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Via USPS & E-Mail

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OGDEN HINCKLEY AIRPORT

3909 Airport Road

Ogden, Utah 84405

Re: Request for Meeting/Resolution
Ogden Regional Airport Association v. Ogden Hinckley Airport

To the Respective Officials of Ogden City and Ogden Hinckley Airport (the “City”):

Durbano Law Firm and Bruce Baird, Esq. have jointly been retained by various individuals and the Ogden Regional Airport Association (the “ORAA”), which represents the interests of most of the hundreds of property owners within Ogden-Hinckley Airport (the “Airport”). On behalf of the ORAA, we are seeking a meeting to present our legal analysis and discuss issues about the operations and management of the Airport. A portion of the issues are explained below and can be discussed in greater detail during the meeting. In sum, it has recently been discovered that many of the Airport’s operations violate both federal and state constitutions, codes, regulations, and/or common law. Rather than engage in expensive and protracted litigation, the ORAA through its representation hopes that an open dialogue will lead to resolution. For this, we have intentionally chosen not to carbon copy the office of the Attorney General or representatives of the Federal Aviation Administration.

The following issues have reached a critical level of urgency which will require court ordered relief if no resolution is found. We therefore ask that the City advise us of its earliest availability to meet during the week of March 15 through March 18, 2021.

FACTS

I. Introduction

The Airport is a public aviation facility owned and managed by Ogden City, a city government of the State of Utah, with oversight by the Utah Aeronautical Division. It is not a public service entity, airport authority, or any other special service district. The Airport is part of a national air transportation system and

therefore falls under the purview of the United States of America via the regulatory body known as the Federal Aviation Administration (“FAA”) pursuant to 49 U.S. Code and applicable federal regulations. The Airport has applied for and received certain FAA grants for the purpose of airport improvements which grants require and impose certain FAA “Assurances” upon Ogden as a “public agency sponsor.” The Assurances include all “general Federal Requirements,” all “Executive Orders,” and “Specific Assurances.” *See* Ex. 2, pp. 2-4.

II. *Historical Use*

Throughout the vast majority of its history, the Airport has operated as a general aviation airport. Within its compound are hundreds of aircraft hangars and tiedowns that sit on City owned property with most hangar owners leasing the ground from the airport. The various lease contracts provide a base monthly rate which can be increased depending upon rises in the Consumer Price Index (“CPI”). At the end of the lease term, the lease historically has the option to be renewed and has been renewed. Historically, lease renewals have been automatic upon the lessee’s request, thus allowing the leases to be passed down from generation to generation. In fact, most (if not all) of the lease agreements provide a right of first refusal provision permitting the lessee first right to renew the agreement at lease end. The Airport’s lessees have placed great stock in being able to reliably renew their leases with the City which has given them confidence in pouring hundreds of thousands of dollars’ worth of construction upgrades and upkeep into their respective hangars.

The Airport also houses three fixed based operators (“FBOs”), Kemp Jet Center, Mountain Valley Aviation, and CB Aviation. The FBOs provide general services to the aircraft owners and lessees within the Airport, providing fuel, plane tie-downs, aircraft maintenance, and other services to transient aircraft and lessees. This firm has not yet been retained by the FBOs but anticipates engagement shortly.

III. *The Airport Business Plan*

In 2019, the Airport adopted the Ogden Airport (OGD) Business Plan (the “**Business Plan**”) to govern the Airport’s operations and general business functions. *See Exhibit 1*, attached hereto. Effectively, the Business Plan discusses the Airport’s plot to take possession of each and every hangar located within its compound whilst the hangar still has useful life, then using the remainder of the hangar’s useful life to earn a profit. The Business Plan further discusses the Airport’s intent to become the sole FBO offering fuel and ground handling at the airport, thus taking over the businesses of the existing FBOs. The Business Plan strategizes its intent to establish an enterprise through the following relevant language.

The current financial plan is simply not sustainable. Losses from operations and losses (cash flow) on all capital projects, specifically the 9.63% local match for multi-million dollar FAA-AIP grants Due to the lease methodology, most [lessees] are just leasing the land directly beneath their hangar.

See Ex. 1, p. 1. The Business Plan then discusses how the Airport would obtain additional revenues from the hangars leased and, in many instances, improved by the Airport’s lessees.

3.c. Address leasing policy. There must be a time set when the hangar is too old to be monopolizing City / Airport land. Policy is essential to support the change from existing policy or past norms, actual or perceived.

