THE CITY OF SAN DIEGO

December 21, 2006

VIA FACSIMILE TO RICHARD D. VAN
858/362-8448

Mr. Tom Story
Sunroad Enterprises
4445 Eastgate Mall, Suite 400
San Diego, CA 92121

Dear Mr. Story,

Subject: 8620 Spectrum Center Blvd. Approval 303319

Development Services Department of the City of San Diego has reviewed your letter of request to install the weather proof covering on the 12-story structure mentioned above.

In the interest of saving the structure from damage which could be caused by weather, your request will be allowed for this phase of construction for the items discussed at the field meeting of December 21, 2006 with Joe Harris subject to your concurrence with the terms of this letter.

The "Stop Work Order," issued December 13, 2006, halting work on the top twenty feet (20' Ft) of the structure, shall remain in place.

This is based on our understanding that Sunroad accepts and acknowledges that any work performed from and after the date of the Notice (i.e., October 27, 2006) is at Sunroad's own risk and without any claim against the City. Specifically, Sunroad acknowledges and agrees that neither Sunroad nor its representatives may, under any circumstances, make any claim or assert any argument against the City for any costs or expenses of any type incurred after October 27, 2006 with respect to the work, nor assert in any way that the lifting of the Notice estops the City from pursuing the remedies that may result from the ongoing FAA inquiry. Said another way, whatever rights either party has vis-à-vis the other party will be the rights as they existed on October 27, 2006.

Sincerely,

Marcela Escobar-Eck
Development Services Director

JH/lgb

Accepted and Agreed:

12/27/06
~~Tom Story~~ Date
RICHARD VAN

Development Services
1222 First Avenue, MS 401 • San Diego, CA 92101-4154

Cooley
GODWARD KRONISH LLP

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DEVELOPMENT SERVICES

November 28, 2006

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Mr. James T. Waring
Land Use and Economic Development
Office of the Mayor
City of San Diego
202 C Street, 9th Floor
San Diego, CA 92101

Re: Appeal by Sunroad Enterprises of Stop Work Order issued October 27, 2006

Dear Mr. Waring:

We are writing on behalf of our client, Sunroad Enterprises ("**Sunroad**"), regarding the Stop Work Order issued on October 27, 2006 (the "**Order**") by the City of San Diego (the "**City**") with respect to the top seventeen feet of Sunroad's Centrum 1 building (the "**Building**"). Pursuant to § 121.0309(c) of the San Diego Municipal Code ("**SDMC**"), Sunroad hereby appeals the Order. Sunroad requests that the City immediately lift the Order and allow construction to proceed on the Building.

As we explain below, the Order arises (a) from a misunderstanding of the FAA's "Determination of Hazard to Air Navigation" (the "**Determination**"), (b) from a misinterpretation of the public nuisance provisions of California Government Code § 50485.2, and (c) from an improper reference to Public Utilities Code ("**PUC**") § 21659(a).

The Building, in fact, poses NO threat to public safety, is NOT a public nuisance, has vested development rights (in favor of Sunroad), and should be allowed to proceed to completion.

The Determination is one component of a complex set of FAA regulations. Under these regulations, the Determination requires changes at the relevant airport (flight paths, circling patterns, etc.), which effectively ELIMINATE any "hazard." In our case, the Determination caused the FAA to issue a Notice to Airmen (the "**NOTAM**") which alerted pilots to the building's presence and raised pilots' circling approach altitude minimums. Once the NOTAM was issued, any potential threat to the safety of air navigation was effectively eliminated.

California Government Code § 50485.2 is NOT a basis for a finding that the Building is a public nuisance and is NOT a basis for the Order. To the contrary, § 50485.2 is designed *solely* to allow local agencies to create zoning rules, NOT to make determinations of nuisance with respect to in-process developments. In our case, that Government Code provision allowed the City to implement the airport zones that related to Montgomery Field. And the Building falls *outside* those airport zones.

PUC § 21659(a) may not be a basis for the Order. The Building is outside those airport zones where the City may apply this statute. The Caltrans issue is not one of nuisance but is a non-substantive, ministerial matter that Sunroad is working to resolve.

With a proper understanding of the Determination, the NOTAM, Government Code § 50485.2, and PUC § 21659(a), the City has no basis to stop work at the Building. The Building poses NO threat to public safety, is not a public nuisance, and the City has no basis for so alleging. Sunroad has vested development rights with respect to the Building—most recently based on the building permit issued by the City AFTER the Determination was a matter of public record to the City.

The Order should be withdrawn. Otherwise, Sunroad will incur further extraordinary and irreversible expenses. And the City risks being liable to Sunroad for those expenses.

I. Background

A. The Building and Development Permits Granted by the City of San Diego

The City of San Diego approved Sunroad's Centrum development in November, 2002. This development, located near the Montgomery Airfield, is a combination of offices and residential buildings. The Building at issue is a 300,000 square foot, 12 story office complex. The Building is located at the northeast corner of Spectrum Center Boulevard and Kearny Villa Road. The City approved Substantial Conformance Review for the Building on February 10, 2006. At that time, the City approved construction of the Building to a height of 180 feet. On March 27, 2006, the City issued a framing and foundation permit for the Building to a height of 180 feet.

