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CITY OF SANTA MONICA

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

IN THE MATTER OF COMPLIANCE  
WITH FEDERAL OBLIGATIONS BY  
THE CITY OF SANTA MONICA,  
CALIFORNIA

FAA DOCKET NO. 16-02-08

**CITY OF SANTA MONICA'S  
PRE-HEARING BRIEF**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

As owner of an older airport—situated atop a mesa with homes just 250 feet from and below its relatively short runway’s ends—the City of Santa Monica has exercised its police and proprietary powers to protect public safety and shield itself against liability by adopting an ordinance (the “Ordinance”) restricting airport access. The Ordinance prohibits Category C&D aircraft from using Santa Monica Airport (“the Airport” or “SMO”). It reflects federal design and safety standards and is based on comprehensive legislative findings, which detail its factual justification. The Airport has no runway safety areas or equivalent arresting systems to protect against runway overruns. The single runway is less than 5,000 feet long and was not designed for the faster category C&D aircraft that today comprise a small part of Airport operations. Homes and busy streets are just off the runway ends, unprotected by any safety margin. The unusual topography exacerbates the risks. And, as owner and operator, the City is legally responsible for maintaining Airport safety.

AAS’s position in this proceeding is that the City must accept C&D operations at SMO. But, the City cannot implement the Runway Safety Areas (RSAs) proscribed by the FAA for C&D aircraft. And, the FAA will not assume the City’s liability in the event of an overrun.

The FAA instituted this Part 16 proceeding against the City, claiming that the City’s attempt to conform Airport operations to federal runway safety standards violates federal law. As this brief explains, and as the evidence at hearing and post-hearing brief

will demonstrate, it does not. To the contrary, the Ordinance embodies a reasonable and prudent restriction, carefully formulated through an exhaustive public process to reflect the FAA's own categories and standards, and authorized both by the City's existing agreements with the FAA and by federal law.

Contrary to the FAA's assertions, the Ordinance is not preempted by federal law. The very grant assurance AAS cites in support of its claim of unjust discrimination expressly allow airport sponsors to ban categories of aircraft for safety reasons. Additionally, Congress and numerous courts have expressly protected the right of airport proprietors to protect local welfare and define the scope of their own liability by controlling ground operations at their airports. And, in any event, the Tenth Amendment shields the City against the federal government coercing the City to operate the airport in a manner that is unsafe under federal standards.

Moreover, the Ordinance does not violate the grant assurances. It is neither unreasonable nor unjustly discriminatory because it reasonably relies on the FAA's own standards for runway safety. And, its enforcement will not disrupt operations in the region because the small percentage of operations that it will displace can easily be absorbed at other regional airports. Moreover, the Ordinance respects the prohibition against exclusive rights because it does not grant any person or entity the right to operate any aircraft that others are prohibited from operating. Indeed, rather than violating the grant assurances, the Ordinance reflects their recognition that the City may limit access to protect safety.

Likewise, the Ordinance is fully consistent with the 1984 Settlement Agreement, which designates the Airport as appropriate for Category A&B aircraft and only obligates the City to accept those aircraft. And, it is consistent with the war-time transfers by which the federal government, as lessee, returned the Airport to its owner, the City.

Based on the evidence that will be produced at hearing and on the arguments made here and in the City's other briefs, the Ordinance should be upheld as a prudent and reasonable measure, which is well-within the City's legislative and proprietary authority, and fully consistent with the existing agreements between the FAA and the City and with federal law.

## **II. SUMMARY OF THE FACTS AND HISTORY OF THE CASE**

Both the Ordinance and the City's argument in this case are based on the FAA's own runway safety standards and the facts relating to the Airport's facilities, its physical situation, and its history, which are summarized in this section.

The Santa Monica Airport is a general aviation facility, which the City has owned since 1926. The current configuration was designed for Category A&B aircraft and consists of a single runway, known as Runway 3/21. It is 4,987 feet long. The runway is used in both directions, depending upon the prevailing wind. The vast majority of takeoffs are to the west and travel over Santa Monica's Sunset Park residential neighborhood; takeoffs to the east travel over a residential neighborhood in Los Angeles.

The Airport has no major runway safety improvements. That is, there are no Runway Safety Areas (RSAs). There are no Runway Protection Zones (RPZs). And,

there are no Engineered Materials Arresting Systems (EMAS) beds. The options for installing such modern safety measures is severely constrained by the Airport's unusual physical circumstances.

The Airport perches atop a plateau. It overlooks residential and other development, built in the mid-20<sup>th</sup> century, which surrounds the Airport on all sides, immediately adjacent to its perimeter. To the east, the Airport is bounded by Bundy Avenue and to the west by 23rd Street. Both are busy arterials which connect dense residential neighborhoods in Los Angeles to the 10 Freeway. Single family residences line both 23rd Street and Bundy, just across them from the Airport and runway ends. On Bundy, these homes and a gasoline station are within a scant 250 feet of the runway end. On 23<sup>rd</sup> Street, the homes are within 300 feet of the runway end. These streets and homes lie between 30 and 60 feet below the runway ends.

The airports configuration, like the surrounding residential neighborhoods, dates back to the middle of the last century. During World War II, the City leased the Airport to the federal government to promote the war effort. (DD, Item 4, Exhibits 25-29) During the war years, the residential neighborhoods around the Airport were fully built out, largely to house workers of the Douglas Aircraft factory at the Airport. In 1948, prior to the leasehold's expiration, the federal government returned the land that had constituted the Airport to the City's control, together with some improvements made during the war. In 1949, in lieu of paying damages to compensate the City for destroying a municipal golf course, the federal government condemned and conveyed some additional property to the City that has since been incorporated into the Airport. In 1952,

the war-time leases expired by their own terms. (DD, Item 4, Exhibits 25-29) With the issuance of a presidential proclamation, the City has operated the Airport continuously, ever since.

In the next decade, the fleet mix started to change with the advent of jets. In response to attendant impacts on the surrounding neighborhoods, the City adopted five ordinances limiting Airport usage. Litigation followed, and four of the five ordinances were upheld in federal court; the fifth, a total jet ban, was invalidated. *See Santa Monica Airport Assoc. v City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979) *aff'd*, 659 F.2d 100 (9<sup>th</sup> Cir. 1981). Following that spate of litigation, the City and the FAA cooperatively resolved their disputes involving Airport usage and operations by adopting the landmark 1984 Settlement Agreement. It comprehensively establishes the rights and obligations of both the FAA and the City with regard to the Airport. And, it remains in full force and effect today.

The 1984 Agreement preserves the City's right, as Airport proprietor, to limit access in order to preserve safety. By express reference to and incorporation of FAA Advisory Circular 150/5300.4B, the 1984 Agreement establishes that the Airport will continue to accommodate Category A&B aircraft, which land at speeds under 121 knots, until 2015. (DD, Item 4, Exhibit 3, p. 9) The 1984 Agreement does not require the City to accommodate faster, Category C&D aircraft at its airport. Ten years later, when the City accepted its last grant from the FAA for Airport facilities, the grant agreement reiterated in Grant Assurance 22(i) that the City possesses the authority to restrict access to protect Airport safety.

