MEMORANDUM

Office of the City Clerk

Date: January 24, 2023

To: Mayor and Members of City Council

Cc: Joshua McMurray, City Manager; Derek Cole, City Attorney

From: Libby Vreonis, City Clerk

Subject: Item 4.1 – Attachments (Letters Received from Legal Firms for the September 13, 2022 Public Hearing)

FOR CONSIDERATION AT THE CITY COUNCIL MEETING OF JANUARY 24, 2023

Item 4.1 is a continued public hearing on "Zoning Ordinance Text Amendments to Article 12 of Chapter 1 of Title 9 of the Oakley Municipal Code ("Special Land Uses")." Page two of the Staff Report mentions three letters from legal firms that were received by the City Council at the September 13, 2022 Public Hearing on the same item. The Staff Report states the three letters are included as attachments to the Staff Report; however, the letters were erroneously omitted from the attachment list at the end of the Staff Report and were not included as attachments. Please accept the three letters discussed in the Staff Report and originally received on September 13, 2022 as attachments to this Memo.

Attachments:

1. Letter from Cox Castle Nicholson received September 13, 2022
2. Letter from Rutan received September 13, 2022
3. Letter from WT Mitchell Group received September 13, 2022

Attachment 1

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Andrew B. Sabey
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September 13, 2022

BY EMAIL

Honorable Mayor Randy Pope and Members of the City Council
City of Oakley
3231 Main Street
Oakley, CA 94561

Re: Zoning Ordinance Text Amendments to Article 12 of Chapter 1 of Title 9 of the Oakley Municipal Code – Adding Subsections to Address Drive-Through Restaurants, Car Washes, Gas Stations, and Self-Storage (RZ 04-21)
City Council Agenda Item No. 4.2

Dear Mayor Pope and Members of the City Council:

We represent O'Hara Properties, LLC ("O'Hara Properties") in connection with its ownership and operation of the Laurel Plaza Shopping Center, located at the northwest corner of Laurel Road and O'Hara Avenue (the "Shopping Center"). In addition, O'Hara Properties also owns the undeveloped land located at the southwest corner of Laurel Road and O'Hara Avenue (collectively, the "Properties"). O'Hara Properties recently became aware of the City's intent to adopt zoning amendments that would prohibit drive-through restaurants, car washes, and gas stations on a substantial portion of the Properties based solely on the dubious—and entirely unsupported—assertion that such uses are somehow inimical with nearby public school uses.

Nothing in the record supports such a finding. Indeed, as was recently evidenced when the City reviewed proposals to place a McDonald's drive-through and a Quick Quack car wash at the Shopping Center, such uses would be compatible with nearby school uses. While the City Council chose to disregard this unrefuted evidence, the documentation from the McDonald's and Quick Quack entitlement processes was clear. In reality, the City simply is opposed to the placement of such uses at the Shopping Center, even though the Shopping Center has long been approved for precisely these types of commercial uses. Approval of the current amendments would expose the City to substantial legal liability. In addition, as this process has unfolded, approval following the City's actions to shield public review would violate the Brown Act.

1. The Properties Are Zoned for Precisely These Types of Uses

O'Hara Properties has been trying for years to complete the build out of its Shopping Center, which was originally approved by the City in March 2008. Consistent with the current use, the Shopping Center is designated in the City's General Plan for "commercial" uses and is zoned for "retail business" uses. To date, all that O'Hara Properties has sought to do is place

standard commercial uses on a property designated for commercial use in a busy area of the City planned for significant future commercial development, and along two of the City's prime arterial streets. Indeed, Laurel Road has been characterized as "the City's highest traveled arterial street." Nonetheless, O'Hara Properties' efforts have been thwarted by the City Council.

