

“Jump-Starting Stalled Redevelopment Projects”

By Ruthann Ziegler and Kevin Gilbert

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Battle Over Aviation Safety

This summer, a tour helicopter collided with an airplane near the Statue of Liberty in New York. Nine people died. In the aftermath, the National Transportation Safety Board (NTSB) and the Federal Aviation Administration (FAA) - two federal agencies responsible for aviation safety - battled over turf. When it was all over, it was the flying public who lost out.

The NTSB's job is to investigate every aviation accident that happens on U.S. soil and to figure out what regulatory changes are required to prevent the same type of accident from happening again. Accident prevention is the NTSB's only reason for being. The NTSB itself, however, has no power to make a new regulation, regardless of how urgently one might be needed. That's the FAA's job. All the NTSB can do after an accident is to offer the FAA a recommendation for change.

But there's a problem. The FAA's mandate is not just to regulate aviation, but to "encourage" it as well. If that sounds like a built-in conflict of interest, it is. When the NTSB makes a regulatory recommendation that might crimp an aviation industry, the FAA is free to ignore it. And that's exactly what the FAA does. As one might imagine, that leads to a bit of frustration over at NTSB headquarters.



MIKE DANKO of The Danko Law Firm in San Mateo represents plaintiffs in cases involving catastrophic personal injury and wrongful death. He is a pilot who has successfully negotiated the Hudson River corridor in both airplanes and helicopters.

One industry sector that has drawn the NTSB's attention over the years is helicopter tour operations. In the last two decades, helicopter tours have become big business. Helicopters crowd the skies, not just over the Statue of Liberty, but over the Grand Canyon, the glaciers of Alaska, the volcanoes of Hawaii - in fact, over just about any spot with tourists and something to look at. The helicopter tour business now generates more than a billion dollars per year in this country. But its safety record has from the outset been very poor. As the industry has grown, that record has only become worse.

Since the 1980s, the NTSB has thoroughly investigated dozens of fatal tour crashes across the country. As a result of what it learned from those investigations, the NTSB has recommended that the FAA increase its surveillance of helicopter operators to catch unsafe piloting practices. It has asked the FAA to require better maintenance programs for those operating tour helicopters. And, as recently as 2002, it has asked the FAA to promulgate new regulations that would separate helicopters from airplanes in high-traffic areas near points of scenic interest.

Few pilots argue with the last recommendation. Simply put, helicopters and airplanes don't mix well. Helicopters fly slower than airplanes. They maneuver unpredictably. They have a small cross section that makes them hard to spot - especially when viewed from behind. In fact, because it is so difficult for airplane pilots to see and avoid helicopters, regulations require helicopters to "avoid the flow of fixed-wing traffic" or, in other words, they must keep out of the way of airplanes. But existing regulations apply only near airports. Having been promulgated before the explosive growth of the air tour industry, the current regulations don't ad-

dress the skies over scenic features, even though scenic features now attract more air traffic than many airports do.

Without a doubt, updated regulations would largely put an end to the dangerous free-for-all in which the helicopter tour industry regularly operates. While the new regulations suggested by the NTSB would promote safety, they wouldn't "encourage" the air tour industry. Rather, they would tend to restrict it. So, sadly, the FAA simply ignored the NTSB's recommendations.

In the days following the Hudson River crash, the NTSB was handed a golden opportunity to tell its story of warnings gone unheeded. No air tour accident in history had drawn more public attention. The country demanded to know how such an accident could ever have happened, and the media allowed the NTSB to hold center stage for weeks. The NTSB could have explained how this accident would have been prevented, had the FAA acted on its longstanding recommendations. It could have pointed out that the accident will perhaps be repeated elsewhere unless the FAA now takes action industry-wide.

But the NTSB didn't do those things. Instead, the NTSB took aim at one of the FAA's air traffic controllers. The controller, working the Teterboro tower, was on a personal call with a girlfriend when he was supposed to be giving his full attention to his duties. That was just too fat a target for the NTSB to resist. The NTSB blamed the controller for failing to warn the airplane pilot that he was on a collision course with the helicopter. The NTSB's condemnation came with stunning speed - only days into the NTSB's investigation.