In the years following adoption of the 1984 Agreement, Airport usage again evolved, while the runway facilities stayed the same. Increasing numbers of faster, category C&D aircraft began using the Airport. With this change in usage came increased risk, which was officially noted. In 1997, the California Department of Transportation (Caltrans), Division of Aeronautics inspected the Airport and sent a letter to Santa Monica. It advised the absence of RSAs from each end of the runway created a risk of potential liability for the City. The State sent a similar letter to the City in 1999. But, the City's options were limited by the physical circumstances. There was not enough space on the Airport property to simply construct RSAs. And, leveling the surrounding neighborhoods to build RPZs was not a viable option because of the number of persons that would be displaced and the exorbitant costs. Meanwhile, the number of faster, C&D aircraft using the Airport continued to increase. As a percentage of the total operations, the C&D operations were relatively small. But, as Caltrans had already pointed out, the risks were significant.

Local concerns about runway safety grew when a fatal accident occurred in 2001. An aircraft overran the west end of the runway during an aborted take-off and exploded into flames on the hillside just across the street from homes on 23rd Street, killing the pilot and passenger. Fortunately, the plane was a slower, Category B aircraft. Had it been a faster, category C or D aircraft, it likely would have crashed into the street and the neighboring homes.

To address the safety and liability risks inherent in the increase of C&D traffic and highlighted by the fatal accident, the City hired an aviation consulting firm to propose

appropriate safety measures. Because the Airport is classified by the FAA as a B-II airport, the consultant studied federal design standards for such airports, applying them to the Airport and its fleet mix. The consultant evaluated various options and ultimately recommended several safety measures. They are collectively known as the Aircraft Conformance Program because they would protect safety and shield the City from liability by conforming Airport usage to Airport facilities according to federal design standards. Among other things, the Program called for creating standard RSAs for A&B aircraft and banning C&D aircraft because the Airport property beyond the distance from the runway ends to the Airport perimeter is far too short for standard C&D RSAs.

In 2002, City staff presented the proposed Conformance Program to the City's Airport Commission for assessment and the formulation of recommendations for the City Council. The Commission endorsed the program, but before the City Council even considered it, the FAA instituted a Part 16 proceeding.<sup>1</sup> In the years that followed, the City attempted to cooperatively reach a negotiated safety solution with the FAA. During

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<sup>1</sup> Although AAS asserts that the instant proceeding was initiated by the issuance of a Notice of Investigation (NOI) in 2002, that proceeding lapsed pursuant to Part 16 regulations, on or about March 10, 2003, 120 days after the City filed its answer on November 8, 2002. See § 16.105, cross referencing Sec. §16.31. AAS claims that the 120-day time limit does not apply to FAA-initiated investigations. DD at 29. However, § 16.105, which is contained within Subpart D—Special Rules Applicable to Proceedings Initiated by the FAA, and thus governs FAA-initiated cases, clearly cross references §16.31, which contains the 120-day limit for issuing the Director's Determination. Accordingly, the Director's Determination was improperly issued and should be dismissed. This is just one of the many procedural irregularities in this case. AAS used the attempted reach-back to the NOI as a reason to allow the City only 10 days to file its complete response to the Order to Show Cause (OSC), including all argument and evidence to rebut the allegations in the OSC. AAS improperly tries to justify this by noting that "ten days[is] the normal time period for responding to a motion under Part 16." DD at 29, quoting the Order on Motion for Extension of Time (FAA Exhibit 1, Item 10).

the course of these negotiations, the FAA suggested that the City build non-standard RSA's.<sup>2</sup>

The City rejected this solution because it would neither adequately protect safety nor adequately shield the City from liability. *See* Revised Direct Testimony of James E. Hall, ¶ 59, pgs. 27-28. The FAA also proposed acquisition of the residential properties at each end of the runway to create RPZs – a suggestion that had been evaluated by the City's consultant as impractical given the number of homes that would be involved and the owners' reluctance to relocate. Estimates are that the City would need to acquire about 650 homes at a projected cost of approximately \$560 Million dollars, not counting relocation and anticipated legal costs. *See* Rebuttal Testimony of Robert D. Trimborn, ¶5.

With the administrative proceeding pending and negotiations ongoing sporadically, the City continued to monitor developments in airport safety and evidence of safety risks. The FAA increased its nationwide efforts to enhance runway safety by funding the construction of Runway Safety Areas at airports across the country. For instance, in 2006, the agency spent \$244,000,000 on RSAs and reported to Congress the following year that it hoped to improve 100% of RSAs at certified airports across the country. The other major safety development was the introduction of EMAS beds as an alternative to RSA's. This development appeared to afford new possibilities for dispute

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<sup>2</sup> AAS rebuttal witness Rick Marinelli objects to the use of the term "substandard RSA," insisting that the proper term is "non-standard RSA." *See* Rebuttal Testimony of Rick Marinelli, ¶26. However, the FAA did not make, and thus, the City did not reject, any FAA proposal that exceeded FAA's RSA standards. The only "non-standard" proposals made by FAA were significantly below FAA's prescribed standards, whether measured in terms of RSAs or EMAS

resolution, which the City and FAA repeatedly discussed. However, the parties were unable to reach agreement because the physical constraints at the Airport do not allow for EMAS beds sufficient in length to meet the FAA's safety standards.

Along with developments in runway safety facilities, there was ongoing evidence of their necessity. Many overruns occurred at other airports, demonstrating both the general risk and the particular risk to Santa Monica. For instance, a fatal overrun at Teterboro, New Jersey involved an aircraft that had used Santa Monica airport the year before. The distance by which the aircraft overran the runway at Teterboro indicated that a similar overrun in Santa Monica would intrude far into the residential neighborhood bordering the Airport. (See City Exhibits 10-13) After the overrun at Teterboro, the FAA approved runway safety improvements at that airport. Likewise, after major overruns occurred at Little Rock, Burbank, and Midway, the FAA approved construction of runway safety improvements at those airports. However, in negotiations with Santa Monica, the FAA argued that the City should accommodate C&D aircraft without meeting such safety improvements and without meeting the FAA's safety standards – standards to which Santa Monica would be held in determining liability arising from an accident.

Years went by, the number of C&D operation continued to rise, and the negotiations failed to yield a safety solution that would adequately protect the City by meeting federal standards. Ultimately, to fulfill its responsibilities as Airport proprietor,

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equivalents. Mr. Marinelli also asserts, in sworn testimony that non-standard RSAs “meet FAA requirements.”

the City Council determined that it could wait no longer. It conducted a series of public hearings in which it considered information supplied by the FAA, City consultants and the public. After careful deliberation, the Council determined that it should prohibit Airport access by C&D aircraft. Based on extensive legislative findings, the Council approved the Ordinance on first reading in the fall of 2007. However, Council held off on the legally required second reading, which typically occurs two weeks after first reading, to allow opportunity for yet another round of negotiations. They occurred in Washington with Congressional assistance, but failed to yield a settlement. Therefore, two and a half months after the first reading, Council adopted the Ordinance on second reading.

