Colorado Criminal Justice Reform Coalition

Prevention, treatment, and alternatives work
Prison should be the last resort

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October 28, 2003

Mr. Craig Sparks, Manager
FAA Northwest Mountain Region
Airports Division
Denver Airports District Office
26805 E. 68th Ave., Suite 224
Denver, CO 80249

VIA CERTIFIED MAIL 7000 1530 0004 7537 0839

Re: Pueblo Memorial Airport

Dear Mr. Sparks:

I am writing in response to the Federal Aviation Administration's (FAA) notice of request to release airport property at the Pueblo Memorial Airport that was published in the *Federal Register* on October 10, 2003. Our organization has several concerns about the City of Pueblo's request. These concerns are set forth below, and I ask that these comments be made part of the record concerning Pueblo's request for release of airport property.

1. FAA has not provided the legally required comment period. The October 10 *Federal Register* notice (Attachment 1) states the FAA is acting under the provisions of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (Public Law 106-181), section 125. The relevant portion of section 125 (Attachment 2) appears to be paragraph (c) which states "[b]efore the Secretary may waive any condition imposed on an interest in surplus property conveyed under subsection (a) that such interest be used for an aeronautical purpose, the Secretary must provide notice to the public not less than 30 days before waiving such condition" (amending 49 U.S.C. 47151). The notice of the present action was published on October 10, with a deadline for public comments of October 31. This twenty-one day comment period appears to be in violation of PL 106-181, §125. Accordingly, we ask that the FAA republish the notice, allowing for a minimum of thirty days for public comments.

2. Granting the request to release at this time would violate 14 CFR 155 and constitute an arbitrary and capricious action. It is an established principle of administrative law that agencies may not exercise discretionary powers in the absence of established standards.[1] Accordingly, the FAA has set forth rules for

[1] See, e.g., *White v. Roughton*, 530 F.2d 750 (7th Cir., 1976).

the release of airport property from surplus property disposal restrictions. These rules are codified as Title 14, Part 155 of the Code of Federal Regulations (Attachment 3). Part 155 applies to "releases from terms, conditions, reservations, or restrictions in any deed…by which some right, title, or interest of the United States in real or personal property was conveyed to a non-Federal public agency under section 13 of the Surplus Property Act of 1944" (14 CFR 155.1). This is precisely the case regarding Lot 69 at the Pueblo Memorial Airport industrial park, which was deeded to the City of Pueblo by the War Assets Administration via a quitclaim deed in 1948 (Attachment 4).[2] The deed imposes reservations and restrictions under the authority of the U.S. Constitution, and the Surplus Property Act of 1944 (at p. 93 of the deed).

Part 155.11 of CFR Title 14 sets forth the required form and content of requests for release. The City of Pueblo submitted such a request to the FAA via an August 20 letter from John O'Neal (Attachment 5). Although the August 20 letter generally complies with the requirements enumerated in 14 CFR 155.11, it does *not* include an environmental assessment (EA) as described in §155.11(c)(12). Paragraph (c)(12) states that an EA must be submitted, "if an assessment is required by Order 5050.4." Order 5050.4 appears to have been superceded by Order 5050.4A ("Airport Environmental Handbook"), which I will rely on in the following paragraphs.

Applicability to Pueblo's request. Order 5050.4A (relevant chapters included as Attachment 6) states that "[u]nless categorically excluded by this order (Chapter 3, paragraph 23), an environmental assessment and environmental impact statement or finding of no significant impact are required for proposed Federal actions related to airports" (Chapter 2, Paragraph 10(b)). The term "federal action" includes "[a]pproval of release of airport land" (Chapter 1, Paragraph 5(a)(5)).

Pueblo's request does not fall under the categorical exclusions. As related in the preceding paragraph, an EA is not required for actions which are categorically excluded under Chapter 3, Paragraph 23. The categorical exclusions enumerated in Paragraph 23 do include "Federal release of airport land" (subparagraph (a)(10)); however, *any* action which would normally be categorically excluded may have its exclusion removed if it meets the criteria of Paragraph 24 ("Extraordinary Circumstances"). We contend that the current proposal does meet the criteria for an extraordinary circumstance and the categorical exclusion is not applicable. Therefore the FAA must request and review an EA before it can make a ruling.

