April 5, 2019

By Email and FedEx

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RE: Santa Monica Municipal Airport – Part 13 Reply

The National Business Aviation Association (“NBAA”), the Aircraft Owners and Pilots Association (“AOPA”), and the General Aviation Manufacturers Association (“GAMA”) (collectively, the “trade associations”) respectfully submit this reply to the March 22, 2019 response of the City of Santa Monica (“City” or “Santa Monica”) in the captioned Part 13 proceeding.

This proceeding presents the question whether an airport sponsor may impose on airport tenants and users the costs of a project designed and intended solely to restrict access to the airport. The City does not deny that the purpose of its project to shorten the runway of the Santa Monica Municipal Airport (“SMO” or “Airport”) was solely political – to impede the use of the Airport by larger aircraft, primarily jets. The City’s second project, the removal of “excess” pavement, is not safety-based and is generally unjustified because the areas at issue are not available to aircraft irrespective of whether they are paved and marked with yellow chevrons (the current configuration) or are pulverized and hydroseeded (as proposed by the City). Neither project has a purpose beneficial to aviation which could warrant the use of airport revenue to accomplish it.

It was in this context that the Director of the Office of Airport Compliance and Management Analysis initiated this proceeding and directed the City to identify the operational, safety, and aeronautical justifications for both projects. The City has not done so, precisely because there are no such justifications for the $7+ million that has been or will be expended.¹

A well-established requirement for airports that have ever accepted federal aviation grants is that revenues generated at the airport must be used by an airport sponsor only in conformity with “the national policy of providing a safe and efficient nationwide system of public-use airports with adequate capacity and capabilities to meet the present and future needs of civil aeronautics.” In the Matter of Revenue Diversion by the City of Los Angeles at Los Angeles International, Ontario, Van Nuys and Palmdale Airports, FAA docket no. 16-96-01, Record of Determination, at 15 (March 17, 1997). An airport sponsor is prohibited by statute from using airport funds for any

¹ The City’s brief, belated attempt to claim that the pavement removal will improve Airport safety – long after the project was initiated without any safety justifications – is spurious. The project actually may be inimical to safety, as discussed further below.
purpose other than to support and foster the nation's aviation system; it may not divert those funds for projects that do not promote a safe and efficient nationwide aviation infrastructure.

The proposition offered by the City – that any non-discriminatory on-airport expenditure is an eligible use of airport revenue, no matter if it is not beneficial for, or even constitutes a direct assault on, the purposes of an airport – disregards the deliberate limits on the purposes for which airport revenue may be used, and undermines the protections on the use of that revenue that are embodied both in the Airport Improvement Program (“AIP”) and statutory mandates. To permit the use of airport revenue to pay for a project that does not benefit an airport, whether or not that project is physically on the airport, flies in the face of this prohibition and would have significant implications for how airport revenue may be used at other federally-obligated airports.

The FAA Can and Should Examine Both of the Issues Identified by the Trade Associations

As an initial matter, in a footnote, the City disputes whether the FAA may act upon the trade associations’ inquiry, citing the 2017 settlement agreement entered into by the FAA and the City, subsequently ratified by a consent decree in the U.S. District Court for the Central District of California. This is mere diversion. The inquiry does not implicate any of the terms of that agreement, but rather whether certain City actions nominally authorized by that agreement can be funded by airport revenue.

- The City previously had no qualms asking the FAA to opine on the same issues, so its newfound suggestion that the FAA cannot actually act is not consistent and not credible.

- Indeed, if the City’s position had any merit, the FAA guidance upon which it purports to rely (as discussed further below) should also be disregarded as an impermissible supplement to and violation of the consent decree.

- Then-FAA Administrator Michael Huerta, in an interview conducted and broadcast by AOPA days after the agreement was signed, specifically stated that “[t]he Part 16 process is still there. … That process is still available during the operation of the airport” and that “I want to stress that if people feel that the City is not abiding by the agreement, the Part 16 process is still available.” See Attachment E, at 13:47 and 18:41.

Moreover, whatever the consequences of the agreement for the City’s obligations under AIP grant assurance #25, the City is simply wrong to assert that it is no longer subject to the statutory obligations of 49 U.S.C. § 47133, which separately prohibits the diversion of airport revenue. The FAA previously has been emphatic that the agreement did not waive any of the City’s statutory obligations. See Final Brief for Respondents, D.C.Cir. no. 17-1054, at 40 (December 4, 2017) (“[t]here is no such waiver in the settlement agreement”).

The bulk of the City’s response is devoted to the argument that the use of airport revenue is appropriate. In so doing, the City asserts that there is only a single question currently before the FAA: Whether the removal of out-of-use pavement beyond a Runway Safety Area (“RSA”) at SMO comprises a permissible use of airport revenue. The City is incorrect. Although this is one
of the questions currently before the FAA, it is not the only question. The inquiry from the trade associations also requested that the FAA address whether the City’s prior use of airport revenue (more than $4 million) to shorten the SMO runway was permissible, and the FAA’s February 6, 2019 letter directed the City to provide justifications for both of the “projects.”

The City Cannot Rely on the then-Chief Counsel’s February 3, 2017 Letter

The primary foundation for the City’s assertion that it is entitled to use airport revenue to remove out-of-use pavement beyond the RSAs is a letter from the FAA’s then-Chief Counsel, dated February 3, 2017 (“Chief Counsel’s letter”). The letter (Attachment A to the trade associations’ inquiry) stated: “[T]he City may use revenue derived from airport operations to cover the costs of shortening the runway.” This statement was not supported by any analysis or citations to justify the diversion of airport revenue to an ineligible project, and in any event the statement on its face concerned only the shortening of the runway, not pavement removal.²

The City argues that the Chief Counsel’s letter is “unconditional[]” and “unambiguous,” but nevertheless undertakes to explain what the underlying reasoning must have been:

- The City postulates that the letter is based on the agreement’s provision that “[t]he costs to shorten the runway … shall be borne by the City,” which the City argues must have meant not only that the FAA would not pay but that any City or Airport account could be used. That is simply not what the agreement says.

- The City also cites the FAA’s commitment to assisting the City “in obtaining federal funds to support the shortening of the runway, as consistent with federal laws, regulations and the availability of federal funds,” and concludes that “if such costs could be eligible for federal funding, they must be costs FAA’s airport revenue-use rules would permit the City to pay with airport revenue.” But the City disregards the specific qualification that such assistance will be available only to the extent legally allowed, and the agreement makes no determinations as to eligibility.

- Lastly, the City asserts that if the agreement “had been intended to prohibit the City from using airport revenue for the costs of shortening the runway, it would have said so but did not.” By that same logic, if the agreement had been intended to allow the City to use airport revenue, it could have said so. It did not.

Each of these arguments is an exercise in speculation. The City does not know if the then-Chief Counsel had these justifications in mind when he wrote the letter. The letter must stand on its own terms – and its terse, unsourced assertion is devoid of any of the hallmarks that justify

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² By the City’s own admission, pavement removal is a project distinct from runway shortening. “Council directed staff to investigate pavement removal options for the unused and abandoned portions of the runway, taxiways and adjacent in-field pavement that could be implemented as a separate and distinct project once the runway shortening project is complete” (emphasis added). Susan Cline, Director of Public Works, Options for the Removal of Excess Runway Pavement at Santa Monica Airport, City Council Report, at 1-2 (September 26, 2017) (Attachment F).
respect for opinions promulgated by agencies. The Chief Counsel’s letter further is directly at odds with prior FAA guidance, as discussed further below.

The City also asserts that the Chief Counsel’s letter warrants deference because he “personally negotiated the Settlement Agreement/Consent Decree with the City and was the principal scrivener of the contract.” Whatever role the then-Chief Counsel may have had as a negotiator does not permit him to override statutory requirements. Further, the City’s assertion about the then-Chief Counsel’s role finds no basis in the public record; notably, the City previously asserted that all details of the negotiations were exempt from release under the California Public Records Act. See, e.g., Letter from Brigette Garay, Public Records Coordinator, to Richard Simon (March 28, 2017) (Attachment G). The City is thus barred from now invoking details of those negotiations or the role of participants.

Further, as the then-Chief Counsel observed in another opinion letter close in time, his opinion “represents the present view” of the FAA but it “does not constrain future FAA action or opinion” and is only an “advisory response.” Clayton County, Georgia v. FAA, 887 F.3d 1262, 1266 (11th Cir. 2018). There, he was correct. See also Tweed-New Haven Airport v. Town of East Haven, 582 F.Supp.2d 261, 266 n.8 (D.Conn. 2008) (“an opinion letter written by an agency counsel … amounts to argument and hearsay”); U.S. v. Mead Corp., 533 U.S. 218, 228 (2001) (courts may consider the “agency’s care,” “formality,” and “consistency”).

Nor is it relevant that the City purportedly relied upon the Chief Counsel’s letter in planning pavement removal. The City “assumed the risk that that interpretation was in error.” Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984). In fact, the City has not relied upon the Chief Counsel’s letter in regard to pavement removal. The City Council voted to award a $3 million contract for pavement removal at its March 26, 2019 meeting, well after the initiation of this proceeding, and the staff report docketed at that meeting makes it clear that the City will continue with the project irrespective of whether the FAA “reverses its prior finding.” In that case, “the City would be prohibited from using airport revenues to pay for any of the project, resulting in all projects [sic] costs having to be paid from the General Fund.” Susan Cline, Director of Public Works, Award Construction and Construction Management Contracts for the Santa Monica Airport – Reuse of Excess Airfield Pavement Project, City Council Report, at 5 (March 26, 2019) (Attachment H).

The Subsequent Guidance from the ADO and Region Should Be Revisited

The City next turns to the guidance provided in the letter from the Manager of the Los Angeles Airports District Office dated August 31, 2018 and the letter from the Manager for Safety and Standards for the Western-Pacific Region dated October 15, 2018 (Attachments B and D, respectively, to the trade associations’ inquiry). The City observes, accurately, that the former implicitly did not object to the use of airport revenue for the removal of out-of-use pavement beyond the RSAs, and the latter explicitly did not object. But the City offers no explanation of why or how those letters are binding and should not (much less cannot) be revisited, to the extent that their guidance was in error. And they should be revisited, for the reasons discussed further below.
The trade associations specifically seek that the FAA revisit and correct its prior guidance, consistent with standard agency practice. See, e.g., Alaska Professional Hunters Association, Inc. v. FAA, 177 F.3d 1030, 1035 (D.C.Cir. 1999) (“when a local office gives an interpretation of a regulation or provides advice to a regulated party, this will not necessarily constitute an authoritative administrative position, particularly if the interpretation or advice contradicts the view of the agency as a whole”). FAA routinely reviews guidance that has been provided at the regional level – which usually is issued without the benefit of broader coordination and input from relevant program offices at the headquarters level – and if needed provides clarifications and/or corrections to that guidance. See, e.g., Letter from Rebecca MacPherson, Assistant Chief Counsel for Regulations, to Taylor Perry, at 2 (July 28, 2010) (Attachment I).

The Pavement Removal at Issue Is Not an Eligible Use of Airport Revenue

The City only briefly disputes the substance of the trade associations’ inquiry. It asserts that grant assurance #25, as well as 49 U.S.C. § 47107 and § 47133, do not actually prohibit the expenditure of airport revenue for the removal of out-of-use pavement beyond the RSAs, because those authorities do not require that expenditures of airport revenue have a legitimate aeronautical purpose. As previously noted, the City is wrong.

As an initial matter, the City has misstated what the trade associations emphasized in their inquiry. Based on FAA guidance, “airport revenue can only be used for legitimate capital or operating costs of an airport” (emphasis added). The pavement removal at issue certainly lacks an aeronautical purpose – the FAA itself already has said so (see Attachment B, at 2). But it also lacks any capital or operational purpose. The City’s political leadership has made clear that the project is not intended to in any way further the airport, but rather to impede the aeronautical use of SMO (especially by jets) by preventing the full-length runway and its capabilities from ever being easily restored, should political or legal circumstances change.3 Likewise, City staff have conceded that they simply follow the orders of the City Council, and cannot themselves provide a justification for pavement removal other than that the City Council has demanded it.4

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3 For example, at the October 23, 2018 City Council meeting, Council Member Kevin McKeown stated that: “I found the organized, concerted outpouring of strongly worded, sometimes offensively worded opinion of the aviation industry from all over the country to be very persuasive. It persuaded me that hopes springs eternal in the aviation press that they’re going to get that airport back and that’s not what’s going to happen and so I totally support our going back out to a bid on only what has been called the alternate and that would be the one that pulverizes everything including the RSAs. I think we should pursue a bid for that and for that only.” See http://santamonica.granicus.com/MediaPlayer.php?view_id=2&clip_id=4226, at 59:15. Andrew Wilder, the Chair of the City’s Airport Commission, speaking at the City Council’s March 26, 2019 meeting, similarly stated that: the project “will effectively guarantee that Santa Monica never has a five thousand-foot runway ever again.” See http://santamonica.granicus.com/MediaPlayer.php?view_id=2&clip_id=4304, at 2:03:48.

4 At a public meeting for airport tenants and users held on September 18, 2018 the City’s Principal Civil Engineer, Curtis Castle, in response to a question about the project’s rationale stated that “Well, this was definitely a Council directive, to do this … That would be a question best asked to the City Council. … My understanding was they did not have to spend this money, they didn’t have to do this project, they chose to do it.” He further stated that “I can’t speak to the benefits of that, I can just say that Council asked us to investigate removing the payment from the end of
In any case, although the City is correct that the FAA’s Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7676 (Feb. 16, 1999), do not expressly state that airport capital and operating costs must serve a legitimate aeronautical purpose, there should be no doubt based on decades of agency guidance that airport revenue cannot be used for purposes directly antithetical to the operation of an airport as an airport. By definition, a project that is intended to sabotage one’s business is not a valid capital or operating cost. See also Nancy McFadden, DOT General Counsel, Legal Opinion on “Limited Review of the State of Hawaii Department of Transportation Use of Airport Revenues,” at 4 (August 16, 1996) and Letter from David Bennett, Director, Office of Airport Safety and Standards, to Margery Bronster, at 2 (July 15, 1996) (expenditures of airport revenue must have “valid airport purposes”) (collectively, Attachment J).

The City attempts to distinguish the guidance that the FAA previously provided in connection with Meigs Field and Stapleton International Airport, as previously cited by the trade associations. But the City cannot dispute that the FAA has opined that deactivating an airport and its runway, and redeveloping aviation facilities for non-aviation use, is an impermissible use of airport funds, and the City proffers no contrary authority of its own. The trade associations respectfully submit that the FAA’s prior guidance is legally correct, and that the present circumstances at SMO are not substantively distinguishable. And although the FAA’s guidance regarding Meigs and Stapleton is the most relevant, it is hardly unique. For example:

- In Boca Airport, Inc. d/b/a Boca Aviation v. Boca Raton Airport Authority, FAA docket no. 16-00-10, Director’s Determination, at 42 (April 26, 2001) (Final Decision and Order March 20, 2003, affirmed on other grounds 389 F.3d 185 (D.C.Cir. 2004)), FAA observed that “[a] payment of airport revenue to a private firm can be considered unlawful revenue diversion if it is not for an airport purpose (i.e. for general economic development”).

- In Airport Revenues: McMahon-Wrinkle Airpark, Big Spring, Texas, no. AV-1998-026, at 4-5 (November 21, 1997) the DOT Inspector General concluded that although a fire station was located on-airport, the majority of its calls were off-airport, and thus reimbursement to the airport for capital and operating expenses that had not benefited the airport was required. The FAA generally concurred. Id., at Appendix II, at 3-4.

- In another audit involving protective services, FAA Oversight Is Inadequate to Ensure Proper Use of Los Angeles International Airport Revenue for Police Services and Maximization of Resources, no. AV-2014-035 (April 8, 2014), the DOT Inspector General specified that expenditures of airport revenue were conditioned “on adequate

the runway.” Similarly, the Airport Director, Stelios Makrides, said: “As the Council is the policymakers of the City, they asked us to study it, we are going back with what we have in front of us to show them the options I described.”

Contrast 49 U.S.C. § 5302(3), which for public transportation grants specifically defines the expenditures that comprise a “capital project”; for example, they include “acquiring, constructing, supervising, or inspecting” facilities – not demolishing a facility, with a narrow exception if it is necessary for the construction of a replacement. Cf. White v. Commissioner, 48 T.C. 430, 435 (1967) (to be eligible to deduct costs as casualty losses under the tax code, “[n]eedless to say, the taxpayer may not knowingly or willfully … damage the property himself”).
documentation that demonstrates the funds were expended for the benefit of the airport.”
Id., at 6. The FAA concurred. Id., at 24-25.

The City itself previously has acknowledged the requirement that operating and capital expenditures must actually benefit an airport – stating that capital or operating costs associated with converting a portion of the “residual land” at SMO released from aeronautical use by the 1984 settlement agreement between the FAA and the City would not be funded with airport revenue. See Letter from Bob Trimborn, Airport Manager, to John Milligan, Supervisor, Standards Section, Western-Pacific Region, at 2 (July 10, 2000) (Attachment K).

Additionally, in litigation pending in the D.C. Circuit (no. 18-1157), Airlines for America (“A4A”) has alleged that expenditures by the Port of Portland, Oregon for stormwater mitigation services rendered off-airport amounted to revenue diversion. The FAA previously denied A4A’s claim in a Part 16 proceeding (FAA docket no. 16-16-04), and has continued to oppose the claim on appeal – but on the basis that the challenged expenditures actually benefitted the airport. “[T]he FAA determined that the Airport did receive benefits from paying for these charges.” Final Brief for Respondent, at 27 (January 16, 2019). Thus, whatever the final ruling on the merits of A4A’s claim, the FAA understands the same prohibition on revenue diversion at issue in this proceeding requires that expenditures of airport revenue benefit the airport. And (as discussed further below) the pavement removal at issue provides no such benefits.

**There Are No Operational, Safety, or Aeronautical Justifications for Pavement Removal**

Only at the very end of its response does the City turn to the specific inquiries put to it by the FAA: the City’s operational, safety, or aeronautical justifications for the prior shortening of the runway and for the planned removal of out-of-use pavement beyond the RSAs. The City’s brief, unsubstantiated claims confirm that no justifications exist.

In regard to the shortening of the runway, the City has simply ignored the issue, asserting that in light of the Chief Counsel’s letter, the only matter before the FAA is the removal of out-of-use pavement beyond the RSAs. In any case, there clearly was no operational, safety, or aeronautical justification for that project. The City shortened the runway because it nominally could, based on the agreement, and because its long-standing goal was to reduce Airport operations. FAA repeatedly has confirmed that the prior runway configuration at SMO was safe. See, e.g., City of Santa Monica v. FAA, 631 F.3d 550, 555 (D.C.Cir. 2011) (“the FAA concluded that Category C and D aircraft could operate safely at SMO in its current configuration”).