The only problem was that the condemnation was completely unfounded. In truth, the helicopter did not appear on the controller's radar screen until after the controller told the airplane to switch to a different controller's frequency. By then, it was too late for the Teterboro controller to advise the doomed pilot of anything. The NTSB had placed blame where it didn't belong.

When the radar data became public, and the NTSB's misfire was exposed, the NTSB wouldn't let it go. Instead, it leveled new charges against the FAA's controller. The NTSB claimed that the controller erred by failing to recognize that the airplane pilot was about to switch to the wrong frequency, and by failing to correct the pilot's mistake. As a result of the pilot's confusion, the pilot never communicated with the next controller, whose radar display *did* depict the collision course. But even that allegation appears to have been unfounded. Nothing in the audiotapes suggests that the Teterboro controller should have been aware that the frequency the airplane pilot was about to change to was the incorrect one.

The NTSB's frustration with the FAA is certainly understandable. But its attack on the FAA controller is not. In trying to pin the accident on



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the controller, the NTSB abandoned its longstanding recommendations, rushed to a judgment contrary to the facts, and ended up looking to all observers like just another foolish government bureaucracy exercising its muscle. The NTSB badly damaged its credibility with the American public.

The FAA has announced that, as a result of the Hudson River accident, it will indeed promulgate a few new regulations. In fact, the new regulations go into effect this week. But the new regulations will apply in the Hudson River corridor only. To keep helicopters and airplanes apart, the FAA will require helicopters operating along the corridor and near the Statue of Liberty to fly at lower altitudes than those occupied by airplanes. To a large extent, the problem over the Hudson is now solved. However, make no mistake about it, the FAA and NTSB have not reconciled. In announcing the new regulations, the FAA noted that it did not consider the NTSB's recommendations at all - it came up with the changes entirely independently.

The new FAA regulations will certainly make safer the crowded skies above "the Lady." But the same dangerous situation that existed over the Hudson River will continue to exist in many of the tour industry's other venues across the country. Why should the lessons "learned" as a result of the midair collision over the Hudson not be applied elsewhere?

The flying public deserves more from the agencies entrusted with their safety.

Jump-starting Stalled Redevelopment Projects

The worst recession in decades, coupled with severe downturns in commercial and residential real estate markets, has hit California especially hard. As the state struggles with the impact of the slump, California's towns and cities face another challenge. Across the state, crucial redevelopment projects are being jeopardized as property values plummet and developers walk away. For cities hoping to revitalize blighted areas, stalled redevelopment projects threaten not only the cities' finances but also their future. By taking an active and creative role to revive faltering projects, however, cities can get the projects back on track and put the cities' own future on a sounder footing. This requires commitment, creativity and the right expertise in redevelopment and public construction law.

California's cities are all too familiar with the negative effect that blighted areas have on the local economy and quality of life. When a redevelopment project designed to revive a blighted area falters, it only compounds those woes. Unemployment rises as construction workers lose their jobs; suppliers go unpaid and nearby businesses suffer. The fenced-in site may be damaged by vandalism or attract criminals, putting pressure on local police and firefighters. As time goes on, the stalled project begins to hurt neighboring property values and to cut

into the city's tax revenues. Eventually the project can become an eyesore and a drag on local business that steers away new development. The longer a project remains unfinished, the more difficult it becomes to restart it.

When faced with a redevelopment project that begins to unravel, cities should first remember that, in the final analysis, it is the city itself that benefits when a project is completed. Successful redevelopment projects bring new residents and businesses to a formerly under-utilized site; such projects revitalize neighborhoods as more people come in to shop and dine; and they generate sales and property tax revenues. This makes it more than worthwhile for a city to invest in these projects to make sure they get back on track.

Cities and redevelopment agencies also need to realize that they need not simply watch in dismay as a project starts to head south. By getting involved early on, making the most of their negotiating and legal leverage, and implementing creative strategies, cities can turn a project around.

