

May 17, 2010

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*By Certified Mail  
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John Lemmo, Chair  
Historical Resources Board  
City of San Diego  
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**Re: Objections of San Diego County Regional Airport Authority to Adoption by San Diego Historical Resources Board of Motion to Designate Authority Property as Historical Resource**

Dear Chair Lemmo and Board Members:

The San Diego County Regional Airport Authority ("Authority") objects to the adoption of the motion made at the April 22, 2010 meeting of the Historical Resources Board of the City of San Diego ("HRB") to designate the Authority's 17-acre property at 1470 Bay Boulevard as an "historical resource" under San Diego Municipal Code, and to any further proceedings in this matter.

A proposal to designate a much larger area than the Authority's property has been pending since 2005, when the Save Our Heritage Organization ("SOHO") initially submitted a nomination for the former Western Salt Company Salt Works ("Salt Works"), encompassing several hundred acres of salt ponds, levees, and structures. On April 22, 2010, Board member Marrone moved to designate as an historical resource what might be understood to be only the Authority's 17-acre property, which is only a small part of the Salt Works. (The motion was unclear). Upon this motion, counsel for the Authority requested and was granted, pursuant to San Diego Municipal Code section 123.0202(d), a continuance of the item until the next meeting of the HRB. The HRB is scheduled to take up the motion again at its May 27, 2010 meeting.

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Despite the multiple legal and procedural errors that the Authority has identified in many prior communications and presentations, the HRB appears poised to proceed in excess of its jurisdiction, and in prejudicial abuse of its discretion, to adopt such a motion. In a final effort to dissuade the HRB from such an improper action, that only can result in unnecessary conflict between the City of San Diego and the Authority, the Authority submits these objections and urges the HRB to recognize that there is a dearth of competent evidence in the record to support such a designation, and that it would not be proceeding in a manner required by law.

Although the Authority respects the desire of the HRB to protect what it perceives as valuable reminders of San Diego's storied past, the Authority is bound by its legal obligations to protect the activities and assets entrusted to it. Therefore, as the HRB will recognize, the Authority must insist that the HRB act in full compliance with the law in the HRB's zealous pursuit of its particular cause.

The Authority hopes that the HRB will abandon this fatally flawed effort and rather will respond to the Authority's proposal to work together with the many other state and federal agencies that are collaborating to reach reasonable and mutually beneficial accommodations to deal with the entire Salt Works, not just the Authority's 17-acre portion of the Salt Works.

The Authority's objections are summarized below.

**THE PROPOSED DESIGNATION WOULD BE IN EXCESS OF HRB'S JURISDICTION AND A PREJUDICIAL ABUSE OF DISCRETION.**

Should the HRB proceed to vote in favor of the designation motion, the designation would be reviewed in court under the standards for a writ of administrative mandamus.<sup>1</sup> Under these provisions, the reviewing court must set aside the challenged action if the agency has proceeded without, or in excess of, its jurisdiction, or if there was prejudicial abuse of discretion. (Cal. Code Civ. Pro. § 1094.5(b)). As set forth below, the HRB's motion, if enacted, would constitute *both* an action in excess of the HRB's jurisdiction and an abuse of discretion, and therefore must be set aside.

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<sup>1</sup> Administrative mandamus is the appropriate remedy when challenging decisions made as the result of proceedings "in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal ... [or] board." Cal. Code Civ. Pro. § 1094.5(a).

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**A. The Proposed Designation Exceeds HRB's Jurisdiction.<sup>2</sup>**

In many respects, the HRB would be overstepping its authority by voting to adopt the proposed historical designation.