Only recently, the City Council denied two separate uses proposed for the Shopping Center: (i) a proposed McDonald's drive-through; and (ii) a proposed Quick Quack car wash. Each application was supported by substantial evidence showing that *no* impacts (health, safety, or otherwise) would result from operation of either of these uses, notwithstanding the City's requiring preparation of multiple technical studies at considerable cost to O'Hara Properties and the two applicants. Moreover, the evidence likewise showed that neither proposed use would result in *any* harmful impacts on the nearby Laurel Elementary School (located to the southwest, across Laurel Road, from the Shopping Center). Without any substantial justification, the City Council denied each of these applications, setting back years of efforts to complete build out of the site. The City's animosity toward commercial development at the Shopping Center has already stigmatized it in the eyes of prospective tenants, further reducing the ability build it out.

Now, under the guise of school safety, the City Council wants to go even further and prohibit drive-through restaurants, car washes, and gas stations across a substantial portion of the two Properties. Putting aside the lack of evidence to support such action, the City's underlying animus against commercial development of the Properties is manifest. Indeed, the staff report reflects that these are two of the only properties (possibly the *only* two properties) in the entire City that would be impacted by the school proximity criteria. For the City to take the extreme step of banning certain uses on the basis of some arbitrarily drawn radius from schools, with no attendant showing to justify such action, demonstrates that the City Council simply does not want these uses on the Properties.

2. The Proposed Text Amendments Would be Arbitrary and Capricious

The proposed text amendment to ban drive-through restaurants, car washes, and gas stations on the Properties on the basis of a randomly derived radius would be arbitrary and capricious, and thus invalid. In reviewing local agencies' planning decisions, courts consider whether the action was "arbitrary or capricious or totally lacking in evidentiary support." (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 238-239; see also *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 521; *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1791.) Courts employ an even "more rigorous form of judicial review" where a land use designation applies uniquely to a single property owner. (See *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900 (conc. opn. of Mosk, J.); see *Reynolds v. Barrett* (1938) 12 Cal.2d 244, 251 [stating that city cannot unfairly discriminate against a particular parcel of land].)

Here, the categorical prohibition on *any* drive-through restaurant, car wash, or gas station use on the Properties (i.e, some of the precise types of uses intended for the Properties and contemplated at the time of approval), without any justification for why proximity to school even

matters in the first instance (let alone proximity based on some arbitrarily determined 300-foot radius) is without justification. Indeed, the administrative records developed in connection with the recent McDonald's and Quick Quack applications demonstrate that no such impacts to Laurel Elementary School would result. Even if there was some possible basis for concern for schools, the numerous other performance and operational standards included in the proposed text amendments (addressing, among other things, traffic safety, noise limits, vehicle queuing, pedestrian access, visibility screening, and litter control) are plainly sufficient to address any potential concern for schools. There is simply no need, in addition to imposing new performance and operational standards, to outright ban drive-through restaurants, car washes, and gas stations on the Properties. Nor is there any justification for such extreme measure noted in the record. Rather, the school proximity criteria are apparently pretext for the City Council to achieve its apparent goal of banning these uses on the Properties.

Moreover, the fact that such action is being proposed only a few months after arbitrarily and capriciously denying the McDonald's and Quick Quack applications is telling, and it would subject the City Council's actions to considerable scrutiny. (Cf. *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 970 [finding city's change in a property's general plan designation in a final attempt to frustrate a particular developer's plans after a history of antagonism towards the property isolated the developer's property as the special object of legislation and therefore was illegal].) Nor does the fact that the City Council's actions may at least in part be motivated by concerns of adjoining neighbors to the Shopping Center make the action any less arbitrary. In *Ross v. City of Yorba Linda*, for example, the City of Yorba Linda contended that neighborhood opposition to construction on nearby private property could itself serve as a rational basis for a local government body to forbid the construction. The court rejected this position, finding that such "argument, carried to its logical conclusion, would be fundamentally destructive of the basic rights guaranteed by our state and federal Constitutions. If public opinion by itself could justify the denial of constitutional rights, then those rights would be meaningless." (*Ross*, 1 Cal.App.4th at 964; see *id.* at 968 [stating that "neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors"].)

