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Via E-Mail and Federal Express

Larry McLaughlin
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City of Sebastopol
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Re: Use Permit and Ordinance Violations by Rotten Robbie

Dear Mr. McLaughlin:

We have been retained by Jack and Donna Fisher to advise them in the matter of the Rotten Robbie gas station and car wash at 7200 Healdsburg Avenue in Sebastopol. We understand that the City issued a conditional use permit to the previous owner and adopted a mitigated negative declaration. Mr. and Mrs. Fisher have provided us with records of these approvals and documentation of other construction activities and operations at the site during the business's lifetime, including the City's approval of a building permit for relocation of the car wash driveway in October 2014.

As you know, Rotten Robbie has caused great disturbance to Mr. and Mrs. Fisher and other residents of their neighborhood for many years. The Fishers have worked tirelessly and in good faith to resolve the noise, pollution, aesthetic, and other environmental issues with the City and the Robinson Oil Corporation. The Fishers wish to continue their productive relations with the City in reaching resolution of this matter, yet they are not satisfied at this time that the City is willing to exercise its legal authority to ensure that Rotten Robbie complies with its use permit and the law. We are therefore writing to share our analysis of the legal issues involved and to propose actions that the City could take to bring this longstanding quality-of-life problem to an agreeable end.

I. Rotten Robbie's Violations of Use Permit

The 1988 use permit's conditions included approval of a landscaping plan, limited hours of operation, and lighting directed away from neighboring residences. *See* April 29, 1988 Letter re Use Permit attached as Exhibit A. The permit also incorporated detailed mitigation measures required by the California Environmental Quality Act ("CEQA"). *See* Mitigated Negative Declaration attached as Exhibit B. The noise mitigation measures require Rotten Robbie to use specific building materials and technologies to ensure noise levels are compatible with the location. *See* December, 1987 Noise Impacts Report at 7-8, attached as Exhibit C. The tree preservation measures require Rotten Robbie to protect native tree species by installing aeration tubes in all areas where paving or other impermeable surfaces are placed within tree driplines; placing 4-6 inches of soil fill within tree driplines prior to paving; and maintaining a minimum of 4 feet of unpaved soil around tree bases. *See* October 1987 Tree Preservation Guidelines at 2-3, attached as Exhibit D.

Rotten Robbie is not in compliance with the requirements of its use permit. *See* Sept. 10, 2012 Letter from Lawrence McLaughlin attached as Exhibit E (RR "uses completely different equipment" than permit requires, "exceed[s] the permitted hours of operation, [uses] excessive lighting and other violations"). Permits do not "evolve" over time to allow uses that would have violated the permit at the time of issuance. *See County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510 (permit successor subject to limitations in permit). Rotten Robbie needs a new use permit to continue its current operations. Issuance of a new permit would be subject to review under CEQA.

The City has the authority to amend or revoke Rotten Robbie's use permit. City staff have determined that Rotten Robbie is a public nuisance. *See* Exhibit E at 1. Notwithstanding efforts to modify the car wash, Rotten Robbie continues to create excessive noise, glare, and annoyance to the surrounding community. Conduct constituting a nuisance creates a "compelling public necessity" warranting revocation of a use permit. *See Suzuki v. City of Los Angeles* (1996) 44 Cal.App.4th 263, 278; *see also* Sebastopol Zoning Code ("Code") § 17.340.040 (declaration of public nuisance); § 17.340.050 (penalties); § 17.250.050(B) (revocation of use permit for violation of zoning ordinance).

II. Rotten Robbie's Violations of Zoning Ordinance

Rotten Robbie is violating multiple provisions of the Zoning Ordinance. The "CO" zoning district requires that the property be screened from adjacent residential lots. *See*

id. at § 17.56.110. The “Transitional Commercial Sites” ordinance, which applies to any commercial development located next to a residential property, requires dense tree landscaping along property edges and prohibits hours of operation past 10 p.m. and “spill over” of outdoor lighting onto adjacent properties. *Id.* at § 17.100.040. Rotten Robbie regularly receives deliveries after 10 p.m. The recent removal of a tree at the northwest corner of Rotten Robbie’s property makes the car wash visible from neighboring residences and causes substantial light spillover onto adjacent residential properties after dark.

