attorney does not and cannot represent you in an individual capacity and you will be required to retain your own counsel in the event that this matter proceeds to litigation.

49. Two days later, on March 29, 2019, a different law firm, Miller Starr Regalia, submitted a letter to the City "regarding the issue of councilmember bias Safeway, Inc. has raised," and proceeded to repeat the same claims of bias set forth in earlier letters by Safeway's

counsel. Miller Star Regalia did not identify its client or explain what prompted its submission of the letter. On information and belief, Safeway orchestrated submission of this letter in an attempt to mislead the councilmembers into believing that Miller Starr Regalia's analysis was not submitted on behalf of Safeway or advancing Safeway's interest.

50. On or about March 28, 2019, the City released its staff report for the upcoming public hearing on April 1, 2019. The City ultimately distinguished the *McCorkle* decision and found that it did not dictate the scope of the City's SPAR or CEQA review for the Project, explaining in relevant part:

> There are also significant differences between the St. Helena and Petaluma design review regulations. In the St. Helena ordinance, there is no equivalent provision to the requirement in IZO Section 24.010(G) of achieving "harmony of the development with its surroundings." Also, the St. Helena code significantly constrains the city's authority to deny a project solely on design review grounds. It provides in subdivision (c) of Section 17.164.040 entitled "Limitations of review" that "[o]nly the proponent's failure to take reasonable account of the items discussed in Section 17.164.010 through 17.164.030 [the Statement of policy, Purpose, and Design criteria sections of the St. Helena Design Review chapter] shall justify the commission's disapproving a proposal solely on the basis of design." There is no comparable provision in the Petaluma SPAR regulations.
>
> . . .
>
> If counsel for Safeway is correct as to the limiting effect of the *McCorkle* case on the ability of Petaluma approving bodies to require mitigation of environmental impacts of projects seeking SPAR approval, that would represent major change regarding the City's environmental review and project approval practices.

51. Although concluding that *McCorkle* did not dictate the scope of the City's review over its own SPAR approval, the staff report did not recommend a specific outcome of the hearing. Instead, it provided draft findings supporting for two alternate actions: (i) require preparation of an EIR prior to consideration of the SPAR, or (ii) adopt the MND and approve the SPAR.

52. Following release of the City staff report disagreeing with Safeway's legal interpretation of the *McCorkle* decision, Safeway submitted yet another letter on April 1, 2019, claiming that "Due to Councilmember bias, the City Council cannot lawfully uphold the appeal." Safeway further threatened, "The delays to date subject the City to tens of millions of

dollars of damages. Any further delays merely compound the City's exposure to additional damages." (Emphasis added.)

53. Later that evening on April 1, 2019, the Council held its continued hearing on the reconsideration motion. During that hearing, Safeway's counsel underlined Safeway's numerous threats of litigation against the City and the councilmembers individually, stating, "The only outcome where the property owner and Safeway do not aggressively pursue legal recourse, including the fast-tracking of discovery and depositions, is if the Council" approved the Project without an EIR. And that is exactly what the Council did. It thereafter went into closed session for approximately 30 minutes to discuss the earlier-scheduled "anticipated litigation" closed section item. Upon reemerging from that closed session discussion, the Council promptly proceeded to reverse its prior vote on December 3, 2018 requiring preparation of an EIR, and instead voted 5 – 1 to approve the Fuel Center based on the same MND the City had previously determined was insufficient to disclose the impacts of the Project.

54. Immediately following the Council's vote, Councilmember Fischer stated that it "would have been fiscally irresponsible" of the Council to vote any other way. The next day, she also posted the following statement on her webpage: "April 2, 2019 – City Council denied the appeal to stop the construction based on the threat of lawsuit from Safeway, and no city funds to fight this lawsuit. Safeway gas station will be built." A true and correct copy of this web post is attached hereto as Exhibit A, and incorporated herein by this reference.

55. The City filed its notice of determination ("NOD") for the Project on April 5, 2019.

JURISDICTION AND VENUE

56. This Court has jurisdiction over the matters alleged in this Petition pursuant to Code of Civil Procedure section 1094.5, and Public Resources Code sections 21168 and 21168.5.

57. Venue is proper in the County of Sonoma under Code of Civil Procedure section 394.

58. This Petition is timely filed in accordance with Public Resources Code section 21167, subdivision (b). The City filed its NOD for the Project on April 5, 2019. (*Citizens of Lake Murray Association v. City of San Diego City Coun*cil (1982) 129 Cal.App.3d 436, 440-441 [the act of posting an NOD commences the 30-day limitations period for the filing of litigation].)

