




Agenda Item #4.B

DATE: **May 6, 2019**

TO: Honorable Mayor and Members of the City Council through City Manager 

FROM: Eric Danly, City Attorney
Heather Hines, Planning Manager

SUBJECT: Adoption of an Urgency Ordinance Imposing a Moratorium on Approval of Applications for New Gas Station Uses in the City of Petaluma That Are Not Already Complete as of the Effective Date of the Ordinance Pursuant to California Government Code Section 65858 and Other Applicable Laws

RECOMMENDATION

It is recommended that the City Council adopt an urgency ordinance imposing a moratorium on the approval of applications for new gas station uses in the City of Petaluma that are not already complete as of the effective date of the ordinance pursuant to California Government Code Section 65858 and other applicable law.

BACKGROUND

On April 1, 2019, the City Council denied the appeal brought against Planning Commission's approval under the California Environmental Quality Act and the City's Site Plan and Architectural Review requirements of the Safeway Fuel Station project located at 335 South McDowell Boulevard in Petaluma. The Council action upheld the Planning Commission's approval of the project. In response to the unprecedented community concern about the possible location of new gas station uses near sensitive receptors like schools and residences, and in view of the recent holding in *McCorkle Eastside Neighborhood Group v. City of St. Helena* limiting approving bodies' ability to review projects' environmental impacts to their authority to mitigate project impacts, the City Council requested that staff prepare for Council consideration and possible adoption an urgency ordinance pursuant to Section 65858 of the California Government Code that would prohibit the approval of applications for new gas station uses in the City. Accordingly, attached is an urgency ordinance prepared pursuant to the authority in Government Code section 65858 that would prohibit approval of new gas station applications in the City that are not already complete as of the effective date of the ordinance.

The attached ordinance would not affect the Safeway Fuel Station Project. However, adoption of the ordinance would bar approval of new gas station applications that are not yet complete while the City Council considers potential new regulatory options regarding new gas station applications. Adoption of new regulatory requirements for new gas station applications, such as requiring conditional use permits for such applications, would expand the ability of City approving bodies to conduct environmental review and exercise discretionary approval regarding

new gas station uses. Such new regulations could permit the approving bodies to order the preparation of an Environmental Impact Report (EIR) regarding future gas station applications, and to disapprove projects that do not satisfy the City's regulations, whether due to emissions or other health impacts, traffic, or other considerations within the City's discretion. A 6/7 vote of the City Council is required to adopt the attached ordinance as an urgency item for an initial period of 45 days. In accordance with Government Code Section 65858, the ordinance may be extended for up to an additional ten months and 15 days following a noticed public hearing within the next 45 days. Prior to the expiration of the initial extension, the ordinance may be extended a final time for up to an additional 12 months, for a total potential duration of two years.

Government Code Section 65858 requires that prior to adoption of an interim ordinance, the City Council must find that there is a current and immediate threat to the public health, safety, or welfare and that adoption of an interim ordinance would protect the public safety, health, or welfare. The attached ordinance includes findings of public health, safety and welfare risk resulting based on the effect of the *McCorkle* decision on the City's ability to conduct full environmental review of applications for new gas station uses and based on potential applications for new gas station uses near sensitive receptors. Ten days prior to the expiration of the initial interim ordinance or any extension, the City Council is required to issue a written report describing the measures taken to alleviate the condition that lead to the adoption of the interim ordinance. Following adoption of an interim ordinance under Section 65858, subsequent interim ordinances affecting the same property are prohibited unless the subsequent ordinance is adopted to protect the public safety, health, and welfare from an event, occurrence or set of circumstances different from those that led to the adoption of the prior interim ordinance. In other words, once an interim ordinance expires, a new interim ordinance cannot be enacted regarding the same health, safety and welfare concerns affecting the same property.

DISCUSSION

Currently, fuel station/gas stations are a permitted use in the C1 and C2 zoning districts in the City. Gas stations are a conditional use in the BP, MU1A, and MU1B zones. In 2013, during the adoption process for the updated SmartCode, the Council adopted modifications to the SmartCode to allow gas stations as a conditional use in the T5 zone within the boundaries of the Petaluma Specific Plan. Gas stations are a permitted use in the D4 district as outlined in the SmartCode.

The Implementing Zoning Ordinance (IZO) does not currently contain any specific use criteria for gas station uses in Petaluma. The definition of a Fueling Station/Gas Station included in Section 27 of the IZO is "A retail business selling gasoline and/or other motor vehicle fuels, and related products. A gas station may also include a convenience store, vehicle services, and restaurant facilities." The definition adopted in Section 9 of the SmartCode is "A retail business selling gasoline or other motor vehicle fuels, and related products. A gas station may also include a convenience store, vehicle services, restaurant facility and/or trailer rental where authorized by the Conditional Use Permit for the gas station."

