Cole, et al, v. City of Santa Monica **(Case SC 055183)**

Plaintiffs' Position Concerning
the City of Santa Monica's Ongoing
Legal Right to Regulate
Aircraft Operations at Santa Monica Airport

August 17, 2000

I. INTRODUCTION AND SUMMARY.

In recent years, the Santa Monica Airport (the "Airport") has been used with increasing frequency by particularly highly-polluting jet aircraft. Because residential neighborhoods immediately surround the Airport, the pollution from such aircraft directly and unreasonably burden those who live nearby. This situation is now the subject of a pending lawsuit brought against the City of Santa Monica (the "City") by nearby homeowners ("Plaintiffs") who are, because their homes are located at the east end of the runway, extremely and in some ways uniquely impacted by the Airport's changing uses.

The City, as the Airport's owner and operator, is its proprietor. Accordingly, the City is responsible for both (1) assuring that the Airport is operated such that its neighbors can reasonably enjoy their properties, and (2) maintaining an adequate buffer between the Airport's impacts and surrounding uses. The City takes the position, however, that it is limited in its ability to restrict uses of the Airport due to - among other things - an agreement that it reached with the Federal Aviation Administration (the "FAA") in 1984 (the "1984 Agreement"). Indeed, the City maintains that it has no power to restrict the Airport's uses, or that it must painstakingly seek and obtain the FAA's unlikely consent before imposing any new restrictions. Careful examination of the applicable law and the 1984 Agreement indicates, however, that the City has been unnecessarily timid about exercising its proprietary power to restrict Airport uses for the benefit of the surrounding community.

In fact, the City retains substantial, unilateral rights to control use of the Airport. Specifically, the City can - and should - restrict the Airport's use based on the relative air polluting qualities of the aircraft that use it. Plaintiffs therefore propose that the City promptly "phase out" from the Airport any and all aircraft that are especially air polluting when they are idling on the Airport grounds.

Doing so would relieve Plaintiffs and their many neighbors of the most extreme burdens that they increasingly suffer.

This position paper sets forth Plaintiffs' counsel's conclusions that result from careful study of the City's rights and powers. It is divided into six parts. Following the introduction and summary is a brief history of the Airport and its changing uses. The remaining four parts explain in depth the legal issues pertaining to the City's ongoing power to restrict Airport uses.

The City's legal rights can be summarized as follows:

- First, the City enjoys broad, historical powers as the Airport's proprietor. Historically, any airport proprietor has enjoyed both the right and the responsibility to restrict obnoxious uses of its property so as not to become liable to its neighbors.

- Second, a federal court ruled in 1979 that the City's then-present total jet ban was not sufficiently justified by the City at the time. That does not mean, however, that the City must forever accept - and impose upon the Airport's neighbors - all of the ill effects of jet operations no matter what they may be. Instead, the same federal court confirmed in 1979 that the City maintains broad powers as the Airport's proprietor. On appeal, these holdings were affirmed.

- Third, the City and the FAA subsequently entered into the 1984 Agreement, which contractually fixes and limits the City's proprietary powers in certain respects, primarily concerning control of the Airport's use regarding noise effects. The 1984 Agreement, however, otherwise expressly preserves the City's proprietary rights and powers concerning the Airport.

- Fourth, in 1990 Congress enacted a particular statute (the Airport Noise and Capacity Act of 1990, or "ANCA") that significantly interferes with proprietary rights of airport operators generally. By its own express terms, however, ANCA does not interfere with the City's proprietary powers precisely because of the existence of the 1984 Agreement. In other words, because of an express, statutory exception to ANCA, the fact that the FAA and the City entered into a specific regulatory agreement in 1984 prevents the FAA from invoking ANCA to interfere with the City's reserved proprietary powers.

- Finally, the City's powers as Airport proprietor are unaffected by various federal laws that limit or "preempt" state and local governments' ability to impose conflicting laws. As a result, the City still enjoys broad proprietary

powers to restrict the Airport's use reasonably pursuant to its "reserved powers" under the 1984 Agreement.

Plaintiffs and their counsel urge the City to exercise its reserved, proprietary powers to ban from the Airport all of the more air-polluting aircraft, many of which are coincidentally jet aircraft. Doing so would not only minimize Plaintiffs' claims, it would also benefit countless others who are increasingly plagued by the Airport's more unreasonable uses. Notably, banning from the Airport the air-polluting aircraft would be entirely consistent with the City's overall "sustainable city" philosophy, about which the City is rightfully so proud.

II. A BRIEF HISTORY OF THE AIRPORT.

The Airport was first established in or about 1919. In the years following, large areas adjacent to the Airport were developed into a DC-3 manufacturing facility by Douglas Aircraft Company. The Airport was also used in the World War II war effort. In 1942, the Airport's runway was constructed at its current location using federal funds.