The City has authority to enforce the Zoning Ordinance. *See Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1298 fn. 17 (city’s remedies include nuisance abatement powers and imposing conditions or seeking injunctive relief under zoning/land use powers); *see also* Code at § 17.340.020 (City “shall adhere to and require conformance with the Zoning Code”); § 17.340.040 (declaration of public nuisance); § 17.340.050 (penalties); § 17.250.050(B) (revocation of use permit for violation of zoning ordinance).

Rotten Robbie also uses excessively loud automated voice commands and noisy equipment that is audible throughout the residential neighborhood. The Fishers have documented near-constant noise levels from the car wash that regularly interfere with their and their neighbors’ quality of life. Not only do these noise impacts violate the prohibition on excessive noise in Transitional Commercial Sites, but Rotten Robbie may also be in violation of the Noise Ordinance. Noise studies conducted on at least two occasions (August 2, 2012 and February 20-23, 2013) have shown that Rotten Robbie was violating the noise ordinance. (*See* August 28, 2012 E-mail from Jeff Weaver attached as Exhibit F; March 28, 2013 Noise Assessment by Illingworth & Rodkin, Inc. attached as Exhibit G). Our firm has hired an independent sound engineer to review the prior noise studies to determine if a new study is needed to address issues that were overlooked, ignored, or misinterpreted.

III. Rotten Robbie Is a Nonconforming Use

Even if the City declines to enforce the use permit, Rotten Robbie is a nonconforming use under the Zoning Ordinance. The City’s Zoning Map shows Rotten Robbie’s property is zoned “CO.” Gas stations and car washes are not permitted in the CO zone. These uses are permitted in the General Commercial (“GC”), General Industrial (“M”), and Heavy Commercial (“CH”) districts. *See* Code at § 17.60.030, § 17.72.020 & § 17.68.030. Rotten Robbie is a nonconforming use because its prior zoning (C-2) allowed the gas station and car wash when the use permit was approved, but the zoning

has since changed so that the use is no longer allowed. *See Sabek, Inc. v. County of Sonoma* (1987) 190 Cal.App.3d 163, 164 (gas station permitted under prior C-2 zoning became legal nonconforming use after zoning ordinance's readoption).

The purpose of zoning is to eliminate nonconforming uses as rapidly as is consistent with the owner's rights. *See City of Los Altos v. Silvey* (1962) 206 Cal.App.2d 606, 608. Legal nonconforming uses are therefore subject to special regulation under the common law and the City's Zoning Ordinance. *See id.* at § 17.200.020 (no extension, alteration, or other change in any nonconforming use permitted except as Code specifically provides). Rotten Robbie is prohibited from extending the nonconforming use to "new square footage added to [a] building" unless it obtains a conditional use permit. *Id.* at § 17.200.030(A). Rotten Robbie failed to obtain a use permit for the car wash extension in 2013, which required CEQA compliance and a public hearing. *Id.* at § 17.260.030.

Rotten Robbie is also prohibited from intensifying its nonconforming operations. *See Hansen Bros. Enterprises, Inv. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 552 (intensification or expansion of existing nonconforming use not permitted). Modifications to the car wash entrance in 2013 to reduce noise levels resulted in a reduction in vehicles using the facility and a commensurate reduction in use-related noise and pollution impacts. This decrease in operations moved Rotten Robbie toward compliance with the Zoning Ordinance and therefore must be maintained. *See Code* at § 17.200.030(B) (use of lesser intensity may not revert to greater intensity). However, the purpose of the most recent car wash driveway relocation was to enable more vehicles to access the car wash, thereby intensifying the related noise and pollution impacts in violation of the Zoning Ordinance.

