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Via Email (cityclerk@sanjoseca.gov) and Federal Express

San Jose City Council
200 E. Santa Clara Street
San José, CA 95113

Re: Requested Two-Week Continuance Regarding Proposed Conditional Use Permit (File No. CP17-025) and Determination of Public Convenience or Necessity (File No. ABC17-005) for the Property Located at 5170 Stevens Creek Boulevard

Dear Mayor Liccardo and Honorable Members of the City Council:

This law firm represents Safeway Inc. in connection with Safeway's full-service grocery store located at 5146 Stevens Creek Boulevard in San Jose. Safeway is in the same small shopping center, Stevens Creek Central, in which the San Jose City Council is being asked to review applications for and consider approval of a Conditional Use Permit and a Determination of Public Convenience or Necessity for a proposed Total Wine & More.

In order to approve the above applications, the Council would be required to identify and find that "a significant and overriding public benefit or benefits will be provided by the proposed use." As explained more fully below, we believe there is significant evidence to the contrary that should be considered before moving forward, particularly as it relates to the diminished economic viability of full service grocery uses (and other nearby retail uses) that will likely result if these applications are approved.

Accordingly, Safeway respectfully requests that the City Council continue this matter for two weeks (until February 27, 2018) to provide an opportunity for Safeway to meet with City staff for further dialogue and to provide additional technical analysis that sets forth the basis for Safeway's concerns regarding the negative economic impact that Total Wine & More will have on Safeway's full-service grocery use as well as other retailers in the vicinity.

BACKGROUND

Safeway, In Connection With Its Long-Term Economic Investment In This Store, Submitted Comments On The Applications That Were Not Considered By The Planning Commission.

Safeway is a tenant at Stevens Creek Central pursuant to a Ground Lease dated April 1, 1994, wherein Safeway funded and constructed its building and has more than two decades of lease term remaining. As Safeway has invested heavily in this site and its building, it has grave concerns regarding the proposed Total Wine applications' likely impairment of the utility and value of the subject property, as explained further herein.

As you know, Total Wine & More proposes to engage in off-sale alcoholic beverage sales and on-sale alcohol beverage consumption in a recently vacant approximately 26,000 square foot space in Stevens Creek Central. As noted in the Staff Report, the project would exceed the number of authorized Alcoholic Beverage Control licenses for the relevant Census tract, creating an undue concentration of on- and off-sale ABC licenses.

Safeway Requests A Continuance To Provide An Opportunity To Consider Relevant Evidence Regarding The Adverse Economic Impact That Approval Of The Applications Will Have On Stevens Creek Central And Vicinity.

We note that Safeway timely filed a notice of objection to this project before the Planning Commission, and for unknown reasons, City staff did not include Safeway's notice in the Commission's staff report and thus this information was not presented to the Commission for its consideration.

STAFF REPORT AND FINDINGS

State law requires adjudicative land use decisions such as this to be supported by findings, and that the findings be supported by evidence. To be legally adequate, findings must "bridge the analytic gap between the raw evidence and ultimate decision or order." See, e.g., *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974). Each finding must be supported by substantial evidence in the record. See California Code of Civil Procedure section 1094.5.

The Record Does Not Contain Substantial Evidence To Support The CUP Findings, Particularly Given The Negative Impact On The Utility And Value Of Property Within Stevens Creek Central And The Vicinity (Including Nearby Residential Uses).

Based on our review of the record to date for these applications (which appears minimal), the findings in the resolution for this proposed project are not legally adequate. Instead of connecting the dots between the required findings and the decision, certain of the proposed findings do not address the relevant legal

requirements and are not supported by any evidence, much less substantial evidence. The law is well settled that an agency's factual findings must address all legal requirements. *Topanga, supra*, 11 Cal.3d at 517 n. 16 (findings must contain more than just "the language of the applicable legislation").

The proposed findings thus do not meet the minimum standards set forth in *Topanga* and are insufficient to approve this project. See, e.g., *Honey Springs Homeowners Ass'n. v. Board of Supervisors*, 157 Cal.App.3d 1122, 1151 (1984) (a finding that is made "perfunctorily" and "without discussion or deliberation and thus does not show the ... analytical route from evidence to finding will be struck down"); *California Aviation Council v. City of Ceres*, 9 Cal.App.4th 1384, 1395 (1992) (conclusory findings that were not "fact specific" were held to fall "far short of the mark").