Pueblo's request constitutes an extraordinary circumstance. Paragraph 24 of Order 5050.4A lists criteria for extraordinary circumstances, several of which are met in the case of Pueblo's request for the release of Lot 69. Specifically:

- The proposed action is likely to be highly controversial on environmental grounds. Paragraph 24, subparagraph b states that an action is highly controversial when the action is opposed on environmental grounds by, *inter alia*, "a substantial number of the persons affected by such action." The proposed project was vigorously objected

[2] Recorded with the Pueblo County Clerk and Recorder, Book 1074, Pages 87-117

to by twenty-three witnesses at the July 28, 2003 City Council hearing (see Attachment 7), many of whose objections are based on environmental grounds, including the socio-economic impacts to the surrounding neighborhood, increased traffic flow, increased water use and wastewater treatment loads, disruption of existing storm water runoff systems, and psychological impacts. Local residents have collected more than 500 petition signatures from Pueblo citizens who are against to the proposed action.

- The community-based opposition to the proposed action is *prima facie* evidence that the action will "[c]ause substantial division or disruption of an established community, or disrupt orderly, planned development, or is likely to not be reasonably consistent with plans or goals that have been adopted by the community in which the project is located" (Paragraph 24(e)(1)).
- The proposed project has the potential to increase surface traffic congestion (Paragraph 24(e)(2)), and no comprehensive traffic impact study has been performed by a qualified traffic engineer.
- Paragraph 24(f)(4) removes a categorical exclusion for any project which would be inconsistent with Federal, state, or local law relating to the environment. Pueblo's rezoning of Lot 69 is in violation of the Pueblo municipal zoning ordinance, and is the subject of a pending lawsuit in Colorado district court (see section 3, below, for further discussion).
- A detailed analysis of water usage and wastewater treatment loads must be conducted prior to any FAA action. The Colorado cities of Limon and Sterling (home to 953 and 2,445 bed prisons, respectively) have seen their wastewater treatment facilities overwhelmed by the opening of new prisons. Subsequently, both cities' treatment facilities have been out of compliance with environmental law, requiring taxpayer-funded upgrades in order to accommodate the prisons' needs.[3] Obviously, the fact that prisons discharge large amounts of water indicates that prisons are also substantial users of water. Throughout the Colorado prison system, each inmate uses an average of 51,140 gallons of water per year.[4] A 1,000 bed prison in Pueblo would use over 51 million gallons of water per year, in a time of prolonged drought when Pueblo residents are being asked to limit household water usage. The water used by a prison would be enough to supply roughly 340 families or 150 average commercial users.[5]

Given the above environmental factors, the FAA cannot act on Pueblo's request without first reviewing an EA and either requiring an environmental impact statement or issuing a finding of no significant impact. If the FAA were to grant the City of Pueblo's request for release in the absence of an EA, such action would constitute an arbitrary and capricious act on the part of the FAA. This assertion is well supported by case law, including the finding of the U.S. Supreme Court in *Vitarelli v. Seaton* that "[a]n executive agency must be rigorously held to the standards

[3] Brian T. Atkinson, "Town may pay for pair of waste water violations," *The Limon Leader* (February 2, 2001) and Community Matters, Inc., *Sterling Area Land Use Plan* (October 1995).
[4] Colorado Department of Corrections, *Budget Request FY 2003-04*, 300.
[5] Average annual water usage statistics come from Colorado Springs Utilities, www.csu.org.

by which it professes its action to be judged" (359 U.S. 535, 546 (1959), Justice Frankfurter, concurring). Given the findings in *Vitarelli*, the FAA must require that Pueblo adhere to the EA requirement in 14 CFR 155.11(c)(12). Moreover, for the FAA to make a decision on Pueblo's request without enforcing the EA provision would violate the requirement that agency decisions be based on consideration of all relevant factors, and would open the door for judicial intervention and review of the FAA's decision making process in this case.[6]

3. The rezoning of Lot 69 violates Pueblo's municipal zoning ordinance. The August 20 request to release airport property (Attachment 5) incorporates Pueblo City Council Resolution 9922 (Attachment 8) by reference. Resolution 9922 authorizes the sale of Lot 69 to Wackenhut Corrections Corporation and includes a Contract to Buy and Sell Real Estate (Attachment 9, "contract") and a Special Warranty Deed (Attachment 10, "warranty deed"). Both the contract and the warranty deed state that Wackenhut shall purchase the property and operate the proposed facility in compliance with local laws (paragraphs 14(c) and 4(j), respectively). Among the local laws which Wackenhut must comply with are zoning ordinances. The construction and operation of a privately owned and operated correctional facility on Lot 69 conforms with neither county or city zoning law.