EXHAUSTION OF ADMINISTRATIVE REMEDIES

59. Petitioner has exhausted administrative remedies to the extent required by law. Petitioner has performed all conditions precedent to this filing and participated in the administrative process. Petitioner's members actively participated in the administrative process leading up to the City's approval of the Project and issuance of a notice of determination, and stated their objections to the City's actions. (See Pub. Resources Code, § 21177, subd. (b).)

60. Respondent has taken final agency actions with respect to adopting the MND and approving the Project. The City has a mandatory duty to comply with all state and federal laws, including but not limited to CEQA, prior to undertaking the discretionary actions at issue in this lawsuit.

STANDING

61. Petitioner has standing to assert the claims raised in this Petition because its members include residents of the City of Petaluma and have personal, health, safety, community and environmental interests that are directly and adversely affected by the City's approval of the Project and adoption of the MND. As an association composed of people who live and work within the City, Petitioner is within the class of persons beneficially interested in, and aggrieved by, the acts of Respondent as alleged below. Ms. McEachin, Ms. Saslow, Ms. Carpenter, Ms. Praetzel and other members of Save Petaluma, have personal, health, safety and property interests that will be adversely affected if the Project is approved based on unlawful considerations and without proper analysis and mitigation of its environmental impacts.

62. Petitioner has a substantial interest in ensuring the Project's impacts are fully mitigated. Unless the relief requested herein is granted, Petitioner's members' health and safety, environmental and community interests will be adversely affected and injured by Respondent's

failure to comply with CEQA in approving the Project and adopting the MND. The City's approval of the Project is also a matter of public interest.

IRREPARABLE HARM

63. The City's failures, set forth in this Petition, constitute a prejudicial abuse of discretion within the meaning of the Code of Civil Procedure and CEQA. (See Code Civ. Proc., §1094.5; Pub. Resources Code, §§ 21168, 21168.5.)

64. Petitioner possesses no other remedy than to challenge the City's abuse of discretion other than by means of this lawsuit. If the City's actions concerning the Project are effectuated, Petitioner, its members and their health, the residents of Petaluma, and the environment will be irreparably harmed. No money damages could adequately compensate for that harm.

PRIVATE ATTORNEY GENERAL DOCTRINE

65. Petitioner brings this action as a private attorney general pursuant to Code of Civil Procedure section 1021.5, and any other applicable legal theory, to enforce important rights affecting the public interest.

66. Issuance of the relief requested in this Petition will confer a significant benefit on the general public by requiring Respondent to carry out its duties under CEQA before approving the Project.

67. Issuance of the relief requested in this Petition will also result in the enforcement of important rights affecting the public interest by compelling Respondent to engage in a fair, objective, and legally adequate analysis of the Project's environmental impacts, and to ensure that the public has a meaningful opportunity to review and comment on these impacts and mitigation measures for that Project.

68. The necessity and financial burden of enforcement are such as to make an award of attorneys' fees appropriate in this case. Absent enforcement by Petitioner, Safeway will proceed with a project that will cause significant, unmitigated human health and environmental impacts that might otherwise have been reduced or avoided through legally adequate environmental review and the adoption of feasible mitigation measures.

NOTICE OF CEQA SUIT

69. On May 3, 2019, Petitioner served a notice of Petitioner's intent to file this lawsuit, pursuant to Public Resources Code section 21167.5. (See Exhibit B, Notice of Commencement of Action against the City of Petaluma.)

REQUEST TO PREPARE ADMINISTRATIVE RECORD

70. Pursuant to Public Resources Code, section 21167.6, subdivision (b)(2), and any other applicable authority, Petitioner elects to prepare the record of proceedings in this action.

FIRST CAUSE OF ACTION
(Violations of CEQA)

71. Petitioner hereby realleges and incorporates the allegations contained in paragraphs 1 through 70, inclusive, of the Petition as if fully set forth herein.

72. CEQA applies to discretionary projects that are undertaken, funded, or approved by public agencies. Under CEQA, a project may be approved based on a MND, rather than an EIR, only if the initial study for the project that is circulated for public review and comment indicates that all of the project's identified, potentially significant adverse effects have clearly been mitigated to less than significant levels, and if no substantial evidence emerges through the public review process that a project may have a significant effect.

73. In this case, Respondent prejudicially abused its discretion in approving the Project because substantial evidence in the administrative record supports a fair argument that Respondent's approval of the Project may result in one or more significant effects on the environment. The substantial evidence before Respondent demonstrates, at a minimum, that the MND:

a. Failed to adequately disclose, evaluate, or mitigate the Project's direct, indirect and cumulative impacts on human health resulting from emissions of toxic air contaminants.

b. Failed to adequately disclose, evaluate, or mitigate the Project's direct, indirect and cumulative impacts associated with transportation and traffic safety.

c. Failed to adequately disclose, evaluate, or mitigate the Project's direct, indirect and cumulative impacts associated with hazardous materials resulting from both demolition/construction activities as well as operational activities.