Shortly after World War II, the federal government and the City entered into an agreement that deeded the Airport land and improvements to the City for its indefinite ownership. As a condition of the transfer, however, the City must continue to use the property as an airport. A few years later, Douglas Aircraft Company ceased using the Airport's runway because it began building larger jet aircraft. Since then, the City has operated the Airport as a general aviation reliever airport - basically, a small, municipal airport. From time to time, the City has taken federal funds for capital improvements to the Airport's facilities.

General aviation (i.e., non-commercial aviation) grew throughout the intervening years, as did the surrounding population. Thus, the Airport grew busier. The character of the Airport changed most radically, however, when jet propelled aircraft began using the Airport. Complaints about the jets in the 1960's ripened into a lawsuit brought by the residents of many nearby homes. That legal battle, *Nestle v. City of Santa Monica*, went all the way to the California Supreme Court, which ultimately ruled that the residents could prosecute claims for nuisance against the City concerning the effects of the Airport. The City then settled the *Nestle* lawsuit, in part by banning jet aircraft from using the Airport.

Consequently, for most of the 1970's, jets were expressly excluded from the Airport. (Many remember the large sign at the east end of the Airport runway that read, "NO JETS.") By 1979, however, the City was embroiled in a federal lawsuit brought by a group of the Airport's users (i.e., the pilots) who were at odds

with the Airport's management for numerous reasons. In that lawsuit, a federal court reviewed many the City's Airport use restrictions, and ruled that the City's jet ban was insufficiently justified. Specifically, the court ruled that the City could not arbitrarily discriminated against jet aircraft, which could be made subject to restrictions only if the restrictions were rational and evenly applied to all aircraft that might use the Airport. Although the court ruled that the City's jet ban was unlawful, the court upheld the City's ability to impose reasonable, general restrictions affecting all aircraft. In particular, it upheld the City's generally applicable local noise limit of 100 decibel (dB) SENEL.

Perhaps in part because of the federal court's ruling against the City's jet ban, the City Council voted in 1981 to study closing the Airport entirely and converting its valuable land to less objectionable and far more profitable uses. The City's threat to close the Airport caused the FAA to threaten action against the City based upon, among other things, the City's previous use of federal funds for Airport projects. The eventual upshot of these conflicts between the FAA and the City was the 1984 Agreement. In it, the City and the FAA agreed that the City would continue to operate the Airport until 2015, and further settled upon certain specified noise restrictions (for example, a 95 dB SENEL limit). As is explained in detail throughout this position paper, however, **the 1984 Agreement specifically provides that the City retains its proprietary powers and right to impose - unilaterally - additional, non-conflicting, reasonable rules and regulations restricting the Airport's uses**.

Much has changed at the Airport since 1984. In the late 1980's, for example, the City leased the land on the northern part of the Airport property to fixed base operators ("FBOs"), which are permanent tenants that service aircraft, providing, for example, hangars, tie-downs, maintenance and fuel sales. Notably, the City approved plans for these FBOs which facilitated the construction of what have increasingly become "jet centers." The City also accepted large sums of FAA money to improve taxiways, and to build an administration building and other "airside" improvements, significantly the 1993 resurfacing of the old, bumpy 1942 runway. Following those improvements and increasingly ever since, faster, heavier, larger and more numerous jet aircraft have been using the Airport.

In addition, while these improvements were underway, the FAA changed its flight rules and began requiring jet aircraft (and all other so-called "instrument flight rule" or IFR aircraft) to await permission from the air traffic controllers at Los Angeles International Airport ("LAX") before taking off. This created significant new "departure delays" at the Airport, requiring the jet aircraft to idle motionless for long periods of time with their engines running - heavily polluting the local environment - while awaiting permission from LAX to take off.

All the while, the types of jet aircraft using the Airport have changed, with much larger and more imposing jets coming in. Worse, the sheer numbers of jet operations have been increasing dramatically. This year, there will probably be more than 12,000 jet operations - almost four times as many as there were in 1993, when the runway was resurfaced. In recent years, the number of jet operations has been increasing at a compounding annual rate near 30%. This year, the rate of increase in annual jet operations will be closer to 50%.

The increasing burdens on the Airport's neighbors have been long recognized by the City's elected and appointed officials and managerial employees. For example, in 1995, the City's mayor pro tem commented publicly on the effects of the jet aircraft, likening the jet exhaust blasts hitting Plaintiffs' residences to tornados. In 1996, the Airport's managers inquired of the FAA about shortening the runway in order to move the jet aircraft operations away from the residences at the east end of the Airport. Although the FAA's staff studied and supported the proposal, the FAA's upper management balked, citing the 1984 Agreement (which prescribes a 5,000 foot long runway). So, nothing was done - except that the City fostered still more special "working group" studies and redoubled its "community relations" efforts. All the while, jet aircraft impacts have continued to worsen. Finally, in 1998, the Plaintiffs (residents and owners of nine homes located just east of the Airport's runway) brought claims against the City for inverse condemnation and nuisance. Their case is now scheduled to go to trial in February 2001.