**1. The Authority Is Not a "Local Agency" Subject to Local Zoning Regulations.**

The HRB does not have jurisdiction to impose historical preservation requirements on the Authority because Authority is not a "local agency" subject to land use controls by the City of San Diego. Rather, it is a State-created regional agency immune to zoning regulation such as historical resource designations. The language of the legislation creating the Authority, its legislative history, and examination of the Authority's role as an Airport Land Use Commission all indicate that the State intended for the Authority to be free of local land use regulations. The HRB's attempt to assert jurisdiction over the Authority is, quite simply, overreaching.<sup>3</sup>

**2. Federal Law Prohibits Spending Airport Revenue for Non-Airport Purposes.**

Additionally, the designation would exceed the HRB's jurisdiction by attempting to impose on the Authority an obligation to spend funds to maintain the Salt Works to historical standards, in direct violation of federal law. The Authority, which is funded *entirely* through airport activities, is strictly prohibited from using airport-derived revenue for non-airport purposes. Such action constitutes unlawful "revenue diversion." The Authority's acquisition of the Salt Works was made in order to fulfill habitat mitigation obligations for airport expansion – a clear airport purpose. However, using airport revenues to maintain the Salt Works' historical features would require expenditures that not only are not airport-related, but frustrate the very airport-related purpose for which the Salt Works was acquired. Such expenditures would violate federal law, and result in significant penalties being assessed against the Authority. The City, to date, has failed to offer any response to the serious concerns the Authority has raised regarding revenue diversion.

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<sup>2</sup> The Authority has set forth at length its legal objections to the proposed designation multiple times, including in a letter of April 9, 2008, an Objection to the Regulation of San Diego County Regional Airport Authority Property Under City of San Diego Historical Resources Regulations, submitted October 16, 2009, and in oral comments to the HRB during the April 22, 2010 hearing. Because these objections are already well-established in the record, they are summarized only briefly here.

<sup>3</sup> As the Authority set forth in its October 2009 Objection, the opinion that the City Attorney provided the HRB on this matter was based in large part on a misapplication of legal precedent to the present situation.

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### **3. Designation Would Interfere with Adopted Federal and State Agreements and Plans for Environmental Restoration.**

Imposing on the Authority a requirement to maintain industrial buildings and equipment, as well as salt piles, in perpetuity would exceed the HRB's jurisdiction by directly interfering with long-standing state and federal habitat restoration plans for the entire Salt Works area. The ongoing interim operation – and eventual shutdown – of the Salt Works is essential to ensure that the decommissioning of salt ponds and levees can be managed in an environmentally sensitive manner.<sup>4</sup> However, requiring the Authority to maintain the industrial facility to historical standards would interfere with these plans in both the short- and long-term. Neither SOHO nor the HRB took part in the public process to establish the restoration plans, which plans since have been adopted by the U.S. Fish and Wildlife Service, in cooperation with the State of California, under its authority to manage the South San Diego Bay National Wildlife Refuge. The HRB simply lacks the authority to impose conditions that would frustrate these lawfully adopted plans. It is unreasonable, many years after the fact, to attempt to impose new obligations that would prevent their operation. The HRB has completely sidestepped the impact that designation would have on the fulfillment of the existing agreements and plans relating to restoration.<sup>5</sup>

#### **B. Designation Would Constitute a Prejudicial Abuse of Discretion.**

Even if the HRB had jurisdiction to require the Authority to maintain the Salt Works to historical standards, if the motion passed, it would be prejudicial abuse of the HRB's discretion. In administrative mandamus proceedings, “[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Cal. Code Civ. Pro. § 1094.5(b)).

We note that HRB staff and Board members have misstated the nature of the original SOHO proposal and misidentified the property which is the subject of the proposed designation. In fact, the initial SOHO proposal,<sup>6</sup> determination of eligibility from the state Office of Historic Preservation (“OHP”),<sup>7</sup> and staff report<sup>8</sup> refer to *all* of the former Salt Works facilities. Despite HRB and staff assertions to the contrary, at no time prior to the April 22, 2010 HRB

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<sup>4</sup> See generally U.S. Fish and Wildlife Service, *Comprehensive Conservation Plan and Environmental Impact Statement for San Diego Bay National Wildlife Refuge – Sweetwater Marsh and South San Diego Bay Units* (August 2006).

<sup>5</sup> In addition, the failure to analyze the effects on implementation of these plans is a violation of the California Environmental Quality Act, as discussed in more detail below.

<sup>6</sup> Report submitted to HRB by Save Our Heritage Organisation (February 2005).

<sup>7</sup> Letter from Dr. Knox Mellon, State Office of Historic Preservation, to Michael Ritchie, Federal Highway Administration (May 28, 2002).

<sup>8</sup> Report No. HRB-08-005 (January 17, 2008).