Whatever the City Council's motivation, banning drive-through restaurants, car washes, and gas stations on the basis of some arbitrarily drawn radius around schools, without any attendant justification, would be arbitrary and capricious, and therefore illegal.

3. The Proposed Text Amendments Would Treat O'Hara Properties Differently Than Similarly Situated Property Owners in the City

In addition to being arbitrary, the intent to effectively ban drive-through restaurants, car washes, and gas stations across much of the Properties would violate O'Hara Properties' right to equal protection because such outright prohibition of standard commercial uses—in an area of the City designated for substantial commercial growth—would treat O'Hara Properties differently than similarly situated property owners in the City. (See U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7(a); see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 63

[equal protection under the U.S. and California Constitutions requires equal treatment of persons that are similarly situated]; see also *id.* [stating that "if the constitutional concept of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"].) Accordingly, where a property owner is subject to special restrictions not applicable to similarly situated properties, that restriction generally will be found to be invalid. (See, e.g., *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338; *Ross*, 1 Cal.App.4th at 960-963 ["It is obvious that by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land."]; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 336-337.)

Here, under the proposed text amendments, the Properties would be treated differently than other similarly zoned parcels within the City simply due to some arbitrary limitation based on their proximity to the Laurel Elementary School. There is no rational basis supporting such a distinction. As described above, the City Council's apparent focus on schools lacks justification, particularly considering all the other performance and operational standards contemplated in the proposed text amendments. Nor is there any basis for singling out schools, to the exclusion of all other uses in the City that could theoretically be impacted by commercial development. The practical impact of the proposed text amendment is that, even where it already has been shown that drive-through restaurants, car washes, and gas stations can be developed on the Properties without causing school impacts, O'Hara Properties would still be prohibited from such uses. This would irrationally single out the Properties for different treatment and violate O'Hara Properties' right to equal protection of the law.

4. The Proposed Text Amendments Would Interfere With Investment Backed Expectations, Deny Future Beneficial Use of the Properties, and Result in a Taking of Property Without Just Compensation

In addition, the proposed text amendments would interfere with O'Hara Properties' reasonable investment backed expectations for the Properties and likely deny future beneficial use of those sites. As such, it would take property without just compensation as well as violate O'Hara Properties' due process rights. (Cf. *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 187 [county ordinance caused a regulatory taking because of "its devastating economic impact" on property]; *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263 [finding inverse condemnation where city ordinance imposed a moratorium on construction in certain area and owner's loss of beneficial use of the subject property]; see generally *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 548 [holding that a regulation that causes a substantial "interference with distinct investment-backed expectations" constitutes a taking].)

Indeed, the Shopping Center, in particular, has for more than a decade been approved for precisely the type of commercial uses that would now be banned under the newly proposed text amendments. O'Hara Properties has been trying to build out the Shopping Center since approval in 2008, and during that time the City Council has approved (without apparent issue) drive-through uses, a car wash, and a gas station. Consistent with both the General Plan land use

designation and zoning for the Properties, not to mention the Properties' location within one of the most high traffic areas of the City, O'Hara Properties has always reasonably expected that it would be able to place standard commercial uses on lots approved for precisely such uses, particularly where it can be shown that such development would result in no discernible impacts to the surrounding communities or the City at large. Without justification, however, and based on application of an arbitrarily determined school radius, the text amendments would deny such beneficial use, where other similarly designated sites would continue to be able to reasonably pursue development.

In this regard, the proposed text amendments would constitute irrational spot zoning, which occurs when a parcel is restricted and given lesser rights than the surrounding property. (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268; see *id.* at 1268 ["The essence of spot zoning is irrational discrimination."].) Irrational spot zoning of the Properties cannot occur without payment of compensation. Here, there is no reason why the Properties should be treated differently than, for example, other commercially zoned lots located across the street that lie outside the arbitrarily determined radius from a school. For these reasons, the proposed text amendments would directly interfere with longstanding—and eminently reasonable—investment backed expectations for the Properties, deny future beneficial uses of the Properties to O'Hara Properties, and result in a taking without compensation.

