

1 Michael J. Aguirre, City Attorney (Bar No. 60402)
Carmen A. Brock, Deputy City Attorney (Bar No. 162592)
2 OFFICE OF THE CITY ATTORNEY
1200 Third Avenue, Suite 1100
3 San Diego, CA 92101-4100
Telephone: (619) 533-5800
4 Facsimile: (619) 236-5856

**EXEMPT FROM FILING
FEES PURSUANT TO
CAL. GOV'T CODE
§ 6103**

5 Christopher W. Garrett (Bar No. 100164)
Laura A. Godfrey (Bar No. 233059)
6 Curtis G. Carll (Bar No. 248470)
LATHAM & WATKINS LLP
7 600 West Broadway, Suite 1800
San Diego, CA 92101-3375
8 Telephone: (619) 236-1234
Facsimile: (619) 696-7419

9
10 Attorneys for Cross-Defendant and Respondent
City of San Diego

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO, CENTRAL DIVISION

14 THE PEOPLE OF THE STATE OF
CALIFORNIA and THE CITY OF SAN
DIEGO, a municipal corporation,

15 Plaintiffs,

16 v.

17 SUNROAD CENTRUM, L.P., a California
18 Limited Partnership, SUNROAD ASSET
MANAGEMENT, INC., a California
19 corporation, SUNROAD ENTERPRISES,
20 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, AERONAUTICS
DIVISION, and DOES 1 through 50,
21 inclusive,

22 Defendants.

23 AND ALL RELATED CROSS-ACTIONS.
24
25
26
27
28

CASE NO. GIC 877054

CROSS-DEFENDANT AND RESPONDENT
CITY OF SAN DIEGO'S OPPOSITION TO
SUNROAD'S EX PARTE APPLICATION FOR
ORDER TO ADVANCE TRIAL DATE AND
GRANT PREFERENTIAL TRIAL DATE

Date: Monday, March 26, 2007
Time: 8:30 a.m.
Dept.: 64
Judge: William R. Nevitt, Jr.

Trial Date: Not Yet Set
Complaint Filed: 12/15/2006

1 **I. INTRODUCTION**

2 The People of California (“People”) and the City of San Diego (“City”) have filed
3 a public nuisance abatement action against Sunroad, a local developer, who has steadfastly
4 refused to alter its construction plans for the Sunroad Centrum I Building (“Sunroad Building” or
5 “Building”), currently under construction only 0.7 nautical miles from the City’s Montgomery
6 Air Field. At this time, the Building is designated a hazard to air navigation at Montgomery Air
7 Field by the Federal Aviation Administration (“FAA”) and the California Department of
8 Transportation, Division of Aeronautics (“CalTrans”) because its height exceeds 160 feet above
9 ground level (“AGL”).

10 Prior to the initiation of construction on the Building, Sunroad received ample
11 notice from the FAA that should the Building exceeds 160 feet AGL, a hazard designation would
12 be issued. Yet, in blatant disregard for such warning, Sunroad boldly constructed the Building to
13 its current height of 180 feet AGL, triggering the initiation of this lawsuit by the People and the
14 City to abate the danger to the public created by the Building at its current height. Sunroad filed
15 a Cross-Complaint against the City, contending the City issued a building permit for the Building
16 and now has no authority to revoke or otherwise prevent Sunroad from completing the Building
17 to 180 AGL, and that the City is liable for damages arising from Sunroad’s decision to construct
18 the Building to 180 AGL despite its knowledge that such height violated state and federal law.

19 Presently before the Court is Sunroad’s *Ex Parte* Application to set an advanced
20 trial date and preferential trial setting pursuant to California Rules of Court 3.1335. An
21 advanced trial date is unnecessary, as the progress of this case is moving forward: a deposition
22 has already been held, several more depositions have been or are about to be noticed, discovery
23 already has been exchanged, and a summary judgment has been set to be heard by this Court on
24 June 29, 2007. The City has filed a Demurrer demonstrating that Sunroad’s cross-claims against
25 the City are legally invalid; as such, setting a trial date before the hearing date on that Demurrer
26 would result in wasted judicial resources. Moreover, as set forth in greater detail below, the
27 grounds for Sunroad’s application are without merit: (1) Sunroad has not established good cause
28 under California Rule of Court 3.1335 to further advance the steady and quick progression of

1 case; (2) Sunroad's appeal to public safety under California Code of Civil Procedure Section
2 36(e) is undermined by its own bad faith actions in constructing the Building; (3) California Rule
3 of Civil Procedure Section 527(e) has no application to these proceedings until the granting of a
4 preliminary injunction; and (4) Sunroad's inverse condemnation claim (even assuming it has
5 adequately alleged such claim, which it has not) is granted no trial preference under California
6 Code of Civil Procedure Section 1260.010 and thus does not establish good cause for priority in
7 trial setting. Therefore, Sunroad has not affirmatively demonstrated good cause to advance the
8 trial date as required by California Rule of Court 3.1335(b).

9 **II. ARGUMENT**

10 **A. An Advanced Trial Date is Unnecessary and Inappropriate Under California**
11 **Rule of Court 3.1335 Because Sunroad Has Not Established Good Cause**

12 A party may receive an advanced trial date "only upon an affirmative showing by
13 the moving party of good cause[.]" Cal. Rules of Court 3.1335(b). There is little need for an
14 advanced trial setting in this case because the case is progressing promptly. The parties begun
15 taking depositions last week, and the City is in the process of noticing several more depositions
16 throughout April and May, 2007. *See* Declaration of Laura A. Godfrey ("Godfrey Decl.")
17 ¶¶ 2-4. The City has filed a demurrer in the Cross-Action, set to be heard before the Court on
18 May 11, 2007, which demonstrates that Sunroad failed to state an actionable claim against the
19 City on a variety of grounds. *See* Godfrey Decl., Ex. A (City of San Diego's Amended Points
20 and Authorities in Support of its Demurrer to the Cross-Complaint, filed March 20, 2007).
21 Moreover, as the critical aspects of this case turn on a purely legal issue --- *viz.*, that the FAA's
22 hazard determination establishes that the Building constructed to 180 feet AGL constitutes a
23 public nuisance --- a significant portion of this case will be resolved on summary judgment, for
24 which the Court has provided the City with a hearing date of June 29, 2007. Godfrey Decl. ¶ 5.
25 As a result, it is unnecessary for this Court to waste its resources and to add to its already
26 congested docket with an advanced trial date to accelerate the pace of this litigation as it is
27
28

1 currently progressing in an expedient manner.¹

2 **B. A Preferential Trial Date Under California Code of Civil Procedure Section**
3 **36(e) is Not Warranted In Light of Sunroad’s Bad Faith Actions**

4 Sunroad seeks an advanced trial date under California Code of Civil Procedure
5 Section 36(e) which allows a court to grant preference to trial if a litigant “satisfies the court that
6 the interests of justice will be served by granting this preference.” Sunroad alleges one basis
7 --- its concern for public safety --- in support of its claim that the trial date should be advanced in
8 “the interests of justice” under Section 36(e), which runs contrary to its own bad faith actions in
9 this dispute and “in light of the totality of the circumstances” does not entitle Sunroad to
10 extraordinary relief. *Salas v. Sears, Roebuck & Co.*, 42 Cal. 3d 342, 343 (1986). In *Salas*, the
11 court determined that “the decision to grant or deny a preferential trial setting rests at all times in
12 the sound discretion of the trial court in light of the totality of the circumstances.” *Id.*
13 Specifically, the court relied on the following for its analysis: “the dilatory action of the plaintiff,
14 the condition of the court’s calendar, the rights of other litigants, and the prejudice to the
15 defendant resulting from the delay.” *Id.* at 346 (quotations omitted). Of particular relevance
16 here are the final two factors, and Sunroad has failed to satisfy either one.

17 Sunroad contends that trial should be expedited because the suit is primarily one
18 concerning public safety, which, in essence, is an attempt to assert “rights of other litigants.”
19 Although the City agrees that the safety of the public is the essential issue in the matter,
20 Sunroad’s argument is ironic as it has repeatedly flouted public safety through its actions in this
21 dispute. First, Sunroad alleges it failed to notify the FAA of its intent to build near the
22 Montgomery Air Field as required under federal law to ensure the safety of air travel. *See*
23 *Godfrey Decl.*, Ex. A at 1. Second, Sunroad admits it failed to heed the warnings of the FAA on
24 two separate occasions that the Building posed a direct risk to air travel and instead constructed
25

26 ¹ Sunroad admits that it is possible that its cross-claims may not be perfected before June, yet,
27 it urges this Court to set a trial date on an accelerated schedule. *See* Sunroad’s Ex Parte
28 Application at 3. Such a schedule would be a waste of judicial resources as well as the City’s
scarce financial resources to prepare for a trial on claims that likely will not survive
demurrer.

1 the Building to a hazardous height. *See* Godfrey Decl., Ex. A at 2. Finally, Sunroad alleges it
2 failed to obtain the required permit from CalTrans for erecting its building in such proximity to
3 an airport. *See* Godfrey Decl., Ex. A at 5-6. The impacted litigants --- the Real Parties in
4 Interest and the People of San Diego --- who, unlike Sunroad, have taken steps to ensure the
5 safety of the airport, are not advocating for an early trial date, as they believe the issues
6 presented are largely legal and can be resolved via summary adjudication. To the extent the
7 issues are not summarily adjudicated, there is no need to inordinately rush the ongoing
8 discovery.

