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BY ELECTRONIC MAIL AND HAND DELIVERY

Office of the Chief Counsel
Attention: FAA Part 16 (Airport Proceedings Docket)
AGC-610
Federal Aviation Administration
800 Independence Ave. S.W.
Washington, D.C. 20591
9-AWA-AGC-Part-16@faa.gov

RE: ***Mark Smith, et al. v. City of Santa Monica, California,***
FAA docket no. 16-16-02

Notice of Appeal and Brief
Motion for Interim Order

Summary of Appeal

Pursuant to 14 C.F.R. § 16.31 and § 16.33, this is an appeal by the Complainants of the November 8, 2019 Director's Determination in the above-captioned docket – specifically, of certain of its findings on issues #1 and #3.

In regard to issue #1, the Director's Determination held that some of the identified transfers of funds made by the City of Santa Monica ("City" or "Santa Monica") to the Santa Monica Municipal Airport ("SMO" or "Airport") did not constitute loans and/or that the applicable interest was excessive or impermissible, and ordered reimbursement of certain principal and interest payments made by the Airport to the City as corrective action. However, based on the law and the facts, all of the identified transfers should have been deemed not to qualify as loans. Additionally, Complainants believe there are mathematical and other errors in the Director's Determination that require correction.

In regard to issue #3, the Director's Determination held that the City's current landing fees – and the underlying methodology – cannot be shown to be consistent with FAA requirements because of subsequent factual developments, and accordingly should be revised as corrective action. Complainants believe that the Director's Determination should have addressed the specific compliance issues presented in the Complaint, to ensure that the corrective action is itself compliant, and that those issues do not evade review. Importantly, the subsequent developments include an excessive and growing surplus at the Airport, which has for years affected, and continues to affect, the landing fees – a matter which the Director's Determination should have addressed and required to be resolved as part of any corrective action.

Motion for Interim Order

Pending the submission of corrective action by the City, and its approval by the FAA, Complainants request that the Associate Administrator enter an interim order suspending the collection of landing fees at the Airport.

The FAA has the authority in a Part 16 proceeding to order the suspension of airport practices suspected to be non-compliant pending a final decision and corrective action. The FAA previously has exercised this authority to address compliance issues in Santa Monica. See U.S. v. Santa Monica, C.D.Cal. no. 08-2695, slip op. (May 16, 2008), affirmed 330 Fed. Appx. 124 (9th Cir. 2009). See also Aircraft Owners and Pilots Association v. City of Pompano Beach, Florida, no. 16-04-01, Director's Determination (December 15, 2005), at 46.

Although the Director's Determination deferred any decision regarding the propriety of the City's collection of landing fees, their continued imposition on Airport tenants and users is a matter of immediate importance and warrants interim relief, pursuant to 14 C.F.R. § 16.11 and § 16.19, for reasons including that:

- The Complainants have demonstrated, in prior pleadings and in this appeal, that the landing fees were adopted and imposed unlawfully, *inter alia*, by manipulating financial materials presented to the public and the decisionmakers; by adopting a methodology which ignores the substantial non-aeronautical revenues and ongoing surpluses at the Airport; by ignoring the principles of reasonableness previously laid out for the City in Bombardier Aerospace Corp. v. City of Santa Monica, no. 16-03-11; and by adopting a facially unreasonable landing fee of $5.48 per 1,000 pounds.

- The Complainants understand that in response to the corrective action required by the Director's Determination, the City intends to maintain its existing landing fee methodology when it re-computes its landing fees. That stratagem ignores the Airport's substantial non-aeronautical income, its burgeoning surplus, and other FAA revenue use principles. The result, given the increased airfield expenses associated with runway truncation and greatly reduced total landed weight due to the diminished operations at the Airport, would be an increase in the already unreasonable and confiscatory fees.

- The City now seeks further delay in the present proceedings and endeavors to thwart them entirely by invoking the potential for discussions with the Western-Pacific Region

regarding Airport finances, even while asserting that the Region does not actually have authority to enter into those discussions.

The FAA can and should take notice that the annual landing fee collections at the truncated Airport are expected to total only $490,000 in FY2019-20 and beyond, according to the City's Adopted Biennial Budget for FY2019-21 (publicly available at https://finance.smgov.net/budgets-reports/annual#/).[1] That is a miniscule component of the Airport's operating revenues – reported to total more than $13.6 million in FY2018 by the City's Comprehensive Annual Financial Report ("CAFRs") – as well as miniscule relative to the Airport's surplus. Yet the revised landing fees have been a substantial burden, ongoing since 2013, on individual Airport tenants and users. The Airport clearly can defer this income for at least the duration of this proceeding, if not permanently.

It also should be clear from the City's current motion to extend the filing deadline for its appeal that, despite this Part 16 proceeding already having been pending for almost four years, the City will seek to delay any determination regarding its landing fees, or any final order. The City has a right to utilize the procedures authorized by Part 16, but its tactics should not be allowed to further penalize those paying the fees. The Associate Administrator should enter an interim order requiring the City to suspend the collection of landing fees unless and until a final order is issued which finds such fees to be compliant.

Procedural Issues

On December 4, 2019, the City sought an extension of its deadline to file an appeal, premised on separate discussions that might occur between the City and the Western-Pacific Region, based on an informal determination issued by the Region on October 21, 2019 – despite disputing that the Region even had authority to require the discussions. See id., at 2-4. Any such discussions should occur in conjunction with – and be subservient to – this proceeding; they should not and cannot moot this appeal. See, e.g., Platinum Aviation v. Bloomington-Normal Airport Authority, Illinois, no. 16-06-09, Final Decision and Order (November 28, 2007), at 15 ("FAA is required to enforce the federal statutes to protect the federal interest in the Airport"); Centennial Express Airlines v. Arapahoe County Public Airport Authority, no. 16-98-05, Final Agency Decision (February 18, 1999), at 4 (duplicative Part 13 proceedings consolidated into Part 16 proceeding to ensure that the FAA complied with Part 16 requirements). Moreover, the permissible methodology for landing fees must be confirmed in this proceeding before any meaningful discussion can be had regarding their compliance. Irrespective of when – or if – the City files its own appeal, the FAA should promptly resolve the issues hereby briefed; this proceeding has already been pending for nearly four years, and the matters on appeal are of great significance not just to the Airport but also national FAA policy. Indeed, a final decision should be expedited. As the FAA is aware, Part 16 was specifically "intended to expedite substantially the handling and disposition of airport-related complaints." See Rules of Practice for Federally-Assisted Airport Proceedings, 61 Fed. Reg. 53998, 54002 (October 16, 1996).