It is well-established that the FAA is the final arbiter of operational, safety, and aeronautical matters, and that airports can impose restrictions premised on such concerns only with FAA’s concurrence, as recently re-emphasized in Kurtz v. City of Casa Grande, FAA docket no. 16-16-01, Final Agency Decision, at 6 (November 15, 2018). In this case, whatever the agreement nominally authorized the City to do without further FAA approval, the agreement did not set forth any operational, safety, or aeronautical justifications, nor has the City in any other venue sought FAA sign-off for an operational, safety, or aeronautical justification to either shorten the runway or to remove out-of-use pavement from the RSAs at SMO.
In its response, the City newly asserts a purported safety rationale for the removal of out-of-use pavement beyond the RSAs: “Since the runway was officially shortened, aircraft operators have persistently ignored the new pavement markings … and have continued to use closed surfaces the City has no obligation to maintain as movement areas.” As an initial matter, this is a post hoc justification, since the City initially directed staff to plan for pavement removal before the runway was shortened. See, e.g., Attachment F.

Moreover, the City has provided no documentation or analysis to support its claim. At meetings of the City’s Airport Commission since the start of 2018, the City has posted a list of “surface incidents related to pilots utilizing the closed sections on each end of the shortened runway.” Since January 2018, 46 incidents have been listed – less than 0.056% of the 82,733 operations at SMO between January 2018 and February 2019. Moreover, the list provides no details about the incidents – critical information such as whether a pilot anticipated or experienced an emergency, or was approved to operate on a closed section by the FAA tower. Nor does the list indicate whether incursions were limited to the RSA; even if a particular incursion was unjustified, if it was limited to the confines of an RSA, it would still provide no justification for Airport funding of the removal of out-of-use pavement beyond the RSAs.6

The City has had ample time to provide specific information supporting its safety claims. Having chosen to rely on conclusory, unsupported assertions, the City’s claims should be given little credence. Nevertheless, within the limited time available to it, NBAA has investigated available data about the listed incidents, to determine if there is any evidence that they implicate safety; any evidence that any incursions extended beyond an RSA; or any evidence that any incursions were, as the City implies, the product of deliberate pilot misconduct. There is no such evidence. For example:

- For the July 31, 2018 incident, the pilot of the Piper 28 experienced a brake failure on landing, which could not have been discovered while in the air. The pilot utilized the RSA for precisely its intended purpose in an emergency. Indeed, for this incident, the City’s list acknowledges that the use of the RSA was justified.

- For the December 22, 2018 incident, the pilot of the Extra 300 has stated that he landed long, was distracted by an ATC communication, and overran the runway by 10-15 feet. The pilot has stated that he has self-reported the incident to the Aviation Safety Reporting System.

6 The City also asserts that pavement removal is required because “FAA has been unable or has failed to cite operators when they have used former runway areas … to depart from the Airport because, as the City understands, FAA has not felt it could meet FAA’s burden of proof to establish violations under FAR Part 91.123(a).” The City cites no basis for this claim, and the trade associations understand that some incursions have resulted in remedial/compliance actions. In any case, the City simply ignores the possibility that the FAA took no action because, under the circumstances, no violation meriting enforcement pursuant to § 91.123(a), or other FAA regulations, had occurred.
For the February 13, 2019 incident, the King Air pilot was confused by the taxiway markings, and requested instructions from the FAA tower about how to proceed. The recording of the pilot’s communications with the FAA tower confirm that it specifically authorized the pilot to taxi on a closed section of the runway. See Attachment L, at 13:58.7

Not only is there no evidence that the removal of pavement beyond the RSAs will enhance safety at SMO, there is evidence that the City’s plans could actually degrade safety at SMO:

- An expert study was provided to the City by NBAA and AOPA on October 22, 2018 (Attachment M) which explained that although aircraft accidents are fortunately rare, the preservation of that pavement beyond the RSAs would reduce both on- and off-airport risks in the event of an accident. The City simply has not responded to the study.

- Additionally, at the March 25, 2019 meeting of the City’s Airport Commission, Diana Hernandez – an Airport Operations/Noise Management Specialist – disclosed that although the City plans to remove pavement in the next few months, it does not plan to actually seed the pavement areas that have been pulverized until the autumn of 2019. See http://santamonica.granicus.com/MediaPlayer.php?view_id=6&clip_id=4309, at 1:09:39. As a result, in the interim the City will have created dirt and particle hazards at SMO, and appears to have no mitigation plan.

- The City has not consulted with experts, as required by Advisory Circular 150/5200-33B and Advisory Circular 150/5370-10H, to evaluate the consequences of introducing grass to the airfield for the first time in decades. The City has asserted that it is in compliance with FAA requirements simply based on the grass mix selected (see, e.g., Attachment F, at 3), but that is wrong. SMO also has a known coyote problem,8 but no consideration has been given to whether grass and birds will serve as a further attractant for them.

All other implications of the City’s actions aside, its blatant disregard for the on-airport and off-airport safety consequences of pavement removal certainly confirms that the project lacks any justification which would enable its funding with airport revenue.

**The Planned Pavement Removal Cannot Be Rate-Based**

Finally, a component of FAA’s guidance that airport revenue could be used to fund the removal of out-of-use pavement beyond the RSAs was a caveat against “assessing the costs of this

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7 This incident also emphasizes that if the City is truly interested in safety (and operational efficiency), it should first ensure that the revised taxiway markings at SMO are both easily understandable and are communicated in advance to pilots – signage and other remedial measures are far less costly and far more effective than pavement removal. Notably, at the March 25, 2019 meeting of the City’s Airport Commission, its Chair, Andrew Wilder, stated that: “I don’t believe that pilots are doing this intentionally. I think there is something wrong with the airport signage or design.” See http://santamonica.granicus.com/MediaPlayer.php?view_id=6&clip_id=4309, at 29:43.

project upon aeronautical rates or rents.” See Attachment B. The trade associations have argued that even if airport revenue, for the reasons discussed above, is not entirely disqualified from use for this project, this distinction is inconsistent with FAA precedent and must be re-examined.

The City has asserted that FAA need not consider this issue, because the City will not rate-base its planned expenditures. But, as explained in the trade associations’ inquiry, to the extent pavement removal instead would be funded out of the revenues previously collected at SMO, that revenue included landing fees and other charges collected from aeronautical tenants and users. Thus, the use of airport revenue, even if previously collected, necessarily implicates the rate base. And, of course, the more than $4 million already spent to shorten the runway came solely from Airport accounts which include landing fee and aeronautical rent payments.

The City has “pledged” not to allocate any pavement removal costs to the rate base, but fails to explain how that commitment can be honored. There is no evidence in the record – nor are the trade associations aware of any – that SMO maintains separate accounts for revenues derived from aeronautical uses and from other airport uses. As a result, it is unclear how Santa Monica could actually comply with FAA’s rate-basing guidance, even assuming it is valid.9

**Conclusion**

The tenants and users of SMO already endure what are among the highest landing fees and other charges of any general aviation airport (and many air carrier airports) in the country.10 All other considerations apart, it is particularly offensive – and antithetical to the fundamental concepts governing the use of airport revenues – that they be burdened with the costs of projects destructive of the facilities that they rely upon. The trade associations sought to remedy this unacceptable and illegal use of airport revenues through their request to FAA for remedial action.

With the City’s purported justifications (or lack thereof) now of record, the trade associations restate their concern that the prior and planned use of airport funds by the City conflict with established statutory and other requirements, and that the advice previously provided by FAA is in error and should be permanently withdrawn. The shortening of a runway and the removal of pavement not only serve no capital or operational purpose, nor any aeronautical purpose, but are directly harmful to aviation, and are prohibited by both the principles of grant assurance #25 and

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9 Despite the City’s effort to characterize the trade associations’ summary of the history of rate-basing as “bizarre,” FAA previously has utilized the concept only to ensure that a project which has aeronautical benefits – but only for specific users – is paid for only by those specific users. The trade associations are not aware of any prior circumstances in which the FAA has suggested that the concept of rate-basing can justify the use of airport revenue to fund a project at an airport which is antithetical to aviation and which benefits no aeronautical user, and the City has not cited any. See also Letter from David Bennett, Assistant Chief Counsel for Airports and Environmental Law, to Joseph Niemann, at 8 (December 2, 1993) (general airport revenues may not be used to pay costs of facilities that do not qualify as airport capital assets) (Attachment N).

10 The petitioners in a pending Part 16 proceeding, *Smith v. City of Santa Monica*, FAA docket no. 16-16-02, have established this proposition without substantive counter by the City. See Complaint, at 33-35 (February 5, 2016); see also *Bombardier Aerospace Corp. v. City of Santa Monica*, FAA docket no. 16-03-11, Director’s Determination at 39 (January 4, 2005).
49 U.S.C. § 47107 and the separately applicable 49 U.S.C. § 47133. To conclude otherwise in this circumstance erodes the very protections intended to ensure that airport revenue is used to support aviation, not for other reasons.

The FAA should have concluded, and should now confirm, that the previously-incurred and now-planned costs at issue are entirely ineligible for funding with Airport revenue. To the extent expenditures have already been made, they must be reimbursed from municipal funds, with interest; and to the extent further expenditures are planned, they must be paid from the City’s General Fund. As the FAA recently emphasized in Forman v. Palm Beach County, FAA docket no. 16-17-13, Director’s Determination, at 16 (February 22, 2019), an airport sponsor is not entitled to rely upon prior FAA advice that upon further analysis of the facts and the law is determined to be in error, nor may an airport sponsor simply refuse to provide evidence to justify its actions.

The City has made it clear, as discussed above, that it is prepared to have its General Fund bear the $7+ million costs of its decisions regarding the SMO runway and other paved areas. The FAA should have no difficulty in concurring.

Sincerely,

_____________________________
Jol A. Silversmith
Barbara M. Marrin

cc: Kevin C. Willis, Director, Office of Airport Compliance and Management Analysis
Kirk Shaffer, Associate Administrator for Airports
Mark McClardy, Director, AWP Airports Division
Dave Cushing, Manager, LAX ADO
Lauren L. Haertlein, Director, Safety and Regulatory Affairs, GAMA
Jim Coon, Senior Vice President, AOPA
Steven J. Brown, Chief Operating Officer, NBAA
Stelios Makrides, Director, Santa Monica Municipal Airport
Scott Lewis, Anderson & Kreiger, LLP

Attachments (audio/video recordings via FedEx only)
To: Mayor and City Council
From: Susan Cline, Director, Public Works, Civil Engineering
Subject: Options for the Removal of Excess Runway Pavement at Santa Monica Airport

**Recommended Action**
Staff Recommends that the City Council:
1. Review and provide direction to staff regarding the preferred option for excess pavement removal at Santa Monica Airport to be implemented as a separate and distinct project once the runway shortening is completed; and
2. Provide direction to staff with regard to proceeding with procuring engineering design services for excess pavement removal.

**Executive Summary**
Santa Monica Airport (SMO) over the last century has grown from a dirt airstrip designed for biplanes to a busy general aviation airport with more than 80,000 landings and take-offs last year. For the past three decades, the City government has sought to rein in the increasingly severe noise, health and safety impacts on surrounding neighborhoods. After protracted litigation, the City of Santa Monica and the Federal government entered into a landmark Consent Decree to authorize permanent closure of SMO at the end of 2028. The Consent also authorized the City to shorten the Santa Monica Airport’s runway by 40% to curb large jet operations. Runway shortening construction is scheduled to be complete by the end of December.

The runway shortening creates more than 700’ feet of excess pavement on each end of the runway. At the May 24, 2017 special meeting, concurrent with selecting the preferred option for shortening the runway and adopting related CEQA actions, Council directed staff to investigate pavement removal options for the unused and abandoned portions of the runway, taxiways and adjacent in-field pavement that could be implemented as a separate and distinct project once the runway shortening project is
Figure A below depicts the abandoned pavement that is potentially eligible for removal, and shows its relation to the Runway Protection Zone (RPZ) and Runway Safety Area (RSA). The RPZ is an area at ground level beyond the ends of the runway to enhance the safety and protection of people and property on the ground. For airports in urban areas, due to historical circumstances, the RPZ often extends beyond the airport boundary and into the surrounding neighborhood. The RSA is the surface immediately at each runway end prepared in a manner that reduces risk of damage to airplanes in the event of an undershoot, overshoot or excursion from the runway. At SMO the RSA extends 300 feet beyond the active runway.

![Abandoned pavement removal options in relation to the RSA and RPZ](image)

**Figure A - Abandoned pavement removal options in relation to the RSA and RPZ**

This report presents three options, listed below, for pavement removal for City Council’s consideration (see Figure A above and Attachment A, Figures 1 and 2 for reference).
These options involve removing unused pavement outside and within the RSA.

- Option 1 - Remove all unused pavement outside the RSA and hydro-seed. Pulverize in place and stabilize pavement within the RSA ($3.44M)
- Option 2 - Remove all unused pavement outside the RSA and install artificial turf. Pulverize in place and stabilize pavement within the RSA ($5.69M)
- Option 3 - Pulverize in-place all unused pavement outside and within the RSA and stabilize ($2.73M)

Pavement removal areas under Options 1, 2, and 3 are partially within the RPZ. The RPZ is a very critical safety area that should be kept free and clear of all objects in order to protect people and property.

**Background**

On February 28, 2017 (Attachment B), Council awarded Feasibility Professional Services Agreement 10436 (CCS) to AECOM, which engaged AECOM to study reducing the length of Runway 3-21 at SMO to 3,500 feet. The agreement included an initial feasibility phase to provide runway shortening options for Council consideration and future selection.

On April 24, 2017 (Attachment C), staff issued an Information Item responding to Council's inquiry about a potential phased interim project for the removal of pavement at the ends of the runway and evaluation of future uses of the excess runway area. The Information Item provided an update on those topics, as well as the overall status of the runway-shortening project.

On May 24, 2017 (Attachment D), Council selected the center-aligned shortened runway option from the two options presented for runway shortening construction. At that meeting, Council also:

- Authorized staff to proceed with further design of the preferred option to establish a guaranteed maximum price (GMP) for a design-build agreement between the
City and AECOM to complete runway-shortening construction prior to December 31, 2017;

- Adopted Resolution No. 11044 stating that the runway-shortening project is categorically exempt from review under the California Environmental Quality Act (CEQA); and
- Directed staff to investigate pavement removal options for the unused and abandoned portions of the runway, taxiways and adjacent in-field pavement that could be implemented as a separate and distinct project once the runway shortening project is complete.

On August 8, 2017, (Attachment E), Council authorized the City manager to execute a design-build agreement with AECOM, for a GMP of $3.52 million to complete runway shortening construction by December 31, 2017. The City and AECOM are in the process of executing the Design-Build Agreement, with construction scheduled to begin in early October 2017 and be complete by the end of 2017.

**Discussion**

The runway shortening project will result in 736 feet of unusable pavement for aircraft operations at each end of the runway. Of the 736 feet, the first 300 feet adjacent to each runway end is required for the Runway Safety Area (RSA).

The RSA must be well-graded with no ruts, humps or surface depressions and capable of supporting Aircraft Rescue and Fire Fighting (ARFF) equipment. Additionally, the first 150 feet of the RSA adjacent to each runway end, which includes the blast pad, must be essentially non-erodible under jet blasts to minimize the generation of Foreign Object Debris (FOD) that represent a major hazard to all aircraft.

**Pavement Removal Options**

The existing runway pavement consists of approximately six inches of asphalt surface pavement over approximately eight inches of concrete pavement. The abandoned taxiways, shoulders and in-field areas consist of variable asphalt and concrete
pavements ranging from three to eight inches thick.

**Option 1 - Hydro-seeding ($3.44M)**

This option includes removing the abandoned pavement outside the RSA, backfilling and hydro-seeding the graded surface. The depth of excavation varies from three inches to thirteen inches, representing the full thickness of the abandoned pavements, and would require minor grading and slope protection. This option also includes pulverizing in place the abandoned pavement within the RSA (Attachment A, Figures 1 and 2). The depth of pulverization is approximately thirteen inches, representing the full thickness of existing runway pavement. The pulverized pavement would be compacted, graded for drainage and stabilized with a soil stabilizer. Drainage improvements would likely be required for collecting storm water and to control excess storm water surface runoff from this area. Closure of the runway would be required during construction.

This option has less up-front costs, but potentially more on-going maintenance requirements. Scheduled maintenance of the hydro-seeded area would be required on an annual basis, supplemented by monthly or quarterly maintenance to control weeds and other vegetation. An irrigation system is not included in the estimate for this scenario. Even with the use of drought tolerant or native plants, to prevent dust from becoming an issue, periodic watering would be required. This option requires no imported fill material. There is a risk that this option may attract wildlife, which is generally discouraged near airports.

**Option 2 - Artificial Turf ($5.69M)**

This option includes removing the abandoned pavement outside the RSA and installing artificial turf. The depth of excavation varies from three inches to thirteen inches, representing the full thickness of the abandoned pavements. This option also includes pulverizing in place the abandoned pavement within the RSA (Attachment A, Figures 1 and 2). The depth of pulverization is approximately thirteen inches, representing the full thickness of existing runway pavement. The pulverized pavement would be compacted, graded for drainage and stabilized with a soil stabilizer. Closure of the runway would be required during construction.
This is the most expensive option initially, but requires less on-going maintenance. Nominal scheduled maintenance of the artificial turf including monthly vacuuming and grooming would be required. Artificial turf would be least susceptible to premature deterioration due to the elements. The drainage improvements for collecting storm water and to control excess surface runoff contribute to the higher project cost. A downside to this option is the considerable number of truck trips generated by the amount of exported material generated and required imported fill. Further, it is anticipated that this option would take the longest to construct by a couple of months.

**Option 3 - Pulverizing In-Place ($2.73M)**

This option includes pulverizing in place the abandoned pavement outside and within the RSA (Attachment A, Figures 1 and 2). The depth of pulverization varies from three to thirteen inches representing the full thickness of the abandoned pavement. The pulverized pavement would be compacted, graded for drainage and stabilized with a soil stabilizer. Drainage improvements would likely be required to control excess storm water surface runoff from this area. It is anticipated that scheduled maintenance of the stabilized area would be required on an annual basis, with ongoing maintenance to control weeds, between the scheduled maintenance. Closure of the runway would be required during construction.

This is the least expensive option and requires no exporting or importing of material. Additionally, this option will likely have the shortest construction duration. This option requires as-needed maintenance to re-compact and stabilize the surface in order to maintain its integrity. This results in the highest maintenance costs of the three options.

For all three options, to conform to FAA requirements, the pulverized pavement within the RSA would be well-graded with no ruts, humps or surface depressions and would be capable of supporting Aircraft Rescue and Fire Fighting equipment and the occasional passage of aircraft without causing damage to the aircraft. The initial 150 feet at each end of the shortened runway (representing the runway blast pad areas) would be resurfaced with asphaltic material, conforming to FAA requirements that the
runway blast pad area shall be non-erodible under jet blasts to minimize the danger of debris (FOD). All excavated areas would need to be backfilled, graded and compacted prior to the opening of the runway. All runway threshold lights, runway end lights and signs would need to be restored and operational at the end of each working shift.

Anticipated Schedule
Staff anticipates the following completion schedule for implementing any of the three pavement removal options, based on the City's design-bid-build procurement process.