9 Notably, Sunroad does not mention the driving force behind this application ---
10 the potential financial loss due to the delays in the construction of the Building caused by its own
11 failure to comply with federal and state law.² As outlined above, Sunroad has no one but itself to
12 blame for any losses because it constructed the Building to a dangerous height at its own risk
13 despite the warnings from the FAA. Rather, the current litigation was the natural and probable
14 result of Sunroad's bad faith and "hasty" acts in its goal to "gain a vested position" despite its
15 open and admitted failure to comply with state and federal law. *McCarthy v. Calif. Tahoe*
16 *Regional Planning Agency*, 129 Cal. App. 3d 222, 233 (1982). Sunroad could be later
17 compensated for such financial loss should this Court later conclude any compensation is
18 warranted. Thus, Sunroad cannot establish that the "interests of justice" support good cause for
19 its Application.

20 **C. California Code of Civil Procedure Section 527(e) Provides No Basis for**
21 **Advanced Trial Setting in the Absence of a Granted Preliminary Injunction**

22 California Code of Civil Procedure Section 527(e) is inapplicable to the current
23 state of this litigation and therefore offers no basis for advancing the trial date. On their face, the
24 procedural guidelines described in Section 527(e) apply *after* a preliminary injunction has been
25 granted and not while the claim is still pending. *See* Cal. Code of Civ. Pro. § 527(e) ("The
26

27 ² Sunroad previously asserted that such alleged financial hardship was a basis for such
28 extraordinary relief in a nearly identical application filed with Judge Meyer, who previously
presided over this action.

1 opposing party may, in response to an order to show cause, present affidavits relating to the
2 *granting of the preliminary injunction . . .*)” (emphasis added). Contrary to Sunroad’s creative
3 interpretation of the statute, Section 527(e) does not apply if a preliminary injunction is merely
4 “at issue.” Instead, the requirement under the statute that “the cause . . . at issue . . . be set for
5 trial at the earliest possible date” refers to the specific circumstances of setting a date for
6 adjudicating the merits of a *granted* preliminary injunction. *Id. See People ex rel. Gow v.*
7 *Mitchell Brothers’ Santa Ana Theater*, 118 Cal. App. 3d 863, 868 (1981) (discussing Section 527
8 as part of the procedure for challenging granted preliminary injunctions). Sunroad’s assertion
9 that it is entitled to swift relief under Section 527(e) is baseless, as no party has filed a motion for
10 a preliminary injunction, nor has the Court issued an order granting any such motion.

11 **D. Sunroad’s Inverse Condemnation Claim Does Not Establish Good Cause For**
12 **an Advanced Trial Date**

13 **1. California Code of Civil Procedure Section 1260.010 Does Not Apply to**
14 **Sunroad’s Inverse Condemnation Claim**

15 No basis exists for advancing the trial date for Sunroad’s inverse condemnation
16 claim under California Code of Civil Procedure Section 1260.010. Section 1260.010 “provide[s]
17 for prompt resolution of whether the condemner has the right to take the property in question,”
18 and is limited to proceedings covered under Title 7 of the Code of Civil Procedure. Cal. Code
19 Civ. Pro. § 1260.010. The proceedings under that title are solely government-initiated
20 condemnation proceedings. *See Mt. San Jacinto Community College Dist. v. Superior Court*,
21 40 Cal. 4th 648, 665 (2007). The fact that “[a]n inverse condemnation is an eminent domain
22 lawsuit” is irrelevant to the application of Section 1260.010 because the statute does not apply to
23 all “eminent domain lawsuits;” rather, it applies only to proceedings initiated under Title 7 of the
24 Code of Civil Procedure. *See CUNA Mutual Life Ins. Co. v. Los Angeles County Metro. Transp.*
25 *Auth.*, 108 Cal. App. 4th 382, 389 n.7. Indeed, the plain language of the statute indicates that it
26 does not afford quick relief to a plaintiff, like Sunroad, who challenges a government’s non-
27 condemnation activity as a taking, but rather applies only to condemnation actions initiated by
28 the government for the purpose of taking property for public use. *See, e.g., Cal. Code of Civ.*

1 Proc. § 1240.020 (“The power of eminent domain may be exercised to acquire property for a
2 particular use only by a person authorized by statute to exercise the power of eminent domain to
3 acquire such property for that use.”); *Id.* § 1250.310 (“The complaint shall contain all of the
4 following . . . (d) A statement of the right of the plaintiff to take by eminent domain the property
5 described in the complaint.”). Thus, Sunroad’s reliance on Section 1260.010 is misplaced and
6 cannot support good cause for an advanced trial date.

7 **2. Sunroad Has Not Alleged an Actionable Inverse Condemnation Claim**
8 **and Thus the Claim Cannot Support Good Cause for Trial Preference**

9 That Sunroad has failed to state an actionable claim for inverse condemnation
10 further militates against granting Sunroad’s *ex parte* motion. First, Sunroad cannot establish a
11 vested right supporting its inverse condemnation claim, as its allegations demonstrate that it did
12 not construct the Building to 180 feet AGL in good faith reliance on the City’s permit. *See, e.g.,*
13 *Avco Community Developers, Inc. v. South Coast Regional Comm.*, 17 Cal. 3d 785, 791 (1976)
14 (holding that to complete a planned construction, a landowner must act in “good faith reliance
15 upon a permit issued by the government”). Similarly, where a developer knows the permit upon
16 which it relies is or might be defective, no vested property right will arise. *See Pettit v. City of*
17 *Fresno*, 34 Cal. App. 3d 813, 823 (1973) (property owner can be required to remove structure
18 built under invalid building permit, even though permit was regular on its face and property
19 owner acted without actual knowledge of any defect in it). Here, as outlined in the Demurrer,
20 Sunroad cannot establish good faith reliance on the City’s permit to support an inverse
21 condemnation claim as its allegations reveal that it had notice of the FAA’s hazard determination
22 prior to framing the Building to a height of 180 foot AGL. *See Godfrey Decl.*, Ex. A at 6-8.

23 Moreover, Sunroad cannot assert a claim for inverse condemnation based on the
24 City’s underlying public nuisance action, because the City has authority under its police power to
25 abate any nuisance without giving rise to a claim for inverse condemnation. *See Lucas v. S.C.*
26 *Coastal Council*, 505 U.S. 1003, 1029 (1992) (recognizing the right of states to “abate nuisances
27 that affect the public generally”); *People ex rel. Dept. of Transportation v. Hadley Fruit*
28 *Orchards, Inc.*, 59 Cal. App. 3d 49, 53 (1976) (“The abatement of a public nuisance pursuant to

1 a reasonable exercise of the police power does not require the payment of compensation at all.”).
2 Any claim for damages based on the City’s actions is therefore untenable. *See* Godfrey Decl.,
3 Ex. A at 9-11. Sunroad cannot rely on this claim to establish good cause warranting such
4 extraordinary relief, due to its failure to allege an actionable inverse condemnation claim

5 **3. Sunroad’s Inverse Condemnation Claim is Not Ripe For Review, and**
6 **Thus Cannot Establish Good Cause for An Advanced Hearing Date**

7 Even assuming that Sunroad has stated an actionable inverse condemnation claim,
8 which it has not, an advanced trial date based this claim is inappropriate because the claim is
9 unripe for review. As explained in the Demurrer, Sunroad has failed to perfect its inverse
10 condemnation claim by exhausting its available administrative remedies and by pursuing its claim
11 for damages prior to the adjudication of the nuisance action. *See* Godfrey Decl., Ex. A at 9-13;
12 *Hensler v. City of Glendale*, 8 Cal. 4th 1, 10-11 (1994). Sunroad lacks any justification to push
13 forward the trial date prior to completing its mandatory jurisdictional prerequisites to bringing
14 the claim. *See Alberlleria v. District Court of Appeal*, 17 Cal. 2d 280 (1941).


15 **III. CONCLUSION**

16 WHEREFORE, the People and the City respectfully submit that Sunroad has not
17 established good cause to grant its Ex Parte Application for and Order to Advance the Trial Date
18 and Grant Preferential Trial Setting, and thus should be denied. Any request for preferential trial
19 setting should proceed, if at all, by regular noticed motion, and only after the Court has heard the
20 City’s Demurrer to the Cross-Action.

21 Dated: March 23, 2007

MICHAEL J. AGUIRRE, City Attorney
Attorneys for Petitioners and Plaintiffs
The People of the State of California and
Petitioners, Plaintiffs, and Cross-Defendant
The City of San Diego

LATHAM & WATKINS LLP

26 By 
Laura A. Godfrey

27 Attorneys for Cross-Defendant The City of
28 San Diego

1 Michael J. Aguirre, City Attorney (Bar No. 60402)
2 Carmen A. Brock, Deputy City Attorney (Bar No. 162592)
3 OFFICE OF THE CITY ATTORNEY
4 1200 Third Avenue, Suite 1100
5 San Diego, CA 92101-4100
6 Telephone: (619) 533-5800
7 Facsimile: (619) 236-5856

**EXEMPT FROM FILING
FEES PURSUANT TO
CAL. GOV'T CODE
§ 6103**

5 Christopher W. Garrett (Bar No. 100164)
6 Laura A. Godfrey (Bar No. 233059)
7 Curtis. G. Carll (Bar No. 248470)
8 LATHAM & WATKINS LLP
9 600 West Broadway, Suite 1800
10 San Diego, CA 92101-3375
11 Telephone: (619) 236-1234
12 Facsimile: (619) 696-7419

13 Attorneys for Cross-Defendant and Respondent
14 City of San Diego

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN DIEGO, CENTRAL DIVISION

13 THE PEOPLE OF THE STATE OF
14 CALIFORNIA and THE CITY OF SAN
15 DIEGO, a municipal corporation,

16 Plaintiffs,

17 v.