74. Respondents violated CEQA by failing to prepare an EIR for the Project despite the existence of substantial evidence in the record of proceedings supporting a fair argument that the Project will cause potentially significant impacts in various resources areas including, but not limited to, air emissions and resulting human health impacts, transportation and traffic safety impacts, and hazardous materials.

75. As a result of the foregoing defects, Respondent failed to adopt legally adequate mitigation for the Project and approved the Project with unmitigated impacts. Respondent prejudicially abused its discretion by adopting an MND that does not comply with the requirements of CEQA, and failing to prepare an EIR for the Project.

76. CEQA requires a lead agency to apply its independent judgment to its adoption of an MND. (Pub. Resources Code, § 21082.1, subd. (c).) The City's adoption of the MND does not reflect the City's independent judgment because the City found that substantial evidence supported a fair argument of significant impacts, and further found that the *McCorkle* decision did not constrain the City's CEQA review authority. Rather, the City's adoption of the MND reflects undue influence on the City Council resulting from threats and intimidation by Safeway.

77. Respondent's decision to adopt the MND is invalid and an abuse of discretion because its findings are not supported by evidence, its decision is not supported by the findings, and it has not proceeded in the manner required by law as required by Public Resources Code section 21081.

78. As a result of the foregoing defects, Respondent's adoption of the MND is contrary to law and invalid and must be set aside.

SECOND CAUSE OF ACTION

(Petition for Writ of Mandate, Code of Civil Procedure section 1094.5)

79. Petitioner hereby realleges and incorporates the allegations contained in paragraphs 1 through 78, inclusive, of the Petition as if fully set forth herein.

80. A Court's inquiry into the validity of an administrative decision extends to whether there was an unfair hearing or prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b); *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470.)

81. The City failed to provide a fair hearing and prejudicially abused its discretion with respect to its approval of the Fuel Center entitlements because the City Council's actions were improperly influenced. The City Council believed that its action on the Project either way would be the subject of litigation, and therefore privately assessed and contrasted the City's financial exposure resulting from the two different anticipated lawsuits, depending on the City Council's decision.

82. On information and belief, despite concluding that the *McCorkle* decision was distinguishable and did not limit the scope of the City's CEQA review authority as Safeway argued, the Council privately determined that a lawsuit brought by Safeway alleging purported bias by the majority of the Council, no matter how weak, would cost hundreds of thousands, and even millions, of dollars to defend in court since it would necessarily include costly depositions and other discovery—as Safeway's counsel had repeatedly threatened. The Council further privately determined that including Safeway's express claim of "tens of millions of dollars in damages" resulted in an overall financial risk to the City of $20 million to $30 million dollars.

83. By comparison, the City Council privately determined that a lawsuit by residents challenging the City's approval of the Project would be a much less expensive writ action that would likely not involve extensive discovery, and—more importantly—Safeway would indemnify and defend the City in any such action. Thus, the City Council determined that approving the Project presented no financial risk to the City from anticipated litigation.

84. The City's decisions to approve the requested SPAR and adopt the MND rather than require an EIR were based on a comparison of the financial risk to the City resulting from anticipated competing lawsuits. While understandable, this financial analysis is an impermissible consideration for both a land use entitlement and CEQA document. The City's failure to render an administrative decision based solely on the record before it, instead issuing

Project approvals as a result of improper considerations and/or improper influence, constitutes an unfair trial and abuse of discretion.

85. The City also prejudicially abused its discretion and failed to provide a fair hearing by concluding that it had no authority to modify, condition or deny the requested SPAR based on environmental, human health and safety impacts resulting from the siting of the Project in relation to existing land uses. In fact, the City has legal authority to modify, condition or deny a SPAR based on these considerations.

86. Based on the foregoing, the City prejudicially abused its discretion and failed to provide a fair hearing to Petitioner and the public on the SPAR and its adoption of the MND. Respondent's approval of the SPAR and adoption of the MND are contrary to law and must be set aside.

87. Accordingly, Petitioner prays for the relief requested below.

PRAYER

WHEREFORE, Petitioner prays for judgment and relief as hereinafter set forth:

1. That the Court issue an alternative and/or peremptory writ of mandate directing the City to:

a. Vacate and set aside all approvals of Project entitlements;

b. Comply with CEQA by preparing legally adequate environmental document under CEQA for the Project

c. Comply with the IZO by holding a new public hearing on the SPAR that is fair, and free from undue influence and errors of law; and

d. Refrain from issuing or approving any further permits or entitlements for the Project until the City has prepared and certified a legally adequate environmental document for the Project and complied with all other requirements of CEQA, as directed by this Court pursuant to Public Resources Code section 21168.9;

