

MICHAEL J. AGUIRRE
SAN DIEGO CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
MICHAEL J. AGUIRRE
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

VIA FAX and REGULAR MAIL

May 17, 2007

Honorable Arnold Schwarzenegger
Governor
San Diego Office
1350 Front Street, Suite 6054
San Diego, CA 92101

Re: Compliance with FAA Notice of Hazard

Dear Governor Schwarzenegger:

Introduction

I am writing as the City Attorney of the City of San Diego to request your assistance in securing help from the office of the Attorney General in the City's efforts to have the top floors removed from a building being constructed in a highly used airport flight path that the Federal Aviation Administration has declared to be a hazard. Simply stated, the building endangers the lives of San Diegans. The California Department of Transportation has issued numerous warnings to the City and the developer of the building, going so far as calling the building "illegal." As the San Diego City Attorney, I have filed a lawsuit in California Superior Court seeking a declaration that construction on the top floors of the building must stop. Recently the California Pilots Association joined the lawsuit. I respectfully request that you ask the California Department of Justice Office of the Attorney General to join in this lawsuit aimed to protect the public safety of San Diegans.

Please find below the chronology of events which detail the City's and the developer's brazen disregard for codes and laws issued by the California Department of Transportation in allowing the construction of a building standing in the path of a highly traveled local airport runway.

Background

On 24 April 2006 the Federal Aviation Administration (FAA) issued a Presumed Hazard letter to Sunroad Enterprises based upon an initial finding that the Sunroad 12 office building at 180 feet exceeded obstruction standards and/or would have an adverse physical or electromagnetic interference affect upon navigable airspace or air navigation facilities.

On 20 June 2006 FAA Obstruction Evaluation Specialist Karen McDonald sent an email to Sunroad reminding Sunroad that the FAA had issued a Presumed Hazard letter advising that the maximum acceptable height for the Centrum 12 office building was 160 feet. The letter warned that after 24 June 2006 the FAA would be in a position to issue a Determination of Hazard to Air Navigation for any height greater than 160 feet.

Also on 20 June 2006 Sunroad sent a letter to the FAA representing that Sunroad conditionally agreed to the 160-foot height specified in the FAA letter of 24 April 2006.

On 22 June 2006 Sunroad filed with the FAA a form 7460-1 representing that the height of the Centrum 12 building would be 160 feet.

On 27 June 2006 the FAA issued a determination of No Hazard for the Spectrum 12 office building based upon the building height being limited to 160 feet.

On 26 July 2006 Sunroad filed a Supplemental Notice with the FAA informing the FAA that the Centrum 12 building was 180 feet.

On 11 August 2006 the FAA issued a Notice of Hazard to air navigation in and around the Montgomery Airport. The FAA based the notice on its finding that the Centrum 12 office building at a height of 180 feet "would have a substantial adverse affect on the safe and efficient utilization of the navigable airspace by aircraft and/or on the operation of air navigation facilities."

On 29 September 2006 Jeff R. Brown, aviation safety officer of the California Department of Transportation, stated that the "construction of the Sunroad Centrum 1 building is a violation of PUC Section 21659(a). Without issuance of a permit by the Department, continued construction of any part of the building that exceeds 160 above ground level is unlawful. That height as specified by the FAA in their Notice of Presumed Hazard, dated April 24, 2006, was the maximum height an object in that location could reach without resulting in a Determination of Hazard to air navigation If construction in violation PUC Section 21659 proceeds, you are proceeding at your own risk, as you have been notified of the Department's position. Additionally, if aircraft accident occurs at the site of this Sunroad Centrum 1 building because of this PUC violation, you are assuming all liability for the accident. Further attempts to obfuscate the issue or cause of additional delay with your legal responsibility to comply with Section 21659 of the State Aeronautics Act will result in enforcement action by the Department."

On 19 October 2006 the San Diego City Attorney wrote a letter to Jim Waring, deputy chief operating officer for the City of San Diego. This letter informed Mr. Waring that the FAA had determined that the Centrum 12 office building at 180 feet was a hazard to air navigation. The letter went on to state that "under California Government Code section 50485.2 the City has a duty has a duty to prevent the creation of any hazard to air navigation using the police powers of the City." The letter also cited San Diego Municipal Code section 121.0302(b)(4) and informed Mr. Waring that the section "makes it unlawful for any person to maintain or allow the existence of any condition that creates a 'public nuisance.'" The letter continued, "[W]ith knowledge of

the declaration by the FAA that the building is a 'hazard to air navigation,' the knowledge that it is a public nuisance under both state and local law, and the knowledge that the building is being constructed in violation of state law, the City must issue a 'Stop Work Order' for the Project."

On 27 October 2006 the City of San Diego's Development Services Department issued a Stop Work Notice "regarding the top 17 feet of" the Centrum 12 building. The notice provided that "no work was to be done in this section of the structure until authorized by this department."

On 9 November 2006 Jeff R. Brown, aviation safety officer for the California Department of Transportation, wrote a letter to Ms. Marcella Escobar-Eck, director of the Development Services Department for the City of San Diego, expressing concern that the Stop Work Order stated that "FAA regulation must be clarified prior to the continuing construction of the structure." Mr. Brown went on to remind the City that "the construction of this structure is a violation of California Public Utilities code Section 21659. This violation was made evident to the City in the City Attorney's letter dated October 19, 2006, and in our letters to the developer or the developer's attorney dated September 14, 2006, September 26, 2006, and October 13, 2006, copies of which were provided to City's Land Use and Economic Development Department staff either directly or via e-mail."