B. The City's Relevant Land Use Plans

The Centrum development is located within one mile of Montgomery Field but outside the following airport land use designated zones and adjuvant noise contours: (1) the Airport Land Use Compatibility Plan for Montgomery Field ("**ALUCP**"); (2) the Montgomery Field Airport Environs Overlay Zone ("**AEOZ**"); and (3) the Kearny Mesa Community Plan, Airport Element – Montgomery Field ("**KMCPAE**").

C. FAA Resolutions as well as Concurrent Action Taken by Sunroad and the City of San Diego

Title 14 of the Code of Federal Aviation Regulations ("**FAR**") Part 77.25 establishes an imaginary airport surface in the airspace above and around an airport. This imaginary plane, the Horizontal Surface, extends 160 feet above the established airport elevation. Entities constructing a building which may invade this Horizontal Surface are obligated to file a Notice of Construction with the FAA. FAR Part 77.15. Sunroad filed such notice on April 5, 2006. On April 24, 2006, the FAA released a "Notice of Presumed Hazard" for the Building. This notice

concludes that the Building would eclipse the Horizontal Surface by 20 feet. Pursuant to this notice, the FAA conducted a more extensive aeronautical study of the Building as authorized by 49 U.S.C. § 44718 and FAR Part 77.33. The study took several months to complete.

Immediately following the issuance of the "Notice of Presumed Hazard," Sunroad investigated the consequences of receiving such a notice by the FAA. Sunroad hired Williams Aviation Consultants to determine whether the Centrum project would exceed the Part 77 standards. Consistent with this cautious approach, Sunroad filed a notice with the FAA on June 22, 2006. The notice informed the FAA that Sunroad would erect the Building to only 160 feet while Sunroad conducted its own investigation.

Ultimately, Sunroad determined that a number of steps could be taken by the City, the FAA and Sunroad to eliminate any perceived risks to public safety. One such precaution is the NOTAM (i.e. the FAA Notice to Airmen) which raised flight minimums above the Building. These modified flight procedures would place pilots on notice of the obstruction and raise flight minimums to accommodate the FAA buffer zone. To accommodate the construction crane for the Building, a NOTAM has been in place over this structure since June 11, 2006. The current NOTAM is actually 220 feet higher than is needed for the Building. Additionally, Sunroad

Third, the use of the word hazard within each statute is vastly different. The FAA's FAR Part 77 provision focuses on efficient and safe use of airspace. To the contrary, Government Code § 50485.2 has grave implications as it states "an airport hazard endangers the lives and property of users of the airport and occupants of land in its vicinity." Therefore, a hazard under § 50485.2 must meet a much higher and more threatening standard than that of FAR Part 77. Due to the NOTAM, the Building fails to meet the elevated standard of § 50485.2

III. Government Code § 50485.2 Relates Solely to the City's Zoning Power.

The October 19 letter bases the Order on the authority granted by Government Code § 50485.2. However, the purpose of this statute is solely to enable the City to develop and implement zoning procedures. Government Code § 50485.2 states, "it is therefore necessary in the interest of the public safety, and general welfare that the creation or establishment of airport hazards be prevented by *appropriate* exercise of the police power" (emphasis added). The language of the statute is intentionally circumspect. The statute is predicated on using a certain, appropriate police power. The appropriate power is found in the title of the statute's chapter, "Airport Approaches Zoning Laws." The October 19 letter neglects this fact and instead borrows the language wholesale to justify the Order.

No authority is granted under Government Code § 50485.2 allowing the City to issue a Stop Work Order or otherwise halt building construction. This statute and the statute following it deal solely with airport zoning regulations. One treatise comments,

> "To prevent the creation or establishment of airport hazards, a city may adopt, administer, and enforce under its police power, airport zoning regulations that may divide the hazard area into zones. Within the zones, the regulations may specify the land uses permitted and regulate and restrict the height to which structures or trees may be erected or allowed to grow." Cal.Jur.3d, *Municipalities,* § 443.

Thus, the City has no authority to issue a Stop Work Order under this statute. § 50485.2 is specifically aimed at airport zoning.

San Diego has, in fact, instituted a number of airport zoning regulations. *See e.g.*, SDMC §§ 132.0201 and 132.0301. Pursuant to its affirmative duty under § 50485.2 "to prevent the creation or establishment of airport hazards," the City zoned the area around Montgomery Field. Specifically, this airport is governed by the AEOZ which is contiguous with the compatibility zones set forth in the current Comprehensive Land Use Plan for Montgomery Field. SDMC § 132.0306(a). The City met its safety obligations under Government Code § 50485.2 by enacting these zones. The Building, however, does not fall within this restricted area. Further, the City has not conditioned any of Sunroad's permits or entitlements on following the mandates of these zones.