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hearing had there been any suggestion that the proceedings were limited to property owned by the Authority. In any case, the proposed designation would be a clear abuse of discretion: On one hand, if the HRB moves to designate the entire Salt Works as provided in the Staff Report and draft resolution, it has failed to act in a manner required by law because not all affected property owners have been properly noticed. On the other hand, if the HRB attempts to limit the designation to the Authority's property, it could not make the required findings to support designation on the basis of the actual evidence in the record as propounded by SOHO and the HRB Staff.

**1. The HRB Has Failed to Proceed in the Manner Required by Law.**

The San Diego Municipal Code plainly requires notice to all landowners whose property is recommended for historical designation (§ 123.0202(b)). Yet the HRB has never notified the owners of much of the property which was the subject of the SOHO application, OHP determination, and staff report.

HRB staff have recommended approval of "the Western Salt Company Salt Works located at 1470 Bay Boulevard" as follows:

The resource shall be listed as an individually significant resource, with the eleven elements identified as "contributing" included in the designation as character defining elements of the resource; and the four elements identified as "noncontributing" excluded from the designation as non-character defining elements.

(Report No. HRB-08-005, January 17, 2008). The Draft Resolution provided by staff also states that the designation would include all eleven contributing elements. (Draft Resolution, September 25, 2009).

During the April 22 hearing, counsel for the Authority pointed out that of the eleven elements identified in the record, only four are located on the Authority's property.<sup>9</sup> The Authority's counsel further established that the City's own Municipal Code (section 123.0202(b)) requires notice to all landowners whose property is recommended for historical designation – notice which had not been given to the owners of the remaining affected

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<sup>9</sup> These are the main processing plant, electrical building, section of narrow-gauge rail line, and salt pile (or more accurately, piles) used for storing harvested salt.

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parcels. Based on the written record before the HRB, therefore, it is clear that the City failed to provide the notice required by law.<sup>10</sup>

In addition, and wholly apart from notice to owners of real property, the proposed action of the HRB purports to require the preservation of the salt piles. There are three distinct problems with that, substantively and procedurally. First of all, the salt piles are not “structures” subject to protection under the City’s Municipal Code. Second, the only party before the HRB is the Authority, but the salt piles are not owned by the Authority, but by the operator of the overall Salt Works. Third, that company conducts its business pursuant to leases and permits across much of the hundreds of acres that comprise the Salt Works. An attempt to control the salt piles is a direct imposition on that operator, and in effect would prevent it from selling the salt it has harvested. Yet the HRB has not provided notice to that business of its intention to impose absolute controls over the placement and removal of salt on existing salt piles. Constitutional due process mandates at least notice and an opportunity to be heard for such owner, prior to the imposition of such potentially ruinous legal requirements.

As noted above, the proposed designation is beyond the HRB’s jurisdiction, because it would clearly be incompatible with adopted federal and state environmental restoration plans. In addition, the proposed designation of the Authority’s portion of the Salt Works without prior full review of the potential environmental consequences on the implementation of the federal and state restoration plans would violate the California Environmental Quality Act (“CEQA”).<sup>11</sup> CEQA mandates that the City at a minimum study the potential environmental consequences of such interference with these major, long-term undertakings to restore vast areas to open water.<sup>12</sup> Just because the HRB is particularly devoted to the cause of historic preservation does not give it license to ignore the environmental consequences that its actions may cause.

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<sup>10</sup> The Authority previously has noted that the reliance on the OHP determination would violate the due process rights of the owner of a purported historic resource, and violate the notice requirements of the Municipal Code, as well as unlawfully delegating the police power of the City.

<sup>11</sup> Approval of the historical designation of the Salt Works clearly would be approval of a discretionary “project” subject to CEQA. *See* Pub. Res. Code §§ 21065, 21080; 14 Cal. Code Regs. § 15378. As such, CEQA requires an evaluation of the project’s significant environmental impacts.

<sup>12</sup> *See* CEQA Guidelines, Appendix G, § IX(b) (lead agency must evaluate whether a project would “[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project ... adopted for the purpose of avoiding or mitigating an environmental effect”); *see Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903 (2004) (finding EIR was required where substantial evidence indicated the project conflicted with such a land use policy).