18 SUNROAD CENTRUM, L.P., a California
19 Limited Partnership, SUNROAD ASSET
20 MANAGEMENT, INC., a California
21 corporation, SUNROAD ENTERPRISES,
22 CALIFORNIA DEPARTMENT OF
23 TRANSPORTATION, AERONAUTICS
24 DIVISION, and DOES 1 through 50,
25 inclusive,

26 Defendants.

CASE NO. GIC 877054

DECLARATION OF LAURA A.GODFREY IN
SUPPORT OF CROSS-DEFENDANT AND
RESPONDENT CITY OF SAN DIEGO'S
OPPOSITION TO SUNROAD'S EX PARTE
APPLICATION FOR ORDER TO ADVANCE
TRIAL DATE AND GRANT PREFERENTIAL
TRIAL DATE

Date: Monday, March 26, 2007

Time: 8:30 a.m.

Dept.: 64

Judge: William R. Nevitt, Jr.

Trial Date: Not Yet Set

Complaint Filed: 12/15/2006

24 AND ALL RELATED CROSS-ACTIONS.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, Laura A. Godfrey, declare as follows:

1. I am an associate at Latham & Watkins, attorneys for Plaintiff and Cross-Defendant City of San Diego ("City"). I am licensed to practice law in the State of California and admitted to this Court. All of the facts set forth herein are within my personal knowledge, to which I could and would testify competently if called upon to do so.

2. On Wednesday, March 14, 2007, counsel for Real Party in Interest Community Airfields Association of San Diego deposed Tait Galloway, a Senior Planner with the City of San Diego in this matter.

3. The City has noticed two depositions in April and May 2007: the deposition of Dan Munch, an architect involved in the underlying litigation, for April 12, 2007; and the deposition of Tom Coleman from Max Crane Works for May 17, 2007. The City is in the process of noticing additional depositions in April and May 2007.

4. Pursuant to 49 C.F.R. § 9.15(a), Sunroad has requested the oral depositions of various Federal Aviation Administration officials who have been involved in this dispute.

5. The City has received a June 29, 2007 hearing date from this Court for its motion for partial summary judgment.

6. Attached hereto as Exhibit A is a true and correct copy of the City's Amended Points and Authorities in Support of Its Demurrer to Sunroads' Cross-Complaint, filed with the Court on March 20, 2007.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

Executed this 23rd of March, 2007 at San Diego, California.



LAURA A. GODFREY

EXHIBIT A

1 Michael J. Aguirre, City Attorney (Bar No. 60402)
2 Carmen A. Brock, Deputy City Attorney (Bar No. 162592)
3 OFFICE OF THE CITY ATTORNEY
4 1200 Third Avenue, Suite 1100
5 San Diego, CA 92101-4100
6 Telephone: (619) 533-5800
7 Facsimile: (619) 236-5856

**EXEMPT FROM FILING
FEES PURSUANT TO
CAL. GOV'T CODE
§ 6103**

5 Christopher W. Garrett (Bar No. 100164)
6 Laura A. Godfrey (Bar No. 233059)
7 Curtis G. Carll (Bar No. 248470)
8 LATHAM & WATKINS LLP
9 600 West Broadway, Suite 1800
10 San Diego, CA 92101-3375
11 Telephone: (619) 236-1234
12 Facsimile: (619) 696-7419
13
14 Attorneys for Cross-Defendant and Respondent
15 City of San Diego

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN DIEGO
13 CENTRAL DIVISION
14

15 THE PEOPLE OF THE STATE OF
16 CALIFORNIA and THE CITY OF SAN
17 DIEGO, a municipal corporation,

18 Plaintiffs,

19 v.

20 SUNROAD CENTRUM, L.P., a California
21 Limited Partnership, SUNROAD ASSET
22 MANAGEMENT, INC., a California
23 corporation, SUNROAD ENTERPRISES,
24 CALIFORNIA DEPARTMENT OF
25 TRANSPORTATION, AERONAUTICS
26 DIVISION, and DOES 1 through 50,
27 inclusive,

28 Defendants.

CASE NO. GIC 877054

CROSS-DEFENDANT AND RESPONDENT
CITY OF SAN DIEGO'S AMENDED
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
DEMURRER TO CROSS-COMPLAINT OF
SUNROAD CENTRUM, L.P., SUNROAD
ASSET MANAGEMENT, INC., AND
SUNROAD ENTERPRISES

Date: May 11, 2007
Time: 2:30 p.m.
Dept.: 64
Judge: William R. Nevitt, Jr.

Trial Date: Not Yet Set
Complaint Filed: 12/15/2006

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUNROAD CENTRUM, L.P., a California
Limited Partnership, SUNROAD ASSET
MANAGEMENT, INC., a California
corporation, SUNROAD ENTERPRISES,

Cross-Complainants
and Petitioners,

v.

THE CITY OF SAN DIEGO, municipal
corporation, and DOES 1 through 10,
inclusive,

Cross-Defendants
and Respondents.

TABLE OF CONTENTS

Page No.

1

2

3 I. INTRODUCTION 1

4 II. FACTUAL BACKGROUND 1

5 III. LEGAL STANDARD 3

6 IV. SUNROAD FAILS TO STATE CLAIMS FOR EQUITABLE ESTOPPEL
7 AND INVERSE CONDEMNATION BECAUSE SUNROAD DOES
8 NOT ALLEGE FACTS ESTABLISHING VESTED RIGHTS IN A 180-
9 FOOT STRUCTURE 3

10 V. SUNROAD FAILS TO STATE A CLAIM FOR INVERSE
11 CONDEMNATION OR EQUITABLE ESTOPPEL BECAUSE THE
12 ALLEGATIONS ESTABLISH THAT IT HAD NOTICE THAT THE
13 BUILDING VIOLATED STATE AND FEDERAL LAW, THUS IT
14 FRAMED THE BUILDING TO 180 FEET AT ITS OWN PERIL 6

15 VI. SUNROAD'S ALLEGATIONS FAIL TO STATE A CLAIM FOR
16 EQUITABLE ESTOPPEL AND INVERSE CONDEMNATION BASED
17 ON A PUBLIC NUISANCE LAWSUIT 9

18 VII. SUNROAD'S CLAIM FOR INVERSE CONDEMNATION FAILS TO
19 STATE A CAUSE OF ACTION BECAUSE IT IS NOT RIPE FOR
20 REVIEW 11

21 VIII. SUNROAD'S FAILURE TO EXHAUST ADMINISTRATIVE
22 REMEDIES BARS ITS SECOND AND THIRD CAUSES OF ACTION 12

23 A. Sunroad's Claim for Inverse Condemnation on the Basis of the
24 Stop Work Order Fails Assert Facts Demonstrating An Exhaustion
25 of Remedies 12

26 B. Sunroad's Petition for Writ of Mandate Fails to Allege a Proper
27 Basis 13

28 IX. CONCLUSION 15

TABLE OF CONTENTS

Page No.

FEDERAL CASES

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992).....13

STATE CASES

ABI, Inc. v. City of Los Angeles,
153 Cal. App. 3d 669 (1984)18

Albelleira v. District Court of Appeal,
17 Cal. 2d 280 (1941)15, 18

Aries Development Co. v. California Coastal Zone Conservation Committee,
48 Cal. App. 3d 354 (1975)12

Autopsy/Post Services, Inc. v. City of Los Angeles,
129 Cal. App. 4th 521 (2005)10

Avco Community Developers, Inc. v. South Coast Regional Commission,
17 Cal. 3d 785 (1976)8, 10

Baldwin-Lima-Hamilton Corp. v. Superior Court of San Francisco,
208 Cal. App. 2d 803 (1962)18