3.d. The city need [*sic*] the time when the hangar is old enough to revert (30 years) to the City’s ownership, but not too old to be able to lease to others without great cost.

i. This is a sweet spot between 30-50 years of age. ***If hangar revert to the City / Airport at 20 or 40 years of age, we can justify capital improvements to the reverted hangars because there is enough useful life left in the asset to make the investment worth the expense***

3.h. Consider City policy reflecting a 30-year lease for new building construction between \$500,000 and \$3 million. More than \$3 million, but less than \$6 million gets 35 years and more than \$6 million get 40 years. No one gets more than 40 years. ***At the end of each of these time periods, the hangar and all improvements revert to the City's ownership.***

3.l. Address the costs involved in demolition and the termination of the leases. Hangars needed to be removed before their lawful lease is up, will likely need to be compensated.

i. ***Such compensation would NOT be for the fair market value of the leasehold improvements,*** rather it would be based upon the cost to lease a comparable hangar facility elsewhere at another airport.

The Business Plan evidences that the Airport is actively conspiring to take out the existing FBOs and become the sole provider at the Airport. The Airports recent actions demonstrate that the Business Plan has been adopted to this respect. This firm has gathered a binder containing accounts of dozens of hangar owners who have lost their property rights from the implementation of the Business Plan.

6. Ogden City to become the sole fueler and ground handler on the OGD airfield.

a. Current FBO's on the OGD airfield

i. Kemp Jet Center

1. Kemp Jet Center has two agreements that, when the lease terminate, would allow for a non-renewal to remove Kemp as an FBO provider at THE AIRPORT.

a. The Kemp FBO agreement terminates on December 31, 2029.

b. The "through-the-fence" agreement with Kemp's southmost FBO terminates on August 1, 2026. ***This agreement is key because without this agreement, Kemp cannot have access to the OGD Airport from their privately-owned land where the south campus exists. It is impossible for Kemp to operate an FBO without this agreement,*** thus, this agreement is the critical negotiation termination point

ii. Mountain Valley Aviation

1. The existing Mountain Valley Lease and FBO agreement terminates on December 31, 2033 at the end of a 25-year agreement.

- c. *I believe that the City / Airport future FBO can easily and successfully compete with Mountain Valley as a FBO until the lease runs out.* Notice needs to be given to Kemp concerning our intent to not renew the through-the-fence agreement and the Mountain Valley FBO agreement.

iii. CB Aviation

1. In CB's current lease, the original termination date was June 1, 2042, but *because CB failed to meet several obligations to which they had agreed to have complete by August 2018, the termination date was reduced to June 1, 2022 (Five years).*
2. *In addition, the current lease has a provision that if the City chooses to become the sole provider of any airport service(s), then CB must vacate that line of business after 90 day notice.*

(emphasis added). Although we do not represent the FBOs at this time, we emphasize this language as further evidence of the legal violations that have occurred and continue to occur.

ANALYSIS

I. The Airport's Conduct Violates Federal and Local Antitrust Law.

The Utah Constitution provides:

It is the policy of the state of Utah that a free market shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people. Each contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is prohibited. Except as otherwise provided by statute, it is also prohibited for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce.

UTAH CONST. art. 12 § 20. Under this premise, Utah's legislature enacted the Utah Antitrust Act. *See* UTAH CODE § 76-10-3101, *et seq.* This act defines illegal anticompetitive activities as follows:

- (1) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared illegal.
- (2) It shall be unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce.

Id. at § 76-10-3104 (emphasis added).

While the Utah Antitrust Act carves out exemptions for political subdivisions, the Airport does not qualify under the City's exemptions. "[I]n order for a state's subdivision to enjoy the 'state action' exemption, there must be an indication that its action is 'authorized or directed' by the state, so that the subdivision is in fact acting on behalf of the state rather than its own parochial interests." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978). Thus, "an adequate state mandate for anticompetitive activities of . . . subordinate governmental units exists when it is found from the authority given a governmental entity to

operate in a particular area, *that the legislature contemplated the kind of action complained of.*" *Id.* at 415. The Supreme Court of Utah has held that the State's interpretation of "authorized and directed" aligns with the federal definition pursuant to the provisions of Utah Code § 76-10-3118. *See Summit Water Dist. Co. v. Summit Cnty.*, 2005 UT 73, ¶ 35, 123 P.3d 437 ("Because municipalities perform many functions in both a private and a public sense, it would be imprudent to categorically reject the applicability of the anti-trust statutes to every act of such governmental entities"). "[I]n order to be eligible for the state action exemption, a municipality must show that it acted pursuant to a 'clearly articulated and affirmatively expressed . . . state policy' to displace competition." *Id.* at ¶ 36. Such authority is entirely lacking here with regards to the Airport's Business Plan model. Indeed, no federal or local statute permits the Airport to take such targeted and hostile action against its FBOs and hangar owners in order to control all marketable services, assets and income/profits generated therefrom.

