



CHEVALIER, ALLEN & LICHMAN LLP

Attorneys at Law

Commercial Litigation • Aviation Law & Litigation • Environmental Law & Litigation

October 3, 2006

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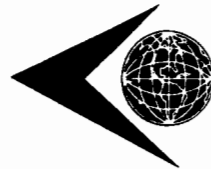
Re: Sunroad Centrum

Dear Ms. Frederick:

We represent Sunroad Enterprises, developer of the Sunroad Centrum Project, located within the land use jurisdiction of the City of San Diego and in the vicinity of Montgomery Field, San Diego. This letter is in response to the September 29, 2006 letter from Aviation Safety Officer Jeffrey Brown concerning the purported requirement that Sunroad obtain a permit from Caltrans, pursuant to *Public Utilities Code* § 21659 to enable the completion of Sunroad Centrum 1, the first of the project's three planned buildings.

In his September 29 letter (attached here as Exhibit 1), Mr. Brown, among other things, dismisses the position taken by Sunroad in response to Mr. Brown's earlier letter of September 14, 2006, as an attempt to "obfuscate the issue or cause additional delay". Mr. Brown is entirely wrong, and Sunroad stands firmly behind the legal position taken in its letter of September 18, 2006 (a copy of which is attached here as Exhibit 2). Sunroad, therefore, reserves its right to rely upon the legal position taken in its September 18 letter, and in no way waives any option by this attempt to find common ground with Caltrans.

Nevertheless, and despite Mr. Brown's legally inaccurate and diplomatically inadequate response, Sunroad, in an effort to answer Caltrans' concerns, will agree to apply for the permit specified in *Public Utilities Code* § 21659. In order to comply, Sunroad reiterates its request, originally made in its September 18 response to Mr. Brown, for a permit application and a copy of Caltrans' regulations implementing § 21659. Sunroad's goal is to achieve consistency with all local, state and Federal regulations. If Caltrans does not provide the documents required for



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compliance in response to this second request, within 10 business days, Sunroad must proceed on the assumption that Caltrans' permit requirements have been satisfied.

Caltrans immediate cooperation is anticipated.

Sincerely,

CHEVALIER, ALLEN & LICHMAN, LLP

Barbara E. Lichman, Ph.D.

cc: Mike Tussey, Airports Director, City of San Diego
San Diego Airports Advisory Committee
David Miller, Attorney, City of San Diego
Tait Galloway, Senior Planner, City of San Diego
Bill Anderson, Director, San Diego Planning & Community Investment Department
San Diego Regional Airport Authority
Tom Story, Vice President Development, Sunroad Enterprises
Craig Bachmann, Director of Construction, Sunroad Enterprises
FAA, AWP 622

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*Flex your power!
 Be energy efficient!*

September 29, 2006

Via Overnight Mail and Facsimile to (714)-384-6521

Ms. Barbara E. Lichman
 Chevalier, Allen & Lichman, LLP
 695 Town Center Drive, Suite 700
 Costa Mesa, California 92626-7187

Dear Ms. Lichman:

Thank you for your letter of September 18, 2006, regarding the violation of California Public Utilities Code (PUC) Section 21659 by the construction of the Sunroad Centrum 1 Building near Montgomery Field airport. Unfortunately, your letter does not answer the concerns of the California Department of Transportation (Department), Division of Aeronautics.

The position stated in our letter of September 14, 2006 to Sunroad Enterprises remains the same. 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 feet above ground level is unlawful. That height, as specified by the Federal Aviation Administration (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 (as determined in the FAA Airspace Determination, dated August 11, 2006, for Aeronautical Study No. 2006-AWP-4601-OE for the planned building height of 180 feet).

If construction in violation of PUC Section 21659 proceeds, you are proceeding at your own risk, as you have been notified of the Department's position. Additionally, if an aircraft accident occurs at the site of the 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 additional delay with your legal responsibility to comply with Section 21659 of the State Aeronautics Act will result in enforcement action by the Department.

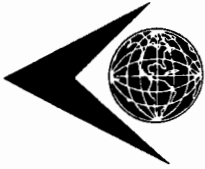
Sincerely,

JEFF R. BROWN
 Aviation Safety Officer

- c: Mike Tussey, Airports Director, City of San Diego
 San Diego Airports Advisory Committee
 David Miller, Attorney, City of San Diego
 Tait Galloway, Senior Planner, City of San Diego
 Bill Anderson, Director, San Diego Planning & Community Investment Department
 San Diego Regional Airport Authority
 Tom Storey, Vice President Development, Sunroad Enterprises
 Craig Bachmann, Director of Construction, Sunroad Enterprises
 FAA, AWP 622

"Caltrans improves mobility across California"

Exhibit 1



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September 18, 2006

Mr. Jeff R. Brown
Aviation Safety Officer
Department of Transportation
Division of Aeronautics
1120 N Street
P.O. Box 942873
Sacramento, CA 94273-0001

Re: Sunroad Centrum

Dear Mr. Brown:

We represent Sunroad Enterprises (“Sunroad”), builder and developer of the Centrum project in the area of Montgomery Field. This is in response to your letter of September 14, 2006, in which you assert that a Department of Transportation permit is required for the Sunroad Centrum 1 building (“Centrum”) pursuant to *Public Utilities Code* § 21659(a). It is Sunroad’s position that this assertion is legally questionable for at least four reasons: (1) the FAA has already raised the circling minimums, eliminating any danger to air navigation, and, thus, *Public Utilities Code* § 21659(a) does not apply; (2) the Centrum project is fully compliant with all city plans and zoning ordinances, including the Airport Environs Overlay Zone (“AEOZ”) at Montgomery Field; (3) the Centrum Project is not subject to any current or proposed Airport Land Use Compatibility Plan limitation; and (4) Caltrans may have overstepped its legal boundaries in relying on *Public Utilities Code* § 21659.