Moreover, this harm would be in addition to the substantial financial harm that *already* has been caused to O'Hara Properties by virtue of the City Council's denials of the McDonald's and Quick Quack projects, respectively, at the Shopping Center. The costs associated from these denials have been substantial, resulting in significant losses in revenue, ongoing carrying costs, and lost tenancies, after O'Hara Properties had finally found two tenants to occupy the existing commercial building pads that have been sitting vacant on the site for years. The City Council's proposed text amendments would only create further additional financial harm.

5. Approval of the Proposed Text Amendments Would Violate the Brown Act

We additionally write this letter to notify the City of our concern that the City Council violated the Brown Act (Gov. Code, §§ 54950 et seq.). The Brown Act reflects the Legislature's pronouncement that public agencies "exist to aid in the conduct of the people's business" and "[i]t is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (Gov. Code, § 54950.) The Brown Act requires that "[a]ll meetings of the legislative body of a local agency shall be open and public[.]" (Gov. Code, § 54953.)

The Brown Act definition of the term "meeting" is intentionally broad, encompassing almost every gathering of a majority of councilmembers to hear, discuss, deliberate or take action on any item of City business or potential City business. (Gov. Code, § 54952.2(a) ["[a]ny congregation of a majority of members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or local agency to which it pertains"].) Furthermore, the Brown Act prohibits a series of

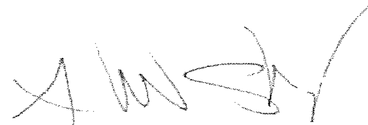
individual communications if they result in a "serial meeting," which by its nature is *not open and public*. (Gov. Code, § 54952.2(b).) A "serial meeting" is a series of meetings or communications between individuals in which ideas are exchanged on city business or potential city business among a majority of the legislative body (e.g., three City councilmembers) through either one or more persons acting as intermediaries or through use of a technological devices (such as e-mail or text), even though a majority of councilmembers never gather together at the same time. "Serial meetings" commonly occur in one of two ways—either a staff member, a member of the body, or some other person individually corresponds with a majority of members of a body (i.e., hub-spoke meeting) or, without the involvement of a third person, a single member calls a second member, who then calls a third member (i.e., daisy chain meeting) until a majority of the body has reached a collective concurrence on a matter.

The City Council's use of a "Checklist of Performance and Operational Standards" (the "Checklist"), at some point following the Council's May 24, 2022 meeting, by which *each* member of the City Council shared information and preferences on the text amendments privately (*i.e.*, not at an open and public meeting) with City Staff to develop a collective concurrence on the text amendments violated the Brown Act prohibition of "serial meetings." This Checklist practice has effectively caused the City Council to have voted on and shaped the text amendments in private, which unequivocally runs afoul of the Brown Act requirement that actions be taken openly and publicly. The publication of each City Councilmembers responses to the Checklist in the aggregate in advance of the public City Council meeting of September 13, 2022 sufficiently crystalizes the issue, as the public is now firmly aware of the privately developed collective concurrence—and that action has already been effectively taken on the text amendments, again outside the purview of the public.

The City Council's apparent disregard for basic open and transparent government, through its failure to comply with the Brown Act, serves as another reason why approval of the text amendments would expose the City to substantial legal liability.

For the foregoing reasons, we respectfully request that the City Council abandon its plan to adopt the proposed text amendments. Adoption in their current form would violate the law, engender further litigation, and expose the City to substantial legal risk. Please do not hesitate to contact me should you have any questions about any of the above issues.