Most recently, U.S. Congressman Henry Waxman wrote to the FAA on behalf of many affected citizens, and proposed two changes in the Airport's operations: one to shorten the runway and another to impose a curfew against noisy aircraft landing at night. Congressman Waxman received a letter in response from Mr. Bill Withycombe of the FAA, which suggests that the proposed changes would conflict with the 1984 Agreement and would thus require a special study and application to the FAA pursuant to the ANCA (or its related regulations, "Part 161"). Mr. Withycombe was non-committal about whether any such study and application would likely result in the FAA's approval of the proposed changes.

III. THE CITY'S PROPRIETARY POWERS THAT EXISTED PRIOR TO THE 1984 AGREEMENT.

An airport's proprietor is responsible and can be held liable to its neighbors for any nuisance and/or taking of property rights caused by the airport's use. It makes no difference that the proprietor is a governmental entity (such as the City)

operating the airport for the public benefit, the proprietor may nonetheless be held liable for any unreasonable impositions upon the airport's neighbors.

Consistent with the fact that an airport's proprietor is answerable to its neighbors for nuisances and/or takings, the courts have long recognized "proprietary powers" to restrict uses of airports that may cause such problems. Exercise of proprietary powers allows the airport owner and operator to restrict the property's use to avoid any liability to its neighbors, provided that the restrictions are reasonable, nonarbitrary and non-discriminatory. "The City of Santa Monica should be allowed to define the threshold of its liability, and to enact … ordinances under the municipal-proprietor exception if it has a rational belief that the ordinance will reduce the potential of liability or enhance the quality of the city's human environment."

In 1979, a federal court reviewed and adjudicated the reasonableness of certain ordinances that the City then had in place restricting Airport uses. For example, the City had imposed a 100 dB SENEL limit for noise events from aircraft operations, and also had banned all jet aircraft. With the exception of the City's total jet ban, the court upheld all of the City's proprietary restrictions such as noise and time restrictions. The court in *Santa Monica Airport Association v. City of Santa Monica ("SMAA I")* applied the legal principle that the City, as part of its inherent powers as the Airport's proprietor, could restrict the Airport's use in *any* reasonable, nondiscriminatory fashion.

The three-part "commerce clause" analysis that the federal court applied in *SMAA I* works as follows: first, the court will determine whether a restriction has an effect on interstate commerce. If not, or if the impact on interstate commerce is *de mininis*, the analysis ends, and the restriction is automatically upheld. If, instead, a significant effect on interstate commerce is found, the analysis inquires next whether the local government has acted within its province (e.g., here, as airport proprietor) and whether the means chosen were reasonably adapted to the end sought. If the local restrictions are rationally related to a legitimate interest, and the interest being served is a "peculiar local concern," the analysis ends, and the proprietary restrictions are upheld. If instead there is no "peculiar local concern," the court balances the burden imposed on interstate commerce against the local interests supporting the restrictions: if the restrictions are found to be non-discriminatory and for the effectuation of "a legitimate local public interest, and their effects on interstate commerce are only incidental, they will be upheld unless the burden imposed on interstate commerce is <u>clearly excessive</u> in relation to the putative local benefits." Applying this analysis, the *SMAA I* court commented on the Airport's short runway and the fact that it is surrounded on

three sides by residential neighborhoods, and found that the Airport is not suitable for commercial air carrier purposes.

As noted, all of the City's proprietary restrictions were upheld in *SMAA I*, except the City's total jet ban. The City's only justifications for its jet ban related to noise and flight safety. The safety argument was dismissed by the court as unsupported by any evidence; and the City noise argument was betrayed by the fact that the City had otherwise established a 100 SENEL noise limit that applied evenly to all Airport users (and thus was not arbitrarily discriminatory). To analogize regarding the latter, it would be as though the City had in place a 35 mile-per-hour speed limit for cars generally on all of its streets, but also had a further ordinance completely banning all sports cars from its roads on grounds that they sometimes are driven too fast. The generally applicable - and thus non-discriminatory - restriction (the 35 MPH speed limit) would suffice to address the City's only articulated interest underlying the restrictions (preventing speeding on city streets). Similarly, the City's generally applicable 100 dB SENEL noise limit sufficed to address the problem of the particularly noisier jets without having to ban jets entirely.

Importantly, the *SMAA I* court upheld the City's right to impose generally applicable "line-drawing" restrictions such as an across-the-board noise limit for all aircraft. But the court denied restrictions that were arbitrarily aimed at some aircraft that might otherwise be able to comply with more generally applicable restrictions. The lesson learned is that the City, as the Airport's proprietor, can "draw lines" concerning use restrictions, but such line-drawing must be generally and evenly applicable to all aircraft - not just to one arbitrarily singled-out type. Therefore, any air-pollution restriction that the City might impose pursuant to Plaintiffs' proposal would have to apply across-the-board (i.e., to piston aircraft, turbo-props, helicopters and jet aircraft) or, if only to one subgroup, only with some justifiable rationale for such discrimination. For example, the City might be able to justify specially restricting instrument flight rule (IFR) aircraft in light of legitimate differences in departure procedures. *SMAA I* was affirmed in its entirety by the U.S. Ninth Circuit Court of Appeals in 1981.