The car wash structure is also a "nonconforming facility." The Zoning Code allows owners to make "ordinary maintenance and repairs" to nonconforming facilities, but prohibits "structural alterations" without a use permit. *Id.* at § 17.200.040(B). So-called "repairs" that increase the use or lifetime of the nonconforming facility (for instance, relocating the car wash driveway to increase car wash patronage) violate the regulations on nonconforming uses. *See Sabek*, 190 Cal.App.3d at 168 (zoning's general purpose to permit no improvements or rebuilding which would extend normal life of nonconforming structure).

We urge the City to more carefully regulate gas stations and car washes, as many other jurisdictions do. *See* December 9, 2014 Sebastopol Planning Commission Staff Report (describing other jurisdictions' screening and noise requirements and mandatory

use permits for improvements). We also urge the City to adopt an amortization period for nonconforming uses. The City has the authority to impose a reasonable amortization period to phase out nonconforming uses. *See Hansen Bros.*, 12 Cal.4th at 552 (zoning ordinance may allow limited period of continued operation adequate for amortization of owner's investment); *Livingston Rock & Gravel Co. v. Los Angeles County* (1954) 43 Cal.2d 121, 127 (zoning looks to future in regulating development and eventual liquidation of nonconforming uses).

IV. City potentially in violation of CEQA

Although the Fishers strongly prefer to work alongside the City to bring Rotten Robbie into compliance with its use permit, the Zoning Ordinance, and the Noise Ordinance, it is important to note that the City could itself be vulnerable to a legal challenge for failing to enforce the law.

CEQA requires environmental review of discretionary agency actions resulting in potentially significant environmental impacts. *See Pub. Res. Code* § 21000 et seq. The City's approval of the driveway relocation required CEQA compliance because the approval required the City's discretion. The driveway relocation required a use permit because it involved the alteration of a nonconforming use or facility. Code at § 17.200.040(B) (structural alteration to nonconforming facility requires use permit). The City has discretion to approve or deny a special use permit. The project also included removing a tree that provided screening of the car wash and nighttime lighting from the adjacent residential property. *See* photographs showing property line before and after tree removal, attached as Exhibit H. This required City discretion to approve a variance from the Zoning Ordinance. A variance requires public notice to property owners within 300 feet of the gas station. Code § 17.270.030. Public notice was not provided before the driveway relocation and tree removal.

The City should have conducted some environmental review or relied on a CEQA exemption prior to approving the driveway relocation project. That review or exemption must also take account of incremental alterations to the gas station over time because the driveway relocation was designed to facilitate those alterations and therefore part of the same overall project. *See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396 (CEQA requires consideration of all reasonably related actions affecting scope or impacts of project); *Arviv Enterprises, Inc. v. S. Valley Area Planning Com.* (2002) 101 Cal.App.4th 1333, 1346 (requiring evaluation of environmental impacts of pending and completed projects that were part of single development).

Approval of the project also violated the CEQA mitigation adopted in 1988. CEQA prohibits the disregard or cancellation of mitigation measures without substantial evidence that the mitigation is no longer needed. *Katzeff v. Cal. Dept. of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601, 614 (agency could not authorize destruction of mitigation by ministerial act). The Tree Preservation Guidelines require specific actions to preserve native trees, including (1) installation of aeration tubes where paving or other impermeable surface is placed within a tree dripline; (2) use of appropriate fill soil over existing grade to protect roots from soil compaction; and (3) maintenance of a minimum of four feet of unpaved and uncompacted soil around the base of trees, with no excavation allowed in this area. The project violated the four-foot "buffer" requirement and may have violated the other requirements as well. See photograph of driveway's current location in relation to native black walnut trees, attached as Exhibit I. Moreover, at least one black walnut tree protected by the City's Tree Protection Ordinance was impacted by the driveway extension and may die as a result of the project approval. See attached photographs of native black walnut trees impacted by driveway relocation, attached as Exhibit J.

V. Conclusion

In sum, the City is presented with several options for reducing or abating longstanding environmental impacts that are in clear violation of the City's Zoning Ordinance and Rotten Robbie's use permit. The Fishers and this firm are eager and available to discuss any of the pertinent factual or legal issues in greater detail should the City so desire.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Ellison Folk