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## 2. The Evidence in the Record Does Not Support Required Findings.

The facts set forth above apparently came as a surprise to the HRB Board members, who asked several clarifying questions of staff and the City Attorney. In response, staff acknowledged that the remaining elements are not owned by the Authority, but claimed – for the first time – that the designation would apply only to those elements located on the Authority’s property, notwithstanding the language of the staff report and draft resolution.<sup>13</sup> Putting aside the fact that for several years, the historic district has been described by SOHO, OHP, and staff as including all eleven elements, and ignoring the failure to provide notice, the HRB’s most recent motion for historic designation of the Salt Works would fail to meet legal standards. The evidence in the record on which the HRB attempts to rely arguably supports designation of a *historic district* encompassing the entire Salt Works, but not the individual Authority buildings/salt piles.

The City’s Municipal Code provides that the HRB “shall make a decision on whether to designate a historical resource based on the criteria specified in, and consistent with the procedures of the Historical Resources Guidelines of the Land Development Manual.” (§ 123.0202(e)). The Land Development Manual, in turn, provides several criteria for determining the significance of a proposed historical resource. The Salt Works has been proposed for designation under “Criterion E,” which may apply if the resource “[i]s listed or has been determined eligible by National Park Service for listing on the National Register of Historic Places or is listed or has been determined eligible by the State Historical Preservation Office for listing on the State Register of Historical Resources ...” (Land Development Manual, Historical Resources Guidelines (2004 rev.) at 14-15).

The basis for designating the Salt Works under Criterion E is that it has been determined eligible for listing on the National Register of Historic Places and listed on the California State Register of Historical Resources. Accordingly, it is essential to evaluate what the determination of eligibility and subsequent state listing actually provide. The 2002 determination of eligibility from the State Office of Historic Preservation states that the Salt Works is “eligible for inclusion on the NRHP as a *historic district*,” based on the eleven contributing elements, which are the same as those identified in the HRB staff report. In turn, the U.S. Department of Interior defines “historic district” as “a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development.” (Bulletin 16A, Glossary of National Register Terms). Thus, the determination of eligibility was based upon an analysis of the Salt Works *as a whole*, including several buildings located on adjacent private

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<sup>13</sup> Adding further to the confusion, the draft resolution identifies the affected property as APN 621-010-06-00. However, this APN does not refer to the Salt Works. The parcel identified in the draft resolution lies to the west and south of the Salt Works parcel, which comprises APN 621-010-05-00.

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property and hundreds of acres of salt ponds located on land under state and federal jurisdiction.

Faced with the facts about the express language of the SOHO proposal, staff report and the basis for the determination of eligibility, at the April 22 hearing, HRB members did not stop to ensure compliance with the requirements of law. Rather, as if bent on a predetermined course, they grasped for some way to salvage this proposal, by limiting the proposed designation to only those few contributing elements actually located on the Authority's property, and ignoring the vast majority not so located:

*[Board Member Marrone]* - "I'll make a motion to designate under ... the criteria set forth by the staff report."

*[Board Member Berge]* - "Can we add the clarification of the elements that we're [designating are] solely [within the Authority's property]?"

*[Unidentified Speaker]* - "Right, the main processing plant, the electrical building, the railroad tracks, and the salt piles used for storage of salt after harvesting."<sup>14</sup>

Assuming (but not conceding) that this motion can properly be read to refer only to the Authority's property,<sup>15</sup> that property, in isolation, has not been found to operate as a district with "a significant concentration ... of sites, buildings, structures, or objects" with historic significance. The HRB has not pointed to any evidence in the record to support a finding that the Authority's property individually qualifies as a historical resource under Criterion E. This lack of evidentiary support renders any motion for historical designation of the Authority's property fatally flawed in a manner that cannot be cured by an after-the-fact attempt to rewrite the record.

**C. Even if the Required Findings Could Be Supported by Evidence, That Still Would Not Justify Designation.**

Finally, even if the HRB could make the required finding that the proposed designation meets the criteria of the Historical Resources Guidelines, it would be an abuse of discretion

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<sup>14</sup> Transcription of the motion made by HRB Board member Marrone, from a recording provided by staff member Shannon Anthony on or about April 27, 2010.