The broad "proprietary power" that a municipal operator of an airport enjoys, which allows it to impose reasonable use restrictions, was also discussed in *British Airways Board v. Port Authority of New York* ("*British Airways*"):

> "Indeed, since the operator controls the location of the facility, acquires the property and air easements and is often able to assure compatible land use, he is liable for compensable takings…. [Citation.] The right of the proprietor to limit his liability by

> restricting the use of his airport has been thought a corollary of this principle. It is perhaps more important, however, that the inherent local aspect of [pollution] control can be most effectively left to the local operator, as the unitary local authority who controls airport access. <u>It has always seemed fair to assume that the operator will act in a rational manner in weighing the commercial benefits of proposed service against its costs, both economic and political</u>."

Proprietary powers and customized local facility use restrictions are also discussed in more recent cases, including two cases specifically concerning airport operations. One such case, *National Helicopter Corp. of America v. City of New York*, is particularly applicable here. The municipal airport proprietor there had mandated a forty-seven percent reduction in the frequency of helicopter traffic, even though the proprietor had neither studied the beneficial effects of the restriction nor provided any "evidence that it was 'in any way calibrated to achieve any particular noise based result.'" A federal district court struck down the proprietary restriction as not meeting the "reasonable, nonarbitrary and non-discriminatory" standard. On appeal, however, the Second Circuit Court of Appeals reversed the district court and upheld the use restriction as a reasonable exercise of proprietary powers. The appellate court opined:

> While we agree that the mandated [use restriction] was not backed by any study reflecting the appropriate scenario or demonstrating that such specific percentage of noise reduction was the ideal, we also believe that the proprietor was entitled to eliminate a portion of the … operations upon reaching a conclusion that a problem of excessive [local pollution] existed. Based on the [study's simple] conclusion that [the mandated] reduction in operations would result in a substantial [pollution] reduction…, we believe that, in this case, the [restriction] was reasonable.

Applying this same reasoning to the City's situation, the City would need to do no more than reasonably conclude that (1) local air pollution from the Airport is excessive, and (2) an Airport restriction banning the more air polluting aircraft would substantially reduce localized air pollution. Given the evidence readily at hand, such conclusions are unassailable. The City therefore has every right to "draw the line" on air pollution wherever the City feels advisable to reduce its potential liability and enhance the quality of the city's human environment. The City need not optimize or even study its chosen solution.

The City should therefore approach the issue of fine-tuning or "line-drawing" proprietary air-pollution restrictions with the confidence that it can and

should take the steps that would reasonably abate the air-pollution nuisance and limit its potential proprietary liability. Indeed, under the analysis set forth in *British Airways*, *SMAA I* and the more recent proprietary powers cases, the City's legitimate concern about poisoning the air in close-quartered residential neighborhoods is precisely the type of "peculiar local concern" about which the City should be afforded the broadest possible discretion to address.

IV. THE CITY'S 1984 AGREEMENT WITH THE FAA HAS ONLY A LIMITED EFFECT ON THE CITY'S PROPRIETARY POWERS.

Following the City's 1981 threat to close down the Airport entirely, the City and the FAA entered into the 1984 Agreement. Careful review thereof indicates that, in important respects, the 1984 Agreement preserves the City's proprietary powers to restrict the uses of the Airport in order to protect the well-being and safety of the surrounding community.

In a nutshell, the 1984 Agreement sets forth detailed agreements regarding a few basic matters and certain specified restrictions concerning noise from Airport operations. Thus, the City cannot close the Airport entirely, nor can it alter the hours of operation, the length of the runway is specified, and there are specific provisions regarding noise restrictions, monitoring and enforcement. Otherwise, however, the 1984 Agreement expressly reserves for the City very broad proprietary powers to restrict Airport operations for the protection of the surrounding community.

Specifically, section 2(a)(i) of the 1984 Agreement expressly sets forth the basic legal principles upon which the FAA and the City settled their long-running differences. These principles include the principle that the "Airport is to be open and available to and for public use on fair and reasonable terms, without unjust discrimination…." The 1984 Agreement continues: "A fundamental purpose of this Agreement is to expand and improve the communication, cooperation and mutual understanding of the various perspectives of the parties, while recognizing and preserving their respective legal rights." 1984 Agreement, § 1. In particular, section 2(b)(i) provides that "[t]he City has the responsibility to manage the Airport, including the ability to take reasonable action designed to abate the impact[s] … on surrounding communities, in accordance with the principles of *Santa Monica Airport Association v. City of Santa Monica*, 479 [*sic*, read "481"] F. Supp. 927 (C.D. Cal. 1979), *affirmed*, 659 F.2d 100 (9th Cir. 1980); and *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977)." Perhaps most importantly, section 14 of the 1984 Agreement expressly provides "that it is appropriate for the City to exercise its proprietary authority to adopt ordinances and regulations applicable to [the Airport's] users and lessees…."

