

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

CARRIE GLEESON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5847

MEMORANDUM OF LAW

DATE: March 12, 2003

TO: Bruce Herring, Deputy City Manager
Will Griffith, Director, Real Estate Assets

FROM: City Attorney

SUBJECT: Payment of Rent by the Airports Enterprise Fund to the General Fund for
Montgomery Field and Brown Field Airports

QUESTION PRESENTED

Can the City require rent to be paid from the Airports Enterprise Fund to the General Fund for the use of the land on which Montgomery Field and Brown Field Airports are located?

SHORT ANSWER

No, requiring rent payments from the Airports Enterprise Fund would be a diversion of airport revenues in violation of federal law.

DISCUSSION

I. The Brown Field and Montgomery Field Property Was Acquired for the Purpose of Operating Airports on the Property.

The property for Montgomery Field was purchased by the City in 1947 and 1948 from private parties. See Attachment 1, Memorandum from Carole Herrin to George Loveland, dated June 22, 1993 [*Herrin Memo*]. The funds used to acquire the property and build improvements included \$302,216.61 in grant money from the Federal Aviation Administration [FAA]. *Herrin Memo*; see also 1973 City Att'y MOL 226 (Attachment 2). The terms and conditions of these

initial grants require that the City operate a public general aviation airport on the property. 1973 City Att'y MOL at 226.

The property for Brown Field was purchased by the City from the federal government in 1962. The deed restricts use of the property to a public airport. Any different use subjects the property to reversion on the demand of the FAA. 1973 City Att'y MOL at 227.

The City has continuously operated airports at Montgomery Field and Brown Field since their acquisition. Prior to about 1980, the airports operated from the General Fund. In about 1980, the City established the Airports Enterprise Fund. *Herrin Memo*. Using the Enterprise Fund, the City has operated the airports on a self-supporting basis, including construction of capital improvements.

II. Federal Law Prohibits the Diversion of Airport Revenues.

In addition to the initial grants received by the City for acquisition of Montgomery Field, the City has received federal grant funding over the years for improvements at both airports. *See, e.g., Schedule of FAA/State Grants* (Attachment 3). Receipt of federal grant money is conditioned upon compliance with "Assurances," that are made part of each grant agreement. (Attachment 4.) The Assurances apply throughout the useful life of the facilities developed or equipment acquired with the funds, but also apply, without limitation, to the use of "Airport Revenues." The Assurances specifically provide that, "there shall be no limit on the duration of the assurances regarding Exclusive Rights and Airport Revenues so long as the airport is used as an airport." Assurances, section B.1. Likewise, federal law restricts the use of revenues generated by any airport that is the subject of federal assistance. 49 U.S.C. §§ 47107 and 47134.

Both federal law and the Assurances require that all revenues generated by the airport be expended for capital and operating costs of the airport. *Id.* and Assurances, § C.25.a. Section C.25.b. of the Assurances gives the FAA the right to audit the use of airport revenue to determine "whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, U.S.C., and any other applicable provision of law, including any regulation promulgated by the [FAA]." Section C.25.c. provides for civil penalties and other sanctions for misuse of airport funds.

FAA regulations define what is a "prohibited use" of airport revenue:

Prohibited uses of airport revenue include . . . 1. Direct or indirect payments that exceed the fair and reasonable value of those services and facilities provided to the airport. The FAA generally considers the cost of providing the services or facilities to the airport as a reliable indicator of value.

Policies and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7,696, 7,720 (1999) [the Final FAA Policies]. The Final FAA Policies also define “unlawful revenue diversion” as including “the use of airport revenue for purposes other than the capital or operating costs of the airport.” 64 Fed. Reg. at 7,716. Further, reimbursement for capital contributions or operating expenses incurred by the airport sponsor (in this case, the City), must be sought within six years after the date the expense was incurred. 64 Fed. Reg. at 7,717; 49 U.S.C. § 47107(1)(5). Any reimbursement payments made for costs incurred more than six years ago is an illegal diversion of airport revenue. *Id.*

Rent payable from the Airports Enterprise Fund to the General Fund for use and operation of the Brown Field and Montgomery Field Airports is neither a current operating expense nor a reimbursable capital contribution. The property for each airport was acquired by the City specifically for the purpose of establishing a public general aviation airport; the City can use it for no other purpose. The capital expense incurred by the City in acquiring and improving the airport property was made decades ago. At the time of establishing the Airports Enterprise Fund, the City did not provide for payments to the General Fund for use of the property. The City has not incurred any new or recent expense in providing land for the airports. Based on these facts, it is likely that the FAA would view institution of rent payments by the Airports Enterprise Fund to the General Fund as revenue diversion in violation of the Assurances and federal law.

CONCLUSION

Use of revenues generated by the City's airports at Brown Field and Montgomery Field and deposited in the Airports Enterprise Fund are restricted by federal law. Those revenues must be used for the current capital and operating costs of the airports. As the property for the City's airports was acquired by the City many years ago for the express purpose of establishing the airports, it is not a current capital or operating cost of the airports.

CASEY GWINN, City Attorney

By
Carrie Gleeson
Deputy City Attorney

CG:ali:mm
Attachments
ML-2003-6