Prior to annexation (discussed below in section 4), Lot 69 was zoned as County I-2 (Light Industrial District). Wackenhut's proposed facility does not fit any of the allowable uses for County I-2 zoning (see Attachment 11).[7] On September 8, 2003, Pueblo City Council approved Ordinance 7045 (Attachment 12), which rezones Lot 69 to a city S-1 district (Governmental Use District). Pueblo's municipal zoning ordinance (Attachment 13) does not allow non-governmental entities to use property zoned S-1 unless the entity has received a special use permit from the Planning and Zoning Commission. No such permit has been granted.

In fact, Ordinance 7045 grants Wackenhut a use by *right*, despite the fact that use by right in an S-1 district is limited to "land areas held, used or controlled exclusively for governmental purposes by any department or branch of government" (Pueblo Municipal Code 17-4-51(16)). Ordinance 7045 indicates that City Council has attempted to grant Wackenhut a use by right for an S-1 district by virtue of the fact that "[t]he construction and operation of the Facility by a non-governmental entity under contract with a governmental agency constitutes a use by such governmental agency in discharge of its governmental duties" (Ordinance 7045, Section 2). This finding not only ignores the nature of an independent contractor,[8] but for City Council to make such a determination as stated in Section 2 of Ordinance 7045 constitutes a *de facto* amendment of the definition of an S-1 district. City Council's amendment of the S-1 definition was not, however, conducted in accordance with the zoning ordinance's provisions for amendments (Attachment 15). This is one of several claims which have been set forth in the lawsuit *Colorado*

[6] See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).
[7] Allowable uses for I-2 also include all allowable I-1 uses, which are included in Attachment 11.
[8] One of the provisions of the draft contract between the Colorado Department of Corrections and Wackenhut Corrections Corporation states "[n]either the Contractor [Wackenhut] not any agent or employee of the Contractor shall be or shall be deemed to be an agent or employee of the state" (see Attachment 14).

Criminal Justice Reform Coalition, et al. v. City Council (Case No. 03CV1295, Pueblo Dist. Ct., see Attachment 16), which our organization filed on October 8, 2003.

Because the pending litigation involves several questions regarding the legality of the land use process surrounding Pueblo's sale of Lot 69, it would be imprudent of the FAA to grant the release of the land before the litigation is resolved.

4. The annexation of Lot 69 was conducted in violation of state law. Another claim in our pending lawsuit concerns possible violations of the Colorado Open Meetings Law (Colorado Revised Statutes, §24-6-401, *et seq.*) by the Pueblo City Council. City Council's official vote on Ordinance 7030 (Attachment 17), annexing 79.18 acres of land (which includes Lot 69), took place on July 28, 2003. City Council, however, sent a letter to Wackenhut dated July 1, 2003 (see Attachments 18-20), which "represents the Pueblo City Council's official expression of our intent to annex, sell, and transfer Lot 69 to WCC [Wackenhut]." Furthermore, City Council wrote that

> [u]pon signing this letter, the City Council is hereby authorizing and directing the City Administration to take all action necessary and required to effect the sale and transfer of Lot 69 from the City of Pueblo to WCC, including, but not limited to, negotiating and drafting an appropriate contract for sale and purchase of Lot 69 and instituting proceedings for the annexation of Lot 69 to the City of Pueblo.

The July 1 letter was a product of a June 30 meeting of City Council, held as an executive session. The council's adoption of the July 1 letter *before* the official vote on July 28 constitutes both an adoption of a final policy in executive session; and, making a decision in private and "rubber stamping" the decision at a later public meeting. Under the Open Meetings Law, final decisions which are made in executive session are void (*Hyde v. Banking Board*, 552 P.2d 32 (Colo. App. 1976)), and public bodies are not allowed to rubber stamp decisions which were previously made in a closed meeting (*Bagby v. School Dist. No. 1*, 528 P.2d 1299 (Colo. 1974)).

For the FAA to grant the release of Lot 69 before the potential violations of the Open Meetings Law are resolved by the court would run the risk of the FAA sanctioning an illegal action by the City of Pueblo. Therefore, we ask that the FAA postpone any action in regards to Lot 69 until *Colorado Criminal Justice Reform Coalition, et al. v. City Council* is resolved.

