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February 28, 2019

SENT VIA EMAIL (edanly@ci.petaluma.ca.us)

Eric Danly
City Attorney
City of Petaluma
11 English Court
Petaluma, CA 94952

RE: March 4, 2019 Regular Meeting of the City Council
Agenda Item # 5.A (Safeway Fuel Center)

Dear Mr. Danly:

As you know, the Petaluma City Council ("Council") voted on December 3, 2018 to require an Environmental Impact Report ("EIR") for the proposed Safeway fuel station ("Project") based on substantial evidence in the record of a fair argument of significant environmental impacts. Subsequently, in an abundance of caution, the City held another hearing on January 28, 2019, to "correct" so-called violations of the Brown Act as alleged by Safeway. At approximately 5:00 pm on the Thursday before that hearing, Safeway submitted a letter arguing that the newly-published decision in *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2019) 31 Cal.App.5th 80 (*McCorkle*), prohibited the City from exercising its discretion to require CEQA review for any environmental impacts other than "design" related impacts. Safeway's letter also threatened a legal challenge premised on several different legal theories if the City disagreed with Safeway's legal interpretation of *McCorkle*.

This letter explains that Safeway's legal arguments are incorrect. First, the *McCorkle* decision is not controlling here and the City retains authority to require an EIR based on "non-design" issues. Second, Safeway's disgraceful threat of legal action is demonstrably frivolous.

I. The *McCorkle* Decision Does Not Control the City's Exercise of CEQA Review Authority Here

Safeway falsely claims that the scope of the City's CEQA review of the Project is "limited to design-related matters." (Safeway letter dated January 24, 2019.) In fact, Safeway's self-serving interpretation of *McCorkle* has no merit.

McCorkle concerns the scope of CEQA review for an eight-unit multifamily residential building ("Project") requiring a design review approval but not a conditional use permit. *McCorkle* upholds, based upon substantial evidence, the city's determination that the scope of its CEQA review for the Project was limited to "design-related environmental issues" and not "use-related issues." In so holding, *McCorkle* relied upon *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 2014 (*Friends of Davis*), for the proposition that "it is for the city to determine the scope that such [design] review will entail." (*Id*. at 92.) The decision then engaged in a detailed recitation and analysis of St. Helena's design review ordinance, including in particular:

- Section 17.164.040C that "***expressly precludes*** the Planning Commission and City Council from disapproving a proposal for non-design related reasons."

- Section 17.164.010 that "***expressly restricts*** the Planning Commission's and City Council's discretion during design review to the general form, spatial relationships and appearances of the project's proposed design . . . ."

(*Id*. at 87, quoting St. Helena's resolution (emphasis added).)

McCorkle goes on to uphold the city's interpretation and application of its own design ordinance based upon its review of the specific language of that ordinance. (*Id*. at 93-94.) Unless a city or county's design review ordinance includes same or similar language so narrowly limiting its scope, *McCorkle* is unlikely to provide useful guidance.

Safeway claims that "Petaluma's SPAR ordinance is indistinguishable from the design review ordinance cited in *McCorkle*." (Safeway letter dated January 24, 2019, p. 11.) Nothing could be further from the truth. The City's implementing zoning ordinance ("IZO") is very different from St. Helena's ordinance, and provides the City with much greater discretion regarding the scope of review, and denial of, site plan and architectural review ("SPAR") approvals.

First, the St. Helena ordinance "***expressly precludes*** the Planning Commission and City Council from disapproving a proposal for non-design related reasons." (*McCorkle, supra*, 31 Cal.App.5th at 87 (emphasis added).) The City's IZO, by contrast, does not include this express limiting language and instead provides: "The appropriate reviewing body . . . may approve the project as applied for, approve the project with modifications, or disapprove the project." (IZO, § 24.010, subd. (G).) As explained more fully below, the IZO does not include similar limiting language because the scope of Petaluma's review of a SPAR is much broader than the scope of St. Helena's review of a design review.

Second, St. Helena's ordinance "***expressly restricts*** the Planning Commission's and City Council's discretion during design review to the general form, spatial relationships and appearances of the project's proposed design . . . ." (*McCorkle, supra*, 31 Cal.App.5th at 87 (emphasis added).) The IZO provides a much broader scope of review, and includes the following:

> The purpose of site plan and architectural approval is to secure compliance with the Zoning Ordinance and ***to promote the orderly and harmonious development*** of the City of Petaluma.
> [¶] . . . [¶]
> 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***:
> [¶] . . . [¶]
> c. The siting of the structure on the property, as compared to the siting of other structures in the immediate neighborhood.

(IZO, § 24.011, subds. (A), (G)(1) (emphasis added).)

Thus, on its face, the scope of the City's review of SPAR approval is much broader than St. Helena's design review ordinance, and includes "any controls" to ensure that the "site" is "satisfactory" as well as requiring "harmony of the development with its surroundings." Unlike the St. Helena ordinance, approval of the SPAR involves consideration of "harmony" that is not defined in the IZO and expressly includes consideration of "other things." These "other things" can certainly be interpreted by the Council as including the broader public health and welfare considerations provided in IZO section 1.040:

> C. 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***.

(IZO, § 1040, subd. (C) (emphasis added).)

Thus, far from "expressly restrict[ing]" the City's approval "to the general form, spatial relationships and appearances of the project's proposed design" as in *McCorkle*, the City's SPAR ordinance expressly includes expansive considerations such as ensuring "the harmony of the development with its surroundings" and "involves other things" that can include even broader "public health, safety and general welfare" considerations pursuant to IZO section 1.040. This expansive language in the City's IZO is very different from the expressly restrictive language of St. Helena's design review ordinance. While other, more restricting interpretations are also possible, *McCorkle* reaffirms that a lead agency's interpretation and application of its ordinance will be upheld under the substantial evidence standard of review. (*McCorkle*, *supra*, 31 Cal.App.5th at 93.)