Sincerely,



Andrew B. Sabey

cc: Derek Cole
Matt Beinke
Earl Callison
Clark Morrison

101852\16168960

RUTAN
RUTAN & TUCKER, LLP

Attachment 2

Matthew D. Francois
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September 12, 2022

VIA E-MAIL

Honorable Randy Pope, Mayor
and Members of the City Council
City of Oakley
3231 Main Street
Oakley, CA 94561

Re: Zoning Ordinance Text Amendments to Article 12 of Chapter 1 of Title 9 of the Oakley Municipal Code ("Special Land Uses")-Adding Four Subsections to Address Drive-Through Restaurants, Carwashes, Gas Stations and Self-Storage (RZ 04-21); September 13, 2022 City Council Hearing, Agenda Item No. 4.2

Dear Mayor Pope and Members of the City Council:

We write on behalf of our client, Safeway Inc. ("Safeway") in regard to the City Council's consideration of the above-referenced Zoning Ordinance Text Amendments (the "Zoning Amendments"). As you may know, Safeway owns approximately 8.7 acres of land at the northeast corner of Laurel Road and O'Hara Avenue (the "Site") in the City of Oakley ("City"). In concept, Safeway does not object to the Zoning Amendments. But, because certain of the Zoning Amendments lack clarity and are not feasible from operational or economic standpoints, the Zoning Amendments could have the unintended (and unfortunate) consequence of preventing future development of the Site with neighborhood-serving commercial uses from moving forward. We urge the City Council to consider these comments and make Safeway's requested changes prior to acting on the Zoning Amendments.

As a bit of background, the Site is planned and zoned for commercial and retail uses. In 2002, Safeway's predecessor received approvals from the City for an 85,000 square foot shopping center (the "Center"). The Center was approved with a 58,000 square foot grocery store, and six pads of up to 28,000 square feet of retail space, including a gas station and drive-through restaurants. In approving the Center, the City Council found that the proposal was compatible with the surrounding area, would generate additional tax revenue for the City, and would include sufficiently wide roadways to meet estimated traffic demands. The City subsequently acquired approximately 1.3 acres of the Site to improve the Laurel/O'Hara intersection with traffic signals and installation of two travel lanes in each direction.

Safeway subsequently acquired the Site. The Center approvals were extended by the City. But due to the Great Recession and subsequent COVID-19 pandemic, plans to develop the Center

were put on hold and the approvals expired. At some point in the future, Safeway is interested in developing the Site and making a significant investment in the City's economic future.

The proposed Zoning Amendments include performance standards pertaining to various, specified uses. Because any development of the Site will likely include a gas station and/or drive-through restaurants, Safeway writes to ask for clarifying amendments to some of the proposed Zoning Amendments.

First, proposed Section 9.1.1240(c)(3) allows gas stations to be located within 500 feet of one another if located at the intersection of "two arterial streets (as defined in the City's General Plan)." We could not locate any specific definition of "arterial street" in the General Plan. Even so, any such definition could change over time leading to uncertainty and unpredictability. As such, we recommend that the second sentence of proposed Section 9.1.1240(c)(3) be modified to read: "Except that any site bordering the intersection of two streets containing at least two travel lanes may have at least two gas stations on separate corners." We also recommend striking the third sentence of proposed Section 9.1.1240(c)(3) about making efforts to have gas stations "mainly serve opposite flows of traffic" as it could have the unintended consequence of conflicting with site-specific traffic studies and/or recommendations from the City's professional Public Works Staff.

Second, proposed Sections 9.1.1236(c)(1), 9.1.1238(c)(1), and 9.1.1240(c)(1) require that traffic studies analyze onsite and nearby pedestrian/bicycle safety. There are no qualifications or standards to guide such analysis. We recommend that language be added to specify that such analysis is intended to focus on providing recommendations to avoid conflicts between various modes of transportation.