The facts continue to demonstrate the reality of the risk. Last year, another overrun occurred at Santa Monica Airport. The aircraft skidded off the runway and down the western embankment toward the residential neighborhood below. All three on board the aircraft were injured. Fortunately, it was a slower, Category B aircraft; and it stopped on the Airport property, across the street from the homes. And, just four weeks ago, an aircraft piloted by a very experienced airman crashed on takeoff at the Santa Monica Airport, killing the pilot and passenger – another grim reminder that machines fail, humans err, and adequate safety margins are essential. This case is about Santa Monica's right to provide those margins by enforcing the Ordinance.

### **III. BURDEN OF PROOF, STANDARDS AND PRESUMPTIONS**

#### **A. The Agency Bears the Burden of Proof In This Proceeding**

Federal regulations governing this proceeding expressly place the burden of proof on the FAA. Section 16.229(a) states: “The burden of proof of noncompliance with an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act is on the agency.” (Emphasis supplied.) Thus, the FAA bears the burden in this proceeding of proving its claims that the Ordinance is unreasonable and discriminatory, constitutes unjust discrimination, confers an illegal exclusive right, violates the Instrument of Transfer and the 1984 Agreement, and is preempted.

#### **B. Review Of The Director’s Determination Is De Novo.**

The Director’s Determination reflects only the results of the FAA’s initial investigation of the issues presented by this case. Pursuant to Section 16.29(b) of the regulations, the evidence gathering and other procedures undertaken so far were “at the sole discretion of the FAA” and were not subject to the Due Process safeguards applicable in the context of the upcoming quasi-judicial administrative hearing. *See* Section 16.202-226 (specifying quasi-judicial procedures for the hearing). Accordingly, the Director’s Determination is not entitled to deference, and review is de novo.

Moreover, according deference to the Director’s Determination in this case would be particularly problematic because the record shows that, prior to its issuance, the FAA had prejudged the case. For instance, the FAA jumped the gun and initiated this Part 16 proceeding before the City Council even considered, let alone adopted, the Ordinance.

Thereafter, FAA officials steadily decried Santa Monica's Aircraft Conformance Program.

Most telling, the former Associate Administrator for Airports announced that he had taken "personal ownership" of the dispute and made this pronouncement, in writing, to the City Council as they were about to consider the Ordinance: "Let me speak very frankly, ladies and gentlemen. What you are considering by this ordinance is flatly illegal." But, that is not all. The Associate Administrator went on to state that the Ordinance was not justified, that the Ordinance was not consistent with the [1984] Settlement Agreement, and to threaten that the FAA "would use all available means" to ensure that no aircraft is denied access to the Airport. These emphatic and inappropriate pronouncements by the Administrator could not help but color the determinations subsequently made by his subordinates.

Therefore, consistent with the regulations and the indisputable evidence of previous agency bias in this case, the hearing must afford de novo review to ensure both actual fairness and the appearance of fairness in this case. *See Amos Treat & Co. v. SEC*, 306 F.2d 206, 267 (D.C. Cir. 1962) [explaining that administrative hearings must be conducted in a way that ensures both actual fairness and the appearance of complete fairness in order to promote public confidence in the process].

In this de novo hearing, the AAS's construction of the regulations does not bind the Hearing Officer. In general, deference to agency interpretation of relevant statutory and regulatory provisions is neither automatic nor unlimited. Rather, its extent depends upon the circumstances, particularly the ambiguity of the regulation. *See Chevron*

*U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Moreover, in this case there is no final agency decision which might warrant deference. Instead, this hearing is part of the process for formulating the final decision and is closer to the ultimate agency decision than the Director's Determination. Thus, the Hearing Officer has full discretion to accept, reject, or modify any findings of the Director based on the evidence and the Hearing Officer's application of the appropriate legal standards. Therefore, in this case, an independent decision must be made based on the evidence adduced at the hearing and the law.

**C. As A Matter Of Law, The Ordinance Must Be Afforded A Strong Presumption Of Validity**

The Supreme Court has mandated that local regulations be shielded with a presumption against preemption. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Thus, as a matter of long-standing precedent, lower tribunals must uphold the exercise of local police power against a preemption challenge absent a clear showing of Congressional intent to the contrary: "We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As an expression of both the City's police and proprietary powers, the Ordinance is shielded by the presumption of validity.

In the Director's Determination, AAS failed to demonstrate that the Ordinance is unreasonable, unjustly discriminatory, established any exclusive right, or violated any

federal right under the Instrument of Transfer, any grant agreement, or the 1984 Settlement Agreement. In contrast, the City's evidence shows that the key assertions, which are the foundation of AAS's case, have no support – much less substantial evidence – to bolster them. Therefore, the presumption against preemption dictates that the Ordinance be upheld.

#### **IV. ARGUMENT**

##### **A. Any Claim Of Preemption Should Be Rejected On Jurisdictional And Substantive Grounds.**

###### **1. The FAA's Preemption Claim Is Not A Proper Subject Of This Proceeding; It Belongs In Court.**

The Hearing Officer's jurisdiction in a Part 16 proceeding is limited by 14 C.F.R. Section 16.1(a). It lists the proper subjects of a Part 16 proceeding. The issue of whether the Supremacy Clause of the United States Constitution preempts a particular local ordinance is not among those subjects. Moreover, the FAA is fully cognizant that preemption is not a proper subject for this proceeding. As noted by the FAA itself at page 23 of its opinion in *Millard Refrigerated Services Inc. v. Omaha Airport Authority*, FAA Docket No. 13-93-19 (8/4/95), remanded on other grounds in *Millard Refrigerated Services Inc., v. FAA*, 98 F.3d 1361 (D.C. Cir. 1996), "...[T]he alleged violation of the Supremacy Clause of the United States Constitution does not fall within the scope of the FAA jurisdiction with regard to federally assisted airport owner's grant assurance obligations. The FAA does not ordinarily resolve constitutional questions in the context

of grant compliance proceedings ...” This statement by the FAA is correct; like other administrative agencies, its authority is limited to its areas of special knowledge. They relate to aviation, not issues of constitutional law, which lie within the purview of the federal courts.

2. In Any Event Federal Law Does Not Preempt the Ordinance; To The Contrary, It Protects The City’s Right to Adopt and Enforce It.

AAS claims in the Director’s Determination and the recently filed Motion for Partial Summary Judgment “that Congress has implicitly preempted the field through the Federal Aviation Act of 1958 and the Congressional mandate to the FAA to prescribe a comprehensive set of aircraft and air traffic rules and regulations.” (Motion for Partial Summary Judgment, p. 8.). In making this argument, however, AAS ignores the well established rule, known as the proprietor’s exception, that an airport proprietor is *not* preempted from imposing restrictions on the use of its own airport, even when such restrictions are broader than restrictions required by FAA regulations and guidance.

The proprietor’s exception was recognized by the Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973) [striking down curfew imposed by a non-proprietor and noting that proprietors have greater rights].

