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MEMORANDUM OF LAW

DATE: May 24, 2005

TO: Mayor and City Council

FROM: City Attorney

SUBJECT: Questions Concerning Alternative Development Scenarios for Brown Field Airport

INTRODUCTION

Councilmember Ralph Inzunza has requested our opinion with respect to certain legal issues arising out of alternative development scenarios for Brown Field Airport [Airport].

QUESTIONS PRESENTED

1. May the City of San Diego [City] either:
 - (a) Reduce the length of the Airport runway, create a smaller Airport, and redevelop the site including the former runway land; or
 - (b) Close the Airport and redevelop the entire site?
2. What are the legal ramifications, if any, to the City for pursuing either option described above?

SHORT ANSWERS

1.
 - (a) No - not without approval from the Federal Aviation Administration [FAA] and FAA approval is unlikely.
 - (b) No - not without approval from the Federal Aviation Administration [FAA] and FAA approval is unlikely. Subject to the City finding a new airport site or there being a determination by the FAA that the Airport is no longer needed for airport purposes, it is unlikely that the FAA would approve a closure of the airport.

2. The City has previously accepted and continues to accept federal grant funds on behalf of the City's Airport Division making the City's airports federally-obligated airports under the terms of the federal grant assurances [Assurances]. A public agency with control of a public-use airport is considered a Public Agency Sponsor [Sponsor]. As a federally-obligated airport Sponsor, the City is statutorily required to make the Airport available, as an airport, for public use on reasonable terms without unjust discrimination to all types, kinds, and classes of aeronautical activities. Failure to comply with the Assurances could result in the City having to repay all federal grant funds previously received by the City's Airport Division, which would subject the General Fund to potential liability for the debt if the Airport Enterprise Fund did not have sufficient funds to cover the repayment.

Further, the City acquired the Airport from the federal government under the Surplus Property Act, via a deed that contains a use restriction requiring the reversion of the entire Airport property should the City no longer operate the Airport as an airport. If the City were to violate the terms of the transferring property deed, the City could also be required to repay all grant funds previously received by the City's Airport Division.

Finally, any reduction of the area being used for the Airport or redevelopment of the Airport property for non-airport uses would subject the City to potential litigation from airport tenants based on contractual obligations contained in their leases.

In order to avoid the legal consequences and potential loss of the Airport property, the City must continue to comply with all laws and regulations and operate Brown Field Airport as it is currently configured.

BACKGROUND

The Airport is on Otay Mesa and is covered by the Otay Mesa Community Plan, which is currently being updated. As part of the update process, Councilmember Inzunza has asked that the following three alternative development scenarios for the Airport be analyzed:

- (a) No change; continue operation of the Airport in its current configuration;
- (b) Reduce the length of the runway and create a smaller airport; redeveloping the land freed up by the shortening of the runway; or
- (c) Take the proper steps to close the Airport; redevelop the entire area for other productive uses.

Certain legal issues arise as a result of these scenarios. In addressing them, we first provide some history.

By Quitclaim Deed [Deed] dated September 1, 1962, the United States of America, acting by and through the Administrator of General Services, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Property Act of 1940 (63 Stat. 377), as amended, and the Surplus Property Act of 1944 as amended thereby, transferred the property now known as Brown Field Airport to the City, subject to the restrictions contained in the Deed. City Resolution No. 173066, accepting the Deed from the United States of America, was passed and adopted on October 16, 1962.

Relevant provisions of the Deed include:

- the term “airport” is defined to include all of such land, buildings, structures, improvements and equipment conveyed to the City;
- it is provided that the entire landing area and all structures, improvements, facilities and equipment transferred by the Deed shall be maintained for the use and benefit of the public at all times and that such maintenance shall be required as to the structures, improvements, facilities and equipment only for the remainder of their estimated life, as determined by the Administrator of the Federal Aviation Agency;
- the property conveyed can be transferred by the City only with the approval of the Administrator of the FAA, or his successors, and only with the proviso that any such subsequent transferee assumes all the obligations imposed upon the City; and
- the property transferred by the Deed cannot be used, leased, sold, salvaged, or disposed of by the City for other than airport purposes without the written consent of the Administrator of the FAA, after a determination by the Administrator that the property can be used, leased, sold, salvaged or disposed of for other than airport purposes without materially and adversely affecting the development, improvement, operation or maintenance of the Airport.

