

THE SURLAND COMPANIES

January 5, 2016

Tracy Mayor and Tracy City Council
City of Tracy
333 Civic Center Plaza
Tracy, CA. 95376

Residential

Commercial

RE: Agenda Item #4 / I - 205 Corridor

Dear Honorable Mayor and Members of the Tracy City Council:

I could not attend tonight but wanted to offer some thoughts on an item for tonight's Council Meeting.

The current course to create a guiding document for the I-205 area is a step in the right direction of creating a path for future development, planning, and design for future I-205 development. These types of documents typically create guidelines to ensure that unaesthetic architecture and design are limited.

The discussion of a moratorium seems more of a symbolic statement that the I-205 area is under review. As it reads, applications may still be submitted, and most any application submitted typically would reach a Council agenda months later at the earliest.

We would suggest as part of this process to add a design/architectural team that could create design concepts based on what other successful cities are implementing and present them in concept graphic forms. This would allow the Council and Community better vision what I-205 might look like based on examples from other successful cities, bringing new ideas to the forefront, and could be implemented as part of the guidelines being prepared.

1024 CENTRAL AVE.

TRACY

CALIFORNIA

95376

TELEPHONE

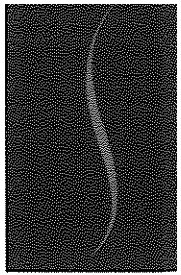
(209)833-7000

FACSIMILE

(209)833-9700

WEBSITE

www.surlandcompanies.com



Many in the development and business community who pass through the City of Tracy ask what will the City of Tracy look like in the future? This process would allow the Council, Community, Staff, Land Owners, and Developers to be a part of shaping what people will view and think of the City of Tracy as they travel to and from our town.

Sincerely,

THE SURLAND COMPANIES

Les Serpa
CEO

cc: Troy Brown – City Manager, City of Tracy

RADOS PROPERTIES – CALIFORNIA LAND, LLC
ONE OF THE RADOS PROPERTIES FAMILY OF COMPANIES

2002 E. MCFADDEN AVE., SUITE 200
SANTA ANA, CA 92705
PHONE 714/835-4612 FAX 714/835-2186

BY E-MAIL

January 4, 2016

City Manager
City Council
City Attorney
Tracy, California

We write to express our concern with what, to borrow a phrase, appears to be a “rush to judgment” regarding the development of property along Interstate 205 from Tracy Boulevard to the east city limit.

Some ten years ago, we made a significant investment in 42 acres of industrial property at 3601 Pescadero. At the time, we were assured that the City wanted industrial development in the area with a very straight forward Development Review process. These assurances came from the City’s Community Development Department and other members of the City planning staff. In addition to what we were told by City staff, the City’s commitment to industrial development in this area was evidenced by the Northeast Industrial Specific Plan, by plans for a Community Facilities District, and by existing, freeway fronting industrial uses on contiguous property. Moreover, there was a significant amount of industrial development in the area at that time with more planned. In sum, in 2005, and at all points since, all indications were that the City wanted industrial in the area around our property.

But recently, for reasons that are unclear, the City has dramatically changed its position. Now, we are told that industrial development along the freeway does not project the desired image of the City to travelers passing through Tracy. How the image projected by industrial development has changed over the last ten years is not clear. Nor is it clear why the City has not met with landowners in an informal and collegial exchange to discuss the City’s aesthetic concerns and ways in which they might be addressed. Had such discussions been held, the City might have learned of the economic concerns created for landowners by its sudden change of course

Apparently the City has undertaken at its expense a quick economic analysis to provide more information about possible non-industrial land uses along the I-205 Corridor. The study by bae urban economics does little to comfort any landowners in the I-205 corridor. Over the next fifteen (15) years, bae projects for the entire City only a 26.4% increase in retail sales, less than 2% per year. Moreover, projected land absorption is very weak even before one considers that the study ignores the impact of e-commerce on retail sales which could further reduce the demand for retail land. And it ignores the obvious tendency of some retailers, auto dealers and big-box retailers for example, to cluster together,

which could leave an area without such retailers today with none in fifteen years even if there is robust growth.

Based upon the above, it is our contention that changing/limiting land uses in the I-205 Corridor and/or establishing overlay zones could condemn landowners to a lack of demand for their property for the foreseeable future, with predictable consequences of serious economic damage. Consequently, we ask the City to slow down and give more consideration to balancing the interests of landowners and the travelers on the I-205.

Sincerely,

A handwritten signature in black ink, appearing to read 'Les Brown', with a long horizontal flourish extending to the right.