Blank v. Kirwan,
39 Cal. 3d 311 (1985)19

Bollengier v. Doctors Medical Ctr.,
222 Cal. App. 3d 1115 (1990)19

Buckley v. Cal. Coastal Com.,
68 Cal. App. 4th 178 (1998)8

Calprop Corp. v. City of San Diego,
77 Cal. App. 4th 582 (2000)16

City of Goleta v. Superior Court,
40 Cal. 4th 270 (2006)8, 12

County of Contra Costa v. State of California,
177 Cal. App. 3d 62 (1986)17

Davidson v. County of San Diego
49 Cal. App. 4th 639 (1996)13

Del. E. Webb Corp. v. Structural Materials Co.,
123 Cal. App. 3d 593 (1981)7

Del Oro Hills v. City of Oceanside,
31 Cal. App. 4th 1060 (1995)8

| | | |
|----|-----------------------------------------------------------------------------------------------------------------------|--------|
| 1 | <i>Freeman v. San Diego Association of Realtors,</i> 77 Cal. App. 4th 171 (1999) | 7 |
| 2 | | |
| 3 | <i>H&M Associates v. City of El Centro,</i> 109 Cal. App. 3d 399 (1980) | 14 |
| 4 | <i>Hensler v. City of Glendale,</i> 8 Cal. 4th 1 (1994) | 16 |
| 5 | | |
| 6 | <i>Igna v. City of Baldwin Park,</i> 9 Cal. App. 3d 909 (1970) | 16, 17 |
| 7 | <i>Kaiser Foundation Hospitals v. Superior Court,</i> 128 Cal. App. 4th 85 (2005) | 17 |
| 8 | | |
| 9 | <i>Leff v. City of Monterey Park,</i> 218 Cal. App. 3d 674 (1970) | 15 |
| 10 | <i>McCarthy v. Calif. Tahoe Regional Planning Agency,</i> 129 Cal. App. 3d 222 (1982) | 12 |
| 11 | | |
| 12 | <i>Ogo Associates v. City of Torrance,</i> 37 Cal. App. 3d 830 (1974) | 17 |
| 13 | <i>People ex rel. Department of Transportation v. Hadley Fruit Orchards, Inc.,</i> 59 Cal. App. 3d 49 (1976) | 13 |
| 14 | | |
| 15 | <i>People v. County of Kern,</i> 39 Cal. App. 3d 830 (1974) | 9 |
| 16 | <i>Pettit v. City of Fresno,</i> 34 Cal. App. 3d 813 (1973) | 11 |
| 17 | | |
| 18 | <i>Rich v. State Board of Optometry,</i> 235 Cal. App. 2d 591 (1965) | 19 |
| 19 | <i>Royer v. Steinberg,</i> 90 Cal. App. 3d 490 (1979) | 14 |
| 20 | | |
| 21 | <i>Rubin v. Green,</i> 4 Cal. 4th 1187 (1993) | 14 |
| 22 | <i>Santa Monica Pines, Ltd. v. Rent Control Board of the City of Santa Monica,</i> 35 Cal. 3d 858 (1984) | 9 |
| 23 | | |
| 24 | <i>Scott v. City of Del Maritme,</i> 58 Cal. App. 4th 1296 (1997) | 14 |
| 25 | <i>Serrano v. Priest,</i> 5 Cal. 3d 584 (1971) | 7 |
| 26 | | |
| 27 | <i>Shaw v. Regents of the University of California,</i> 58 Cal. App. 4th 44 (1997) | 18 |
| 28 | | |

| | | |
|----|-----------------------------------------------------------------------------------|--------|
| 1 | <i>Stokes v. Board of Permit Appeals,</i> 52 Cal. App. 4th 1348 (1997) | 11 |
| 2 | | |
| 3 | <i>Strong v. County of Santa Cruz,</i> 126 Cal. 3d 610 (1975) | 11 |
| 4 | <i>Tivens v. Assessment Appeals Board,</i> 31 Cal. App. 3d 945 (1973) | 18 |
| 5 | | |
| 6 | <i>Washington v. County of Contra Costa,</i> 38 Cal. App. 4th 890 (1995) | 7 |
| 7 | <i>Wenzler v. Municipal Court,</i> 235 Cal. App. 2d 128 (1965) | 18 |
| 8 | | |
| 9 | FEDERAL STATUTES | |
| 10 | 14 C.F.R. § 77.13 (a)..... | 5 |
| 11 | 14 C.F.R. § 77.14..... | 9 |
| 12 | 14 C.F.R. § 77.35(c)..... | 10 |
| 13 | STATE STATUTES | |
| 14 | Cal. Civ. Code § 47(a) & (b)..... | 14 |
| 15 | Cal. Civ. Proc. Code § 430.10(e)..... | 7 |
| 16 | Cal. Civ. Proc. Code § 430.30(a)..... | 7 |
| 17 | Cal. Civ. Proc. Code § 1086 | 18 |
| 18 | Cal. Civ. Proc. Code § 1094.5(b)..... | 18, 19 |
| 19 | Cal. Gov't Code § 50485.2..... | 13 |
| 20 | Cal. Civ. Pro. Code § 1085(a)..... | 18 |
| 21 | Evidence Code § 451 | 7 |
| 22 | Government Code § 815.2 | 14 |
| 23 | Government Code § 818.4 | 15 |
| 24 | Government Code § 820.6 | 14 |
| 25 | Municipal Code § 111.0102..... | 9 |
| 26 | Municipal Code § 121.0302(i)..... | 9 |
| 27 | Municipal Code § 121.0308..... | 9, 10 |
| 28 | Municipal Code § 121.0309(a) | 10 |

1 Municipal Code § 121.0309(c) 16
2 Public Utilities Code § 21659 10, 18
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 In response to the City of San Diego's ("City") effort to ensure the continuing safety of
3 air travel in the region, cross-complainants Sunroad Centrum, L.P., Sunroad Asset Management,
4 Inc., and Sunroad Enterprises (collectively "Sunroad") now seek \$40 million in damages and an
5 order prohibiting the City from acting on behalf of the public welfare. Sunroad alleges that the
6 City has improperly stopped construction on a twelve-story office complex in Kearny Mesa,
7 which is only 0.7 miles from Montgomery Air Field ("MAF"). The City required Sunroad to
8 limit the height of its project by twenty feet to avoid the creation of an air hazard, as identified by
9 the Federal Aviation Administration ("FAA"). The City initiated this lawsuit on
10 December 15, 2006, seeking a judicial determination that Sunroad's continuing construction
11 constitutes a public nuisance. In response, Sunroad filed a Cross-Complaint, asserting the
12 following causes of action: (1) equitable estoppel; (2) inverse condemnation; and (3) writ of
13 mandate. Sunroad has failed to alleged facts sufficient to support a legal basis for its claims.

14 **II. FACTUAL BACKGROUND**

15 Taking the allegations of the Cross-Complaint as true, as is required at this stage,
16 Sunroad alleges as follows. Sunroad and the City entered into a Development Agreement in
17 1997 for a series of office and residential buildings called the Centrum Project. *See* Cross-
18 Complaint and Petition for Writ of Mandate ("CC") ¶ 1. The project's first building, the subject
19 of this dispute, is a 12-story office building ("Sunroad Building" or "Building") located within
20 one mile of Montgomery Air Field. CC ¶ 1, 4. The City issued the framing and foundation
21 permit for the Building on March 27, 2006. CC ¶ 3. As designed and permitted, the Building
22 would rise to 180 feet above ground level ("AGL"). CC ¶ 2, 3.

23 On April 5, eight days *after* receiving the permit from the City, Sunroad filed a Notice of
24 Proposed Construction with the Federal Aviation Administration ("FAA") even though the
25 agency mandates it be completed at least 30 days *before* the application for a construction
26 permit. CC ¶ 5.¹

27 _____
28 ¹ The FAA requires advance notice for any proposed construction which may pose a hazard to
air travel. 14 C.F.R. § 77.13 (a). The person responsible for such construction must give

1 In response, the FAA warned that if the Building rose above 160 feet AGL, it would be a
2 hazard to air navigation. CC ¶ 7; Godfrey Decl., Exh. A. Sunroad was given 60 days from April
3 24 to fix the hazard. *Id.* Three days before the time elapsed, Sunroad notified the FAA in a
4 letter dated June 20, 2006, that it would halt construction at the non-hazardous level of 160 feet
5 AGL. CC ¶ 9. Two days later, Sunroad submitted a FAA form 7460-1 indicating that the
6 building height would be only 160 feet AGL. CC ¶ 9. On July 7, 2007, the City issued Sunroad
7 another permit for the Building under the originally designed height of 180 feet. CC ¶ 3.

8 Supplanting the FAA's expert judgment of air safety with its own, Sunroad concluded
9 that the Building, in fact, did not pose a hazard at 180 feet AGL. CC ¶ 10. Sunroad informed
10 the FAA of its intent to disregard the FAA's assessment and to build to the originally planned
11 height 180 feet AGL. *Id.* On the very same day, July 26, 2006, Sunroad also let the FAA know
12 that it had installed steel frames and was already at 180 feet AGL. *Id.* One month later on
13 August 11, the FAA disagreed with Sunroad's determination and issued a Determination of
14 Hazard to Air Navigation, concluding that "the structure has a substantial adverse effect on the
15 safe and efficient utilization of navigable airspace by aircraft and is a hazard to air navigation."
16 CC ¶ 11, Godfrey Decl., Exh. B.²

17 On October 17, 2006, the City issued a Stop Work Order ("SWO") for the Building,
18 requiring that construction stop on the top seventeen feet of the Building. CC ¶ 13. The SWO
19 was later revised to cover the top 20 feet. *Id.* Sunroad appealed the SWO on November 28,
20 2006, and the City responded in a letter dated December 21, 2007, by allowing limited
21 construction on the top 20 feet of the Building. CC ¶ 14.

22 On December 15, 2006, the City filed this lawsuit against Sunroad to enforce the FAA's
23 hazard determination and to prohibit Sunroad from building above 160 feet AGL given the
24 continuing threat to the safety of air travel. CC ¶ 15. Based on these claims, Sunroad filed this
25

26 notice before the date the construction is planned to begin or the construction permit is to be
27 filed, whichever is earlier. *Id.* § 77.17(b).

28 ² Defendant's Cross-Complaint states that the Determination of Hazard to Air Navigation was
issued on August 26, 2006. The document itself, however, is dated August 11, 2006. *See*
Godfrey Decl., Exh. B.

1 Cross-Complaint to enjoin the City from further interference with the construction of the
2 Building and to recover alleged damages attributable to the City's actions.