Subsequently, Congress, the Courts, and the FAA itself all recognized the proprietor’s exception.

In response to the decision in *City of Burbank*, Congress provided in the Airline Deregulation Act that federal preemption of restrictions on air carriers’ pricing, routing and services “does not limit a state, political subdivision of a state, or political authority

from carrying out its proprietary powers and rights.” 49 U.S.C. 41713(b)(3). Congress’s intent to preserve broad proprietary powers was made clear in the legislative history. For example, the Solicitor General of the United States referred to some of the legislative history when arguing in support of a ban on certain operations at LaGuardia Airport in New York: “Following action by the Conference Committee ... members of each house engaged in a colloquy in which the questioner asked whether the bill would affect ‘the long recognized powers of the airport operators to deal with noise and other environmental problems at the local level.’ 124 Cong. Rec. 37419) (1978) (statement of Sen. Kennedy); *id.* at 38526 (statement of Rep. Markey) Senator Cannon responded that *‘[i]t was not the intent of the Senate conferees to limit in any way the normal exercise of the existing proprietors’ powers to place non-discriminatory restrictions on the operations at an airport.’* (*Id.* at 37419-37420 (Emphasis added). Similarly, Representative Anderson stated that *‘[i]t was not the intent of the House conferees to limit in any way the normal exercise of a proprietor’s powers to determine the level and nature of service to be provided at airports.’* (*Id.* at 38526 (Emphasis added))”

Consistent with the breadth of the statutory language, Courts have almost uniformly affirmed the inherent power of an airport proprietor to restrict operations at its airport for noise, environmental, and safety reasons. *Alaska Airlines v. City of Long Beach*, 951 F.2d 977, 982 (9<sup>th</sup> Cir. 1991) (affirming range of access restrictions and explaining that *Santa Monica Airport Ass’n, supra*, rejected a narrow reading of the proprietor’s exception); *National Business Aviation Ass’n v. City of Naples Airport Authority*, 162 F.Supp.2d 1343 (M.D. Fl. 2001 (rejecting preemption challenge to ban on

a particular class of jets); *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2<sup>nd</sup> Cir. 1987), *cert. denied*, 108 S.Ct. 1467 (1988) (rejecting claim that airport proprietary rights should be narrowly limited and affirming a 1,500 mile perimeter rule for LaGuardia Airport); *Midway Airlines v. County of Westchester*, 584 F.Supp. 436, 440-41 (S.D.N.Y. 1984) (holding that Congress did not intend to preempt long-recognized powers or airport operators to deal with environmental issues and other dangers caused by aircraft using the airport); *British Airways II*, 564 F.2d 1002 (2d Cir. 1977) (rejecting preemption challenge to ban on specific aircraft); *National Aviation v. City of Hayward, California*, 418 F. Supp. 417, 422 (N.D. Cal. 1976) (“[i]t is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative.”); *Air Transport Association v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975) (same); *British Airways Board v. The Port Authority of New & New Jersey*, 558 F.2d 75 (2<sup>nd</sup> Cir. 1977) (upholding proprietary power to impose a temporary ban on certain aircraft due to the “inherently local aspects” of the flights. *See also, Gustafson v. City of Lake Angelus*, 76 F.3d 778, 783 (6<sup>th</sup> Cir 1996) (affirming a local law banning seaplane operations on a local lake, emphasizing the critical distinction between regulating the “navigable airspace,” which is federally preempted, and regulating where aircraft may land, which is not federally preempted).

In short, federal statutory law, legislative history, Grant Assurance 22(i) and an unbroken line of cases all establish that the City's ban for safety reasons of C&D aircraft is not preempted.

Indeed, the proprietor's exception has been applied in previous challenges to access restrictions at SMO including a ban on all jet operations for safety reasons, to find that they were **not** preempted. *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927, 935 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100, 104 (9<sup>th</sup> Cir. 1981) [five City ordinances not preempted; jet ban struck down on other grounds]. In upholding the Santa Monica's authority to ban operations based on noise, the Ninth Circuit recognized that the purpose of the exception is to ensure a proprietor's power to protect public safety and welfare and limit its own liability. 659 F.2d at 104, fn.5 ("The City of Santa Monica should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exception if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environments.").

The FAA itself recognizes the inherent power of an airport proprietor to restrict access for safety reasons. Specifically, Grant Assurance 22(i) provides that an airport may "prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or to serve the civil aviation needs of the public." AAS cannot take away the power that the FAA has already given airport proprietors.

AAS simply ignores the proprietor's exception and relies almost exclusively on non-proprietor cases. And, the recognition AAS does afford misstates the exception's scope. For example, *Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213 (10<sup>th</sup> Cir. 2001), cited by AAS, did not find the airport ban on schedule service to be preempted. Instead, the Tenth Circuit rested its decision on the facts: "[o]ur careful review of the administrative record confirms a dearth of evidence to support the Authority's claim that the ban on scheduled service is necessary due to ground congestion, operational safety and environmental impact concerns." 242 F.3d at 1223-1224. Also, AAS's claim that the proprietor's exception is limited to noise regulations and similar nuisances is belied by the long line of cases cited above. *See e.g., Western Airlines v. Port Authority, supra* [rejecting claim that the exemption is limited to noise regulations]. Thus, local bans on aircraft for safety reasons are not, as AAS asserts, preempted.

**B. Implementation Of The Ordinance Is Consistent With the Grant Obligations To Make The Airport Available For Public Use On Reasonable Terms And Without Unjust Discrimination Because The City Reasonably Distinguished Between A&B Aircraft And C&D Aircraft Based On Their Landing Speeds And The FAA's Runway Safety Standards.**

The heart of this dispute is the Agency's claim that the Ordinance violates federal requirements prohibiting unreasonable and unjustly discriminatory airport access restrictions. However, nowhere in the substantive obligations imposed on current

sponsors does it say that a municipal airport proprietor cannot reasonably restrict access of a federally defined class of aircraft in order to protect immediately adjacent neighborhoods and avoid municipal liability. Nor does the FAA's guidance state that design standards and operational safety are unrelated, as AAS contends here. Thus, the Agency's case is dependent, in large measure, upon a strained construction of the regulations contrived to protect Airport access at all costs and irrespective of the City's rights.

Federal law does not prohibit access restrictions. Indeed, it expressly authorizes airport proprietors to adopt reasonable restrictions. Consistent with this Congressional mandate, the FAA's regulations merely require that terms of access be reasonable and that they not unjustly discriminate. In this case, the FAA cannot establish that the access restriction imposed by the Ordinance is unreasonable because it is based on the FAA's own categories and standards.

The FAA classifies aircraft by their approach speed on landing. Aircraft with approach speeds below 121 knots are in Categories A or B. Aircraft with approach speeds at or above 121 knots are classified as C or D aircraft. In order to ensure that aircraft in both groups operate safely, the FAA standards require RSAs as a component of airport design. By providing additional lead space at the end of the runways, they provide a margin for error in the event of an overrun or undershoot. Specifically, the FAA requires 300 foot RSAs for runways serving A&B aircraft and 1,000 foot RSAs for runways serving C&D aircraft. These standards are formulated to ensure that 90% of aircraft that overrun the runway will stop within the RSA.