Third, the Zoning Amendments contain Operational Standards for each of the proposed uses. These standards require such things as requiring employees to pick up trash or litter on or adjacent to the site as well as within 300 feet of the perimeter of the site. (*See, e.g.*, proposed Sections 9.1.1236(d)(2) and 9.1.1240(d)(2).) The standards also require on-site managers to control loud noise, loitering, and similar activities on the site and to "take whatever steps are deemed necessary to assure the orderly conduct of employees, patrons, and visitors on the premises." (*See, e.g.*, proposed Sections 9.1.1236(d)(3)-(4) and 9.1.1240(d)(3)-(4).)

For safety and liability reasons, employees and managers (many of whom may be minors or young adults) should not have to control litter in the public right-of-way or respond to and address potential criminal or nuisance activities on-site. Many of these activities are instead properly handled by the City's Police Department and/or Public Works Staff. We recommend that instead of these standards that an operational plan be required to be submitted in conjunction with approval of each such use addressing litter, noise, loitering, etc.

Fourth, all of the uses include a proposed definition of "sensitive uses." But the Zoning Amendments do not further address or discuss the term "sensitive uses." As such, we recommend that proposed definition be stricken from proposed Sections 9.1.1236(b)(2), 9.1.1238(b)(2), and 9.1.1240(b)(2).

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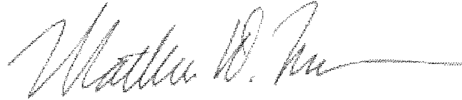
Thank you for your consideration of Safeway's views on this important matter. Representatives of Safeway will be in attendance at your September 13, 2022 hearing. In the meantime, please do not hesitate to contact me or Natalie Mattei, Safeway's Director of Real Estate, at (925) 226-5754 with any questions regarding this correspondence.

Very truly yours,

RUTAN & TUCKER, LLP



Matthew D. Francois

MDF:cm

cc: Natalie Mattei, Director of Real Estate, Safeway, *via email*
Joshua McMurray, City Manager, *via email*
Derek Cole, City Attorney, *via email*
Libby Vreonis, City Clerk, *via email*

September 13, 2022

City Council Members
City of Oakley City Council
3231 Main Street
Oakley, CA 94561

Re: Sept. 13, 2022 City Council Agenda 4.2 Ordinance Text Amendment for Special Land Uses

Dear Council Members,

For the past 29 years the WT Mitchell Group Inc. has been developing commercial real estate primarily throughout California. We have developed 42 major commercial projects with anchor tenants such as Target, Walmart, Costco, Home Depot, Lucky Grocery, Safeway, Raley's, Walgreens, CVS to mention a few. We are currently evaluating sites within the city limits of Oakley for commercial and mixed-use development. For this reason we wish to support your staff's well considered staff report specifically regarding the additional Performance Standards language to the special land uses in your zoning code.

Over the past ten years most of the commercial projects that we have been involved contain a mixed-use component. Imposing some of the other text changes that we have heard suggested might preclude us from even considering mixed use development. Further the alternative suggestions could discourage work force housing.

We believe your current zoning ordinance has restrictions in place on the special land uses that require a case by case consideration before a conditional use permit can be approved. For that reason there is no public benefit to impose some of the alternatives that are being considered in all cases. If adopted they may prevent you from allowing a project with great public benefit from being approved or developed in the future.

For the most part we agree with the staff report, however in sections 9.1.1240 Gas Stations we would ask that you consider providing an exception to the Performance Standard 9.1.1240 c.3) for gas stations that are a part of a larger master planned project of 45,000 SF or greater. In one of the locations we are considering it is on a busy intersection but one of the roads is not considered an arterial but a collector. When a gas station is designed into a larger project it is usually located at the street with anchor and shops tenant buildings behind providing a physical buffer to surround land uses.

Please consider our slight modification to exempt Performance Standard 9.1.1240 C.3) for master planned projects as mentioned above. We wish to support your staff's well considered recommendations. Thank you for allowing me to provide these comments.

With Best Personal Regards,
WT Mitchell Group Inc.

B. Mitchell

William T. Mitchell
President

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