- Procure Design Services - January 2017
- Final Design Completion - April 2018
- Construction Award - August 2018
- Construction Completion - February 2019

California Environmental Quality Act (CEQA) Determination
It has been determined that removal of the excess runway pavement at Santa Monica Airport (SMO) would be categorically exempt from CEQA pursuant to Sections 15301 and 15304 of CEQA Guidelines. Section 15301 provides a Class 1 exemption for the minor alteration of existing public or private facilities involving negligible or no expansion of use. Section 15304 provides a Class 4 exemption for minor public or private alterations in the condition of land and/or vegetation. The project would make improvements to existing un-useable pavement at SMO, which will include the removal of existing pavement and the installation of a stable surface (artificial turf, hydro-seeded soil and mulch, ground-in-place and stabilized pavement, etc.). Therefore, the project qualifies as a Class 1 and Class 4 exemption. In addition, none of the exceptions specified in Section 15300.2 of CEQA Guidelines would apply that would preclude the use of this CEQA exemption - the project site is not located in a sensitive environment, the project will not have a significant effect on the environment, the project would not damage scenic resources, the project would not be located on a hazardous waste site; and the project would not cause a change to a historical resource. Therefore, this project is determined to be categorically exempt from CEQA.
Financial Impacts and Budget Actions

Once design and construction management costs are factored in, the cost for excess pavement removal would range from, approximately $2.7 million to $5.7 million (depending on the option selected) based on estimates developed by AECOM (Attachment A). There are no funds set aside or available in the City’s Fiscal Year 17-18 Capital Improvement Program (CIP) for this project. Additionally, the Airport Fund does not have sufficient reserves and could require a loan from the General Fund to remove the excess pavement. If directed by Council to proceed with one of the options presented above, staff would issue a Request for Proposal to select an engineering design consultant through a competitive process, and would return to Council in early 2018 to potentially authorize the City Manager to advance a General Fund loan to the Airport Fund and award a Professional Services Contract to initiate the design phase of the project, along with recommended budget actions.

Prepared By: Allan Sheth, Civil Engineering Associate

Approved Forwarded to Council

Susan Cline, Director  9/21/2017  Rick Cole, City Manager  9/22/2017

Attachments:

A. Feasibility Report - Removal of Abandoned Pavement at SMO
B. February 28, 2017 Staff Report
C. April 24, 2017 Staff Report
D. May 24, 2017 Staff Report
E. August 8, 2017 Staff Report
F. Written Comments
G. Powerpoint Presentation
March 28, 2017

VIA E-MAIL

Richard K. Simon, Esq.
1700 Decker School Lane
Malibu, CA 90265
resimon3@verizon.net

Re: Requests for Public Records dated March 16, 2017

Dear Mr. Simon:

This letter is the City’s formal response, pursuant to Government Code section 6253, to the nine attached Public Records Act requests received via email on March 16, 2017.

Under the California Public Records Act, California Government §§6250 et seq., the City must disclose documents which are public records as defined by Government Code § 6254, but is not obligated to disclose drafts of such documents. In addition, the City may withhold records for a variety of reasons, including if the public interest in withholding the record is clearly outweighed by the public interest in disclosing it. (Gov. Code § 6255.)

At the outset, we note generally that the City will not respond to unduly burdensome requests. The courts have recognized that the City may legitimately raise an objection that a request is overbroad or unduly burdensome. (California First Amendment Coalition v. Superior Court (1998) 67 Cal.App.4th 159, 165–166.) “[A] person who seeks public records must present a reasonably focused and specific request, so that the public agency will have an opportunity to promptly identify and locate such records and to determine whether any exemption to disclosure applies.” (Galbiso v. Orosi Public Utility Dist. (2008) 167 Cal.App.4th 1063, 1088.)

Our initial review of your nine requests indicates that several of them are individually very broad, and as a whole will require several hundred hours of employee time simply to review potentially responsive documents for confidential, privileged, or otherwise exempt information. These nine requests — seeking essentially every document relating to a massive City project which is also the subject of a pending legal proceeding — are not “reasonably focused or specific” and the City objects that they are overbroad and unduly burdensome.

Furthermore, section 6255, subdivision (a), authorizes the City to withhold any records, even if no express statutory exemption from production applies, if the City can show “that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” In weighing the benefits and costs of disclosure, a court will take into account “any expense and inconvenience involved in segregating non-exempt from exempt information, because the statutory term ‘public interest’ encompasses public concern with the cost and efficiency of government.” [Citations.] We may thus take it as established that the Act includes a policy favoring the efficiency of government and limitation of its costs.” (North County
Parents Organization v. Department of Education (1994) 23 Cal.App.4th 144,151-152; see also  
Fredericks v. Superior Court (2015) 233 Cal.App.4th 209, 235.) “[A]lthough the evident purpose of  
the Act is to increase freedom of information by giving the public maximum access to information in  
the possession of public agencies, such access to information is not unlimited under the Act.” (North  
County Parents, supra, 23 Cal.App.4th at p. 152.)

More specifically, the City will not release any attorney-client communications or attorney  
work product. (Gov. Code § 6254, subd. (k).) Virtually all of these requests seek documents which  
pertain to pending litigation before the Circuit Court for the District of Columbia, and so in addition  
to many of the responsive documents being privileged, all are exempt from disclosure at the very  
least until the pending litigation is concluded. (Gov. Code § 6254, subd. (b).) In addition, to the  
extent that your requests seek records reflecting the City’s decision-making and deliberative process,  
such records are exempt from disclosure on that basis as well. (Govt. Code § 6255; see also  
Accordingly, documents that contain the substance of conversations among City officials, City staff  
and advisors, contents of discussions, deliberations and like materials that reflect advice, opinions,  
and recommendations by which government policy is being formulated are all privileged and exempt  
from disclosure.

Request 1: All drafts of the Settlement Agreement. The City will produce the final version  
of the Settlement Agreement as adopted by the Court in its Consent Decree, but  
not preliminary drafts. First, each draft of the settlement agreement reflects legal  
advice and work product from attorneys on all sides of the matter, and are  
therefore exempt from disclosure. (Gov. Code § 6254, subd. (k).) Further, the  
CPRA exempts from disclosure preliminary drafts of public records if the public  
interest in withholding them will outweigh the public interest in disclosing them.  
(Gov. Code § 6254, subd. (a).) Here, prior drafts of the Settlement Agreement  
without context or explanation for their place within the process would likely  
confuse the public as to why certain portions were added, deleted, or modified.  
(See also Gov. Code § 6255.) Therefore, only the final version of the Settlement  
Agreement, as it appeared as part of the Consent Decree, is attached to this letter.  
Also, you may find a copy of the Settlement Agreement included in the Consent  
Decree on the City’s website by following this link:  
https://newsroom.smgov.net/Media/Default/CMO/Consent%20Decree%20(FAA  
%20-%20Santa%20Monica).pdf

Request 2: All drafts of the Consent Decree. As you may already be aware, the Consent  
Decree is the United States District Court’s order authorizing and implementing  
the Settlement Agreement. Therefore, the Settlement Agreement is restated  
within the Consent Decree. As noted above, and for the same reasons, no  
preliminary drafts of the Consent Decree will be disclosed.

Request 3: All Records concerning, relating to or describing the Settlement. This request  
is extremely broad, and requiring the City to search every database, server, and  
file for every mention of the term “settlement” will produce vast amounts of  
documents which will need to be reviewed for responsiveness, privilege, and  
potential confidentiality. This request is not reasonably focused or specific, and
the City objects to it on that basis. (Galbiso, supra, 167 Cal.App.4th at p. 1088.)
Furthermore, to the extent this request seeks documents which are privileged, attorney work product, or confidential, such records will not be disclosed. (Gov. Code § 6254, subd. (k).) Finally, this request plainly seeks records reflecting the City’s decision-making and deliberative process, and those records will not be produced pursuant to the deliberative process privilege. (Govt. Code § 6255; California First Amendment Coalition, supra, 67 Cal. App. 4th 159.)

Request 4: All Records concerning, relating to or describing the Consent Decree. See response to Request 3 above.

Request 5: All Records consisting of, reflecting or pertaining to communications between the City and the FAA concerning the Airport. This request seeks communications which are privileged, attorney work product, or confidential, and therefore will not be disclosed. (Gov. Code § 6254, subd. (k).) In addition, all such records are related to pending litigation before the Circuit Court for the District of Columbia, and are therefore exempt from disclosure under Government Code section 6254 subdivision (b). Finally, this request plainly seeks records reflecting the City’s decision-making and deliberative process, and those records will not be produced pursuant to the deliberative process privilege. (Govt. Code § 6255; California First Amendment Coalition, supra, 67 Cal. App. 4th 159.)

Request 6: All Records consisting of, reflecting or pertaining to communications between the City and any third party other than the FAA concerning the Settlement. This request is not reasonably focused or specific, and the City objects to it on that basis. (Galbiso, supra, 167 Cal.App.4th at p. 1088.) You have not identified any particular persons within the City whose communications you wish the City to examine, and the City will not guess as to what the nature of your inquiry is. Furthermore, to the extent this request seeks documents which are privileged, attorney work product, or confidential, such records will not be disclosed. (Gov. Code § 6254, subd. (k).) In addition, this request plainly seeks records reflecting the City’s decision-making and deliberative process, and those records will not be produced pursuant to the deliberative process privilege. (Govt. Code § 6255; California First Amendment Coalition, supra, 67 Cal. App. 4th 159.) Finally, this request seeks records pertaining to pending litigation, all of which are exempt from disclosure. (Gov. Code § 6254, subd. (b).)

Request 7: All Records consisting of, reflecting or pertaining to communications between the City and any third party other than the FAA concerning the Consent Decree. See response to Request 6.

Request 8: All Records used, referred to or relied upon by the City in negotiating or documenting the Settlement Agreement and/or the Consent Decree. This request plainly seeks records reflecting the City’s decision-making and deliberative process, and those records will not be produced pursuant to the deliberative process privilege. (Govt. Code § 6255; California First Amendment Coalition, supra, 67 Cal. App. 4th 159.) This request is not reasonably focused or
specific, and the City also objects to it on that basis. (Galbiso, supra, 167 Cal.App.4th at p. 1088.) Furthermore, to the extent this request seeks documents which are privileged, attorney work product, or confidential, such records will not be disclosed. (Gov. Code § 6254, subd. (k).) Finally, this request seeks records pertaining to pending litigation, all of which are exempt from disclosure. (Gov. Code § 6254, subd. (b).)

Request 9: All Records of any communications relating to or concerning the Settlement Agreement and/or the Consent Decree between or among any City employees, agents, representatives or officials, including, but not limited to, any members of the City Council or any City commission. This request is not reasonably focused or specific, and the City objects to it on that basis. (Galbiso, supra, 167 Cal.App.4th at p. 1088.) To the extent this request seeks documents which are privileged, attorney work product, or confidential, such records will not be disclosed. (Gov. Code § 6254, subd. (k).) In addition, this request plainly seeks records reflecting the City’s decision-making and deliberative process, and those records will not be produced pursuant to the deliberative process privilege. (Govt. Code § 6255; California First Amendment Coalition, supra, 67 Cal. App. 4th 159.) Finally, this request seeks records pertaining to pending litigation, all of which are exempt from disclosure. (Gov. Code § 6254, subd. (b).)

For the reasons outlined above, the City will provide you with a copy of the Consent Decree issued by the District Court which contains the Settlement Agreement. No other records will be disclosed.

Sincerely,

Brigette Garay
Public Records Coordinator

Enclosure
To: Mayor and City Council
From: Susan Cline, Director, Public Works, Civil Engineering
Subject: Award Construction and Construction Management Contracts for the Santa Monica Airport - Reuse of Excess Airfield Pavement Project

Recommended Action
Staff recommends that the City Council:
1. Award Bid #SP2533 to Sully-Miller Contracting Company, a California-based company, to provide construction services for the Santa Monica Airport – Reuse of Excess Airfield Pavement Project for the Public Works Department;
2. Authorize the City Manager to negotiate and execute a contract with Sully-Miller Contracting Company in an amount not to exceed $3,109,824 (including a 15% contingency);
3. Authorize the Director of Public Works to issue any necessary change orders to complete additional work within contract authority;
4. Authorize the City Manager to negotiate and execute a professional services contract with CivilSource, an NV5 Company, for construction management and inspection services in an amount not to exceed $216,761 (including a 15% contingency);
5. Authorize the Director of Public Works to issue any necessary change orders and modifications to provide additional services within contract authority.
6. Authorize budget changes as outlined in the Financial Impacts & Budget Actions section of this report.

Summary
In 2017, the runway at the Santa Monica Airport (SMO) was shortened to 3,500 feet, per the terms of the January 2017 Consent Decree with the Federal Aviation Administration (FAA), which resulted in an 8% reduction in airport operations during calendar year 2018 and an 81% decline in jet aircraft operations compared to before the runway was shortened. The runway shortening project resulted in excess pavement at both ends of the runway that is not pertinent to airport operations. Staff researched possible alternatives to the removal of the excess pavement and on September 26, 2017, Council elected to install hydrosed (native, drought tolerant grasses and plants) at the ends of the runway in place of the current pavement. Staff recommends awarding
a construction contract to Sully-Miller Contracting Company for the SMO Reuse of Excess Airfield Pavement Project. Additionally, staff recommends awarding a professional service agreement to CivilSource an NV5 Company to provide construction management and inspection services for the project.

Fig. 1 (Areas to be hydroseeded are in green/yellow are approximate)

The green/yellow areas at each of the runway depict the area where the excess pavement will be removed and replaced with grasses and plants.

Discussion

The SMO Reuse of Excess Airfield Pavement Project involves removing the excess pavement and installing hydroseed at both ends of the runway, including pulverizing and stabilizing the Runway Safety Areas (RSAs) (the surface immediately at each end of the runway outlined in red in Figure 1) that constitute about 12% of the excess pavement. Because the FAA objects to the use of airport funds to pulverize and stabilize pavement within the RSAs, construction in the RSAs would be paid using General Fund dollars. Pursuant to prior guidance from the FAA, the costs of the project other than the pulverization and stabilization of the pavement within the RSAs will be paid using airport revenues. A complaint by aviation groups opposing the project has been filed seeking to have the FAA overturn this prior guidance – were the FAA to do so, the balance of the project likely would need to be paid using General Fund dollars.

At Council’s direction, staff are proceeding with converting the excess runway pavement to hydroseed. Hydroseeding consists of plant seeds, finely ground water-soluble fertilizer, and a stabilization mixture that would be sprayed over the entire area to ensure that the seeds stick to the surface. Mulch would also be installed to help the
seeds sprout. The seeding mix would consist of low-growing, drought tolerant plants and perennial grasses native to Southern California that would comply with FAA guidelines requiring them to be low-growing and to not attract wildlife.

The Council also directed staff to explore pavement removal options in the Runway Safety Areas (RSA), which currently meet FAA standards. The FAA objects to using airport funds for the pulverization and stabilization of the existing pavement within the RSA, so construction in the RSAs would be paid using General Fund dollars. The FAA stated their objection and other concerns in a letter dated August 31, 2018 (Attachment C).

Staff moved forward with construction bidding on September 20, 2018 and received two bids on October 8, 2018. Due to the FAA’s objection to using Airport Fund monies for the RSA work, the bid package listed the RSA pulverization and stabilization as additive/alternative work that could be included in the award of the construction contract using non-airport funds at the direction of Council. However, staff received two bids that exceeded the project budget, and on October 23, 2018, the Council rejected all bids and directed staff to rebid the project. The Council also directed staff to include the RSA work in the base bid, thus eliminating the additive/alternative bid items.

To secure more competitive bids during the rebidding phase, staff revised the bidding documents to include an additional staging area that a contractor would be able to use to store the project spoils (excavated materials), thus enabling more efficient execution of the work. Additionally, the bid posting period was increased from the original duration of three weeks to six weeks to allow prospective bidders sufficient time to analyze their prices and prepare detailed bids.

Public Outreach
Staff held a community meeting and provided a project update on September 18, 2018 at the Museum of Flying. Additionally, staff presented the same project update at the September 24, 2018 Airport Commission meeting. The purpose of the presentations was to notify the community about the project status, timeline and proposed work hours.
Most of the work would occur at night. Noise levels would be monitored by Sully-Miller to ensure their compliance with the City’s noise ordinance. The project is similar in nature and impact to the runway shortening project, which included pavement removal for the taxiways. The shortening project did not generate any noise complaints.

Staff continued to receive input and questions from the community following the two meetings. The feedback was primarily focused on the scope of work within the RSAs and whether the RSA pulverization and stabilization should be included in the scope of the project. As stated above, when the City Council rejected bids on October 23, 2018, it directed staff to include the RSA work in the base bid, responding to community concerns regarding the inclusion of the RSA pulverization and stabilization in the project.

Airport Commission
The Airport Commission passed two motions on September 24, 2018:

1. **We urge the City Council to reinforce their September 26, 2017 direction to Staff, to proceed with the original, publicly vetted "Option 1" construction project, including pulverizing and stabilizing the complete depth (both asphalt and concrete) of the RSAs - covered with blast protective asphalt for the first 150’ as earlier specified.** [Motion carried 4-1]

2. **According to the FAA’s current position, the City cannot use Airport funds for the work within the RSAs, and we recommend that the City pursue a waiver or ask the FAA to reconsider.** [Motion carried 3-2]

The City requested that the FAA reconsider its objection to the use of Airport Funds for the RSA work. The FAA replied on October 15, 2018 (Attachment D) reinforcing its original objection.

Complaint to FAA
On November 30, 2018, the National Business Aviation Association, the Aircraft Owners and Pilots Association, and the General Aviation Manufacturers Association, sent a letter to the FAA arguing that the FAA should rescind and overturn its prior guidance and instead hold that airport revenues cannot be used to cover any costs associated with the runway shortening and pavement removal, including the removal of pavement outside the RSAs (Attachment E). On February 6, 2019, the FAA advised these industry groups that it was treating their letter as a Part 13 complaint, and requested that the City of Santa Monica respond within 30 days. The City did not receive the letter until approximately two weeks after it was sent and will be requesting a 21-day extension for its response. The City believes the complaint from the industry groups is without merit. If the FAA agrees with the City, airport revenues could continue to be used to pay for those portions of the project other than the pulverization and stabilization of the RSAs. If the FAA disagrees and reverses its prior finding, however, the City would be prohibited from using airport revenues to pay for any of the project, resulting in all projects costs having to be paid from the General Fund.

**Landscape Maintenance**

Sully-Miller would be responsible for maintenance of the hydroseeded areas and the temporary irrigation system for the six months following completion of construction, which is anticipated for summer 2019. Sully-Miller would also be responsible for plant establishment (preparing the site, spraying the hydroseed and replacing plants that die), weeding, trimming/mowing, leak repairs and other maintenance items related to the hydroseeded areas during the six-month period. After the maintenance period ends, the Airport Fund would pay for all maintenance costs, which are estimated to be $6,250 per quarter for the 14 acres.

