

February 7, 2007

Steven M. Strauss

T: (858) 550-6006  
sms@cooley.com

VIA FACSIMILE AND MAIL

Kimberly A. Urie  
Deputy City Attorney  
1200 Third Avenue, Suite 1620  
San Diego, CA 92101

**Re: City Attorney's Notice of Nuisance**

Dear Ms. Urie:

We are writing in response to your letter of January 31, 2007 to our client Sunroad Enterprises ("**Sunroad**"). Sunroad denies the allegations of your letter and the contention that Sunroad has violated the San Diego Municipal Code in any manner. Despite the City Attorney's failure to identify a Municipal Code violation or prove the existence of a public nuisance, Sunroad takes the City Attorney's threats of criminal prosecution very seriously. Sunroad submits this letter to not only to make clear its position with respect to the City Attorney's claims but to correct the record which has been distorted by the City Attorney.

Safety is Sunroad's highest concern. Our business partners, tenants, and the City rely on that basic tenet. Sunroad has been working closely with the City and the Federal Aviation Administration ("**FAA**") to reconfirm to the satisfaction of all that the Sunroad Centrum Building (the "**Building**") poses no safety issue. The City Attorney's actions have unfortunately impeded that process and have thus been a disservice to the people of San Diego.

The City Attorney claims in its letter that the "conditions described above violate the San Diego Municipal Code." While the letter goes on to discuss the FAA, the California Department of Transportation ("**CalTrans**"), and the issuance of the Stop Work Order, it does not inform Sunroad of the Municipal Code Section it is alleged to have violated. Sunroad requests immediate clarification on this issue.

Further, even assuming there was a violation of the Municipal Code (which Sunroad denies), the City has not disclosed to Sunroad how a violation of the Municipal Code constitutes a public nuisance that would fall under California Penal Code 373a. As you know, the predicate to a Penal Code 373a violation is a public nuisance, not that there has been a Municipal Code violation. Please identify the Municipal Code violation which the City Attorney contends has created a public nuisance under Penal Code 373a.

Moreover, the City Attorney's threats of criminal prosecution are improper in light of the fact that no public nuisance has been established (as required under Penal Code 373a). The City Attorney has filed a civil suit seeking to establish that the Building constitutes a public

nuisance. Until the question of whether a public nuisance exists is answered by that Court (and Sunroad is confident the Court will find Sunroad's favor), it is premature and inappropriate to threaten criminal prosecution against Sunroad unless it razes the top 26 feet of the Building. Should the City Attorney proceed with its threats and file a criminal action, Sunroad will take all actions necessary to protect its rights, including seeking to enjoin the prosecution of the criminal at action until such time as the civil Court has reached a conclusion on the public nuisance issue.

Finally, none of the "conditions" cited in the letter establish a public nuisance, let alone a violation of the Municipal Code. It appears that the "conditions" referred to are: (1) the FAA determination; (2) the CalTrans permit; and (3) the Stop Work Order. These issues are discussed below.

#### **The FAA Determination is Not a Finding of Public Nuisance**

The FAA is the sole governmental agency with regulatory authority over the safety of air navigation. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626-627 (1973); *see also, City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, (1999) 72 Ca1.App.4th 366, 379. As such, the FAA cannot allow a derogation of "public safety" to exist at any airport. If the FAA were to determine, through evaluation under the procedures set forth in 14 C.F.R., Part 77, that a threat to the safety of air navigation exists, it is required to revise published aeronautical procedures through a Notice to Airmen ("NOTAM"), so as to eliminate the safety hazard. *See, e.g.,* FAA Order 7400.2F, § 5-1-3.

As the City Attorney is aware, a NOTAM was issued by the FAA originally on or about June 27, 2006 to accommodate the full 330 foot height of the construction crane used to build the Building. Although the NOTAM has been revised at times over the last 7 months, the key portions of the NOTAM remain in effect. According to FAA Terminal and Approach and Departure Procedures (TERPS), the NOTAM ensures that a pilot emerging from the clouds on approach to Montgomery Field will be more than 300 feet above the full height of the Building. When he or she drops below that altitude, it becomes his or her responsibility to see and avoid a structure, not the FAA's, not the City's and not Sunroad's. The Building itself, therefore, poses no threat to public safety.

In summary, the Building poses no threat to public safety, and the City Attorney's claim that it does is irresponsible and without legal or factual support.