Contrary to Safeway's claim, not all "design review" approvals are the same. As established above, the City's SPAR is arguably not properly described as a mere "design review" approval due to its much more expansive scope. Even if it is, however, *McCorkle* never asserts, as Safeway argues, that all such approvals are limited to "design-only" CEQA review. The Thomas Law Group, another law firm that sought publication of *McCorkle*, disagrees with Rutan & Tucker's one-size-fits-all characterization:

> In consideration of the scope of the City's design review scheme, the Opinion finds that the City "lacked[ed] . . . discretion to address environmental effects" of the project.
>
> Case law ***clarifying the type of design review schemes that do and do not invoke CEQA review*** is particularly important to provide guidance to lead agencies as they implement and adopt design review processes.

(See attached Exhibit A, p. 2 (emphasis added).)

Put simply, the St. Helena design review scheme does not invoke CEQA review, and the City's SPAR scheme does invoke CEQA review.

In summary, Petaluma's SPAR ordinance is much broader than St. Helena's design review ordinance. St. Helena's ordinance is expressly restrictive, whereas Petaluma's ordinance is expressly expansive. Even if the City's SPAR is considered merely a "design review" approval—a characterization that is highly questionable at this point—"[I]t is for the city to determine the scope that such [design] review will entail." (*Id*. at 92.) The Council is well within its authority, consistent with *Friends of Davis* and *McCorkle*, to find that its consideration of a SPAR approval includes so-called "non-design" environmental issues.

II. Safeway's Disgraceful Threat of Litigation Is Frivolous

Safeway's January 24, 2019 letter dedicated approximately 15 pages to describing the parade of litigation horribles that would befall the City unless it agrees with Safeway's interpretation of the *McCorkle* and not require an EIR for the Project. Safeway's attempt at intimidation is not just shameful; it is completely frivolous. All of these same legal theories (save one) were advanced by another Safeway fuel station in Sacramento, and dismissed in Sacramento Superior Court on demurrer. (See attached Exhibit B.) Safeway's legal counsel, Rutan & Tucker, was involved in that other action and knows full well that these legal theories have no merit.

The only legal theory to survive demurrer in Sacramento was Safeway's Equal Protection argument. But in the Sacramento case, and here, the applicable level of review is "rational basis" scrutiny, which is the lowest level of judicial scrutiny. In Sacramento, the question is whether it was rationale for the City of Sacramento to deny the requested CUP. Here, Safeway's claim is even more attenuated since the relevant question would be whether it was rationale for the City to find that substantial evidence supports the "fair argument" standard thereby requiring an EIR before considering approval or denial. The answer would be obviously "yes" under this very deferential standard of review for all the reasons set forth on December 3, 2018, and so the legal challenge would fail.

In short, Safeway's appalling threat of legal action against the City for requiring an EIR is without merit and, frankly, frivolous. *McCorkle* does not require the City to reverse its prior unanimous decision requiring an EIR before considering the Project, and Safeway's attorneys know full well that any legal challenge would be futile.

III. The *McCorkle* Decision Illustrates the City's Broad Authority to Deny the Requested SPAR

Section I of this letter explains the significant differences between St. Helena's design review ordinance and Petaluma's SPAR ordinance, and why those differences mean that the *McCorkle* decision does not constrain the Council's discretion to require an EIR for the proposed gas station. These same differences provide a helpful contrast illustrating the City's broad authority to deny the requested SPAR altogether.

McCorkle explains that section 17.164.040C of St. Helena's ordinance "expressly precludes the Planning Commission and City Council from disapproving a proposal for non-design related reasons." The City's IZO, by contrast, does not include this express limiting language and instead broadly provides: "The appropriate reviewing body . . . may approve the project as applied for, approve the project with modifications, or disapprove the project." (IZO, § 24.010, subd. (G).) Relevant considerations are also much broader than St. Helena's ordinance, and include "harmony of the development with its surroundings . . . among other things." Both "harmony" and the "other things" may include "public health, safety, and general welfare" considerations pursuant to section 1.040 of the IZO.

In sharp contrast with St. Helena's ordinance, the City is well within its authority to deny the requested SPAR based on the same public health and welfare considerations justifying an EIR. (See Appellant's letter dated September 14, 2018, pp. 2-7.) While Appellants previously raised this issue, neither Safeway nor City staff offered a contrary legal analysis. Instead, the City's staff report dated December 3, 2018 offered a non-legal policy argument:

> The City has not interpreted its discretion under SPAR so broadly as to permit rejecting outright uses specified as permitted in a zoning district based on SPAR considerations. Doing so could undermine the stability and reliability of the permitted land uses specified in the use tables in Chapter 4 of the IZO.

(Staff report dated December 3, 2018, p. 14.)

This policy argument was previously addressed in a letter dated November 30, 2018. Put simply, this policy concern does not, and frankly should not, legally prohibit the City from applying the plain language of its own zoning code. (*United Public Employees v. Public Employment Relations Bd*. (1998) 213 Cal.App.3d 119 ["every word, phrase or provision is presumed to have been intended to have a meaning and

perform a useful function"].) And even a longstanding practice of not applying a particular code provision does not moot or obviate it. (*Stocktonburger v. Jordan* (1938) 10 Cal.2d 636, 648.)

In conclusion, Appellants urge the Council to deny the requested SPAR pursuant to its broad authority granted by the IZO. Alternatively, Appellants ask that the Council uphold its prior decision requiring preparation of an EIR before considering approval.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: 
Patrick M. Soluri

PS/mre

Attachments: Exhibit A, Request for Publication by Thomas Law Group
Exhibit B, Sacramento County Superior Court Minute Order

cc: Heather Hines, Planning Manager, Planning Division (hhines@m-group.us)
Olivia Ervin, Environmental Planner, Planning Division (oervin@m-group.us)
Claire Cooper, City Clerk (ccooper@ci.petaluma.ca.us)
Council Members:
Mayor Teresa Barrett (teresa4petaluma@comcast.net)
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Dave King (davekingpcc@gmail.com)
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EXHIBIT A

T|L|G Thomas Law Group

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NICHOLAS S. AVDIS
LESLIE Z. WALKER
Of Counsel

January 4, 2019

Hon., Acting Presiding Justice Simons
Hon. Needham
Hon. Bruiniers
Court of Appeal
First Appellate District
Division Five
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication: *McCorkle Eastside Neighborhood Group v. City of St. Helena*, Court of Appeal, First Appellate District, Division Five, Case No. A153238

Honorable Justices:

Pursuant to California Rules of Court, Rule 8.1120, Thomas Law Group on behalf of California Infill Builders Federation ("Infill Builders"), respectfully requests publication of the opinion issued by this Court in *McCorkle Eastside Neighborhood Group v. City of St. Helena* filed December 18, 2018 (the "Opinion"). This letter sets forth Infill Builder's interest in publication and the reason why the Opinion meets the standard for publication pursuant to California Rules of Court, rule 8.1120(c).

