

**INTERIM REPORT NO. 33  
SPECIAL REPORT TO THE ATTORNEY  
GENERAL REGARDING SUNROAD  
CENTRUM 12**

**REPORT OF THE  
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## I. BACKGROUND

General Dynamics, a military contractor, formerly operated an industrial facility on a 242-acre parcel of land neighboring City-owned Montgomery Field airport. The company, which once employed 7,000 at the Kearny Mesa site, closed the facility and began working on plans to develop the land for commercial and industrial use.

On 2 December 1997, the San Diego City Council approved a plan submitted by General Dynamics to develop a high-density, mixed-use retail, commercial and industrial business park.<sup>1</sup> Specifically, a plan was approved to construct a series of complexes to include retail stores, office buildings, and industrial or manufacturing centers. The project, called New Century Center, essentially split the parcel into two parts. The project designated the western 85 acres for up to 1.4 million square feet of retail, entertainment and commercial land uses. The eastern 158 acres of the property was zoned to permit the construction of up to 3 million square feet of industrial and business park land uses.<sup>2</sup> The project, as approved, also included plans for road, public amenities, the retention of seven acres for Missile Park and four acres for a vernal pool conservation area.

In 1998, General Dynamics sold the New Century project to LNR Kearny Mesa Inc., a subsidiary of Lennar Partners.

LNR Kearny Mesa proposed changes to the project, which was then named “San Diego Spectrum.” The change to the project opened up the potential for multi-residential housing on the project site. Zoning maps were changed to permit construction of 448 units of multi-residential housing and another 550 units in a separate portion of the project, bringing the total number of residential units to 998. These changes were approved by the City on 3 October 2000.<sup>3</sup>

As a result of the housing crisis in the City of San Diego,<sup>4</sup> the City encouraged development of more affordable housing at San Diego Spectrum.

In December 2000, Sunroad Enterprises purchased 40 acres of land from Lennar.<sup>5</sup> Sunroad Centrum Partners submitted an application in February 2001 to build 570

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<sup>1</sup> Minutes of the 2 December 1997 meeting of the San Diego City Council. (Exhibit 1)

<sup>2</sup> See at *Id.*

<sup>3</sup> Minutes of the 3 October 2000 meeting of the San Diego City Council. (Exhibit 2)

<sup>4</sup> Branscomb, Leslie Wolf; “San Diego lags U.S. in home ownership”; *San Diego Union-Tribune*; 23 May 2001. (Exhibit 3)

<sup>5</sup> Potter, Matt. “Breaking Stories: Aaron’s Gold.” *San Diego Reader*. 1 February 2007. (Exhibit 4)

additional housing units.<sup>6</sup> According to the proposal, the increased dwelling units required Sunroad to provide 3.42 acres of land for park space and fund its design and construction. The City Council approved the changes on 29 January 2002.

Sunroad submitted another series of proposed changes to what was now called the Sunroad Centrum project late in 2002 to increase the residential component by another 570 units. The proposal included an item that, if approved by City Council, would require Sunroad to increase the amount of affordable housing units from 10 percent to 20 percent of the 570 units.<sup>7</sup> Sunroad's proposal to increase the residential component of the overall development was forwarded directly to the Mayor's office in January 2002.<sup>8</sup> The proposal was approved at the 12 November 2002 meeting of the City Council by a vote of 8-to-0.<sup>9</sup>

Two years later, at the 10 February 2004 meeting of the San Diego City Council, then-Mayor Dick Murphy announced that the leadership of Sunroad Enterprises pledged a donation of \$1 million to the City to buy a helicopter for San Diego's Regional Fire and Rescue Helicopter Program.<sup>10</sup> According to the Sunroad Foundation, a subsidiary of Sunroad Enterprises, "Over the next five years, for every car sold at Toyota Chula Vista, Pacific Honda, Kearny Mesa Ford, Scion Chula Vista, Kearny Mesa Infiniti, Kearny Mesa Subaru, Kearny Mesa Hyundai, Kearny Mesa Kia and Toyota California, every boat slip rented at Sunroad Resort Marina and every round of golf sold at Maderas Golf Club, Sunroad will make a donation to the fund."<sup>11</sup>

Meanwhile, the Sunroad Centrum construction project continued to move through the City's planning processes. On 23 January 2006, Deputy City Engineer Lee Hennes sent a memorandum to City Clerk Elizabeth Maland stating that the project had been approved. The memo stated:

The City Engineer has examined [sic] and states that he can make the necessary findings to approve the final map 'Sunroad B –

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<sup>6</sup> 23 January 2002. City of San Diego Manager's Report No. 02—19. Subject: "Sunroad at San Diego Spectrum – Initiation of a Development Agreement Amendments. Council District 6. Process Five." (Exhibit 5)

<sup>7</sup> 6 November 2002. City of San Diego Manager's Report No. 02-257. Subject: "Sunroad at San Diego Spectrum – Amendments to the Progress Guide and General Plan; Kearny Mesa Community Plan; new Century Center Master Plan, Development Standards, and Design Manual; Amendments to the General Dynamics Development Agreement; and a Rezone. Council District 6. Process 5." (Exhibit 6)

<sup>8</sup> 24 January 2002 and 25 January 2002 letters from Sunroad attorney Paul Robinson to Mayor's office. (Exhibits 7 and 8)

<sup>9</sup> Minutes of the 12 November 2002 meeting of the San Diego City Council. The meeting minutes reflect what Council member Scott Peters was absent for the vote on the Sunroad proposal. (Exhibit 9)

<sup>10</sup> Minutes of the 10 February 2004 meeting of the San Diego City Council. (Exhibit 10)

<sup>11</sup> Sunroad Foundation announcement. Source: [www.sunroadfoundation.org/index.htm](http://www.sunroadfoundation.org/index.htm). (Exhibit 11)

Promenade...Specifically, the City Engineer has caused the map to be examined and has made the following findings:

- (1) The map substantially conforms to the approved tentative map, and any approved alterations thereof and any conditions of approval imposed with said tentative map.
- (2) The map complies with the provisions of the Subdivision Map Act and any local ordinances applicable at the time of approval of the tentative map.
- (3) The map is technically correct.<sup>12</sup>

The maps included with the memorandum outline the lot sizes and the easements required for public amenities such as electrical work and lighting. The final zoning map was approved by the San Diego City Council on 6 February 2006.<sup>13</sup>

Something, however, went wrong in the planning and development process. The project led to construction of a 180-foot building that has been deemed a hazard by the FAA and a threat to the safety of pilots. This report will detail how representatives of the City of San Diego repeatedly ignored warnings that the building was too high and did not heed warnings from state and federal oversight agencies that the building was a “hazard” to the safety of pilots, and later misled the public about the process.

## **PART I: SUNROAD CENTRUM BUILT IN VIOLATION OF FEDERAL AND STATE SAFETY CODES**

### **A. CENTRUM 12**

Sunroad officials had been made aware of the FAA concerns about the height of the Centrum 12 building in early April 2006. Centrum 12 architect Dan Much forwarded an e-mail to Sunroad officials on 3 April 2006 explaining that FAA Obstruction Evaluator Karen McDonald would be making an “obstruction evaluation” of the Centrum 12 building.<sup>14</sup> The e-mail and related response from a Sunroad official provided as follows:

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<sup>12</sup> 23 January 2006 memorandum from Lee Hennes, Deputy City Engineer, to Elizabeth Maland, City Clerk. Subject “Approval of the final map ‘Sunroad B – Promenade’” (Exhibit 12)

<sup>13</sup> Minutes of the 6 February 2006 meeting of the San Diego City Council. (Exhibit 13)

<sup>14</sup> 3 April 2006 e-mail from Dan Much, architect for Sunroad, to Aaron Feldman, owner of Sunroad Enterprises, and Tom Story, Vice President of Development for Sunroad Enterprises. Subject: regarding Centrum, FAA Obstruction Evaluation, (cc’s and e-mail addresses omitted). (Exhibit 14).

From: Dan Munch  
Sent: Monday, April 03, 2006 1:20 PM  
To: Dan Feldman; Tom Story; Craig Bachmann  
Subject: Centrum, FAA Obstruction Evaluation

All-

I spoke with John Cruz this morning and asked him if Centrum was reviewed and approved by the airport authority or FAA. Apparently, no such review took place. In speaking with Jeannette Temple briefly, he stated that if such a review was necessary, they would have caught it soon after we submitted. He didn't know why the FAA would be getting involved this late in the game, and requested I try to find out what triggered their review.

I then spoke with Karen McDonald with the FAA Obstruction Evaluation Dept. She explained that this process started a couple weeks ago when a letter from a "concerned citizen" crossed her desk, inquiring as to whether the project they read about in the newspaper had been reviewed for its impact on the circling procedures for Montgomery...

So even though the building doesn't meet the standard criteria triggering FAA review, they have requested we submit the project so that they can issue an official "airspace determination" in order to appease Joe Citizen.<sup>15</sup>

As anticipated, the FAA issued a Presumed Hazard letter on 24 April 2006 to Sunroad Enterprises because the Centrum 12 building planned to stand 180 feet tall would have "an adverse impact on the published circling instrument flight procedures utilized at Montgomery Field."<sup>16</sup> The FAA letter advised the "maximum acceptable height of the structure at this site is 160 feet above the ground."<sup>17</sup> After receiving notice that the Centrum 12 office building was a presumed hazard, Sunroad executives continued to construct the building to 180 feet.