[1] "Administrative or official notice is the administrative law counterpart to judicial notice." See Bodin v. County of Santa Clara, California, no. 16-11-06, Final Agency Decision (August 12, 2013), at footnote 22. Likewise, the FAA can and should take notice of the other CAFRs and City documents cited in this appeal, also available from its website.

The Appeal

Issue #1 – The City has engaged in revenue diversion additional to that identified in the Director's Determination, via inadequately documented loans and other practices.

The first issue identified in the Complaint was revenue diversion – an issue that the FAA has repeatedly confirmed to be a top priority for agency enforcement. See, e.g., In the Matter of Revenue Diversion by the City of Los Angeles, at Los Angeles International, Ontario, Van Nuys and Palmdale Airports, no. 16-96-01, Record of Determination (March 17, 1997), at 15. The Director's Determination concurred that certain of the identified transfers of funds did not comply with Santa Monica's revenue use obligations, as explicated in the FAA's Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7718 (February 16, 1999) ("Revenue Use Policy"). For these transfers, the Director's Determination generally requires that any repayments of capital or interest made within the six year period before the Complaint was filed (back to February 5, 2010; see 49 U.S.C. § 47107(m)(7)) – except, in the case of capital only, if the repayment was made within the six year period after the transfer was made (see 49 U.S.C. § 47107(k)(5)) – must be reimbursed to airport accounts, with statutory interest (see 49 U.S.C. § 47107(n)-(o)). Any outstanding principal balances for transfers made more than six years ago must be erased from airport accounts. The Complainants accept and endorse these findings, but submit this appeal for the reasons set forth below.

Additional Transfers from the City to the Airport Were Inadequately Documented

Although the Director's Determination concluded that many of the transfers identified in the Complaint were inadequately documented so as to constitute loans, it nevertheless found that three of the transfers – with principal exceeding $6.5 million – did constitute valid loans, because the documentation was "reasonably contemporaneous," despite having been executed between three and fifteen months after the transfers. See id., at 7-8. No authority was cited for this novel interpretation of the Revenue Use Policy, and the Complainants respectfully disagree. This is a significant issue, given both the direct financial implications for the Airport,[2] and the overall implications of allowing airport sponsors to retroactively deem fund transfers to actually be loans.

Simply put, the standard applied by the Director's Determination was in error because it is not the standard mandated by the Revenue Use Policy. The requirement that a transfer be documented to be a loan is not that documentation be "reasonably contemporaneous"; the requirement is that the documentation exist "at the time [the loan] was made." Only if the latter standard is met may an airport sponsor "repay the loan principal and interest from airport funds." 64 Fed. Reg., at 7718. Given that the purpose of the Revenue Use Policy was to prevent improper revenue diversion, it should be obvious that the FAA intended airport sponsors to be bound by what was said – and only what was said – alongside a fund transfer; there was no intention to allow loans to be made on unspecified terms, or to allow a retroactive declaration of their terms. Such practices would transparently undercut the interests of airports and their users. The potential for a sponsor to abuse an airport by later dictating loan terms that would never be acceptable in an arm's-

[2] Those implications include the calculation of the Airport's landing fees and the growing surplus at the Airport, as discussed below in connection with issue #3.

length transaction is evidenced by what the City actually did (which the FAA held impermissible) – refinancing non-interest bearing loans as interest-bearing loans.

The FAA does not appear to have provided any further guidance regarding this section of the Revenue Use Policy. Complainants did previously suggest that the FAA could look to the use of the term "contemporaneous" – not, however, to the use of the phrase "reasonably contemporaneous" – for guidance. In doing so, Complainants emphasized that the term has been interpreted to mean events "arising within hours or days, but not months or years apart." See Shapiro v. Secretary of Health and Human Services, 101 Fed. Cl. 532, footnote 10 (2011) (emphasis added and internal citations omitted). See also OSHA Standard Interpretation 1904.7(b)(3)(ii) and (b)(3)(iii), 2007 WL 1732831 (May 15, 2007) ("contemporaneous," as used in guidance for the procurement of a second medical opinion, in most instances would include same-day recommendations, but "a recommendation provided during a year-end review of injuries and illnesses recordkeeping information would almost never be considered 'contemporaneous'"). Moreover, the meaning of the language used in the Revenue Use Policy should be clear on its face. See, e.g., Seattle Lumber Co. v. Richardson & Elmer Co., 120 P. 517, 518 (Wash. 1912) (language requiring delivery of document "at the time" of delivery of material held "too plain for construction"). See also In re C.L.Whiteside & Associates Construction Co., Inc., 118 B.R. 886, 888 (S.D.Fla.Bankr. 1990) (relying on documents which contemporaneously and "clearly document[ed]" a transfer to conclude that it comprised a loan).

Accordingly, the Associate Administrator should find that because documents created months after the date of a transfer are insufficient for that transfer to be deemed a loan, the three transfers still at issue were not loans, and appropriate reimbursement is due to the Airport.

- On November 30, 2004, the City transferred $2,839,729 to the Airport. There is no evidence that the documents which assert that this transfer was a loan were created any earlier than June 23, 2005 – when the first signature was affixed – and they were not finalized until August 3, 2005, when the last signature was affixed. See Exhibits 15g and 16a to the Complaint. As discussed above, this documentation – finalized more than nine months after the date of the transfer – is inconsistent with the Revenue Use Policy requirement that a loan be "clearly documented … at the time it was made." Accordingly, to the extent that any repayments of interest were made by the Airport on or after February 5, 2010 (the applicable six-year statute of limitations), and any repayments of principal were made after November 30, 2010 (the end of the six-year window for airport sponsors to recover non-loan capital contributions), they must be reimbursed, with statutory interest, and any outstanding balances erased from Airport accounts. The Director's Determination and the record do not appear to enable an exact calculation of the amount to be reimbursed, although it appears that the principal has been fully repaid, with $2,224,720 of those payments having occurred after November 30, 2010. See City's Answer (July 1, 2016), Exhibit G. The FAA should require that the City provide additional documentation, so the necessary calculations can be performed.