At the request of the City Council, staff has brought forward the attached temporary urgency ordinance under California Government Code Section 65858 that would prohibit the approval of any new gas station applications in the City not already complete as of the effective date of the ordinance for a period of 45 days. The interim ordinance could be extended beyond the initial 45-day period for a total duration of up to two years. Such an ordinance would preserve the status quo of existing gas stations in the City and provide time for the City to study the potential impacts that new gas station uses may have on nearby neighborhood and sensitive receptors, options for regulating gas station uses in the City, and the practical and legal implications of the various regulatory options.

The City Council's adoption of the urgency ordinance would allow for a period of consideration and discussion regarding options for potential new legislation regarding new gas station uses during which new gas station applications would be processed but could not be approved. Following expiration of the interim ordinance, new gas station applications could be approved, subject to any new regulatory requirements that have taken effect during the moratorium period. Depending upon the specific impacts that the City Council may wish to address, legislative options may include:

- Modification to the IZO and/or SmartCode to prohibit new gas stations uses in all zones;
- Modification to the IZO to make new gas station uses subject to a CUP in all zones where they are currently permitted as of right;
- Modification to the use tables in the IZO and/or the City's zoning map changing the zones in which gas stations are permitted;
- Adoption of specific use criteria for new gas station uses (similar to the approach taken for Bed and Breakfast Inns and Short-Term Vacation Rentals);
- Adoption of specific use criteria for new gas stations uses when in proximity to sensitive receptors such as residential neighborhoods, schools, parks, etc.;
- Adoption limitations on the size (number of pumps/dispensers or annual fuel throughput) of new gas station uses; and/or
- Adoption of expanded definitions of gas station uses addressing large gas stations and small gas stations (number or pumps/dispensers or annual fuel throughput), and identification of the appropriate entitlement process (e.g., whether a CUP or use criteria should apply) to address project specific impacts.

Based on direction given by the Council at the May 6, 2019 meeting, staff will research appropriate legislative options and associated legal and practical issues for the Council's consideration. It is unlikely that the necessary research and analysis would be completed within the initial 45-day moratorium period and would likely necessitate an extension of the urgency ordinance. However, staff would provide the Council with a status update concurrent with any future extension request. As noted above, Section 65858 of the Government Code requires that staff prepare for Council issuance at least 10 days prior to expiration of the interim ordinance a report on the measures taken to alleviate the conditions that led to adoption of the interim ordinance.

If the Council enacts an interim ordinance temporarily prohibiting approval of new gas station applications not already complete as of the effective date of the ordinance, the law requires that

staff continue to process any pending gas station applications or applications received during the moratorium period. Interim ordinances under Section 65858 only temporarily suspends project approvals subject to a moratorium, but not project processing. If the Council adopts an interim ordinance on new gas station applications, such proposed new uses would not be brought before the decision-making body until such time as the interim ordinance is repealed (presumably upon new regulation of new gas station uses taking effect), or has expired.

PUBLIC OUTREACH

Adoption of an interim urgency ordinance is not subject to the procedures and public noticing otherwise required for adoption of a zoning ordinance. This item had been distributed along with the rest of the May 6 City Council Agenda and posted on the City's website in accordance with the requirements of the Brown Act and the City's established practice. Any future extension of the interim ordinance will require public noticing pursuant to Government Code Section 65090, which requires published notification in the City's official newspaper at least ten days prior to the hearing.

FINANCIAL IMPACTS

Staff costs associated with preparation of this urgency ordinance are covered under the City's contract with M-Group under base level services and by the staff budget for the City Attorney's Office and does not have any additional cost impacts to the General Fund.

ATTACHMENTS

Attachment 1 Draft Urgency Ordinance

**AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PETALUMA
IMPOSING A MORATORIUM ON THE APPROVAL OF APPLICATIONS FOR NEW GAS
STATION USES IN THE CITY OF PETALUMA THAT ARE NOT COMPLETE AS OF THE
EFFECTIVE DATE OF THE ORDINANCE PURSUANT TO CALIFORNIA GOVERNMENT
CODE SECTION 65858 AND OTHER APPLICABLE LAW**

WHEREAS, Article XI, Section 5 of the California Constitution provides that it shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to the general laws; and

WHEREAS, Section 54 of Article VIII of the Petaluma Charter provides that the City, by and through its council and other officials shall have and may exercise all powers necessary or appropriate to the municipal corporation and the general welfare of its inhabitants, which are not prohibited by the constitution and which it would be competent for the charter to set forth particularly or specifically, and the specification of any particular powers shall not be held to be exclusive or any limitation on the general grant of powers; and

