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VIA HAND DELIVERY

Jim Waring
Deputy Chief Operating Officer
Department of Land Use and Economic Development
City of San Diego

Dear Mr. Waring:

Sunroad Centrum Building 1

As you are aware, on August 11, 2006, the Federal Aviation Administration [FAA], completed an aeronautical study under the provisions of 49 U.S.C., Section 44718 and Title 14 of the Code of Federal Regulations, Part 77, concerning the Sunroad Centrum Building 1 Project [Project]. The aeronautical study revealed that the structure as built would have a “**substantial adverse effect** on the safe and efficient utilization of the navigable airspace by aircraft...” [emphasis added]. In light of this conclusion, the FAA has determined that the Project is a “hazard to air navigation.” *See FAA Aeronautical Study No. 2006-AWP-4601-OE*. This determination was subject to review on or before September 10, 2006. No request for review was sought by the Project applicant. Thus, the FAA determination stands.

Under California Government Code section 50485.2, the City has a duty to prevent the creation of any hazard to air navigation using the police powers of the City. California Government Code section 50485.2 reads in relevant part:

It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared: (a) that the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question; and (b) that it ***is therefore necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented by***

appropriate exercise of the police power or the authority conferred by Article 2.6 (commencing with Section 21652) of Part 1 of Division 9 of the Public Utilities Code. [Emphasis added].

In addition, San Diego Municipal Code section §121.0302(b)(4) makes it unlawful for any person to maintain or allow the existence of any condition that creates a “public nuisance.” The City’s Municipal Code defines “public nuisance” as “any condition caused, maintained or permitted to exist which constitutes a threat to the public’s health, safety and welfare.” SDMC §11.0210. Furthermore, California Government Code section 50485.2 defines “public nuisance” as the “creation or establishment of an airport hazard.”

The Project, under both state and local law, fits squarely within the definition of a “public nuisance.” As an “airport hazard,” the Project is a “public nuisance,” and, as a condition constituting a threat to the public health, safety, and welfare, it is also a “public nuisance.” Therefore, by maintaining the structure at its current height, the Project applicant is maintaining a “public nuisance” in violation of San Diego Municipal Code section 121.0302(b)(4).

Pursuant to California Government Code Section 38773, the City has the authority to judicially abate public nuisances by filing criminal or civil actions. The City also has the authority to make the expense of abatement of the nuisance a special assessment, or a lien against the property on which it is maintained and a personal obligation against the property owner, in accordance with California Government Code Sections 38773.1 or 38773.5. SDMC §12.0204. The City may also abate any violation of a state code, which constitutes a “public nuisance.” SDMC §12.0602.

In addition, to being a “hazard to air navigation” and a “public nuisance,” the Project is being constructed without permits required by California law. California Public Utilities Section 21659(a) requires that an applicant obtain a permit from the California Department of Transportation prior to building any structure that would exceed the FAA obstruction standards included in Title 14 of the Code of Federal Regulations, Part 77, Subpart C [Part 77]:

No person shall construct or alter any structure or permit any natural growth to grow at a height which exceeds the obstruction standards set forth in the regulations of the Federal Aviation Administration relating to objects affecting navigable airspace contained in Title 14 of the Code of Federal Regulations, Part 77, Subpart C, unless a permit allowing the construction, alteration, or growth is issued by the department.

At Project location, a structure of 180’ would exceed the obstruction standards under Part 77 and, therefore, require a state permit prior to construction. The Project applicant has not sought or obtained the state permit and is continuing construction in violation of state law. This violation is punishable as a criminal offense with a fine of not more than one thousand dollars (\$1,000) or by imprisonment of not more than six months, or both. Public Utilities Code §21019.

Finally, the City's permit revocation proceedings authorize the revocation of the building permit for the Project. Permit revocation is permitted where project approval violates an applicable statute, ordinance, law, or regulation; or when the approval is detrimental to the public health, safety, or welfare; or when the approval constitutes a public nuisance. SDMC §§121.0314(c)(4) and (5). The Project, as approved, violates Federal Regulations, the state Public Utility Code, and the San Diego Municipal Code. Additionally, the approval is detrimental to the public health, safety, and welfare, and constitutes a "public nuisance."

With 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.

Sincerely yours,

MICHAEL J. AGUIRRE, City Attorney

By

David E. Miller
Deputy City Attorney

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Attachments

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