These various references to the City's reserved proprietary powers and the express incorporation of the *SMAA I* and *British Airways* decisions into the 1984 Agreement make it plain that the City retains its broad proprietary powers to restrict uses of the Airport reasonably for the protection of the surrounding communities.

Further scrutiny of the 1984 Agreement shows that it was intended to resolve only certain particular "disputes [that] occurred over an extended period of time and … involved a number of *specific* issues." 1984 Agreement, § 1. The 1984 Agreement indeed limits the City's powers regarding those specific issues. *See* 1984 Agreement, § 12 (maintenance of runway length), §§ 15-20 and 26-29 (noise), § 22 (night departure restriction), § 23 (standard departure track), § 24 (helicopters), and § 25 (touch-and-go restrictions). Because of such detailed provisions, the City is effectively unable to alter or add to those specified Airport restrictions. The City retains its proprietary powers, however, to otherwise restrict the Airport's use to the extent reasonably needed to protect the surrounding community and to thereby protect the City from liability.

To explain still further, the following specific sections of the 1984 Agreement all weigh heavily in favor of an interpretation that limits the City's control over further noise restrictions but preserves the City's right to ban air-polluting aircraft:

- Section 1: "[T]his Agreement responds to the concerns of … residents of neighborhoods affected by noise from the Airport"; "various Airport disputes … have involved a number of specific issues"; a "common factor[]" to all such specific issues has been "[t[he impact on the community … of noise from aircraft operations…."; "This Agreement describes the specific points of agreement between the parties…."; "A fundamental purpose of this Agreement is … recognizing and preserving [the parties'] respective legal rights."

- Section 2 (preamble): "This Agreement was reached only after … extensive study and analysis of the issues involving the Airport."

- Section 2a: "This Agreement is based on a recognition of the legal rights … of the parties [and] a balancing of interests…."; Three legal principles underlie the Agreement: (i) "The Airport is to remain open … for public use … on fair and reasonable terms, without unjust discrimination…." (ii) The FAA has exclusive authority for the regulation of "the use of navigable airspace, and movement of aircraft through that airspace." (iii) "[T]he City has the

responsibility to manage the Airport … in accordance with the principles of [*SMAA I*] and [*British Airways*].”

- Section 2b(i): “[The Airport] has a vital and critical role … as a general aviation reliever…” “diverting aircraft from the air carrier airports and other heavy used airports”; “[O]ther similar general aviation reliever airports in the area … [cannot] accept or absorb the services provided by Santa Monica Airport.”

- Section 2(b)(ii): “Noise from aircraft … can … impact … the quality of life of citizens…. Many residents … have long complained to the City [about] aircraft noise and demanded … effective action with respect to noise.”

- Section 2(c)(ii): “[I]t is agreed that the Airport can be redesigned so as to maintain the current level, quantity and type of service….”

- Section 2(c)(iii): “The recognition that any noise problem at the Airport can be addressed through a noise mitigation program …, and by sensitive placement of flight paths to achieve noise abatement consistent with safety.”

- Section 3: “All prior agreements between the parties concerning the Airport, and all actions of the parties during the duration of this Agreement, shall be interpreted consistent with this Agreement.”

- Section 8: “The Airport will be capable of accommodating most kinds of general aviation aircraft [within a particular wingspan category]….”

- Section 12: Giving qualified authority for the City to decide unilaterally to displace landing threshold, provided community noise impacts are not increased thereby.

- Section 14: “The parties recognize and agree that it is appropriate for the City to exercise its proprietary authority to adopt ordinances and regulations applicable to lessees and users consistent with the terms of this Agreement.”

- Section 15: Noise Abatement Principles (“the parties agree to cooperate and work toward the abatement of aircraft noise”).

- Section 16: “The parties believe that substantially all of the currently based or transient aircraft which have used the Airport in recent years can be operated safely using safe noise abatement operating procedures and meet [the 95] SENEL limitation.”

- Section 19(d): "If the City's noise goal is not met…, the City will analyze alternative noise mitigation measures, … it being explicitly agreed, however, that no material term of this Agreement can be amended or modified without the agreement of the parties…."

- Section 22: "It is agreed that [the City's specified night departure restriction noise measure] will not be amended or modified without the prior agreement of the parties."

- Section 24: "The parties recognize that noise from helicopters can … impact … residential communities…." "[T]he City may [unilaterally] deny access to an FBO, a substantial portion of whose activity involves helicopter operations."

- Section 25: "The parties agree that the pattern flying restriction … may be modified [unilaterally] by the City … based on the results of the noise abatement study."

- Section 26: "The Airport Layout Plan includes … features intended to provide mitigation of aircraft noise."

- Section 27: "Programs to acquire homes … may be additional means to achieve the City's noise abatement goals."

- Section 28: "[Federal] funds will be made available for … Airport planning, Airport improvement, and noise abatement projects…."

- Section 29: "The parties agree to work cooperatively and consult with each other … in particular … with respect to implementation of the tiered noise level concept … as well as any other proposal designed to effect noise abatement at the Airport.").

