

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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

Via Facsimile

June 27, 2007

Patrick P. Gunn, Esq.
Cooley Godward Kronish LLP
4401 Eastgate Mall
San Diego, CA 92121

Re: City of San Diego, et al. v. Sunroad Centrum, L.P., et al.
San Diego Superior Court, Case No. GIC 877054

Dear Mr. Gunn:

We write to respond to your letter of June 26, 2007, in which you agree that Sunroad will comply with the City's Restoration and Mitigation Order ("Order") dated June 21, 2007, and that Sunroad will reduce the height of the Sunroad Centrum Tower to comply with federal, state and local law. While we appreciate Sunroad's statement of its intent to comply with the Order, a few points must be made in response to your letter:

- You contend that Sunroad has no obligation to comply with state law because there are no California Department of Transportation regulations in place. Administrative regulations to guide Sunroad's conduct obviously are unnecessary because the Public Utilities Code itself explicitly sets forth the law: "***No person shall construct ... any structure at a height which exceeds the obstruction standards set forth in the regulations of the Federal Aviation Administration relating to objects affecting navigable airspace....***" Cal. Pub. Utilities Code § 21659(a) (emphasis added). Leaving no doubt as to Sunroad's legal obligations, Caltrans wrote to Sunroad on September 14, 2006, on September 29, 2006, on October 13, 2006, on October 25, 2006, on November 9, 2006, on November 27, 2006, and on January 19, 2007, each time advising Sunroad that the Tower is an airport hazard if it exceeds a height of 160 feet. On May 8, 2007, Caltrans filed a declaration under penalty of perjury, stating that "the Sunroad Tower remains in violation of PUC § 21659 ***constituting an on-going hazard to the public and all who utilize Montgomery Field airport.***" (Emphasis added). Last week, Caltrans filed another declaration with the San Diego Superior Court under penalty of perjury, confirming that "the Sunroad Tower violates California Public Utilities Code Section

21659(a), and is an ‘airport hazard’....” There can be no possible question that the Tower at its current height violates state law. Sunroad’s reliance upon unnecessary “regulations” to justify its violation of plain statutory law is inexcusable.

- You state that the City “conspicuously omitted” from its Order “any mention of public safety.” Let there be no confusion: Public safety is paramount to the City and the other legal authorities. That is why the Federal Aviation Administration issued a Notice of Presumed Hazard in April of 2006, followed by a Determination of Hazard on August 11, 2006, expressly finding that the Tower at 180 feet has a “*substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft....*” (Emphasis added). In its recent sworn declaration, Caltrans states under penalty of perjury that “*this hazard to air navigation...threatens the safety of all California citizens.*” (Emphasis added). Because these authorities—which are charged by law with regulating air safety—have made final and binding determinations that the Tower is unsafe as constructed, the City has acted and will continue to act to protect the public, both on the ground and in the air, from the risk of catastrophic results which your client’s conduct has created.
- You state that the Mayor and Development Services Department have made it clear that the City will accept nothing less than deconstruction of the building to an FAA-approved height. That is correct—because that is what superior federal and state law requires. The City is enforcing that law, as it must under the United States and California Constitutions. As Caltrans stated in its June 22, 2007 Declaration to the court: “Caltrans has looked to the City Attorney’s Office to be the lead enforcement agency in obtaining Sunroad’s compliance with State law and elimination of the airport hazard resulting from the Tower—hence the reason for Caltrans’ letters to the City of San Diego. As such, *the City Attorney’s office is a necessary link to the resolution of this hazard to air navigation which threatens the safety of all California citizens.*” (Emphasis added). Thus, we agree with you that Sunroad’s legal position is “futile,” not because the merits of any administrative appeal have been pre-judged, but because controlling federal and state law could not be more clear, and the City’s duty to enforce that law cannot and should not be shirked.
- Next, you refer to the “precipitous” emergency course of action that the City may have to take to raze the unlawful floors of the Tower. If Sunroad had timely complied with federal and state law, the City would not have been required to consider such action. However, Sunroad’s scofflaw conduct and recalcitrance have forced the City to develop its own contingent safety plan, which the City will implement if necessary, as discussed further below. The City has been enormously patient and tolerant of Sunroad’s defiance of the law, and Sunroad has attempted to use that past forbearance to its litigation advantage. Make no mistake: the City’s tolerance is at an end.

- Finally, you indicate that Sunroad will comply with the Order “under protest and with full reservation of rights to seek all appropriate compensation.” There is no question that Sunroad constructed the Tower with full knowledge that the Tower violated federal and state law—the FAA’s Notice of Presumed Hazard was issued long before Sunroad framed the steel Tower to the unlawful height. Sunroad even misled the FAA into believing that Sunroad would comply with federal law. For Sunroad now to contend that it relied upon a *City building permit* to excuse Sunroad from complying with *federal and state aviation restrictions* is as ridiculous as saying a City building permit to construct a restaurant also grants a state liquor license. Sunroad simply turned a blind eye to the requirements of federal and state law that it knew existed, and ran the risk that it could resolve matters with the FAA and Caltrans—a gamble which failed. It is Sunroad that will bear the consequences of this calculated risk—not the City. The City cannot possibly be liable for enforcing the law to require removal of an unlawful building.

Turning to next steps: We appreciate Sunroad’s willingness to now comply with federal and state law and the Order. To ensure continued rapid progress towards restoring public safety, the City has hired experts to monitor the mitigation and removal of all parts of the Sunroad Tower that are unlawful, and to ensure that Sunroad safely and fully complies with the Order. The City’s experts will intervene in the work if that is necessary to safely and completely eliminate all portions of the Tower that exceed the maximum legal height of 160 feet above ground level (“AGL”).

In addition, the City will proceed with an Abatement Notice and Order tomorrow, which will not be served unless and until the City determines that Sunroad has refused to comply with terms of the existing Order. If Sunroad fails to comply with the terms of the Order, the City will assess administrative penalties in the amount of \$2,500 per day until the Tower is less than 160 feet AGL.

The City will also seek recovery of its costs and fees, as authorized by law, including San Diego Municipal Code Sections 12.0608(f) and 121.0312(c). The fees and costs the City will seek to recover include, but are not necessarily limited to, the costs incurred by the Development Services Department to, among other things, investigate and document violations; the costs of City abatement if that becomes necessary; the costs incurred by the Mayor and his office; the costs incurred by the City Attorney’s Office to investigate and prosecute the nuisance abatement action and to defend Sunroad’s Cross-Complaint in that action; and the costs incurred by the City to pay for outside counsel to defend Sunroad’s Cross-Complaint in that action. We apprise you of these remedies so that your client is on notice of the City’s intent in this regard.

Despite the litigation between Sunroad and the City, and the foregoing points, we appreciate Sunroad’s willingness to now embark on a productive and responsible course. To that end, the City will consider working with a respected mediator to resolve all remaining disputes, and to facilitate progress towards rapid restoration of public safety. The City’s outside counsel has already had discussions with you to further that objective. We believe that, working together with Sunroad, we can put this unfortunate chapter behind us, allowing the Mayor and City

Patrick P. Gunn, Esq.

-4-

June 27, 2007

Attorney to return to pressing City business, and allowing Sunroad to return to the lawful pursuit of its business endeavors. We look forward to working with you to ensure that the Tower is reduced to a safe and lawful height.

Very truly yours,



MICHAEL J. AGUIRRE, City Attorney

MJA:meb