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November 30, 2018

SENT VIA EMAIL (hhines@m-group.us)

Heather Hines, Planning Manager
Planning Division, City of Petaluma
11 English Street
Petaluma, California 94952

RE: December 3, 2018 Regular Meeting of the City Council
Agenda Item # 5.B (Safeway Fuel Center)

Dear Ms. Hines:

This letter provides follow up analysis regarding the proposed Safeway Fuel Station Project ("Project"). Our prior letter, dated September 14, 2018, set forth in detail the City's broad authority to deny the requested site plan and architectural review ("SPAR") required for the Project. In response to that analysis, the applicant submitted a memo from its law firm, Rutan & Tucker, dated September 17, 2018, purporting to demonstrate that the City's discretionary authority over the Project is "very narrow." Rutan & Tucker's misleading analysis lacks merit.

As to the grounds required to deny the requested SPAR, Rutan & Tucker claims that the *Desmond* and *Saad* cases are "inapposite." This is exactly wrong, and the language from *Desmond* cannot be more clear:

> Because we are reviewing a *denial* of a requested land use permit, it is not necessary to determine that *each* finding by the Board was supported by substantial evidence. As long as the Board made a finding that any one of the necessary elements enumerated in the ordinances was lacking, and this finding was itself supported by substantial evidence, the Board's denial of appellant's application must be upheld.

(*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336-337 [italic in original].) Rutan & Tucker attempts to support its mischaracterization of *Desmond* by relying on the Planning Commission's action on the SPAR, but that action is legally irrelevant because the City Council reviews the Project *de novo*, as correctly noted in the

City Council's staff report. (Staff report, p. 13.) Thus, contrary to Rutan & Tucker's false and misleading analysis, the City Council is not required to somehow "reject nearly the entirety of the evidence before it."

Rutan & Tucker goes on to assert that the "siting" consideration under IZO section 24.010, subd. (G)(1) is limited to "setbacks and other site plan elements." Rutan & Tucker cites no supporting legal authority whatsoever for this constrained interpretation, which is completely inconsistent with the City's broad authority granted to the City under section of 1.040 of the IZO. This critical provision of the IZO includes:

> 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, § 1.040.)

The City's staff report correctly confirms that the granting of a SPAR is a discretionary action, and so section 1.040 necessary applies to that decision. It is telling that Rutan & Tucker's memo purportedly addressing the scope of the City's authority does not even mention, much less address, IZO section 1.040. The Council, in its *de novo* review of the Project, is well within its authority to deny the requested SPAR based on the broad general health and welfare considerations described in section 1.040 of the IZO.

Unlike Rutan & Tucker, the City's staff report attempts to conscientiously address IZO section 1.040, and states in relevant part:

> The City has not interpreted is 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, p. 14.)

While we can appreciate the City's policy concern, this unsubstantiated concern does not allow the City to simply ignore section 1.040 or treat it like it doesn't exist. (*United Public Employees v. Public Employment Relations Bd*. (1998) 213 Cal.App.3d 1119 ("every word, phrase or provision is presumed to have been intended to have a meaning and perform a useful function").) And even if it is correct that the City has never previously relied on section 1.040 to deny a SPAR, an agency's existing practice – even if longstanding – is given no weight by a reviewing court when engaging in statutory construction. (*Stockburger v. Jordan* (1938) 10 Cal.2d 636, 648.) The plain language of IZO sections 24.010 and 1.040 clearly vest the City with discretion to deny a requested SPAR, and base that denial on broad public health and welfare considerations.

As demonstrated in the original and supplemental Fox/Kapahi reports, substantial evidence in the record supports the conclusion that the siting of the Project is not harmonious with the neighborhood and is inconsistent with the health and welfare of the City and its residents. That finding is all that is required to deny the requested SPAR and the Project.

Thank you for your consideration of the above matters.

Very truly yours,

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By: 
Patrick M. Soluri

PS/mre

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