As described below, the Opinion addresses whether the discretionary component of the City of St. Helena's ("City") design review approval process provides the City with authority to consider a project's environmental consequences to trigger analysis under the California Environmental Quality Act (Public Resources Code, §§ 21000 et seq., "CEQA"). Importantly, in holding that the City's design review process did not require the separate invocation of CEQA, the Court cites the express content of the City's design review ordinance. As the substantive provisions of the City's design review process mirrors provisions in other jurisdictions' municipal codes (and provides guidance for jurisdictions that desire to create other similar design review processes), the Opinion –

if published – would have the potential to avoid reoccurring litigation challenging the relationship between CEQA and such design review schemes.

1. Infill Builders has an interest in the Opinion's publication. (California Rules of Court, Rule 8.1120(a)(2).)

Infill Builders is a statewide organization of builders, developers, and affiliated businesses and professionals that build homes, schools, and retail space in California's urban areas. Its core belief is that quality infill development results in environmentally and economically sound investments in this state's urban communities.

In this capacity, Infill Builders has an interest in the development of case law under CEQA. Specifically, Infill Builders has an interest in clarifying the law with respect to issues that are routinely associated with the environmental review of projects, such as the application of CEQA review to infill projects subject solely to similar limited design review schemes. Accordingly, Infill Builders has a particular interest in the publication of the Opinion.

2. The Opinion should be published because it "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, Rule 8.1105(c)(2).)

As the Opinion discusses, the petitioners attempted to show that the City violated CEQA by failing to consider environmental impacts that fell outside the scope of the City's design review process. The Opinion holds that the City "properly found that its discretion was limited to design review, given that no use permit was required for multi-family housing in [high density residential] districts." Importantly, while the Opinion acknowledges that mixed discretionary and ministerial projects are considered discretionary projects that may be subject to CEQA review, to implicate CEQA, the "discretionary component of the project [must] give[] the agency the authority to mitigate environmental impacts." In consideration of the scope of the City's design review scheme, the Opinion finds that the City "lack[ed] … discretion to address environmental effects" of the project.

Case law clarifying the type of design review schemes that do and do not invoke CEQA review is particularly important to provide guidance to lead agencies as they implement and adopt design review processes.

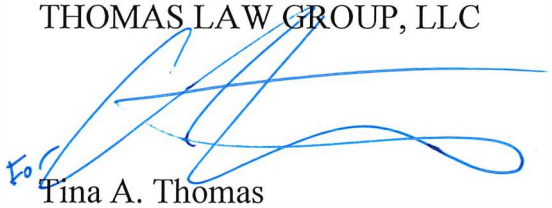
3. The Opinion should be published because it involves "a legal issue of continuing public interest." (Cal. Rules of Court, Rule 8.1105(c)(6).)

Finally, the Opinion addresses legal issues of continuing public interest. Particularly in highly built-out infill areas within the State's urban core, projects are often subject only to design review approval. The design review schemes adopted by many jurisdictions are similar to the design review provisions expressly set forth and interpreted in the Opinion. As a result, publication of this case may reduce future ambiguity and litigation over the relationship between this type of design review scheme and the requirements of CEQA. Therefore, the Opinion involves legal issues of "continuing public interest" pursuant to rule 8.1105(c)(6) for jurisdictions throughout the State.

4. Conclusion

As demonstrated above, the Opinion meets the standards for publication set forth in California Rules of Court, rule 8.1105(c)(2) and (c)(6). On behalf of Infill Builders, we respectfully request that the Court certify the Opinion for publication.

Very truly yours,
THOMAS LAW GROUP, LLC



Tina A. Thomas
Counsel for
California Infill Builders Federation

cc: All counsel of record
Proof of service attached

McCorkle Eastside Neighborhood Group v. City of St. Helena
Court of Appeal, First Appellate District, Division Five, Case No. A153238

PROOF OF SERVICE

I am a resident of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

On January 4, 2019, a true copy of the REQUEST FOR PUBLICATION was electronically filed with the Court of Appeal, First Appellate District, Division 5 through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's e-filing system.

Matthew David Hinks Jeffer, Mangels, Butler & Mitchell, LLP 1900 Avenue of The Stars 7th Floor Los Angeles, CA 90067	Attorneys for Petitioner and Appellant: McCorkle Eastside Neighborhood Group and St. Helena Residents for an Equitable General Plan
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Thomas Benton Brown Stephen Edward Velyvis Burke, Williams & Sorensen, LLP 1901 Harrison Street, Suite 900 Oakland, CA 94612	Attorneys for Respondent: City of St. Helena and City Council of St. Helena
Amanda Jean Monchamp Monchamp Meldrum LLP 50 Francisco Street, Suite 450 San Francisco, CA 94133	Attorneys for Real Party in Interest and Respondent: Joe McGrath

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 4th day of January 2019, at Sacramento, California.