The FAA might attempt to argue that one particular ambiguity in the 1984 Agreement could be interpreted to limit the City's ongoing ability to restrict air-polluting aircraft from operating at the Airport. Specifically, Section 8 of the 1984 Agreement reads, "The City will … operate the Airport as a viable functioning facility without derogation of its role as a general aviation reliever airport…." Several factors, however, weigh heavily against an overly broad interpretation of that particular clause.

First, the provision's reference to a "viable functioning facility" reflects the context leading to the 1984 Agreement: the City was threatening to close the Airport completely to all aircraft uses. Additionally, the Airport's role as an important "general aviation reliever airport" in 1984 was not - just as it is not now - dependent upon the absence of unique, local restrictions. This is demonstrated by the fact that the Airport operated pursuant to its own unique, local restrictions both *before* and *after* drafting of the 1984 Agreement, including the particular SENEL limitations. Such restrictions obviously limited the extent and nature of the Airport's use, but did not prevent it from functioning as a reliever airport.

Legally, Section 8 of the 1984 Agreement must be interpreted in light of section 2(a)(iii) and - especially - in light of the final sentence of Section 14, the latter of which expressly grants the City the ongoing "proprietary authority" to impose use restrictions "by regulation or ordinance" upon the Airports "users and lessees." Basic contract law weighs heavily against resolving any ambiguity or conflict such that the City's proprietary powers are entirely forfeited. For example, no portion of the 1984 Agreement should be read as superfluous. In addition, if more than one meaning is reasonably consistent with a contract's language, then the contract is ambiguous and must therefore be analyzed for the parties' underlying intentions.

As a basic rule of contract construction, where one plausible interpretation of an agreement is broader than another, courts should not apply the broader interpretation absent a clear manifestation of intent of the parties. In the event that a situation arises that the parties did not foresee, the contract must be construed in light of their original intent, the instrument itself and its purposes and the surrounding circumstances. Ambiguities and gaps in the contract should be resolved by finding what the parties would have bargained for had they addressed the matter explicitly at the time. Thus, a reviewing court would ask what stance the City would have taken if the recent developments had been foreseen in 1984.

Finally, contract law explains that an ambiguity in a contract involving language provided by a federal agency must be interpreted strictly against the federal agency. This is especially proper taking into account "the [Federal] Government's vast economic resources and stronger bargaining position in contract negotiations." Moreover, any interpretation of a contract that makes it grossly one-sided is suspect.

Thus, there are only two possible ways in which to interpret the 1984 Agreement in its entirety. Either:

the City specifically settled with the FAA concerning (a) certain noise issues and (b) not closing the Airport entirely, shortening the runway or further limiting hours of operation, but otherwise retained its proprietary powers to restrict the Airport's use in a reasonable and non-discriminatory manner, consistent with ongoing potential liability to the community for nuisances and takings, or

the City foolishly agreed to relinquish effectively all of its proprietary powers for thirty-one years (until 2015), all the while remaining solely liable to the surrounding community for any evolving takings and nuisances.

The second interpretation is plainly unreasonable, and therefore should be rejected. It would be unreasonable to conclude that the City intended to give away all of its proprietary powers through the 1984 Agreement, thus rendering all of the various "reserved powers" provisions essentially meaningless. Indeed, no fair-minded observer would believe that the City intentionally jettisoned its proprietary powers to address even the most unbearable Airport uses.

Regardless, however, under any interpretation of the 1984 Agreement, the City is not entitled to impose with impunity upon Plaintiffs and their neighbors as it has. Simply put, the City could never have agreed with the FAA that the Airport's neighbors can be increasingly poisoned and their home lives rendered unbearable without recourse.

V. THE AIRPORT NOISE AND CAPACITY ACT OF 1990 ("ANCA") DOES NOT APPLY TO THE AIRPORT BECAUSE OF THE EXISTENCE OF THE 1984 AGREEMENT.

Plaintiffs' counsel were alarmed recently when the City's long-time "noise expert," Mr. Vince Mestre, made a public presentation before the Santa Monica Airport Commission, in which he lamented certain onerous FAA procedures for requesting approval of local airport restrictions under "Part 161" (FAA regulations for implementing ANCA). Any objective observer would have understood that Mr. Mestre meant for those in attendance to conclude that any further regulation of operations at the Airport is necessarily subject to the seemingly insurmountable provisions of Part 161.

To the contrary, Plaintiff's counsel's legal research indicates that Part 161 does not apply to the City's further reasonable control of the Airport's use. Specifically, Section 161.7(b)(3) of 14 CFR Part 161 expressly provides that its "notice, review and approval requirements … do not apply to airports [having

restrictions pursuant to] … [a]n intergovernmental agreement including airport noise or access restriction in effect on November 5, 1990." The City's 1984 Agreement with the FAA is precisely such an "intergovernmental agreement." Therefore, the notice, review and approval requirements of Part 161 simply do *not* apply to the Airport with respect to any regulation that is consistent with the 1984 Agreement. *See* 49 U.S.C. § 47524(d)(3).