- On an unknown date in April 2009, the City transferred $400,000 to the Airport. There is no evidence that the document which asserts that this transfer was a loan was created any earlier than July 13, 2009 – when the first signature was affixed – and it was not finalized until July 24, 2009, when the last signature was affixed. See Exhibit 16b to the Complaint.

As discussed above, this documentation – finalized approximately three months after the date of the transfer – is inconsistent with the Revenue Use Policy requirement that a loan be "clearly documented … at the time it was made." Accordingly, to the extent that any repayments of interest were made by the Airport on or after February 5, 2010, and any repayments of principal were made after April 2015, they must be reimbursed, with statutory interest, and any outstanding balances erased from Airport accounts.[3] The Director's Determination and the record do not appear to enable an exact calculation of the amount to be reimbursed. The FAA should require that the City provide additional documentation, so the necessary calculations can be performed.

- On an unknown date between July 1, 2011 and June 30, 2012, the City transferred $3,309,648 to the Airport. There is no evidence that the document which asserts that this transfer was a loan was created any earlier than October 10, 2012 – when the first signature was affixed – and it was not finalized until October 12, 2012, when the last signature was affixed. See Exhibit 16c to the Complaint. An almost identical document was subsequently signed on dates between March 21, 2013 and March 28, 2013; the only substantive change appears to be the applicable interest rate (see Exhibit 16d to the Complaint). As discussed above, this documentation – finalized at least three months and potentially more than fifteen months after the date of the transfer – is inconsistent with the Revenue Use Policy requirement that a loan be "clearly documented … at the time it was made." Moreover, because the date of the transfer is unknown, the FAA should deem it to have occurred on the date least favorable to the City for the purposes of reimbursement, July 1, 2011. Generally, "the FAA may require [an airport sponsor] to produce records sufficient to support the amounts claimed"; unverified claims will not be recognized. See Application of the Airport and Airway Improvement Act to the Proposed Lease of the Albany County Airport, 15 U.S. Op. Off. Legal Counsel 26, footnote 7 (February 12, 1991).[4] Accordingly, to the extent that any repayments of interest were made by the Airport on or after February 5, 2010, and any repayments of principal were made after July 1, 2017, they must be reimbursed, with statutory interest, and any outstanding balances erased from Airport accounts.[5] The Director's Determination and the record do not appear to enable an exact calculation of the amount to be reimbursed. The FAA should require that the City provide additional documentation, so the necessary calculations can be performed.

Based on the foregoing, the additional transfers for which the Associate Administrator should require reimbursement are:

[3] The City's CAFRs indicate that the Airport repaid $1,000,000 in advances from other funds – presumably, repayment of principal for transfers that the City asserts were loans – in FY2018, and a further $1,070,786 in FY2016. But the CAFRs do not specify the exact dates; nor do they clarify which transfers were thereby repaid.

[4] See also FAA Order 5190.6B, § 15.12; In the Matter of Revenue Diversion by the City of Los Angeles, at Los Angeles International, Ontario, Van Nuys and Palmdale Airports, no. 16-96-01, Record of Determination (March 17, 1997), at 20.

[5] See footnote 3.

Transfer Amount	Date Funded	Date Documented
$2,839,729	November 30, 2004	August 3, 2005
$400,000	April 2009	July 24, 2009
$3,309,648	Between July 1, 2011 and June 30, 2012	October 12, 2012

For One Transfer, the Director's Determination Did Not Address the Excessive Interest Rate

The Director's Determination correctly found that the rate of interest on any loan from the City to the Airport must be consistent with the rate of return received by the City for other investments. In an apparent oversight regarding one loan – the $400,000 transferred on an unknown date in April 2009 for which interest was set at 8% by the belated documentation – the Director's Determination fails to apply this requirement, even though the City acknowledged that during the relevant timeframe its average return on investments was 2.85% (see City's Answer (July 1, 2016), Exhibit F). If the FAA continues to maintain that this transfer was adequately documented to comprise a loan, excessive interest payments since February 5, 2010 must be reimbursed, with statutory interest.

The Director's Determination Includes Significant Calculation Errors and Omissions

In connection with the $2,839,729 transfer made by the City to the Airport on November 30, 2004, the Director's Determination states that principal repayments of $2,859,090 and $188,873 subsequently were made, and that as a result the principal has been overpaid by $188,873, an amount which must be reimbursed. See id., at 8. But that math does not add up. Based on these figures, the principal was overpaid by $208,234, and thus an additional $19,361 must be reimbursed (with statutory interest).

Additionally, the Complaint alleged that among the transfers made by the Airport to the City was a payment of $115,000 at an unknown date in FY2007 (i.e., between July 1, 2006 and June 30, 2007). See Exhibit 13 to the Complaint. The City has acknowledged the authenticity of the document upon which the Complainants relied. See City's Answer (July 1, 2016), at 17. But the City has provided no documents or discussion to justify treating this transfer as a loan. Nor has the City identified any evidence that this transfer was ever repaid. Unfortunately, the Director's Determination likewise failed to discuss this transfer. The Director's Determination should have deemed this issue to be conceded, and a further $115,000 reduction in the Airport's outstanding balance to the City to be required, along with reimbursement of any interest payments since February 5, 2010 (with statutory interest).

