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May 5, 2011

City Attorney Carmen A. Trutanich
City Hall East
200 N. Main Street, Room 800
Los Angeles, California 90012

Re: Administrative Code Enforcement Program

Dear City Attorney Trutanich:

We write on behalf of Tract No. 7260 Association, Inc. (Tract 7260), an association of homeowners in the Century City area that seeks to improve the quality of life for its members and the City of Los Angeles (City) at large. While Tract 7260 applauds efforts to ensure that the City's laws are enforced and the integrity of our neighborhoods preserved and enhanced, it has serious concerns about numerous aspects of the proposed ordinance establishing an Administrative Code Enforcement Program (ACE Program) that is before the City Council. The ACE Program ordinance should be revised in order to provide greater accountability, transparency, and fairness for the citizens of Los Angeles. The following provides an analysis of the deficiencies of the proposed ACE Program ordinance and suggestions for remedying these critical weaknesses.

**An Adequate Cure Period During Which No Fines or Administrative Costs
Are Imposed Must Be Included**

The ACE Program has the laudable goal of encouraging residents of Los Angeles to comply with the City's laws by providing an opportunity to cure a violation without incurring an administrative fine. However, the program appears to have an ancillary goal of generating revenue for the City by collecting "Enforcement Costs" from anyone cited with a violation, even if the individual is willing to remedy the problem. In the event of a "Continuing Violation," a "reasonable period of time to correct" the violation must be afforded prior to imposing an administrative fine. (§ 11.2.03.) Such a provision is absolutely necessary and fundamental to achieving the stated objectives of the ACE Program, increased compliance with the municipal code. However, the same provision imposes liability for "the Enforcement Costs associated with the Administrative Violation," even if the violation is corrected during the cure period. (See also § 11.2.07, subd. (B).) Tract 7260 believes that there should be a period during which a violation can be cured without permitting the City to impose enforcement costs. Other jurisdictions with similar programs do not impose enforcement costs when individuals remedy a violation in a

timely manner, for example, Riverside, Santa Monica, Tustin, Redwood City, and the City of San Diego.

Imposition of enforcement costs on citizens who are willing to comply with the law is a trap for the unwary and serves no legitimate public purpose. The ACE Program should not be a “cash cow” that funds City departments at the expense of City residents who may have unknowingly violated one of the City’s many code provisions, and who are willing and prepared to promptly remedy a violation. The ACE Program supposedly will “authorize City enforcement officers assigned to various departments . . . to issue administrative citations in the course of their *normal duties and responsibilities*.” (July 30, 2010, City Attorney Report, p. 3 (emphasis added).) If these officers are truly acting within the normal scope of their duties when a violation becomes apparent, any enforcement costs should be minimal and already accounted for within the budget of each department. There is thus no reason for the City to collect these costs when the issuance of the citation has already achieved the primary objective of the program — the correction of the violation in a timely manner. The imposition of enforcement costs on individuals who have corrected a violation serves only the purpose of filling the City’s coffers, not to encourage compliance with the law or to genuinely cover the cost of issuing the violation.

Moreover, responsible individuals should be permitted to obtain an extension of the “cure period” upon a showing of hardship. It is possible, and indeed, likely at certain times of the year, that weather or other conditions outside of an individual’s control will make it impossible for the violation to be cured within the specified period. The delay could even be caused by the City itself during a permitting process. In fact, the City could generate revenue by increasing the permitting time for a permit to remedy a cited violation, causing an individual to fail to cure within the cure period. In such circumstances, individuals should be able to request an extension of the period to correct a violation. The City of Tustin, for example, allows an individual to obtain, by written application, an extension of up to 30 days upon a showing of good cause of hardship. Tract 7260 encourages the City to incorporate an extension provision into the ACE Program to increase the program’s overall fairness for those who wish to correct a violation but who are unable to do so within the period of time specified.

Fines for Successive Violations Should Not Be Imposed During the Cure Period or When an Appeal Is Pending

The penalty scheme in the ACE Program imposes significantly escalating penalties on successive violations. At the same time, it defines an administrative violation as “a separate and distinct offense” for “each and every day” that the violation exists. (§ 11.2.03, subd. (C).) The ordinance does not make clear whether “each and every day” that a violation exists subjects a violator to a potential step up in penalties, by being considered a second or third violation, or whether each subsequent day would be a separate instance of the same “first” violation. The law must at the very least be rewritten to clarify how penalties are permitted to be assessed to a continuing violation. Moreover, other jurisdictions apply a temporal limit to the application of increased penalties for second and third violations, increasing a penalty only for subsequent violations and distinct violations of the same Municipal Code section in the same calendar year.

