

County of Santa Clara County Counsel



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DATE: August 12, 2008

TO: Board of Supervisors

FROM:

A handwritten signature in cursive script, appearing to read "Ann M. Ravel".

Ann Miller Ravel
County Counsel

SUBJECT: Report Back on Legal Options Relating to Reid-Hillview Airport

RECOMMENDED ACTION

Consider recommendations relating to legal options relating to Reid-Hillview Airport.

Possible action:

- a. Under advisement from March 18, 2008 (Item No. 17): Accept report from the Office of the County Counsel relating to legal options relating to Reid-Hillview Airport.

- b. Direct the Administration and/or County Counsel to take any action the Board deems appropriate.

REASONS FOR RECOMMENDATION

At the March 18, 2008, Board of Supervisors meeting, the Board asked that County Counsel report to the Board with an analysis of the legal options associated with continuing or discontinuing the present use of Reid-Hillview Airport property. This report responds to the referral.

As explained more fully below, should the County decide to sell or lease all or part of the Reid-Hillview Airport, the Federal Aviation Administration (FAA) could raise objections based on certain grant assurances the County agreed to when it accepted certain grants from the FAA. If objections were raised, the County could pursue a number of options that, if successful, would allow the County to sell or lease all or part of the property notwithstanding objections raised by the FAA. In brief, the County could pursue the following:

- **Petition the FAA.** The County could petition the FAA to sell or lease all or part of the Reid-Hillview Airport on the basis that it is no longer needed for civil aviation purposes.
- **Legal Challenge to Any FAA Action to Deny Petition to Sell or Lease Airport Land.** If the FAA denies the County's petition to sell or lease the airport, that action could be challenged on the basis that it is arbitrary and capricious, or on the basis that it is contrary to the County's rights under the U.S. Constitution. Some of the legal arguments the County could assert include the following:

- **Improper Retroactive Application of Grant Assurances.** The County could assert that grant assurances restricting the use of airport land and revenues, entered into years after the grants under which the County acquired airport land, cannot be retroactively applied to restrict the County's use of land acquired under those past grants.

- **Limited Duration of Grant Assurances.** The County could assert the grant assurances which the FAA alleges would restrict the County's ability to sell or lease the airport land are effective only as long as the airport is operational. None of the grants explicitly require the County to continue operating the airport, and the assurances made by the County specific to the grants used to acquire airport land have been fulfilled.

- **Rescission.** The County could seek to rescind, or in essence cancel, the present and past grant agreements by returning funds to the FAA on the basis that it is in the public interest to do so.
- **Seek Congressional Relief.** The County could seek the assistance of its federal representatives to enact legislation allowing the County to sell or lease all or part of the airport.

BACKGROUND

The Reid-Hillview Airport was originally constructed and opened in 1939 by Cecil Reid as Reid's Hillview Airport, a private airport open to the public. The County acquired the airport, then approximately 65 acres in size, in 1961.

Over the next several years, the County acquired additional land to expand the airport to its current size of approximately 180 acres, receiving several grants from the FAA for that purpose. The County received FAA grants in the following

years and amounts to be used either solely or in part to acquire land: 1) 1962 (\$363,285); 2) 1963 (\$384,878); this grant was subsequently amended in 1967 (\$398,010) to cover the cost of additional land; 3) 1964 (\$346,570); and 4) 1971 (\$22,145).

The County has received numerous additional grants from the FAA to help pay for development and improvements to the Reid-Hillview Airport. Most recently, in 2006, the County accepted a grant of \$1,200,000 for noise abatement. In 2007, the County received its last two FAA grants for the airport. The first of these grants was in the amount of \$551,300 for security fencing, and the second was in the amount of \$475,000 for the acoustic treatment of houses located north of the airport.

All grants come with terms, or "assurances," that the County must agree to abide by. The vast majority of grants entered into by the County, including the most recent ones, include language limiting certain assurances to: "the useful life of the facilities developed under the Project but in any event not to exceed twenty (20) years from the date of acceptance of an offer of Federal aid for the Project."

In 2001, 2003, 2005, 2006 and 2007, the County entered into grant agreements containing a new assurance providing that "there shall be no limit on the duration of the terms, conditions, and assurances with respect to real property acquired with federal funds."

Starting in 2006, the grant agreement the County entered into contained the additional assurance that "[f]or 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" The assurance further provides that if airport land is sold, the government must receive its proportionate share of the fair market value from that lease or sale. This additional assurance was based on a change in federal law requiring certain assurances be given in exchange for the receipt of FAA grants.

The County has also agreed to a grant assurance requiring that it file an Airport Layout Plan (ALP) which must be approved by the FAA. Under the U.S. Code provision requiring airport sponsors to agree to this assurance, any changes or modifications to the ALP, such as the sale or lease of airport property, must be approved by the FAA. This ALP is made part of the grant agreement and attached as "Exhibit A" to that agreement, listing all property composing the airport, whether purchased with federal funds or the sponsor's own funds.