In finding that certain interest payments must be reimbursed to the Airport, the Director's Determination appears to rely on the interest paid through 2016, the year that the Complaint was filed and thus the most current data available in the record (see id., at 7-8). The City, in its July 1, 2016 Answer, acknowledged that for certain transfers the interest rate had been excessive (presuming that they were valid loans), and in a letter dated September 29, 2016 proposed

corrective action in the amount of $33,818 for those loans, effective as of September 30, 2016.[6] But interest payments have continued to be made to the City by the Airport up to the present day – presumably based on transfers: (i) that the City asserted were valid but the Director's Determination now has ruled do not constitute loans at all, and (ii) that the Director's Determination now has ruled cannot be interest-bearing, even if they constitute loans.[7] At a minimum, the Director's Determination should have specified that its calculations of the reimbursement due for interest payments were subject to revision based on subsequent interest payments, and that the City, as part of the required corrective action, should identify what interest-related transactions have occurred since 2016, so the necessary calculations can be performed.

Finally, it appears that the Director's Determination utilized an inappropriate dataset for its two calculations of specific amounts of interest paid prior to and into 2016 that must be reimbursed by the City (see id., at 7-8).[8] In making those calculations, the Director's Determination relied on data in the City's Exhibit G, which accompanied the City's July 1, 2016 Answer in this docket. But Exhibit G was provided by the City to recalculate the interest that should have been paid on certain loans for which the City acknowledged the interest rate had been excessive. Exhibit G does not record the actual interest payments made by the Airport to the City. See City's Answer (July 1, 2016), at 16. As a result, the reimbursement proposed by the Director's Determination is too low, since the actual interest payments made by the Airport to the City were higher than those memorialized in Exhibit G. The Director's Determination and the record do not appear to enable an exact calculation of the amount to be reimbursed. The FAA should require that the City provide additional documentation, so the necessary calculations can be performed – for both these two cases as well as for the other directives in the Director's Determination that interest be reimbursed but for which no specific calculations were provided by the FAA.[9]

Issue #3 – The Director's Determination should have addressed the issue of whether the methodology used by the City to compute landing fees was compliant, to ensure that it does not evade review and that the City's corrective action is meaningful; additionally, the Director's Determination should have specifically addressed the ongoing and growing Airport surplus.

The third issue identified in the Complaint was the imposition of a revised set of landing fees at the Airport, effective August 1, 2013, which was alleged to be facially excessive based on the Airport's financial situation as well as to have been premised on inputs and methodology that were specifically impermissible. This is not the first time that the FAA has been called upon in a

[6] This amount, along with $1,069,328 to address the underpayment of rent by Santa Monica College (for a total of $1,103,146), was credited to the Airport in FY2017 as a special item, according to the City's CAFRs.

[7] The City's CAFRs indicate that the Airport paid $69,367 in interest on long-term obligations in FY2018, $76,731 in FY2017, and $129,214 in FY2016.

[8] In particular, $454,592 for the prior non-interest bearing transfers refinanced in 2005 and 2009 and $383,173 for the November 30, 2004 transfer.

[9] Additionally, the Director's Determination does not attempt to calculate the statutory interest due on payments of principal and interest made by the Airport, which will turn on the dates that those payments were made and the Treasury's Current Value of Funds Rate ("CVFR") in effect on each of those dates. Presumably the City is expected to make those calculations, based on the date that reimbursement actually is made, but those calculations also should be subject to verification.

Part 16 proceeding to require the City to bring its landing fees into compliance with its federal obligations. See Bombardier Aerospace Corp. v. City of Santa Monica, no. 16-03-11. In fact, the City specified that the revised landing fee regime it adopted in 2013 was intended to finally resolve the issues still pending from that docket. See Exhibit 27 to the Complaint. Despite the significance of this issue, the Director's Determination devoted less than a page of analysis to it – and did not substantively engage the Complaint, instead finding that since the Complaint had been filed, the factual situation of the Airport had significantly changed, and thus the City should generally update its fees as a form of corrective action.

The Complainants do not dispute that the factual situation of the Airport has changed since the Complaint was filed. But the Director's Determination nevertheless should have addressed the associated legal issues identified in the Complaint. The methodology utilized by the City in 2013 to calculate landing fees was inconsistent with the Revenue Use Policy. To the extent that the Director's Determination requires corrective action by the City but does not specify the methodological parameters for that corrective action, the same issues may arise again – yet evade review, given that Part 16 does not ensure that the Complainants will be able to participate in, object to, or appeal from a corrective action process. See, e.g., Keathly v. City of McKinney, Texas, no. 16-03-14, Director's Determination (October 13, 2004), at 17. The FAA therefore not only had the capability but the responsibility to address the allegations of non-compliance made in the Complaint. Because the Director's Determination failed to do so, it is now incumbent upon the Associate Administrator to address them, to ensure that Santa Monica's methodology is currently and will in the future be in compliance with its continuing federal obligations.

Further, one of the subsequent changes in the Airport's factual situation has been the continued growth of a surplus. That surplus was already excessive at the time of the Complaint, and based on public records has skyrocketed since to almost $13 million. This figure will be enhanced by the finding in the Director's Determination on issue #1 and should be further enhanced by the issues raised on appeal of issue #1 by the Complainants. Given that the Director's Determination has established that developments subsequent to the Complaint are relevant to and will be considered in connection with issue #3, and the overall unique circumstances of this proceeding, the corrective action required by the Director's Determination should have included actions to address the prior and continuing effects of the surplus, including, as requested in the Complainants' associated motion, the suspension of landing fee collections until such time as a corrective action plan has been approved by the FAA – and, as discussed below, the refund to Airport users of the excessive – and thus unlawful – fees that have been collected.

The Substantive Compliance Issues for Landing Fees Should Have Been Addressed

The FAA has repeatedly established that excessive fees for aeronautical users of airports – along with any interconnected surpluses – are also among the agency's significant compliance concerns. The FAA's Airport Compliance Manual elaborates upon this issue, but the guidance is not new, having appeared in substantially similar form in § 4-20(c) of Order 5190.6A (1989) and § 70(d) of Order 5190.6 (1973). The central mandate is that: "In establishing new fees … sponsors should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenue may be spent. … Additionally, the progressive accumulation of substantial amounts of surplus aeronautical revenue could warrant an

FAA inquiry into whether the aeronautical fees are consistent with the sponsor's obligation to make the airport available on fair and reasonable terms." See Order 5190.6B, § 17.9.