On 14 November 2006 Sunroad Vice President for Development Tom Story appeared before the City of San Diego Airports Advisory Committee at the Montgomery Field Airport Lobby. During this meeting, according to the meeting minutes, Mr. Story admitted Sunroad had decided to not amend the building plans for the Centrum 12 building to the 160-foot height, as represented to the FAA, "out of financial consideration." According to the meeting minutes, "Tom Story, Vice President for Development of Sunroad Enterprises, said that when it became known that 180 feet was going to be a hazard, they considered stopping at 160 feet but they would have had to redraw the plans. They decided not to amend the plans out of financial consideration. Sunroad's rights are fully vested. He believes the hazard is mitigated through the NOTAM and by raising the approach minimums. Mr. Story stated that the project was in full compliance with the City requirements."

On 21 November 2006 Sunroad Vice President of Development Tom Story wrote a letter to the City's Development Services Department requesting "authorization for the Development Services Department to install roofing on the Centrum 12 building" Mr. Story represented that completing the roof was needed "to protect the in-progress construction work and materials that are being installed in the lower 160 feet of the building and to avoid further delay of our project." In his letter Mr. Story went on to request that Sunroad be allowed to complete nine specific construction tasks. Mr. Story further stated, "[W]hile we clarify our position with the FAA we believe it prudent that Sunroad be allowed to protect our existing investment in order to minimize the cost and/or liability to the City should Sunroad determine that we must seek compensation for any incurred damages by the stop work order."

On 1 December 2006 the San Diego City Attorney wrote Jim Waring regarding the request made by Sunroad representative Tom Story on 21 November 2006. The City Attorney informed Mr. Waring that the "mere suggestion of a possible solution to the current problem certainly does not

warrant a change of status to the current Stop Work Notice.” The memorandum went on to remind Mr. Waring that the Department of Transportation had specifically requested that the Stop Work Order not only be invoked, but that the City move forward with permit revocation procedures.” The memorandum concluded that “for all of these reasons it is imperative that there be no change to the Stop Work Order whatsoever.”

On 13 December 2006 the Department of Development Services expanded the Stop Work Notice from the top 17 feet to the top 20 feet of the Centrum 12 building.

On 15 December 2006 the San Diego City Attorney filed a civil complaint directed at the public nuisance posed by the Sunroad 12 office building based upon the Notice of Hazard Determination by the FAA.

On 21 December 2006 the City’s Development Services Department sent a letter to Tom Story as agent for Sunroad which provided, “[I]n the interest of saving the structure from damage which could be caused by weather, your request will be allowed for this phase of construction with the items discussed at the field meeting of 21 December 2006 with Joe Harris subject to your concurrence with the terms of this letter.”

On 19 January 2007 Jeff R. Brown wrote in a letter to Jim Waring, “[W]hen the facts of the situation show a developer failed to comply with a federal notification regulation (Federal Aviation Regulation Part 77.17), used that violation of federal regulation to obtain local planning and building approval, knowingly began construction of a building determined by a federal agency to be a hazard, constructed parts of the building in violation of State law (PUC Section 21659), and continues to defy State and local attempts to resolve the situation, the reluctance of the City to take the necessary steps to protect its citizenry is a mystery.” Mr. Brown continued, “As you surely know, the City Attorney of San Diego has filed a complaint against Sunroad on behalf of the City as the necessary first legal step in removing the hazard posed by the Sunroad Centrum 1 building. We ask that you rigorously enforce the Notice, and join with the City Attorney and others united in the interest of public safety, to protect the people of San Diego and local, State, and federal interest in Montgomery Field airport for which the City has obligated itself.”

On 31 January 2007 the San Diego City Attorney sent a notice to Sunroad pursuant to California Penal Code §373(a). Penal Code §373(a) provides, “every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, after reasonable notice in writing from a city attorney to remove, discontinue or abate the public nuisance has been served upon such person, is guilty of a misdemeanor, and shall be punished accordingly; and the existence of such nuisance for each and every day after the service of such notice shall be deemed a separate and distinct offense.” The notice went on to state that “failure to take corrective action will constitute a misdemeanor” and each day the nuisance exists after service of this notice is a separate and distinct offense pursuant to California Penal Code §373(a).

On 20 March 2007 the San Diego City Attorney sent a notice to Sunroad clarifying that “no work of any kind is to be conducted on the top 20 feet of the Centrum 1 structure.” The notice

Honorable Arnold
Schwarzenegger

-5-

May 17, 2007

further stated, "Any previous communication allowing Sunroad to 'weatherize' the structure or by implication, allow any work whatsoever to be conducted within the top 20 feet of the structure, is hereby permanently revoked."

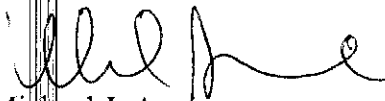
On 15 May 2007 the San Diego City Attorney issued his 17th Interim Report regarding the Sunroad Centrum 12 building and the SDG&E Substation.

Discussion

It is under the dire conditions detailed above that I hereby request the Governor to direct the California Department of Justice Office of the Attorney General to join in the City Attorney's lawsuit against the developer of the building standing in the flight path. I believe assistance from the California Department of Justice Office of the Attorney General would provide the necessary force to halt the construction of this building.

It is my fear that without your assistance, work will continue on this building and further endanger the lives of citizens of the State of California.

Respectfully yours,



Michael J. Aguirre
San Diego City Attorney