The recent correspondence between Congressman Henry Waxman and Mr. Bill Withycombe of the FAA (*see supra* at pp. 6-7) illustrates the typical misconception under which the City and the FAA seem to be functioning regarding ANCA's applicability to the Airport. As the brief history set forth above explains, Congressman Waxman wrote to the FAA and requested (1) that it permit the City to shorten the Airport's runway significantly (presumably to lessen the likelihood of larger corporate jets coming in), and (2) to lower the SENEL noise limit for nighttime arrivals at the Airport. The FAA rejected both proposals as contrary to the 1984 Agreement and requiring compliance with the onerous procedures of ANCA.

It is important to recognize, however, that either (or both) of Congressman Waxman's proposed mitigation measures might require an amendment of the 1984 Agreement. Shortening the Airport's runway seemingly conflicts with Section 9 of the 1984 Agreement, and lowering the SENEL noise limit at night seemingly conflicts with Section 16 of the 1984 Agreement. Assuming for argument that implementing either of Congressman Waxman's proposals would therefore require amendment of the 1984 Agreement, 49 U.S.C. section 47524(d)(4) would operate to require compliance with ANCA's onerous procedures. Because of the 1984 Agreement's strong "reserved powers" provisions, however, the City can ban air-polluting aircraft from the Airport without amending the 1984 Agreement. Therefore, Plaintiffs' proposal does not suffer from the same impediment that Congressman Waxman's proposals arguably might face.

Interestingly, Mr. Withycombe's letter in response to Congressman Waxman concludes as follows: "Any new or revised noise and access restrictions … must be established in accordance with the requirements of [ANCA]." As is explained below, Mr. Withycombe's thus misconstrues 49 U.S.C. § 47524(d)(3), wherein Congress intended to honor inter-governmental agreements - not just restrictions in place. Mr. Withycombe's statement also undermines the 1984 Agreement's reserved powers provisions, and thus seemingly reflects an interpretation of ANCA that would abrogate (i.e., repudiate) that critical part of the 1984 Agreement. At most, Mr. Withycombe should have written: "Any amendment to the 1984 Agreement that would reduce or limit aircraft operations must be established in accordance with the requirements of [ANCA]." Even if Mr.

Withycombe accurately represented a carefully considered view of the law in accord with official FAA policy, however, the City should allow neither Mr. Withycombe nor the FAA to disregard the City's legal rights.

Admittedly, the air-pollution restriction that Plaintiffs propose would constitute an "access restriction" as defined by ANCA. Accordingly, Plaintiffs' counsel concede that, if ANCA applied to the City's powers as set forth in the 1984 Agreement and the City were unilaterally to impose an air pollution restriction, the FAA could seek an injunction to compel ANCA compliance and set aside the restriction. Fortunately, however, ANCA does not impede the City's reserved powers because of 49 U.S.C. section 47524(d)(3). Section 47524(d)(3) expressly exempts from ANCA "an[y] intergovernmental agreement … in effect on November 5, 1990." It does not say, "any noise or access restriction in effect on November 5, 1990 pursuant to an intergovernmental agreement." The distinction is crucial because the former provides for recognition of the City's reserved powers clause in the 1984 Agreement, whereas the latter does not. Importantly, the former would not be a statutory abrogation of the 1984 Agreement, whereas the latter would be.

Plaintiffs' counsel maintain that section 47524(d)(3) was intended to grandfather in all intergovernmental agreements in effect on November 5, 1990 which included noise and access restrictions. Therefore, it is not just restrictions that were specifically articulated by November 5, 1990 which are grandfathered and thus exempt from ANCA, but the entire intergovernmental agreements - including reserved powers clauses as well. Given the genesis and context of section 47524(d)(3), as well as tenets of statutory construction and basic contract law, Plaintiffs' counsel's interpretation is the only reasonable and permissible interpretation of section 47524(d)(3).

In addition to the logical interpretation of the plain meaning of ANCA's non-applicability language, what little legislative history there is concerning ANCA also supports Plaintiffs' position. Specifically, the House of Representative's Conference Report on ANCA, dated October 26, 1990, describes ANCA as it then was written (in the midst of a largely unrecorded drafting process). The "conference substitute" bill report contained the following specified exceptions to ANCA:

> the requirements of [ANCA] shall not apply to noise and access restrictions which -
>
> first became effective prior to October 1, 1990;

are implemented pursuant to an intergovernmental agreement executed prior to October 1, 1990; or

are implemented at an airport where the FAA already has formed a working group to examine the noise impact of air traffic control procedure changes.

Thus, even the language used in the conference committee bill report was clear about Congress' intent to honor the entirety of intergovernmental agreements. Specifically, the committee's proposed exception from ANCA's sweep of all "noise and access restrictions [that] … are implemented pursuant to an intergovernmental agreement executed prior to October 1, 1990." This language plainly permits implementation of restrictions that are subsequently formulated pursuant to reserved powers that are set forth in "an intergovernmental agreement executed prior to October 1, 1990." Most importantly, the "cut-off date" that is specified in the conference committee bill report modifies <u>only</u> the execution of the intergovernmental agreement itself - and <u>not</u> specific restrictions (…"an intergovernmental agreement [that was] executed prior to October 1, 1990").