Because the Airport does not qualify under the city's exemptions, its plan and activities related to inhibiting the free market within the Airport are illegal and unconstitutional. The Airport is actively using its position and authority in renewing leases to suppress competition and become the sole owner of hangar property as well as the only provider of fuel and ground handling at the Airport.

The Business Plan is purportedly premised on the need to solve the number one "existing major current problems," i.e., "Annual Financial Loss from airport operations." However, this notion of the Airport operating at a financial loss is hotly disputed and should be made the subject of an audit request to the State Auditor, John Dugal. However, even assuming that the Airport is operating at a financial loss, such is not nor cannot be the basis for a governmental entity to utilize its monopolistic power of seizing or taking private property and/or businesses in pursuit of becoming a "for profit" entity and replacing the private sector. It should be undisputed that the general purpose of any governmental entity is to provide basic services for the health, safety, welfare, and protection of the people it serves. A safe infrastructure associated with transportation clearly falls within this category. Because the Airport benefits the people outside of city boundaries, a special service district or official airport authority designation could be utilized to permit taxing and assessment. However, competing against the private market is never an appropriate use of government resources.

II. The Airport's Nonrenewal and/or Repossession of Hangars and Hangar Improvements Constitutes an Unlawful Taking.

The United States Constitution provides that "private property [shall not] be taken for public use, without just compensation. U.S. CONST. am. 5. Similarly, Utah's Constitution states "[p]rivate property shall not be taken or damaged for public use without just compensation." UTAH CONST. art. 1 § 22. These protections extend to lessee property held under a valid lease. *See Colman v. Utah State Land Bd.*, 795 P.2d 622, 626 (Utah 1990). Just compensation demands that a property owner "be put in as good a position money wise as they would have occupied had their property not been taken." *UDOT v. Admiral Beverage Corp.*, 2011 UT 62, ¶ 28, 275 P.3d 208. "[T]o be fair and just, [compensation] must reflect the fair value of the land to the landowner." *Id.* (citations and internal quotations omitted). "Compensation meets this standard of fairness when it makes the landowner financially whole by placing him in the position he would have occupied were his property not taken. Moreover, Federally Assisted Programs such as the Airport are mandated under the Uniform Relocation Act, 42 U.S.C. § 4601, *et seq.*, to provide relocation assistance to displaced property owners as a result of condemnation or other takings procedures and are mandated to minimize the economic impact and social well-being of its communities. *Id.* at § 4621.

Further, principles of equitable estoppel are invoked when "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *United Am. Life Ins. Co. v. Zions First Nat'l Bank*, 641 P.2d 158, 161 (Utah 1982).

Here, the Business Plan outlines the Airport's intent to terminate various lease agreements, but states that it will not pay fair market value to the lessees, instead only paying the cost to lease a comparable hangar facility elsewhere at another airport. On its face, this explanation of compensation violates constitutional protections against takings. The Business Plan further outlines the Airport's intent to revoke future leases to current lessees even though historically the leases have been consistently renewed without issue. The Lessee's have become so reliant on these "automatic" renewals that they have expended thousands or even millions of dollars in leasehold improvements with the understanding that they will be able obtain a lease renewal, or even pass down the leasehold to their next of kin. The Airport is equitably estopped from changing their course of dealings established over years to the detriment their lessee's, especially where the Airport acknowledges that the useful life of a hanger will exceed the term of the lease. Because the Airport's intent in not renewing the leases is simply to turn a profit by capitalizing on the remainder of the hangar's useful life, this is a clear violation of the takings clause and a breach of the right of first refusal in the lease agreements.