Les Brown
Operations Executive

LWB:ms

YRC Worldwide Inc
10990 Roe Avenue
Overland Park, KS 66211
Phone 913.696.6192
yrcw.com



January 5, 2016

VIA E-MAIL
council@ci.tracy.ca.us

Hon. Michael Maciel and City Council Members
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

Re: *January 5, 2016, City Council Meeting
Agenda Item #4 – Interim Ordinance*

Dear Mr. Mayor and Council Members:

In yesterday's mail, we belatedly received a postcard indicating that at tonight's meeting, the City Council would consider adoption of an Interim Ordinance imposing a moratorium on any entitlements for warehouse and distribution uses along the I-205 Corridor. We own and operate a freight terminal on a large parcel located at 1535 E. Pescadero Avenue—within the affected area—and we strongly object to the passage of the Interim Ordinance.

Pursuant to the City's Industrial Areas Specific Plan, our property has been designated for Light Industrial use since it was annexed into the City in 1989. In that time, we have spent in excess of \$20 million for the construction of our terminal, provided jobs for local residents, and have always tried to be a good corporate citizen of the City.

We understand that you are aware we have contracted to sell a portion of our property (the "Excess Property") to Industrial Property Trust. It appears the Interim Ordinance is specifically intended to prohibit or hinder IPT's proposed development of the Excess Property. Under California law, the Interim Ordinance is to be used only where there is "a current and immediate threat to the public health, safety, or welfare." There is no such threat here for the development of a warehouse/distribution facility in an area that has been zoned and used for similar industrial purposes for the better part of the last three decades. This hardly poses the kind of "immediate threat" contemplated by California law. It appears the sole reason for the Interim Ordinance is to defeat the sale of our Excess Property. *See, the Arnell line of cases.*

You have previously received a letter from Cox Castle Nicholson, dated September 15, 2015, outlining issues involved in the proposed Interim Ordinance. Those same legal issues pertain here and we incorporate them in this letter. For your convenience, we attach a copy of that letter.

YRC Worldwide Inc
10990 Roe Avenue
Overland Park, KS 66211
Phone 913.696.6192
yrcw.com



The one-day post card notice we received (especially coming right after the holidays and possibly in violation of California notice and hearing requirements) has not given us sufficient time to fully evaluate the impact on our property, prepare a complete response, and make arrangements to travel to California. For the reasons stated above, we ask you to reject the proposed Interim Ordinance. If you are not willing to reject the Interim Ordinance outright, in fairness, we ask that you at least table this matter until your next meeting to allow us a reasonable time to prepare a more complete response.

Sincerely,

A handwritten signature in blue ink that reads "Christopher J. Masoner".

Christopher J. Masoner
Counsel
Chris.Masoner@yrcw.com

cc: Dan Sodergren, City Attorney, via email
Nora Pimentel, City Clerk, via email
Stephen Cassidy, Pepple Cantu Schmidt PLLC, via email

**Handout - Agenda Item 3
September 15, 2015, Council Mtg**



Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, California 94104-1513
P: 415.262.5100 F: 415.262.5199

R. Clark Morrison
415.262.5113
cmorrison@coxcastle.com

File No. 099999

September 15, 2015

VIA EMAIL

Honorable Mayor Michael Maciel
Mayor Pro Tem Robert Rickman, and City Councilmembers
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

Re: September 15, 2015 City Council Meeting: Agenda Item No. 3, Interim Ordinance

Dear Honorable Mayor Maciel, Mayor Pro Tem Rickman, and City Councilmembers:

Cox, Castle & Nicholson LLP represents DCT Industrial Operating LLC ("DCT"). DCT is the developer of that certain real property (the "DCT Property") located within the City of Tracy ("City") along the "I-205 Corridor" and within the area to be covered by the City's proposed development moratorium (the "Interim Ordinance"). As you know, DCT has a development application before the City, which application the City deemed complete on August 25, 2015. It is clear from the text of the Interim Ordinance that DCT's project is the intended target of the City Council's action tonight. In fact, we are aware of no other development proposal that would be affected by this moratorium.

As outlined further below, any action by the City Council to approve the moratorium would be illegal. DCT urges the City Council to reject the Interim Ordinance and direct the continued processing of DCT's project through the City's existing development plan review process.

1. Background.

As recognized by the Interim Ordinance, there is one "pending land use application for a distribution use in the I-205 Corridor." That application is DCT's application, which requests approval of a Preliminary and Final Development Plan to construct a 795,732 square foot, 37-foot high industrial distribution building. As described further below, this application represents a revised version of DCT's project following the City Council's denial of a specific plan amendment to increase the permitted height on DCT's property.