WHEREAS, California Government Code Section 65858, subdivision (a) provides: that city legislative bodies may, to protect public safety, health and welfare, adopt as an urgency measure an interim ordinance prohibiting any uses that may conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying or intends to study within a reasonable time; that adoption of such urgency measures requires a four-fifths vote of the legislative body; that such measures shall be of no effect 45 days from the date of adoption, and may be extended a maximum to two times and have a maximum total duration of two years; and

WHEREAS, California Government Code Section 65858, subdivision (c) provides that legislative bodies may not adopt or extend such interim ordinances unless they contain findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional entitlements would result in that threat to public health, safety, or welfare; and

WHEREAS, California Government Code Section 65858, subdivision (c) further provides that such interim ordinances that have the effect of denying approvals needed for the development of projects with a significant component of multifamily housing (as defined in California Government Code Section 65858, subdivisions (g) and (h)) may not be extended except upon written findings adopted by the legislative body, supporting by substantial evidence on the record, that:

- (1) the continued approval of the development of multifamily housing projects would have a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date that the ordinance is adopted by the legislative body,
- (2) the interim ordinance is necessary to mitigate or avoid such impact, and
- (3) there is no feasible alternative to satisfactorily mitigate or avoid such impact as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance; and

WHEREAS, California Government Code Section 65858, subdivision (d) provides that ten days prior to the expiration of an interim ordinance or any extension, the legislative body shall issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance; and

WHEREAS, residents in the neighborhood in proximity to the proposed Safeway Fuel Station project at 335 South McDowell Boulevard at the corner of South McDowell Boulevard and Maria Drive have expressed opposition to the project based on concerns related to air quality, health risks, safety, and circulation and traffic impacts;

WHEREAS, teachers, administrators, parents, and students and the adjacent McDowell Elementary School have expressed opposition to the project based on concerns involving potential impacts associated with air quality, health risk, safety, and circulation impacts; and

WHEREAS, public comments received in opposition to the project express a common concern with the incompatibility of the proposed gas station with the surrounding land uses and sensitive receptors, including residential, parks, and schools; and

WHEREAS, the property located at South McDowell Boulevard and Maria Drive is currently zoned C-2 and new gas station uses are a permitted use in the Zone C-2, subject to approval of Site Plan and Architectural Review (SPAR); and

WHEREAS, SPAR approval pursuant to Section 24.010 of the City's Implementing Zoning Ordinance (IZO), Ordinance No. 2300 N.C.S. adopted July 2, 2008, involves consideration of SPAR factors such as appropriate use of materials, architectural style, siting of structures on property, size, location and design of signs, and bulk and height of proposed structures, landscaping to approved City standards, and ingress, egress and internal circulation; and

WHEREAS, currently in the City new gas station uses are permitted in the C1, C2, and D4 zoning districts subject to SPAR, and are permitted in the BP, MU1A, MU1B, and T5 zones subject to SPAR and issuance of a Conditional Use Permit; and

WHEREAS, on December 17 and 18, 2018, respectively, the cases of *Georgetown Preservation Society v. County of El Dorado* and *McCorkle Eastside Neighborhood Group v. City of St. Helena* were published; and

WHEREAS, although the court in *Georgetown* held that evidence of aesthetic impacts of the proposed development in that case was sufficient to trigger the need for an Environmental Impact Report, the court in *McCorkle* held that environmental review in that case was limited to the scope of St. Helena's design review authority, and, specifically, its authority under its zoning regulations to mitigate project environmental impacts; and

WHEREAS, based on the *McCorkle* ruling, legal counsel for Safeway argued that the City Council could not order an Environmental Impact Report based on information in the record concerning project emissions and health risk impacts that are outside of the scope of the City's discretionary approval under its SPAR regulations, and

WHEREAS, on the advice of the City Attorney and following the *McCorkle* ruling, the City Council denied that appeal regarding the Planning Commission's approval of the Safeway Fuel Station project, upholding the Planning Commission approval, despite concerns regarding potential health and other impacts of the project; and

WHEREAS, prior to the *McCorkle* decision, it had been the City's consistent practice to treat applications for SPAR approval as subject to the exercise of discretion of the approving body, up to and including the authority of the approving body to disapprove the project on SPAR grounds, and to conduct full CEQA review, up to and including the ordering of an Environmental Impact Report, if warranted; and

WHEREAS, the *McCorkle* case limits environmental review of development applications to environmental impacts the approving body has authority to mitigate; and

WHEREAS, the California Supreme Court has denied petitions to depublish or overturn the *McCorkle* ruling, which remains in effect and binding on the City and its ability to conduct environmental review regarding projects such as applications for new gas stations that may be subject to only design review in specified zones; and