2. That the Court issue a stay, temporary restraining order, a preliminary and/or permanent injunction barring Respondent and Real Party, and all persons working on their behalf, from proceeding with any activity, which may result in any physical change in the

environment on the Project site pending completion of this litigation and full compliance with CEQA;

3. That the Court issue a writ of mandate directing Respondent and Real Party to suspend all necessary steps and all activity in furtherance of the Project until the City takes all necessary steps to bring its actions into compliance with CEQA;

4. That Petitioner be awarded costs of this proceeding;

5. That Petitioner be awarded reasonable attorney's fees for this action pursuant to Code of Civil Procedure section 1021.5, and any other applicable provisions of law; and

6. That Petitioner be awarded such other and further relief as the Court deems just and proper.

Dated: May 3, 2019

SOLURI MESERVE,
A LAW CORPORATION

By: 

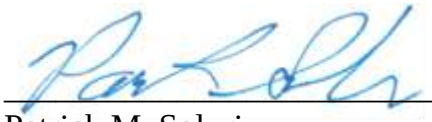
Patrick M. Soluri
Attorney for Petitioner
Save Petaluma

VERIFICATION

I, Patrick M. Soluri, am counsel of record for Petitioner Save Petaluma. I sign for Petitioner absent from the county of counsel. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 3rd day of May, 2019, in Sacramento, California.



Patrick M. Soluri

EXHIBIT A

FISCHER ★ (http://dlyndafischer.com/)

PETALUMA CITY COUNCIL

HOT TOPICS (HTTP://DLYNDAFISCHER.COM/CATEGORY/HOT-TOPICS/)

SAFEWAY GAS STATION

POSTED MARCH 9, 2019 (HTTP://DLYNDAFISCHER.COM/SAFEWAY-GAS-STATION/) DLHF (HTTP://DLYNDAFISCHER.COM/AUTHOR/ADMIN/)

City Council activities on this topic:

April 2, 2019 – City Council denied the appeal to stop the construction based on to threat of lawsuit from Safeway, and no city funds to fight this lawsuit. Safeway gas station will be built.

Shall there be a gas station built in Safeway parking lot?

- Yes
- No

EXHIBIT B

SOLURI MESERVE
a law corporation

tel: 916.455.7300 · fax: 916.244.7300
510 8th Street · Sacramento, CA 95814

May 3, 2019

SENT BY U.S. MAIL & EMAIL
(cityclerk@ci.petaluma.ca.us; ccooper@ci.petaluma.ca.us)

Claire Cooper, CMC
City Clerk, City of Petaluma
11 English Street
Petaluma, CA 94952

RE: Notice of Commencement of Action against City of Petaluma

Dear Ms. Cooper:

Please take notice, under Public Resources Code section 21167.5, that Petitioner Save Petaluma intends to file a Verified Petition for Writ of Mandate (the "Petition") under the provisions of the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA"), against the City of Petaluma ("City"). The Petition challenges the City's April 1, 2019 approval of a 16-pump Safeway Fuel Station at the corner of South McDowell Boulevard and Maria Drive (the "Project"). The lawsuit will be based on violations of CEQA and other claims, as discussed more fully in the Project's administrative and environmental review proceedings. The exact nature of the allegations and relief sought is described in the Petition that Petitioner plans to file on May 6, 2019.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: 
Patrick M. Soluri

PS/mre

cc (via email only): Eric Danly, City Attorney (EDanly@cityofpetaluma.org)

Attachment: Proof of Service

PROOF OF SERVICE

I hereby declare that I am employed in the City of Sacramento, County of Sacramento, California. I am over the age of 18 years and not a party to the action. My business address is 510 8th Street, Sacramento, California 95814.

On May 3, 2019, I served the attached document:

NOTICE OF COMMENCEMENT OF ACTION AGAINST CITY OF PETALUMA

on the following parties or attorneys for parties, as shown below:

Claire Cooper, CMC
City Clerk, City of Petaluma
11 English Street
Petaluma, CA 94952
Emails: cityclerk@ci.petaluma.ca.us; ccooper@ci.petaluma.ca.us

Service was caused as follows:

✓ **BY U.S.P.S. FIRST-CLASS MAIL**: I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the U.S. Postal Service. In the ordinary course of business, correspondence would be deposited with the U.S. Postal Service on the day on which it is collected. On the date written above, following ordinary business practices, I placed for collection and mailing at my place of business the attached document in a sealed envelope, with postage fully prepaid, addressed as shown above.

✓ **VIA ELECTRONIC MAIL**: I caused such document to be sent by electronic mail to the addressee at the email addresses listed above. The document was served electronically from my place of business at 510 8th Street, California 95814 from my electronic service address at mae@semlawyers.com.

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California on May 3, 2019.

Mae Ryan Empleo