When City officials found out about the "Presumed Hazard Notice" on 19 June 2006, San Diego City Planning Department Planner Tait Galloway informed senior officials in the City's Development Services Department of the FAA's hazard warning

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<sup>15</sup> See at *Id.*

<sup>16</sup> 24 April 2006 FAA Notice of Presumed Hazard. (Exhibit 15). 20 June 2006 e-mail from Karen McDonald, Air Traffic Airspace Specialist for the FAA. (Exhibit 16)

<sup>17</sup> 20 June 2006 e-mail from FAA Hazard Evaluator Karen McDonald to Dan Munch, Sunroad Architect, and Craig Bacchman, Vice President of Construction for Sunroad; Subject: "2006-AWP-1638-OE; Carbon copied: Kelley Broughton, Deputy Director of the City's Development Services Department, and Tait Galloway, Planner for the City of San Diego, Bruce Beard, James Machado, Kevin Haggerty, and Eric Nelson, representative of the County of San Diego. (Exhibit 17).

regarding the Centrum 12 office building: Galloway issued the following e-mail to his senior officials in the City's Development Services Department:

From: Tait Galloway  
To: Halbert, Gary; Broughton, Kelly  
Date: 6/19/2006 12:30 PM  
Subject: FAA Issue w/Sunroads Centrum 12 (PTS 64541)

In response to the voicemail that Kelly forwarded to me concerning the FAA, the FAA has a significant issue with Sunroads Centrum 12 project in Kearny Mesa concerning the building's height.

The proposed project is a 12 story (180 ft) 306,000 sq. ft. office building. It appears that the project is currently in SCR (PTS 64541) and a building permit is being inspected (PTS 84081).

The FAA wants the building height reduced to 160 ft as stated in a letter to the project applicant. Also, the FAA has requested to me that the other proposed projects near this project [sic] to be submitted to the FAA.

This proposed project would affect flight operations at Montgomery and affect the City's ability to receive future FAA funding for Montgomery.<sup>18</sup>

The FAA, meanwhile, sent Sunroad officials another letter that stated the plan for the Centrum 12 building at 180 feet was a hazard. The second Determination of Hazard was sent to Sunroad on 20 June 2006 by the FAA:

Subsequent to the issuance of our letter, it has come to the attention of the FAA that this building is under construction. After the 60 days has elapsed from April 24, 2006, with no resolution of the issue, our office will be in a position to issue a Determination of Hazard to Air Navigation for any height greater than 160 feet above the ground for this aeronautical study 2006-AWP-1638-OE.<sup>19</sup>

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<sup>18</sup> 19 June 2006 memorandum from Tait Galloway to Gary Halbert and Kelly Broughton Re: FAA Issue w/Sunroads Centrum 12. (Exhibit 18).

<sup>19</sup> 20 June 2006 e-mail from FAA Hazard Evaluator Karen McDonald to Dan Munch, Sunroad Architect, and Craig Bacchman, Vice President of Construction for Sunroad; Subject: "2006-AWP-1638-OE; Carbon copied: Kelley Broughton, Deputy Director of the City's Development Services Department, and Tait Galloway, Planner for the City of San Diego, Bruce Beard, James Machado, Kevin Haggerty, and Eric Nelson, representative of the County of San Diego. (See Exhibit 17).

## B. SUNROAD AGREES TO LOWER BUILDING TO 160 FEET

On the same day that Sunroad officials received this second warning, company officials agreed to the 160-foot height limit in a statement to the FAA. Craig Bachmann, director of construction operations for Sunroad, stated in a letter to the FAA that:

[W]e agree to the 160 foot height specified in your letter of April 24, 2006 which stated that we and the FAA needed to reach a resolution not later than 60 days from the date of your letter.<sup>20</sup>

Gary Halbert, Director of the City's Development Services Department, also understood the building was going to be limited to the 160-foot height. Halbert said in an interview that a Sunroad attorney stated specifically that the building would be constructed to the lower height. Halbert said that after receiving this information, he then notified his immediate superiors, including Jim Waring. According to the interview report:

The first time that Gary Halbert can recall hearing about a height issue with this project was in late May or June 2006. Tait Galloway had informed him of a phone call he received from the FAA stating that the Sunroad project encroached on the air space buffer zone and this was going to be listed as a 'presumed hazard.' Sunroad had a fully vested agreement with the city of San Diego, which was permitted by the city....

Gary Halbert stated that in June 2006, he attended an Airport Terminal Advisory Group (ATAG) meeting with Barbara Lichman, who is an attorney working for Sunroad on this project. Gary Halbert was informed by Ms. Lichman that 'Sunroad would agree to halt construction on the building at 160 feet.'...Gary Halbert told others in DSD and his boss (Jim Waring) that Sunroad would stop at 160 feet and he assumed that the problem was solved.<sup>21</sup>

According to Jim Waring's schedule, he held a meeting between 11:15 a.m. and 11:30 a.m. with Gary Halbert on 20 June 2006. The notes of the meeting state, "per JS."<sup>22</sup>

A few days later, Sunroad filed a new Form 7460-1, an FAA permit application. The document submitted to the FAA by Sunroad stated the Centrum 12 building would have a "maximum height of 160."<sup>23</sup>

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<sup>20</sup> 20 June 2006 letter from Craig Bachmann, Director of Construction Operations for Sunroad, to Federal Aviation Administration Air Traffic Division. (Exhibit 19).

<sup>21</sup> 31 May 2007, telephonic interview of witness: Gary Halbert; Interview conducted by Vince delaMontaigne; Interview Topic: Sunroad Project. (Exhibit 20).

<sup>22</sup> 20 June 2006 meeting calendar of Jim Waring. (Exhibit 21)

<sup>23</sup> 22 June 2006 FAA Form 7460-1 filing by Sunroad. (Exhibit 22).

The FAA issued a Determination of No Hazard to Air Navigation letter to Sunroad on 27 June 2006 for its application for Centrum 12 at 160 feet.<sup>24</sup> In other words, the FAA approved the building at the 160-foot level.

Meanwhile, officials from the City's Development Services Department ("DSD") and the City Attorney's Office continued to communicate to ensure the building height would not go above 160 feet. Mr. Galloway expressed this understanding in a 29 June 2006 e-mail to Mr. Halbert and Deputy City Attorney David Miller. Galloway wrote:

Sunroad's attorney Barbara Lichman contacted me this afternoon concerning the outcome of our meeting this afternoon...She commented that the applicant will hold the structure to 160 ft. pending the outcome of a new aeronautical study.<sup>25</sup>

Mr. Halbert then forwarded this information to high-ranking City officials including Kelly Broughton and Jim Waring, in a carbon copied e-mail. Mr. Galloway sent another e-mail to superiors at the Development Services Department to alert them that Sunroad received approval from the FAA to build to 160 feet.

The Centrum 12 project has been issued a building permit...Barbara Lichman, aviation attorney representing Sunroads [sic] specifically for this issue indicated that the construction crane for Centrum 12 recently received approval from the FAA to exceed 160 ft for construction purposes and that Sunroads [sic] will not exceed the 160 ft pending the outcome of a new FAA evaluation...I will keep you informed as more information is available.<sup>26</sup>

At this point, City officials were on notice that the Sunroad Centrum building would be constructed at the 160-foot height.

As a result of this understanding, the City's Development Services Department issued a permit for the "Sunroad Centrum - 12 Bldg" on 7 July 2006.<sup>27</sup> The permit

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<sup>24</sup> 27 June 2006 FAA Determination of No Hazard to Air Navigation letter issued to Sunroad. (Exhibit 23).

<sup>25</sup> 29 June 2006 e-mail from Tait Galloway, City Planner, to David Miller, Deputy City Attorney; Subject: "Spectrum Sunroad Centrum 12"; Carbon copied: Gary Halbert: Director of the Development Services Department. (Exhibit 24).

<sup>26</sup> 6 July 2008 e-mail from Tait Galloway to Mike Tussey; Subject: "Re: ATAG Update / Sunroads Spectrum"; Carbon copied: Gary Halbert, Kelley Broughton, David Miller. (Exhibit 25).

<sup>27</sup> 7 July 2007; Building Permit approving construction of Sunroad Centrum 12. (Exhibit 26)

provided for: "Building Permit for the construction of a twelve (12) story, 306,000 sq. ft. commercial office building."<sup>28</sup> The permit did not specify a height.