I. The FAA Has Already Raised the Circling Minimums By Way of NOTAM and Will Do So Permanently By Jeppesen Publication Upon Notification of Building Completion.

Contrary to Caltrans’ claim, the Centrum project does not impact air navigation at Montgomery Field. The FAA has raised circling minimums at Montgomery Field by Notice to Airmen (“NOTAM”) thereby accommodating a construction crane at 330 feet which easily subsumes the height of the Centrum 1 building at 180 feet. As the FAA has no power to control land use, it had no choice but to remove the Hazard through operational changes. When the FAA determines that a structure would constitute a hazard to flight, the FAA is required to revise published aeronautical procedures through a NOTAM so as to eliminate the hazard. *See 77*

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Exhibit 2



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C.F.R. § 77.11(b)(5); FAA Order 7400.2F, Section 5-1-3. Ultimately, upon notification of completion of Centrum 1, the FAA will raise the height of the circling minimums by 20 feet, originally through a NOTAM, and eventually depending on the publication cycle, through publication in Jeppesen. Accordingly, Centrum 1 does not fall within the provision of *Public Utilities Code* § 21659, and does not require a Department of Transportation permit.

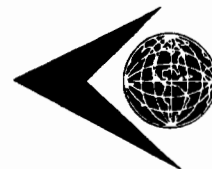
II. The Centrum 1 Project Fully Complies With Local Zoning Laws.

The City of San Diego has overlain an AEOZ on the commercial zoning surrounding Montgomery Field. The Centrum Project fully complies with the height limits in the AEOZ. On that basis, San Diego approved the tentative and final maps for the project and has already granted a building permit to Centrum 1. Sunroad has scrupulously complied with this building permit.

Government Code § 50485.14, as cited by the California Attorney General in 53 Op. Atty. Gen. Cal. 75 (1970) interpreting *Public Utilities Code* § 21659, provides that “Neither this article nor anything expressed in it is intended to be or is to be construed as a denial of the power of local governing bodies and agencies to provide for zoning regulations pursuant to Article XI, Section 11 of the Constitution.” To the extent that *Public Utilities Code* § 21659 purports to impose a restriction on land use in excess of that imposed by the local governing body, it is arguably misapplied here.

III. The Centrum Project Does Not Fall Within Any Current or Proposed Airport Land Use Compatibility Zone Established in the Governing Airport Land Use Compatibility Plans.

The current land use compatibility plan for Montgomery Field contains compatibility zones which conform to those established in the California Airport Land Use Planning Handbook. The ALUCP currently proposed by the San Diego Airport Land Use Commission also contains six compatibility zones. Centrum lies outside all these current and proposed compatibility zones. Therefore, the height of Centrum 1 is not constrained by any existing or proposed airport land use compatibility plan.



Mr. Jeff R. Brown
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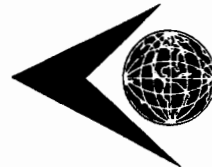
IV. Caltrans is Acting In Excess of its Jurisdiction in Attempting to Apply Public Utilities Code § 21659 to the Centrum Project.

As a general rule, Caltrans may only exercise its jurisdiction over aviation in areas not already occupied by the Federal Government. *See City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380. In this case, Caltrans has arguably overstepped that jurisdiction in that it is attempting to enforce height restrictions in the vicinity of Montgomery Field which fall squarely within the area fully occupied by Federal Aviation Regulation ("FAR") Part 77.

The Federal preemption doctrine is derived from the supremacy clause of the U.S. Constitution, and provides that, among other things, where Federal law fully occupies a given field of regulation, the Federal law preempts all state and local law on that subject. The Federal Aviation Act empowers the FAA to fully regulate the use of navigable airspace. Title 14, *Code of Federal Regulations*, Part 77 ("Part 77") establishes height limitations for structures located in the vicinity of airports to avoid penetration of navigable airspace. It is reasonable to conclude that Congress intended that Federal law preempt all state and local law purporting to establish structure height standards in airport environs. In addition, *Public Utilities Code* § 21019 goes much further than Federal law where it imposes penalties which Part 77 does not.

Second, and even if *Public Utilities Code* § 21659 were not encroaching on the domain of Federal regulation, Caltrans' effort to enforce *Public Utilities Code* § 21659 is procedurally defective. For example, unlike Sections 21666 and 21668 which address requirements and conditions for issuing Airport Permits, Section 21659 does not prescribe what procedures need to be followed in applying for a construction permit, or what criteria the Department uses in evaluating permit applications and granting permits. Nor has Caltrans promulgated any regulations implementing Section 21659 which might fill this procedural void. In short, any attempt to enforce *Public Utilities Code* § 21659, and in particular here where full compliance with all existing rules has been achieved, will likely be regarded by the courts as arbitrary, capricious, and, thus, a patent abuse of discretion.

In conclusion, Sunroad understands Caltrans' concern with the interests of aviation, particularly safety, and shares that concern. However, Sunroad believes that aviation concerns must be balanced with a recognition of the right of the City of San Diego to make plans for development within its own jurisdiction, and of the interests of San Diego citizens in relying on the residential and economic development reflected in those plans.



Mr. Jeff R. Brown
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We are confident this letter answers Caltrans' concerns.

Sincerely,

CHEVALIER, ALLEN & LICHMAN, LLP

Barbara E. Lichman, Ph.D.

cc: San Diego Airports Advisory Committee
Bill Anderson, Director, San Diego Planning &
Community Investment Department
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