3 **III. LEGAL STANDARD**

4 "A demurrer properly is granted when the pleadings fail to state facts sufficient to
5 constitute a cause of action." *Washington v. County of Contra Costa*, 38 Cal. App. 4th 890, 895
6 (1995); *see also* Cal. Civ. Proc. Code § 430.10(e). A demurrer "admit[s] all material facts
7 properly pleaded, but not contentions, deductions or conclusions of fact or law." *Serrano v.*
8 *Priest*, 5 Cal. 3d 584, 591 (1971). *See also Freeman v. San Diego Ass'n of Realtors*, 77 Cal.
9 App. 4th 171, 185 (1999) ("Although a court must on demurrer accept as true properly pleaded
10 facts, a demurrer does not admit contentions or conclusions of law or fact."). The Court may
11 consider, as grounds for a demurrer, any matter which the court must or may judicially notice
12 under Evidence Code §§ 451 or 452. *See* Cal. Civ. Proc. Code § 430.30(a). The allegations of
13 the complaint are not accepted as true if they contradict or are inconsistent with facts judicially
14 noticed by the court. *Del. E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604
15 (1981) ("Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters
16 judicially noticed by the court render the complaint meritless.").

17 **IV. SUNROAD FAILS TO STATE CLAIMS FOR EQUITABLE ESTOPPEL AND**
18 **INVERSE CONDEMNATION BECAUSE SUNROAD DOES NOT ALLEGE**
19 **FACTS ESTABLISHING VESTED RIGHTS IN A 180-FOOT STRUCTURE**

20 In its First Cause of Action, Sunroad alleges that it framed the Building to its full 180-
21 foot height in good faith reliance on the City's permit, and as a result, its rights in the Sunroad
22 Building have vested as a matter of law and the City is estopped from "taking any action to limit
23 Sunroad from performing work consistent with or in accordance with the building permit."
24 CC ¶¶ 20-24. Likewise, in its Second Cause of Action, Sunroad asserts a claim for inverse
25 condemnation, alleging that its "property interest in the Building was vested, at the latest, upon
26 the City's issuance of the Building permit." CC ¶ 26. The only portion of the Building which
27
28

1 Sunroad alleges was “taken” is the “top 26 feet of the Building,”³ and the only basis for a
2 property right that was asserted was the existence of the building permit. CC ¶ 28.

3 Sunroad’s equitable estoppel and inverse condemnation claims both are based on the
4 identical theory --- “vested” rights under the building permit --- and Sunroad alleges no legally
5 sufficient facts to state either cause of action. To state a claim for equitable estoppel, a plaintiff
6 must allege: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that
7 his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to
8 believe it was so intended; (3) the other party must be ignorant of the true state of facts; and
9 (4) he must rely upon the conduct to his injury.” *City of Goleta v. Superior Court*, 40 Cal. 4th
10 270, 279 (2006). This doctrine is designed to give a vested right to a property owner if it has
11 incurred substantial liabilities *in good faith reliance* upon a permit issued by the government.
12 *Avco Community Developers, Inc. v. South Coast Regional Comm’n*, 17 Cal. 3d 785, 791 (1976).

13 An inverse condemnation claim also requires the establishment of a property right as a
14 threshold matter to asserting a claim. *See Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th
15 1060, 1075 (1995) (“To state a cause of action for inverse condemnation, a landowner must
16 allege not only *ownership of the property*, but also the governmental entity’s taking or damaging
17 of property, and substantial *damage to property rights* that was substantially caused by the
18 entity’s conduct”) (emphasis added). Accordingly, Sunroad must “alleg[e] and prov[e]
19 [Sunroad’s] property right” in the top 26 feet of the Building and the “infringement” of that right
20 by the City. *Buckley v. Cal. Coastal Com*, 68 Cal. App. 4th 178, 192 (1998).

21 Sunroad’s allegations establish that it does *not* have a vested right to construct its
22 building in violation of local, state, and federal law. Sunroad’s allegations do not support a
23 legitimate expectation of present *or* continued rights in the top 26 feet of the Building.
24 Sunroad’s legal conclusion that its rights in the Building framed to its full 180-foot height are
25 “fully vested” due to the City’s issuance of the permit is belied by the allegations in the Cross-

26 _____
27 ³ The source of this number is unclear, given Sunroad’s claims that (1) the City’s permit
28 allowed them to build up 180 feet, (2) Sunroad told the FAA the building would rise to 180
feet, and (3) the City’s amended SWO limits construction to the top 20 feet of the Building.
CC ¶¶ 3, 10, 13, 17. For the purpose of the Demurrer, Sunroad’s figure is accepted as true.

1 Complaint. See CC ¶ 21. The issuance of a City permit does not, on its own, grant a party
2 unlimited “vested rights.” Rather, vested rights gained in reliance of a government permit are
3 “no greater than those specifically granted by the permit itself.” *Santa Monica Pines, Ltd. v.*
4 *Rent Control Board of the City of Santa Monica*, 35 Cal. 3d 858, 866 (1984). Furthermore, a
5 property owner does not gain vested rights in reliance on approval by a local public entity where
6 the rules and practices adopted by the county did not conform with the requirements of state law.
7 See *People v. County of Kern*, 39 Cal. App. 3d 830, 842-43 (1974).

8 Municipal Code § 111.0102 grants the City authority to issue building permits. However,
9 any such permit was necessarily conditioned on compliance with Municipal Code § 121.0308,
10 which provides that the issuance of a permit “does not prevent the City Manager from
11 subsequently requiring the correction of errors in the plans, specifications, and other data or the
12 Building Official from stopping building operations that are in violation of the Land
13 Development Code or *any other applicable law.*” *Id.* (emphasis added). Thus, based on the
14 Municipal Code provisions, as a matter of law, any building permit issued by the City does not
15 provide the applicant with a vested right to build a structure which is “in violation of the Land
16 Development Code” or “any other applicable law,” which would include the requirements of the
17 FAA or the California Department of Transportation (“CalTrans”). These provisions establish
18 that the building permit issued to Sunroad does not create a free pass to build a 180-foot structure
19 as Sunroad wishes, but rather it may do so only if such a structure complies with *every* relevant
20 law applying to the construction of the Building, *including* federal and state regulations.⁴

21 Based on Sunroad’s own allegations, the Building currently violates federal and state law.
22 Sunroad alleges that it failed to notify the FAA of the project until *after* receiving the permit
23 from the City, and after construction had begun, in violation of 14 C.F.R. § 77.14. CC ¶ 6.
24 Sunroad alleges that on April 24, 2006, the FAA issued a “Notice of Presumed Hazard”
25

26 ⁴ Moreover, Sunroad’s permit was subject to Municipal Code § 121.0302(i), which provides
27 that “[t]he City may take any appropriate enforcement action to abate a public nuisance,
28 *despite the issuance of any permits* to maintain, later, expand, or reconstruct a structure.”
Thus, the permit was conditioned by the City’s ability to issue the stop work permit to abate
any public nuisance.

1 informing Sunroad that the Building would intrude into the navigable airspace of the
2 Montgomery Air Field by 20 feet. CC ¶ 7. Despite receiving the FAA’s notice that the Building
3 should not exceed 160 feet AGL, Sunroad alleges that it constructed the Building to 180 feet
4 AGL. CC ¶ 10. Sunroad further admits that the FAA issued a “Determination of Hazard to Air
5 Navigation” on August 26 [really August 11], pursuant to 14 C.F.R. § 77.35(c). CC ¶ 11.
6 Because Sunroad did not receive a “No Hazard” Determination, Sunroad is required obtain a
7 permit from CalTrans pursuant to the Public Utilities Code § 21659. Sunroad does not allege its
8 compliance.

9 Based on its allegations, any “vested rights” Sunroad might have obtained through the
10 permit issued by the City under the Municipal Code cannot as a matter of law include the right to
11 construct the Building to 180 feet AGL, as such height violates state and federal law. *See*
12 Municipal Code § 121.0308.⁵ As Sunroad has not alleged adequate facts to establish a “vested
13 right” that has been violated by the City’s actions, Sunroad cannot maintain an equitable estoppel
14 or an inverse condemnation claim against the City.

15 **V. SUNROAD FAILS TO STATE A CLAIM FOR INVERSE CONDEMNATION OR**
16 **EQUITABLE ESTOPPEL BECAUSE THE ALLEGATIONS ESTABLISH THAT**
17 **IT HAD NOTICE THAT THE BUILDING VIOLATED STATE AND FEDERAL**
18 **LAW, THUS IT FRAMED THE BUILDING TO 180 FEET AT ITS OWN PERIL**

19 As a second separate and independent ground, the demurrer should be sustained based on
20 Sunroad’s failure to allege facts constituting good faith reliance on the City’s permit. To state a
21 claim for equitable estoppel or a vested property right for inverse condemnation, a party must
22 allege that they relied on the permit in good faith. *See Avco*, 17 Cal. 3d at 791 (holding that to
23 complete a planned construction, a landowner must act in “good faith reliance upon a permit
24 issued by the government”); *Autopsy/Post Services, Inc. v. City of Los Angeles*, 129 Cal. App.

25
26 ⁵ Even accepting Sunroad’s allegations, the City was thus permitted under the Municipal Code
27 to issue the SWO due to Sunroad’s failure to comply with the applicable state and federal
28 laws. *See* Municipal Code § 121.0309(a). This is particularly the case because Sunroad
alleges that the Sunroad Building has been identified by the FAA to constitute a danger to
public safety.