### C. SUNROAD CONTINUES PLAN TO BUILD TO 180 FEET

Sunroad also filed a Supplemental Notice, or a subsequent permit application, to the FAA on 26 July 2006 which sought approval to construct the Centrum 12 building to 180 feet.<sup>29</sup>

Mr. Galloway received a phone call from Sunroad's attorney to notify the City the company had re-applied with the FAA to construct the building to 180 feet.<sup>30</sup> Galloway sent an e-mail to his superiors at DSD to notify them of the potential problems with the FAA and the airport if Sunroad built to 180 feet. Galloway wrote:

Having spoken with Barbara Lichman yesterday, it is my understanding that Sunroads [sic] resubmitted the Centrum 12 project to the FAA for an airspace evaluation and that the FAA made the same determination as prior: that building's height at 180 ft would affect the instrument circling procedures at Montgomery Field and the FAA recommended a building height of 160 ft.<sup>31</sup>

Galloway indicated in the e-mail that despite the FAA hazard warning, Sunroad would construct the building to 180 feet, thereby disrupting flight operations at the airport. Galloway wrote:

Barbara indicated that Sunroads [sic] is planning to proceed as permitted and that they are attempting to schedule a meeting with you and David to discuss the issue in more detail. If they proceed as permitted, it is my understanding that the FAA will issue a notice of hazard for the project and will have to amend the circling procedures for Montgomery Field.<sup>32</sup>

Mr. Broughton, Deputy Director of DSD, then asked City personnel to begin forwarding information about the Sunroad issue to Mr. Waring.<sup>33</sup> City Planner John Cruz responded

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<sup>28</sup> See at *Id.*

<sup>29</sup> 26 July 2006 Supplemental Notice from George Williams on behalf of Sunroad for the Centrum 12 building, 26 July 2006, 7460-1 for ASN: 2006-AWP-4601-OE. (Exhibit 27).

<sup>30</sup> 27 July 2006 e-mail from Tait Galloway to Gary Halbert; Subject: "Sunroads Centrum 12"; Carbon copied: David Miller, Ketih Greer, Kelly Broughton, and Mike Westlake. (Exhibit 28)

<sup>31</sup> See at *Id.*

<sup>32</sup> See at *Id.*

<sup>33</sup> 28 July 2006 e-mail from Kelley Broughton to John Cruz; Subject: "Re: Sunroad Centrum – 14 Substantial Conformance Review". (Exhibit 29).

that Mr. Waring had been involved in the issue and that he had hosted a meeting with Sunroad officials. Mr. Cruz wrote:

Yes, Jim Waring has been involved. In fact, he recently (within the last month or two) led a meeting between Sunroad and SDG&E that was attended by the bigwigs of Sunroad, attorneys for SDG&E, Gary [Halbert], Bob Manis, Jeannette, and myself.<sup>34</sup>

As illustrated by this communication, high-level planning and development officials at the City were aware of the issues with the Sunroad building.

#### **D. BUILDING AT 180 FEET AGAIN FOUND HAZARDOUS TO SAFETY**

The FAA issued a Determination of Hazard letter to Sunroad on 11 August 2006 in response to the application to construct the Centrum 12 building to 180 feet. In the correspondence, the FAA included a separate letter that chided the company for its failure to comply:

The FAA attempted to negotiate with the sponsor to reduce the height of the structure. The original first filing by the sponsor at the same location and height was issued a presumed hazard negotiation letter advising the sponsor of the aeronautical instrument procedure impacts. The sponsor responded with a second filing lowering the structure height to the required acceptable height. The second filing was issued a determination of no hazard. This third filing increased the structure height to the original height of the first filing. **The sponsor stated the refusal to lower the structure height was dictated by land availability and location.** The sponsor's representative advised the FAA by submission of FAA 7460-2, that the structure had reached its greatest height on the same day as the third filing.

Therefore, it is determined that the structure has a substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft and is a hazard to air navigation.<sup>35</sup>

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<sup>34</sup> 28 July 2006 e-mail from John Cruz to Kelly Broughton. (Exhibit 30).

<sup>35</sup> 11 August 2006 FAA Determination of Hazard to Air Navigation letter issued to Sunroad. (Exhibit 31).

## E. SUNROAD PLANS TO CHANGE CIRCLING PATTERN

City staff met with Sunroad officials on 11 August 2006 to discuss the issue. According to meeting notes taken by Mr. Galloway, Sunroad officials stated that the building was constructed to 180 feet regardless of the FAA hazard letter.<sup>36</sup> Tom Story, Vice President of Development for Sunroad, told City staff at the meeting, “Structure is up; floor are poured.”<sup>37</sup> Sunroad’s attorney, Barbara Lichman, stated that once the building is complete above the FAA’s hazard level, the FAA can simply lift the hazard level to accommodate the new building. Ms. Lichman stated, “Once there is a hazard, the FAA changes operation procedures then it is no longer a hazard...FAA has no land use authority, so they strongly try to protect the surfaces.”<sup>38</sup> According to the meeting notes, Ms. Lichman then explained that the FAA was already considering a height restriction change. Ms. Lichman stated: “FAA is considering modifying the Part 77 regulations...The proposed change to the Part 77 regulation could address this issue.”<sup>39</sup> Mr. Galloway also reported what occurred at the 11 August 2006 meeting in an e-mail to DSD and planning department officials. Mr. Galloway wrote:

At Tom Story’s request, Keith Greer, David Miller and I met with Tom Story, Barbara Lichman (aviation attorney), Tom Kamman (airspace expert) to broadly discuss option for the Sunroads [sic] Centrum project. The Centrum 12 project recently topped out at 180 ft. The FAA has issued a notice of hazard for the Centrum 12 building since it affects the instrument procedures for the circling minimums (see attached). Barbara and Tom Kamman agreed to study recently proposed changes to the Part 77 regulations used by the FAA...<sup>40</sup>

This is the first meeting where any discussion occurred about changing the FAA’s Part 77 regulations to allow the Sunroad building to stand at 180 feet.

Another meeting was held between City and Sunroad officials on 5 September 2006, but no resolution was reached on the hazards.

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<sup>36</sup> 11 August 2006 meeting notes of Tait Galloway, Subject: “Meeting with Sunroad to Discuss the Centrum Project”, Attendees: Keith Greer (City), Tait Galloway (City), David Miller (City Attorney), Tom Story (Sunroad), Barbara Lichman (Sunroad Attorney), Tom Kamman (Sunroad Aviation Consultant). (Exhibit 32).

<sup>37</sup> See at *Id.*

<sup>38</sup> See at *Id.*

<sup>39</sup> See at *Id.*

<sup>40</sup> 11 August 2006 e-mail from Tait Galloway, Senior Planner for the City, to Kelly Broughton, Deputy Director of the City’s Development Services Department; Subject: “Sunroads [sic] Centrum 12 & 14”; Carbon copied to: David Miller, John Cruz, Keith Greer, Mike Westlake. (Exhibit 33).

At this point, the California Department of Transportation (Caltrans) became involved. Jeff Brown, aviation safety officer for Caltrans, sent a letter to Sunroad on 14 September 2006 to notify the company the height of the 180-foot building violated state permitting and safety codes:<sup>41</sup>

It has come to attention of the California Department of Transportation (Department), Division of Aeronautics, that the Sunroad Centrum 1 building is under construction and already at its maximum height of 180 feet above ground level...

As detailed in the FAA Airspace Determination referenced above, the Centrum 1 building penetrates the Horizontal Surface, as defined in Section 77.25(a) of FAR Part 77.

Until you receive a permit from Department, it is unlawful for you to proceed with construction. Section 21019 of the PUC outlines potential punishment for related violations.<sup>42</sup>

This letter, which was carbon copied to City officials, put both Sunroad and the City on notice that the building under construction was violating state codes.

The next day, Deputy City Attorney David Miller contacted Chris Ferrell, official at the California Department of Transportation, to discuss whether the 180-foot tall Sunroad 12 building was a public nuisance. Mr. Miller wrote:

I would love to schedule a meeting to discuss these buildings. It is my opinion that both proposals, as well as the one that has already reached its maximum height, are 'public nuisances' and a danger to the health and safety of the people on the ground and in the air. My review of the Development Agreement does not indicate that the developer has any vested rights to build a specific height, nor violate the Part 77 horizontal surfaces.<sup>43</sup>

The public nuisance theory could have allowed the City to order the construction to stop on the part of the building that stood in violation of state and federal codes.

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<sup>41</sup> 14 September 2006 letter from Jeff Brown, Aviation Safety Officer for Caltrans, to Craig Bachmann, Vice President of Construction for Sunroad Enterprises; Carbon copied to Mike Tussey, City of San Diego Airports Director, San Diego Airports Advisory Committee, David Miller, Deputy City Attorney, San Diego Regional Airport Authority, FAA, AWP 622. (Exhibit 34)

<sup>42</sup> See at *Id.*

<sup>43</sup> 15 September 2006 e-mail from David Miller, Deputy City Attorney for the City, to Chris Ferrell, representative of the California Department of Transportation, Subject: "Sunroads Spectrum Buildings – Montgomery Field". (Exhibit 35).

Sunroad's attorney, Ms. Lichman, responded with a letter to Caltrans on 18 September 2006 that stated that "Caltrans is Acting In Excess of its Jurisdiction in Attempting" to enforce the FAA codes and that "aviation concerns must be balanced with a recognition of the right of the City of San Diego to make plans for development within its own jurisdiction...."<sup>44</sup> In other words, Ms. Lichman told Caltrans to mind its own business.

It was not long before Caltrans responded that the construction of the building remained in violation of Public Utilities Codes. Caltrans sent a letter to Sunroad dated 19 September 2006 which stated:

The position stated in our letter of September 14, 2006 to Sunroad Enterprises remains the same. The construction of the Sunroad Centrum 1 Building is a violation of PUC Section 21659(a). Without issuance of a permit by the Department, continued construction of any part of the building that exceeds 160 feet above ground level is unlawful....