III. *The Airport's Utility of Article 8 to Increase Rent Constitutes a Breach of the Lease Agreements and Abuse of Authority.*

Conditions for increases to rent for leased grounds is governed by the separate lease agreements between the Airport and lessee's. Notwithstanding, the Airport has recently burdened its lessee's with drastic rate increases using Title 8 of the Ogden Municipal Code as justification. The Airport Manager is abusing his power under Ogden Municipal Code ("OMC") § 8-1-2 which provides him with "full power to carry out, administer and enforce this title to oversee its implementation." Further, a unilateral vote by Ogden City to increase rent is, in fact, a unilateral breach on the part of the city. This violates basic contract principles and possibly even notions of fairness contemplated in federal civil rights.

The City and the Airport are using Title 8 to fulfill the "Grant Assurances" imposed upon the Airport by the FAA through receipt of grant money. Although no Utah cases apparently address the question of the effect of FAA Grant Assurances on third-party contracts, a California Court of Appeal recently reviewed such a situation in *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 120 Cal. Rptr.3d 797 (Cal. App. 2011).

In *Mammoth Lakes*, the Town of Mammoth Lakes (the "Town") made certain assurances in exchange for receiving federal funds from the FAA for the Town's airport. One of these grant assurances required the town to not sell or lease any part of the airport property without the approval of the FAA. *Id.* at 805. The Town, without FAA approval, subsequently entered into a development agreement with a developer, allowing the developer to lease airport property, construct improvements, such as airport hangars, and build a hotel or condominium. *Id.* The contract also gave the developer the option to purchase the land after thirty years. *Id.* at 805-7.

Several years after the contract was executed, the FAA took the position that the development agreement violated the Town's grant assurances and refused to allow the Town's expanded air services if the developer's project went forward. *Id.* at 808. When the developer insisted on exercising its contract rights, the Town invoked the assurance with the FAA to prohibit the developer's contractual rights. In sum, the Town argued that it was not obligated to honor the developer contract because the developer's rights conflicted with the grant assurances promised by the Town to the FAA. *Id.* at 810-11.

When the developer sued for breach of contract, the Town pointed to language in the developer's contract excusing a party from performance for "governmental restrictions imposed or mandated by governmental entities other than Town." *Id.* at 816. The court rejected this argument. *Id.* The court held that the Town's assertion was meritless "because the FAA's restrictions were within the control of the Town." *Id.* In other words, the grant assurances were freely made by the Town, and its own actions could not be a defense to the breach of contract action. *Id.* at 816-17.

The Town next argued that it was not in breach because the developer's contract required compliance with "all applicable rules and regulations of the FAA." *Id.* at 817. But, the court likewise rejected this argument. *Id.* Grant assurances, the court opined, are not "rules and regulations" of the FAA. *Id.*

Here, the City is in the same position as the Town of Mammoth Lakes. The City is improperly relying on authority granted by its own ordinances to impose grant assurances on third-party lessees who are under no obligation to fulfill those assurance. The City controls whether or not to make grant assurances, and it further controls the ordinances it enacts. The City's imposition of rules and regulations which are not part of the lease agreements constitutes an abuse of authority.

IV. The City's Use of Security Badges for Non-Security Uses is an Abuse of Authority.

In recent years, the Airport has ramped up commercial airliner traffic and use of its facilities with companies such as Allegiant Air. This commercial use has required the Airport to enact various rules and regulations imposed by the Transportation Security Administration. Specifically, the Lessee's are required to undergo a security background check for issuance of security badges before entering Airport property to access their hangars or tiedowns. These security badges are intended to maintain safety and protection of the traveling public. However, the Airport has recently begun using these security devices to impose its will against hangar owners whom the Airport deems to be out of compliance with airport use. For instance, the Airport has recently adopted a policy of not allowing non-aircraft items to be stored in hangars. To enforce this policy, the Airport has deactivated lessee's security badges to prohibit them from entering the Airport's security gate and accessing their hangars and property. This use of security badges falls well outside the scope of their purpose, and further demonstrates that the Airport is abusing its authority and violating basic constitutionally protected rights by restricting the property rights of the lessee hanger owners.

CONCLUSION

The foregoing issues are based only upon a preliminary review of this matter and is not meant to provide an exhaustive list of violative behavior. Indeed, it is suspected that the Airport has engaged in several other unlawful acts which may be equally or more egregious. The City's actions unjustly deprive hangar owners and tenants of the rights they have enjoyed for many years. There is no justification for this.¹ The Airport's well-documented conspiracy against its lessees is grounds for immediate legal action. Accordingly, we ask that the City provide its availability for a meeting as soon as possible. We look forward to working towards a speedy resolution.

Sincerely,

DURBANO LAW FIRM

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¹ The claimed need to make a profit is not a proper governmental justification or function.