ANALYSIS

1. The Deed Contains Specific Use Restrictions.

As stated above, the City received the Airport property from the federal government under the Surplus Property Act via a Deed that contained very specific use restrictions. The Deed specifically set forth that “the entire landing area, as defined in GSA Regulation 2-I-102.01a.10, and all structures, improvements, facilities and equipment in which this instrument transfers any interest shall be maintained as part of the airport for the use and benefit of the public” This provision clearly intended that the entire runway be maintained for continued

airport use. Further, by setting forth that the City could only transfer the property “with the proviso that any such subsequent transferee assumes all the obligations imposed upon the City,” the idea of conveying the property or any portion of it for any use other than aviation, would not be allowed without an express finding from the FAA that such use was in the best interest of the national airport system.

Accordingly, either (a) reducing the length of the runway to create a smaller airport and redeveloping the land freed up by the shortening of the runway or (b) closing the Airport and redeveloping the entire area for other productive [non-aviation] uses, would require approval of the FAA.

2. Brown Field Airport is a Federally-Obligated Airport that must Comply with All Grant Assurances Regarding Airport Use.

Pursuant to the provisions of Title 49, U.S.C., subtitle VII, as amended, a number of contractual obligations referred to as Assurances are incorporated into and become part of all grant agreements each time the City accepts federal grant funds for City airports. The Assurances require, in part, that the airport Sponsor make the airport available for public use as an airport and not permit any activity that would interfere with its use as an airport during the period of federal interest. The term of the Assurances extends for the useful life of each grant-funded project, not to exceed twenty years from the date of each grant acceptance. The City has accepted a number of federal grants within the last several years and expects to receive additional grant funds during 2005. As a result of the City having accepted federal grant funds, the Airport is deemed a federally-obligated airport for at least the next twenty years. Failure to comply with the assurances would give the FAA the contractual right to demand repayment of all grant funds previously paid to the City’s Airport Division.

3. An FAA-Approved Closure is Unlikely Because Brown Field is an Integral Part of the National and Local Airport Systems.

In 2004, the Airport ranked as the 216th busiest of the 492 airports in the nation with an operating traffic control tower. Additionally, the Airport is sixth out of the twelve busiest public-use airports in San Diego County for takeoffs and landings, and is an International Port of Entry serviced by the United States Customs Service.

The Secretary of Transportation may only waive the condition of a Surplus Property Act land transfer (like that that gave the Airport to the City) if the Secretary decides (a) that “the property no longer serves the purpose for which it was given,” or (b) that “the waiver will not prevent carrying out the purpose for which the conveyance was made and is necessary to advance the civil aviation interests of the United States.” 49 U.S.C. section 47153(a)(1). As the sixth busiest airport in the County, City officials would have a heavy burden trying to persuade the FAA that the Airport was no longer serving the purpose for which it was given. Further, it is generally accepted that space for general aviation is at a premium at airports in the County. Therefore, closure of a busy general aviation airport would not be advancing the civil aviation interests of the United States.

In the FAA's Interpretive Order 5190.6A (10/1/89), titled "Airport Compliance Requirements," the FAA states that "[a] total release, permitting the sale and disposal of real property acquired for airport purposes under the Surplus Property Act, shall not be granted unless it can clearly be shown that the sale of such property will benefit civil aviation." The Order provides that the FAA's general policy regarding the release of surplus property allows property to "be released for sale or disposal upon a demonstration that such disposal will produce an equal or greater benefit (to the airport or another public airport) than the continued retention of the land." The Order also states that an airport owner requesting a release must justify the request, and could do so by "showing that the expected net proceeds from the sale of the property at its current market value will be required to finance items of airport development and improvement." *Id.* at 1194-1195.

A major goal of the National Transportation System is the preservation, improvement, and development of the national airport system. The existing national airport system, if it is to continue serving commercial and general aviation safely and efficiently, must preserve the existing infrastructure and accommodate growth. Both Montgomery and Brown Field Airports play an important role in the airport system by providing relief to the San Diego International Airport and by serving general aviation in general. As one of the busiest airports in the country and sixth busiest in the County, it is unlikely that the FAA would allow the Airport to be closed.

4. If Ever Allowed, Closure Would Take Years and Would Be Costly.

With the appropriate federal approvals, it may be possible to close a federally-obligated airport by first locating a new site, then building a new airport and moving all the aviation activities to the new airport prior to closing the old airport. A case in point is the City of Denver, Colorado, which, because it opened a new airport, is one of the few cities in recent years allowed to close an airport.