At the Santa Monica Airport, which was designed for aircraft with slower landing speeds, the runway ends are singularly close to the Airport boundaries. And, they are only about 300 feet from the edge of the residential neighborhoods located at each end of the relatively short runway. Thus, there is no room for the 1,000 foot runway safety areas required by FAA design standards for C&D aircraft. (*See* City Exhibits 28-29)

According to the FAA's standard for RSAs, the fact that homes are located within 300 feet of the runway ends means that an A or B aircraft overrunning the runway to the west (the direction of most departures and landings) will likely stop short of the surrounding residential neighborhood. Conversely, a C&D aircraft overrunning the runway will likely not stop short of the neighborhood. To the contrary, according to the FAA standards, it would intrude 700 feet or more into the neighborhood before stopping. (City Exhibits 28-29)

The FAA does not dispute the danger of overruns or the importance of providing RSAs. It has undertaken a huge runway safety program and has spent almost Two Billion Dollars (\$2,000,000,000) installing them at airports throughout the country. Moreover, in this case, the Director admits in his Determination that "aircraft can and do overrun the ends of runways, sometimes with devastating results" (p.42); that "an RSA enhances safety" (p.35); and that "RSAs are an integral part of runway safety" (*Id.*).

Nevertheless, the Director found that the City acted unreasonably in prohibiting access by C&D aircraft despite the lack of, and impossibility of providing, adequate RSAs. The Director's rationale was that "FAA approved aircraft certification manual[s] and the underlying regulatory framework" allow C&D aircraft to land on shorter runways

like Santa Monica's. However, the issue is not whether, theoretically and if all goes well and according to the manual, a particular aircraft is physically able to land on a runway the length of Santa Monica's. Rather, the issue is whether, in light of the particular physical circumstances of the Santa Monica Airport and the established benefits of RSAs, it was reasonable for the City to prohibit access by C&D aircraft for safety reasons based on the FAA's own classifications and design standards.

In support of its assertion that the Ordinance is unreasonable, the FAA claims that because some B aircraft travel faster than some C aircraft, the Ordinance is insufficiently precise. This argument has no merit for at least two reasons. First, the Ordinance is based on the FAA's own categories which reflect the likely distance travelled by aircraft that overrun runways according to their certified approach speeds. Second, the legal standard applicable to ordinances is not perfection; it is rationality. The courts have held that a proprietor's approach to regulating its airport need not be perfect. *Western Airlines, Inc. v. Port Authority of New York*, 658 F. Supp. 952 (SDNY 1986) aff'd 817 F.2d 222 (2<sup>nd</sup> Cir. 1987) *cert. denied*, 108 S.Ct. 1467 (1988)[quoting Justice Holmes: "the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* at 960. ]

**C. Implementation Of The Ordinance Does Not Violate The Prohibition Against Exclusive Rights Because The City Has Not Created Any Monopoly Or Precluded Any Person Or Business From Using The Airport.**

The FAA itself has explained that “[t]he purpose of the exclusive rights provision as applied to civil aeronautics is to prevent monopolies and combinations in restraint of trade and to promote competition at federally obligated airports.” AC No:150/5190-6 (1/4/07, p.3).

Likewise, case law recognizes that the purpose of the prohibition is to preclude anti-competitive practices at airports. Thus, in *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11<sup>th</sup> Cir. 1985), the court explained that the prohibition “was intended to describe a power, privilege, or other right excluding or barring another or others from enjoying or exercising a likely power, privilege, or right.” In providing this explanation, the 11<sup>th</sup> Circuit cited *Aircraft Owners and Pilots Assoc. v. Port Authority of New York*, 305 F.Supp. 93, 105 (E.D.N.Y. 1969). In that case, the court, quoting a prior Attorney General Opinion, stated that “[t]he type of exclusive right prohibited by [the prohibition] has been described as one of the sort noxious to anti-trust laws.”

Thus, for example, the prohibition against the creation of exclusive rights would be violated if Santa Monica only allowed one business selling aircraft fuel to operate at its airport because that business would have a monopoly on fuel sales. In that example, the City would be granting an opportunity to one person or corporation and denying that same right to another. In contrast, because Santa Monica’s prohibition against C&D

operations creates no monopoly or combination in restraint of trade and grants no one a particular right to one that is denied to others in the same category, the Exclusive Rights Grant Assurance is not violated. FAA has argued that the City has granted an exclusive right to A&B aircraft, but it is clear that the prohibition against exclusive rights protects natural and corporate persons – not aircraft.

Moreover, even if an access restriction applicable to categories of aircraft did violate the Exclusive Rights Grant Assurance, the Ordinance would fall within the safety exception to that assurance. The FAA has established that “[a]n airport sponsor can deny a prospective aeronautical service provider the right to engage in an on-airport aeronautical activity for reasons of safety and efficiency.” AC No: 150/5190-6, p.3.

**D. AAS’s Contention That The Agency’s Design Standards Are Irrelevant To Safety Is Arbitrary And Capricious And Provides No Support For AAS’s Assertion That The Ordinance Is Unreasonable.**

In conjunction with its claims of unjust discrimination and exclusive rights, the FAA asserts that its own design standards are irrelevant to safety and therefore may not be used to justify the Ordinance. This contrived and irresponsible assertion is alarming given that safety is the Agency’s congressionally-mandated primary obligation. 49 U.S.C. §40101(d)(1) [amended in 1996 to specify that safety is the FAA’s highest priority, above promoting utility or commerce]. The flight operations and aircraft certification standards simply mean that, if everything goes right, and there is no mechanical failure or pilot error, a C or D aircraft can land safely at the Airport. However, perfect operations are not

the City's concern, nor should they be. Likewise, they are not the FAA's concern in other circumstances.

Runway safety programs, like the FAA's national program and the City's local effort, address the unusual, but regularly occurring, operations plagued by mechanical failure, pilot error, bad weather and similar circumstances. In these less than perfect operations, design standards are critical to safety. As attested by James E. Hall, former Chairman of the National Transportation Safety Board, airport design standards and flight operations standards work together to ensure safety. Specifically, "airport design standards accomplish what operational standards cannot ... RSAs or EMAS beds provide for what the Airplane Flight Manual cannot: a physical buffer that can prevent the unpredictable but ever-present risk of an overrun from having devastating effects." Hall Revised Direct Testimony at ¶55.

Indeed, in other contexts, the Agency itself uniformly recognizes the risk of overruns and the corresponding necessity of conforming operations to runway safety design standards in order to ensure safety. Thus, the FAA has publicly declared that "[a]ircraft can and do overrun the ends of runways, sometimes with devastating results." AC No. 150/5220-22A. Indeed, the Director's Determination in this case specifically acknowledges this reality of airport operations. (DD, pg. 42.) And, in the National Plan of Integrated Airport Systems, the FAA states:

"[T]he success of airports in not becoming a link in the chain of events or circumstances that lead to an accident or contribute to its severity can be attributed to their adherence to Federal standards for design and operation. These standards, which have been developed over time, provide the

necessary dimensions or procedures to accommodate aircraft operations along with an extra margin for safety to accommodate deviations from the norm.

