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To Hayward City Council members
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Subject: Airport Property Partners LLC

Notes:

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December 16, 2011

Via Facsimile and Email: List-Mayor-Council@hayward-ca.gov

Mayor Michael Sweeney
and City Council Members
City of Hayward
City Hall Building
777 B Street
Hayward, CA 94541-5007

Airport Property Partners, LLC

Dear Mayor Sweeney and Fellow Council Members :

This firm represents Airport Property Partners, LLC and Hayward FBO LLC, which as you may know operate hangar and fueling facilities at the Hayward Executive Airport (known as APP Jet Center) pursuant to a lease with the City of Hayward. It is our understanding that the City Council is being asked to approve at their December 20, 2011 meeting a lease arrangement with Hayward Airport Development LLC ("HAD") that will provide for phased-in use and operation of various airport facilities. This new lease arrangement grew out of a May 2009 Request for Proposals for Redevelopment of the former Air National Guard site and Development of Aircraft Storage Hangars at the Hayward Executive Airport. Pursuant to that RFP, the City was "interested in a proposal that maximizes the use of the site as a multi-dimensional development, incorporating commercial, non-aviation development, private hangar development and taxi-lane access and associated ramp space." The RFP established minimum specifications and requirements and contemplated significant capital expenditures on the part of the successful proponent. The "product" of this RFP process appears to be the proposed lease agreement with HAD, in which event the City has failed to abide by its own procurement requirements, and instead participated in a sole-source negotiation in violation of the City's own established procedures, and to the detriment of other potential proposers and existing Airport tenants. Moreover, the proposed terms of the lease arrangement with HAD clearly appear to be far below market rates which implicate well-established prohibitions against the sale or encumbrance of public property at less than market value, and may rise to the level of a breach of the City's obligation of good faith and fair dealing in contracts it has with existing tenants, such as Airport Property Partners. My client's specific concerns include:

1. The proposed lease/project proposal with HAD is contrary to the City's procurement procedures as established in the 2009 RFP for Development of Aircraft Storage Hangars. Even though the City reserved the right to "amend or cancel" the RFP, it was required to provide notice of such actions and instead appears to have done a complete overhaul of the procurement process without notice and for the intended benefit of only one proposer. Moreover, there is no indication in the December 12,

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2011 report from the Public Works Director to the Council Airport Committee as to how, if any, of the specific requirements of the RFP are to be met under the current lease proposal. For example, there is no indication that a firm commitment has been made by the proposer, or is required by the City, for development and use of the entire site, or a defined portion of the site, nor does there appear to be a specified capital requirement. As such, the City's actions appear arbitrary and capricious and in violation of its own established procurement process.

2. The proposed lease terms with HAD are far below market rate. Although the actual lease between HAD and the City has apparently not been made public, the above-referenced Public Works Director report indicates that hangar rental rates are at \$0.52 per square foot per year. This amount is merely a fraction of the hangar rental rates at the Airport posted on the City's website. The City specifies in published materials that rental rates for hangar space at the Airport is approximately \$3.76 per square foot per year, which is reflective of market rates. See FY2011 Master Fee Schedule at p. 100. The rent in the proposed lease with HAD is a fraction of that amount, and the hangar space being rented is of a higher quality and size than any others currently available at the Airport. The City's entry into this market as a "landlord" offering substantially below-market rates raises two critical issues. First, as you know, the City as a municipal corporation does not have the right or power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation. Consistent with this prohibition, the City cannot sell or otherwise encumber property at below its appraised fair market value. Second, by participating in a below-market arrangement with a competitor of my client, the City exposes itself to a claim that it has breached the obligation of good faith and fair dealing implied in every contract. In this case, the City and my client have a contractual relationship through a ground lease at the Airport which further requires that my client invest additional capital in hangar space it owns. My client entered into that arrangement, and made those commitments, in good faith and with the full expectation that the City would take no action to deliberately undermine its ability to fairly compete. However, in this instance, the City, as the landowner, has created an unlevel playing field by advantaging one competitor through a rent agreement that is far below market and not available to other participants or tenants.

3. As a recipient of grant funding from the Federal Aviation Administration, the Hayward Airport cannot engage in economic discrimination. Specifically, under applicable FAA Grant Assurances provisions, in the event the "sponsor itself exercises any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions." In other words, the FAA prohibits unjust, unfair and discriminatory economic practices.

We hope that the City will reevaluate the proposed lease arrangement in light of its own procurement practices as well as those requirements that it deal fairly with all Airport tenants. We thank you for your consideration, and we are of course happy to answer any questions you may have.

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Very truly yours,



John Lynn Smith

JLS:rp

cc: Michael Lawson, City Attorney

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