For instance, work on the centerpiece of a downtown redevelopment project in the East Bay city of Pittsburg ground to a halt after the developer abandoned it last year with the project 90 percent completed. The city, however, took a proactive stand and was able to reach a deal, essentially, to buy the property from the bank that was foreclosing as well as to pay off claims and provide for construction contracts to finish the project. Under the deal, the city will sell the residential units being built as well as act as landlord for the commercial properties. The total scope of the redevelopment project has been scaled back, but the main portion will be completed. Thus, an incomplete project that could have become an eyesore is becoming a magnet for future development, attracting restaurants and other businesses.

To successfully jump-start a stalled project, it is crucial to get involved at the first signs of trouble to avoid a situation where rapidly rising legal claims make it very difficult to reach a settlement. When a developer walks away from a project, suppliers and sub-contractors will take legal action to recoup their losses. As the legal process grinds on, however, the attorney fees can mount quickly and eclipse the original amounts in dispute. By beginning negotiations early on, a city can seek to settle those claims at a point where attorney's fees are not yet a significant impediment to reaching a deal with the suppliers and subcontractors.

Another key point is to remember that public entities, to some extent, have greater leverage in negotiations to settle claims because they are not subject to mechanics liens, which can give claimants an ownership interest in the property. Often, subcontractors and suppliers are unaware of this and will file mechanics liens against a public sector construction project instead of stop notices, which simply direct a public entity to set aside money that would have gone to the developer. This is an oversight that cities and agencies can take advantage of when negotiating to settle claims.

Rather than limiting the discussion to simply settling claims, however, cities should go into negotiations with the goal of getting the project completed. By taking this view, it is possible to find opportunities and creative solutions to restart the project and turn an unexpected problem into a long-term success.

Of course, money is an issue as cities are feeling the revenue pinch brought on by the downturn in the economy and the real estate market. Builders and suppliers are also suffering, and in a very slow construction market, they may be much more willing to negotiate to keep a project going, bringing in some revenue and keeping their crews and equipment working. Agreements between a city and builder will be subject to legal bidding requirements, but there are exemptions that can allow a city to contract with the same builder to finish the project

even if the developer walks away.

In a tough financing environment, cities and agencies have the advantage of being able to provide a variety of financial incentives for projects. These can include waiving fees to make a project more attractive, allowing a developer to delay payment of fees until the project is complete, or providing some offset of fees. In addition, cities can provide tax credits and tax incentives so that a developer has a larger financial stake in the success of a project. Another key advantage that public entities have is the ability to secure financing through both private lenders and public bond markets.



RUTHANN G. ZIEGLER, a principal with Meyers Nave, chair of the Public Law Practice Group and co-founder of the firm's Sacramento office, has more than 20 years experience in public law, representing municipalities and special districts.

As a final step, eminent domain is a consideration for stalled projects. Where it fits within the parameters of the law, cities can use their eminent domain power to purchase a stalled project at fair market value. One key advantage of eminent domain is that the city doesn't have to litigate to settle all the claims encumbering the property but only needs the approval of the court, which will then dole out the money to the claimants. This can help a city to get a property back on the market quickly and avoid a long delay where problems build up around the unfinished site.



KEVIN GILBERT is a member of the litigation department at Meyers Nave, based in Oakland, and focuses on representing public entities in complex construction disputes.

When a project stalls, everyone involved is likely to lose: the banks, developers, subcontractors, suppliers, commercial and residential neighbors and the city as a whole. Everyone, then, needs to be convinced that the completion of the project is a win for all concerned. To get there, the city or agency needs to go back to the original vision for the project and to find the opportunities to get it back on track. This takes a city manager and city council who are committed to the project and willing to do the work to make it a success. In addition, it requires a city attorney willing to seek the needed expertise in public construction and redevelopment law so that the city doesn't miss opportunities to revive a project. In the end, redevelopment projects are not simply about money, but rather about the future of the city. By focusing on that future, cities and redevelopment agencies stand a better chance of turning a stalled project into a success.

Meyers Nave was involved in the city of Pittsburg project.

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