If construction in violation of PUC Section 21659 proceeds, you are proceeding at your own risk, as you have been notified of the Department's position. Additionally, if an aircraft accident occurs at the site of the Sunroad Centrum 1 Building because of this PUC violation, you are assuming all liability for the accident.<sup>45</sup>

It is important to note that high ranking officials of the City of San Diego were carbon copied on this letter, including: Mike Tussey, Airports Director, City of San Diego; San Diego Airports Advisory Committee; Bill Anderson, Director, San Diego Planning & Community Investment Department; San Diego Regional Airport Authority.

Sunroad's attorney, Ms. Lichman, responded to Caltrans on 3 October 2006 in a peculiar letter. Ms. Lichman wrote that Sunroad would fill out the permits required by Caltrans:

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<sup>44</sup> 18 September 2006 letter from Barbara Lichman, attorney for Sunroad, to Jeff Brown, Aviation Safety Officer for the Department of Transportation; Subject: "Re: Sunroad Centrum"; Carbon Copied to: San Diego Airports Advisory Committee; Bill Anderson, Director, San Diego Planning & Community Investment Department; Tait Galloway; Mike Tussey, Director, City of San Diego Airports; David Miller, San Diego City Attorney; Tom Story, VP Development, Sunroad Enterprises; Craig Bachmann, Director of Construction, Sunroad Enterprises. (Exhibit 36).

<sup>45</sup> 29 September 2006 letter from Jeff Brown, aviation safety officer for CalTrans, to Barbara Lichman, attorney representing Sunroad; Carbon copied to: Mike Tussey, Airports Director, City of San Diego; San Diego Airports Advisory Committee; David Miller, Attorney, City of San Diego; Tait Galloway, Senior Planner, City of San Diego; Bill Anderson, Director, San Diego Planning & Community Investment Department; San Diego Regional Airport Authority; Tom Story, Vice President Development, Sunroad Enterprises; Craig Bachmann, Director of Construction, Sunroad Enterprises; FAA, AWP 622. (Exhibit 37).

Sunroad, in an effort to answer Caltrans's [sic] concerns, will agree to apply for the permit specified in *Public Utilities Code* § 21659.<sup>46</sup>

Ms. Lichman also demanded a copy of the permit from Caltrans and stated if Caltrans failed to respond to Sunroad's permit application within 10 days, then Sunroad will consider the building compliant with all codes, consider the building legal and move on with construction. Ms. Lichman wrote:

In order to comply, Sunroad reiterates its request, originally made in its September 18 response to Mr. Brown, for a permit application and a copy of Caltrans' regulations implementing § 21659. Sunroad's goal is achieve consistency with all local, state and Federal regulations. **If Caltrans does not provide the documents required for compliance in response to its second request, within 10 business days, Sunroad must proceed on the assumption that Caltrans' permit requirements have been satisfied...Caltrans immediate cooperation is anticipated.** (Emphasis added).<sup>47</sup>

It did not take long for Caltrans to respond. Mr. Brown, Aviation Safety Officer for Caltrans, wrote a letter to Sunroad on 13 October 2006 which stated the company must comply with the rules, that Sunroad may use a letter format to apply and that Sunroad cannot set the deadline for Caltrans response. Specifically, the letter stated:

Please submit the full permit request within 10 days of receipt of this letter, so that we may continue to expeditiously handle this matter.

Upon receipt of the request for a permit, the Department will review the submitted material. If the Department approves the request, a permit letter authorizing the construction will be issued...

The Department also takes issue with your ultimatum stating Sunroad must proceed if you do not have a response from the Department within 10 business days. There is no part of PUC Section 21659 authorizing self-imposed deadlines regarding the validity and application of the statute,

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<sup>46</sup> 3 October 2006 letter from Barbara Lichman, counsel for Sunroad Enterprises, to Mary Frederick, Director of the California Department of Transportation Division of Aeronautics; Subject: "Re: Sunroad Centrum"; Carbon copied to: Mike Tussey, Airport Director for the City of San Diego; San Diego Airport Advisory Committee; David Miller, Deputy City Attorney for the City; Tait Galloway, Senior Planner for the City; Bill Anderson, Director of San Diego Planning & Community Investment Department; San Diego Regional Airport Authority; Tom Story, Vice President of Development for Sunroad Enterprises; Craig Bachmann, Director of Construction for Sunroad Enterprises; FAA, AWP 622. (Exhibit 38)

<sup>47</sup> See at *Id.*

and you do not have the authority to dictate arbitrary deadline upon a State agency.<sup>48</sup>

Meanwhile, the San Diego Airports Advisory Committee<sup>49</sup> (“SDAAC”) discussed the Sunroad building at a meeting and voted to support the FAA’s hazard determination. The SDAAC sent a letter to Mayor Sanders outlining its position on 12 October 2006. The letter stated:

On October 10<sup>th</sup>, 2006, at the regular meeting of the San Diego Airports Advisory Committee, the following motion was made...

**Resolved** that the Airports Advisory Committee inform the Mayor’s office with a copy to the Caltrans Division of Aeronautics that the AAC supports Caltrans in withholding of a permit to construct a hazard to air navigation within one-mile of Montgomery Field.’

**THE MOTION PASSED 9-1.**<sup>50</sup>

It is clear from these letters, e-mails, interviews, and meeting notes that City officials in all levels of the bureaucracy were on notice of the significant problems resulting from Sunroad’s construction of the 180-foot building in violation of state and federal codes.

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<sup>48</sup> 13 October 2006 letter from Jeff R. Brown, Aviation Safety Officer for Caltrans, to Barbara Lichman, Counsel for Sunroad; Carbon copied to: Mike Tussey, Airport Director for the City of San Diego; San Diego Airport Advisory Committee; David Miller, Deputy City Attorney for the City; Carmen Brock, Deputy City Attorney for the City; Tait Galloway, Senior Planner for the City; Bill Anderson, Director of San Diego Planning & Community Investment Department; San Diego Regional Airport Authority; Tom Story, Vice President of Development for Sunroad Enterprises; Craig Bachmann, Director of Construction for Sunroad Enterprises; and FAA, AWP 622. (Exhibit 39).

<sup>49</sup> The primary purpose of the City of San Diego Airports Advisory Committee is to provide advocacy for San Diego General Aviation as an integral part of the total aviation system. The Advisory Committee is charged with the responsibility of studying major aviation issues, specifically regarding Montgomery and Brown Field Airports, San Diego Airports Division staff, or Advisory Committee members. The Advisory Committee specifically is charged with providing the Airports staff with recommendations regarding Brown and Montgomery Airports. The Airports Advisory Committee shall provide recommendations on matters related to aviation planning, airport development, proposals, and policies. (<http://www.sandiego.gov/airports/aac/description.shtml>)

<sup>50</sup> 12 October 2006 memorandum from the San Diego Airports Advisory Committee to Mayor Jerry Sanders; Subject: AIRPORT ADVISORY COMMITTEE MEETING RESOLUTIONS”; Carbon copied to: Mike Tussey, Deputy Director of Airports; Caltrans Division of Aeronautics, Jeff Brown; Development Services, John Cruz; AAC Members. (Exhibit 40).

**F. CITY ATTORNEY DISCUSSES NOTICE OF PUBLIC HAZARD TO STOP WORK ON BUILDING**

The City Attorney's Office sent a formal request on 16 October 2006 to Mr. Waring, Deputy Chief of the Land Use and Economic Development for the City, to issue a "Stop Work Order" to prohibit all work on the portion of the building standing in violation of the 160-foot height restriction. Deputy City Attorney David Miller sent the e-mail request to Mr. Waring and stated:

The City Attorney, Michael Aguirre, requests that the Development Services Department of the City of San Diego immediately issues [sic] a 'Stop Work Order' for the above referenced building [Sunroad Centrum Building 1], as continued construction is in violation of PUC section 21659 and Federal Aviation Regulation (FAR) Part 77 Obstruction Standards. More importantly, the current height of the building, 180', poses a risk to human life both in the air and on the road...

As a 'Public Nuisance,' the City may take immediate action to abate...

Following the issuance of the 'Stop Work Order,' the City Attorney's Office requests that a permit revocation hearing be scheduled pursuant to the San Diego Municipal Code...<sup>51</sup>

Mr. Waring did not respond to the request.

The San Diego City Attorney's Office doubled its effort and on 19 October 2006 sent a letter to Mr. Waring that stated the City had a duty to prevent public nuisances involving threats to public safety in and around airports and advised that work on the building be stopped. The letter stated:

Under California Government Code section 50485.2, the City has a duty to prevent the creation of any hazard to air navigation using the police powers of the City. California Government Code section 504485.2 reads in relevant part:

It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in the vicinity and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft ... it is therefore necessary in the interest of the public health, public safety, and general

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<sup>51</sup> 16 October 2006 e-mail from David Miller, Deputy City attorney for the City, to Jim Waring, Deputy Chief of the Land Use and Economic Development for the City. Subject: "Sunroad Spectrum Building 1"; Carbon copied to: Abbe Wolfsheimer, Deputy City Attorney; Carmen Brock, Deputy City Attorney for the City; Chris Morris, Deputy City Attorney; Karen Heumann, Assistant City Attorney for the City; Kelly Broughton, Deputy Director of the City's Development Services Department; Shirley Edwards, Deputy City Attorney. (Exhibit 41)

welfare that the creation or establishment of airport hazards be prevented by appropriate exercise of the police power....<sup>52</sup>

Mr. Waring did not respond to this request from the City Attorney's Office.