For example, the standards for runway safety areas are designed to minimize damage to aircraft and injuries to occupants when an aircraft unintentionally leaves the runway ... The consequences of incidents are less likely to be severe because of the adherence to design standards.”

NPIAS 2005-2009 at p.22.

Likewise, in *Millard Refrigerated Services, Inc., v. Omaha Airport Authority*, FAA 13-93-19 (8/4/95), the FAA acknowledged the connection between airport design standards and safe aircraft operations, explaining that design standards are a “means of insuring that airports intended for use by specific types of aircraft are designed and developed to meet the needs of such aircraft and to provide the level of safety necessary for all airport users.” *Id.* at pg. 26.

And, if ever an airport needed the full protection of the FAA’s airport design standards for runway safety areas, that airport is Santa Monica’s. With steep drop offs at the runway ends and with homes, two major arterials, and a gas station all within a few hundred feet of the runway ends, the risks of human error or mechanical failure are greatly exacerbated.

**E. The FAA's Contention That Implementation Of The Ordinance Will Cripple Air Travel Is Not Supported By The Evidence; Instead, It Will Show That Implementing The Ordinance Will Neither Disrupt Air Travel Nor Overburden Air Traffic Control**

In light of its own recognition of both the danger of overruns and the linkage between design standards and operational safety, and in light of concurring expert opinion, why would the AAS want to prevent Santa Monica from implementing the FAA's own runway safety standards? The only explanation offered by the AAS is that the Ordinance would adversely impact Airport users. However, this is a matter of convenience, not safety. On its face, the Ordinance does not stop any operator or passenger from using Santa Monica Airport. It does not impair the ability of any individual or corporation to use A&B aircraft at the Airport. And, the vast majority of Santa Monica Airport operations involve A&B aircraft. In 2008, there were about 336 operations per day at SMO. Of those only 21—or about 6%—involved C&D aircraft. Thus the vast majority of operations would be entirely unaffected by the Ordinance.

The evidence at hearing will also show that, of those who do use C&D aircraft, almost half are charter or fractional share aircraft, and participants in such programs have the opportunity to shift to other aircraft. Thus, charter and fractional passengers who presently utilize C&D aircraft can switch to A&B aircraft and thereby continue to use SMO. Or, they can continue to fly on C&D aircraft and use any one of several other airports near SMO.

AAS decries these options, predicts that the Ordinance will significantly disrupt air travel in Southern California, and claims that other airports in the area are operating at capacity and will not be able to absorb displaced C&D operations. AAS makes these claims despite their acknowledgement that AAS did not even bother to perform any research or analysis to support them. *See* Rebuttal Testimony of David Fish, ¶7; Testimony of Miguel Vasconcelos, Pgs. 189-191. The City's evidence at hearing will belie AAS's capacity claims. In fact, it will show that there is ample capacity at Los Angeles, Van Nuys, Burbank, Long Beach and Hawthorne airports to accommodate C&D operations displaced by the Ordinance. *See* Yurtis at ¶24. Moreover, the evidence will show that shifting 7,600 annual C&D operations from SMO to other local Los Angeles area airports will not place additional strain on the Air Traffic Control System. To the contrary, the evidence will show that shifting jet operations from Santa Monica to other airports will actually result in a decrease in the air traffic controller workload because of SMO's close proximity to Los Angeles Airport (LAX), which makes traffic management more difficult. Moreover, there can be no dispute that eliminating very short flights from SMO to LAX or Van Nuys can only have a positive effect on congestion.

Thus, displacing a relatively small number of operations, 9,000 at most, out of 1,000,000 in the region, will in no way burden the regional air traffic system. *See* Direct Testimony of Barry A. Yurtis, ¶15. To the contrary, the system will operate exactly as it does now. *See* Yurtis at ¶¶31-37. And, any minor personal inconvenience to Airport

users is overwhelmingly justified by the vast safety improvement that will be realized by implementing the FAA's runway safety standards.

Indeed, the law already establishes that public safety considerations trump the flying preferences of individual flyers. For instance, in *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055 (9<sup>th</sup> Cir. 2006), the Court of Appeals quoted the 11<sup>th</sup> Circuit's decision in *Head v. Medford*, 62 F.3d 351, 356 (1995), for the proposition that no one has a constitutionally protected right to use a particular airport in the aircraft of his or her choice. In upholding the denial of a fee award, the Ninth Circuit said that plaintiff's claims were frivolous since plaintiff "could not, even at the outset of the litigation, establish that it had a constitutionally protected right to operate its preferred aircraft at its preferred airport." 452 F.3d at 1060.

**F. The AAS's Other Claims Related To Safety Should Be Rejected Out Of Hand, Based On The FAA's Own Standards, Statements, And Conduct.**

In defense of its claims, the AAS makes two other arguments related to safety that cannot withstand rational assessment. First, AAS claims that because there has never been a Category C or D overrun at the Airport, there is no runway safety problem. However, the irrefutable evidence of such overruns at other airports, the Agency's own acknowledgement that overruns happen, and its huge investment in RSAs at other airports show that this claim is too capricious for serious consideration.

Second, the FAA asserts that C&D aircraft are, in general, safer than A&B aircraft and therefore should not be banned from the Airport. However, among other things, this

assertion fails to take into account the fact that the runway at Santa Monica is less than 5,000 feet long and that many, many homes lie within 1,000 feet of the runway end, the distance that the Agency itself specifies as appropriate to create a margin of safety for C&D overruns. Indeed, Mr. Marinelli acknowledges that C&D aircraft, while no more likely to experience an overrun than A&B aircraft, are likely to go further than A&B aircraft when they do overrun a runway. *See* Marinelli Direct Testimony, ¶40. This acknowledgement reflects the factual basis for the disparity in RSA length for different categories of aircraft. Thus, both of these arguments should be rejected out of hand as arbitrary and capricious.

**G. The AAS's Contention That The Ordinance Violates Grant Assurances Must Also Be Rejected Based On Grant Assurance 22(i) And The FAA's Own Precedent.**

The AAS's claim that the grant assurances prohibit the type of access restriction established by the Ordinance is belied by Grant Assurance 22(i). It provides: "The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Consistent with this language, the FAA concluded in *Millard* that "In the interest of airport safety and efficiency, the owner of a public-use airport may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport ..." *Millard*, p. 13 (emphasis supplied). Moreover, the fact that the FAA's flight rules may allow an aircraft to operate at an airport does not

prevent the airport from banning them for safety reasons. Thus, in *Millard*, the FAA upheld an airport operator's decision to limit access through weight restrictions. The FAA's holding rested, in part, on the existence of physical constraints at the airport and the fact that the operator reached the decision to limit access "only after thorough study and evaluation conducted to determine the actions required to meet the currently effective FAA design standards." *Millard* at p. 25. Thus, the FAA concluded that the access restriction comported with the grant assurances because it was reasonable.

