



U.S Department
of Transportation

**Federal Aviation
Administration**

Western-Pacific Region
Airports Division

Federal Aviation Administration
P.O. Box 92007
Los Angeles, CA 90009-2007

June 18, 2004

Tracy L. Means
Airports Director
City of San Diego
Montgomery Field
3750 John J. Montgomery Drive, MS 14
San Diego, CA 92123

Dear Ms. Means:

**Brown Field Municipal Airport (SDM)
Land Use Inspection Report**

This letter is in regard to the Federal Aviation Administration (FAA) inspection visit to Brown Field Municipal Airport (SDM) on June 8, 2004. The FAA coordinated its inspection with the 5010 compliance inspection conducted by the Caltrans Division of Aeronautics. We wish to thank you for the time and attention your staff devoted to our visit and for their cooperation during the inspection. This letter provides the findings and recommendations generated by the FAA land-use inspection.

An inspection serves as a means for the FAA to perform surveillance and compliance oversight of a federally obligated airport in order to assess whether or not airport land uses comply with federal requirements. Inspections are part of a national program that is being conducted pursuant to Senate Report No. 106-55, dated May 1999. Congress directed that the FAA conduct land-use inspections at airports that have received federal assistance in order to detect if unauthorized land uses exist. The FAA must disclose in its reports to Congress the identity of all airports that have unauthorized land uses and must provide Congress with the FAA's plans for eliminating those unauthorized uses.

During our inspection, we toured the airport to assess the current uses of airport facilities. We found that airport land uses did not fully comply with federal requirements. Non-aeronautical activities are pervasive at SDM and occupy a significant portion of the airport. There are airport tenants whose business operations are strictly non-aeronautical. The few aeronautical tenants that exist have been allowed to conduct non-aeronautical businesses on their leasehold property.

The non-conforming land uses observed at SDM far exceed the amount of airport property devoted to aviation. Non-conforming land uses observed at SDM include automobile storage

and salvage facilities, a compost recycling center, a municipal fire station, a carpet retail store, bus and truck parking, and a federal border patrol center.

The FAA is concerned about non-aeronautical activities at federally obligated airports because the non-aeronautical use of airport land does not represent the highest and best use of obligated airport land. More significantly, airport sponsors pledge to operate airports in accordance with specific federal standards in exchange for federal airport aid. In simple terms, this means airports must be made available exclusively for aeronautical activities and airport purposes in the service of civil aviation, commerce, and national security. Therefore, non-aeronautical uses of airport land represent a conflict with the airport sponsors' federal obligations.

The non-aeronautical users at SDM are conducting activities whose operational needs do not require them to be located at an airport. The City may have permitted non-aeronautical activities at SDM because the land was vacant. However, the availability of vacant airport land does not justify a non-aeronautical use, nor does it override the City's obligation to operate SDM for airport purposes. When airport land is available, the City should promote it exclusively for aviation purposes and seek aeronautical businesses to occupy it.

We wish to remind the City that the grant assurances, as well as the surplus property conveyance deed, place specific obligations on an airport sponsor. Grant Assurance 19, *Operation and Maintenance*, does not permit any activity that interferes with SDM's use for airport purposes. Grant Assurance 22, *Economic Nondiscrimination*, requires that SDM be available for aeronautical activities on reasonable terms. One of the conditions in the conveyance deed stipulates that the airport will be used for airport purposes. These obligations clearly preclude the introduction of non-aeronautical activities unless these activities receive prior approval from the FAA.

Although non-aeronautical activities must generally be avoided, FAA policy does permit limited exceptions to the above requirements. In accordance with that policy, when airport land is not immediately needed or cannot be used for airport purposes, the FAA may concur with land use on a temporary basis for a non-aeronautical purpose. However, when an aeronautical need develops, non-aeronautical use must cease so airport facilities can revert to aeronautical use.

Whenever there is a need or demand for aeronautical facilities or services, non-aeronautical activities are not justified. Non-aeronautical activities should never displace aeronautical uses that could make a higher and better use of airport land. Airport land and facilities with direct access to the airfield are not suitable locations for non-aeronautical activities, even on a temporary basis.

The airport sponsor should not allow aeronautical tenants to introduce non-aeronautical uses on their leasehold property. A tenant's desire to profit from a non-aeronautical use of a leasehold cannot legitimately preempt the sponsor's obligation to use airport property for aeronautical purposes. To prevent tenants from engaging in non-aeronautical activities, lease agreements should stipulate that non-aeronautical uses are prohibited.

When non-aeronautical activities do occur, the airport sponsor must comply with an airport revenue requirement. Grant Assurance 24, *Fee and Rental Structure*, dictates that the airport must be made as self-sustaining as possible. In accordance with this principle, which is more fully delineated in the revenue use policy (64FR7696, 2/16/1999), whenever a non-aeronautical use exists, the airport sponsor is obligated to charge non-aeronautical users fair market commercial rates (FMV) for the use of airport land and facilities. Non-aeronautical users may not be given free rent, nominal rent, or below market value rates.