Under the ordinance as written, there is essentially a lifetime increased penalty attached once a first citation is issued. A time limit for the imposition of successive violation penalties would be an appropriate addition to the ACE Program ordinance.

The law has a much more troubling defect than this unclarity. Under the law as written, an inspector could visit a property repeatedly, each time assessing escalating fines upon a continuing violation. At the same time, the owner might be attempting to either cure the violation or demonstrate that the citation is inappropriately issued. This repeated assessment is inappropriate and should be proscribed by the ordinance. Particularly when a citation is appealed, the repeated imposition and continual increase of fines sends a threatening message to the citizen, discouraging the pursuit of legitimate appeal rights, and increasing the amount of money that must be deposited in order to pursue an appeal. The ordinance should specify that no additional fines may be imposed for the same violation during the cure period or when a citation has been appealed.

A Cap on Total Penalties, as Well as Administrative and Enforcement Costs, Must Be Included

The ACE Program ordinance does not include any limit to the amount of fines or administrative costs that may be assessed. Other jurisdictions with such programs, including Santa Monica and Riverside, assess a maximum penalty that may be imposed for a single instance of violation. Indeed, as discussed above, there is no limit to the number of times that a continuing violation could be assessed additional penalties, even during the cure period. The ordinance should incorporate a cap on penalties, including for successive days or subsequent violations, to ensure that the ultimate penalty imposed on any individual is not grossly excessive.

The proposed ordinance also leaves unspecified how administrative and enforcement costs will be determined and assessed. While Tract 7260 understands that such costs may vary depending on the circumstances, at the very minimum, a maximum cap should be imposed to limit the costs and make the public aware of what its maximum liability might be. A preferable approach would be to include a cap as well as a schedule of the type of costs that might be included. An individual should be informed, for instance, how much additional enforcement and administrative costs would be imposed if the person seeks an administrative hearing. Leaving these costs entirely unspecified could result in unfortunate surprise to a citizen who simply seeks to avail themselves of all appellate rights. Courts have expressed concerns over the assessment of excessive costs as a condition of appealing a deprivation of a property interest. (See, e.g., *California Teachers Assn v. State of Calif.* (1999) 20 Cal.4th 327, 331 [provision requiring suspended teacher to pay half the costs of administrative law judge used on appeal is unconstitutional deprivation of due process].) The imposition of costs in order to exercise the right of appeal must have “a real and substantial relation to a proper legislative goal.” (*Id.* at p. 338.) If the City’s objective is to obtain compliance, it should have no problem limiting the enforcement costs that can be collected and providing adequate information about these costs to a party who receives an administrative citation. Allowing limitless enforcement and administrative costs to be imposed simply where an individual seeks to exercise their right to appeal a violation

— even when the violation is found to have merit — suggests that the City has an interest other than seeking compliance with the laws and discouraging frivolous appeals. Tract 7260 urges the City to clarify what costs will be imposed and place a cap on total costs.

The ACE Program Does Not Adequately Address Issues of Fundamental Fairness

Any analysis of the ACE Program must begin with the fact that the fines that can be imposed under the penalty schedule can rapidly become quite high. Given the fact that the fines involved are potentially significant, protections are required to ensure that residents are not deprived of due process. For example, the ordinance should allow a responsible person who appeals a citation to demonstrate a good faith reliance upon a contractor's representation that a permit was not required or that a given improvement was appropriate under the code as a defense to a citation. This would provide a defense for an otherwise blameless homeowner who appropriately relied upon misleading advice. Tract 7260 believes that such an individual should not be heavily fined.

Moreover, the application of the ACE Program in certain situations could prove extremely unfair, and the program should be modified to protect against such occurrence. For example, consider a hypothetical elderly resident of Los Angeles who has resided in the same home for 50 years. An inspector who happens to be in the area identifies a violation of the building code that has existed for years and does not present any safety hazards, but the cost of remedying the violation is beyond the means of the homeowner. How does the ACE Program address this situation? Under the ordinance as presently written, that homeowner could be assessed continuing, escalating fines until the violation is cured, and if the homeowner cannot afford to fix the problem, the fines can grow without limit. Ultimately, a lien could be recorded against the property. Is this situation fair? Hardly. Tract 7260 urges the City to determine how the ACE Program can be modified to protect the homeowner who may unwittingly be harboring a condition that violates a code provision.