1 4th 521, 529 (2005) (holding that landowner lacked vested rights when it acted in bad faith by
2 misleading the government agency as to the nature of its business when applying for the permit);
3 *Stokes v. Bd. of Permit Appeals*, 52 Cal. App. 4th 1348, 1357 (1997) (“[The permit holder] did
4 not act in good faith reliance on the building permits and has not vested right to complete
5 construction.”).

6 Similarly, where a developer knows the permit upon which it relies is or might be
7 defective, no vested property right will arise. *See Strong v. County of Santa Cruz*, 126 Cal. 3d
8 610, 617 (1975) (a developer cannot claim a vested right in reliance on a permit that he had
9 reason to know might be defective); *Pettit v. City of Fresno*, 34 Cal. App. 3d 813, 823 (1973)
10 (property owner can be required to remove structure built under invalid building permit, even
11 though permit was regular on its face and property owner acted without actual knowledge of any
12 defect in it). Moreover, estoppel cannot be invoked against a public agency “where it would
13 defeat the effective operation of a policy adopted to protect the public.” *Id.* at 822.

14 Here, Sunroad has not alleged facts establishing good faith reliance on the City’s permit.
15 Rather, based on the following, Sunroad had ample knowledge that the Building would violate
16 state and federal law *before* Sunroad framed the Building to 180 feet AGL, but nonetheless
17 continued construction at its own peril:

- 18 • **March 27, 2006:** Sunroad sought and obtained permits for the Building to a height of
19 180 feet, without first giving the requisite 30-day notice to the FAA. *See* CC ¶¶ 3, 6.
- 20 • **April 5, 2006:** *After* receiving the framing and foundation permit, Sunroad tardily filed
21 its Notice of Proposed Construction with the FAA. CC ¶ 6.
- 22 • **April 24, 2006:** Less than 30 days later, the FAA issued a “Notice of Presumed Hazard.”
- 23 • **April 24, 2006 – June 20, 2006:** Sunroad disregarded the FAA’s notice, and continued
24 construction on the Sunroad Building, despite the FAA’s warning. *See* CC ¶¶ 7, 9.
- 25 • **June 20, 2006:** Sunroad finally responded to the FAA, asserting that it would “halt
26 construction of the Building at 160 feet[.]” CC ¶ 9.
- 27 • **June 22, 2006:** Sunroad submitted a FAA Form 7460-1 Form to the FAA indicating that
28 the Building’s maximum height would be only 160 feet. CC ¶ 9.

- 1 • *July 26, 2006*: Despite its assurances to the FAA, Sunroad announced that it intended to
2 build the Building to 180 feet, and without FAA approval, framed the Building to 180
3 feet AGL. *See* CC ¶ 10.
- 4 • *August 26, 2006*: The FAA issued to Sunroad a Determination of Hazard to Air
5 Navigation. Nonetheless, Sunroad continued to build to 180 feet, ceasing only when the
6 City issued a stop work order nearly two months later. CC ¶¶ 11, 13.

7 Thus, Sunroad alleges that it continued to construct the Building to 180 feet AGL, despite
8 multiple warnings from the FAA that such a height was unacceptable under federal law. Even
9 more striking, Sunroad alleges that it assured the FAA that it would stop construction at 160 feet,
10 but only one month later, resumed construction on the building to 180 feet without notice to or
11 approval of the FAA, relying on its “own study” that allegedly confirmed that the Building posed
12 no threat to safety. CC ¶ 10. Because Sunroad alleges that it “chose to ignore [the FAA’s]
13 warning, it did so . . . at [its] peril,” and thus cannot state a claim for equitable estoppel or
14 inverse condemnation. Sunroad has not alleged facts supporting the required good faith reliance
15 on the City’s permit to construct the Building to 180 feet AGL; rather, it alleges that it had ample
16 notice that such height violated state and federal law, and that it proceeded ahead nonetheless
17 “solely to gain a vested position.” *McCarthy v. Calif. Tahoe Regional Planning Agency*, 129
18 Cal. App. 3d 222, 233 (1982) (holding that the “hasty sequence of events here compels the
19 conclusion that the work performed and sum expended were guilefully and precipitously done
20 solely to gain a vested position” to avoid complying with FAA regulations). *See also Aries Dev.*
21 *Co. v. California Coastal Zone Conservation Comm.*, 48 Cal. App. 3d 354, 549 (1975) (“One
22 who proceeds with ‘unseemly haste’ bears a risk that his conduct might bear the stigma of bad
23 faith.”) (quotation and citation omitted).

24 Thus, Sunroad cannot state a claim for equitable estoppel or inverse condemnation
25 because Sunroad has not alleged facts supporting “vested rights” to a 180-foot structure, or that it
26 acted good faith in constructing a 180-foot structure. Allowing a claim against the City based on
27 these allegations would be improper, as it would not serve to avoid a “grave injustice,” and it
28 would defeat the public’s strong interest in airport safety. *See City of Goleta*, 40 Cal. 4th at 279.

1 VI. SUNROAD'S ALLEGATIONS FAIL TO STATE A CLAIM FOR EQUITABLE
2 ESTOPPEL AND INVERSE CONDEMNATION BASED ON A PUBLIC
3 NUISANCE LAWSUIT

4 As a third independent ground for this demurrer, even if the Court concludes that
5 Sunroad adequately pleaded vested rights to the Sunroad Building framed to the 180-foot height,
6 any such vested right may be impaired through subsequent police power enactments necessary to
7 protect public health or safety. As explained in *Davidson v. County of San Diego*: “The vested
8 rights doctrine in the land use context is subject . . . to the qualification that such a vested right,
9 while immune from divestment through ordinary policy power regulations, *may be impaired or*
10 *revoked if the use authorized or conducted thereunder constitutes a menace to the public health*
11 *and safety or a public nuisance.”* 49 Cal. App. 4th 639, 649 (1996) (emphasis added). Sunroad
12 admits that the FAA alerted Sunroad that the Building, framed to a height exceeding 160 feet,
13 encroaches on protected airspace and constitutes a danger to the public health and safety. CC
14 ¶¶ 7, 10.⁶ Given these allegations, it is apparent that Sunroad’s claim “fails to acknowledge . . .
15 that notwithstanding the rights created by [a City-issued permit], the local agency may apply
16 subsequent regulations to the project if it determines a failure to do so would create a condition
17 dangerous to the public health and safety.” *Davidson*, 49 Cal. App. 4th at 649.

18 Moreover, the City has authority under its police power to abate any nuisance without
19 giving rise to a claim for inverse condemnation. See *Lucas v. S.C. Coastal Council*, 505 U.S.
20 1003, 1029 (1992) (recognizing the right of states to “abate nuisances that affect the public
21 generally”); *People ex rel. Dept. of Transportation v. Hadley Fruit Orchards, Inc.*, 59 Cal. App.
22 3d 49, 53 (1976) (“The abatement of a public nuisance pursuant to a reasonable exercise of the
23 police power does not require the payment of compensation at all.”). Any claim for damages

24 ⁶ It is explicitly within the City’s police power to stop potential airport hazards. Under
25 California Government Code § 50485.1, an “airport hazard” is “any structure or tree or use of
26 land which obstructs the airspace required for the flight of aircraft in landing or taking off at
27 an airport or is otherwise hazardous to such landing or taking off of aircraft.” The declared
28 policy of California is that “the creation or establishment of an airport hazard is a public
nuisance” and “airport hazards be prevented by appropriate exercise of the police power
. . . .” Cal. Gov’t Code § 50485.2. Any part of the Sunroad Building in excess of 160 feet
AGL has been declared by the FAA to be a “Hazard to Air Navigation.” CC ¶ 11. Thus, the
City’s issuance of the SWO was a legitimate and essential exercise of its police powers.

1 based on the City's actions are therefore untenable.

2 In a case close in point, *Scott v. City of Del Mar*, oceanfront homeowners sued the City of
3 Del Mar in inverse condemnation after it removed a seawall adjacent to their homes. 58 Cal.
4 App. 4th 1296 (1997). The homeowners sought compensation for the destruction itself and the
5 diminution in the value of their homes that resulted. *Scott*, 58 Cal. App. 4th at 1301. Despite the
6 general rule that compensation is required for "any actual physical injury" to property by the
7 government, the exception for nuisance abatement applied in this case because the legislature
8 had determined "that the obstruction of a public-right-of-way" was "an abatable nuisance." *Id.* at
9 1305. By virtue of that fact alone, tearing down the seawall did "not give rise to an inverse
10 condemnation action" and the homeowners were not entitled to any compensation. *Id.* at 1307.
11 In the present action, Sunroad paradoxically alleges that if the City is *successful* in having the
12 Building declared a nuisance, Sunroad will be entitled to compensation; rather, a nuisance
13 determination would preclude Sunroad from *any* compensation. Therefore, Sunroad fails to state
14 a cause of action for inverse condemnation.