**Past Council Actions**

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<th>Date</th>
<th>Action</th>
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<tr>
<td>09/26/17</td>
<td>Council directs staff to replace excess runway with hydroseed and pulverize pavement</td>
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<tr>
<td>01/23/18</td>
<td>Award of agreement with AECOM for design services to prepare the plans and specifications for this project</td>
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Vendor Selection – Construction

Vendor Selection Recommendation

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<td>Shimmick Construction</td>
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<td>Griffith Company</td>
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Best Bidder Justification

Sully-Miller is the lowest bidder and has completed similar pavement work for other municipalities and airfield work at Los Angeles World Airport. References, including LAWA, reported positive experiences working with Sully-Miller. They have also performed similar projects in the past for Santa Monica, including work at SMO in 2011-12.

Vendor Selection – Construction Management

The construction management firm would provide inspection services for this project. The inspector would observe and inspect the nighttime work, ensure that construction adheres to project design plans and specifications, answer contractor questions in the field, verify quantities on contractor invoices, prepare daily inspection reports, capture and maintain progress photos, coordinate work with various City departments, distribute construction notifications, and address questions or concerns from the public. City staff
does not have the capacity to inspect and manage the construction of night work projects such as this one, which require full-time oversight.

CivilSource an NV5 Company was selected for this project from an approved shortlist of construction management firms. The shortlist was created by way of the Request for Qualifications (RFQ) process, and CivilSource an NV5 Company submitted a proposal as part of the Request for Proposal (RFP) process and was subsequently selected.

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<td>Santa Monica Daily Press</td>
<td>124</td>
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<tr>
<td>CALTROP Corporation</td>
<td>Municipal Code SMMC 2.24.073</td>
</tr>
<tr>
<td>CivilSource an NV5 Company</td>
<td>Swinerton</td>
</tr>
<tr>
<td>Hill International</td>
<td>Evaluation Criteria</td>
</tr>
</tbody>
</table>

The training, credentials and experience of the person or firm; the demonstrated competence, ability, capacity and skill of the firm to perform the contract or provide the services; the capacity of the firm to provide the service promptly, within the time specified, and without delay; the sufficiency of the firm’s financial and other resources; the character, integrity, reputation and judgment of the firm; the ability of the firm to provide such future service as may be needed; and the price which the firm proposes to charge, including whether the price is fair, reasonable and competitive.

Responding vendor proposals were evaluated and scored based on the above criteria, and the top four were recommended as best qualified firms to be placed on a shortlist to provide construction management services for the various Capital Improvement Program projects the City undertakes. The evaluation and selection were completed by staff in the Public Works Department.
<table>
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<th>RFP Advertised In (City Charter &amp; Municipal Code)</th>
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<td>Sent to the 5 shortlisted firms</td>
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### Justification to Award

A single proposal was received. A committee from the Civil Engineering Division evaluated the proposal based on the criteria listed in the RFQ section. Based on the evaluations, the committee recommends awarding the RFP to CivilSource an NV5 Company as the best qualified firm based on its technical competence, staffing capacity, and experience with similar airport projects.

### Financial Impacts and Budget Actions

Staff seeks authority to award a contract with Sully-Miller Contracting Company in an amount not to exceed $3,109,824 (including a 15% contingency) for the SMO Reuse of Excess Airfield Pavement Project. Staff also seeks to award an agreement with CivilSource an NV5 Company for construction management and inspection services in an amount not to exceed $216,761 (including a 15% contingency). The majority of funds for both agreements are available in C5707360.689000. An appropriation from the General Fund of $305,900 is required for the award of the construction contract. As discussed above, if the FAA rescinds its guidance and prohibits the use of airport revenues to pay for the project, then the entire project cost would need to be paid out of the General Fund. The hydroseeded areas will require annual maintenance costs of $52,500, which will be funded in the Airport Fund and included in the Public Works FY 2019-21 Biennial Budget request. Award of the construction and construction management contracts require the following budget changes:

### FY 2018-19 Budget Changes

- Attachment H
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**Agreement Request: CivilSource an NV5 Company**

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**Prepared By:** Curtis Castle, Civil Engineer

**Approved**

Susan Cline, Director 3/15/2019

**Forwarded to Council**

Rick Cole, City Manager 3/17/2019

**Attachments:**

A. September 26, 2017 Staff Report
B. January 23, 2018 Staff Report
C. FAA Letter Regarding RSAs
D. FAA’s Response to City’s October 1 2018 Letter _Excess Pavement Reuse Project_
E. Part 13 NBAA Runway Shortening - Letter from FAA - 2019.02.06
F. Sully Miller Oaks Initiative Disclosure Form
G. CivilSource an NV5 Company Oaks Initiative Disclosure Form
H. Written Comments
Dear Mr. Perry:

This letter is in response to your May 19, 2010 request for interpretation of 14 C.F.R. § 61.113. You ask whether you can operate a “hobby type aerial photography business,” in which you would function as the pilot and photographer, with a private pilot certificate. You note that you would either take photographs from the aircraft to be sold later, or would conduct photography operations for a pre-arranged buyer.

Generally, private pilots are prohibited from acting as pilot in command of an aircraft for compensation or hire. See 14 C.F.R. § 61.113(a). However, a private pilot may conduct operations for compensation or hire when the flight is incidental to a business or employment and the aircraft does not carry passengers or property for compensation or hire. See § 61.113(b).

You included with your request a copy of a letter addressed to Mr. Pritchard H. White which states that aerial photography or survey operations which do not carry persons or property for compensation or hire may be conducted with a private pilot certificate. This letter distinguishes operations in which the aircraft is used as an aerial platform for other photographers for compensation or hire for which the pilot would need a commercial pilot certificate. This letter was signed by Leland S. Edwards, Jr., an attorney then in the FAA’s Northwest Mountain Regional Office. See Legal Interpretation to Mr. Pritchard H. White, from Leland S. Edwards, Jr., Attorney (May 11, 1995).

We note, however, that on June 17, 1987 the FAA Chief Counsel’s office issued a legal interpretation that stated that an individual must hold a commercial pilot certificate in order to act as pilot in command of an aircraft involved in an aerial photography business. See Legal Interpretation to Mr. Wayne M. Del Rossi, from John H. Cassady, Assistant Chief Counsel, Regulations & Enforcement Division (June 17, 1987) (enlosed). To reach that conclusion, the FAA examined whether the photography flights would be incidental to the pilot’s business, and found that the “proposed aerial photography business is not an activity, completely unrelated to aviation activities, in which a pilot certificate would be irrelevant to the fundamental character of the business.” Id. Likewise, this interpretation determined that the pilot would be receiving compensation for the operations in violation of the permissible private pilot privileges. See id.
As these interpretations are inconsistent, the FAA must determine which is controlling. Validly adopted legal interpretations issued by the Regulations Division of the Office of the Chief Counsel are coordinated with relevant program offices at FAA Headquarters and have FAA-wide application. Interpretations issued by regional offices generally are not coordinated at the national level. Therefore, in a situation such as this, where two interpretations address an identical scenario and reach an inconsistent result, the interpretation issued by the Assistant Chief Counsel for Regulations takes precedence. Accordingly, the Del Rossi letter is the controlling interpretation in this situation and your proposed operations could not be conducted with a private pilot certificate.

This response was prepared by Dean Griffith, Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the General Aviation and Commercial Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of further assistance.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

Enclosure
Sr. Wayne M. Del Rossi  
4577 Calks Ferry Road  
Leesville, South Carolina 29070

Dear Mr. Del Rossi:

Mr. David Anderson, Aviation Safety Inspector of the Carolina Flight Standards District Office (FSDO) in Columbia, South Carolina, forwarded your letter of February 24, 1987, and attachments, to this office for reply. As you requested, we have returned Daniel Roth's brochure, Aerial Photography: From Start To Success, under separate cover. In your letter, you requested an interpretation of the Federal Aviation Regulations (FAR's) as they may apply to your proposed aerial photography business and your private pilot certificate.

As you are aware, section 61.118 sets forth the privileges and limitations of your private pilot certificate. That section states, in pertinent part, that a private pilot may not, for compensation or hire, act as pilot in command of an aircraft. An exception to that section states that a private pilot may, for compensation or hire, act as pilot in command of an aircraft in connection with any business or employment if the flight is only incidental to that business or employment and the aircraft does not carry passengers or property for compensation or hire.

Where it is doubtful that an operation is for "compensation or hire," the test applied is that included in the definition of a commercial operator under Part 1 of the FAR's; namely, whether the flight is merely incidental to the pilot's business or is, in itself, a major enterprise for profit. The proposed aerial photography business is not an activity, completely unrelated to aviation activities, in which a pilot certificate would be irrelevant to the fundamental character of the business. Quite clearly, flight operations are a substantial and integral part of an aerial photography business. The fact that the photographs were taken from an aircraft is a strong selling point for a customer. In addition, although you state that finding customers, developing pictures, and selling finished photographs would be a large part of your business, the essential feature of your proposed business is tied to the operation of an aircraft.
Neither the percentage of aircraft use, the amount of flight time, nor the prices charged for your product are relevant to this analysis. The critical issue is whether you are being compensated, either directly or indirectly, for flight operations. "Compensation or hire" has been held to include furthering one's economic interest. Therefore, if you receive any money in connection with your aerial photography business, even if it merely pays for your flight time and results in no other financial benefit, you would be furthering your own economic interest.

Contrary to your claim that the pilot is not being compensated for acting as pilot in command of an aircraft, the customer is receiving, and is being charged for, a service in flight operations performed by a private pilot in violation of section 61.118. Moreover, so long as you present yourself as ready to accept compensation related to your proposed business, the fact that you do not disclose actual costs related to flight operations does not alter the fact that you would be acting as pilot in command of an aircraft for compensation or hire.

To comply with the FAR's, you must hold a commercial pilot certificate in order to act as pilot in command of an aircraft as part of your proposed aerial photography business.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

John H. Cassady
Assistant Chief Counsel
Regulations & Enforcement Division

cc: David Anderson
Memorandum

U.S. Department of Transportation
Office of the Secretary of Transportation

Subject: Legal Opinion on "Limited Review of the State of Hawaii Department of Transportation Use of Airport Revenues"

From: Nancy E. McFadden
General Counsel

To: Melissa Spillenkothen
Assistant Secretary for Administration

Date: August 16, 1996

You have requested a legal opinion regarding three recommendations made by the Office of Inspector General (OIG) to the Federal Aviation Administration (FAA) resulting from its 1994 audit of the use of airport revenues by the Airports Division of the State of Hawaii Department of Transportation (HDOT).

The first recommendation pertained to assessing interest on the recovery of airport funds that had been used to purchase land in the Kapolei area of Oahu that is not needed for airport purposes. The OIG recommended that the FAA require the State to pay the Airports Division lost interest income of $6.5 million, as of June 30, 1994, resulting from the unlawful airport revenue diversion of $64.4 million used to acquire this land. You asked whether, and under what legal authority, the FAA may require payment of such interest.

The second and third recommendations relate to an interpretation of 49 U.S.C. 47107(j)(6), which specifies that Hawaii is not eligible for discretionary airport improvement program (AIP) grants in any fiscal year in which it is using $250 million of airport revenues, generated by off-airport duty-free facilities, for certain airport access highway projects. The OIG recommended that FAA withhold future AIP discretionary grants from the State until all airport revenues held by HDOT are expended for the highway projects; the OIG also recommended that FAA rescind

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1 In pertinent part, 49 U.S.C. 47107(j) reads:

47107(j)(6): Hawaii is not eligible for a grant under section 47115 of this title [the AIP discretionary grant program] in a fiscal year in which Hawaii uses under paragraph (2) of this subsection [eligible airport-access highway construction] revenue from sales referred to in paragraph (2) [the eligible surplus airport revenues from off-airport duty-free sales]. Hawaii shall repay amounts it receives in a fiscal year under a grant it is not eligible to receive because of this paragraph to the Secretary of Transportation for deposit in the discretionary fund established under section 47115.

---

Reply to NKessler
Attn. of: x69154

Attachment J
three FY 1992 AIP discretionary grants it had awarded the State to repair hurricane
damage at Honolulu International and Lihue airports, and require the State to repay
funds received from the grants ($5.6 million as of July 1, 1994) to FAA for deposit in
the discretionary fund.

Our office had issued a legal opinion on December 13, 1994, concluding that the State
was ineligible to receive AIP discretionary grants in FY 1992 and in any year thereafter
in which the State spends, or has available to use for the airport access highway
project, any part of the $250 million in airport revenues. You asked whether our 1994
opinion may be affected by the circumstances surrounding the 1992 discretionary
grant or by any other factors. You also asked whether there may be future
circumstances that would enable the State to receive discretionary grants while any
part of the $250 million continues to be available for airport access highway projects.

I. Opinion in Brief

A. Interest Recovery

Our opinion on the first OIG recommendation is that the FAA does have the authority
to require the sponsor to reimburse the Airports Division with the lost interest
payments associated with the sponsor's reimbursement to the Airports Division of the
actual amount of its unlawful diversion of airport revenues. The FAA's power in this
area is based on federal grant assurances, federal common law, and FAA precedent.

B. Withholding Future Grants and Repayment of 1992 Grant
   Award

With regard to the OIG recommendations that FAA withhold future AIP discretionary
grants until all eligible surplus airport revenues held by HDOT Highways Division
are spent for eligible airport access projects and that FAA rescind the three FY 1992
AIP discretionary grants it had awarded the State and require repayment, our position
here is unchanged from our December 1994 legal opinion. That opinion concluded
that Hawaii is ineligible for AIP discretionary grants in any fiscal year in which it has
available to use, or uses, any remainder of the $250 million of surplus airport revenue;
additionally, Hawaii must return to the FAA the amount of AIP discretionary grants it
received in fiscal year 1992. A future circumstance which could alter this opinion
would be the enactment of federal legislation entitling the State to AIP discretionary
grants and overriding the current prohibition in 49 U.S.C. 47107(j)(6).

II. Analysis of Interest Recovery

A. Purchase of Kapolei Land

1. Introduction
The issue here relates to recovery by the State's airports division of imputed interest on the $64.4 million of airport revenues the HDOT spent in November 1991 to purchase 161 acres of property in the Kapolei area of Oahu. The State has agreed to reimburse the Airports Division for the $64.4 million; it is our understanding that the Governor of Hawaii recently signed legislation to issue bonds to repay the full $64.4 million. We understand the State expects the proceeds to be available for repayment to the Airports Division within the next several months.

2. Hawaii's Position

In recent submissions to the FAA from both counsel for Hawaii and Hawaii's Attorney General, the State argues that the purchase of the Kapolei property with the use of airport funds was intended to fulfill legitimate and appropriate airport purposes. The State maintains that the history of the HDOT's efforts to purchase land and relocate tenants in connection with the expansion of the Honolulu International Airport is complex. It believes DOT's Office of Inspector General did not take into account all of the facts and circumstances showing the legitimate airport purpose for the transaction from its inception to its close. It urges the FAA to find that the imposition of an imputed interest charge would impose a significant unwarranted penalty on the State, particularly in view of the State's willingness to repay the $64.4 million purchase price to the State's airports division account.

According to the submissions and exhibits provided by the State, it appears that, in late 1988, the airports division intended to use the Ualena Street area for an air cargo facility and related airport operations, in connection with the multi-billion dollar plan to construct an international terminal building and an airport people mover system. In late 1989, the HDOT entered into discussions with the owners of the fee interests in the Ualena Street parcels pertaining to acquisition of these interests. State legislation was passed, effective July 1990, to permit HDOT to acquire land and to provide for the relocation costs of the dislocated lessees or tenants as a result of the acquisition of land for the expansion of the Honolulu international airport.

At this time, according to the documentation provided by Hawaii, the State considered moving some of the displaced Ualena Street tenants to the Kapolei properties and examined the possibility of trading the Kapolei land with the Ualena fee simple owners. In October, 1990, the State intended to acquire the Kapolei raceway park parcel for a land exchange with the Ualena Street fee owners. In March, 1991, the State provided the fee owners with maps of the lands available for exchange including the feedlot and the raceway park. The Ualena Street fee owners' representative informed the State that the fee owners would not be interested in the Kapolei lands unless the lands were rezoned from agriculture to urban district. In late April, 1991, the State produced a zoning timetable for the raceway park lands, and also wrote the fee owners about the land exchange possibility. In May, 1991, the HDOT informed the State Board of Land and Natural Resources of its intent to effectuate the land exchange.
The State's submissions further show that on July 23, 1991, after lengthy discussions with the Ualena Street fee owners, the HDOT accepted the fee owners' offer to sell the Ualena Street land for $80.2 million. On August 1, 1991, however, the State wrote to the fee owners regarding a possible land exchange for the Kapolei property and on August 30, 1991, the board of directors of one of the Ualena Street fee owners considered the State's land exchange proposal and authorized management to follow up on this matter.

The State provided no further documentation on the land exchange issue. Its argument that HOOT continued to attempt to effectuate the land exchange through June 30, 1992, the date of the final payment by HOOT for the Ualena Street properties, relies on a deposition of the then-Deputy Director of HDOT. That official, by her own admission however, did not participate in the negotiations with the Ualena Street fee owners. There is no other evidence or documentation supporting the State's argument that it had valid airport purposes, well into 1992, for purchasing the Kapolei property. The State however, requests that the Department not require it to pay imputed interest on the funds it used for purchase of the Kapolei property, stating that it would impose a significant and unnecessary punitive burden on the State, which is undergoing its own fiscal crisis.

3. Findings

We find, as described in the IG's audit report, that HDOT agreed to purchase the Ualena Street property on July 23, 1991, and signed the settlement agreement with the lessees on August 30, 1991. The Ualena Street property owners, accordingly, had agreed to accept a cash payment from the State, rather than exchange their property for the Kapolei land. It was also clear that the displaced Ualena Street tenants would not relocate to the Kapolei land.

In November 1991, the HDOT used $64.4 million in airport revenues to purchase the Kapolei land. The record submitted by the State supports its contention that there was a valid airport interest in the Kapolei property until, at the latest, a August 30, 1991 board of directors meeting of a Ualena Street fee owner. We find no additional documented evidence to support the State's contention that there was a valid airport interest in the Kapolei property by November 1991.

B. Law on Recovery of Interest

The State has argued that the revenue retention requirement does not specifically provide for the recovery of interest by the airport and it is not within the Department's authority to require payment of interest.

This argument, however overlooks the statutory provision requiring the Secretary to provide an opportunity for the airport sponsor to take corrective action to cure an unlawful revenue diversion. (49 U.S.C. 47111(e)). The statutory program to enforce
the revenue diversion prohibition, moreover, explicitly relies on Secretarial discretion to determine the type and extent of corrective action necessary. ² It is within the reasonable discretion of the Secretary to require a sponsor that has unlawfully diverted airport revenue to make corrective action to repay the airport fund the amount of the diversion plus interest.

Even without the specific provisions relating to corrective action, the statutory AIP program vests the Department with discretion in assuring compliance with the grant assurances. For example, the written assurances on use of revenue must be "satisfactory to the Secretary" that airport-generated revenues will be used for the airport and related airport system. 49 U.S.C. 47107(b). Furthermore, to "ensure compliance" with the grant assurances, the Secretary shall prescribe requirements for sponsors as he or she "considers necessary." 49 U.S.C. 47107(g). What is "necessary and satisfactory" to carry out the grant conditions is a matter of discretion of the Secretary. New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989).