Lastly, the County has agreed to a grant assurance requiring that any "revenue generated by a public airport" will be used for operating expenses of the existing airport or airport system, or will be used on other air facilities, for as long as Reid-Hillview is used as an airport.

When the County previously considered the possible closure of Reid-Hillview Airport, and recently in its letter to the Board of March 7, 2008, the FAA has expressed the view that the County is legally obligated under the terms of the grant agreements to continue the operation of Reid-Hillview airport.

Options Should the Board Choose to Close Reid-Hillview Airport

1. Petition to Sell or Lease Airport Property

a. Process to Petition to Sell or Lease Airport Property

The FAA issues "Orders" interpreting its statutory authority. To ensure compliance with grant assurances, the FAA issued Order 5190.6A (Airport Compliance Requirements). Pursuant to this Order, the FAA sets forth an administrative procedure providing that the FAA has authority to approve or prohibit a sponsor's attempt to close, sell or lease an airport funded under FAA grants. Section 7-18 provides that a sponsor must obtain permission to delete any property

shown on "Exhibit A" to the grant agreement, which will only be granted if the land is not needed for present or foreseeable public airport purposes.

Section 7-20 further provides that a sponsor seeking to dispose of an airport for non-airport purposes must make a request to that effect to the Associate Administrator for Airports, including exhibits and documents justifying the request. Each request to release an airport sponsor prior to the expiration of the grant assurances, which are discussed below, is considered by the Associate Administrator for Airports on a case-by-case basis. The FAA will then make a determination on the request, though there is no set time line in which the decision must be issued.

When the FAA is asked to make any changes to grant agreements, its overarching concern is "the extent that such action will protect, advance, or benefit the public interest in civil aviation." The FAA considers several other factors, including the owner's past and present compliance with all airport agreements and actions to make a safe and usable airport for maximum use by the public; the reasonableness and practicality of the owner's request in terms of aeronautical facilities needed and priority of need; the net benefit derived by civil aviation and compatibility with civil aviation; and the consistency with the guidelines for specific kinds of releases as discussed in the FAA Order.

Section 7-37, subd. (b), of FAA Order 5190.6A provides that if an airport sponsor requests a modification of a grant assurance, it must be determined that one of the following apply: 1) the purpose for the provision is no longer applicable; 2) the modification of an agreement will not prevent the public purposes underlying the obligation and such action is necessary to protect the interest of the United States in civil aviation; 3) the modification will obligate the airport owner under new terms determined necessary in the public interest and to advance the interests of the United States in civil aviation; or 4) the modification will conform the rights and obligations of the owner to the statutes of the United States and Congressional intent.

The procedure described above is not codified in any statute but is only contained in FAA orders, which may be considered persuasive but which are not entitled to the deference of regulations or statutory law. Although the FAA procedure is detailed, as explained below, the County could assert that certain considerations are contrary to the relevant federal statutes. Finally, though the County holds title to all airport lands, the FAA may assert that it is entitled to certain monetary compensation, including substantial penalties, should the County attempt to sell or lease airport lands in whole or in part, without first seeking the FAA's permission as outlined above.

b. Petition to FAA on the Basis that the Reid-Hillview Airport is No Longer Needed for Civil Aviation Purposes

The County could petition the FAA to close the airport by demonstrating that it was no longer needed in the interests of civil aviation. The FAA has, in the past, agreed to closure of an airport. In *Friends of Richards-Gebaur Airport v. Federal Aviation Administration*, a pilots association challenged the FAA's decision to allow closure of the Richards-Gebaur Airport in Kansas City after the FAA concluded that it would result in a net benefit to aviation. In this case, the airport in question was operating at a substantial loss; in 1997, the airport lost \$18 million, which was heavily subsidized by the city's other two airports.

The city decided to seek closure of the airport in order to develop the land into a new intermodal rail-truck freight distribution center. The FAA and the city negotiated a memorandum of agreement to close the airport, which recognized the substantial losses and heavy subsidies by the two other city airports, which drained funds otherwise available to the latter two airports. The FAA found "that this financial burden was not necessary in a metropolitan area served by several other airports that remain open to general aviation." In return for closure of the airport and release from its grant assurances, the city agreed to deposit \$5 million into an escrow account to be used by the FAA for airport improvement projects; additionally, the city agreed that for the first 20 years of its lease with the rail-truck operator, the income would be deposited in the city's aviation account to be used solely for aviation purposes. With the above facts and this agreement in mind, the Court of Appeal held that "it was reasonable for the FAA to determine that a release providing a

net benefit to aviation is 'necessary' to protect or advance civil aviation interests within the language of the statute."