The FAA recently explicated the meaning of this requirement in United Airlines v. Port Authority of New York and New Jersey, no. 16-14-13, Director's Determination (November 19, 2018). Although the FAA acknowledged that an airport has some discretion in making expenditures that can be incorporated into the rate base for its aeronautical fees, the FAA also criticized the lack of transparency in and a lack of supporting documentation for the Port Authority's methodology, and accordingly required corrective action. See id., at 17-18. Moreover, in a prior proceeding involving Santa Monica, the FAA specifically held that a fee may be unreasonable independent of whether it results in a surplus; that costs not specifically attributable to a specific cost center must be allocated by methodology that is transparent, reasonable, not unjustly discriminatory, and applied consistently; and that critical technical shortcomings in methodology are a basis for the FAA to reject a landing fee schedule. See Bombardier Aerospace Corp. v. City of Santa Monica, no. 16-03-11, Director's Determination (January 3, 2005), at 44-45. See also New England Legal Foundation v. Massport, 883 F.2d 157 (1st Cir. 1989) (upholding DOT administrative ruling which invalidated a flawed landing fee methodology).

Accordingly, although Complainants do not dispute that the Director's Determination was correct to require the City to update its landing fees to reflect the changed factual circumstances of the Airport, the FAA erred by failing to address whether the methodology previously utilized to establish landing fees for the Airport was compliant with FAA requirements. If new factual data is input into a methodology which remains improper, the outcome will still be improper. Thus the consequence of the absence of the requested guidance in the Director's Determination is significant for SMO – and also for airports across the U.S., since such guidance will also inform whether their methodologies for calculating landing fees comply with their federal obligations.

This is very much a live issue. As an initial matter, the Director's Determination specifies that Santa Monica cannot be determined to be in compliance with its federal obligations. See id., at 11. Further, in a prior Part 16 proceeding that specifically involved Santa Monica, the FAA confirmed that it may address current sponsor practices that are likely to result in future non-compliance. See National Business Aviation Association v. City of Santa Monica, California, no. 16-14-04, Director's Determination (December 4, 2015), at 9 ("the issue here posed is one in dispute now. Moreover, we may in limited circumstances, consider a case where the current situation portends the high likelihood of a future violation"). See also JetAway Aviation LLC v. Board of Commissioners, Montrose County, Colorado, no. 16-06-01, Director's Determination (November 6, 2006), at 34; Town of Fairview, Texas v. City of McKinney, Texas, no. 16-99-04, Director's Determination (July 26, 2000), at 17.

In this proceeding, the City specifically has defended its methodology, and thus absent new guidance can be expected to utilize the same methodology in the corrective action plan, only changing the starting data points to reflect the Airport's changed factual situation. The FAA should prevent that from happening, because that would allow the substantive issues raised in the Complaint to evade review while providing the City a nominal justification to increase its landing fees still further, based on its prior faulty reasoning. Because the Director's Determination failed to do so, the Associate Administrator should now address the following issues, specifically raised in Complainants' prior pleadings and now incorporated by reference into this appeal:

- Transparency and Documentation. The Complaint argued that the process utilized by the City to increase its landing fees was impermissible because it was poorly documented – key assumptions were not explained, or were inconsistent among the few documents available to the public, and the City refused to make additional documents available to the public. See id., at 25-26 and 35. See also Complainants' Reply (August 1, 2016), at 19-21. Although the Director's Determination instructed the City to start afresh, it did not address whether the City's prior practices had been compliant. The FAA should specify that the prior procedures were not compliant, based on the briefing already provided.

- Airfield Costs and Revenue. The increase in landing fees challenged by the Complaint was primarily premised on an alleged deficit between airfield costs and airfield revenue. Complainants argued that this rationale was invalid because it did not: (i) accurately measure the costs and revenue attributable to the airfield; (ii) explain how costs were allocated between airfield and non-airfield centers;[10] and (iii) take into account the overall financial picture of the airport – including non-airfield costs and non-airfield revenue – which was revenue-neutral if not revenue-positive. See id., at 23-25 and 31-33. See also Complainants' Reply (August 1, 2016), at 12. The Director's Determination briefly describes the City's accounting for non-airfield costs and revenues as "unclear" (see id., at 11), but did not make any specific findings about the City's prior practices nor provide any guidance to the City for the methodology to be used going forward. To ensure that the pending corrective action will be meaningful, the FAA should specify whether: (i) the City's measurement of airfield costs and revenue was compliant; (ii) the methodology for allocating costs between airfield and non-airfield centers was compliant; and (iii) the Airport's overall finances must be considered even if an airfield deficit exists.

- Indirect Cost Reimbursement. The increase in landing fees challenged by the Complaint also was premised in part on the Airport's reimbursement to the City of indirect costs. The Complaint argued that the City should not have been allowed to rely on those figures, because of the lack of any explanation thereof, including both the amounts and the allocation methodology, as well as a significant but unexplained year-over-year increase in the figures relied upon by the City. See id., at 26-28. See also Complainants' Reply (August 1, 2016), at 13-15. It is well-established that an airport sponsor has the burden to document the municipal expenditures that it claims are payable by an airport. See Complainants' Reply (August 1, 2016), at 4-5. The Director's Determination briefly describes the City's allocations as "unclear" (see id., at 11), but did not make any specific findings about the City's prior practices nor provide any guidance to the City for the methodology to be used going forward. The FAA should specify whether undocumented indirect cost reimbursement may be considered at all in setting landing fees – and if allowed, how it should be allocated between airfield and non-airfield cost centers – to ensure that the pending corrective action will be meaningful.

- Legal Expenditures. The increase in landing fees challenged by the Complaint further was premised in part on certain legal fees incurred by the City. The Complaint argued (see id.,

[10] Santa Monica belatedly submitted an exhibit which purported to explain the allocations, but that exhibit comprises either a post hoc rationale or was improperly withheld from the public at the time the landing fees were adopted – the City has not specified which. See Complainants' Objections (September 19, 2016), at 1-2.

at 28-29; see also Complainants' Reply (August 1, 2016), at 15-16) that those fees, in addition to being undocumented, also should not have been payable with airport revenue (irrespective of whether they were allocated to an airfield or non-airfield cost center), to the extent that they were not incurred in support of the Airport, but rather in support of an unsuccessful effort by the City by ordinance to restrict Class C/D aircraft operations at SMO – an effort rejected by both the FAA and the courts. See, e.g., City of Santa Monica v. FAA, 631 F.3d 550 (9th Cir. 2011). The Director's Determination does not even mention this issue, much less make a finding. As above, this issue must be addressed by the FAA if corrective action is to be meaningful.