<sup>15</sup> We note that the speakers continued to describe the subject property in contradictory terms. The reference to "the criteria set forth by the staff report" in the motion, and the fact that the proposed elements needed to be clarified yet again, suggests that confusion still exists among the Board members regarding the subject of the designation.



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to leap from that finding to the contemplated designation. The Authority has raised significant practical and policy issues that have gone unaddressed, demonstrating the lack of reasoned decision-making in this proceeding.

By voting to approve the historical designation of the Salt Works, the HRB would be attempting to impose on a fellow public agency several quite extraordinary burdens: First, the HRB would require the Authority to abandon its mandatory environmental mitigation obligations. Second, the HRB would require that Authority maintain on its property not only multiple dilapidated buildings, but also transitory mountains of salt, to vague and uncertain historical standards. (Despite the Authority's requests, the HRB has neglected to offer any guidance as to how one would maintain salt piles – which, by design, exist only for brief periods before the salt is transported and sold – in a historical manner. This is all the more frustrating because the Authority does not even own the salt piles, as noted above.) Third, the HRB would ask the Authority to contravene federal laws restricting diversion of airport revenues in order to expend the funds necessary for these efforts. Although the Authority has repeatedly encouraged the HRB to weigh these serious policy implications, the HRB's results-oriented approach has caused them to be pushed aside – precisely the kind of abuse of discretion that the administrative mandamus process serves to remedy.

## CONCLUSION

For years, the Authority has made good-faith attempts to engage the City on arrangements for the historical resources at the Salt Works, short of a designation that would be contrary to law and unduly burdensome for the reasons set forth above. Unfortunately, these efforts have been greeted with silence. Most recently, the Authority has submitted to the City a draft Memorandum of Agreement to facilitate negotiations between the parties and demonstrate its commitment to commemorating the Salt Works' role in San Diego's history. The Authority believes this is a reasonable resolution that would preserve key historical elements across the entire Salt Works, without putting the Authority in the position of violating statutory and contractual obligations.

For all of the reasons set forth above, the Authority objects to the proposed designation and requests that the HRB not adopt the pending motion to designate the Salt Works as a historical resource, and desist from any other proceedings in this matter.

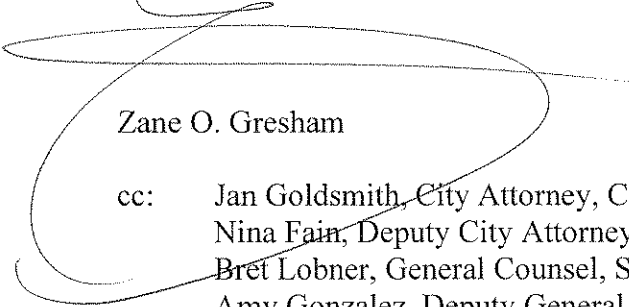
Further, in light of the serious legal issues raised above and in earlier communications, the Authority respectfully suggests that the Historical Resources Board consult with its counsel about the implications of its motion. The Authority recognizes that the HRB has received some preliminary advice from the City Attorney's office on several points that have been discussed in this proceeding. That communication does not address many of the issues that have been identified (both before and after that advice was rendered). Nor does that communication come to grips with key questions, such as the role of federal regulatory

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requirements applicable to airports under the Supremacy Clause of the U.S. Constitution. Accordingly, the Authority respectfully suggests that the HRB ensure that it receives from the City Attorney full and thorough advice, based on all the facts and legal principles that now are before it, before taking any further action.

Finally, the Authority renews its invitation to cooperate with the many other agencies that are seeking a mutually beneficial solution for the future of ALL the Salt Works. If the HRB expresses any willingness to work cooperatively, the Authority is still interested in pursuing a collaborative agreement for the management and recognition of the Salt Works' historical features. At the least, if the HRB is uncertain about City policy regarding such cooperation, it should defer action until it has sought and received such direction as it deems necessary within the City.

Sincerely,



Zane O. Gresham

cc: Jan Goldsmith, City Attorney, City of San Diego  
Nina Fain, Deputy City Attorney, City of San Diego  
Bret Lobner, General Counsel, San Diego County Regional Airport Authority  
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