Should the FAA oppose the County's sale, or lease of, a portion of Reid-Hillview, as a matter of due process, the FAA would have to justify why the airport would continue to be needed for civil aviation purposes. If the County can counter these reasons, or otherwise demonstrate why closing the airport would be beneficial as was the case with the Kansas City airport discussed above, or demonstrate that continued operation of the airport poses a public nuisance, it may be able to attack any FAA determination prohibiting the County from closing the airport.

If a petition to sell or lease all or part of the Reid-Hillview Airport were denied on the basis that the FAA continues to believe the airport is needed for a civil aviation purposes, the County could argue that such a sale or lease would be consistent with the County's due process rights and statutory law.

c. Closure of Other Municipal Airports

Other municipalities have attempted to close airports, or otherwise restrict activities, with varying degrees of success. The City of Santa Monica attempted to ban jets landing at its airport, but the FAA blocked the ban by filing a cease and desist order and initiating enforcement proceedings against Santa Monica, relying on grant assurances agreed to by the city. In 2007, the City of Oceanside explored closure of its airport in favor of a mixed use development, but abandoned the effort following FAA objections that the city was bound to continue operating its airport in light of its acceptance of FAA grants.

Other attempts to close municipal airports have been successful, although the methods have been different. In Kansas City, the city was able to reach a settlement with the FAA to close Richards-Gebaur Airport. The FAA released Kansas City from the grant assurances on the condition that the funds from the proceeds of the sale would be used for other airports in the area and revenue from the planned lease of the land would continue to be used for transportation purposes for 20 years, and also due to the existence of other airports in the area which were considered sufficient to support aviation.

In Austin, Texas, the city closed the Austin-Mueller Airport, without the FAA's objection, based on the premise that the airport's general aviation operations would be moved to Bergstrom Air Force Base. The closure took three years and construction of a mixed-use development began on the former airport land.

In Chicago, in 2003, Mayor Richard Daley bulldozed the runway at Meigs Field without notifying the FAA. After years of legal action, the city agreed to repay \$1 million the FAA claimed was illegally diverted to demolish the airport. The land used for the airport was not acquired with federal funds in this case, but was leased by the city. The FAA also fined the city \$33,000, the maximum possible, for failing to provide advance notice of its plans to close the airport. Similar conduct today would have resulted in a \$300,000 fine. As part of the settlement, the city denied wrongdoing.

2. Legal Challenge to Any FAA Action to Deny Petition to Sell or Lease Airport Land

If the County petitions the FAA for a modification of its grant assurances in order to sell or lease all or part of the airport land and the FAA denies that petition, section 706 of Title 5 of the U.S. Code (the Administrative Procedures Act) provides that an administrative agency's decision may be overturned by the court if it is: 1) arbitrary, or capricious or an abuse of discretion; 2) contrary to a constitutional right or power; 3) exceeds the statutory jurisdiction of the agency; or 4) fails to follow procedures set forth in the law. This same section provides that a court may compel the FAA to take an action unlawfully withheld or unreasonably delayed.

If the County were to apply to sell or lease all or a portion of the airport land, and the FAA withheld permission to modify or cancel the grant assurances, the County could argue to a court that the FAA determination should be overturned on any one of the above bases.

a. Improper Retroactive Application of Grant Assurances

An assurance in the County's grant agreements with the FAA provides that the County "will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary." (Exhibit A is a document that shows a plot of the existing land boundary for an airport and includes a description of each parcel that makes up the property boundary.) This assurance is not necessarily limited to land acquired with federal funds; it also extends to property that was acquired without federal assistance but "shown on Exhibit A."

The County could argue that the restrictions related to federally-funded property should not apply to Reid-Hillview. Not until just prior to the 2005 grant did Congress amend the relevant statute to indicate that the federal government's interest in real property should apply retroactively. Specifically, 49 U.S.C. § 47107(c)(1)(A) provides that land purchased with a grant "before, on or after" December 1987 is considered land that "is needed for an airport purpose" (except a noise compatibility purpose), if that land is needed for an aeronautical purpose and revenue generated from the land contributes to the self-sufficiency of the airport. This statute was more recently amended to provide that land that "was or will be acquired for an airport purpose" can only be sold when land is no longer needed for an airport purpose; when the land is sold the Government is then entitled to its proportional share of the proceeds. 49 U.S.C. § 47107(c)(2)(b). The FAA's "Policy and Procedures Concerning the Use of Airport Revenue: Notice," as set forth in the Federal Register, states that the above amendment was a clear declaration of legislative intent for retroactivity. The County could argue that such an attempt at retroactive action by the FAA and Congress violates due process or stands in contradiction to the presumption that statutes affecting substantive rights and liabilities must have a prospective effect only.