Stephanie Richburg

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 06/12/2018 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: R. Mays, M. Oreschak

CASE NO: **34-2016-00200153-CU-BC-GDS** CASE INIT.DATE: 09/12/2016
CASE TITLE: **Calvine & Elk Grove-Florin LLC vs. City of Sacramento**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Hearing on Demurrer to the 2nd Amended Complaint

TENTATIVE RULING

The Court rules on Defendants' demurrer to Plaintiffs' Second Amended Complaint as follows.
Plaintiffs' Request for Judicial Notice is granted as to the existence of the Second Amended Complaint, the Superior Court's ruling on Plaintiffs' related petition for writ of mandate, the Sacramento City Council Rules of Procedure, and portions of the Sacramento City Code. The *existence* of these documents are properly subject to judicial notice. (See *Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118; see also *Startford Irrig. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61, 68.) The Court, however, does not accept the truth of any facts within the judicially notice documents, only the existence thereof.
The Court notes that both parties have failed to comply with Rule of Court 3.113(d), which, with the exception of motions for summary judgment [not at issue here], limits an opening or responding memorandum to 15 pages, unless a party submits an ex parte application to the court in advance of filing requesting a page extension (CRC 3.113(e)). In the absence of a court's advance authorization to file a longer pleading, the court may considered it "in the same manner as a late-filed paper" (CRC 3.113(g)), meaning the Court has discretion to disregarding all or part of the pleading. Both parties have exceeded the applicable page limit and neither obtained Court approval to do so. While in this instance the Court, in its discretion, has considered all legal arguments contained in the moving and opposing papers but cautions the parties that repeated disregard for the Rules of Court may result in the Court declining to review submissions or other sanctions.
FACTS
The Second Amended Complaint (SAC) alleges as follows.
Plaintiffs are the owners and developers of a mixed use development and open space project currently known as "Crocker Village" (previously known as "Curtis Park Village"). Crocker Village is approximately 72 acres, located primarily north of Sutterville Road and between 24th Street and the Union Pacific Railroad, in the Curtis Park area of Sacramento. (SAC ¶ 16.)
In 2010, the City's Planning Commission unanimously recommended approval of permits and development entitlements, and environmental review, for the development of a proposed project in Curtis Park. On or about April 1, 2010, the City Council approved and certified the environmental impact

report ("EIR") for the Project. (SAC ¶ 17.) In September 2010, the City Council unanimously approved land use and development entitlements for the development of the Project, which included rezoning, PUD Guidelines and Schematic Plan, and Master and Tentative Parcel Maps under the Subdivision Map Act. The City Council also approved findings of fact, a statement of overriding considerations, and a mitigation monitoring plan for the Project, which included findings of consistency with the City's general plan and land use policies. (SAC ¶ 18.) 19.

The approval for the Project included development of 7.8 acres of parks, parkways and open space, 527 new homes (including 189 single family homes and 338 multi-family units), and commercial/retail/office space. The Project designated 16.3 acres for development of commercial uses including an 11.8 acre parcel in the southern portion of the site for a neighborhood shopping area ("Commercial Center") and a 4.7 acre northern commercial "flex zone". The approval of the project in September 2010 by the City Council also included 145 conditions of approval to ensure that the Project was compliant with City policy, addressed community concerns, and would mitigate environmental issues consistent with the amount of affordable housing, open space, commercial and other housing development approved by the Council. (SAC ¶ 19.) The approval included plans and provisions for development of a large Commercial Center, including approximately 265,000 square feet of retail/commercial/service buildings with capacity for more than 700 on-site parking spaces. The City Council zoned part of the site for Shopping Center use ("SC" zoning), including a gas station as a permissible use, subject to City Planning Commission approval of a Conditional Use Permit ("CUP"). (SAC ¶ 20) As part of the City's approvals for the Project, Plaintiffs allege that Defendants required them to make many public improvements costing over $20 million plus additional fees with regard to improvements, utilities, and traffic concerns. Plaintiffs further allege that in approving the Project, the City Council made unanimous findings that the Project was consistent with the City's applicable general plan and land use policies.

In June 2014, the City's Planning Staff approved Plaintiffs' Project plans for the Commercial Center component of the Project. Based on the approval, Plaintiffs allege that they then spent more than $35 million for soil testing and treatment, improvements to the site, and the design and construction of parks, streets, curbs, sidewalks, utilities, other public improvements and affordable housing. Plaintiffs further allege that they undertook to dedicate an easement and take other actions as requested by the City to facilitate construction of overcrossings and bridges to provide new connections between Sacramento City College, the light rail station and to the surrounding community on the east side of the rail tracks.

Contemporaneous with working on improvements to the Project site, Plaintiffs entered negotiations with Safeway to become an "anchor tenant" for the Project. Plaintiffs allege that they informed Defendants multiple times that Safeway would provide jobs to residents of the surrounding Oak Park Neighborhood. Safeway conditioned its lease for the Project on receipt of a CUP for a gas station within the Commercial Center. Plaintiffs contend that the long term viability and sustainability of Safeway as an anchor tenant was and is dependent on receipt of a CUP for a fuel center within the Project. Accordingly, Plaintiffs allege that they expended substantial time, funds and resources planning for the development of a fuel station, which they contend was an allowed use within the SC zoning. Further, according to Plaintiffs, the City's Planning & Development Code (Municipal Code § 17.216.51) provides that a gas station use is a permissible use in the SC zone, subject only to the Planning Commission approving a CUP.

In August 2014, Plaintiffs applied to the City to approve the proposed Safeway facility in the SC zone, including an application for a CUP for a fuel center within the Commercial Center SC zoned flex zone area. Following review, investigation and analysis, City Planning Staff concluded that the issuance of the CUP together with the site plan design was *consistent* with applicable City planning and zoning policies. City Staff also conducted additional environmental analysis of the proposed fuel center and added an addendum to the Project EIR in May 2015, which concluded that approval of the CUP and development of the fuel center would not result in any significant new environmental impacts that had not been previously addressed by the City. Plaintiffs allege that their CUP application was also subject to review by every other City public agency, including Sacramento Metropolitan Air Quality Management District (SMAQMD); Plaintiffs contend that SMAQMD has never required a similarly-situated applicant in the City to conduct an air quality study normally associated with the application for an operating permit, prior to issuance of a CUP. Plaintiffs allege that Defendant [council member] Schenirer, in whose area the

Project was proposed, directed Staff to require SMAQMD to prepare a health risk assessment prior to the Planning Commission's consideration of Plaintiffs' CUP application as a means of delaying and increasing the cost of the CUP. The health risk assessment [HRA] was completed as required, and SMAQMD purportedly concluded that the fuel center would **not** have a significant effect on public health or safety such as would support the denial of the permit.

Thereafter, City Planning Staff concluded that the CUP and site plan was consistent with City plans and policies and recommended the City approve the CUP, site plan and design review for the fuel center. Following a public hearing on June 11, 2015, the City Planning Commission voted to approve the CUP, subject to 89 conditions of approval to address community concerns and various issues contained in the City's own analysis of the Project.

