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July 15, 2019

SENT VIA USPS FIRST-CLASS MAIL & EMAIL (mfrancois@rutan.com)

Matthew D. Francois
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San Francisco, CA 94105

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

Dear Mr. Francois:

This responds to your letter dated July 10, 2019 purporting to meet and confer on various issues regarding *Save Petaluma v. City of Petaluma et al*. As discussed more fully below, the claims supporting your threatened demurrer and anti-SLAPP motion are without merit. In fact, neither your July 10th letter nor July 9th telephone call represent a good faith effort to meet and confer. Rather, they are mere vehicles to transmit your threat to "seek an award of attorneys' fees and costs." Your strategy of naked threats and intimidation based on Safeway's vast financial resources will not work with the members of Save Petaluma.

I. THE DEMURRER

A. CEQA Claim

Your letter asserts three grounds to demurrer to Plaintiffs' first cause of action for demurrer. These include: (i) failing to seek judicial review of the notice of determination following the planning commission's action on the project; (ii) failing to administratively appeal the City's reliance on a mitigated negative declaration ("MND") for the project; and (iii) the City's lack of discretion to require an EIR for the project. All these claims are without merit. The first two are completely frivolous.

You first claim that Petitioner was somehow required to file a legal action following the Planning Commission's decision. The authorities in the string cite are all irrelevant because they do not involve a situation, as here, where a timely administrative appeal is taken. The leading CEQA treatise explains: "If an appeal is available to a

higher administrative remedy is not pursued, an action attacking the agency decision is barred. The courts do not have jurisdiction to hear a matter until all administrative avenues for relief have been pursued and the administrative process has been completed." (Kostka & Zischke, Practice Under CEQA, § 23.103.) Additional authorities are unnecessary to support this basic rule.

Second, you claim that Petitioner did not appeal the City's reliance on the MND. However, this argument has been refuted by the City's own prior position and conduct. As the City previously explained:

> *Comment #31: The Appellant did not explicitly appeal the City's approval of the Mitigated Negative Declaration within 30-days of the filing of the Notice of Determination with the Sonoma County Clerk, and therefore the approval of the MND was final.*
> The appeal applies to both Planning Commission actions, approval of the IS/MND and approval of SPAR. See discussion below under the heading City Council Action on the Appeal beginning on page 33.
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> . . .
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> **City Council Action on the Appeal**
> The Appeal challenges not only the Planning Commission's SPAR approval pursuant to Resolution No. 2018-21B, but also the MND approval for the Project pursuant to Resolution No. 2018-21A. Safeway disputes this conclusion, arguing that only the Project SPAR is on appeal. Nonetheless, both the Project MND and SPAR are properly on appeal before the City Council, in accordance with the following . . .

(City staff report dated March 4, 2019 (bold and italic in original.) Other authorities supporting this position also exist, which I have previously submitted to the City.[1]

Your third argument is that the City has no discretion to require an EIR for the project. While not as frivolous as the first two claims, it is also without merit. As previously explained, *McCorkle* is factually distinguishable because the City's SPAR ordinance is broader than the St. Helena design review ordinance. Once, again, the City's record is consistent with this position:

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[1] One wonders how your firm can effectively advocate on behalf of the City when such advocacy requires the City to disavow the legality of its own prior conduct.

> 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 provisions.

(City staff report dated March 4, 2019.)

Further, the *McCorkle* decision upheld a lead agency's own determination that it did not have discretion over a design review approval. "[I]t is for the city to determine the scope that such [design] review will entail." (*Id*. at 92.) *McCorkle* does not support, as you suggest, an attempt to constrain a lead agency's interpretation of its own ordinance.

B. The Fair Hearing Claim

Your letter states that Petitioner's fair hearing cause of action is subject to demurrer based on "procedural and substantive grounds." Yet, neither your telephone call nor follow up letter provide legal support for that position as required by Code of Civil Procedure section 430.41.

You first assert a "procedural" deficiency due to the issue not being exhausted. We disagree, and the record will show that members of Save Petaluma and others asked that the City Council not base its decision on the cost of defending a lawsuit by Safeway. In any event, Petitioner adequately alleged this factual issue and so demurrer is inappropriate. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (court must assume the truth of the petition's factual allegations on demurrer).)

With respect to the "substantive" basis for demurrer to the second cause of action, you fail to discharge your duty to meet and confer under Code of Civil Procedure section 430.41, subdivision (a)(1) ("As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer

and identify with legal support the basis of the deficiencies").) During our telephone call on July 9, 2019, you stated that you would provide me authority stating that public decision-makers may validly consider costs resulting from land use decision-making. Your citations to *Nasha* and *Guilbert* however, in no way even address this issue, however, much less support this position. Specifically, *Nasha* does not address the issue of any costs, either to the agency itself or individual decision-makers, resulting from the actions in that case. Similarly, *Guilbert* addressed a disciplinary hearing and not a land use decision, and simply did not address any issue related to whether the cost associated with implementation of that decision was permissible.

Put simply, you have not yet conferred with respect to your claim that "[t]he Second Cause of Action also fails to state any cognizable claim for denial of a fair hearing on the merits." To the extent the legal authority exists that you described on July 9, 2019, Code of Civil Procedure section 430.41 requires you to provide Petitioner with such authority before filing a demurrer.

II. THE ANTI-SLAPP MOTION

Your letter asserts that Petitioner's second cause of action is also subject to an anti-SLAPP motion. While there is no specific rule requiring you to meet and confer before filing an anti-SLAPP motion, it is telling that your letter again utterly fails to support this preposterous claim with any relevant authority.

