

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

ABBE WOLFSHEIMER
DEPUTY CITY ATTORNEY

Michael J. Aguirre
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: October 3, 2006

TO: Jim Waring, Deputy Chief Operating Officer for Land Use and Economic Development

FROM: City Attorney

SUBJECT: Airport Enterprise Fund

QUESTION PRESENTED

On June 28, 2006, Jim Waring, Deputy Chief Operating Officer for Land Use and Economic Development, posed two questions to the Office of the City Attorney:

1. If the City develops airport properties and enhances their aviation utility yet, as a part of that effort, brings in “non-aviation” businesses, etc. (none of which interfere with airport operations), must all the revenue generated stay in the Airport Enterprise Fund [AEF]?
2. If the City reimburses the FAA for its grants, can the “extra” revenue generated be used by the City for non-aviation purposes?

SHORT ANSWER

1. Yes. The airport properties may be leased for non-aeronautical purposes upon written approval of the FAA Administrator, but all revenue generated by these leases must be placed in the AEF and used for aeronautical purposes.
2. Probably not. Surpluses are discouraged, but if they do accrue, they must be placed in the AEF. Still, because the law is silent on reimbursement of grant monies in exchange for the legal use of surplus funds, this issue might be negotiable.

BACKGROUND

In 1947 and 1948, the City purchased the properties known as Montgomery Field from a number of private owners. To acquire and improve these properties, the City applied for and received \$302,216.61 in grant monies from the FAA. The terms and conditions of the grant, called Assurances, require that the City operate a public general aviation airport on the property.

In 1962, the City purchased the property known as Brown Field from the federal government. The deed restricts the use of the property to that of a public airport; use for non-aviation purposes can cause the property to revert to the federal government upon FAA demand. Since its purchase, Brown Field has received multiple federal grants and thus it, too, must comply with all grant Assurances. *CA Memorandum of Law 1973 @227*

DISCUSSION

A. Diversion of Airport Revenues to Other Funds

It is permissible to develop airport property for non-aeronautical uses upon the written approval of the FAA Administrator but both Federal law and the Assurances mandate that all revenue generated by these airports is to be expended for their capital improvements and their operating costs. *49 U.S.C. § 47133; 49 U.S.C. § 47107(b); Assurances § 25 b.* City law and policy is in accord. Until 1981, these airports were supported by the City's general fund. The City then formed an AEF to make these airports self-sustaining.

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.* The Assurances require the City to comply with all federal laws, regulations, executive orders, policies, guidelines and requirements related to the use of federal funds for airport projects. *Assurances § C.1.* Together, the Federal law and Assurances specifically provide that airport revenues "may not be expended for any purpose other than the capital or operating costs of:

- a. the airport;
- b. the local airport system; or
- c. any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property."

49 U.S.C. § 47107 (b)(1); § 47133; Assurances § C.25 a.

The Final FAA Policies reiterate these concepts. They define “unlawful revenue diversion” as “the use of airport revenue for purposes other than the capital or operating costs of the airport.” *Policies and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7716, 7696, 7720 (1999). They cite *U.S.C. § 47107 (1) (2) (A-D)* which expressly prohibits “the diversion of airport revenues through:

- a. Direct payments or indirect payments that exceed the fair and reasonable value of those services and facilities provided to the airport;
- b. Use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems...”

It is therefore clear that all revenues generated by aeronautic and non-aeronautic uses at Brown Field and Montgomery Field must be placed in the AEF and expended only for capital improvements and operating costs of these airports.

B. Reimbursement for Federal Grants

The law is silent as to the reimbursement of the Federal government for funds it has granted for aeronautical purposes - although reimbursement may be required along with civil penalties and other sanctions where an airport operator illegally diverts airport revenues. Assurances § C. 25 c. Perhaps, code and case law is silent because no grantee airport has ever returned a federal gift or had the wherewithal to pay back and thereby cancel the government’s gift. One may rationally presume that the Federal government would accept this largesse but one cannot presume that, in exchange, the FAA would permit the diversion of surplus funds for non-airport uses. Still the FAA Administrator or Secretary of Transportation may be willing to negotiate this matter.

C. Accumulation and Use of Surplus Revenue

Federal law, however, does address the use of surplus funds. In general, airport proprietors “must maintain a fee and rental structure that ... makes the airport as financially self sustaining as possible.” To implement the Assurances, “charges to aeronautical users must be reasonable and not unjustly discriminatory.” *U.S.C. § 47107 (a)(b)* However, the subsequent section provides: “In establishing new fees and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenues may be spent, including reasonable reserves and other funds to facilitate financing and to cover contingencies. While fees charged to non-aeronautical users are not subject to the reasonableness requirement or the Department of Transportation Policy on airport rates and charges, the surplus funds accumulated from those fees must be used in accordance with *49 U.S.C. § 47107(b)*.”

The Assurances impliedly address surplus airport property. While the Assurances must be applied to “revenues generated throughout the useful life of the facilities developed or the equipment acquired with the funds” and while “there shall be no limit on the duration of the assurances regarding...Airport Revenues so long as the airport is used as an airport” *Assurances §B.1*, unneeded airport property may be leased or sold upon written approval of the FAA.

The Assurances provide that: “For land purchased under a grant for airport development purposes, it will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary (of Transportation) an amount equal to the United States proportionate share of the fair market value of the land. That portion of the proceeds of such disposition which is proportionate to the United States share of the cost of acquisition of such land will: (a) upon application to the Secretary, be reinvested in another eligible airport improvement project or projects approved by the Secretary at that airport or within the national airport system, or (b) be paid to the Secretary for deposit in the Trust Fund if no eligible project exists. *Assurances § C. 31 (b)*. (Note that the City reimbursed the Secretary of Transportation upon its sale of Montgomery Field property to General Dynamics.)

CONCLUSION

Revenues generated by the City airports at Brown Field and Montgomery Field must be deposited in the Airports Enterprise Fund and expended only for capital improvements and operating costs of these airports. Surpluses are generally discouraged but when they accrue, they, too, must be placed in the Airport Enterprise Fund. However, unneeded airport property may be conveyed upon approval by the FAA Administrator, and once the federal government is compensated for its investment, the balance of the proceeds may be used by the City.

MICHAEL J. AGUIRRE, City Attorney

By
Abbe Wolfsheimer
Deputy City Attorney