In June 2015, some residents of Curtis Park along with a local neighborhood association, the Sierra Curtis Neighborhood Association (SCNA), filed an appeal of the Planning Commission's approval of the Project with the City Council. Plaintiffs contend that Defendant City Councilman Schenirer and Defendant Mayor Kevin Johnson knew of the residents' plan to appeal the Planning Commission decision even before the Planning Commission hearing occurred and that Schenirer "actively assisted" in the residents' appeal, which sought denial of the CUP.

In September 2015, Plaintiffs submitted a revised alternative plan, which proposed a relocation of the fuel station to the southwest corner of the site. The relocation of the fuel center, while less visible from the road, apparently placed the fuel center further away from the nearest residences, thereby reducing air quality impacts on residential dwellings.

In response, City Planning Staff conducted additional review and ultimately prepared a Staff Report to address the issues raised by the residents' appeal. The Staff Report concluded that Plaintiffs' relocation of the fuel station should further reduce any traffic and environmental impacts and concluded that the CUP was consistent with the City's adopted land use plans and policies. The City Council set these items for consideration and for related hearing on the residents' appeal on its calendar for November 17,2015.

Plaintiffs allege that, in connection with the residents' appeal, Defendants Schenirer and Johnson and other unidentified members of the City Council "developed personal bias and animus against Plaintiffs and against the CUP application." More specifically, Plaintiffs contend that Schenirer, Johnson and other members of the City Council engaged in private activities and discussions before the actual public hearing on the appeal intended to influence the decisions and votes of the other members of the Council against the CUP application prior to the hearing on the appeal.

At the hearing on the appeal, following presentation of evidence, consideration of the Planning Staff Reports, and other testimony, the City Council voted to adopt a motion by Councilmember Schenirer, seconded by Councilmember Steve Hansen, to "reject Staff's recommendation to certify the addendum to a previously adopted EIR and mitigation monitoring plan, and Conditional Use Permit and Site Plan and Design Review, and instead deny the application by denying the Conditional Use Permit." (SAC ¶ 50.) Plaintiffs allege that the City Council did not make any findings or identify any evidence during the hearing to support the denial of the CUP. The Draft Minute of the November 17, 2015, Council Meeting were issued on December 7, 2015.

Plaintiffs allege that Defendants thereafter approved the Draft Minutes, but did not issue any further written record of the decision, did not hold another public hearing to discuss the findings or provide evidence or justification for denying the CUP. Plaintiffs contend that in the days following the Council's denial of the CUP, they received an email from an unidentified City Councilmember in which the Councilmember stated: "There was no rational reason to deny the use permit. Obviously the vote was influenced by other factors. Public policy by personal animosity always leads to bad results." (SAC ¶ 56.)

Plaintiffs also allege that at approximately the same time, following the CUP hearing, Defendant Johnson visited Plaintiffs' offices and informed Plaintiff Petrovich that he (Johnson) and his staff had reviewed the CUP and did not see a reason to prevent it from moving forward, but Schenirer had already requested Johnson to vote with him and Johnson felt obligated to do so. (SAC ¶ 57.)

Plaintiffs contend that Defendant Schenirer "made it his personal mission to intentionally and unlawfully disrupt Plaintiffs' business relations and economic opportunities with Safeway and anyone else that

Schenirer arbitrarily disapproved of as an anchor tenant for the Project." (SAC ¶ 58.) In support of this contention, Plaintiffs aver that Schenirer tried to block the CUP by attempting to secure bank financing on behalf of Nugget Market, a Safeway competitor. Specifically, Plaintiffs allege that starting in approximately mid -2015, Schenirer promised organizations and members in his district that he could deliver a Nugget Market to the Project with the denial of the CUP.

Plaintiffs contend that Schenirer sought financing for a Nugget Market through Five Star Bank, which . Plaintiffs did not authorize him to do. Plaintiffs requested Schenirer to cease all such activity and informed him and Five Star Bank that Plaintiffs were not interested in pursuing a construction loan for Nugget. Schenirer continued to hold conversations with Nugget and Five Star Bank, despite Plaintiff's contract relationship Safeway. Plaintiffs further allege that Schenirer contacted Safeway corporate representatives directly, which Plaintiffs allege was an attempt "to drive a wedge between Plaintiffs and Safeway with the intent of forcing Nugget into the Project." (SAC ¶ 69.) Five Star Bank ultimately informed Schenirer it could not finance a Nugget Market.

According to Plaintiffs, Schenirer also boasted prior to the hearing that he already had the voted needed to deny the CUP by being in personal contact with "at least two Planning Commissioners prior to the Planning Commission hearing ... in June 2015." (SAC ¶ 59.) According to Plaintiffs, one member of the community was so concerned with Schenirer's public boasting that the Council would vote howsoever he wanted them to was a violation of the Brown Act, that she sent an email to the City and later attended a City Council meeting to share her concerns. (SAC ¶ 61.) According to Plaintiffs, this same community member, along with Plaintiffs, also made a public records request regarding all City Council communication related to the CUP, but Plaintiffs contend that the requests were essentially ignored without any documents being provided.

At an unknown date, Plaintiffs ultimately secured these documents via a separate lawsuit. Plaintiffs contend that the documents they received show that Schenirer and Johnson actively campaigned for denial of the CUP and improperly communicated outside of public deliberation regarding the matter. Specifically, Plaintiffs allege, inter alia, that Schenirer, members of his staff and other employees of the Council were current or former members of SCNA, which was not disclosed; that Schenirer had personal relationships with members of SCNA and "coached" them in the appeal process; that Schenirer was willing to meet with SCNA members but not Plaintiffs prior to hearing; that Schenirer's staff informed SCNA members that they would place their speaker request cards at the top of the stack at the hearing to ensure that SCNA and opponents of the CUP permit were able to speak; Schenirer made disparaging remarks regarding Plaintiff Petrovich to foster ill will against Petrovich and the Project; Schenirer solicited emails from SCNA to "misrepresent .. the public opposition to the gas station"; Schenirer drafted a script for the CUP appeal to create a predetermined result of rejection; Plaintiffs contend that Schenirer's communications, relationships and actions warranted recusing or disqualifying him from serving in a quasi-judicial capacity during the CUP hearings or deciding any matter related to the Project. Plaintiffs further contend that Schenirer's actions in attempting to sway the votes of the other councilmembers to deny the CUP prior to the hearing violated the Council's obligation to remain fair and impartial in voting on the CUP appeal.