The FAA's Notice of proposed policy (NPP) and request for comments on "Policy and Procedures Concerning the Use of Airport Revenue"³ announces FAA's intention to normally require the recovery of the diverted amount and associated interest, in cases of unlawful airport revenue diversion:

IX. Monitoring and Compliance

B. Investigation of Revenue Diversion:
No Formal Complaint Filed

² 49 U.S.C. 47111(e), "Action on Grant Assurances Concerning Airport Revenues." provides, in pertinent part:

If, after notice and opportunity for a hearing, the Secretary finds a violation of section 47107(b) of this title [Written Assurances on Use of Revenue], . . . , and the Secretary has provided an opportunity for the airport sponsor to take corrective action to cure such violation, and such corrective action has not been taken within the period of time set by the Secretary, the Secretary shall withhold approval of any new grant application for funds under this chapter, . . . Such applications may thereafter be approved only upon a finding by the Secretary that such corrective action as the Secretary requires has been taken to address the violation and that the violation no longer exists. (Italics supplied).

1. Admission of unlawful revenue diversion. If the sponsor admits to unlawful diversion, the FAA will require the diverted amount and associated interest to be remitted to the airport account within a reasonable period of time. If the sponsor complies, the FAA will take no further action.

E. Sanctions for Noncompliance

As explained above, if the FAA makes a preliminary finding that airport revenue has been unlawfully diverted and the sponsor declines to take the corrective action (which usually would involve crediting the diverted amount to the airport account with interest), the FAA will propose enforcement action.

(61 Fed. Reg. 6143)

The NPP is consistent with FAA precedent requiring the repayment of associated interest in cases of unlawful revenue diversion. For example, in 1992, the municipal owner of an airport admitted to unlawful diversion of airport revenues, from 1989 to 1992, consisting of $2.1 million in commissions from long-distance telephone calls. It repaid the principal amount plus $300,000 in interest to its airport division, when notified by the OIG and FAA. The amount of interest sought and recovered equaled the lost earnings by the airport division, during the period in question.

FAA policy in this area is consistent with the long-standing federal common law obligation for States and municipalities to pay prejudgment interest on debts owed to the Federal Government. See, United States v. Texas, 507 U.S. 529; 123 L. Ed. 2d 245, 251 (1993), holding that the Debt Collection Act of 1982 left in place the States' federal common law obligation to pay prejudgment interest on debts owed to the Federal Government, and that Texas was liable for interest on losses it incurred through participation in the Food Stamp Program. That the imposition of such interest may work a hardship on the State is not a valid reason for relieving the State of such liability. See, West Virginia v. United States, 479 U.S. 305 (1987), holding the State of West Virginia liable for prejudgment interest on the debt arising from its obligation to reimburse the U.S. for services rendered by the Army Corps of Engineers under the 1970 Disaster Relief Act. Additionally, holders of federal grant money are required, absent specific authorization to the contrary, to refund any interest earned on that money to the federal government. See, Commonwealth of Pennsylvania v. Department of Health and Human Services, 996 F.2d 1505, 1511 (3rd Cir. 1993).

Considerations of equity and fairness may be weighed to determine the actual duty to pay interest (in addition to the principal) in the absence of an explicit congressional directive. See, Blau v. Lehman, 368 U.S. 403 (1962) (lower court's denial of interest in a private action under Securities Exchange Act not manifestly unfair or inequitable); Board of Commissioners of Jackson County v. United States, 308 U.S. 343, (1939) (denial of interest by county to United States, on behalf of an Indian, on repayment of
county property taxes, because the county acted innocently and had no reason to
know the taxes were not properly the county's); Federal Deposit Insurance
Corporation v. Rocket Oil Company, 865 F.2d 1158 (10th Cir. 1989) (denial of
prejudgment interest to FDIC under the National Bank Act based on equitable
considerations of the circumstances of Rocket Oil Company, who was forced to be a
creditor, in this case).

Courts have found the grant of interest to be a function of the following, among other
factors: (i) the need to fully compensate the wronged party for actual damages
suffered, (ii) considerations of fairness and the relative equities of the award, and/or
(iii) the remedial purpose of the statute involved. See, Wickham Contracting Co. Inc.
v. International Brotherhood of Electrical Workers, 955 F.2d 831 (2d Cir. 1992),
(affirming the award of prejudgment interest on damages recovered by Wickham
Contracting Co. under the Labor Management Relations Act, which provides a civil
remedy to employers sustaining damages from secondary strike activity by a labor
organization). See also, cases cited and discussion of the law on prejudgment interest,
Wickham, op. cit. at 955 F.2d 833-838.

We have considered the equities involved in this case and have determined that the
State must pay interest to fully compensate the airport division for the misused
funds. We agree with the State that there was a legitimate airport purpose for the
property at the inception of the Kapolei land purchase. Over time, however, and
certainly by the fall of 1991, it became apparent to the State that the Ualena Street fee
owners were no longer interested in a land exchange with the Kapolei parcel due to
the zoning considerations; the fee owners preferred the cash payment. Additionally,
the Ualena Street lessees did not need the Kapolei land for relocation. The HDOT
therefore used $64.4 million of the airport revenues in November 1991 to purchase the
Kapolei property without a documented, legitimate airport purpose.

Further, there was no long-standing reliance by the State of Hawaii on FAA or other
federal action permitting the use of airport revenues to purchase property not needed
for airport purposes. Moreover, there was no confusion on the part of the State as to
the meaning of the revenue retention requirement in connection with use of revenues
to purchase off-airport property. Since it is apparent that the State knowingly
diverted the airport revenues to an unlawful use, we agree that the FAA must assess
interest on the State's repayment to the Airports Division.

The State of Hawaii, as a federal grantee, is aware that it must use all its airport
revenues generally for the airport system, except to the extent inconsistent with
certain pre-September 2, 1982 financing legislation. (Section 511(a)(12) of the Airport
and Airway Improvement Act of 1982; recodified as 49 U.S.C. 47107(b)). Hawaii's pre-
AAIA financing statutes authorize five percent of the airport revenues to be
transferred to the State common fund. (See March 7, 1994 DOT Office of the Inspector
General "Interim Summary Report on the Audit of Monitoring Airport Revenue,
Federal Aviation Administration", at 14, noting the 1993 advisory opinion on this issue
by the Assistant General Counsel for Environmental, Civil Rights and General Law).
More specifically, as early as 1989, the State knew any diversion of the revenues the Honolulu airport received from its lucrative off-airport duty-free shop would violate the revenue retention requirement. The State pursued a federal legislative amendment, which was enacted in 1990, to permit it to use up to $250 million of such surplus airport revenue, for certain airport access highway projects. (This is described in the June 7, 1995 letter from Hawaii's Airports Administrator, Mr. Owen Miyamoto, to the Manager of FAA's Hawaii Airports District Office, Mr. Howard S. Yoshioka, entitled Exhibit 1 to the State's April 4, 1996 submission to the FAA's Director, Office of Airport Safety and Standards, Mr. David L. Bennett).

As the IG found, the State also knew, in November 1991, at the time of consummation of the transaction for the Kapolei land that the property would not be used for airport purposes and that use of airport revenues to purchase this land for the State was tantamount to unlawful revenue diversion. We find nothing in the State's submission on this point to contradict the IG's findings. Also, there was no attempt on the part of the State to request an opinion of the FAA as to the legality of the use of this substantial amount of funds.

Moreover, the federal government moved quickly when it uncovered the circumstances of the diversion. The Office of Inspector General's audit for the fiscal year ending June 30, 1993, occurred less than two years after the diversion of revenue and the OIG moved promptly to alert the State of its concern as to the legality of the transfer.

C. **Amount of Interest**

Since the statutory program does not specifically provide for the recovery of interest, there is some discretion in the methodology used by the FAA to calculate the interest recovery. We suggest, though, that the FAA should apply the method of interest calculation it selects consistently in other situations of recovery of diverted airport revenue and interest.

The IG calculated the interest recovery on the basis of the annualized return the State had been receiving on its pooled revenues, including the airport fund. This is a reasonable method of calculating interest, since it compensates the airport fund for the loss of the use of its money. It also is the method the FAA has followed in the past. We suggest the FAA use this method unless there are exceptional circumstances warranting use of another method.

III. **Analysis of Withholding Future Grants and Repayment of 1992 Grant Award**

A. **Hawaii's Use of Off-Airport Duty-Free Revenues**

1. **OST 1994 Legal Opinion**
Our December 1994 opinion explained that section 47107(j) was a limited exception to the general statutory requirement that airport sponsors retain all airport-generated revenue for lawful airport and airport-related purposes. We specifically interpreted the section 47107(j) statutory prohibition against Hawaii’s eligibility for receipt of AIP discretionary grants in "a fiscal year in which Hawaii uses" the $250 million of revenue generated by the off-airport duty-free facilities.

The State had argued that the only year in which it was ineligible to receive a discretionary airport grant was in fiscal 1991, when the HDOT Airports Division transferred the entire amount of eligible surplus airport revenues (i.e., the $250 million) to the HDOT Highways Division. The State regarded the transfer from the Airports fund as a "use" within the meaning of the statutory provision. We agreed that this transfer constituted such a "use," but disagreed that the term "use" could be read so narrowly. We interpreted the term "use" rather, to include (1) transferring, holding and making available the eligible surplus airport revenue for eligible construction projects; and (2) actually spending the eligible surplus airport revenue for eligible construction projects.

2. Hawaii’s Arguments
   a. Senator Inouye’s Letter

The State, in its April 4, 1996 submission to the FAA, included a June 7, 1995 letter from its airports administrator to the FAA, disagreeing with our December 1994 opinion. Hawaii’s airports administrator argued, first, that Congress intended Hawaii to be ineligible for discretionary grants only in the year in which the $250 million was transferred from Hawaii’s airports division fund to the transportation use special fund dedicated to eligible projects. He relied on a December 22, 1994 letter from Senator Inouye to Secretary Peña arguing as follows:

The term "use," as it appears in both Sections 511(a)(12) and 511(g) [recodified as 49 U.S.C. 47107(b) and 47107(j)], should be understood to have its common meaning. Under this approach, the Hawaii duty-free revenues were used by the state at the time they were initially transferred from the Airport Revenue Fund because, at that point, the administrator of the Airport Revenue Fund had lost all control over the monies and they were legally dedicated for use for eligible highway projects. . . .

Senator Inouye also was concerned that equating the term "use" with actual expenditure could have the negative effect of allowing other airports to transfer revenues to non-airport funds and hold the money without spending it.

b. Discussion and Legal Opinion

We disagree with the interpretation of "use" in Senator Inouye’s letter to the Secretary. Initially, we point out that statements by individuals Members of Congress made after the enactment of a statute are entitled to little or no weight. See, for example,
Our discussion of the term "use" in our December 1994 opinion was based on the common, dictionary meaning of the word. We do not agree that the term "use" in both the Hawaii Revenue Use exception (49 U.S.C. 47107(j)) and the Revenue Use Assurance (49 U.S.C. 47107(b)) means simply a transfer of control; this neglects the fact that the term "use" in 47107(b) refers to the term "expended," which means to "spend" or "use up." Webster's Third New International Dictionary, (1971). The common dictionary meaning of the word "use" is broad enough to include the following situations: "to expend or consume by putting to use"; "to put into action or service"; "to have recourse to or enjoyment of"; "to carry out a purpose by means of"; or "to make instrumental to an end or process." (Ibid.)

Both the terms "use" and "expend" in section 47107(b) were intended to have a broad meaning, however. This is evidenced in the legislative history behind the Revenue Use Assurance (as discussed in our December 1994 legal opinion). There, Congress described the revenue use assurance as requiring airports to "dedicate" airport-generated revenues to airport purposes; "utilize" airport revenues for those purposes; and recognized that certain financing arrangements at grandfathered airports require that airport revenues be "available for use" at other facilities. (1982 U.S. Code Congressional and Administrative News, 1473-1474). Congress construed the term "use" in its broad sense in 47107(b); the fact that it employed the same term in 47107(j) is further strength behind its intention to apply the same meaning.

Moreover, had Congress intended to prevent Hawaii from obtaining discretionary AIP grants only in the fiscal year in which the State transferred the funds to the highway special use account, it could have stated so specifically. (For example, another subsection to section 47107, explicitly refers to proceeds "deposited" in certain accounts. 49 U.S.C. 47107(c).

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4 49 U.S.C. 47107(b) WRITTEN ASSURANCES ON USE OF-reVENUES. --(1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that local taxes on aviation fuel (except taxes in effect on December 30, 1987) and the revenues generated by a public airport will be expended for the capital or operating costs of--(A) the airport; (B) the local airport system; or (C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.

(2) Paragraph (1) of this subsection does not apply if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator, or a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator. [emphasis supplied].
Additionally, Senator Inouye claims that Congress intended to mirror the 1989 Hawaii legislation, authorizing the "transfer" of duty-free revenues to a State fund, subject to federal law. It, however, is telling that, despite its knowledge of the State legislation, Congress selected to employ the broader term "use," rather than the more restrictive term "transfer." Limiting Hawaii's eligibility for AIP discretionary funds during the period in which the State uses the duty-free revenues is also consistent with the fact that the Hawaii Revenue Use exception is a limited exception to the general prohibition against diverting or transferring airport revenues for non airport-related purposes. 5

3. Hawai'i's Arguments

a. Secretary Skinner's Letter

The State also relies on an April 11, 1991 letter from then Secretary Skinner to the Director of HDOT approving, with conditions, the State's determination of airport actual and projected capital and operating costs and revenues for fiscal years 1990 and 1991, pursuant to 49 U.S.C. 47107(j)(5). 6 The airport administrator interprets this letter as an expectation by the Secretary that Hawaii's transfer of the full $250 million would be tantamount to its "use" within the meaning of the Hawaii Revenue Use exception.

b. Discussion and Legal Opinion

We disagree with this strained interpretation of the Secretary's letter. This letter responded to a statutory provision requiring the Department's technical verification of Hawaii's accounting system. 49 U.S.C. 47107(j)(5). Hawaii was not permitted to use any duty-free revenue for the eligible highway projects during a fiscal year unless its total airport revenue amounted to more than 150 percent of the projected costs for that fiscal year. 49 U.S.C. 47107(j)(2). Hawaii was required to determine its costs, revenue, and projected revenue increases and submit these determinations to the Secretary, who had 30 days within which to disapprove those determinations. 47107(j). The Secretary's April 1991 letter was an approval of Hawaii's determination, within the meaning of 47107(j)(5).

5 We stated in our December 1994 opinion (p. 6) that the provision in question is one excepting Hawaii from a rule of general applicability limiting the diversion of airport revenues, and where there is any doubt as to intent in such circumstances it "should be resolved in favor of the general provision rather than the exception," Sutherland Stat. Const. §47.11 (5th Ed.)

6 Hawaii was permitted to use airport revenue for the eligible highway projects only if its airport revenue and other income exceeded 150 percent of the projected airport capital and operating costs for such year. 49 U.S.C. 47107(j)(2). It must determine its airport costs, revenue, and projected revenue increases and submit them to the Secretary of Transportation, who approves or disapproves the determination. 49 U.S.C. 47107(j)(6).
Nowhere in the letter was there an indication that Hawaii would be eligible for AIP discretionary funds in fiscal year 1992 or thereafter. The State implies that the letter indicated that Hawaii would fulfill its obligation to use the $250 million by transferring those revenues out of the airports account. The Secretary’s letter, however, contemplated that Hawaii would be using the funds over a period of years for the eligible highway projects. The Secretary required Hawaii to "provide a certified report at the completion of each fiscal year (until all authorized funds are expended) documenting the amounts and specific projects toward which these funds were applied." (April 11, 1991 letter at 1). Moreover, the Secretary reminded the State that "the limitations imposed by the Act" must be "fully complied with." The Secretary’s letter supports our view that Hawaii is ineligible to receive AIP discretionary grants while it has available to use, or spends, any of the $250 million in surplus airport revenue.

4. Discussion on Hawaii’s Public Policy Argument

The airports administrator contends further that our reading of the statute results in bad public policy by encouraging the quick and inefficient dissipation of duty-free revenues for the eligible highway projects in order to avoid a later loss of AIP discretionary grants.

This argument ignores the legislative history of the Hawaii Revenue Use amendment, as was discussed in our December 1994 opinion. Representative Hammerschmidt, during floor discussion of the amendment, stated: "Hawaii would not be eligible for Airport Improvement Program grants in any year that it used duty-free store revenue for highway construction...". (November 20, 1989 Congressional Record--House at 9140).

In addition, without this special legislative exemption, Hawaii’s use of airport revenue for the highway projects at issue would violate the Federal grant assurances. 49 U.S.C. 47107(b); FAA’s proposed Policy and Procedures Concerning the Use of Airport Revenue, 61 Fed. Reg. 7134 (Feb. 26, 1996). There are no other airports in the country which are enjoying this exception from the revenue use assurance. Not being eligible for AIP discretionary grants is the price the State of Hawaii must pay for receiving this unique congressional exception from the revenue diversion prohibition. Indeed, the Federal Aviation Administration Authorization Act of 1994 has underscored congressional intent to restrict AIP discretionary grants in situations of lawful revenue diversion. See, section 112(d) of the 1994 Act; 49 U.S.C. 47115(f). The Secretary must consider as a factor militating against the award of discretionary grants whether an airport is engaging in lawful revenue diversion.

B. 1992 Discretionary Grants

You have asked whether our opinion would be affected by the fact that the 1992 award of the discretionary grants was to assist Hawaii in repairing damage from Hurricane Iniki at Honolulu International Airport and Lihue Airport. While we
sympathize with the State for the damage caused by the hurricane, we are constrained by the plain terms of the statute to respond that our opinion is not affected by the circumstances of the discretionary grants.

The statutory language makes Hawaii ineligible for a discretionary grant in any fiscal year in which it uses the eligible surplus airport revenues. There is no exception—in the statute or in the legislative history—to this prohibition on its receipt of discretionary grant awards. In addition, there is a specific directive to the State to repay any AIP discretionary funds it receives during its period of ineligibility. This directive, combined with the absolute prohibition on receipt of discretionary grant awards, emphasizes the congressional concern that Hawaii not receive any discretionary funds during the period in which it is allowed to lawfully divert the eligible surplus airport revenues. Further, as we noted in our 1994 opinion, Congress intended the prohibition on AIP discretionary grants to be firm and to apply to "any year that it [i.e. Hawaii] used duty-free store revenue for highway construction..." 7

Since our opinion on this issue derives from the plain language of a Federal statute, that opinion obviously could change if the statutory language were altered. Thus, if a statute were enacted overriding the prohibition contained in 49 U.S.C. 47107(j)(6), our opinion would have to be revised accordingly.

We have coordinated this legal opinion with the FAA and note their concurrence.

We are attaching, for your information, the FAA's July 15, 1996 letter to Hawaii's Attorney General, following through on the OIG's recommendations.