WHEREAS, the City's SPAR regulations do not address emissions or other project health risks unrelated to aesthetics, siting and internal circulation; and

WHEREAS, City Planning staff has been contacted by a potential applicant for a new gas station use located at the corner of Industrial Drive and Petaluma Boulevard North, near sensitive receptors including a school, and where new gas stations uses are permitted as of right and subject only to SPAR review, posing a threat to the public health, safety and welfare, from environmental and health impacts that the City may be unable to avoid or mitigate following the *McCorkle* decision; and

WHEREAS, there is no information in the record supporting that this interim ordinance regarding new gas station applications in the City of Petaluma that are not complete as of the effective date of the ordinance may have the effect of denying approvals needed for the development of projects with a significant component of multifamily housing as defined in the California Government Code Section 65858, subdivisions (g) and (h); and

WHEREAS, pursuant to Section 15001 of the California Environmental Quality Act (CEQA) Guidelines, this ordinance is exempt from CEQA based on the following:

- (1) This ordinance is not a project within the meaning of Section 15378 of the CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately; it prevents changes in the environment related to new gas station use applications pending consideration of possible amendments to the City's Zoning Code or other land use regulations;
- (2) This ordinance is categorically exempt from CEQA under Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its policy power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the evaluation and possible adoption of contemplated local legislation, regulation and policies, which local legislation, if adopted, will be subject to CEQA requirements;
- (3) This ordinance is not subject to CEQA under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment, and for the reasons set forth in subparagraphs (1) and (2) above, it can be seen with certainty that there is no possibility that this ordinance will have a significant effect on the environment;

NOW THEREFORE BE IT ORDAINED by the Council of the City of Petaluma as follows:

Section 1. Recitals Made Findings. The above recitals are hereby declared to be true and correct and findings of the City Council of the City of Petaluma.

Section 2. Moratorium Imposed. A moratorium is hereby imposed on the approval of applications for new gas station uses in the City of Petaluma that are not complete as of the effective date of this ordinance in accordance with the City's powers under Article XI, Section 5 of the California Constitution, Article VII, Section 54 of the City Charter and California Government Code Section 65858 and other applicable law, as follows:

- A. Scope
Applications for land use or development entitlements for new gas station uses in the City of Petaluma not complete as of the effective date of this ordinance may not be approved during the moratorium period.

- B. Statutory Findings and Purpose
This ordinance is declared to be an interim ordinance as defined under California Government Code Section 65858. This ordinance is deemed necessary for the following reasons:
 - 1. The purpose of this ordinance is to protect the public safety, health, and welfare from a current and immediate threat posed by the issuance of land use or development entitlements for new gas station uses that could result in negative health, safety or other impacts on adjacent or nearby existing uses or neighborhoods with which new gas station uses may not be compatible, absent adequate local regulation addressing compatibility of new gas station uses with adjacent or nearby uses or neighborhoods.
 - 2. New gas station uses have been and/or may be proposed for construction in the City, and unless a moratorium is imposed on the issuance of land use or development entitlements for new gas station uses in the City, such development may result in negative health, safety or other impacts on adjacent or nearby existing uses or neighborhoods with which new gas station uses may not be compatible, absent adequate local regulation addressing compatibility of new gas station uses with adjacent or nearby existing uses or neighborhoods. This is particularly true regarding City zoning districts where currently new gas stations are permitted uses (C1, C2, and D4 zones) and approval of applications for such proposed new uses is subject only to site plan and architectural review, which review does not take into account such consideration as project emissions and other health impacts unrelated to aesthetics, siting and internal circulation.
 - 3. It is, therefore, necessary to impose a moratorium on issuance of land use or development entitlements for new gas station uses in the City that are not complete as of the effective date of this ordinance to provide time to evaluate and adopt legislation, guidelines and/or policies as required to address negative health, safety or other impacts of proposed new gas station uses on, adjacent to or nearby existing uses or neighborhoods.

C. Applicability

This ordinance applies to approval of applications for land use or development entitlements for new gas station uses in the City that are not complete as of the effective date of this ordinance. This ordinance has no effect on the processing of applications for land use or development entitlements for new gas station uses in the City, except that such applications may not be approved during the moratorium period. Subject to the moratorium on approval of applications for land use or development entitlements for new gas station uses, applications for such entitlements will continue to be processed during the moratorium period in accordance with applicable law.

Section 3. Severability. If any provision of the ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 4. Effective Date and Duration. This ordinance shall become effective immediately upon passage and adoption if passed and adopted by at least four-fifths vote of the City Council and shall be in effect for 45 days there from unless extended by the City in accordance with Government Code Section 65858.