The City's Conditional Use Permit findings require that the proposed use at the location requested will not:

- i. Adversely affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area;
- ii. Impair the utility or value of property or other persons located in the vicinity of the site; or
- iii. Be detrimental to the public health, safety, or general welfare.

With respect to the "utility or value of property . . . of other persons located in the vicinity of the site," the proposed findings simply discuss the existing crime rate without the proposed use and the proximity of the use to the nearest residential uses. Importantly, however, the proposed findings say nothing about how the use would affect the utility or value of property of other real property owners located within Stevens Creek Central and the vicinity, including, among others, Safeway (which holds a long-term ground lease to its premises and has invested substantially to construct and maintain its approximately 61,796 square foot building).

Given the possibility of cannibalized alcoholic beverage sales between a full service alcohol retailer and a full service grocery store and the urban decay that could result — including potentially the vacancy of Stevens Creek Central's anchor tenant — this finding lacks substantial evidence and fails to meet the standards set forth in *Topanga*.

There also appears to be no substantial evidence in the record upon which such a legally adequate finding could be made. For example, there is nothing in the record of which we are aware that would enable the conclusion that the project would not "impair the utility or value of property or other persons located in the vicinity of the site." If there is a report that addresses such issues, we would appreciate the opportunity to review and comment on it.

In addition, the findings appear to minimize, or avoid, discussion of nearby residential uses, particularly to the east. That neighborhood is engaged and vocal, and the project findings should directly address how the requirements can be satisfied in the context of such a sensitive land use, as required by the Municipal Code.

There Is Not Substantial Evidence In The Record To Support A Finding Of Significant, Overriding Public Benefits; To The Contrary, There Will Likely Be Significant Adverse Economic Impacts To The Community By Impairing The Ongoing Economic Vitality Of The Full-Service Grocery Use And Anchor Tenant In Stevens Creek Central.

Furthermore, the City's requirements for a Determination of Public Convenience or Necessity require that *all* of the findings provided in San Jose Municipal Code section 6.84.030 must be made or, in the alternative, that the Council identify and find that there is "a significant and overriding public benefit or benefits will be provided by the proposed use." San Jose City Code, § 6.84.030(E). Here, the proposed resolution to approve this use concedes that at least one of the required findings *cannot be made*: "alcoholic beverage sales would not represent a majority of the proposed use." As City staff agree, this finding cannot be made because alcoholic beverage sales would represent a *majority* of the proposed use.

Given that all of the mandated findings cannot be made, the only way for the Council to approve the project would be to find there are overriding considerations that would justify said approval. As explained above, not only does there *not* appear to be any substantial evidence to support a conclusion there are significant, overriding public benefits, *but the evidence is quite to the contrary; i.e., there are likely to be significant adverse economic impacts to the community by impairing the ongoing economic vitality of the full-service grocery use and anchor tenant in Stevens Creek Central.*

Finally, City staff propose to exempt the project from the requirements of the California Environmental Quality Act ("CEQA") and CEQA Guidelines (Cal. Pub. Res. Code § 21000 et seq. and 14 Cal Code Regs. § 15000 et seq.) pursuant to CEQA Guidelines section 15301. Section 15302 provides an exemption for "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use." 14 Cal. Code Regs. § 15301.

The proposed CEQA exemption is not justified here because an "exception" to the exemption applies. In particular, the CEQA Guidelines preclude use of an

exemption “where there is a reasonable possibility the project will have a significant impact on the environment due to unusual circumstances.” CEQA Guidelines, § 15300.2(a)(c)(d). Unusual circumstances exist here given that the proposed use would directly take away significant sales from Safeway’s alcoholic beverage department. Such overlap within the small Stevens Creek Central runs the unnecessary and avoidable risk of cannibalizing a meaningful portion of Safeway’s existing business, which could lead to the type of urban decay recognized in such cases as *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184 (2004). Thus, even if the City could properly exempt the project under the Class 1 “existing facilities” exemption, the project cannot be determined exempt from CEQA because unusual circumstances exist and the City has no evidence upon which to conclude the project would not lead to urban decay.

For the foregoing reasons, we respectfully request that the City Council continue the matter for two weeks to provide an opportunity for further dialogue and full vetting of these important land use considerations before proceeding.

Very truly yours,

MILLER STARR REGALIA



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