Attachment

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7 Remarks of Representative Hammerschmidt, Congressional Record—House, November 20, 1989, at 9140.
Ms. Margery S. Bronster  
Attorney General  
State of Hawaii  
425 Queen Street  
Honolulu, HI 96813

Dear Ms. Bronster:

This is in response to your letter of March 27 to Federal Aviation Administration (FAA) Chief Counsel Nicholas Garaufis regarding the acquisition of land in the Kapolei area, and in further response to the final audit report of the Department of Transportation Office of the Inspector General (OIG) dated April 28, 1995.

In its report, the OIG recommended that the FAA:

1. Initiate the procedural steps necessary to reach a final determination regarding noncompliance with grant assurances, and ensure the state refunds $64.4 million to the Airports Division [of the Hawaii Department of Transportation (HDOT)].

2. Require the state to pay the Airports Division lost interest income of $6.5 million, as of June 30, 1994, resulting from $64.4 million in airport funds being used for nonairport purposes.

3. Withhold future AIP discretionary grants from the state until all airport revenues held by the Highways Division are expended.

4. Rescind the three AIP discretionary grants and require the state to refund grant funds of $5.6 million (as of July 1, 1994) to FAA for deposit in the discretionary fund established under Section 507(c) of the Airport and Airway Improvement Act of 1982, as amended (AAIA).

Recommendation 1. In your letter, you note that the State of Hawaii will not contest the recommendation to reimburse the airport fund for the $64.4 million of airport revenues used to purchase the Kapolei lands. We understand that the Governor has signed state legislation to issue bonds for the repayment of the full purchase price of $64.4 million, and that the proceeds are expected to be available for repayment of the airport account within the next several months.
Please notify the FAA Airports District Office when this transfer has been made.

Recommendation 2. Both the OIG and the FAA have made clear that interest generally must be included in the reimbursement of airport revenue diverted to general use. When the diverted revenue is repaid to the airport account, the accrued interest is added to the principal in order to reflect the full cost to the airport account and to remove any incentive to hold diverted funds in the general account.

In your letter, you argue that interest should not be assessed on the $64.4 million used to purchase the Kapolei land, because the purchase was intended to fulfill legitimate airport purposes and because the state is willing to settle the matter with the full repayment of the $64.4 million principal. We acknowledge that the purchase of the Kapolei land could have been a legitimate airport capital cost if the land had been used for the relocation of tenants displaced by airport development, or for a land swap to obtain land necessary for airport development. The record shows that the state initially intended to purchase the property for this legitimate purpose.

However, the record does not indicate that this purpose remained valid at the time of the purchase of the land in November 1991. The information submitted with your letter seems to indicate just the opposite: that HDOT knew some months before the purchase that the Ulana Street fee owners accepted an offer of cash, not land, for the property, and would not relocate to the Kapolei property. While a state official who did not participate in the negotiations with the owners thought that HDOT continued to try to negotiate a land swap through June 1992, the record otherwise does not reflect any discussion of an exchange of the Kapolei property after August 1991.

Accordingly, we cannot agree with the state that a valid airport purpose for the purchase of the Kapolei property continued to exist as late as November 1991, or that the circumstances of the purchase of the Kapolei property would warrant an exception, on legal or equitable grounds, from the general policy regarding accrual of interest on diverted airport revenues.

In the audit report, the OIG recommended that the state reimburse the airport account for interest on the $64.4 million used to purchase the Kapolei property, assessed from the November 1991 purchase date at least through June 1994. In your letter, in addition to the substantive argument that the interest should not be assessed, you also argue for relief from the assessment of interest on the grounds that the state is experiencing a
interest on the grounds that the state is experiencing a
groove fiscal situation that will require program cuts and
employee layoffs.

We understand from the state's Washington, DC, legal
counsel that the state may have some proposed alternatives
for resolution of the interest issue that would not require
a direct transfer of funds from the general account to the
airport account. We also understand that the offer of
these alternatives is made only to resolve the open revenue
diversion audit and compliance investigation, and would not
represent an admission by the state that interest should be
assessed on the funds used for the Kapolei purchase. We
would be pleased to discuss the state's proposal, and we
will contact your Washington counsel to arrange a meeting
for this purpose within the next several weeks.

Recommendation 3. While the state has argued that there is
no current ban on grants of discretionary funds, the FAA
believes the issue was resolved by the legal opinion of the
Department of Transportation General Counsel's office in
December 1994. That opinion found that the $250 million of
duty-free funds transferred to HDOT were not "used," within
the meaning of 49 U.S.C. § 47017(b) and (j), as long as they
had not been expended on eligible projects. The FAA has
not issued any discretionary grants to the state since
fiscal year 1992 (FY-92), and will not issue any
discretionary grants to the state until all of the $250
million has been expended. We understand that the state
expects to complete the projects to be funded with these

Recommendation 4. In FY-92 the FAA awarded grants of
discretionary funds for special disaster relief to assist
the state in repairing damage caused by Hurricane Iniki at
Honolulu International and Lihue Airports. Upon review of
the circumstances of the grant, the funds used, and the
Department's legal opinion discussed under Recommendation 3
above, the FAA has concluded that the grants must be
rescinded and any expended funds restored to the Airport
and Airway Trust Fund. The state has actually expended
$322,555 of discretionary grants to repair security fencing
completed under Lihue Airport project AIP-14. This
expended amount has been converted from discretionary to
entitlement funds. The balance of FY-92 grants in
unliquidated amounts of $8,069,945 for Lihue AIP-14, and
$607,500 for Honolulu AIP-25, have been deobligated.
Further, through an administrative error, a portion of the
discretionary funds was used to fund a project at Keahole
Airport with the commensurate amount of entitlement funds
in the project at Lihue Airport. This administrative error
has been corrected by assigning the funds as originally
intended. Therefore, the entire State of Hawaii FY-92
of $7 million has now been returned, and no further action by the state is required.

We appreciate the state's cooperation in addressing the issues raised in the OIG audit. We will contact your Washington counsel in the near future to discuss means of resolving the remaining open issue under Recommendation 2.

If you have any other questions on this matter, please contact Mr. Howard Yoshioka, Manager of the FAA Hawaii Airports District Office, at 808-541-1232.

Sincerely,

[Signature]

David L. Bennett
Director, Office of Airport Safety and Standards
July 10, 2000

Mr. John Milligan  
Supervisor Standards Section AWP-621  
Federal Aviation Administration  
Western-Pacific Region Airports Division  
P.O. Box 92007 WWPC  
Los Angeles, California 90009

Dear John,

I again apologize for not being able to attend the June 7th meeting regarding the proposed Airport Park and the pending issuance of a Notice of Preparation for the Environmental Impact Report. I understand that the meeting went very well and was pleased to hear that you and Herman were generally supportive of the proposed project. I have been debriefed by Marty, Jeff & Karen and I am writing this letter to confirm my understanding of your discussions regarding the City's compliance with the terms and conditions of the 1984 Agreement in relationship the proposed Airport Park project.

It is my understanding that Herman would like us to further clarify the issue of the Airport's ability to park the 550 based and 40 transient aircraft required under the 1984 Agreement and that you felt we could obtain the FAA's sign off on this issue through the preparation of a combined EIR/EIS for Airport Park. The EIS would only cover the issue of aircraft parking spaces to show that the development of the proposed Airport Park project on the designated residual land will not impact the required number of aircraft parking spaces. Through this process we will produce a map depicting the required aircraft parking spaces for both versions of the park plan (i.e. locating vehicle parking in portion of mid-level tie down area, or locating it to the west of the fields next to Donald Douglas Loop South). I further understand that the wing-span, or the size of the aircraft, is not a critical issue so long as the layout is representative of the 1983 fleet mix based at the Airport. I am happy to say that the third FBO issue is now behind us with the City Council approval of a long term lease with American Flyers.

The City is on the verge of embarking on the EIR for the Airport Park in accordance with the requirements of California Environmental Quality Act. Based upon your request, we plan to include a limited EIS to verify the aircraft parking count as part of the environmental analysis. If this is not your recollection of the comments made during the meeting, please let me know as soon as possible so I can advise the rest of the staff. If I don't hear from you within the next ten days, we will proceed with the Notice of Preparation for the EIR/EIS.

JUL 1 2000

tel: 310 458-8591 • fax: 310 572-4495
I will forward to you for review and comment all pertinent documents generated during the environmental analysis and will keep you apprised of significant events as they occur. The Airport Park, and its recreation facilities and jogging paths, will enhance public acceptance of the Airport in the communities in the immediate area of the Airport. Airport revenue will not be used to support either the capital or operating costs of Airport Park. If you have any questions or desire additional information regarding this matter, please don't hesitate to give me a call at (310) 458-8772.

Sincerely,

Bob Trimborn
Airport Manager

cc: Herman Bliss, Airport Division Manager AWP-600 A
SANTA MONICA MUNICIPAL AIRPORT RUNWAY SAFETY AREA STUDY

Dr. Antonio A. Trani
Virginia Tech

September 21, 2018
# Table of Contents

BACKGROUND OF THE PROBLEM

RUNWAY SAFETY ANALYSIS TASKS

AIR TRAFFIC AT SANTA MONICA MUNICIPAL AIRPORT

RUNWAY SAFETY AREA ALTERNATIVES MODELED

RISK ASSESSMENT METHOD

ACCIDENT FREQUENCY MODELS

ACCIDENT LOCATION MODELS

ACCIDENT RATES CONSIDERING DIVERSE AIRCRAFT TYPES

ALTERNATIVE EVALUATION OF RELATIVE RISK

DYNAMICS OF AIRCRAFT OVERRUNS

ESTIMATING ACCIDENTS OVER TIME AT SANTA MONICA

OTHER BENEFITS OF PAVED RUNWAY SAFETY AREAS

CONCLUSIONS AND FINAL RECOMMENDATION

REFERENCES
Background of the Problem

The City of Santa Monica and the Federal Government entered into Consent Decree that authorizes provides the option should the City elect to close the Santa Monica Municipal Airport (SMO) in the year 2028 (1). The agreement authorized the reduction of the runway length from 5,000 feet to 3,500 feet. SMO has a generous runway width of 150 feet. With the shortening of the runway, 750 by 150 feet of paved areas are available at each runway end. The reduction in runway length to 3,500 feet limits the number of jet operations at the airport and provides space for Federal Aviation Administration (FAA) mandated Runway Safety Areas (RSA). The RSA areas for this class of airport (considering Runway Design Code B-II) require a minimum of 300 feet beyond the departure runway end and 300 feet prior to the runway landing threshold (2). Figure 1 shows the schematic of the runway length changes.

![Figure 1 Santa Monica Municipal Airport Runway Shortening Alternative B. Source: City of Santa Monica.](attachment:figure1.jpg)

The provision of 750 feet of paved areas at both ends of runway 3-21 provides an additional safety margin for aircraft operating at Santa Monica Municipal airport today. A plan to remove pavement from the existing runway to comply with the minimum 300-foot long RSA area seems unwise and could adversely affect the safety of the operations at SMO for the next ten years. A safety analysis to understand the implications of this decision is the subject of this report.

Runway Safety Analysis Tasks

The following tasks have been completed as part of the safety study for the Santa Monica Municipal airport:

a) Review the accident safety record of the Santa Monica Municipal Airport,
b) Examine existing risk analysis models to estimate the relative safety and accident risk of various runway safety area configurations for the Santa Monica Municipal Airport,

c) Quantify the relative risk and safety margins offered by the existing 750 by 150-foot paved surface compared to the standard 300 by 150-foot unpaved runway safety area mandated by the Federal Aviation Administration.

The analysis presented in this report employs risk assessment methods developed by the Airport Cooperative Research Program (ACRP) for the FAA with adaptations to predict accident risk for General Aviation aircraft.

**Air Traffic at Santa Monica Municipal Airport**

According to the FAA Terminal Area Forecast historical data (FAA, 2018), Santa Mónica Municipal Airport had a significant decline in traffic from its peak year of 1992 with 240,350 annual operations. In 2017, the airport registered 77,594 operations (see Figure 2). The reduction in the number of operations is consistent with the observed trends in the number of General Aviation operations over the years in the Los Angeles area (see Figure 3) and, more generally, in the United States. In the Los Angeles area, only Los Angeles International Airport has experienced growth in the past 15 years. According to the FAA, Santa Monica Municipal airport projects modest growth of in the next ten years (3.6%). Figure 4 shows the expected growth in operations for SMO.

![Figure 2 Santa Monica Municipal Airport Traffic (2005-2017). Source: FAA ATADS System.](image-url)
After the reduction of the runway length from 5,000 feet to 3,500 feet, the aircraft fleet mix has changed significantly at the Santa Monica Municipal Airport (SMO). Large and super mid-size business jets (e.g., Gulfstream G-IV, Bombardier Challenger 300) used to operate regularly at SMO before the reduction in runway length. Today, mostly small business jets (e.g., Embraer Phenom 300) and a few mid-size jets (e.g., Cessna Sovereign) continue to operate at SMO due to the new runway length limitations. Figure 5 shows the distribution of aircraft types operating at SMO using recent traffic statistics (January 1 to June 30, 2018). The figure shows that 73.5% of the airport operations are performed by single and multi-engine piston aircraft. 14.6% of the operations are turboprop aircraft and 5.1% attributed to jet aircraft. 6.8% of the airport operations are performed by helicopters.
Figure 5 Breakdown of Aircraft Types Operating at Santa Monica Municipal Airport. Source: City of Santa Monica.

Figure 6 shows the runway length requirements for selected turboprop and small business jets aircraft operating at SMO. The figure includes two typical mission trip lengths (600 and 1,000 nm) and the takeoff field length at maximum takeoff gross weight obtained from the aircraft manufacturer performance data (Business and Commercial Aviation, 2018). Figure 6 shows that some turboprop aircraft such as the Beechcraft Raytheon King Air B200 have limitations in runway length while operating at SMO today. According to Figure 6, the B200 can operate in shorter 300 nm missions from SMO, but not in the longer mission profiles shown in Figure 6. The runway length requirements for the Embraer Phenom and the Beechcraft King Air B350 are close to the available runway length at SMO. These facts are relevant because the procedure to assess runway safety area risk considers runway length available as a critical parameter in the estimation of the probability of an accident at the airport. The higher the ratio of runway length required and the runway length available, the higher the likelihood of an accident overrun.

Figure 7 shows the runway length requirements for selected piston-powered aircraft operating at SMO. The figure includes two typical trip lengths (300 and 600 nm) and the takeoff field length at maximum takeoff gross weight obtained from the aircraft manufacturer performance data (Business and Commercial Aviation, 2018). Figure 7 shows that Cirrus SR-20 have longer runway length requirements compared to the more powerful Cirrus SR-22.
Figure 6 Runway Length requirements for Selected Turboprop and Jet Aircraft Operating at Santa Monica Municipal Airport. Source: Business and Commercial Aviation (May 2018).

Figure 7 Runway Length requirements for Selected Piston Aircraft Operating at Santa Monica Municipal Airport. Source: Business and Commercial Aviation (May 2018).

Runway Safety Area Alternatives Modeled

To make a risk assessment, we investigated three runway safety area configurations of the runway at SMO. Figure 8 shows the three configurations side by side. Configuration 1 involves a 750 x 200-foot runway safety area includes a 750 x 200-foot paved area beyond the runway end. Configuration 2 removes 750 feet of pavement on each side of runway 3-21 at SMO. Configuration 2 requires a 150-foot paved
blast pad area. Configuration 3 is a 300 x 200-foot paved runway safety area. All RSA configuration areas meet the minimum standard runway safety criteria dimensions required by the FAA for runway code B-II (300 x 500-foot). All RSA configurations studied comply with FAA Runway Safety requirements (300 feet RSA before landing runway threshold and beyond the landing runway end) for aircraft design group II and approach speed group B. A large paved area at each end of the 3,500 foot-runway offers an additional buffer to contain an aircraft that overruns on landing (or takeoff); or a plane that touches down before the runway threshold (undershoot).

Figure 8 Runway Safety Area Configurations Studied for Santa Monica Municipal Airport.
Risk Assessment Method

The risk assessment method adopted in this study is presented in detail in the Airport Cooperative Research Program report 50 (ACRP, 2011). The risk assessment process requires a three-part risk modeling process: a) determine accident event probability; b) determine the event location and c) modeling consequences (see Figure 9). The analysis presented in this study measures the relative level of safety offered of three configuration RSA alternatives.

Figure 9 ACRP Runway Safety Area Risk Modeling Process (ACRP Report 50, 2011).

Accident Frequency Models

ACRP Report 50 offers a family of logistic regression models to estimate the probability of an accident at an airport. The models presented in ACRP report 50 consider several independent variables including: aircraft size, aircraft user class, visibility conditions, wind conditions, adverse weather conditions like rain, fog, icing, and the log criticality factor which measures the ratio of the aircraft runway length required vs. the actual runway available for the operation (i.e., landing or takeoff). Figure 10 shows the coefficients of the independent variables and the general logistic regression equation used in the analysis. Figure 10 shows five distinct models developed depending upon the type of accident scenario of interest. For example, the column labeled LDOR represents the independent variable coefficients for the landing overrun events. LDUS is a landing undershoot event and TOOR represents a takeoff overrun event. For this study veer-off events (labeled LDVO and TOVO) were not considered because the relative risk assessment assumes that SMO maintains the same runway/taxiway configuration present today.

In the accident event analysis, we used typical environmental conditions at Santa Monica. The accident database used in the derivation of the coefficients of the independent variables include 41% of business jets. Nevertheless, the authors of the ACRP report ignored many accidents involving aircraft with a gross weight of less than 6,000 lb. This fact requires some corrections in the analysis.

Accident Location Models

ACRP Report 50 developed a family of exponential regression models to estimate the location of an accident from a runway end or the extended runway centerline. Figure 11 shows the family of equations used to estimate the location of an accident for five accident types. This study only considers LDOR, LUS and
TOOR accidents. Figure 12 shows a sample application of the landing overrun location model to demonstrate that a 750-foot paved area beyond a runway end offers a five-fold improvement in containing a landing overrun compared to a 150-foot paved area.

**Accident Rates Considering Diverse Aircraft Types**

Combining the accident frequency and the accident location model models, we estimate the probability of an accident outside of the paved area for each one of the three RSA configurations (see Figure 8). Tables 1-3 summarize the probabilities of an accident for three aircraft groups typically represented at SMO. For this analysis, we used the runway length requirements of the Cirrus SR20 (piston), the Beechcraft King Air B200 (turboprop) and the Embraer Phenom 300 (jet). These three aircraft represent the three major aircraft groups operating at SMO. The tables contain probabilities that an aircraft of each type has an accident outside the paved area for three accident scenarios considered: Landing Overrun (LDOR), Landing Undershoot (LFUS) and Takeoff overrun (TOOR). The results of this evaluation suggest that Configuration 1 is 6.9 to 3.2 times “safer” compared to Configuration 2 when the safety metric is the probability of having an accident outside the paved RSA area. Table 4 shows the relative risk when comparing Configurations 1 and 2.

Table 5 shows the relative risk when comparing Configurations 3 and 2.