DCT worked productively with the City for over two years on this proposal, going to great lengths – while incurring substantial costs, including approximately \$80,000.00 paid, at

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the request of the City, to the City's consultants – to address any and all reasonable outstanding concerns. As acknowledged in the June 2, 2015 staff report on DCT's original proposal, DCT's project "does not create any negative visual impacts within the city, particularly along I-205, [and] minimizes its industrial appearance." This staff report further concluded that DCT's project "is consistent with the Environmental Impact Report (EIR) that was prepared for the General Plan [and that] no further environmental assessment is required." In recommending approval of DCT's original application, the Planning Commission also found that the project "is compatible with the land use, design, and operational characteristics of the neighboring properties." (See Planning Commission Resolution No. 2015-006.)

Following the City Council's denial of a specific plan amendment to increase the permitted height on DCT's property, DCT further refined its proposal by reducing the height of the building to be consistent with the requirements of the I-205 Corridor Specific Plan. Thus, the current application is an improvement over the previous application, and City staff and the Planning Commission both supported and recommended approval of that application. As a result of the modification – and as staff acknowledged when it deemed DCT's application to be complete – DCT's proposal is fully consistent with all requirements of the General Plan, the I-205 Corridor Specific Plan, and all applicable ordinances. The only discretionary approval now required from the City is development plan review.

When DCT resubmitted its application, the City requested DCT to agree to a delay in the schedule for project consideration. It was *not* disclosed to DCT that the purpose of the requested delay was to give the Council an opportunity to adopt a moratorium before DCT's application could be heard. In fact, DCT met with the City staff to discuss its plan on September 8, the day prior to publishing the agenda, and no mention was made of it.

2. The Use of Extraordinary Legislative Fiat Is Unnecessary and Illegal.

Government Code Section 65858 allows local agencies to adopt an interim ordinance "as an urgency measure" in order to "protect the public safety, health, and welfare." Such measures take effect immediately upon adoption and without the usual procedural safeguards accompanying the adoption of an ordinance (e.g., two readings, 30-day effective date). The Legislature recognized the extraordinary nature of this tool by limiting its initial duration to 45 days. As described further below, the Legislature further provided that this tool may be used only when the City Council can properly make a finding of an urgent threat to public health, safety and general welfare.

The Interim Ordinance is plainly targeted at DCT's proposal. In particular, it states that the threat addressed by the moratorium "is a pending land use application for a distribution use in the I-205 Corridor that may conflict with, and undermine, any new land uses, development standards, and design standards that the City may implement as a result of the current study of the I-205 Corridor which is being undertaken." This is an urgent threat to the public's health, safety and welfare?

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What makes this more astonishing is that the City's staff has already concluded that DCT's proposal is benign, consistent with all applicable codes, and fully addressed by the City's General Plan EIR. Nonetheless, the staff report for tonight recommends a moratorium so that the City may conduct a study "intended to better further the visual and economic goals and objectives of the City's General Plan," the same General Plan with which staff has already determined the DCT's application to be consistent. (See June 2, 2015 staff report, Agenda Item 4, p. 4.) It is rather late in the game to do this. The City has an established process to evaluate a project's adherence to architectural and aesthetic standards and guidelines – the development plan review process – and it is troubling that the City is seeking to remove all certainty in how applications for new development will be treated in the City moving forward.

The City Council must not resort to an extreme legislative action to strip DCT of its due process rights to a fair hearing and the consideration of evidence in accordance with the City's Municipal Code. As described above, the City has an established, adequate and perfectly legal vehicle to review any aesthetic or other related questions. A legislative moratorium is completely unnecessary and inappropriate in this case.

3. A Moratorium May Not Be Used to Frustrate a Developer's Plans.

The Courts have established that a moratorium under Government Code Section 65858 cannot be enacted for the purpose of frustrating a developer's plans. (*Sunset View Cemetery Assn. v. Kraitz* (1961) 196 Cal.App.2d 115, 123 [interim ordinance restricting cemetery uses and activities had the "single, realistic purpose" of frustrating Sunset View's application and was invalid]; see also *Atlantic Richfield Co. v. Board of Supervisors* (1974) 40 Cal.App.3d 1059.)