So is the Ordinance. Like the access restriction in *Millard*, it was undertaken only after careful study and extensive consideration. Thus, for the same reasons that the FAA approved the access restriction in *Millard*, the Ordinance should be upheld in this case. And, AAS's failure to apply the principles that were enunciated in *Millard* to this case is arbitrary and capricious.

**H. The Instrument Of Transfer, By Which The Airport Reverted Back To The City At The End Of World War II Lease To The Federal Government, Was Not A Deed; Therefore, It Did Not And Legally Could Not Impose Restrictive Covenants Governing Airport Operations And Prohibiting The Ordinance.**

It is important to note at the outset that AAS's claim that the City violated the Surplus Property Act rests on the same fundamental factual assertions and legal standards as its claims that the C&D ban violated the grant assurance prohibitions against unjust discrimination and exclusive rights. Thus, once the Hearing Officer has resolved the basic question of whether the City has violated the grant assurances, there is no need to

address the remaining issues. Although the parties dispute the applicability of the Surplus Property Act to the C&D ban, AAS has not offered any additional substantive arguments supporting a violation of the Surplus Property Act.

The Agency contends that the Ordinance is unlawful under the Surplus Property Act of 1944 because it violates conditions of a deed or deeds whereby the federal government transferred the Airport back to the City in 1948. The law and the facts both belie this contention.

As a matter of fact, the City of Santa Monica owned the land now occupied by the Airport prior to World War II. During the war, the City leased portions of the Airport and surrounding lands to the federal government to further the national war effort. (DD, Item 4, Exhibits 25-29) However, the City retained its fee interest in the land. Specifically, the evidence will show that, in 1941, the City and federal government entered into two leases. Both expired by their own terms in 1953. Thus, the federal government's interest in the airport property was a mere leasehold interest, not a fee interest.

The FAA claims that it had more than a leasehold interest based on the "Instrument of Transfer" – an agreement made between the parties in 1948. However, this claim is belied by an accompanying resolution of the City Council, approving the Instrument, and characterizing it as the federal government's surrender of leasehold interests and certain appurtenant easements and rights of way.

As a matter of law, a mere tenant cannot impose restrictive conditions on a landlord or upon the landlord's reversion. This is because a lease transfers only the right

of possession and use; and, once those rights are extinguished, the tenant can no longer control use of the property. *See Stone v. City of Los Angeles*, 114 Cal.App.192, 198-199 (1931). As a mere tenant of the City, the federal government could not have conditioned the reversion to the City.

The FAA's own Compliance Handbook confirms the federal government's inability to exceed the scope of its property interest as lessee. Order 5190.6A states, in part: "This [reverter] right extends only to the title, right of possession, or other rights vested in the United States at the time the property described in the instrument of conveyance was transferred to a grantee." Para., 8-2, p.59.

Additionally, as to the Santa Monica Airport in particular, the FAA has already tacitly acknowledged that there is no deed imposing restrictions on the Airport's operation. In signing the 1984 Agreement, the FAA recognized that Santa Monica had no legal obligation to operate the Airport after the year 2015. And, in a finding important to the outcome of a previous Part 16 case, the FAA stated that "the [1984] Settlement Agreement makes clear that the City is obligated to operate the Airport only for the duration of the Agreement (through July 1, 2015)." *Santa Monica Airport Assoc. v. City of Santa Monica*, Docket No. 16-99-21, Director's Determination (11/22/00) at pg. 22. Further, the Director found that the future of the Airport in 2015 "is a local land use matter." *Id.* at pg. 23.

Had any restrictions or obligations to operate the Airport in a particular way (or at all) been imposed on the City by a deed covenant, the City's obligation to operate the Airport would not have been a subject of the 1984 Agreement. Moreover, the obligation

would not expire in 2015, pursuant to the 1984 Agreement, as the FAA determined in 2000. However, there were no such restrictions, because there was no deed.

Additionally, because there was no deed, the jurisdiction of the FAA to make determinations in this proceeding about the effect of the transfer instruments is dubious. 14 C.F.R. Section 16.1, which establishes the jurisdictional parameters for Part 16 proceedings, speaks of deeds, not leases. And finally, as to any improvements which were transferred to the City at the end of the wartime leases, the useful life of those improvements (20 years) has long since expired. *See* DD, p. 12, fn. 23.

**I. The Ordinance Is Fully Consistent With The City's Contractual Obligations To The FAA; Indeed, The Parties To The Agreement Recognized And Protected The City's Proprietary Right To Limit Access To Protect Safety.**

In 1984, the City and the federal government cooperatively resolved a series of disputes relating to Airport operations by entering into a fully negotiated contract. The 1984 Settlement Agreement sets forth the mutual rights and responsibilities of the parties as to operation of the Airport through the year 2015.

It thereby disposes of certain issues in this case. However, there is a threshold issue as to whether compliance with the 1984 Agreement may be determined in this administrative proceeding.

1. As A Party To The Contract, The FAA Lacks Jurisdiction To Determine Whether The City Has Breached The 1984 Agreement; Only A Court Can Adjudicate That Issue.

Though the 1984 Agreement disposes of certain issues in this proceeding, the question of whether the City is in breach of the Agreement is not a proper subject of this proceeding. The interpretation of settlements and other contracts made by the FAA is not a proper subject for this Part 16 proceeding. *See* 14 CFR Section 16.1(a)[listing Part 16 issues and omitting contract disputes]. The FAA’s assertion of jurisdiction to administratively and unilaterally decide whether the City has breached its settlement agreement with the FAA flies in the face of basic legal principles. Of course one party to a contract may not unilaterally adjudicate whether the other party has committed a breach! The parties stand on equal footing. This fundamental principle of contract law applies to the federal government as it does to all contracting parties. *See Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947) [explaining that the federal government’s contracts are subject to the same legal principles as other contracts]. One party cannot render a legal decision as to whether the other has breached a contract; only the courts have that power.

AAS falsely claims in the Director’s Determination that the City agreed to make the 1984 Agreement a “special condition” of a subsequent AIP grant, thus making it subject to FAA compliance determinations. In fact, the grant agreement established that it is to be interpreted in light of the provisions of the 1984 Agreement. (DD, Item 6, pg. 51). This is consistent with the language of the 1984 Agreement itself, which states:

“It is agreed that any future grant agreements between the City and the FAA which are designed to implement the programs covered by this Agreement, defined as those agreements for the federal funding of programs or improvements intended to further this Agreement executed prior to July 1, 1995, shall be consistent with this Agreement and shall not extend or alter the obligation of the City to operate the Airport under this Agreement, except as may be required by federal statute.” (DD, Item 4, Exhibit 3, pgs. 8-9)

AAS’s assertion underscores its fundamental misunderstanding and mischaracterization of the 1984 Agreement. It did not impose obligations only on the City, subject to FAA’s unilateral interpretation; rather, it imposed obligations on both the City and the FAA, and as set forth below, defined the scope of the unjust discrimination and exclusive rights prohibitions in the context of A&B aircraft versus C&D aircraft. AAS cannot unilaterally interpret the commitments FAA made in the 1984 Agreement nor walk away from them.