- Amortization Costs. Another foundation for the Complaint's challenge to the increase in landing fees was the amortization costs cited by the City, which also lacked supporting documentation and further did not appear to be properly categorized, given the consistent disparity between them and the data recorded in the City's audited CAFRs (see id., at 29-30; see also Complainants' Reply (August 1, 2016), at 16-18). This is another item that the Director's Determination briefly describes as "unclear" (see id., at 11) but about which there are no specific findings about the City's prior practices nor any guidance to the City for the methodology to be used going forward. As above, this issue must be addressed by the FAA if corrective action is to be meaningful.

- Double Charges. The Complaint's challenge to the City's increase in landing fees additionally was premised in part on the fact that the fees previously applied only to transient aircraft, but as revised applied to all aircraft, with the consequence that based operators now are effectively double-charged for costs already accounted for through other fees they pay such as tie-down fees, hangar fees, and fuel flowage fees (see id., at 31; see also Complainants' Reply (August 1, 2016), at 18). The Director's Determination does not address this issue. This is yet another issue that must be considered by the FAA if corrective action is to be meaningful.

- Loans and Interest. The Director's Determination specifies that a defect in the fee methodology previously used by the City was that it improperly presumed that the payments made to the Airport by the City were valid loans and thus payments of interest (and presumably also payments of principal, although not mentioned by the FAA) were required. See id., at 11. The Complainants concur – but as discussed above, the Director's Determination does not identify all of the principal and interest that must be reimbursed, nor does it include the complete data necessary for the computation of the reimbursement required.[11] As a result, the Associate Administrator's resolution of the appeal of issue #1, including revised guidance for and calculations of the reimbursement that is due, is essential for the corrective action required in connection with issue #3 to be meaningful.

- Facial Reasonableness. The Director's Determination acknowledged that the landing fees at SMO on a per-pound basis had increased by 264% (and the collected revenue initially increased by 500%). See id., at 11. Nevertheless, it did not address the Complaint's

[11] The City's FY2018 CAFR states that the outstanding advances from other funds to the Airport comprise $7,748,971. That does not account for improper past payments of principal and interest, or statutory interest – but suffice to say that at the conclusion of this proceeding, the Airport's surplus is likely to exceed $20 million.

allegation that the revised landing fees at SMO are facially unreasonable. See id., at 33-35; see also Complainants' Reply (August 1, 2016), at 16. In Bombardier Aerospace Corp. v. City of Santa Monica, no. 16-03-11, Director's Determination (January 3, 2005), at 39, the FAA observed that the landing fee then imposed at SMO was the highest in the United States, and although that comparison did not mean that the fee was inherently unreasonable, "it does illustrate that the SMO landing fee methodology is not the result of generally accepted practices used within the industry." In this case, Complainants documented that the revised landing fee also was out of sync with other comparable airports – one source of evidence being the City's own data. Accordingly, irrespective of any new data that the City could provide, the FAA should have addressed whether the revised landing fee was facially impermissible – or, at a minimum, that it was evidence of improper methodology, re-emphasizing why the issues set forth above should also have been addressed by the Director's Determination, and on this appeal must be addressed.

The Ongoing and Growing Revenue Surplus Should Also Have Been Addressed – and Remedied

The FAA has recognized that landing fees and surpluses are intertwined matters – and that unjustified surpluses are another compliance issue of major concern to the agency. See, e.g., Order 5190.6B, § 17.9; 49 U.S.C. § 47101(a)(13); Sound Aircraft Services v. East Hampton Airport, no. 16-14-07, Director's Determination (January 2, 2019), at 12 ("the existence or absence of a surplus will … play an important role in determining if such a fee is reasonable"). As discussed above, the Director's Determination failed to fully address the landing fee issues at the Airport, but did give them some attention, and required the City to recalculate the fees. Yet the Director's Determination barely mentioned – and took no action to address – the surplus which existed and continues to exist at the Airport, intertwined with the landing fees. That was an error which must now be corrected by the Associate Administrator.

As a preliminary matter, the Airport's surplus is not a new issue in this appeal. The Complaint alleged that the Airport's overall finances prior to the revision of its landing fees was at least neutral if not in the black, and that the consequence of the revision of the landing fees would be the accumulation of an impermissible surplus (see id., at 21-25 and 31-33; see also Complainants' Reply (August 1, 2016), at 13).[12] The Complaint was correct, despite the City's response that "it is obvious that there is no 'surplus' at the Airport – nor any realistic expectation that surplus will progressively accumulate there any time soon." See City's Answer (July 1, 2016), at 24. The City also may assert that the growth in the surplus can be attributed to factors such as

[12] Moreover, the Director's Determination in its ruling on issue #3 itself established that subsequent developments are relevant to and will be considered in this proceeding. The FAA indubitably has the discretion to expand the scope of a Part 16 investigation beyond the allegations made in a complaint and to collect additional evidence. See, e.g., 14 C.F.R. § 16.29; Town of Fairview, Texas v. City of McKinney, Texas, no. 16-04-07, Final Agency Decision (November 30, 2005), at 20. In any case, to the extent necessary, the Complainants petition for the current surplus – and other public City data post-dating the 2016 briefing – to be taken into consideration pursuant to 14 C.F.R. § 16.33(f). There is good cause to do so, given that the changed factual situation of the Airport was introduced as an issue by the FAA itself; the current status of the surplus and other financial reporting was, by definition, information not previously available to the Complainants; and the growth of the surplus directly bears upon the intertwined landing fees. See also National Business Aviation Association v. City of Santa Monica, California, no. 16-14-04, Final Agency Decision (August 15, 2016), at 7-8 (accepting supplemental affidavits from the City); Martin v. City of Prescott, Arizona, no. 16-97-01, Final Agency Decision (October 7, 1997), at footnote 2.

growth in non-aeronautical revenue – but that still would not justify a surplus, and if anything provides a further justification for corrective action such as the reduction or elimination of landing fees at SMO (as discussed further below). Non-aeronautical revenue should be used to reduce the economic impact on aeronautical users. See, e.g., Bombardier Aerospace Corp. v. City of Santa Monica, no. 16-03-11, Director's Determination (January 3, 2005), at 43.