In *Sunset View*, the county accepted the cemetery's application for a permit and the very next day adopted an urgency ordinance placing limitations on such uses. On the basis of the ordinance, the county then refused to process the cemetery's application. (*Sunset View, supra*, at p. 117.) In finding the urgency ordinance invalid, the court determined that "the enactment of the ordinance stemmed from the county's attempt to frustrate respondent's plans. The generality of the language of the ordinance does not conceal its single, realistic purpose: the prohibition of respondent's mortuary." (*Id.* at 124–125; see also *Ross v. City of Yorba Linda* (1991) 1 Cal. App. 4th 954, 970 ("Here, we cannot imagine a more obvious attempt to 'frustrate a particular developer's plans.' [Citations.] The city's own records reflect the plan amendment was precipitated by the very rezoning request now before this court. The plan amendment isolates the Rosses (and the two of their neighbors to whom the plan amendment might make a difference) as the special objects of legislative action. This itself is constitutionally impermissible".])

As in *Sunset View* and *Ross*, the "single, realistic purpose" of the Interim Ordinance – as evidenced by the findings contained in the Ordinance itself (Recitals K and P) – is to frustrate DCT's application. DCT's application has already been determined by staff to be

complete. Given the very language of the Interim Ordinance, and the City's request that DCT agree to a delayed hearing schedule on its project without disclosing the reason for that request, it is quite clear that the purpose of this ordinance and moratorium is to deny DCT the due process rights it has already earned – as acknowledged by the City. This is not a legal course of action.

4. The Interim Ordinance Constitutes Illegal Spot Zoning.

A claim under the equal protection clause of the U.S. Constitution arises with a showing that an agency has “adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” (*Walgreen Co. v. City & County of S.F.* (2010) 185 Cal.App.4th 424, 434.) In California development, the term “spot zoning” is often used to describe a zoning action that violates the principle of equal protection because of its discriminatory nature. (*Viso v. State of Cal.* (1979) 92 Cal.App.3d 15, 22; *Reynolds v. Barrett* (1938) 12 Cal.2d 244, 251 [“by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land.”]; *Charles L. Harney, Inc. v. Board of Permit Appeals* (1961) 195 Cal.App.2d 442, 448–449 [applying rule to moratorium]; *Ross*, 1 Cal.App.4th 954 at 962 [“the dark implication in the city's argument is that there are numerous ‘islands’ in the city's zoning scheme, and that the ‘line must be drawn’ at this one, lest others fall prey to ‘urbanization.’ Be that as it may, *arbitrary* line-drawing is antithetical to the individual right to equal protection of the law.”].)

By way of example, the property owners in *Ross* asserted an equal protection violation when a city denied their application for permits to develop their land at densities similar to those on surrounding parcels. The court held that the denial of rezoning was arbitrary and discriminatory, and thus unconstitutional. (*Ross*, 1 Cal. App. 4th at 963.) The court rejected the city's argument that the zoning was supported by a rational basis – the prevention of encroaching urbanization – explaining that this could not be a rational basis when urbanization had already occurred in the surrounding parcels. (*Id.* at 962.) The facts in this case are on all fours with *Ross*.

The DCT project site is designated by the I-205 Corridor Specific Plan for “Light Industrial” uses. The parcel to the west is also designated Light Industrial, and other properties nearby are designated General Commercial. And the City has previously approved a considerable number of industrial and warehouse uses along the I-205 Corridor. For example, a waste management facility is located approximately one mile to the west, and parcels to the south and east of the DCT project site are developed with industrial and warehouse uses. Thus, the City's claim that the Interim Ordinance is needed to ensure that warehouses and distribution facilities do not threaten the public health, safety, or welfare – due to aesthetic concerns – cannot provide a rational basis for the City's discrimination against the DCT proposal. As in *Ross*, the City's “arbitrary line-drawing is antithetical to the individual right to equal protection of the law.” (See *Ross*, *supra*, 1 Cal.App.4th at p. 962.) Adoption of the Interim Ordinance would constitute arbitrary and discriminatory spot zoning in violation of DCT's rights to equal protection.

5. The City Cannot Make the Findings Required by Section 65858.

To adopt an interim ordinance, Government Code Section 65858, subdivision (c) requires that the City Council find that **“there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or other applicable entitlement for use . . . would result in that threat to the public health, safety, or welfare.”** (Emphasis Supplied.) Although courts grant deference to an agency’s urgency findings, the referenced facts must “reasonably be held to constitute an urgency.” (*216 Sutter Bay Assoc. v. County of Sutter* (1997) 58 Cal.App.4th 860, 868, citing *Crown Motors v. City of Redding* (1991) 232 Cal.App.3d 173, 179.)