15 In addition, any action by the City to file the public nuisance lawsuit in this action,
16 whatever its merits, is protected by the privileges set forth in Government Code §§ 815.2 and
17 820.2. See *H&M Associates v. City of El Centro*, 109 Cal. App. 3d 399, 406 (1980) (public
18 entity and its employees cannot be liable for an injury resulting from discretionary activities "to
19 assure that courts refuse to pass judgment on policy decisions in the province of coordinate
20 branches of government"). These acts, in addition to the issuance of the SWO, are also protected
21 by Government Code § 820.6, which provides: "[i]f a public employee acts in good faith,
22 without malice, and under the apparent authority of an enactment that is unconstitutional, invalid
23 or inapplicable, he is not liable for an injury caused thereby except to the extent that he would
24 have been liable had the enactment been constitutional, valid and applicable."⁷ Moreover, any

25
26 ⁷ To the extent that Sunroad's claims are predicated on damage caused by the City's actions,
27 including any "stigma" suffered by Sunroad as a result thereof, see CC ¶ 18, such claims are
28 barred by California Civil Code §§ 47(a) and (b), which protect any publication or broadcast
in the "proper discharge of an official duty" (Cal. Civ. Code § 47(a)) or in any judicial
proceeding or any other proceeding authorized by law and subject to administrative review
(Cal. Civ. Code § 47(b)). See *Royer v. Steinberg*, 90 Cal. App. 3d 490, 500 (1979) (Section

1 damage arising from the issuance of the SWO is protected by Government Code § 818.4, which
2 provides a public agency with immunity for “an injury caused by the issuance, denial,
3 suspension, or revocation of . . . any permit . . . or similar authorization where the public entity
4 . . . is authorized to determine whether or not such authorization should be issued, denied,
5 suspended or revoked.” Because the acts upon which Sunroad’s claims are based are
6 discretionary in nature and there are no allegations suggesting that the City acted in bad faith,
7 Sunroad’s tort claims fail as a matter of law due to these statutory immunities.

8 **VII. SUNROAD’S CLAIM FOR INVERSE CONDEMNATION FAILS TO STATE A**
9 **CAUSE OF ACTION BECAUSE IT IS NOT RIPE FOR REVIEW**

10 As a fourth and independent ground for demurrer, Sunroad’s attempt to use the current
11 litigation as a basis for inverse condemnation violates the requirement that the matter be ripe for
12 review. In this case, Sunroad’s claim is not ripe until 1) the nuisance lawsuit has been
13 adjudicated, as discussed immediately above, and 2) Sunroad has exhausted its available
14 administrative remedies. The requirement of exhaustion of administrative remedies is a
15 jurisdictional prerequisite to bring an action that challenges an agency decision. *Albelleira v.*
16 *District Court of Appeal*, 17 Cal. 2d 280 (1941). As one court wrote:

17 When administrative machinery exists for resolution of
18 differences, the courts will not act until such administrative
19 procedures are fully utilized and exhausted. To do so would be in
20 excess of their jurisdiction. Because the rule is jurisdictional, the
doctrine is not open for judicial discretion. The rule is applicable
whether the petitioner is seeking ordinary mandamus or
administrative mandamus.

21 *Leff v. City of Monterey Park*, 218 Cal. App. 3d 674, 680-81 (1970).

22 Sunroad alleges that “*if successful*, the City’s action will constitute a permanent taking of
23 Sunroad’s vested property interest.” CC ¶ 30 (emphasis added). The adjudication of this lawsuit
24 will provide the “final and authoritative determination of the type and intensity of development
25 legally permitted” on the Building that is necessary before this Court may consider the inverse
26

27 47(a) “protects any statement by a public official, so long as it is made (a) while exercising
28 policy-making functions, and (b) within the scope of his official duties”); *Rubin v. Green*, 4
Cal. 4th 1187, 1193 (1993) (holding that communications with “some relation” to judicial
proceedings are “absolutely immune from tort liability” under Section 47(b)).

1 condemnation claim. *Calprop Corp. v. City of San Diego*, 77 Cal. App. 4th 582, 590-591 (2000).
2 Indeed, addressing an assertion that a takings claim was ripe for review, the Supreme Court of
3 California, relying on U.S. Supreme Court precedent, found that “until a final administrative
4 decision has been made, one which affords the administrative agency and any reviewing body
5 having similar authority the opportunity to amend the agency decision and/or grant a variance,
6 whether a taking has occurred through application of a land-use regulation to specific property
7 cannot be determined” *Hensler v. City of Glendale*, 8 Cal. 4th 1, 10-11 (1994).

8 **VIII. SUNROAD’S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BARS**
9 **ITS SECOND AND THIRD CAUSES OF ACTION**

10 **A. Sunroad’s Claim for Inverse Condemnation on the Basis of the Stop Work**
11 **Order Fails Assert Facts Demonstrating An Exhaustion of Remedies**

12 Sunroad’s claim for inverse condemnation legally concludes that the City’s Stop Work
13 Order “constitutes a temporary taking of Sunroad’s vested property interest” and that “[if]
14 successful, the City’s action [to prevent further construction] will constitute a permanent taking.”
15 CC ¶¶ 27, 29. Inverse condemnation claims require that the party bringing the challenge has
16 previously exhausted all possible administrative remedies. *Hensler v. City of Glendale*, 8 Cal.
17 4th 1, 13 (1994); *see also Igna v. City of Baldwin Park*, 9 Cal. App. 3d 909, 915 (1970) (prior to
18 bringing an inverse condemnation claim, the “party aggrieved by the application of a statute or
19 ordinance must invoke and exhaust the administrative remedies provided thereby”) (citations
20 omitted). Sunroad alleges no facts in the Cross-Complaint that suggests it has exhausted its
21 administrative remedies.

22 Sunroad admits that it has invoked the administrative review process, and that it
23 “appealed the Stop Work Order on November 28, 2006.” CC ¶ 14. Sunroad fails to plead the
24 existence of any further action following December 21, 2006. *Id.* The Municipal Code provides
25 for such further process following the issuance of a SWO. *See* Municipal Code § 121.0309(c).
26 Specifically, when a SWO is issued, the Development Services Director “shall” review the
27 appeal and “[t]he decision maker will provide informal rapid access for appellants[.]” *Id.* That
28 appeal process applies here, where the City issued the SWO for abatement of an unsafe condition

1 and public nuisance, not because of any building permit violation, but because of public danger
2 and violations of state and federal law.

3 According to Sunroad’s allegations, the administrative process has been perfected,
4 despite its pending appeal. CC ¶ 15. Sunroad is required to exhaust its available remedies
5 before bringing further action. By failing to allege an attempt to pursue available administrative
6 remedies prior to bringing suit, Sunroad’s cause of action for inverse condemnation fails. *See*
7 *Igna v. City of Baldwin Park*, 9 Cal. App. 3d at 911 (in inverse condemnation claim, holding that
8 plaintiff’s failure to “allege compliance with the applicable . . . statutes” prior to bringing suit
9 rendered the suit “prematurely instituted”). Sunroad has not alleged compliance with the appeals
10 process and thus its claims are premature.

11 In seeking to allege around the exhaustion requirement, Sunroad alleges that “it would be
12 futile for [it] to challenge the City’s action in any other forum due to the fact that the City has
13 sued Sunroad seeking the deconstruction of the Building.” CC ¶ 29. Futility offers a very
14 limited exception to the exhaustion requirement. *See Kaiser Foundation Hospitals v. Superior*
15 *Court*, 128 Cal. App. 4th 85, 101 (2005); *County of Contra Costa v. State of California*, 177 Cal.
16 App. 3d 62, 77 (1986); *Ogo Associates v. City of Torrance*, 37 Cal. App. 3d 830, 834 (1974)
17 (describing the futility exception to exist only “when the aggrieved party can positively state
18 what the administrative agency’s decision in his particular case would be”). To support its
19 futility claim, Sunroad has offered only the existence of the City’s protective lawsuit. CC ¶ 29.
20 That factual allegation is facially inadequate to “positively state” that the review supplied by the
21 Development Services Director would be futile.

22 **B. Sunroad’s Petition for Writ of Mandate Fails to Allege a Proper Basis**

23 In its Third Cause of Action for Writ of Mandate, Sunroad seeks “[a]n alternative writ of
24 mandate . . . prohibiting the City from taking any action to limit Sunroad from performing work
25 consistent with or in accordance with the building permit.” CC ¶ 40. Sunroad points to the
26 City’s “existing Stop Work Order” and “the City’s present litigation” as causing “substantial
27 damages to Sunroad” warranting the writ. CC ¶ 36. Sunroad’s petition seeks to bypass both the
28 administrative process for appealing a SWO and the underlying litigation. Such a request is an

1 inappropriate basis for issuing a writ of mandate under either Code of Civil Procedure § 1085(a)
2 or § 1094.5, and Sunroad’s petition is defective on multiple grounds.

3 Under Code of Civil Procedure § 1085(a), a writ of mandate may be issued “to compel
4 the admission of a party to the use and enjoyment of a right or office to which the party is
5 entitled, and from which the party is unlawfully precluded[.]” Cal. Civ. Pro. Code § 1085(a).
6 “[T]wo basic requirements are essential to the issuance of the writ: (1) A clear, present and
7 usually ministerial duty upon the part of the respondent . . . , and (2) a clear, present and
8 beneficial right in the petitioner to the performance of that duty.” *Baldwin-Lima-Hamilton Corp.*
9 *v. Superior Court of San Francisco*, 208 Cal. App. 2d 803, 813-14 (1962) (internal citations
10 omitted). Sunroad has wholly failed to allege facts establishing either requirement.