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<td>-0.772</td>
<td>-1.144</td>
<td>-0.114</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ceiling 1000 to 2500 ft</td>
<td>-0.345</td>
<td>-0.721</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Visibility less than 2 SM</td>
<td>2.881</td>
<td>3.096</td>
<td>2.143</td>
<td>1.364</td>
<td>2.042</td>
</tr>
<tr>
<td>Visibility from 2 to 4 SM</td>
<td>1.532</td>
<td>1.824</td>
<td>-0.334</td>
<td>0.808</td>
<td></td>
</tr>
<tr>
<td>Visibility from 4 to 8 SM</td>
<td>0.200</td>
<td>0.416</td>
<td>0.652</td>
<td>-1.500</td>
<td></td>
</tr>
<tr>
<td>Xwind from 5 to 12 kt</td>
<td>-0.913</td>
<td>-0.295</td>
<td>0.653</td>
<td>-0.695</td>
<td>0.102</td>
</tr>
<tr>
<td>Xwind from 2 to 5 kt</td>
<td>-1.342</td>
<td>-0.698</td>
<td>-0.091</td>
<td>-1.045</td>
<td></td>
</tr>
<tr>
<td>Xwind more than 12 kt</td>
<td>-0.921</td>
<td>-1.166</td>
<td>2.192</td>
<td>0.219</td>
<td>0.706</td>
</tr>
<tr>
<td>Tailwind from 5 to 12 kt</td>
<td>0.066</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tailwind more than 12 kt</td>
<td>0.786</td>
<td>0.98</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Temp less than 5 C</td>
<td>0.043</td>
<td>0.197</td>
<td>0.558</td>
<td>0.299</td>
<td>0.988</td>
</tr>
<tr>
<td>Temp from 5 to 15 C</td>
<td>-0.019</td>
<td>-0.717</td>
<td>-0.453</td>
<td>-0.544</td>
<td>-0.42</td>
</tr>
<tr>
<td>Temp more than 25 C</td>
<td>-1.067</td>
<td>-0.463</td>
<td>0.291</td>
<td>0.315</td>
<td>-0.921</td>
</tr>
<tr>
<td>Icing Conditions</td>
<td>2.007</td>
<td>2.703</td>
<td>2.67</td>
<td>3.324</td>
<td></td>
</tr>
<tr>
<td>Rain</td>
<td>0.991</td>
<td>-0.126</td>
<td>0.355</td>
<td>-1.541</td>
<td></td>
</tr>
<tr>
<td>Snow</td>
<td>0.449</td>
<td>-0.25</td>
<td>0.548</td>
<td>0.721</td>
<td>0.963</td>
</tr>
<tr>
<td>Frozen Precipitation</td>
<td>-0.103</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gusts</td>
<td>0.041</td>
<td>-0.036</td>
<td>0.006</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fog</td>
<td>1.74</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thunderstorm</td>
<td>-1.344</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Turboprop</td>
<td>-2.517</td>
<td>0.56</td>
<td>1.522</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign OD</td>
<td>0.929</td>
<td>1.354</td>
<td>-0.334</td>
<td>-0.236</td>
<td></td>
</tr>
<tr>
<td>Hub/Non-Hub Airport</td>
<td>1.334</td>
<td>-0.692</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log Criticality Factor</td>
<td>9.237</td>
<td>1.629</td>
<td>4.318</td>
<td>1.707</td>
<td></td>
</tr>
<tr>
<td>Night Conditions</td>
<td>-1.36</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure 10 ACRP Probability of Accident Occurrence Model (Source: ACRP Report 50).
Figure 11 Location of Accident Models (Source: ACRP Report 50).

<table>
<thead>
<tr>
<th>Type of Accident</th>
<th>Type of Data</th>
<th>Model</th>
<th>$R^2$</th>
<th># of Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>LDOR</td>
<td>X</td>
<td>$P(d &gt; x) = e^{-0.00321x^{0.8881}}$</td>
<td>99.8%</td>
<td>305</td>
</tr>
<tr>
<td></td>
<td>Y</td>
<td>$P(d &gt; y) = e^{-0.02659x^{0.863}}$</td>
<td>93.9%</td>
<td>225</td>
</tr>
<tr>
<td>LDUS</td>
<td>X</td>
<td>$P(d &gt; x) = e^{-0.0148x^{0.7769}}$</td>
<td>98.7%</td>
<td>83</td>
</tr>
<tr>
<td></td>
<td>Y</td>
<td>$P(d &gt; y) = e^{-0.02568x^{0.60165}}$</td>
<td>98.5%</td>
<td>86</td>
</tr>
<tr>
<td>LDVO</td>
<td>X</td>
<td>$P(d &gt; x) = e^{-0.00109x^{0.85794}}$</td>
<td>99.2%</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>Y</td>
<td>$P(d &gt; y) = e^{-0.04285x^{0.65366}}$</td>
<td>98.7%</td>
<td>90</td>
</tr>
<tr>
<td>TOOR</td>
<td>X</td>
<td>$P(d &gt; x) = e^{-0.0109x^{0.77045}}$</td>
<td>99.6%</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>Y</td>
<td>$P(d &gt; y) = e^{-0.0159x^{0.68981}}$</td>
<td>94.2%</td>
<td>39</td>
</tr>
</tbody>
</table>

Figure 12 Landing Overrun Longitudinal Location Model.
Table 1 Estimated Probabilities of Accident for RSA **Configuration 1** for Three Aircraft Groups Operating at Santa Monica Airport. The Probabilities in the Table Represent the Chance of an Aircraft having an Accident Outside the Paved RSA Area for that Configuration.

<table>
<thead>
<tr>
<th>Group</th>
<th>Probability of Landing Overrun</th>
<th>Probability of Landing Undershoot</th>
<th>Probability of Takeoff Overrun</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piston</td>
<td>1.4602E-08</td>
<td>1.7654E-08</td>
<td>8.2249E-09</td>
</tr>
<tr>
<td>Turboprop</td>
<td>3.8592E-08</td>
<td>1.9187E-08</td>
<td>2.2357E-08</td>
</tr>
<tr>
<td>Jet</td>
<td>3.6479E-08</td>
<td>1.8998E-08</td>
<td>2.2357E-08</td>
</tr>
</tbody>
</table>

Table 2 Estimated Probabilities of Accident for RSA **Configuration 2** for Three Aircraft Groups Operating at Santa Monica Airport. The Probabilities in the Table Represent the Chance of an Aircraft having an Accident Outside the Paved RSA Area for that Configuration.

<table>
<thead>
<tr>
<th>Group</th>
<th>Probability of Landing Overrun</th>
<th>Probability of Landing Undershoot</th>
<th>Probability of Takeoff Overrun</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piston</td>
<td>1.0111E-07</td>
<td>8.9563E-08</td>
<td>2.6553E-08</td>
</tr>
<tr>
<td>Turboprop</td>
<td>2.6722E-07</td>
<td>9.7342E-08</td>
<td>7.2179E-08</td>
</tr>
<tr>
<td>Jet</td>
<td>2.5259E-07</td>
<td>9.638E-08</td>
<td>7.2179E-08</td>
</tr>
</tbody>
</table>

Table 3 Estimated Probabilities of Accident for RSA **Configuration 3** for Three Aircraft Groups Operating at Santa Monica Airport. The Probabilities in the Table Represent the Chance of an Aircraft having an Accident Outside the Paved RSA Area for that Configuration.

<table>
<thead>
<tr>
<th>Group</th>
<th>Probability of Landing Overrun</th>
<th>Probability of Landing Undershoot</th>
<th>Probability of Takeoff Overrun</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piston</td>
<td>5.33293E-08</td>
<td>5.12743E-08</td>
<td>1.82737E-08</td>
</tr>
<tr>
<td>Turboprop</td>
<td>1.40947E-07</td>
<td>5.57274E-08</td>
<td>4.96732E-08</td>
</tr>
<tr>
<td>Jet</td>
<td>1.33229E-07</td>
<td>5.51767E-08</td>
<td>4.96732E-08</td>
</tr>
</tbody>
</table>

Table 4 Ratio of Probabilities of Accident for **Configurations 1 and 2**.

<table>
<thead>
<tr>
<th>Group</th>
<th>Ratio of Probabilities of Landing Overrun (Configuration 2/Configuration 1)</th>
<th>Ratio of Probabilities of Landing Undershoot (Configuration 2/Configuration 1)</th>
<th>Ratio of Probabilities of Takeoff Overrun (Configuration 2/Configuration 1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piston</td>
<td>6.9</td>
<td>5.1</td>
<td>3.2</td>
</tr>
<tr>
<td>Turboprop</td>
<td>6.9</td>
<td>5.1</td>
<td>3.2</td>
</tr>
<tr>
<td>Jet</td>
<td>6.9</td>
<td>5.1</td>
<td>3.2</td>
</tr>
</tbody>
</table>
Table 5 Ratio of Probabilities of Accident for Configurations 3 and 2.

<table>
<thead>
<tr>
<th>Group</th>
<th>Ratio of Probabilities of Landing Overrun (Configuration 2/Configuration 1)</th>
<th>Ratio of Probabilities of Landing Undershoot (Configuration 2/Configuration 1)</th>
<th>Ratio of Probabilities of Takeoff Overrun (Configuration 2/Configuration 1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piston</td>
<td>1.9</td>
<td>1.8</td>
<td>1.5</td>
</tr>
<tr>
<td>Turboprop</td>
<td>1.9</td>
<td>1.8</td>
<td>1.5</td>
</tr>
<tr>
<td>Jet</td>
<td>1.9</td>
<td>1.8</td>
<td>1.5</td>
</tr>
</tbody>
</table>

**Alternative Evaluation of Relative Risk**

The method presented in the previous section is similar to the techniques explained in ACRP report 50. An alternative method used to obtain a second evaluation of relative risk is to use the location models developed in ACRP Report 50 and implement a Monte Carlo simulation to estimate the location of accidents by simulated annealing. This process models the accident locations using the distributions of the location equations provided in ACRP 50 to estimate the distances beyond the runway end and the transverse position of the accident location from the extended centerline location. The probability distributions of longitudinal and transverse location are assumed to be independent random variables. For this analysis, we simulated 10 million landing or takeoff operations for each accident scenario modeled and estimate the probability that an accident occurs within the paved RSA area. A computer program was created to execute the analysis. Figure 13 illustrates the Monte Carlo simulation results for landing overrun accident locations for Configuration 1. The process is repeated for all three runway safety area configurations and three accident scenarios modeled.

Table 6 summarizes the percent of accidents contained within the paved section of the runway safety area for each RSA configuration. For example, 76.3% of the landing overrun accidents occur within the 750x200-foot paved section in Configuration 1. Similarly, only 30.2% of the landing overrun accidents are likely to happen within the 150 by 150-foot paved blast pad area of Configuration 2.

Table 7 shows the relative risk reduction between Configurations 1 and 2 and Configurations 3 and 2. A well-maintained, 750 by 200-foot paved area (Configuration 1) at Santa Monica airport decreases the runway risk and damage to aircraft in case of an accident by a factor of 1.8-3.8 (see Table 7) when compared to an unpaved area with a 150 feet long blast pad area (Configuration 2). The reduction in risk is between 1.5-2.0 when comparing Configuration 3 (300 by 200-foot paved area) and Configuration 2.

**Dynamics of Aircraft Overruns**

The ACRP Report 50 location models were derived from examination of the aircraft wreckage in actual runway overruns and undershoot events. Most airports have runway safety areas that are unpaved. As such, the location models in ACRP 50 have a particular bias in the final locations of the accident aircraft because most of the overruns occur in unpaved runway safety areas. When an aircraft overruns an unpaved area, ACRP reports an average deceleration rate of 2.1 m/s². When an aircraft overruns a paved area (such as the existing condition at Santa Monica Airport), pilots can maintain control of the aircraft and can achieve higher deceleration rates (~3.5 m/s² or more) as shown in Figure 14. An overrun with an aircraft leaving the runway at 70-knots over an unpaved RSA area results in a typical stopping distance of 272 meters. The same overrun event over a paved RSA requires 187 meters to stop. There is a 31% reduction in the stopping distance. The consequence of such an overrun is clear: the overrun over a paved area
would result in little or no damage to the aircraft. The overrun in an unpaved area will result in substantial damage to the aircraft.

Examination of actual overruns provides another data point on the actual dynamics of aircraft during accidents. Figure 15 shows the deceleration rates of a Gulfstream G-IV high-speed takeoff overrun at Bedford, MA. The runway in question had a paved section of 311 meters followed by an unpaved section 192 meters long. The estimated deceleration rates using the National Transportation Safety Board data transcript were 5.0 m/s² for the unpaved section and 2.1 m/s² for the unpaved section. In this accident, the deceleration rate on the paved section was possible with the use of thrust reversers, brakes, and spoilers.

![Figure 15: Deceleration Rates for Gulfstream G-IV Takeoff Overrun](image)

Figure 13 Monte Carlo Simulation of Landing Overrun Accident Locations for Configuration 1. The Blue Dots Represent Accident Locations Inside the Paved RSA Area. The Red Dots are Accidents Outside the Paved RSA Area.

![Figure 13: Monte Carlo Simulation of Landing Overrun Accident Locations](image)

Table 6 Percent of Accidents Contained by the Paved Area of the Runway Safety Area for Three RSA Configurations Studied.

<table>
<thead>
<tr>
<th>Configuration</th>
<th>Percent of Accidents Expected to Occur Inside RSA Paved Area Landing Overrun (%)</th>
<th>Percent of Accidents Expected to Occur Inside RSA Paved Area Landing Overshoot (%)</th>
<th>Percent of Accidents Expected to Occur Inside RSA Paved Area Takeoff Overrun (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>76.29</td>
<td>41.18</td>
<td>42.57</td>
</tr>
<tr>
<td>2</td>
<td>30.18</td>
<td>23.15</td>
<td>11.35</td>
</tr>
<tr>
<td>3</td>
<td>50.49</td>
<td>35.19</td>
<td>22.58</td>
</tr>
</tbody>
</table>
Table 7 Relative Risk of Accidents Contained by Paved Areas for Three Configurations Studied. Values are Normalized to 1 for Configuration 1. Higher Values in Table Indicate Improvements in Containing an Accident.

<table>
<thead>
<tr>
<th>Configuration</th>
<th>Ratio of Probability of Overrun Contained Inside the RSA Paved Areas</th>
<th>of Probability of Landing Undershoot Contained Inside Paved Area</th>
<th>Ratio of Probabilities of Takeoff Overrun Contained by Paved RSA Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2.50</td>
<td>1.80</td>
<td>3.80</td>
</tr>
<tr>
<td>2</td>
<td>1.00</td>
<td>1.00</td>
<td>1.00</td>
</tr>
<tr>
<td>3</td>
<td>1.70</td>
<td>1.50</td>
<td>2.00</td>
</tr>
</tbody>
</table>

Figure 14 Numerical Simulation Results of a Runway Overrun.

Figure 15 Gulfstream G-IV Takeoff Runway Overrun at Bedford, MA. Source of Data: NTSB/AAR-15/03 Report.
Estimating Accidents Over Time at Santa Monica

Aircraft accidents are rare events. Looking at the National Transportation Safety Board database, we found 36 accident events reported at Santa Monica between 1992 and 2017. Examination of accident events such as landing overruns, landing undershoots and takeoff overruns, we found that on average, SMO experiences one landing overrun every 708,600 landings. Similarly, the landing undershoot events occur once every 1,417 million landings. Figure 16 shows the summary of accident events at Santa Monica. Based on past accident statistics and using FAA forecast operations in the future, Santa Monica is likely to experience 1.53 runway accident excursion events in the next ten years. The methodology to predict accident rates in ACRP report 50 predicts a total of 0.6 runway excursion events over a ten-year period. This discrepancy was expected because the ACRP accident rate equations eliminated most General Aviation operations (aircraft with less than 6,000 lb. of takeoff weight). The analysis suggests that General Aviation runway excursion accidents are at least 2.55 times more frequently than commercial aviation runway accidents. Using this logic, we corrected the final estimate of the potential number of accidents at Santa Monica. Figure 17 summarizes the expected number of accidents at SMO over a ten-year period (2018-2028) showing the contributions to such accidents by aircraft type. As expected, piston-powered aircraft contribute 65% of the total expected accidents at SMO due to the large number of operations of such aircraft. Comparing the expected number of accidents for three RSA configurations, we conclude that a 750 by 200-foot paved RSA area, reduces the potential runway excursion events over a ten-year period by a factor of 2.66 (see Figure 17) compared to Configuration 2.

Table 8 summarizes the consequences of potential accidents at Santa Monica Municipal Airport for three RSA configurations. It is clear from Table 8, that Configuration 1 offers the best level of protection against aircraft damage and personal injury in case of an aircraft overrun or aircraft undershoot event.

![Figure 16 Santa Monica Accident Rates for Accident Events Modeled.](image)
Figure 17 Santa Monica Municipal Expected Accidents Over a Ten-Year Period (2018-2028).

Table 8 Consequence Analysis Table of Accidents at Santa Monica for Three RSA Configurations.

<table>
<thead>
<tr>
<th>Configuration</th>
<th>Landing Overrun</th>
<th>Landing Undershoot</th>
<th>Takeoff Overrun</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>No damage if overrun is contained to central 750 x 200-foot paved area</td>
<td>Minor damage if undershoot is contained to central 750 x 200-foot paved area</td>
<td>No damage if overrun is contained to central 750 x 200-foot paved area</td>
</tr>
<tr>
<td></td>
<td>Major damage if aircraft departs the central 750 x 200-foot paved area</td>
<td>Major damage if aircraft departs the central 750 x 200-foot paved area</td>
<td>Major damage if aircraft departs the central 750 x 200-foot paved area</td>
</tr>
<tr>
<td></td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
</tr>
<tr>
<td>2</td>
<td>Minor damage if overrun is contained to 150 x 150-foot blast pad paved area</td>
<td>Minor damage if overshoot is contained to 150 x 150-foot blast pad paved area</td>
<td>Minor damage if overrun is contained to 150 x 150-foot blast pad paved area</td>
</tr>
<tr>
<td></td>
<td>Major damage if aircraft departs the 150 x 150-foot paved area</td>
<td>Major damage if aircraft departs the 150 x 150-foot blast pad paved area</td>
<td>Major damage if aircraft departs the 150 x 150-foot paved area</td>
</tr>
<tr>
<td></td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
</tr>
<tr>
<td>3</td>
<td>No damage if overrun is contained to 300 x 150-foot paved area</td>
<td>No damage if undershoot is contained to the central 300 x 200-foot paved area</td>
<td>No damage if overrun is contained to 300 x 200-foot paved area</td>
</tr>
<tr>
<td></td>
<td>Minor damage if aircraft departs the central 300 x 200-foot paved area</td>
<td>Major damage if aircraft departs the central 300 x 150 ft paved area but inside the 500 ft wide RSA</td>
<td>Minor damage if aircraft departs the central 300 x 200-foot paved area</td>
</tr>
<tr>
<td></td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
<td>Catastrophic damage if aircraft undershoots the 750 x 500-foot RSA</td>
<td>Catastrophic damage if aircraft departs the 750 x 500-foot RSA</td>
</tr>
</tbody>
</table>
Other Benefits of Paved Runway Safety Areas

Paved runway safety areas have the added benefit of a potential reduction of wildlife strikes. Wildlife strikes are rare events (just like aircraft accidents). According to the national wildlife strike database, in 2016 there was one wildlife strike for every 5,966 operations (i.e., landings or takeoff) in the National Airspace System. Santa Monica reported 20 wildlife strikes in the period between 1996 and 2016, or one wildlife strike for every 113,000 operations at the airport. The average of wildlife strikes at SMO is well-below the national average. Adding a grassy area as part of the proposed runway safety area (Configuration 2) are likely to attract birds and increase the risk of a wildlife strike.
Conclusions and Final Recommendation

The following conclusions are the final results of the study.