As another illustration, consider the enactment of a new law that requires homeowners to maintain sidewalks adjacent to their residences. Upon the effective date of the new law (a mere 31 days after publication), inspectors could spread out across the City issuing citations to homeowners whose sidewalks are in unsatisfactory condition due to roots from trees owned by the City. The period between when an ordinance is published and when it goes into effect may not provide adequate time for homeowners to remedy significant violations that have been newly created by operation of law, particularly where many other individuals across the City will be similarly affected. The ACE Program should address this situation by phasing in enforcement of new laws over a period beyond the effective date. This is the only way that the program will be truly fair.

Quarterly Public Reporting on Implementation of the ACE Program Will Provide Greatly Needed Transparency and Reduce Serious Potential for Abuse

The ACE Program grants a significant degree of authority to the City's various enforcement officers. Although Tract 7260 believes that this program is proposed with the best of intentions, it is rife with the potential for abuse in the future. For example, an enforcement officer could be directed to spend a disproportionate amount of time in a particular neighborhood or community. Perhaps these efforts could be directed at neighborhoods where more affluent residents would better be able to afford to pay fines and enforcement costs. Alternatively, inspectors could target neighborhoods where residents have less economic resources and will not have the money or time to contest violations, even if a citation has no merit. Or perhaps the efforts would be targeted at neighborhoods with a high concentration of residents advocating against individuals in positions of power within City government. None of these circumstances justifies increasing the enforcement presence in a particular neighborhood. The proposed ACE Program contains no protection against such activity. To ensure that the ACE Program is not administered in a way that permits this type of abuse, a quarterly reporting requirement should be included in the ordinance. Each department should be required to report, with some reasonable level of granularity that will allow for evaluation of selective enforcement concerns, the number of administrative violations issued, the number corrected, the amount of administrative fines collected, and the number of contested violations affirmed and reversed after hearing. This would provide the public, as well as the City's decisionmakers, with highly relevant metrics as to the application and success of the ACE Program's implementation.

Such reporting is essential to ensure that the implementation of the ACE Program is not susceptible to challenge under due process or equal protection grounds. Due process protects individuals by "prevent[ing] the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1178, fn. 28.) Moreover, "the due process clause precludes arbitrary and irrational decisionmaking." (*Id.* at p. 1183.) Due process prevents "governmental power from being used for purposes of oppression" and halts governmental "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 697, 709-710.) The use of the ACE Program to target affluent communities or individuals or groups that have expressed dissenting viewpoints would trigger serious judicial scrutiny, and public disclosure of the program's implementation is required in order to discourage such an abuse.

Moreover, the same type of analysis and reporting must be conducted on a quarterly basis for the code enforcement officers themselves. The enforcement officers will need to be trained to issue the citations appropriately. It is thus critical for the City to track the effectiveness of each officer. Are officers writing appropriate citations for actual violations, or are citations written in error? Are officers including all necessary information to provide the recipients of citations adequate notice of the offense and the consequences of the offense? By tracking the outcomes of each citation, by officer, the City will ensure that the ACE Program is administered efficiently

Carmen Trutanich

May 5, 2011

Page 6

and fairly. To commence a new program without such monitoring and tracking would not provide adequate insurance that the program operates justly and efficiently.

Penalties for Illegal Improvements Should Be Based Upon the Degree of Harm Posed by a Violation or the Knowing Nature of Noncompliance, Rather than Surface Area

For violations involving improvements to buildings or land, the ACE Program proposes to assess penalties based upon the surface area involved in a violation. This scheme may lack an adequate nexus between the harm created by a violation and the penalty imposed. For instance, a violation involving landscaping could encompass a large surface yet pose minimal risk of harm. An individual could repeatedly violate similar provisions of the code (yet not the same provisions, so as to incur penalties for subsequent violations) on a small surface area, and face only the lowest permissible penalty in spite of conscious violation of the law. The City of Santa Monica utilizes a penalty structure based not upon the surface area involved in the violation, but upon an assessment of the likely harm that could result from a given violation or the nature of any repeated non-compliance. The largest fines are imposed for violations that present “a substantial probability” of “death or serious physical harm to the public at large.” Next on the scale are violations presenting the threat (but not substantial probability) of such harm, violations that “are likely to cause . . . serious harm to public or private property,” and violations that “present a conscious and willful disregard” of prior orders. A reduced penalty is imposed on violations that are “likely to cause . . . harm” to property, or those violations reflecting “repeated or continuous noncompliance” with prior orders. The lowest level of penalty is imposed on all other violations. Santa Monica’s penalty structure provides a clear relationship between the harm being addressed by the penalty and the amount of penalty imposed; the ACE Program’s connection is more attenuated and in some cases, the penalty is likely to be grossly disproportionate to the offense involved.