Meanwhile, Sunroad Attorney Lichman continued to exchange correspondence with Caltrans officials. Ms. Lichman sent a letter to Caltrans on 24 October 2006 that clarified that Sunroad would not comply with the Caltrans permitting procedure:

Based on the above, Sunroad must decline to subject itself to Caltrans' unfettered discretion. Sunroad remains willing, as always, to apply for a permit pursuant to *Public Utilities Code* § 21659 at any point in time in which Caltrans can provide Sunroad with properly enacted regulations for governing Caltrans' decision to grant or deny the permit.<sup>53</sup>

This is the first communication where Sunroad unequivocally stated that it would not follow permitting guidelines as established by Caltrans.

Caltrans later sent a letter to the City Attorney's office that sought assistance in its attempt to enforce state codes. Gary Cathey, Chief of Airports for Caltrans, sent a letter to the City Attorney's Office on 25 October 2006 that stressed the need for a Stop Work Order on the building. The letter stated:

The Department confirms its prior position requesting that the City take action regarding the subject construction which violates both State and federal recommendations....In this case, the height of the building that Sunroad Enterprises is constructing is not only a nuisance, but a hazard and an obstruction, thus violating the applicable Government Code sections and the State Aeronautics Act. The Department requests that the City continue to invoke the 'Stop Work Order', and move forward with the revocation proceedings.

Also, the Department requests that it receive all applicable notices regarding the 'Stop Work Order' and the revocation proceedings, as the

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<sup>52</sup> 19 October 2006 letter from San Diego City Attorney letter to Jim Waring, Deputy Chief of the Land Use and Economic Development for the City. (Exhibit 42).

<sup>53</sup> 24 October 2006 letter from Barbara Lichman, counsel for Sunroad, to Jeff R. Brown, Aviation Safety Officer for Caltrans; Subject: "Sunroad Centrum 2 – Permit Application Pursuant to *Public Utilities Code* § 21659; Carbon copied to: Marcella Escobar-Eck, Director of the City's Development Services Department; Bill Anderson, Director of San Diego Planning & Community Investment Department; Tait Galloway, Senior Planner for the City; Mike Tussey, Airport Director for the City of San Diego; Bruce Behrens, Chief Counsel of Caltrans; Tom Story, Vice President of Development for Sunroad Enterprises; Craig Bachmann, Director of Construction for Sunroad Enterprises. (Exhibit 43).

Department would like the opportunity to intervene and participate in the subject hearings.<sup>54</sup>

Based on this letter, Caltrans concurred with the need to issue the Stop Work Order and prohibit additional work on the portion of the Sunroad building in violation of state and federal codes.

Sunroad Attorney Lichman, issued a letter to the City on 26 October 2006 that stated that the City had no right to stop construction on the 180-foot building. Ms. Lichman cited what she perceived as a lack of authority by FAA and Caltrans to regulate land use issues. Ms. Lichman wrote:

The City cannot be seen now to attempt to halt a planned, approved, and vested project...on the sole ground of an FAA determination explicitly inapplicable to the control of land use, the impact of which, if any, has been remedied by a change in operations that more than accommodates the height of all Centrum planned buildings, and which effectively eliminates all issues of safety of 'air navigation' or 'the efficient utilization of navigable airspace by aircraft', the FAA's sole charge.<sup>55</sup>

This statement is crucial. Ms. Lichman, in effect, stated that because Sunroad was working to change the height limits with the FAA,<sup>56</sup> the City could not enforce the FAA hazard letters. Ms. Lichman's letter continued:

Rather than accepting the assertions of staff at Caltrans and the FAA, the City Attorney should be seeking to ensure that the full long-established prerogatives of the City's land use authority are respected.<sup>57</sup>

This comment, equally as insolent, requests that the City Attorney disregard the recommendations of state and federal regulatory agencies and act to pursue the developers' land use project. Ms Lichman continued:

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<sup>54</sup> 25 October 2006 letter from Gary Cathey, Chief of the Caltrans Office of Airports, to Office of the City Attorney, City of San Diego. Subject: "Re: Sunroad Centrum Building Stop Work Order." (Exhibit 44).

<sup>55</sup> 26 October 2006 letter from Barbara Lichman, counsel for Sunroad, to David Miller, Deputy City Attorney for the City. Subject: "Re: Sunroad Centrum Building 1 – Response to Request for 'Stop Work' Order". (Exhibit 45)

<sup>56</sup> See Exhibits 28, 32 and 33 referencing a series of e-mails and meeting between Sunroad and City officials. In these meetings Sunroad stated that it would begin research and assemble a proposal for to the FAA to raise the height restrictions in the areas surrounding Montgomery Field.

<sup>57</sup> 26 October 2006 letter from Barbara Lichman, counsel for Sunroad, to David Miller, Deputy City Attorney for the City. Subject: "Re: Sunroad Centrum Building 1 – Response to Request for 'Stop Work' Order". (Exhibit 45\_)

In light of these facts, and the vast weight of applicable law, it is Sunroad's position that any attempt to halt construction for Centrum 12 would subject the City to potential legal action, including, but not limited to, claims for breach of its Development Agreement and for the taking of its property, claims amply demonstrated by the facts. Therefore, the Sunroad requests that the City refrain from taking enforcement action...<sup>58</sup>

Finally, Sunroad threatened litigation if the City complied with the then-current recommendation of state and federal regulators and issued the Stop Work Order.

#### **G. CITY ISSUED INSUFFICIENT STOP WORK ORDER**

The City's Development Services Department issued a Stop Work Notice on 27 October 2006 which applied to the top 17 feet of the Sunroad Centrum 12 building.<sup>59</sup>

This is a stop work notice regarding the top seventeen feet of this structure. No work is to be done in this section of the structure until authorized by the department. FAA regulations must be clarified prior to continuing construction of the structure previously mentioned above.<sup>60</sup>

At this point, the work on the top 17 feet of the Sunroad building was ordered to cease.

Shortly after the order was issued, Caltrans wrote a letter to the Marcella Escobar-Eck, then-Director of the City's Development Services Department, which stated that the Stop Work Notice was insufficient and chided City staff for delaying its issuance. The letter stated:

Although release of the Notice appears to have been unnecessarily delayed, the Department appreciated the fact the City took this essential step. However, we must address several problems with the Notice.

Our first concern is the Notice only states 'FAA regulations must be clarified prior to the continuing construction of the structure'. We remind you that the construction of this structure is a violation of California Public Utilities Code (PUC) Section 21659. This violation was made clear to the City in the City Attorney's letter dated October 19, 2006, and in our letters to the developer or the developer's attorney dated September 14, 2006, September 29, 2006, and October 13, 2006, copies of which were

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<sup>58</sup> See at *Id.*

<sup>59</sup> 27 October 2006 City of San Diego Development Service Notice to Stop Work. (Exhibit 46).

<sup>60</sup> See at *Id.*

provided to City Land Use and Economic Development Department staff either directly or via e-mail.<sup>61</sup>

Crucially, Caltrans stated that the Stop Work Order was issued only in reference to the FAA Code. This, of course, was the code that Sunroad proposed to have changed by the FAA.<sup>62</sup> Caltrans pointed out that the Stop Work Order did not reference the PUC Code violation. The letter continued:

Additionally, the Notice stipulates that no work is to be done in the top seventeen feet of the structure... Any construction over 160 feet is a violation of PUC 21659. That means any construction in the top twenty feet of the building would constitute a hazard and be a violation of State law.<sup>63</sup>

Here, Caltrans stated that the Stop Work Order did not cover the part of the building that was in violation of FAA and PUC codes. In other words, Caltrans said that the Stop Work Order fell short of achieving the objective.

On 14 November 2006, Sunroad Vice President for Development Tom Story appeared before the City of San Diego Airports Advisory Committee at a public meeting held at the Montgomery Field Airport Lobby. According to the meeting minutes, Mr. Story admitted that Sunroad had knowingly decided not to amend the building plans for the Centrum 12 building to the 160-foot height, as requested to the FAA. According to the meeting minutes:

Tom Story, Vice President for Development of Sunroad Enterprises, said that when it became known that 180 feet was going to be a hazard, they considered stopping at 160 feet but they would have had to redraw the plans. They decided not to amend the plans out of financial consideration. Sunroad's rights are fully vested. He believes the hazard is mitigated through the NOTAM and by raising the approach minimums. Mr. Story stated that the project was in full compliance with the City requirements. (emphasis added)<sup>64</sup>

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<sup>61</sup> 9 November 2006 letter from Jeff R. Brown, Aviation Safety Officer for Caltrans, to Marcella Escobar-Eck, Director of the City's Development Services Department. Carbon copied to: David Miller, Deputy City Attorney for the City, and Carmen Brock, Deputy City Attorney for the City. (Exhibit 47)

<sup>62</sup> See Exhibits 28, 32 and 33 referencing a series of e-mails and meeting between Sunroad and City officials. In these meetings Sunroad stated that it would begin research and assemble a proposal for to the FAA to raise the height restrictions in the areas surrounding Montgomery Field.