Furthermore, the last purchase of airport property with federal funds was in 1971, some 37 years ago. The federal government, however, did not begin imposing indefinite restrictions on property acquired with federal funds until 1982. The 1962, 1963, 1964, and 1971 grants did not include language that later appeared for the first time in subsequent County grant agreements indicating that the duration of assurances with respect to real property had no limit. The County could reasonably argue that the indefinite real property assurance should not apply retroactively to property acquired at a time when the FAA did not impose unending assurances on publicly-sponsored airports. In that case, any obligation on the assurances and/or to continue operation of the airport expressed or implied in the 1962, 1963, 1964, and 1971 grant agreements expired no later than 1991.

b. Limited Duration of Grant Assurances

In the past, the FAA has alleged that pursuant to the grant assurances, the County cannot accept grant funds and then close the airport before the useful life of the funded improvements has expired or the passage of 20 years, whichever

occurs earlier. Under that reasoning, the County would be obligated to continue operating the airport for the useful life of the facilities developed with the 2007 grant, but not past 2027, assuming no additional grant funds were accepted in the interim. The FAA would have to approve the closure of the airport during that time.

There are, however, arguments in favor of airport closure notwithstanding the grant assurances. The County could contend that the grant assurances should only be effective as long as the airport is operational. Under that interpretation, the assurances would only be relevant as long as the County chose to run Reid-Hillview. If the County decided to stop operating the airport, there is no sound justification for prohibiting the sale or lease of the airport land, especially since the assurances made by the County specific to the grants used to acquire the land have been fulfilled.

None of the 39 grant assurances the County has agreed to explicitly requires that the airport remain operational. Thus, the FAA's interpretation is at best only implied in the assurance language. The argument could accordingly be made that by failing to expressly require airport operation for a specified period, the grant assurances permit the County to close the airport.

Notably, in 2007, the FAA wrote a letter to the City of Oceanside, which was considering allowing its 20-year grant with the FAA to expire, closing its airport and selling the land for development. The FAA took the position that because airport property was acquired with federal funds, "the obligation to keep the Airport open as an airport does not expire, since there is no limit on the duration of the obligations with respect to real property acquired with federal funds." This is an extreme position that would appear to lock in an airport sponsor to carry on airport activities in perpetuity. Whether a court would find this to be reasonable is unclear. This is particularly true where, as here, the FAA's position depends on the retroactive application of a statutory change to expired grants.

3. Rescission of Grant Agreement

Courts have held that a grant agreement may be considered a kind of federal contract. Under federal contract law, the remedy of rescission allows a party to seek disaffirmance of a contract and the return to the status quo that existed before the transaction was executed. Because there is little controlling federal common law on rescission, at least one court has looked to the laws of the state in which the claim arose to determine whether rescission was warranted.

In California, a party to a contract may rescind the contract if a statutorily-enumerated ground for rescission exists, one of which is "[i]f the public interest will be prejudiced by permitting the contract to stand." (Civ. Code section 1689, subd. (b)(6).) Because the relevant statute requires a rescinding party to have a cause for rescission, it would not suffice for the County merely to return to the federal government the grant money it has received over the years. Instead, the County would be required to argue that it is entitled to rescind the contract because the public interest would be prejudiced if the contract were allowed to stand. It would be possible to substantiate this claim, for example, if the County could show that there is no longer a need for the airport, and its continued operation is unnecessarily diverting funds that could be used for other vital public services. The County may also be able to substantiate this claim if the County were able to argue that the Airport constitutes a public nuisance, since allowing such a nuisance to continue to exist would presumably constitute a "prejudice" to the public interest.

As noted above, rescission would not be effected merely by returning to the FAA the grant monies received to date. Instead, the County would be required to offer to restore all the benefits it received under the grants. If the FAA consented to the rescission, the grant agreements would be extinguished and the County would be relieved of the prohibition against the sale or lease of airport land. If, on the other hand, the FAA objected to the proposed rescission, a court could be called upon to resolve the matter. Assuming California law applied, a court would examine whether the County had just cause to rescind the agreements. This examination would likely include an analysis of whether the public interest was prejudiced by allowing the agreements to stand. Given the paucity of case law relating to the rescission of federal grants, a court might also look to other factors, as argued by the parties, when determining whether the County was entitled to rescind the agreements.

4. The County May Seek Congressional Relief

Notwithstanding the FAA's position as outlined above, the County may seek relief through its congressional delegation. The City of Rialto, California, for example, was able to secure a provision in a federal transportation bill that directed the FAA to permit Rialto to close the Rialto Municipal Airport, with certain restrictions on the proceeds of the sale of the property.

CONCLUSION

Should the Board determine that it wishes to pursue the sale or lease of the Reid-Hillview Airport, the legal procedures would be extremely complex and lengthy. In addition to the administrative processes of the FAA and possible ensuing litigation, the County would be required to adhere to CEQA processes.