The FAA should take administrative notice of the City's CAFRs (publicly available at https://finance.smgov.net/budgets-reports/annual#/), which show that the factual situation at the Airport includes a tripling of its unrestricted cash and investments since 2016. At the end of FY2015 (June 30, 2015) – the most recent figure available at the time the Complaint was filed – they amounted to $4.2 million, but increased to $7.2 million at the end of FY2016 (June 30, 2016), $12.3 million at the end of FY2017 (June 30, 2017), and $12.9 million at the end of FY2018 (June 30, 2018).[13] Notably, that latest increase occurred despite airport revenue having been used to finance the initial truncation of the Airport's runway in FY2018. Moreover, much of this revenue comes from long-term, high-PSF non-aeronautical leases, which are anticipated to continue through 2028. For example, in 2016 the Airport entered into a five-year lease – with a five-year renewal option – with Snapchat, Inc. (now Snap, Inc.) for non-aeronautical uses, which alone generates more than $3 million in annual revenue.[14] The surplus will only continue to grow.

This rapid growth in the Airport's cash on hand, without any clear purpose for the funds, should be of serious concern to the FAA. There is no dispute that airports can and should maintain a reserve account sufficient to cover anticipated – and even unanticipated – future expenses. See, e.g., Order 5190.6B, § 17.9; H. Rpt. 103-677, at 68 (August 5, 1994). But an outright runaway accumulation of monies is not justifiable. In this case, there is no analysis of future expenses or contingencies to justify the surplus. Contrast Sound Aircraft Services v. East Hampton Airport, no. 16-14-07, Director's Determination (January 2, 2019), at 13. In a Part 16 proceeding involving a similar general aviation airport, Aerodynamics of Reading v. Reading Regional Airport Authority, no. 16-00-03, the FAA held that an unrestricted cash balance of $462,000 – of which $362,000 was specifically designated to be a reserve account – was "within the bounds of reasonableness in the context of the airport's financial contingencies, debt service, and future development." See Final Decision and Order (July 23, 2001), at 21. In contrast, in this case the Airport's unrestricted cash position amounts to nearly 2800% of RDG's cash position – far beyond the boundaries of reasonableness.

Moreover, this is a unique case, given the settlement agreement between the City and the FAA which provides the City the discretion to close the Airport after the end of 2028 – an opportunity which the City's political leadership publicly insists will be taken.[15] In light of that

[13] The CAFRs also calculate the airport's net position. Although there is no indication in FAA guidance that this figure – which includes fixed assets – should be used to evaluate an airport's "surplus," the Complainants note that it shows even more growth than the Airport's cash position. At the end of FY2015, it was negative $5.5 million; at the end of FY2016, it was $200,000; at the end of FY2017, it was $6.1 million; and at the end of FY2018, it was $7.6 million.

[14] See https://publicdocs.smgov.net/WebLink/DocView.aspx?id=2341197 (May 10, 2016) (approving proposal previously submitted as Complainants' Exhibit 84).

[15] See, e.g., A Resolution of the City Council of the City of Santa Monica Implementing the Consent Decree and Authorizing All Actions Necessary to Ensure the Closure of Santa Monica Airport Effective as of Midnight on

position, the Airport's need for long-term financial reserves is drastically reduced. Nor should it be permissible for the Airport to accumulate surpluses today that are not intended to ever be used for aeronautical purposes, but rather to be retained until after the Airport has been closed and then used to repurpose the property for non-aeronautical purposes and/or for general municipal purposes. Such a practice would amount to transparent – and impermissible – revenue diversion.[16]

Under these circumstances, the Director's Determination should not just have required the City to prepare an updated fee methodology but also to prepare a corrective action plan for the surplus in the Airport's accounts. At a typical airport, a means to achieve compliance once a surplus had been identified might be to "convert a reasonable amount of the airport revenues into improvements that would enhance the value of the airport to the community (T-hangars, aircraft parking areas, terminal buildings, etc.)." See FAA Order 5190.6A, § 4-20(c) (1989); FAA Order 5190.6, § 70(d) (1973). But, as discussed above, given the City's stated intent to close the airport in just over nine years, there would be no justification for the surplus being repurposed for significant aviation-related capital expenditures. Given the improbability if not impossibility of the City being able to identify legitimate Airport capital expenditures for which the surplus accumulated can be used, the proper solution would be for the surplus to be used to reduce the operational costs of the Airport's users – foremost by eliminating the Airport's landing fees (including, as moved for above, their immediate suspension – and ultimately their refund).[17]

Finally, the Director's Determination also should have required the City to consider using the surplus to reduce the tie-down and rent and fuel flowage fees paid by aeronautical tenants at the Airport. Even if landing fees are suspended going forward, that would reduce the surplus by only $4.5 million over the nine remaining years of the Airport's guaranteed lifespan. Given the lack of appropriate capital projects to which those funds could be deployed, the only other means to bring the surplus back within the zone of reasonableness is to reduce the other fees collected by Airport users. The Director's Determination having failed to address this issue, the Associate Administrator should now do so.

The Unlawful Landing Fees Collected To Date Must Be Refunded

Between August 1, 2013 and the present, the City has continued to charge Airport users landing fees that are among the highest in the country, despite its failure to properly advise, and receive informed input from, affected parties; its repetitive manipulation of underlying financial data; its rejection of its own analysis of other airports' landing fees demonstrating the inherent

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December 31, 2028, and the Shortening of the Santa Monica Airport Runway Pending Closure, no. 11026 (February 28, 2017) (https://publicdocs.smgov.net/WebLink/DocView.aspx?id=2344542). See also Complaint, at 7-9.