Plaintiffs also contend that after the CUP was denied, Schenirer contacted a potential "back up" grocery tenant, a "national box retailer" and a fitness club that all expressed interest in the project, as a means of disrupting the project.

Finally, Plaintiffs allege that Schenirer made various remarks regarding Plaintiff Petrovich that Plaintiff contend are defamatory, including that Petrovich is an anti-Semite, as a means of fostering public ill will against Petrovich.

Plaintiffs allege that the disapproval of the project and the related interference with other potential tenants has cost them millions of dollars in damages, both past and future. Plaintiffs further contend that similarly situated developers and projects have routinely been granted CUP applications for gas stations in similar projects, even closer to residences, without being subject to the same scrutiny and hurdles in the application process, and that the Defendants' denial of the CUP was arbitrary and a denial of Plaintiffs' constitutional rights.

LEGAL STANDARD ON DEMURRER

In ruling on a demurrer, the trial court examines the pleadings to determine whether it alleges facts sufficient to state a cause of action under any legal theory, with the facts being assumed true for purposes of this inquiry. (*Committee for Green Foothills v. Santa Clara County Bd. Of Supervisors* (2010) 48 Cal.4th 32, 42; *Pang v. Beverly Hosp., Inc*. (2000) 79 Cal.App.4th 986, 989.) If "all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer. [Citation.] In ruling on a demurrer based on res judicata, a court may take judicial notice of the official acts or records of any court in this state. ([Citations]; Evid. Code, § 452.)" (*Frommhagen v. Bd. of Supervisors* (1987) 197 Cal.App.3d 1292, 1299, 243 Cal. Rptr. 390.)

ANALYSIS

First Cause of Action: Procedural Due Process

"The Fourteenth Amendment due process clause states that no state may 'deprive any person of life, liberty, or property without due process of law.' The procedural component of the due process clause ensures a fair adjudicatory process before a person is deprived of life, liberty, or property. [Citations.] Not every denial of a fair hearing for which a remedy may be available under state law implicates constitutional due process. [Citation.] 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' [Citation.] The range of interests protected by procedural due process is limited. [Citation.]" (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 852.)

"A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural due process only if the person has 'a legitimate claim of entitlement to it.'[] [Citation.]" (*Las Lomas, supra,* 177 Cal.App.4th at p. 853, fn. omitted.) This component must be addressed before the Court reaches any question regarding the fairness of a particular proceeding. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1178.) '"When analyzing whether a plaintiff presents a legitimate claim of entitlement, we focus on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome.' [Citation.] 'Under this approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest. . . . Under this standard, a cognizable property interest exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." . . .' [Citations.]" (*Clark, supra,* 48 Cal.App.4th at 1180-1181, fn. omitted.) A local agency's opportunity to deny issuance suffices to defeat a claim of a federally protected property interest even if, in a particular case "objective observers would estimate that the probability of issuance was extremely high." (*Id.* at 1180.)

Here, Plaintiffs' application sought a conditional use permit to operate a gas station on the Subject Property. The process for obtaining a CUP is contained within the City's own Codes. City Code section 17.808.200 (Pl. RJN Exh. E) establishes, in relevant part, that "[a] condition use permit is a discretionary permit and is not the automatic right of an applicant." This same City Code section goes on to establish the decisions and findings that must be made at various levels to approve a CUP. (*Id.*) Even where the proposed use and operating characteristics are "consistent with the general plan and any applicable specific plan or transit village plan" and the "standards, requirements and regulations of the zoning district, the proposed use is situated on a suitable parcel as defined elsewhere in the City Code, and the proposed use is not detrimental to public health, safety, convenience or welfare or creates a nuisance," the City Code nonetheless states that "[t]he decision-maker *may* approve a conditional use permit[.]" (*Id.*) Under this same section, the decision-maker also may "impose conditions" as determined to be "necessary or appropriate."

In opposition, Plaintiffs argue that other sections in the City's Code eliminate any discretion and entitle them to have a gas station on their property. Plaintiffs cite City Code section 17.16.510 (Pl. RJN Exh. D), which addresses permitted uses in SC zones and states that the uses contained therein "are permitted by right in the SC zone, *subject to the limitations specified[.]*" (*Id.* at p. 1.) By definition, a "by right" use

does not require discretionary zoning approvals unless the entity reserves a right unto its self in a particular respect.

Here, the City of Sacramento has established within SCC section 17.16.510 that gas stations are subject to approval by the City's Planning and Design Commission. (*Id.* at p. 3). The Commission, where necessary, may conclude that a CUP is (or is not) required for the property. Once it is determined that a CUP is necessary, the provisions of SCC section 17.808.200 come into play and the discretion allotted to the various levels of decision-makers as contained within the Code section are in force. The Court concludes that when these SCC sections are read together, it is clear that the City has reserved at least some amount of discretion unto itself in determining whether CUPs are necessary for a given project and whether the CUP should be granted. From a legal standpoint, CUPs are "discretionary by definition." (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224.) Since the City has retained discretion as to whether a CUP is necessary and whether a CUP should be granted as to any given project, it retained discretion sufficient to defeat the claim of a property interest requisite to asserting a due process claim. Further, zoning the property or issuing approvals for work preliminary to the ultimately desired construction, or a party incurring costs related thereto, does not equate to a representation to a landowner that a project is guaranteed to move forward or that he may construct particular structures on the property. (See *Stubblefield Constr. Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 708.)

Based on the facts currently alleged, there is nothing that mandates approval of a project or of a CUP, so as to give Plaintiffs a **property interest** for purposes of a cognizable due process interest. Accordingly, Defendants' demurrer as to the First Cause of Action is sustained.

