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MEMORANDUM

**TO: DAVID P. MISKY, EXECUTIVE DIRECTOR
MILWAUKEE 440TH LOCAL REDEVELOPMENT AUTHORITY**

**FROM: GEORGE SCHLOSSBERG
AUDREY EIDELMAN ***

DATE: JANUARY 10, 2008

**RE: RESTRICTIONS ON THE USE OF PROPERTY RECEIVED THROUGH A
FEDERAL AVIATION ADMINISTRATION SPONSORED PUBLIC
BENEFIT CONVEYANCE**

This memorandum is in response to your request that we provide you with an overview of the covenants and restrictions that will be placed on surplus Federal property received through a Federal Aviation Administration (“FAA”) sponsored public benefit conveyance (“PBC”).

The Federal government has the authority to convey surplus property to public bodies without charge for use as a public airport under Section 13(g) of the Surplus Property Act of 1944 (49 U.S.C. §47151). In order to convey the surplus property, the Secretary of Transportation (“Secretary”) must deem such property:

- (1) desirable for “developing, improving, operating, or maintaining a public airport...”;
- (2) necessary to fulfill future requirements for “developing, improving, operating or maintaining a public airport”; or
- (3) necessary to derive revenue from nonaviation businesses at a public airport [49 U.S.C. §47151(a)].

* Admitted to practice in Massachusetts; application for admission to the District of Columbia pending.

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The Department of Transportation, through the FAA, is the agency with responsibility for the review and approval of airport PBC applications; the Administrator of the FAA has been delegated the sole responsibility for enforcing compliance with the terms and conditions of disposals to be used as a public airport. 41 CFR §102-75.425. Surplus Federal property made available to eligible public entities pursuant to Section 13(g) will be conveyed by means of a Federal deed containing various covenants and restrictions requiring the grantee to utilize the property for aviation purposes and for the public benefit use of public airports in perpetuity. GAO Federal Real Property Report, GAO-06-511 (June, 2006), at 8. The FAA's sample Application ("Application") for Airport Property under 49 USC §§47151-47153 sets forth the terms and conditions that govern the airport PBC as following:

- (1) "The deed or deeds also shall contain covenants running with the land which require the observance by the Applicant of the reservations, restrictions, and conditions contained below in Sections 6b to 6o inclusive; except that the provisions of subsections 6b(1)[use as a public airport] and 6b(2)[maintain in safe and serviceable condition] below shall be included in the deed or deeds as conditions subsequent rather than as covenants" [Application, Section 6].
- (2) "the airport shall be made available as an airport for use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for the use of the airport..." [Application, Section 6b(1); *See also* 49 U.S.C. §47152(2)].
- (3) "[the Applicant] will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property...without the written approval of the Secretary" [Application, Section 6b(10)(b)].
- (4) "The Applicant will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with assurances" [Application, Section 6b(10)(c)].

If any of the terms, conditions or restrictions of the Application, PBC, or Federal Deed are violated, the title, right of possession and all other rights transferred to the Applicant will revert back to the Federal government [Application, Section 6g(1)]. Specifically, the Federal deeds executed under the PBC process contain a provision requiring that the property revert to Federal control if it is not used for the public purpose for which it was obtained.

The public body receiving title to the public airport property may use, lease, salvage or dispose of the property for other than airport purposes, only if the Secretary determines that such use will not materially or adversely affect the development, improvement, operation or maintenance of the airport. 49 U.S.C. §47152(1). Further, the Applicant may transfer the

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property to successors and assigns only with the approval of the Secretary, with the provision that any subsequent transferee assume all of the obligations imposed upon the initial Applicant. Application, Section 6g(2). Finally, the Administrator of the FAA may grant releases from the terms, conditions, reservations, or restrictions from an airport PBC conveyance only if the Administrator determines that:

- (1) the property to which the release relates no longer serves the purpose for which it was conveyed; or
- (2) the release is necessary to carry out the civil aviation interests of the United States and the release will not prevent accomplishment of the purpose for which the conveyance was made. 14 CFR §§155.1, 155.3.

However, it is important to note that the Administrator of the FAA may not issue a release from the terms, conditions, reservations or restrictions of a PBC if it would “allow the sale of the property concerned to a third party, unless the public agency concerned has obligated itself to use the proceeds from the sale exclusively for developing, improving, operating, or maintaining a public airport.” 14 CFR §155.7(b).

I trust that this memorandum provides you with a sufficient background on the FAA sponsored PBC process. If you have any questions regarding the information set forth above, please call me directly at 202.828.2418 or contact me by email at george.schlossberg@kutakrock.com or call Audrey Eidelman directly at 202.828.2467 or contact her by email at audrey.eidelman@kutakrock.com.

G.R.S.