1) A well-maintained, 750 by 200-foot paved area (Configuration 1) at both runway-ends of runway 3-21 at Santa Monica Municipal Airport decreases the expected number of hazardous accidents over a ten-year period by a factor of 2.26 (66% reduction in expected accidents) compared to an unpaved area with a 150-foot long blast pad area (Configuration 2).

2) Configuration 3 (paved area of 300 x 200 feet) could reduce by 25% the number of hazardous accidents compared to Configuration 2 (unpaved area with a 150-foot blast pad area).

3) A well-maintained, 750 by 200-foot paved area (Configuration 1) at Santa Monica airport decreases the runway risk and damage to aircraft in case of an accident by a factor of 1.8-3.8 (see Table 7) when compared to an unpaved area with a 150-foot blast pad area (Configuration 2).

4) The reduction in risk is between 1.5-2.0 when comparing Configuration 3 (300 by 200-foot paved area) and Configuration 2 - an unpaved area with a 150-foot blast pad area.

5) Paved runway safety areas provide an additional reduction in risk that is not completely addressed with the ACRP report 50 location models used in the analysis. When an aircraft overruns an unpaved area, the average deceleration rate is 2.1 m/s. When an aircraft overruns a paved area (such as the existing condition at SMO), pilots can maintain control of the aircraft and can achieve higher deceleration rates (~3.5 m/s or more).

6) Paved areas beyond the runway end are desirable to reduce hazardous and catastrophic damage to aircraft and property.

7) The consequences of aircraft overruns are critical and should be considered in the final decision for SMO. An overrun over a paved area would result in little or no damage to the aircraft. The overrun in an unpaved area will result in substantial damage to the aircraft.

Given that Santa Monica airport has 750-foot paved sections on both runway-ends, it is our recommendation to keep this configuration to maintain the level of safety of operations at the airport.
References

1) City of Santa Monica Airport Air Quality Study: Scope of Work, 2018, Available at: https://www.smgov.net/uploadedFiles/Departments/Airport/2017.10.23%20City%20of%20Santa%20Monica%20Air%20Quality%20Study%20Scope%20of%20Work.pdf


DECEMBER 2, 1993

Joseph R. Niemann, Esq.
General Counsel
City of St. Louis Airport Authority
Lambert-St. Louis International Airport
P.O. Box 10212
St. Louis, MO 63145

Re: Proposed purchase of TWA assets by the
City of St. Louis

Dear Mr. Niemann:

The Chief Counsel has referred to this office your letter of
October 19 requesting advice on the proposed purchase by the
City of St. Louis (City) of certain assets of Trans World
Airlines, Inc. (TWA). The City would lease back the assets to
TWA. Based on the information provided in the October 19
letter, as supplemented by letters from your Washington Counsel
dated October 22 and November 5, and assuming no default by
TWA, as discussed below, the proposed transactions do not
appear to be on their face inconsistent with the City’s federal
grant assurance obligations within the jurisdiction of the
Federal Aviation Administration (FAA).

Please understand that this letter provides only the present
views of this office on the City’s legal obligations, but does
not bind or constrain the FAA’s enforcement discretion or
preclude any changes in our legal views. In addition, under
the Airport and Airway Improvement Act of 1982, as amended
(AAIA), 49 U.S.C. App. 2201 et seq., air carriers and other
aeronautical users of the airport may file administrative
complaints asking the FAA to investigate alleged violations.
This letter does not bind the FAA to any particular resolution
in the event that such a complaint is filed regarding the
proposed transaction. This letter does not constitute FAA
approval of the transaction.
This letter addresses the following issues:

a. Whether the proposed transactions would be inconsistent with the requirement to provide access to Lambert-St. Louis International Airport (STL) on fair and reasonable terms without unjust discrimination contained in section 511(a)(1) of the AAIA, 49 U.S.C. 2210(a)(1);

b. Whether the proposed transactions would be inconsistent with Federal prohibitions on the grant of exclusive rights to use Federally-funded airports; and

c. Whether the proposed transactions would be inconsistent with the limitations on the use of airport revenues contained in Section 511(a)(12) of the AAIA, 49 U.S.C. App. 2210(a)(12).

The Proposed Transaction

The City is a creditor of TWA. To settle the City's claims in the TWA bankruptcy proceeding, TWA, the City, and the TWA Official Unsecured Creditors Committee have entered into a memorandum of understanding (MOU) that provides for the acquisition by the City of certain TWA assets. The assets would be leased back to TWA. The transaction is structured in two phases.

In Phase I, the City would purchase TWA's long-term leasehold interests at STL for the terminal, aprons, and air cargo facilities and TWA's personal property at STL, including loading bridges, baggage handling systems, ground power systems, deicing systems, hold-room seating, office furnishings, counters and millwork, flight information display systems and communications installations and all motorized and non-motorized ramp and maintenance equipment. The purchase price for this phase of the transaction is $30 million, consisting of $24.7 million cash and $5.3 million in forgiveness of the City's pre-petition claims against TWA. TWA would pay rents sufficient to reimburse the city for its $24.7 million investment and interest over the remaining useful life of the assets acquired. The City would use contingency funds in the airport's accounts for this payment.

TWA currently leases its terminal gates under a long-term exclusive lease. Under the MOU, the new gate lease would be on a month-to-month basis. In addition, to maintain an exclusive right to use all of its current gates, TWA would have to
maintain a minimum level of scheduled departures. If departures were to fall below the specified minimum, the City would have the right to reassign a portion of TWA's gates on a preferential use basis, and TWA's remaining gates would be converted from exclusive to preferential use.

In Phase II, the City would purchase TWA's leasehold interests in its Hangar/Maintenance/Office Building (located at the airport) and its Reservation Center (located off-airport) and TWA's fee title interest in its Flight Training Center (located adjacent to the airport). The purchase price for this transaction is $40 million. The source of the funds would be newly-issued, general airport revenue bonds. Rental rates would be set at a level designed to recover the City's investment, including interest on bonds issued by the City, over the remaining useful life of the assets.

The City is entering into this transaction to preserve the benefits to the airport and area residents of the presence of TWA's hub, and to recapture control over TWA's airport facilities currently under long-term exclusive lease to TWA.

Applicable Law

Your letter specifically requested advice on whether the proposed transactions are consistent with the City's grant assurances made to the FAA in accepting Federal Airport Improvement Program (AIP) grants under the AAIA. The statutorily mandated assurances appear at section 511 of the AAIA, 49 U.S.C. App. 2210. Sections 511(a)(1), 511(a)(2) and 511(a)(12) are relevant here.

Under section 511(a)(1), STL must be open to public use on fair and reasonable terms without unjust discrimination. In particular, each air carrier must be subject to such nondiscriminatory and substantially comparable rates, fees, rentals and other charges as are applicable to other carriers that make similar use of the airport. The airport sponsor may make reasonable classifications of air carriers, so long as a classification is not unreasonably withheld from a carrier that assumes the obligations imposed on other carriers in the classification.

Section 511(a)(2) prohibits the grant of an exclusive right for the use of the airport to any person providing aeronautical services to the public. Section 308 of the Federal Aviation Act, as amended, 49 U.S.C. App. 1349, also prohibits the grant of an exclusive right.
Section 511(a)(12) requires that all revenues generated by the airport be expended for the "capital or operating costs of the airport, the local airport system, or other local facilities" owned by the sponsor, which are "directly and substantially related to the actual air transportation of passengers or property." 49 U.S.C. App. 2210(a)(12). The current statutory language was enacted in 1987. The original provision permitted revenue to be expended for other local facilities "directly related to the transportation of persons or properties."

In adopting the original provision, Congress wanted to ensure that "airport systems which are receiving Federal assistance are utilizing all locally generated revenue for the systems which they operate." Congress acted to protect airport users from being "burdened with 'hidden taxation' for unrelated municipal services." H.R. Rep. 97-760 at 712, U.S. Code Congo. and Ad. News 1190, 1474 (1982).

Congress enacted the 1987 amendment as a way of "limiting" the authorization to spend airport revenue on other transportation facilities "to facilities directly and substantially related to the actual air transportation of passengers or property." H.R. Rep. No. 100-123. See also H.R. Rep. 100-484. Thus, the 1987 amendments were intended to narrow the scope of this authorization.

Application of law to proposed transactions:

a. Access on Fair and Reasonable Terms Without Unjust Discrimination

Based on the information contained in the October 19 and October 22 letters, the proposed transactions do not appear on their face to be inconsistent with the City's obligation to provide access on fair and reasonable terms without unjust discrimination. Section 511(a)(1) prohibits only unjust discrimination, not all discrimination. Section 511(a)(1) contemplates that carriers that do not make similar use of facilities might face different rates and charges; it explicitly authorizes sponsors to establish reasonable carrier classifications.

In this case, the City is apparently receiving concrete benefits in exchange for its acquisition of TWA property. First, TWA's terminal gate leases would be converted from long-term exclusive-use leases to month-to-month flexible-use leases. This change in status should make it easier for the City to regain control over its gates in the event of further
financial or other difficulties on the part of TWA. Second, the City is gaining a contractual commitment by TWA to maintain a given level of service, with the right to take back gates if that service is not maintained. We understand that no such commitment appears in the City's current leases with TWA. Finally, to the extent that the proposed transactions help assure TWA's continuing financial viability, the transactions will help secure to the City the benefits of having the major hub of a carrier with extensive domestic and international route systems. Unjust discrimination does not necessarily arise when a sponsor gives favorable lease terms to a single carrier in exchange for special benefits that do not accrue in a standard lease.

FAA's policy guidance recognizes that differences in a carrier's use of an airport can justify differences in rates and charges. FAA Order 5190.6A, Airport Compliance Requirements, (October 2, 1989) provides at par. 4-14(d) that "a sponsor may charge different rates to similar users of the airport if the differences can be justified as nondiscriminatory and such charges are substantially comparable. ** Differences in the values of properties involved and the extent of use made of the common use facilities are factors to be considered." TWA leases 57 gates and operates 210 regularly scheduled flights.

In light of all of these facts described above, there is no basis to conclude at this time that TWA's use of the airport is not sufficiently different from other carriers to justify different lease arrangements.

Finally, the MOU does not, by its terms, preclude the City from making similar terms available to a carrier that offers similar benefits to the City, and your letter of October 19 states that such arrangements are not foreclosed. Based on the foregoing representations, there is no basis to conclude at this time that the City is unreasonably withholding from other carriers the opportunity to achieve terms comparable to those offered to TWA.

To the same effect, in light of the foregoing, there is no basis to conclude at this time that the proposed transactions would be inconsistent with the City's obligation to provide access to the airport on fair and reasonable terms without unjust discrimination.
b. Prohibition on Exclusive Rights

The proposed transactions do not in concept appear to conflict with the prohibitions on the grant of exclusive rights. The City’s mere ownership of facilities does not itself give rise to a prohibited exclusive right. Ownership of airport facilities by the sponsor is not uncommon. In this case, we understand that TWA’s are not the only gates at STL and that carriers have access to other facilities of the same nature as those included in the transaction. As described in your letter, the transaction has the potential to ameliorate TWA’s exclusive-use rights. The leases are being converted from long-term exclusive-use leases to month-to-month leases that would convert to preferential-use leases with rights of recall for terminal gates in certain circumstances.

If, however, the City were to decline to offer substantially similar terms to another carrier offering substantially similar benefits to the City, the proposed transaction could be construed as an exclusive arrangement for TWA. Such an arrangement could be considered to grant TWA an exclusive right, as well as providing access on unjustly discriminatory terms.

c. Use of Airport Revenues

Section 511(a)(12) must be addressed separately for each phase of the transaction.

In Phase I of the transaction, the City will acquire TWA’s interest in property and equipment located on the airport that are used in TWA’s day-to-day operations of air carrier service. The acquisition cost will be financed by the forgiveness by the City of TWA’s prepetition debt and by a cash payment drawn from airport accounts. TWA will make rental payments designed to repay the cash payment (with interest) over the remaining useful life of the properties and equipment to be acquired.

Given the source of the cash payment, these funds appear to be drawn from airport revenue. In addition, TWA’s lease payments would qualify as airport revenue. However, the property and equipment to be acquired, such as gates, hold-room seating, and ramp equipment, all appear to qualify as airport capital assets. Accordingly, the use of airport revenue to finance the City’s purchase would qualify as the use of airport revenues to pay the capital costs of STL. As such, Phase I does not appear to be inconsistent with the City’s Federal obligations regarding the use of airport revenue.
The analysis of Phase II is more complicated. In that transaction, the City will purchase some on-airport assets (hangar and office building), some assets adjacent to the airport (flight training center) and off-airport assets (reservation center). The acquisition cost will be funded with airport revenue bonds. TWA would agree to pay rent sufficient to repay the bonds over the remaining useful life of the assets. General airport revenue would be used to repay the bonds only if TWA defaulted and the City could not find another tenant willing to assume TWA's obligations.

Your letter suggests that each of these assets is eligible for acquisition with airport revenue because they are (or will be) on the airport and are used by TWA in its air carrier business. Your letter also suggests that the Phase II transaction may be considered a permissible use of airport revenue because it is linked to phase I, which cannot proceed independently.

This office is not prepared at this time to fully endorse your analysis of section 511(a)(12) and your interpretation of airport capital costs. Nevertheless, based on representations by the City and its legal counsel since October 26, as discussed below, it does not appear that Phase II would be inconsistent with the requirements of section 511(a)(12).

A transaction would be consistent with section 511(a)(12) in either of two cases: (1) the funds used to acquire the property are not derived from airport revenue, or (2) the property to be acquired consists of airport capital assets under section 511(a)(12).

In considering whether airport revenue is involved, the first element of the analysis is the source of the purchase price itself -- bond proceeds. Unlike accumulated airport capital surpluses that are derived from airport revenues, bond proceeds themselves are not airport revenue. Rather they are a fresh infusion of capital. As such, nothing prohibits an airport operator from issuing bonds to acquire assets that are not "airport capital" within the meaning of section 511(a)(12), so long as airport revenues within the meaning of section 511(a)(12) are not used to repay those bonds.

The next step involves considering the funds that would be used to finance the bonds. Focusing on the parties' intentions to have TWA lease payments fully fund the bonds, it is reasonable to draw a linkage between the concepts of "airport capital costs" and "airport revenue."
To the extent that the assets included in Phase II qualify as airport capital assets, it is reasonable to treat the **pro rata** share of TWA's lease payments for those facilities as airport revenue. Airport revenue would be applied to fund airport capital costs (the costs of acquiring airport capital assets) and section 511(a)(12) would be satisfied. Conversely, for assets which do not qualify as airport capital assets, it would be reasonable to treat the **pro rata** share of TWA's lease payments for these assets as something other than airport revenue. Because airport revenue is not being used to finance these non-airport capital costs, section 511(a)(12) would not be implicated.

However, in the event of a default, where no other tenant was found to assume the lease payments on the TWA facilities, the bonds would be paid by general airport revenue. To the extent that the Phase II assets do not qualify as airport capital assets within the meaning of section 511(a)(12), the use of general airport revenues to repay the bonds would be inconsistent with that statutory provision.

The transaction may still be consistent with section 511(a)(12) if all of the property to be acquired consists of airport capital assets. Of the Phase II assets, we find that the hangar and associated maintenance and office facilities are airport capital assets on which airport revenue may be expended under section 511(a)(12). With respect to the training center, the Chief Counsel noted in a previous opinion that the office is "not prepared ... to interpret Section 511(a)(12) to permit the use of airport revenues to support off-airport pilot training facilities as a general principle." While that interpretation remains in effect, we have been advised by counsel for the City that the City intends to incorporate the pilot training facility into the airport, once it is acquired, and to submit a revised airport layout plan indicating that this property is part of the airport. On the basis of that representation, and the fact that the facility is adjacent to the current airport property, the training facility transfer might appropriately be viewed as the acquisition of an on-airport facility, although the issue is not entirely clear. On that basis, the potential use of airport revenues to fund the acquisition does not appear inconsistent with section 511(a)(12).

The only remaining property included in Phase II is the leasehold interest in an off-airport reservation center. Based on your letters and the subsequent representation of counsel for the City, the leasehold consists of a month-to-month lease
in commercial space in a shopping center, and the lease was given no value in the calculation of worth of TWA's transferred assets. In your letter you argue that the lease should be treated as de minimis in that the leasehold consists only of the current 30-day tenancy. Based on the information provided, i.e., your representation of zero value, the month-to-month lease might appropriately be considered a de minimis consideration to that extent. Accordingly, inclusion of the reservation center in the list of facilities which potentially may be funded by airport revenues does not appear inconsistent with section 511(a)(12) or with an earlier opinion of this office that airport revenue may not be used for the acquisition of an off-airport reservation center.

Based on the above, Phase II as proposed does not appear to be inconsistent with section 511(a)(12).

You should note that the City's obligation under section 511(a)(1) to provide access on fair and reasonable terms without unjust discrimination includes the obligation to charge fair, reasonable and not unjustly discriminatory rates, fees and charges. If TWA were to default on its obligations and the City were to raise general air carrier landing fees and user charges substantially to cover debt service for the Phase II bonds, questions might arise over the consistency of the new charges with this statutory obligation. Any questions would have to be resolved on the basis of the facts and circumstances at the time that the fees were raised. Among the factors that the FAA would consider in reviewing any complaint about the new user charges would be whether the remaining tenants used or otherwise benefited from the City's ownership of the Phase II assets. This letter should not be construed as addressing that issue.

Finally, as a matter of policy, the FAA discourages unlimited accumulation of airport revenue without expenditure on permissible capital projects. FAA Order 5190.6A, supra, at par. 4.20(c) provides that "the progressive accumulation of substantial amounts of airport revenues may suggest an inquiry into the reasonableness of user charges and fees. Unless the sustained accumulation of airport revenues can be viewed as building a reserve for periodic renewal of facilities (seal coating, re-roofing, etc.), the community should be urged to convert a reasonable amount of the airport revenues into improvements that would enhance the value of the airport to the community. ..." The FAA has not analyzed the issue of whether the City's ability to use existing airport funds to finance the Phase I transaction is consistent with the FAA's policy on accumulation of revenue. Therefore, this letter should not be construed as addressing this issue.
Please feel free to contact me if you have any questions regarding this letter.

Sincerely,

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