<sup>63</sup> 9 November 2006 letter from Jeff R. Brown, Aviation Safety Officer for Caltrans, to Marcella Escobar-Eck, Director of the City's Development Services Department. Carbon copied to: David Miller, Deputy City Attorney for the City, and Carmen Brock, Deputy City Attorney for the City. (Exhibit 47)

<sup>64</sup> 14 November 2006 City of San Diego Airports Advisory Committee Minutes Montgomery Field Airport Lobby. (Exhibit 66).

Mr. Waring, Deputy Chief of Land Use and Economic Development for the City, was also present at the meeting and stated that he believed the permit that was issued for the building was legal. He noted, however, that individuals need to keep an open mind about the land uses surrounding airports.

Mr. Waring began discussion on the Sunroad project by saying that he believes the City was acting in conformance to existing regulations and policy when it issued the building permit for the 12 story building. Balance needs to be found when considering competing issues around airports. Many FAA restrictions preclude non aviation land uses that could produce revenue for the City. When land is scarce, land uses need to be intensified.<sup>65</sup>

Mr. Waring, in effect, turned the conversation from protecting the interest of the City in an oncoming battle with a developer to discussing ways to bring in revenue to the City. Most curiously, Mr. Waring chose to broach the subject with an organization that previously voted to support the FAA's position.

#### **H. SUNROAD REQUESTS LIFTING STOP WORK ORDER FOR SUNROAD BUILDING**

It was not long before Sunroad officials began to lobby City officials to allow work on top of the Centrum 12 building to continue. Mr. Story issued a letter to Ms. Escobar-Eck, then-Director of the City's Development Services Department, on 21 November 2006 which requested authorization from Development Services "to complete the roof" of Centrum 12 in order "to protect the existing and in-progress construction work and materials that are being installed in the lower 60 feet of the building to avoid further delay of our project."<sup>66</sup> The letter requested the City's approval to allow Sunroad to complete nine tasks on the top 20 feet of the building that included fire proofing the elevator penthouse; framing the elevator penthouse, installing of roofing at penthouse and building, and more.<sup>67</sup> Mr. Story described this work as "winterizing."<sup>68</sup>

Meanwhile, for the first time, an attorney representing Caltrans sent a letter to Sunroad's legal representative to reaffirm Caltrans' position that the Code violation

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<sup>65</sup> See at *Id.*

<sup>66</sup> 21 November 2006 letter from Tom Story, Vice President of Development for Sunroad Enterprises, to Joe Harris, Chief Building Inspector for the City of San Diego; Subject: "Re: Centrum 12 Office Tower, 8260 Spectrum Center Blvd"; Carbon copied: Marcella Escobar-Eck, Director of the City's Development Services Department. (Exhibit 48).

<sup>67</sup> See at *Id.*

<sup>68</sup> See at *Id.*

remained because the building was still standing at 180 feet. The letter, sent on 27 November 2006, stated:

The Department stands firm in its position that the proposed construction of the Sunroad Centrum project violated Public Utilities Code, Section 21659, as height of the building is not only an obstruction, but has been determined to be hazardous to navigable airspace as well...

Thus, Sunroad Centrum's current position, which is simply to take no action is not acceptable, nor a viable option.<sup>69</sup>

It was becoming increasingly clear that Caltrans was not going to back off its position on the building height.

Sunroad took a different approach and attempted to open negotiations with Mr. Waring on how to let the building stay. The City received a letter on 28 November 2006 from another attorney hired by Sunroad. The attorney, Steven M. Strauss, submitted a proposal to have the City lift the "Stop Work Order."<sup>70</sup> Mr. Strauss took the opportunity in the letter to expand on a plan that had been outlined briefly with City employees in an earlier meeting.<sup>71</sup> Specifically, Mr. Strauss stated that Sunroad sought the City's assistance in requesting "the FAA to permanently change circling minimums to Runway 28R to accommodate the Building." Mr. Strauss stated that, as part of the proposal, Sunroad offered to install landing devices to assist pilot navigation for airplane landings. Per Mr. Strauss' proposal, in exchange for Sunroad's role in lobbying the FAA and the installation of the aviation navigation equipment, the City must agree to immediately lift the Stop Work Order. It is crucial to note the letter was not addressed or carbon copied to the City Attorney.

During this same time period, Ms. Lichman sent a letter to Mr. Waring that outlined a plan similar to what was proposed by Mr. Strauss. Ms. Lichman's plan proposed to have Sunroad lobby the FAA to lift the height restriction and implement

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<sup>69</sup> 27 November 2006 letter from Raiyn Bain, attorney for Caltrans, to Barbara Lichman, attorney for Sunroad Enterprises; Subject: "Re: Sunroad Centrum – Compliance With *Public Utilities Code* § 21659. (Exhibit 49).

<sup>70</sup> 28 November 2006 letter from Steven Strauss, attorney for Sunroad, to Jim Waring, Deputy Chief of Land Use and Economic Development for the City; Subject: "Re: Appeal by Sunroad Enterprises of Stop Work issued October 27, 2006"; Carbon copied to Aaron Feldman, Owner and President of Sunroad Enterprises; Tom Story, Vice President of Development for Sunroad Enterprises; and Dan Feldman, Vice President of Sunroad Enterprises. (Exhibit 50).

<sup>71</sup> 11 August 2006 meeting notes of Tait Galloway, Subject: "Meeting with Sunroad to Discuss the Centrum Project", Attendees: Keith Greer (City), Tait Galloway (City), David Miller (City Attorney), Tom Story (Sunroad), Barbara Lichman (Sunroad Attorney), Tom Kamman (Sunroad Aviation Consultant). (Exhibit 32).

various aviation navigation devices in and around the airport in exchange for that City's immediate cancellation of the existing Stop Work Order.<sup>72</sup> Ms. Lichman wrote:

In return for the City's acquiescence to this limited relief from the Stop Work Order, Sunroad will agree that if, in the final analysis, the proposal outlined in this letter, and all reasonable variations thereto, are determined infeasible by the FAA, Sunroad will assume liability for any work performed that would otherwise fall within the parameters of the Stop Work Order....

In summary, Sunroad appreciated the City's willingness to consider avenues of constructive resolution of this issue...<sup>73</sup>

These letters provide evidence that supports the allegation that Sunroad sought assistance from the City to change the existing FAA and Caltrans height restrictions to allow for the building to remain at 180 feet.

Mr. Waring was receiving a very different message from the City Attorney's Office. Mr. Aguirre informed Mr. Waring in a letter dated 1 December 2006 that he should "make no change" to weaken or lift the Stop Work Order.<sup>74</sup> Mr. Aguirre wrote:

At its present height of 180 feet, the building is both a public nuisance and violated the California Government Code and the State Aeronautics Act. The City Attorney's Office does not believe the mere possibility of placing a 'localizer device' at Montgomery Field at some future date (provided the FAA approves), addresses the immediate and long term safety needs of the City. A mere suggestion of a possible solution to the current problem certainly does not warrant any change of status to the current Stop Work Order....

For all of these reasons, it is imperative that there be no change to the Stop Work Order whatsoever. Rather, Sunroad may proceed with its administrative remedies if it believes a rescission of the Stop Work Order is warranted.

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<sup>72</sup> 1 December 2006 letter from Barbara Lichman, counsel for Sunroad, to Jim Waring, Deputy Chief of Land Use and Economic Development for the City. Subject: "Sunroad Spectrum – Proposal to resolve FAA 'Hazard' Issues at Montgomery Field"; Carbon copied to: Marcella Escobar-Eck, Director of the City's Development Services Department; James Barwick, Director of the City's Real Estate Assets Department, David Miller, Deputy City Attorney for the City; Carmen Brock, Deputy City Attorney for the City; Steven Strauss, attorney for Sunroad; Tom Story, Vice President of Development for Sunroad Enterprises; Dan Feldman, Vice President of Sunroad Enterprises; and Rick Vann, Executive Vice President of Sunroad. (Exhibit 51)

<sup>73</sup> See at *Id.*

<sup>74</sup> 1 December 2006 memorandum from City Attorney Michael Aguirre to Jim Waring, Deputy Chief of Land Use and Economic Development. (Exhibit 52).

The officials at the City's Development Services Department were thereby on notice from the City Attorney that for legal reasons no changes to the Stop Work Order should occur

Evidence provided later in this letter from the City Attorney was also ignored by Mr. Waring and the City's Development Services Department.

#### **I. MAYOR'S AIDE NEGOTIATED AND APPROVED LIFTING OF STOP WORK ORDER**

Despite the City Attorney's warning, Mr. Waring, with the approval of Mayor Sanders, ordered the Stop Work Order to be lifted. Evidence presented in this section will show that Mr. Waring undertook this course of action through a series of meetings with Sunroad officials – some of which were attended by Mayor Sanders. Evidence presented in this section will also show Mr. Waring's course of action stood in clear contravention to the recommendations from the FAA, Caltrans and the City Attorney's Office – all of which wanted the Stop Work Order to remain.