There must be a distinction between aeronautical and non-aeronautical rates. The fair market value rate for non-aeronautical use is not the airport rate that applies to aeronautical users. The fair market rate for non-aeronautical activities is the commercial rate being charged for similar non-aeronautical activities in the local area. For example, the fair market rate for vehicle storage is the rate charged in the local area to store vehicles. This means that if a non-aeronautical use is approved, the airport sponsor must adjust the airport rental rate and charge the commercial market rate that applies to the type of non-aeronautical activity that will be conducted at the airport. This would generally result in the non-aeronautical user paying more to use airport facilities than the airport user conducting aeronautical activities.

Pursuant to Assurance 24, the City should include appropriate rate provisions in lease agreements so tenants understand the implications of trying to introduce non-aeronautical activities to the airport. As a deterrent against the introduction of unapproved non-aeronautical activities, the airport lease should specifically prohibit all non-aeronautical activities and stipulate that an unapproved non-aeronautical activity represents a material breach of the lease agreement.

When non-aeronautical activities do exist, tenants should know that the rental rate for non-aeronautical activities will be based on FMV, and the rate may differ considerably from the rate applied to aeronautical activities. Tenants should also understand that the FMV rate is not optional or negotiable but mandated by the grant assurances.

The difference in rental rates for aeronautical and non-aeronautical users is based in part on the fact that aeronautical users can only conduct their activities at an airport, while non-aeronautical users can conduct their activities anywhere off the airport and therefore do not need to be accommodated at an airport.

When an airport sponsor disregards the obligation to obtain FMV rate of return for non-aeronautical uses of airport property, this may be viewed as revenue diversion, which is prohibited by Grant Assurance 25, *Airport Revenue*. When FMV is not charged for non-aeronautical activities, the tenant benefits from an undervalued property, while the airport foregoes revenue that it would have otherwise earned if the appropriate FMV rent had been charged.

Some of the non-aeronautical activities occurring at SDM may have been there for a long time. Over time, tenants and even the City may have mistakenly assumed that the non-aeronautical activities at SDM represent a permitted use of obligated airport land. However, the federal obligations established in the conveyance deed and grant assurances, requiring aeronautical uses

of the airport, have never been waived. They still require that the airport be used for airport purposes. Therefore, the non-aeronautical uses represent a non-conforming use of the airport.

In accordance with Assurance 19, the airport sponsor must maintain the airport in a safe and serviceable condition at all times. However, the compost recycling center in the northeast corner of the airport poses a potential safety problem. The center operator has piled the recycled materials into huge mounds that may be penetrating the airport's imaginary surface. Therefore, the center not only represents an inappropriate non-aeronautical activity, but its operation may be deleterious to safe airport operating conditions as well.

We are requesting that the City formulate a corrective action plan to eliminate or replace the current non-aeronautical uses with commercial aeronautical businesses at the earliest possible date. We shall expect a comprehensive reply containing the City's proposed plan and implementation schedule. It should include, but not be limited to, the following actions:

1. The plan should contain the actions the City will take to eliminate or relocate non-aeronautical uses.
2. For all non-aeronautical uses, the City will prepare a statement for the FAA showing the amount of rent that each tenant is currently paying and whether or not the amount represents the actual fair market value of the property
3. If non-aeronautical users are paying no rent or below market value rent, the City will impose a rental obligation on these tenants based on a fair market value assessment of the property while they continue to occupy airport land.
4. Henceforth, the City will seek FAA approval of all non-aeronautical uses of the airport before they are allowed at the airport.

We shall expect the City's reply containing the proposed corrective action plan and implementation schedule by August 20, 2004. Please mail the reply to:

Federal Aviation Administration
Airports Division, AWP-620.1
P.O. Box 92007
Los Angeles, CA 90009

In closing, please be advised that Section 722 of Public Law 106-181 (April 5, 2000) amended 49 USC 47131 and requires, as part of the Secretary's annual report to Congress, the inclusion of a detailed statement listing airports that the FAA believes are not in compliance with grant assurances or other requirements with respect to airport land use. The report includes a description of the non-compliance issues, the timeliness of corrective actions by the airports, and the actions the FAA intends to take to bring the airport sponsors into compliance. Based on the Section 722 requirement, SDM will be included in the annual report to Congress. If the City chooses not to take suitable corrective action and the non-conforming conditions continue, the FAA may initiate action to enforce the grant agreements.

We look forward to your response. In the meantime, if you have any questions or wish to discuss this matter, please call me at (310) 725-3634.

Sincerely,

Original Signed by
Tony Garcia

Tony Garcia
Airports Compliance Specialist

Attachment: Airport Photos