5. Granting the release would violate the provisions of the 1948 quitclaim deed. The 1948 quitclaim deed (Attachment 4) between the War Assets Administration and the City of Pueblo includes the following restriction on the land:

> no property transferred by this instrument shall be used, leased, sold, salvaged, or disposed of by the party of the second part [City of Pueblo] for other than airport

> purposes without the written consent of the Civil Aeronautics Administrator,[9] which shall be granted only if said Administrator determines that the property can be used, leased, sold, salvaged or disposed of for other than airport purposes without materially and adversely affecting the development, improvement, operation or maintenance of the airport at which such property is located…

Allowing Wackenhut to build and operate a correctional facility at the industrial park would cause numerous problems for the airport industrial park. Since Pueblo Memorial Airport depends largely on industrial park tenants for its economic livelihood, any action which harms the industrial park also "materially and adversely" affects the development, improvement, and operation of Pueblo Memorial Airport. There are several factors which could lead to negative impacts on the economic health and viability of the airport.

During the City Council hearing on July 28 (Attachment 7), officials from the Pueblo Economic Development Corporation (PEDCo) testified to the negative image that the prison would bring to the industrial park. These allegations were detailed further in an August 1 article in the Pueblo *Chieftain* (Attachment 21). Reinforcing the validity of PEDCo's predictions, the industrial park has already lost at least one prospective corporate tenant due to the siting of the Wackenhut facility (Attachment 22).

That a prison would result in business aversion to locating in the industrial park (or even Pueblo in general) is not surprising, given the socio-psychological dynamics that have been observed in regards to prison siting. It is crucial to consider the cumulative psychological impact that the Wackenhut facility could have on Pueblo County residents in general, as well as the resulting economic ramifications which could specifically target the airport industrial park. In a 1992 issue of *Crime & Delinquency*, researcher David Shichor concluded that prison construction is "closely related to the status and prestige of the [host] community" and "status and prestige of a community are important social indicators because residents are often ascribed social status according to the neighborhood they live in."[10] Not surprisingly, Shichor goes on to remark that "[c]ommunities in which a prison is sited become stigmatized because they are usually in a bad economic situation and cannot find other, more reputable resources to better their situation."[11] Concepts such as stigmatization and public sentiment are increasingly acknowledged as important factors in determining the economic health of a region. University of Montana economics professor Thomas Power describes "discretionary qualities" (i.e., factors which comprise quality of life) as crucial elements in analyzing local economies. Power writes "[t]o regard discretionary qualities as the trivial interest of the leisure class and to focus public economic policy on a quantitative expansion in the volume of material input and output is to systematically ignore what we really want from our economy and the most productive ways of obtaining it. Discretionary qualities are not the frosting on the economic cake, they *are* the

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[9] The Civil Aeronautics Administration (CAA) and the position of Administrator of the CAA were abolished and replaced by the FAA and the Administrator of the FAA via the Federal Aviation Act of 1958 (PL 85-726). Thus, the FAA and its administrator are the legal successors to the CAA and its administrator.
[10] David Shichor, "Myths and Realities in Prison Siting" *Crime & Delinquency* 38.1 (1992): 80.
[11] Shichor 80.

cake."[12] Clearly, prisons shape the general atmosphere of the local community, which in turn colors the perceptions of potential employers and residents who visit the area. As Shichor puts it, undesirable land uses (including prisons), "may determine, or at least, have a strong negative influence on the 'symbolic quality' of a community."[13]

For all of the above stated reasons, the Colorado Criminal Justice Reform Coalition asks that the FAA take the following actions:

1. Issue a new notice for public comments, allowing for the statutorily required thirty day comment period.
2. Reject Pueblo's request for release of Lot 69 and require that the city prepare an environmental assessment before the FAA will consider the request further.

I thank you for the opportunity to submit these comments on behalf of our organization. If I can be of any assistance to your office, please do not hesitate to contact me at (719) 475-8059 or via email at stephen@ccjrc.org.

Sincerely,

Stephen Raher
Co-Director/Senior Policy Analyst

Attachments

cc: John O'Neal

[12] Thomas Michael Power, *Lost Landscapes and Failed Economies* (Washington, DC: Island Press, 1996) 24.
[13] Shichor 80.