2. In Any Event, The 1984 Agreement Establishes That The Airport Need Only Service A&B Aircraft.

Sections 2bii and 8 of the 1984 Settlement Agreement specify the types of aircraft to be accommodated at the Airport. Section 8 states “[t]he Airport will be capable of accommodating general aviation aircraft generally consistent with Group II Design Standards set forth in FAA Advisory Circular 150/5300.4B, dated February 14, 1983.” The Advisory Circular referenced in that language states: “The standards, recommendations and guidance matter in this Advisory Circular (AC) define an airport suitable for the less demanding Aircraft Approach Category A&B airplanes, i.e., airplanes with approach speeds of less than 121 knots.” *Id.* at p.1., Chapter 1, Para.2

(emphasis supplied). Additionally, a separate advisory circular, specifically applicable to airports serving more demanding aircraft, was not cited in the 1984 Settlement Agreement. *See* AC 150/5300-12. That the 1984 Agreement specifically cites the advisory circular applicable to airports serving A&B aircraft—and not the circular applicable to airports serving C&D aircraft—demonstrates the parties’ intent that the City would only be required to make the Airport available to A&B aircraft, not C&D aircraft.

The Director’s Determination asserts that the cited advisory circular, dealing with airport standards, cannot be used to exclude aircraft operations. *See* DD at 21, *citing to* AC 150/5300-13, *Airport Design*, Change 12, Para. 1. Perhaps the advisory circular itself cannot exclude aircraft, but that is not the City’s position. Rather, it is the fact that the 1984 Agreement, in the context of a provision that defines the type of aircraft that must be allowed to operate at SMO in order to avoid a grant assurance violation, cites to an advisory circular that only applies to airports serving A&B aircraft, and symmetrically, does not cite to the comparable advisory circular that applies to airports serving C&D aircraft. Thus a reasonable interpretation of the Agreement, one compelled by logic, is that SMO need not serve C&D aircraft. AAS has not provided any plausible alternative explanation of the meaning of this provision. Instead, it attempts to mischaracterize the 1984 Agreement and the City’s position. Despite its efforts, AAS cannot escape or avoid the plain meaning of the provisions of the 1984 Agreement.

3. The 1994 Grant Assurances Also Expressly Recognize The City's Right To Exclude Classes Of Aircraft For Safety Reasons.

The 1984 Agreement's requirement that the Airport must serve only A&B aircraft and that the City should have the concomitant right to exclude others on reasonable terms for safety reasons was echoed ten years later. In 1994, the City accepted a federal grant on condition that the City would retain its proprietary right to exclude aircraft posing safety risks. Section 22(i) of the 1994 Grant Assurances provides that "[t]he sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport ... ."

Thus, the documents relating to the war-time transfers of the airport property demonstrate that the City has no ongoing obligations under the Surplus Property Act. Likewise the language of the 1984 Settlement Agreement and of the 1994 Grant Assurance expressly recognize the City's right to reasonably restrict Airport access. Having agreed with the City, in 1984 and again in 1994, that the City is only required to accept aircraft appropriate and safe for its facilities, the FAA cannot prevail on its claim that those agreements are violated by adoption of the Ordinance.

**J. The Tenth Amendment Precludes The FAA From Compelling The City To Accept C&D Aircraft At Its Airport.**

The Tenth Amendment prohibits the federal government from conscripting state and local governments to regulate on its behalf. While Congress has the authority to encourage states to regulate according to federal preference, the Constitution does not give the federal government the authority to compel them to do so. *New York v. United*

*States*, 505 U.S. 144, 157 (1992); *see also Printz v. United States*, 521 U.S. 88, 935 (1997). This protection against federal coercion extends to the states and to municipalities alike. *Id.* at 931, n.15.

In this case, the Tenth Amendment issue is whether the FAA's attempt to impose upon the City of Santa Monica the safety and liability risks attendant upon C&D aircraft using the Airport amounts to impermissible federal coercion. The FAA has argued that, like Congress, it may attach conditions to the receipt of federal funds. The argument is correct, but unavailing.

In its Tenth Amendment cases, the Supreme Court has focused on distinguishing between inducement, which is entirely appropriate, and federal coercion, which is unconstitutional. *See, e.g., McConnell v. F.E.C.* 540 U.S. 93 (2003). In the specific context of grant conditions, the Supreme Court has established that to constitute an inducement, as opposed to coercion, a grant condition must be unambiguous so that the responsibility undertaken by the grantee is clear from the inception. *South Dakota v. Dole*, 483 U.S. 203 (1987) Thus, the Court said that if the federal government "desires to condition the States' receipt of federal funds, it must do so unambiguously ... enabl[ing] the States to exercise their choice knowingly, cognizant to the consequences of their participation." *Id.* at 207.

In this case, the grant conditions fail to meet the Supreme Court's requirement of clarity. They merely impose general prohibitions against "unjust discrimination" and the granting of "exclusive rights." But, the City's right to exclude types of operations for safety reasons is explicitly preserved by the grant assurance on unjust discrimination.

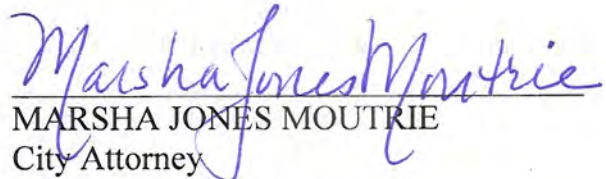
The grant conditions do not, for instance, explicitly prohibit the City from meeting the FAA's own runway safety standards. Nor do they prohibit the City from restricting Airport usage to those planes for which the Airport meets federal design standards. Nor do they notify the City that to receive the grant funds it must relinquish its rights under the 1984 Agreement.

Nor could the City have possibly understood the grant conditions to require the City to shoulder the risks of C&D operation at the Airport, particularly in light of the terms of the 1984 Agreement which only obligates the City to allow A&B operations at SMO. Indeed, like the 1984 Agreement, the grant conditions themselves authorize the City to restrict access to protect safety. Thus, in accordance with the Supreme Court's reasoning in *Dole*, the grant conditions cannot be found to deprive the City of its Tenth Amendment protection against federal coercion.

## V. CONCLUSION

For the foregoing reasons, as shown by the evidence of record and as will be demonstrated at the hearing, the Hearing Officer should uphold the Ordinance and find in favor of the City on the basis that the FAA has failed to meet its burden of proving that the Ordinance violates the grant assurances or is otherwise unlawful.

DATED: March 6, 2009

  
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City of Santa Monica

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 6, 2009, I served a true copy of the foregoing document on the following persons at the following addresses:

**By Overnight Delivery and Facsimile:**

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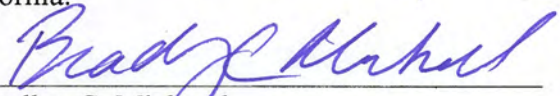
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Executed on **March 6, 2009**, at Santa Monica, California.

  
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Bradley C. Michaud