IV. The Building Does Not Meet the Definition of Public Nuisance Under City or State Law and Violates No Provisions of the Land Development Code.

The October 19 letter declares the Centrum project a public nuisance based on (a) Government Code § 50485.2, and (b) SDMC § 11.0210. The Building does not qualify as a public nuisance under either statute, nor does it violate any other applicable section of the Land Development Code.

First, Government Code § 50485.2 may not be the basis of such a determination for the reasons stated in the previous two sections. This statute grants authority to institute city zoning procedures, not to determine nuisances for projects already in development.

Second, the Municipal Code's own definition of nuisance does not apply as there is no threat to the safety or general well being of the public. The City defines a 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. The FAA Determination resulted in action, the NOTAM, which eliminated any potential source of danger.

Finally, Sunroad does not violate any other applicable section of the Land Development Code. The most applicable section of the Land Development Code to this case is the SDMC Article 2, Division 3, AEOZ. Specifically, sections 132.0201(c) and (d) state the purpose of this code is provide the City the "opportunity to participate in the evaluation process conducted by the FAA and CALTRANS" and to ensure "the minimum vertical buffers are provided between the FAA-established approach paths and *structures* constructed within the Airport Approach Overlay Zone." The entirety of the Centrum development, however, falls outside the AEOZ. When granting building permits and entitlements, the City never subjected the Centrum development to any of the AEOZ regulations. As such, this SDMC division is inapplicable.

The City has failed to show any violation of the Land Development Code. SDMC § 121.0309 demands some breach of the Land Development Code before a Stop Work Order may be issued. The Order is, therefore, unwarranted.

V. The Caltrans Dispute Is Immaterial to the City's Position.

The City cannot justify the Order using PUC § 21659(a). SDMC § 132.0201 states the purpose of the AEOZ is to ensure "that the applicable provisions of California Public Utilities Code Section 21659, as administered by the California Department of Transportation (Caltrans), are satisfied." However the Centrum development is outside the AEOZ. Therefore, this statute has no effect. Instead, Caltrans has sole discretion to enforce PUC § 21659(a) using the penalties provided to it by PUC § 21019. Sunroad fervently believes such penalties will not be necessary as it is in compliance with all state laws.

VI. Sunroad's Rights to Develop Have Vested.

Sunroad has a vested right to build the Building to 180 feet because of the July 7, 2006 building permit. California law holds, "[i]f a property owner has performed substantial work and incurred substantial liabilities in good reliance on a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." *AVCO Community Developers, Inc. v. South Coast Regional Comm'n* (1976) 17 Cal.3d 785, 791 (citing *Dobbins v. City of Los Angeles* (1904) 195 U.S. 223). Additionally, Sunroad's rights have vested regarding its Vesting Tentative Map, Government Code §§ 66498.1-66498.9, and its Development Agreement, Government Code §§ 65843-65869.5

Although the City is not prohibited from applying future policies to the Development Agreement, such policies are limited to "those which do not conflict with existing laws, the project entitlements or the express provisions of this agreement." Original Development Agreement § 5.1. Within the definition of conflicts within the Development Agreement are those conflicts affecting "the maximum height or size of proposed buildings on the property." *Id.* at § 5.1.1. The right to erect the Building to 180 feet has therefore vested.

VII. Potential Mitigation Measures

Notwithstanding the fact that Sunroad believes that the City issued the Stop Work Order in error, Sunroad is prepared to consider participating with the City in implementing the following mitigation measures:

First, Sunroad is currently asking the FAA to permanently change circling minimums to Runway 28R to accommodate the Building. Such changes will actually lower the minimums now in place. Furthermore, it will raise pre-Centrum flight minimums by less than 20 feet.

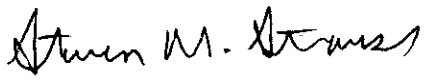
Second, Sunroad has already installed install lighting and placed markings on the Building to alert pilots to the Building's presence and is willing to make these fixtures permanent. While Government Code § 50485.2 charges the City with the costs of such measures within airport zones, Sunroad is willing to consider paying for such safety measures in order to complete the Centrum projects.

Third, Sunroad is willing to participate in the installation of an Instrument Landing System to Runway 10. This would eliminate the need for the circling approach now at issue. The City, as operator of the airport, would traditionally shoulder the cost of this improvement. Sunroad, however, is willing to consider contributing to the costs of this system in order to eliminate safety concerns and ensure the full development and growth of Kearny Mesa as envisioned in the Spectrum Master Plan.

VII. Conclusion

Sunroad requests the Order be lifted immediately. Failure to do so by the City will result in irreparable harm. The City's failure to lift the Order may constitute a breach of the Development Agreement, thereby exposing the City to significant damages claims by Sunroad. We hope that the City will act in accordance with relevant law and the Development Agreement.

Sincerely,



Steven M. Strauss

CC: Mr. Aaron Feldman
Mr. Tom Story
Mr. Dan Feldman

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