[16] The Western-Pacific Region's informal determination dated October 21, 2019 warned Santa Monica that doing so would be non-compliant. Likewise, nothing in 49 U.S.C. § 47133 suggests that the closure of an airport releases from its obligations any revenues previously collected under its auspices.

[17] The City – in the Capital Improvement Program that is part of its FY2019-21 Adopted Biennial Budget – has proposed to spend up to $7.3 million annually on street, sidewalk, and building projects. These expenditures either are unconnected to aviation, or must be premised on the funded projects continuing to be used after the closure of the Airport, for entirely non-aeronautical purposes. This is an inversion of FAA policy – the City in effect is assessing higher fees for aeronautical users in order to subsidize facilities for non-aeronautical users. Contrast United States Construction Corporation v. City of Pompano Beach, Florida, docket no. 16-00-14, Final Agency Decision (July 10, 2002), at 21 ("[o]perating the airport for aeronautical use is not a secondary obligation; it is the 'prime obligation'").

unreasonableness of the SMO fees; its refusal to account for non-aeronautical income – the Airport's principal income stream – in establishing and maintaining the rate base; and its continued maintenance of its landing fees in the face of an enormous and growing surplus. The landing fees were thus not just improper but unlawful from their inception, and as the surplus includes revenues from those fees, the Director's Determination also should have included in its corrective action directive a requirement that the City address how those fees should be refunded to the affected users.

The Complainants are aware that the FAA previously has opined that Part 16 is not an appropriate forum in which to request monetary damages. See, e.g., Consolidated Services Engineers and Constructors, Inc. v. City of Palm Springs, no. 16-03-05, Director's Determination (June 10, 2004), at 28. But those statements are not determinative here; what is proposed is not a request for damages, but rather that for corrective action that is needed to bring an airport into current compliance, in the form of reimbursement; that is clearly within the FAA's authority. This remedy is particularly appropriate under the unique current circumstances, in which there are not, nor will there be, legitimate expenditures for which those funds possibly can be used.

The FAA has not previously been asked in Part 16 proceedings to apply, and thus has not applied, a critical element of its authority, as identified by 14 C.F.R. § 16.109(a) – to issue "an order directing the refund of fees unlawfully collected." Nothing in the language or history of that regulation limits the meaning of the term "unlawfully," but the FAA consistently has described general violations of grant assurances to be "unlawful." See, e.g., Pelzer v. State of Michigan, 16-16-05, Director's Determination (May 16, 2018), at 26; Bodin v. County of Santa Clara, California, no. 16-11-06, Director's Determination (December 19, 2011), at 21-22; Skydive Paris, Inc. v. Henry County, Tennessee, no 16-05-06, Director's Determination (January 20, 2006), at 19; Clarke v. City of Alamogordo, New Mexico, 16-05-19, Director's Determination (September 20, 2006), at 23; United Aerial Advertising, Inc. v. County of Suffolk Board of Commissioners, no. 16-99-18, Director's Determination (May 8, 2000), at 17. Consistent with that guidance, the existence of a surplus at SMO that is incompatible with grant assurances #24 and #25 – and was built on the backs of excessive user fees, as alleged in the Complaint (see id., at 22-23) – can and should be the basis for an FAA order directing refunds.

Moreover, even if the Section 16.109(a) authority for the first time should be construed to be limited to statutory violations, revenue diversion is a statutory violation pursuant to 49 U.S.C. § 47133 – and the Complaint alleged that the maintenance of a surplus by the Airport amounts to a violation of not just grant assurance #24 but also of grant assurance #25 (see id., at 22-23). The mere existence of an excessive surplus, in which funds are parked and not used for aeronautical purposes, standing alone amounts to revenue diversion – and in this case, the City may have a further, ulterior motive to retain the surplus for impermissible post-closure use. See also Sound Aircraft Services v. East Hampton Airport, no. 16-14-07, Director's Determination (January 2, 2019), at 12 (noting linkage – unreasonable fees are "a circumstance leading to revenue diversion, or an inappropriate revenue surplus").

Finally, nothing in Part 16 generally prohibits the FAA from recommending that a corrective action plan incorporate restitution to users who have previously paid excessive fees. As discussed above, since the truncation of the runway the landing fees collected by the Airport have declined, but previously they peaked at more than $1.5 million annually (in FY2014) – a

significant, unwarranted expense for users of the Airport, which also cynically served the purpose of driving traffic away from the Airport. Again, this is an unusual case, given the length of time that elapsed between the filing of the Complaint and the Director's Determination; the enormous surplus that has been accumulated; and the changes in the Airport's factual situation – including the establishment of a timeframe for its closure – in the interim. Thus the Associate Administrator at a minimum should conclude that the corrective action instructions to the City should have been broader in scope, including reimbursement of unlawful landing fees, given the unprecedented surplus compliance problem in Santa Monica.

Conclusion

For the reasons set forth above, the Associate Administrator should revise the Director's Determination, in connection with issue #1, to specify that none of the transfers between the City and the Airport identified in the Complaint were adequately documented to comprise loans, and to modify the reimbursement obligations of the City based on both that finding and the other errors and omissions in the Director's Determination that are identified in this appeal, as well as require that the City provide supplemental data to the extent necessary for revised calculations to be made of the City's exact reimbursement obligations.

In connection with issue #3, the Associate Administrator should resolve the compliance issues identified in the Complaint but not addressed in the Director's Determination. Although the City has been instructed to update its landing fees because of subsequent changes in the factual situation of the Airport, the methodological issues identified in the Complaint are relevant to the parameters of the corrective action and are capable of evading review if not addressed at this time. Moreover, the current factual situation includes an excessive and growing surplus, which is intertwined with the landing fees; the Director's Determination should not have ignored this issue – which it specifically recognized – and pending the preparation and approval of a corrective action plan, should have ordered remedies, such as the suspension of landing fees at SMO and refunds to Airport users of fees that not only created an excessive surplus but were thus illegal. The Associate Administrator should now provide redress, including by the requested interim order.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day caused the foregoing pleading to be served on the following persons at the following addresses by first class mail, postage prepaid, and by electronic mail:

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Dated this 9th day of December, 2019

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