Additionally, within statutory limits, the FAA, if requested, may be persuaded to act to release or amend any airport agreement to the extent that such action will protect, advance, or benefit the public interest in civil aviation. The case of *Friends of Richards-Gebaur Airport v. Federal Aviation Administration*, 251 F. 3d 1178 (8th Cir. 2001), sets forth a situation where the FAA allowed an airport closure under very strict conditions. In 1998, the City of Kansas City, Missouri, sought permission to close the Richards-Gebaur Airport because it had consistently lost money. Between 1983 and 1997, losses exceeded \$18 million and were subsidized by the City's two commercial airports. The airport's losses were projected to continue at more than \$1.5 million annually. In 1997, in an effort to pursue an opportunity to redevelop the land into a new intermodal rail-truck freight distribution center, Kansas sought permission to close the airport. *Id.* at 1183. In approving the closure, the FAA's memorandum agreement stated that "the FAA found that although the facility was maintaining operation as a general aviation airport, it was able to do so only at substantial losses which were heavily subsidized by Kansas City's other commercial airports, draining funds otherwise available to those facilities. The FAA found that this financial burden was not necessary in a metropolitan area served by several other

airports that remain available to general aviation.” *Id.* at 1183. The FAA concluded that the terms it attached to the release and closure of the airport would result in a net benefit to aviation. *Id.* at 1183. However, even though the FAA allowed Kansas City to close the subject airport, the City was required to deposit \$5 million into an escrow account to be dispersed by the FAA for federally eligible aviation improvement projects in the Kansas City area and, for the next twenty years, to deposit all the net proceeds from the projected lease (of the property which used to be the airport) into its aviation account for use solely for specified and general aviation projects. *Id.* at 1183-1184.

Accordingly, even though Kansas City was allowed to close the Richards-Gebaur Airport, the deal was structured in such a way that the redevelopment of the airport property would produce revenue that could only be utilized to advance aviation development in the Kansas City airport system. Specifically, the FAA found that “highly unusual circumstances exist that would support a finding that the release and closure of the Richards-Gebaur Airport would result in a net benefit to aviation” *Id.* at 1193. The facts of this case are not relevant to the City’s airport system in that the City’s airports are self-sustaining.

Also, an airport’s Sponsor that did not receive its airport property via the Surplus Property Act (such as Montgomery Field Airport) could decide that it no longer wants to comply with the terms and conditions of the Assurances or operate its airport. This could conceivably be accomplished without FAA approval. However, the Sponsor would have to stop accepting federal funds for a period that extends twenty years from the last date of acceptance of grant funds and, during the duration of the remaining twenty years or portion thereof, the Sponsor would be required to maintain and operate the airport in a safe and serviceable condition in accordance with the minimum standards as may be required or prescribed by applicable Federal, State and local agencies for maintenance and operation. Essentially, an airport’s Sponsor would have to support itself without the aid of federal funds for twenty years – a very costly endeavor which is why most airports are dependant upon federal funds. If the airport could not support itself during that time period, the Sponsor would be forced to seek funds from non-federal sources such as a City’s General Fund.

CONCLUSION

If, without prior FAA approval, the City attempted to reduce the length of the Airport’s runway or close the entire Airport so that the freed up land could be redeveloped for other productive uses, the City would be in violation of the terms and conditions contained in the original transferring Deed and of the contractual obligations contained in the federal grant Assurances agreed to by the City. The FAA would not only have the right to stop both property-use changes at the Airport, the FAA could sanction the City for such actions and take over the Airport or give control of the Airport to another agency. Additionally, the FAA could require that the City repay all grant funds previously granted to the City for both Brown Field and Montgomery Field Airports.

In the event of either property-use change, the City could also be sued by the long-term leaseholders on the airport for damages resulting from the City's attempted reduction or closure of the airport.

If the City is to retain the Brown Field Airport property, the City is required to continue operating Brown Field Airport as an airport with its current landing areas intact. Additionally, the City must continue its compliance with all laws, regulations and Assurances, which includes making Brown Field Airport available as an airport for public use, on reasonable terms without unjust discrimination to all types, kinds, and classes of aeronautical activities.

MICHAEL J. AGUIRRE, City Attorney

By

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DJB:mm

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