The plain language of both (i) the conference committee version of ANCA and (ii) the final version is thus properly construed to avoid any abrogation of the 1984 Agreement's reserved powers provisions. Importantly, it is a basic "principle of statutory interpretation that <u>Congress' abrogation of pre-existing contracts must be in clear and unmistakable terms</u>." Moreover, the U.S Supreme Court ruled in 1996 that Congress could not - even in clearest and most unmistakable terms - abrogate binding regulatory contracts to which the federal government is a party (e.g., the 1984 Agreement) without exposing the federal government to liability for all consequential damages under generally applicable contract law. Nor can the FAA or any other federal agency, when exercising its discretion granted by Congress, abrogate a binding regulatory contract without exposing the federal government to liability.

The FAA, as the agency charged by Congress with implementing ANCA, may attempt to argue that it should be afforded the discretion to interpret 49 U.S.C. section 47524(d)(3) as it sees best. For at least two reasons, however, the generally applicable rule that a court should defer to a federal agency's interpretation of an ambiguous federal statute should not apply here to uphold Mr. Withycombe's suggested interpretation of ANCA. The first reason is that a federal agency may not exercise its discretion to abrogate a contract binding the federal government without immediately exposing the federal government to liability. The second is that Mr. Withycombe's interpretation is, in any event, an

impermissible and unreasonable interpretation under basic tenets of statutory interpretation and contract law.

Given these realities, one must wonder whether the FAA would really want to argue that ANCA operates to abrogate the 1984 Agreement - thereby exposing the federal government to liability. For example, the FAA might not want the federal government to be derivatively liable for all the sums that the City might soon owe Plaintiffs - and any and all additional sums that the City might later owe to Plaintiffs' various neighbors. *See, e.g.,* Bill Withycombe's Letter dated July 19, 2000 to Congressman Waxman, at p. 1 ("The [C]ity of Santa Monica … is primarily responsible for … implementation of actions designed to reduce the affect of noise and other environmental factors on the communities surrounding the Santa Monica Airport.").

If the City's attorneys are fearful that the FAA would take action against the City for reasonably exercising its proprietary powers, Plaintiffs' counsel urge the City to construct a thoughtful request of the FAA's Washington, D.C. Office of the Chief Counsel, concerning the continuing viability of the express "reserved powers" provisions in 1984 Agreement.

Plaintiffs' counsel is hopeful and guardedly optimistic that a persuasively presented request would yield a correct and favorable response. Even if the FAA's legal staff provides the wrong answer, however, the City should proceed apace with Plaintiffs' proposed proprietary air-pollution limitations and simply allow the FAA to sue and lose. In any such lawsuit, either (i) the City's new restrictions would be upheld by a Court, or (ii) the FAA should be found liable to the City for all damages flowing from the federal government's abrogation of the heavily-negotiated 1984 Agreement.

VI. OTHER PREEMPTIVE FEDERAL STATUTES DO NOT AFFECT THE CITY'S PROPRIETARY POWERS.

There remains a question concerning whether any federal statutes, apart from ANCA, might prohibit the City from banning air polluting aircraft. For example, Plaintiffs' counsel are informed that the FAA has unofficially discussed its view that a provision of the federal Clean Air Act (42 U.S.C. section 7573) preempts any state or local regulation of aircraft engine emissions. The FAA's general position in this regard does not impede Plaintiffs' proposal, however, because Plaintiffs' proposal is based upon the City's exercise of reserved proprietary powers, and not upon the City's exercise of its general police powers.

The U.S. Supreme Court has specifically recognized that federal preemption doctrines (such as that indicated by the Clean Air Act provision) operate to prevent only a state or local exercise of general police powers, and not any exercise of proprietary powers. Recently, this crucial distinction was expressly recognized in the specific context of airport operations. Thus, unquestionably, the Clean Air Act preemption provision and similarly "preemptive" federal statutes cannot be invoked by the FAA to limit the City's exercise of its reserved proprietary powers.

VII. CONCLUSION.

The City has, by entering into the 1984 Agreement, effectively tied its own hands concerning certain specified aspects of the Airport's operations (noise regulations, runway length requirements and hours-of-departures). That notwithstanding, the City can and should exercise its reserved proprietary powers to provide much-needed relief to the increasingly outraged communities surrounding the Airport. Plaintiffs' counsel therefore urge the City to enact promptly an ordinance that would rapidly "phase out" all aircraft with particularly air-polluting engines. The FAA would be out of bounds legally were it to object to the City's imposition of reasonable proprietary restrictions.

If you have any questions of Plaintiffs' counsel, or would like for Plaintiffs' counsel to address any individual(s) or group(s), Plaintiffs' counsel would be glad to do so. Plaintiffs' counsel are eager to do whatever we can in this regard on behalf of Plaintiffs and all of the Airport's neighbors.

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