Sunroad attorney Steve Strauss sent Mr. Waring a draft letter on 6 December 2006 that outlined the agreement in which the City would lift the Stop Work Order in exchange for Sunroad taking the lead in lobbying the FAA to change the height restrictions and the airport approach procedure at Montgomery Field.<sup>75</sup> The letter stated:

Dear Jim:

We are writing to confirm the following matters with respect to the Notice as agreed between our client, Sunroad Centrum Office I, L.P. ('Sunroad'), and the City of San Diego (the 'City') with respect to Sunroad's Centrum 1 building (the 'Building'):

1. The City hereby lifts the Notice and grants to Sunroad the authority to resume work with respect to the top 17 feet of the Building until the earlier to of (a) completion of the Building, including without limitation issuance of a certificate of occupancy, or (b) final determination and resolution of the FAA matter...
3. The City shall reasonably cooperate with Sunroad with respect to the matters relating to a new or revised Instrument Approach Procedure as outlined in numbered item (1) through (5) of the

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<sup>75</sup> 5 December 2006 letter from Steven Strauss, attorney for Sunroad, to Jim Waring, Deputy Chief of the Land Use and Economic Development for the City; Re: "Notice to Stop Work dated October 27, 2006, with Respect to Permit Number 30331 for Job Address 8620 Spectrum Center Blvd (the Notice)". (Exhibit 53). Letter was attached to 6 December 2006 e-mail from Steven Strauss, attorney for Sunroad, to Jim Waring, Deputy Chief of Land Use and Economic Development for the City. Subject: "Sunroad FAA". (Exhibit 54).

December 1, 2006, letter to you from [Barbara Lichman, at] Chevalier, Allen & Lichman.<sup>76</sup>

The letter illustrates that Mr. Waring had discussions with Sunroad officials to negotiate the lift of the Stop Work Order.

Mr. Waring sent a version of the letter back to Mr. Strauss on 8 December 2008 with a message that stated:

Steve;  
Attached is a revised version of your letter. Because it took me a while to get this done, I am sending it to you and Marcela [sic] at the same time. So we may have other words or issues. Let me know your thoughts.  
Jim<sup>77</sup>

It is worth noting that the City Attorney's Office was not included on any of these negotiations or correspondence.

Mr. Strauss responded to Mr. Waring on 11 December 2006 with an e-mail that stated, "Jim: Attached are clean and redline versions of the redline that you sent me on Friday. I am hoping we can finalize this agreement today."<sup>78</sup> It is worth noting that carbon copied on the e-mail was Dan Feldman, Vice President of Sunroad Enterprises, and Aaron Feldman, Owner and President of Sunroad Enterprises. It is also worth noting that no members of the City Attorney's Office were copied.

The next day, Mr. Waring received an e-mail from a Sunroad official to offer assistance in lobbying the FAA to change the height restrictions surrounding Montgomery Field. Specifically, Tom Story, Vice President of Development for Sunroad, offered Mr. Waring the assistance of Sunroad's lobbyist, who specializes in FAA influence. Mr. Story wrote in a 12 December 2006 e-mail to Mr. Waring:

Jim,  
The person we met with in DC (FAA) is Kevin Haggerty at \*\*\*-\*\*\*-\*\*\*\*.  
I'd like to suggest if you are going to discuss the FAA's position vis-à-vis our meeting with them that it might be helpful if I were in on the call. I could have our DC FAA lobbyist set this up if you like....

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<sup>76</sup> See at *Id.*

<sup>77</sup> 8 December 2006 e-mail from Jim Waring, Deputy Chief of Land Use and Economic Development for the City, to Steven Strauss, attorney for Sunroad; Subject: "Re: Sunroad/FAA"; Carbon copied: Marcella Escobar-Eck, Director of the City's Development Services Department. (Exhibit 55).

<sup>78</sup> 11 December 2006 e-mail from Steven Strauss, attorney for Sunroad, to from Jim Waring, Deputy Chief of Land Use and Economic Development for the City; Subject: "Sunroad/FAA: Letter of agreement w/City"; Carbon copied: Dan Feldman, Vice President of Sunroad Enterprises, and Aaron Feldman, Owner and President of Sunroad Enterprises. (Exhibit 56).

Tom Story  
V.P. Development  
Sunroad Enterprises<sup>79</sup>

Mr. Waring responded to Mr. Story that same day:

Tom;  
Can you set it up for between 8 and 9 our time tomorrow morning? If so,  
call my cell at \*\*\* \*\*\* \*\*\*\*\* and let me know...  
Jim<sup>80</sup>

This e-mail exchange makes clear that Mr. Waring was actively working with Sunroad officials to circumvent a violation of Public Utility Commission and FAA codes as described by Caltrans in six letters on 14 September 2006, 29 September 2006, 13 October 2006, 25 October 2006, 9 November 2006 and 27 November 2006. Worse, the final letter from Caltrans – sent to the City’s Development Services Department on 27 November 2006 – was a sharp rebuke to the City for failing to issue a Stop Work Order that properly conveyed the violation as described by Caltrans.

Coincidentally, while Mr. Waring was working with Sunroad officials to lift the Stop Work Order, the City issued a modified Stop Work Order to include the top 20 feet of the building. The Stop Work Order was signed by Julia Rosaler, Building Inspector for the City.<sup>81</sup>

On 15 December 2006 the City Attorney, on behalf of the People of the State of California and the City of San Diego, filed a complaint to abate the public nuisance caused by the Centrum 12 building hazard.<sup>82</sup>

## **J. STOP WORK ORDER LIFTED**

Just days after the City Attorney filed the lawsuit, Mayor Sanders scheduled a meeting on 19 December 2006 from 10 a.m. to 10:15 a.m. for a “Conference Call re: Sunroad.”<sup>83</sup> It is unclear who also attended the conference call.

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<sup>79</sup> 12 December 2006 e-mail from Tom Story, Vice President of Development for Sunroad Enterprises, to Jim Waring, Deputy Chief of Land Use and Economic Development for the City. Subject: “Centrum 1 Stop Work Order” (Exhibit 57)

<sup>80</sup> 12 December 2006 e-mail from Jim Waring, Deputy Chief of Land Use and Economic Development for the City, to Tom Story, Vice President of Development for Sunroad Enterprises. Subject: “Re: Centrum 1 Stop Work Order”. (Exhibit 58)

<sup>81</sup> 13 December 2006 City of San Diego Development Service Notice to Stop Work. (Exhibit 59).

<sup>82</sup> 15 December 2006 Complaint to abate nuisance. (Exhibit 60).

<sup>83</sup> 19 December 2006 calendar for Mayor Jerry Sanders. (Exhibit 61).

Shortly after conference call was concluded, Mr. Story sent an e-mail to City Building Inspector Joe Harris and Ms. Escobar-Eck. Mr. Story stated that he wanted to see the draft of the letter that would lift the Stop Work Order on the Sunroad building.

The relevant section is paragraph (5) 1<sup>st</sup> paragraph on page three. Marcela, I'd like to review the draft letter of authorization before it is signed to ensure that the letter comports with my understanding of what was agreed to via phone.<sup>84</sup>

Strikingly, the "relevant section" of the letter cited by Mr. Story points to a portion of a letter that Sunroad's attorney write to the City that sought a deal to lift the Stop Work Order. The section fo the letter discusses the specific work that would be permitted by the City by lifting the Stop Work Order. The language cited by Mr. Story in the 1 December 2006 letter stated:

(5) That upon submission of this letter by Sunroad, and agreement to its provisions by the City, the City will also agree to immediately allow completion of the tasks listed in Attachement A to this letter [Sunroad's 21 November 2006 letter to the City] to this letter, as well as the installation of electrical and mechanical equipment on the roof and elevator equipment to the penthouse.<sup>85</sup>

This point is crucial because Mr. Story, again, stated in the e-mail that he wanted to that the "letter comports with my understanding of what was agreed to via phone." This provides evidence to support the allegation that Ms. Escobar-Eck was aware that the lifting of the Stop Work Order would permit the installation of mechanical and electrical equipment – both beyond what could be considered "weatherizing."

That same day Isam Hassenin, Chief Building Official for the City, was told by a subordinate that the Development Services Department was considering lifting the Stop Work Order to allow Sunroad to continue work on the top 20 feet of the Centrum 12 building. Mr. Hassenin wrote an e-mail to Ms. Escobar-Eck to inquire about the truth of this allegation and recommend against lifting the order:

From: Isam Hassenin

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<sup>84</sup> 19 December 2006 e-mail from Sunroad's Vice President of Development Tom Story to Joe Harris, Building Inspector for the City, and Marcela Escobar-Eck, director of the City's Development Services Department. Subject: "FW: Letter dated December 1, 2006 Attached. 1 December 2006 letter from Sunroad attorney Barbara Lichman to Jim Waring, Deputy Chief of Land Use and Economic Development for the City of San Diego; Subject: "Sunroad Centrum – Proposal to Resolve FAA 'Hazard' Issues at Montgomery Field". 21 November 2006 letter from Tom Story, Vice President of Development for Sunroad, to Joe Harris, Chief Specialist Inspector for the City of San Diego; Subject: "Re: Centrum 12 Office Tower, 8620 Spectrum Center Blvd. (Exhibit 62)

<sup>85</sup> See at *Id.*

To: Escobar-Eck, Marcella  
Date: 12/19/2006 1:25:45 PM  
Subject: sunroad

Marcella,

Joe tells me that you're about to sign a letter allowing them to do work in the roof area. I have reviewed the plans with senior structural staff and would recommend against allowing any work in the topmost floor, the roof, and penthouse.