### **The CalTrans Permit Process Does Not Establish a Public Nuisance**

The CalTrans regulations have no relation to the declaration of a public nuisance. The statute provides that any structure that exceeds FAA Part 77 height standards must apply for a permit. This regulation has specific enforcement mechanisms and penalties (PUC § 21019), none of which are controlled by the City Attorney nor implicate a violation of the Municipal Code.

To be more specific, the Building is 0.7 nautical miles away from Montgomery Field, and it falls outside of all airport land use designated zones including the Montgomery Field Airport Environs Overlay Zone (“**AEOZ**”). Although the Municipal Code § 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,” this statute has no effect because the Centrum development is outside the AEOZ.

Further, Sunroad never violated state law, knowingly or any other way. Although Sunroad has twice submitted requests for a permit from CalTrans, Sunroad has since discovered that the regulations implementing the alleged permit requirement contained in Public Utilities Code § 21659 were repealed in 1997. CalTrans has failed and refused, since that time, to comply with the procedures mandated by the California Administrative Procedures Act, Govt. Code § 11340, et seq., to legally reenact implementing regulations. As Sunroad has discussed with CalTrans on several prior occasions, in the absence of implementing regulations, any attempt by CalTrans to exercise discretion to grant or deny a permit would be an abuse of that discretion, and patently outside the scope of CalTrans’ authority.

Simply put, there has been no violation of any Caltrans’ regulations; and, even if a violation existed, it would not constitute a violation of the SDMC as the City Attorney’s letter implies.

### **The Stop Work Order Does Not Establish a Public Nuisance**

As the City Attorney well knows, the City issued a Stop Work Order on October 27, 2006 with respect to the top seventeen feet of Sunroad’s Building. Pursuant to § 121.0309(c) of the San Diego Municipal Code, Sunroad appealed the Stop Work Order on November 28, 2006. On December 13, 2006, the City issued a second Stop Work Order covering the top twenty feet of the Building.

On December 21, 2006, the City, your client, sent a letter to Sunroad authorizing Sunroad to perform certain limited work on the Building consistent with a December 21, 2006 field meeting with Joe Harris. The authorization was subject to Sunroad’s concurrence with the terms of the letter which required Sunroad to bear the risk of the additional work. Sunroad signed and returned the letter on December 27, 2006. See Attachment A.

At no time after the October 27 or December 13 Stop Work Orders up until December 26, 2006, did Sunroad conduct any work in violation of those Stop Work Orders, as the City

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Attorney has falsely accused. After December 26, 2007, Sunroad has performed only those items discussed in the December 21, 2006 field meeting with respect to the top twenty feet of the Building.

In short, the existence of the Stop Work Order provides no basis for the City Attorney to allege a public nuisance or a violation of the Penal Code.

**Conclusion**

The Building poses no threat to public safety, is not a public nuisance, and has vested development rights (in favor of Sunroad). Rather than ignoring the authorities and proceeding with the Building, as the City Attorney contends, Sunroad has been working tirelessly with the City and FAA to demonstrate the correctness of its position and to answer all questions. Sunroad is currently endorsing that the City petition the FAA to permanently raise the circling minimums to Runway 28R by 20 feet in response to the Building. Such changes will actually lower the minimums specified in the current NOTAM which provide for the construction cranes. Sunroad agrees to voluntarily limit the height of buildings 2 and 3 to 180 feet unless and until the City and FAA have approved a suitable landing approach which would allow the buildings to exceed the 180 foot height limit.

The City Attorney's refusal to acknowledge or participate in the City and Sunroad's constructive efforts is unfortunate for the City and the general public. The City Attorneys' factual distortions concerning the project and the new and utterly baseless threat of criminal prosecution are not merely counterproductive, they irresponsibly expose the City to significant liability and malicious prosecution. Sunroad reserves all rights to recover damages against the City for its actions.

Sincerely,



Steven M. Strauss

Enclosure

cc: Tom Story  
Jim Waring



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

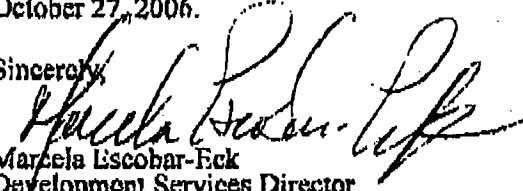
Development Services Department of the City of San Diego has reviewed your letter of request to install the weather proof covering on the 12-story structure mentioned above.

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

1229 First Avenue, MC 601 - San Diego, CA 92101-1229