Moreover, the penalty structure for sign violations, while somewhat logically linking fines to the size of the signs, could be altered to serve as an even greater deterrent by linking the fine directly to the gross revenues generated by an illegal sign. Fines based upon surface area could be an insufficient disincentive to violate the sign ordinances because the revenue obtained from an illegal sign might exceed the fine imposed. Imposing a fine in the amount of 110 percent of gross revenues would certainly deter any rational-minded business from violating the ordinance, and would be rationally related to the legitimate municipal purpose of enforcing compliance with the sign ordinances. A sign that generated no commercial revenue could be assessed a penalty on the basis of surface area.

The Proposed Ordinance Does Not Adequately Address Due Process Concerns

The proposed ordinance defers development of critical policies, allowing the City Attorney to establish policies and procedures that are designed to ensure that those accused of violations are adequately informed of their rights and the nature of the offense, and that proceedings are resolved expeditiously and appropriately. While the present City Attorney may intend to develop fair and effective policies, there is no guarantee that these policies will not be modified by a future City Attorney, and there is no review process for such procedures specified

in the ordinance. Rather, the City Attorney appears to have sole discretion to implement much of the ACE Program without the benefit of public hearing. Many of these policies can easily be — and in other jurisdictions, are — incorporated into the proposed ordinance so that future officeholders are not easily able to subvert sound and important components of the ACE Program.

For instance, the ordinance provides that notification of a violation to the holder of a lease, mortgage, deed “shall conform to the policies and procedures established by the City Attorney’s Office.” This is a critical component of providing adequate due process to an accused, and should not be deferred for administrative development. Other jurisdictions, such as Santa Monica and San Diego, set out the procedures for notifying property owners in the ordinance itself. These procedures include locating the property or business owner if possible to obtain a signature, mailing a citation to the property owner on the assessment roll, posting a citation in a conspicuous location, and service on the holder of any mortgage, lien or lease of record. The ACE Program ordinance should incorporate all of these provisions to ensure that notice is received by those cited, a fundamental component of due process.

Similarly, the ordinance does not establish the required content for citations, nor the timing in which a hearing must be scheduled, nor the appropriate procedures for such a hearing, again deferring this for implementation by the City Attorney. Other jurisdictions provide such information in the laws establishing similar programs. A citation should, at a minimum, inform an individual of the date, time, and location of the violation; the code provision violated and a description of the violation; specify the actions required to correct the violation and the consequences for failure to correct the violation; provide the time within which the violation must be corrected; state the amount of penalty imposed, when penalty is due, and the consequences of failure to pay; identify all rights of appeal; and contain the signature and clearly legible name of the issuing officer.

Because individuals are required to deposit the amount of any fine assessed prior to an appeal hearing (absent financial hardship), the ACE Program should be designed to minimize the period between the required deposit and the hearing by requiring hearings to be provided quickly, within at most 30 days of the deposit. Extensive delays in this post-deprivation proceeding would trigger due process concerns. Prior to the hearing, all documents that the issuing department intends to rely upon should be disclosed to the accused, in order to avoid unfair surprise at the hearing. Where such substantial fines may be at issue, the law should establish minimal procedural requirements that cannot be varied .

The ordinance also does not provide for adequate notice to potential purchasers of a property that a violation has been assessed against it. Other jurisdictions, including San Diego and Redwood City, provide that notice of potential violation may be recorded in the public records for a property, providing constructive and actual notice of such violation to future owners. This approach is critical if the City is ever to seek penalties against a subsequent owner for failure to bring a property into compliance.

Carmen Trutanich

May 5, 2011

Page 9

Conclusion

The ACE Program has the potential to improve the quality of life in the City by increasing compliance with City Code. However, it has the potential for abuse, and imposes needless costs upon law-abiding, well-intentioned citizens. Tract 7260 believes that if the ACE Program ordinance is reformed in the ways suggested herein, these weaknesses would be remedied, for the benefit of the entire City.

Sincerely,

Beverly G. Palmer

cc: Jane Usher, City Attorney's Office
Paul Koretz, Council District 5