Second Cause of Action: Substantive Due Process

Like procedural due process, to assert a deprivation of substantive due process, a plaintiff must establish a protected property interest. (*Vieira Enterprises, Inc. v. City of East Palo Alto* (2012) 208 Cal.App.4th 584, 595-596 [quoting *Clark, supra,* at 1184.)

As discussed above, Plaintiffs have not met this requirement because they have failed to establish a legally cognizable property interest. At this point, since Plaintiffs have not stated a cause of action due to the lack of property interest, the Court expresses no opinion as to whether the purported conduct that Plaintiffs assign to Defendants constitutes relief as defined in *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1033.

For the foregoing reasons, the demurrer to the Second Cause of Action is sustained.

Third Cause of Action: Equal Protection

In general, "[t]o state a claim under 42 U.S.C. § 1982 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." (*Washington v. Davis* (1976) 426 U.S. 229, 239-240.) A plaintiff who does not allege membership in a class or group may still bring an equal protection claim based on the "class of one" theory." (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564; *Las Lomas Land Co. LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 857.) To sufficiently allege such a claim, a plaintiff must plead facts alleging that (1) he was treated differently from other similarly situated persons; (2) the difference in treatment was intention, and (3) there was no rational basis for the difference in treatment. (*Las Lomas, supra,* 177 Cal.App.4th at 857.)

The Court concludes that Plaintiff here have made the required allegations. Plaintiffs have alleged that other parties, properties and developments similarly situated to their own are routinely granted CUPs

without being subject to the scrutiny, procedural hoops and animosity. (See SAC ¶ 53.) Plaintiffs have alleged that while Defendants had a small amount of discretion in approving CUPs, that discretions was exercised unequally and detrimentally. At this stage in the proceedings, Plaintiffs are not required to provide specific examples of other similarly-situated parties who received more favorable treatment, nor are they required to plead facts negating every possible rational basis for the reason that the CUP was denied. Plaintiff have alleged facts negating any inference that the City and the other Defendants acted in accordance with its own policies and lacked any rational basis for rejecting the CUP. At the demurrer stage, these allegations are sufficient; whether Plaintiffs ultimately can prove that they were treated differently than those same similarly-situated individuals, and whether Defendants had a rational basis for their alleged actions, are not relevant for purposes of demurrer. Accordingly, the demurrer as to Plaintiffs' Third Cause of Action is overruled.

Fourth Fifth and Sixth Causes of Action

Plaintiff's Fourth, Fifth and Sixth Causes of Action - for intentional interference with economic relations, negligent interference with economic relations, and "conspiracy to commit tort," respectively - are all tort claims alleged against all Defendants except Shirey. All of these claims are predicated upon failing to recuse Schenirer from the CUP vote and negotiating with other potential tenants (SAC¶¶ 116-118, 126-128), as a means of disrupting Plaintiffs' relationship with Safeway and other alternative anchor tenants.

Defendants demur to these tort claims on the grounds that they are immune from liability pursuant to Government Code sections 818.2 [public entity not liability for injuries caused by adopting or failing to adopt an enactment or by failing to enforce any law], 818.4 [public entity not liable for injury caused by the issuance or denial, or by the failure to issue or deny any permit where the entity or its employee is authorized to do so], 820.2 {immunity from liability for injuries arising out of acts or omissions where the act was the result of discretion, even where discretion is abused], 821 [no public employee liability for adopt or failure to adopt or enforce an enactment] and 821.2 [no public employee liability for injury caused by issuance or denial, or failure or refusal to issue or deny any permit or license, where authorized to determine whether such authorization should issue]. Plaintiffs have opposed the demurrer only with respect to Government Code section 820.2. Plaintiffs' only real opposition with respect to section 815.2 is that Defendants were acting outside the course and scope of their employment with the City and therefore the immunities are inapplicable. (Opp. at p. 15 [citing SAC ¶ 10].) Plaintiffs' SAC makes clear, however, that "Defendants, and each of them at various times alleged herein *acted on behalf of the City and the Council in the course and scope of their employment with the City."* (SAC ¶ 10 [emphasis added].)

Plaintiffs have clearly alleged that Defendants acted in the course and scope of their employment and while they may reference that certain activities were outside of that course and scope, Plaintiffs do not identify or otherwise delineate which activities. Since Plaintiffs have indeed alleged that the actions occurred with the course and scope of employment - and Plaintiffs have included and the City of Sacramento as a Defendant as to all causes of action - and since the only means by which the City of Sacramento may be liable for the acts of its employees is if those employees were within the course and scope, the Court concludes that for purposes of demurrer, the SAC alleges that the individual Defendants acted within the course and scope of their employment. Since Plaintiffs did not oppose application of section 820.2 in any other respect, the demurrer is sustained in this respect.

Further, the Court construes Plaintiffs' lack of substantive opposition as to the remaining identified Government Code immunities as a concession to the merits of Defendants' arguments. While Plaintiffs suggest that the denial of the CUP is only the proverbial tip of the iceberg, Plaintiffs offer no other arguments to show that the remaining immunities are inapplicable, or that allegations of other conduct outside the denial of the CUP is not subject to discretionary immunity pursuant to section 820.2.

The Court also notes that, unless otherwise stated, the immunity conferred by the Government Code statutes applies even in the presence of allegations of fraud or malice. (See *Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1341; *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 648-649.)

Since the Court has concluded that the various Government Code immunities preclude liability as to the facts currently alleged, the Court need not analyze the demurrer to these same causes of action specific to whether Civil Code section 47 precludes liability.

For the foregoing reasons, the demurrer as to the Fourth, Fifth and Sixth Causes of Action is sustained.

Seventh Cause of Action: Violation of Equal Protection and Due Process Under State Law

In their Seventh Cause of Action, Plaintiffs seek damages under the State Constitution for violations of their equal protection and due process rights. (See SAC ¶ 144.) It is well established, however, that there is no cause of action for damages for alleged violations of California Constitution art. I, section 7, which pertains to due process and equal protection. (*Degrassi v. Cook* (2002) 29 Cal.4th 333, 335, fn 1; *Katzberg v. Regents of Univ. of California* (2002) 29 Cal.4th 300, 303, fn. 1, 321.) Accordingly, the demurrer is sustained as to the Seventh Cause of Action.