Thank you,  
Isam Hassenin, P.E., C.B.O.  
Chief Building Official, City of San Diego<sup>86</sup>

Mr. Hassenin in the e-mail clearly warned Ms. Escobar-Eck not to allow any additional work on the top floor of the building.

Later that day, Mayor Sanders held a face-to-face meeting with City officials, Sunroad's President Aaron Feldman, and Sunroad's Vice President Tom Story, from 4:30 p.m. to 5 p.m.<sup>87</sup> The meeting attendees also included Kris Michell, Ronne Froman and Julie Dubick.<sup>88</sup> According to an interview conducted of Mr. Waring:

Mr. Feldman explained to Mayor Sanders the same information that he had been discussing with Mr. Waring; i.e. Sunroad is a business partner with the city; Sunroad wanted to ensure the building is safe for everyone; Sunroad will commit to finding a suitable solution to the problem; Sunroad wanted to avoid a lengthy and costly legal action, etc. He apologized to the Mayor and said that he wanted 'to do the right thing and did not mean to hurt you or the city.' The City Attorney's office filed civil litigation against Sunroad on December 15<sup>th</sup>, 2006 and Mr. Waring informed the Mayor that they should just listen and not commit to anything. The Mayor and his staff listened attentively but committed to nothing. The meeting was short and lasted approximately 20-30 minutes.<sup>89</sup>

Mayor Sanders' calendar entry and Mr. Waring's interview testimony give crucial insight into how Mayor Sanders gave a developer a special opportunity to explain himself

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<sup>86</sup> 19 December 2006 e-mail from Isam Hassenin, Chief Building Official for the City of San Diego, to Marcella Escobar-Eck, Director of the City's Development Services Department. Subject: "sunroad". (Exhibit 63)

<sup>87</sup> 19 December 2006 calendar entry for Mayor Jerry Sanders. (Exhibit 64).

<sup>88</sup> 22 June 2007, Memorandum of Interview of Jim Waring. Interview conducted by Vince delaMontaigne. (Exhibit 65).

<sup>89</sup> See at *Id.*

after the developer knowingly constructed a building that violated federal height restriction. It is crucial to note that Sunroad's Vice President of Development Tom Story told the San Diego Airport Advisory Committee that when the company found out the FAA had rejected its 180-foot application, the company built to that height anyway.<sup>90</sup>

Mayor Sanders gave an interview on the *Roger Hedgecock Show* in which Sanders discussed what had occurred at the meeting and admitted that he approved lifting the Stop Work Order to allow winterizing. Mayor Sanders stated:

Aaron Feldman asked to come over and explain his side of the story. He came over and said that he didn't want to file a lawsuit against the City. He didn't want to file a lawsuit for quite a bit of money against the City, but he was feeling compelled to because he felt that he done everything correctly, even though we know now that's not the case. He also felt that it was if we couldn't winterize that building, it was going to create damage in the [sic] that couldn't be taken care of and if they sued us we were going to owe a lot more money for that. I talked with Jim Waring, we had conversations, and basically the decision was made to let the building be winterized...I thought that the right decision was to let it be winterized...<sup>91</sup>

Coincidentally, Ms. Escobar-Eck signed a letter that modified the Stop Work Notice to allow work on the top floors to continue on 21 December 2006. Ms. Escobar-Eck issued a letter which allowed some work on the building to continue "above the level specified in the notice."<sup>92</sup> Ms. Escobar-Eck wrote:

Development Services Department of the City of San Diego has reviewed your letter of request to install weatherproofing covering on the 12-story structure mentioned above.

In the interest of saving the structure from damage which could be caused by weather, your request will be allowed for this phase of construction for the items discussed at the field meeting of December 21, 2006 with Joe Harris subject to your concurrence with the terms of this letter.<sup>93</sup>

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<sup>90</sup> 14 November 2006 City of San Diego Airports Advisory Committee Minutes Montgomery Field Airport Lobby. (Exhibit 66)

<sup>91</sup> Transcript of the 14 June 2007 radio excerpt from the *Roger Hedgecock Show* broadcast on KOGO 600. (Exhibit 67).

<sup>92</sup> 21 December 2006 letter from Marcella Escobar-Eck, director of the City's Development Services Department, to Tom Story, Vice President of Development for Sunroad Enterprises. Subject: "8620 Spectrum Center Blvd. Approval 300319". (Exhibit 68).

<sup>93</sup> See at *Id.*

With this letter, Ms. Escobar-Eck permitted construction to continue on the top of the Sunroad Centrum 12 building despite being put on notice by the Federal Aviation Administration and Caltrans that the building violated state and federal codes.

Meanwhile, Chief Building Official Mr. Hassenin continued to attempt to convince Ms. Escobar-Eck that allowing construction above 160 feet is a bad idea. In a 21 December 2006 e-mail he wrote:

If it were determined that the top 20 feet of the structure is to be removed, all portions of the structure above the floor level of the 11<sup>th</sup> floor must be removed to accommodate the rebuilding of the elevator penthouse to be within the FAA maximum height of 160 feet. Therefore, it is not advisable to do any construction beyond the floor level of the 11<sup>th</sup> floor.<sup>94</sup>

Mr. Hassenin's plea had no effect and the lift of the Stop Work Order was approved under the signature of Ms. Escobar-Eck.

It is also worth mentioning that City of San Diego codes state the only individual authorized to lift a Stop Work Order is the City's Chief Building Official. At the time of the Sunroad controversy that individual was Isam Hassenin. As stated in the evidence presented in this report, Mr. Hassenin voiced his concerns on at least two occasions that the Stop Work Order should **not** be lifted. In an interview with investigators, Mr. Hasenin confirmed this account:

This amendment to the stop work order was being managed by Marcela Escobar-Eck and Jim Waring. Mr. Hasenin had very little to do with this. He recalled meeting with Marcela on the amendment to the stop work order and Isam Hasenin did not think all of this wrk should be permitted. Tis was more than the original agreement that the city offered to Sunroad. Marcela stated that additional negotiations had taken place and this is what the city was going to permit. He did not remember the city attorney's office being part of this discussion...He did not consider any of the changes in the amended order to be life safety issues, but this was more for the benefit of Sunroad. The city of San Diego was now allowing substantial work to be completed, while the original stop work order in October halted all construction on the project. There was differences of opinions but Mr. Hasenin said that Marcela Escobar-Eck was the boss and she made the decision.<sup>95</sup>

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<sup>94</sup> 21 December 2006 e-mail from Isam Hassenin, Chief Building Official for the City of San Diego, to Marcella Escobar-Eck, Director of the City's Development Services Department. Subject: "here it is". (Exhibit 69)

<sup>95</sup> 30 June 2007 interview of Isam Hasenin, former Chief City Building Officer for the City of San Diego. Interview taken by Vince delaMontaigne; Topic: "Sunroad". (Exhibit 70)

What Mr. Hasenin did not know was that the decision was made by Mayor Sanders and Mr. Waring. Ms. Escobar-Eck was merely carrying out the directives given as a result of Mayor Sanders' and Mr. Waring's meeting with Sunroad Owner and President Aaron Feldman.

As evidenced by the letter sent by Ms. Escobar-Eck, Mr. Hassenin refused to sign the order. Mayor Sanders appeared on the local radio show, the *Roger Hedgecock Show*, and stated that because Mr. Hassenin refused to sign the Stop Work Order, the procedures for lifting it had to be changed for the entire City and, in turn, Ms. Escobar-Eck, then-Director of the Development Services Department signed the order.<sup>96</sup>

RH: So you that in your bureaucracy there's somebody who's supposed to, that actually is designated by your procedures and state law, to sign, because it's a pretty serious matter. You know, stopping work. A stop work order is a pretty serious matter. And there's actually a building official that's designated to do that.

JS: Right.

RH: It's not Marcella [Escobar-Eck].

JS: No comment.

RH: I mean, and, and, and Waring had to change the policy in your department because the guy who was supposed to do it, the guy who was actually under the policies and the state law required to do it, in terms of modifying any stop work order, refused to do it.... [T]his particular building official who was designated to issue stop work orders and any amendments to them, any changes to them, refused to do it, wouldn't allow his deputies to do it, and Marcella did tell him, and I understand it, 'Okay, then I'll do it.'

JS: And, and I understand it differently, but that's...I understand she went to him and asked if he was willing to do it and he said no. And she said alright, I'll do it. She didn't try to put the pressure on him to do it, knowing that it was a political situation....

RH: Okay, So I just wanted to make that clear that a stop work order modification went out, *not from the person that would normally do it*, because Marcella went and asked him to do it in the first place, right...

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<sup>96</sup> Transcript of the 14 June 2007 radio excerpt from the *Roger Hedgecock Show* broadcast on KOGO 600. (Exhibit 67)











































