The single cited case, *Sonoma Media Investments, LLC v. Superior Court* (2019) 23 Cal.App.5th 24, 37 (*Sonoma Media*), is simply irrelevant. *Sonoma Media* represents a typical SLAPP suit "asserting causes of action for defamation, libel per se, and false light invasion of privacy" against the defendants. (*Id*. at 27.) As you are well aware, Petitioner's second cause of action does not similarly arise directly out of Safeway's activities—nor, indeed, is it even an action against Safeway. Rather, it is an action against the City alleging that the City deprived Save Petaluma, on behalf of the public, a fair hearing because the Council impermissibly considered litigation costs in its decision on the requested SPAR. Your sole reliance on *Sonoma Media* is misguided to say the least.

The controlling case is *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060, where the court states, "[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity," but "may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability . . . ." Here, Safeway's naked

threats of "tens of millions of dollars of damage" against the City, and further threat of pecuniary harm to individual Council Members[2] is not "the wrong complained of," but rather evidence of the unlawful consideration of such issues by the City Council.

More importantly, also controlling is Code of Civil Procedure section 425.17 which specifically states, "Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public." Thus, the instant action is statutorily exempt from the Anti-SLAPP law. Particularly applicable here, Code of Civil Procedure section 425.17, subdivision (a) states:

> The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

The threatened anti-SLAPP motion is precisely the "abuse of Section 425.16" contemplated by the California Legislature. Save Petaluma's action is an action brought solely in the public interest and is protected by Code of Civil Procedure section 425.17, subdivision (b). Your threat of fee recovery pursuant to an anti-SLAPP motion is therefore completely baseless. Should you file this frivolous motion, the court will award Save Petaluma its attorneys' fees defending the motion. (Code Civ. Proc., § 425.16, subd. (c).)

III. THE ADMINISTRATIVE RECORD

Your discussion of the administrative record misconstrues our telephone call and reflects an obvious confusion on your part about the process of record preparation. Your letter states, "[Y]ou indicated that you have taken no steps to obtain the requisite documents from the City." This statement is false. In fact, I repeatedly corrected this same misstatement by you during our telephone call on July 9, 2019.

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[2] As you know, your office wrote directly to the Mayor and Council Members stating, "[Y]ou will be required to retain your own counsel in the event that this matter proceeds to litigation."

To clarify, yet again, Petitioner elected to prepare the record of proceedings pursuant to Public Resources Code section 21167.6, subdivision (b)(2), and served that election on the City.[3] Upon receipt of such an election, a CEQA lead agency has the duty to provide the petitioner with those documents that will ultimately form the basis of the Record. (*St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App 4th 989, 1048, 1052-53 (*St. Vincent's*); *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1060-1061 (*CAR*).) These cases, and others, clarify that a CEQA lead agency must gather and provide to the electing CEQA petitioner the agency's administrative files that will comprise the Record.

As the court in *CAR* explained: "In *St. Vincent's School*, the plaintiff also chose to prepare the record. (*St. Vincent's*, *supra*, 161 Cal.App.4th at 1014.) To enable it to do so, the city was ***required*** to locate 2,208 documents, totaling more than 58,000 pages, which ultimately took up more than 20 boxes." (*CAR*, *supra*, 229 Cal.App.4th at 1054 (emphasis added).) The facts of the *CAR* decision are also in accord: "Petitioners chose to prepare the record of proceedings, themselves, as permitted by CEQA's record preparation statute, specifically, section 21167.6, subdivision (b)(2). The City maintains it thereupon made available some 26,000 pages of material to facilitate petitioners' preparation of the record." (*CAR*, *supra*, 229 Cal.App.4th at 1048.)

It is absurd to suggest that a CEQA petitioner can somehow prepare an administrative record before being provided the lead agency's records. While some documents are available on the City's website, the scope of the required record of proceedings under CEQA is broad. (See Pub. Resources Code, § 21167.6, subd. (e).) Without obtaining the agency's files, a CEQA petitioner has no way to know whether it has collected all required documents for a complete record.

Further, your reference to the 60-day deadline to certify a record under Public Resources Code section 21167.6 is not a concern to Petitioner. Petitioner will expeditiously prepare the record of proceedings upon receiving the City's administrative files. Public Resources Code section 21167.6, subdivision (c) authorizes an unlimited number of 60-day extensions to that deadline. This will no doubt be required due to your apparent refusal to assemble and transmit its files to Petitioner. Further, in light of the reluctance expressed in your letter, Petitioner insists that the City commit by July 17, 2019, to provide Petitioner with the documents comprising the City's files along with a proposed timeline for providing those files to Petitioner. Should you refuse to comply

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[3] See Verified Petition for Writ of Mandate; Election to Prepare the Record of Proceedings, ¶ 70.

with this reasonable request, Petitioner will file a motion to compel the City to release its files so that a record may be prepared. This motion, however, should be unnecessary given the clarity of the City's obligation to provide record to Petitioner.

IV. THE SETTLEMENT CONFERENCE

During our telephone call, I asked you to provide authority stating that a party may not participate in the CEQA-mandated settlement conference by telephone. Your cited authorities do nothing of the sort. That said, Petitioner is willing to participate in person if City officials, your clients, be present. If so, please provide me the names by July 22, 2019.

* * *

As established above, both your proposed demurrer and anti-SLAPP motion are without merit. Even if you are not convinced of this, you have not satisfied your duty to meet and confer as to your proposed demurer to Petitioner's second cause of action. By July 17, 2019, please provide the requisite analysis of the fair hearing claim along with your assurance that the City will assemble and transmit its files comprising the record in this case.

Very truly yours,

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