Eighth Cause of Action - Unfair Competition/Violation of Govt. Code §§54950/Failure to Discharge Mandatory Duty/Conflict of Interest

While confusingly titled, at heart Plaintiffs' Eighth Cause of Action alleges violation of the Brown Act due to alleged communications of the City Council outside of the formal open meeting (Govt. Code § 54952.2) with regard to the November 2015 hearing on the CUP. (See SAC ¶ 146 and subparagraphs thereof.)

Government Code section 54960.1 states the following requirements for alleging a violation of the Brown Act: (1) the interested person alleging a violation must first submit a cease and desist letter by postal mail or facsimile transmission to the clerk or secretary of the legislative body being accused of the violation "clearly describing the past action of the legislative body and nature of the alleged violation"; (2) the cease and desist letter required must be submitted to the legislative body within nine months of the alleged violation; (3) the time during which the legislative body may respond to the cease and desist letter has expire and the legislative body has not provided an unconditional commitment to rectify and not repeat the last action at issue in the future; and 94) within 60 days of teceipt of the legislative body's response, or 60 days of the expiration of time for the legislative body to respond, the party may commence an action thereon or be forever barred. (See Govt. Code § 54960.1(a)(1), (2), (3), (4) and 54960.1(c).)

There are no allegations whatsoever that Plaintiffs authored a cease and desist letter as required by section 54960.1, let alone that Defendants responded to it. Plaintiffs argue that this section of the Brown Act applies only to litigation challenging past actions, not future actions, and they allege that various violations will "continue to occur" and some were not discovered until after suit was filed. (See Opp. at p. 19.) In support of this argument, Plaintiffs cite to the granting of their Petition for Writ of Mandate, compelling the City to remedy procedural defects at the first hearing. Thus, according to Plaintiffs, the CUP application is still before the City Council and Plaintiffs are apparently convinced that future violations will occur. Thus, according to Plaintiffs, the threat of future harm exists, which excuses them from sending the cease and desist letter required by section 54960.1. The Court disagrees.

While under certain circumstances, a party may be excused from the prerequisite letter requirements of

section 54960.1 where there is the threat of future harm (see *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1156), those factual circumstances are not before this Court. Review of the SAC's Eighth Cause of Action clearly reflects that Plaintiffs contend Defendants violated the Brown Act based on various alleged conduct related to the CUP and the hearing *of November 2015*. There are no other allegations. Here, the future harm that Plaintiffs allege (not in the SAC, but only in the opposition to demurrer) is purely speculative and nowhere included in the SAC, nor could it be since it has not happened.

Plaintiffs have alleged a Brown Act violation from the inception of this case, which was filed on September 12, 2016. For Plaintiffs to say that they did not know the basis of their Brown Act claim is insufficient. This lawsuit is now nearly two years old; Plaintiffs have always based their lawsuit, including violation of the Brown Act, on the conduct leading up to the November 2015 hearing. Since all conduct of which Plaintiffs complain is in the past, and since Plaintiffs fail to establish compliance with section 54960.1, or any excuse from doing so, Defendants' demurrer to the Eighth Cause of Action is sustained. Moreover, it has been well over 300 days since the behavior of which Plaintiffs complain occurred, and Plaintiffs have never sent the mandatory cease and desist letter, this claim is barred as a matter of law and the demurrer in this regard must be sustained without further leave to amend. (See § 54960.1(a)(4); *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1119.) Plaintiff has not addressed how it might amend the pleading to assert the claim.

Ninth and Tenth Causes of Action: Defamation

Here, Plaintiffs allege causes of action for defamation against Defendants Schenirer (Ninth COA) and Shirey (Tenth COA). As noted above, Plaintiffs allege that Schenirer told third-parties that Petrovich was anti-Semitic. (SAC ¶¶ 152-155.) As to Shirey, Plaintiffs allege that he told Schenirer that Petrovich was "mentally ill and is in serious need of psychiatric treatment." (SAC ¶ 157.)

Defendants demur on the grounds that these communications are immune under Civil Code section 47 because they were made during the CUP administrative process.

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (50 has a natural tendency to injure or causes special damage." (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1369.)

Pursuant to Civil Code section 47, a privileged publication is one that is made in any "(1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2." (Civil Code § 47(b).) Similarly, Civil Code section 47(a) broadly encompasses all discretionary acts essential to the proper exercise of an executive decision, while Civil Code section 47(c) immunizes a person's statement to others on matters of common interest from liability in tort, provided that the speaker did not act with malice.

As to the Ninth Cause of Action against Schenirer, the allegations are unclear as to whether the purported defamation was oral or written, or when or how it was made. Accordingly, the demurrer as to this cause of action is sustained.

With regard to Shirey, Plaintiffs have alleged that Shirey stated to Schenirer that Petrovich was mentally ill and in need of psychiatric care. Some months later, those statements were published in the Sacramento Bee. The Court concludes that Shirey's initial statement to Schenirer regarding Petrovich was privileged under Civil Code section 47(b) and (c) since the statements were related to the CUP matter and both Schenirer and Shirey had the same interests. Plaintiffs do not explain how Shirey's statement came to be published in the Sacramento Bee, but the Court concludes that Shirey's statement

was still made in the context of the CUP proceedings and therefore is privileged pursuant to Civil Code section 47.

While Plaintiffs contend that the statements against Petrovich were made with malice or were otherwise retaliatory, that allegation is immaterial for purposes of section 47 privilege because the privilege is "absolute and is unaffected by the existence of malice." (See *Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 941.)

The demurrer to the Ninth and Tenth Causes of Action is sustained.

CONCLUSION

Based on the foregoing, Defendants' demurrer to the First, Second, fourth, Fifth, Sixth, Seventh, Ninth and Tenth Causes of Action is SUSTAINED WITH LEAVE TO AMEND.

The Demurrer as to the Eighth Cause of Action is SUSTAINED WITHOUT LEAVE TO AMEND.

Defendants' demurrer to the Third Cause of Action is OVERRULED.

Plaintiffs shall file and serve their Third Amended Complaint on or before July 3, 2018. Defendants shall file and serve their response thereto no later than 30 days following service, 35 days if service is by mail.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.