In *216 Sutter, supra*, a newly-elected board of supervisors adopted an interim ordinance to prevent eighteen development agreements from going into effect. These development agreements had been approved at the end of the previous board’s term and would have facilitated substantial new development in the rural county. (*216 Sutter, supra*, at pp. 864–865.) In upholding the County’s adoption of the interim ordinance, the Court determined that the County’s findings were sufficient as a matter of law. In its ruling, the Court specified that the county had identified an actual, reasonable urgent need for the ordinance: the development agreements were due to vest the next day, and the board wished to maintain the relevance of a pending public referendum that was directly contrary to the development allowed by the agreements. (*Id.* at 868.)

Unlike the situation in Sutter County, there is not in this case a “current and immediate threat” to anything or anyone. The Interim Ordinance says only that the City “received an application” on July 17, 2015, that it “anticipates receiving other similar land use applications . . . in the near future,” and that the City “believes that the General Plan’s goals and standards related to preserving the visual and economic importance of the I-205 Corridor may be better furthered by incorporating updated development standards and [] design standards.” (Recitals K through M.) On the basis of this “belief,” and without any supporting evidence, the Interim Ordinance declares that “[t]he approval of the [DCT’s project] would be a threat to public health, safety, or welfare.” (Recital Q.)

It is difficult to understand how the City Council could possibly make a finding of current and immediate threat with respect to DCT’s project given (i) the conclusions of the City’s staff regarding the acceptability of DCT’s revised project; (ii) that DCT’s revised project has never been presented to the City Council; (iii) the surrounding land use patterns; and (iv) that there is no current schedule for consideration of DCT’s final development plan. Moreover, the notion that “there may be more applications in the future” is pure speculation and certainly does not generate the urgency required by Section 65858. Even if an application were filed, processing of that application would go well beyond the 45-day moratorium and so only DCT’s application would be affected.

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There is no current and immediate threat and the City can simply utilize its existing development review process to consider DCT's application.

6. The Moratorium Would Violate DCT's Statutory and Constitutional Civil Rights.

To present a valid procedural due process claim under federal law, DCT must show that the City's action deprived DCT of a protected property interest. (*Harris v. County of Riverside* (9th Cir. 1990) 904 F.2d 497, 501; 42 U.S.C. § 1983.) Although procedural due process claims cannot generally be asserted to challenge a legislative act, in *Harris*, the court determined that the plaintiff could assert a procedural due process claim to challenge a general plan amendment because that broad, legislative action "specifically targeted" the plaintiff's property and so was subject to the constraints of procedural due process. (*Id.* at 503.)

Similarly, here, the Interim Ordinance is a legislative action to which the requirements of procedural due process would not normally apply. However, the Interim Ordinance specifically targets the DCT application and DCT's property because only DCT's application would be affected by the Interim Ordinance. Further, as stated below, DCT has a vested property right to develop under the DCT application. To adopt the Interim Ordinance would prevent approval of DCT's application and could, for up to two years, prevent any development of DCT's property, thereby depriving DCT of its protected property interest and potentially resulting in a compensable temporary taking. This would all occur without notice and hearing to DCT, in contravention of its constitutional rights to due process and the protections of Section 1983 of the Federal Civil Rights Act.

7. The City Cannot Retroactively Divest DCT of Its Vested Rights

"[Z]oning ordinances may not operate retroactively to divest a permittee of vested rights previously acquired . . . [i]t is well settled that the new ordinance may operate retroactively to require a denial of the application, or the nullification of a permit already issued, provided the applicant has not already engaged in substantial building or incurred expenses in connection therewith." (*Igna v. City of Baldwin Park* (1970) 9 Cal.App.3d 909, 913-914; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1179 [interim ordinance did not divest defendant in enforcement action of vested right because permit was denied and no substantial expense had been incurred].) Here, DCT has incurred a substantial expense in excess of \$800,000 to finalize and process its application. This expense was incurred in good faith reliance on the City's actions during discussions relating to finalization and processing of the DCT application. The DCT application is also still pending and has not been denied. Therefore, unlike in *Kruse*, where the permit had already been denied and no substantial expense had been incurred, the Interim Ordinance here cannot operate retroactively to divest DCT of its vested right to pursue the project.

* * *

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Mayor Pro Tem Robert Rickman, and City Councilmembers
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For the reasons stated above, DCT urges the City Council to deny approval of the Interim Ordinance.

Sincerely,



R. Clark Morrison

cc: City Clerk (via email)
Dan Sodergren, City Attorney (via email)
Jeff Phelan, DCT (via email)
David Haugen, DCT (via email)
John Spiegleman, DCT (via email)

RCM/SRM

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