11 First, Municipal Code § 121.0308(b) expressly grants the City the discretion to stop
12 “building operations that are in violation of . . . applicable law.” Sunroad’s allegations amount to
13 an admission of violation of state and federal law. *See supra* at 6-9. Therefore, Sunroad has
14 failed to allege any facts supporting a “clear” or “present” duty on the City to allow Sunroad to
15 operate under the permit. The same violation of law precludes Sunroad from alleging facts
16 establishing a “present and beneficial right” to performance of that duty. *Id.* Second, mandamus
17 relief is improper where petitioner has an adequate legal remedy. *Cal. Admin. Mand. § 7.20* at
18 340; *Tivens v. Assessment Appeals Bd.*, 31 Cal. App. 3d 945, 947 (1973). A damages action is
19 usually adequate and thus mandate is unavailable to enforce a contractual obligation against a
20 public entity. *See, e.g., Shaw v. Regents of the University of California*, 58 Cal. App. 4th 44,
21 51-52 (1997); *Wenzler v. Municipal Court*, 235 Cal. App. 2d 128, 132 (1965). Here, Sunroad
22 has an adequate remedy at law; it has sued the City seeking to recover monetary damages in this
23 very action. Because Sunroad’s own pleading establishes that it has an adequate remedy at law,
24 extraordinary relief by mandamus will not lie. Cal. Civ. Proc. Code § 1086. *See also ABI, Inc.*
25 *v. City of Los Angeles*, 153 Cal. App. 3d 669, 687-88 (1984).

26 Finally, administrative writs of mandate also require exhaustion of administrative
27 remedies as a threshold requirement to bringing a petition. *See* Cal. Civ. Proc. Code § 1094.5(b);
28 *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 292 (1941) (when seeking an extraordinary

1 writ "the rule is that where an administrative remedy is provided by statute, relief must be sought
2 from the administrative body and this remedy exhausted before the courts will act"); *Bollengier*
3 *v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1126 (1990). Without having completed the
4 administrative process, the court cannot evaluate "whether the respondent has proceeded
5 without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any
6 prejudicial abuse of discretion." Cal. Civ. Proc. Code § 1094.5(b). *See also Rich v. State Board*
7 *of Optometry*, 235 Cal. App. 2d 591, 601 (1965). Sunroad has a process by which to appeal the
8 SWO, and has availed itself of that process by filing an appeal, which is pending. *See Godfrey*
9 *Decl., Exh. D.* Prior to exhaustion of administrative remedies, this Court has no basis by which
10 to evaluate the alternative writ of mandate and therefore the cause of action fails on its face.

11 **IX. CONCLUSION**

12 Sunroad has filed a Cross-Complaint that reveals its own defects on its face: Sunroad has
13 no vested right or good faith reliance on the City's actions; Sunroad is in violation of federal and
14 state law; and Sunroad cannot sue the City for legitimate efforts to protect public safety. The
15 demurrer to the Complaint should therefore be sustained without leave to amend because based
16 on Sunroad's allegations, there is no "reasonable possibility that the defect[s] [in the Cross-
17 Complaint] can be cured by amendment." *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985).

18 Dated: March 20, 2007

MICHAEL J. AGUIRRE, City Attorney

19

Attorneys for Petitioners and Plaintiffs
The People of the State of California and
Petitioners, Plaintiffs, and Cross-Defendant
The City of San Diego

20

21

22

LATHAM & WATKINS LLP

23

24

By: Christopher W. Garrett
Christopher W. Garrett
Attorney for Cross-Defendant The City of
San Diego

25

26

27

28

1 Michael J. Aguirre, City Attorney (Bar No. 60402)
Carmen A. Brock, Deputy City Attorney (Bar No. 162592)
2 OFFICE OF THE CITY ATTORNEY
1200 Third Avenue, Suite 1100
3 San Diego, CA 92101-4100
Telephone: (619) 533-5800
4 Facsimile: (619) 236-5856

5 Christopher W. Garrett (Bar No. 100164)
Laura A. Godfrey (Bar No. 233059)
6 Curtis G. Carll (Bar No. 248470)
LATHAM & WATKINS LLP
7 600 West Broadway, Suite 1800
San Diego, CA 92101-3375
8 Telephone: (619) 236-1234
Facsimile: (619) 696-7419
9

10 Attorneys for Cross-Defendant and Respondent
City of San Diego

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO, CENTRAL DIVISION

14 THE PEOPLE OF THE STATE OF
CALIFORNIA and THE CITY OF SAN
15 DIEGO, a municipal corporation,

16 Plaintiffs,

17 v.

18 SUNROAD CENTRUM, L.P., a California
Limited Partnership, SUNROAD ASSET
19 MANAGEMENT, INC., a California
corporation, SUNROAD ENTERPRISES,
20 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, AERONAUTICS
21 DIVISION, and DOES 1 through 50,
inclusive,

22 Defendants.
23

CASE NO. GIC 877054

PROOF OF SERVICE

Dept.: 64
Judge: William R. Nevitt, Jr.

Trial Date: Not Yet Set
Complaint Filed: 12/15/2006

24 AND ALL RELATED CROSS-ACTIONS.
25
26
27
28

SD\576100.2

1 I am employed in the County of San Diego, State of California. I am over the age
2 of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600
3 West Broadway, Suite 1800, San Diego, CA 92101.

4 On **March 23, 2007**, I served a true copy of the following document: **CROSS-
5 DEFENDANT AND RESPONDENT CITY OF SAN DIEGO'S OPPOSITION TO
6 SUNROAD'S EX PARTE APPLICATION FOR ORDER TO ADVANCE TRIAL DATE
7 AND GRANT PREFERENTIAL TRIAL DATE; DECLARATION OF LAURA A.
8 GODFREY IN SUPPORT THEREOF; PROOF OF SERVICE**

7 I deposited the above document(s) noted by for facsimile transmission on
8 March 23, 2007, in accordance with the office practice of Latham & Watkins
9 LLP for collecting and processing facsimiles. I am familiar with the office
10 practice of Latham & Watkins LLP for collecting, processing, and transmitting
11 facsimiles, which practice is that when a facsimile is deposited with the Latham
12 & Watkins LLP personnel responsible for facsimiles, such facsimile is
13 transmitted that same day in the ordinary course of business. The facsimile of
14 the above document(s) was transmitted to the following parties:

12 Steven M. Strauss
13 Patrick P. Gunn
14 Dennis C. Crovella
15 **Cooley Godward Kronish LLP**
16 4401 Eastgate Mall
17 San Diego, CA 92121
18 Tel: (858) 550-6000
19 Fax: (858) 550-6420
20 *Attorneys for Defendants, Cross-Complainants, and Petitioners*
21 *Sunroad Centrum, L.P., Sunroad Asset Management, Inc., and Sunroad*
22 *Enterprises*

18 I am readily familiar with the Firm's practice of collection and processing
19 correspondence for mailing. Under that practice it would be deposited with the
20 U.S. Postal Service on that same day with postage thereon fully prepaid in the
21 ordinary course of business, addressed to the following parties in this matter:

20 Steven M. Strauss
21 Patrick P. Gunn
22 Dennis C. Crovella
23 **Cooley Godward Kronish LLP**
24 4401 Eastgate Mall
25 San Diego, CA 92121
26 Tel: (858) 550-6000
27 Fax: (858) 550-6420
28 *Attorneys for Defendants, Cross-Complainants, and Petitioners*
Sunroad Centrum, L.P., Sunroad Asset Management, Inc., Sunroad Enterprises

26 I caused such envelope to be delivered by hand to the offices of the addressee(s)
27 **VIA FEDERAL EXPRESS**, addressed as follows:

28 I caused to be personally delivered the above-described document(s) to the
offices of the addressee(s) listed below:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

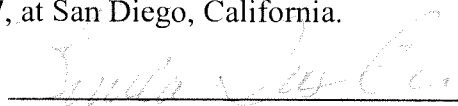


I caused to be delivered the above-described document(s) by electronic mail to all the parties in this matter.

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Bruce A. Behrens, Chief Counsel Jeffrey Benowitz, Deputy Chief Counsel Raiyn Bain Julie A. Jordan 4050 Taylor Street, MS 130 San Diego, Ca 92110 Tel: (619) 688-2531 Fax: (619) 688-6905 Email: raiyn_bain@dot.ca.gov Julie_Jordan@dot.ca.gov</p> <p><i>Attorneys for Respondents, State of California acting by and through the Department of Transportation, Division of Aeronautics</i></p> | <p>Gerald Blank Law Offices of Gerald Blank 444 West 'C' Street, Suite 210 San Diego, CA 92101 Tel: (619) 238-1111 Fax: (619) 238-1126 Email: gblank@san.rr.com</p> <p><i>Counsel for Real Party In Interest/Indispensable Party Community Airfields Association of San Diego, Inc.</i></p> |
| <p>James F. Pokorny, Esq. Law Offices of James F. Pokorny 110 West "C" Street, Suite 1504 San Diego, CA 92101 Tel: (619) 239-8142 Email: jpokorny@pacbell.net</p> <p><i>Attorney for Real Party in Interest Aircraft Owners And Pilots Association, Inc.</i></p> | <p>Kathleen A. Yodice, Esq. Yodice Associates 601 Pennsylvania Ave., N.W. Suite 875 Washington, DC 20004 Tel: (202) 737-3030 Email: Kathy.Yodice@aopa.org</p> <p><i>Attorney for Real Party in Interest Aircraft Owners And Pilots Association, Inc.</i></p> |

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 23, 2007**, at San Diego, California.



Linda M. Bernstein