May 7, 2019

**Re: Santa Monica Municipal Airport**

Dear Mr. Armstrong:

This is the rebuttal by the City of Santa Monica (the “City”) to the April 5, 2019 reply submitted to the Federal Aviation Administration (“FAA”) by the National Business Aviation Association (“NBAA”), Aircraft Owners and Pilots Association (“AOPA) and General Aviation Manufacturers Association (“GAMA”) (collectively, the “complainants”). The City is grateful that FAA granted the City’s request for time, to May 8, 2019, to submit this rebuttal. The City was shocked, however, by the order FAA included in its April 19, 2019 letter granting the City’s request. Because immediate action is required, the City will address FAA’s order before turning to the City’s rebuttal.

**Urgent Request to Retract FAA’s Unjustified April 19 Order**

FAA’s April 19, 2019 letter to the City, which granted the requested time to submit the City’s rebuttal, contained the following surprising order: “no airport revenue may be used to fund the removal, pulverization, or destruction of the existing pavement of the former runway or taxiway areas, pending resolution of the NBAA/AOPA/GAMA complaint.” This mandate is contrary to FAA’s past guidance to the City – which the City has followed in good faith – and inconsistent with FAA’s well-established procedures for resolving complaints regarding use of airport revenue. If it is not retracted, FAA’s unexpected mandate, coming just before the City Council is set to establish the City’s fiscal year 2020 budget, will upend the City’s carefully planned budget process without providing any needed protection to federal interests or meaningful relief to the complainants. There was no basis for FAA to issue this unwarranted and unfair order and it should be rescinded immediately.
In Section II.A of the Settlement Agreement/Consent Decree between FAA and the City, FAA allowed the City to shorten the runway at Santa Monica Municipal Airport (the “Airport” or “SMO”). All of the work that is the subject of this proceeding is in furtherance of the approved runway shortening and consistent both with the Settlement Agreement/Consent Decree and with all applicable FAA safety and design specifications. Notably, neither the complainants nor FAA contend that the City was prohibited from shortening the runway or that the City may not remove runway and taxiway pavement which should no longer be in use. The issue before FAA in this proceeding is whether the City can properly use airport revenue to fund this work.

FAA, from the ADO up to Headquarters, has repeatedly advised the City that it could use airport revenue to fund the initial lighting and marking changes and the later removal of pavement, consistent with the provisions of the Settlement Agreement/Consent Decree that explicitly authorized the shortening of the runway. Following this advice from FAA, the City has appropriated money for this work from its Airport Fund and reasonably anticipated that it could use these appropriated funds for this purpose.

As the City explained in its initial response to the complaint, and further argues below, there is no sound basis for FAA to reverse its position and preclude the City from using airport revenue for either of the City’s runway shortening projects.

But even if FAA were ultimately to conclude in this Part 13 proceeding that its previous guidance was mistaken and that airport revenue cannot be used for the two runway shortening projects, FAA would ordinarily then give the sponsor an opportunity to terminate or correct the diversion before taking any formal enforcement action. See “Policy and Procedures Concerning the Use of Airport Revenue” (“Revenue Use Policy”), ¶ IX.B.1, 64 Fed. Reg. 7696, 7722 (Feb. 16, 1999); Compliance Guidance Letter 2014-01, ¶ III.E.2 (notice of potential noncompliance to request the airport sponsor take corrective action). Indeed, even if FAA completed an investigation on a formal complaint under Part 16 and found that the City could not use airport revenue for these projects, FAA would ordinarily dismiss the complaint if the City agreed to take corrective action and reimburse the Airport Fund. See Revenue Use Policy, ¶ IX.C, 64 Fed. Reg. 7723; Compliance Manual, Order 5190.6B, § 16.8(b); 49 U.S.C. 47107(m)(3) (administrative action appropriate only after sponsor has been notified it is required to reimburse the airport, has had an opportunity to do so, but has failed to make the reimbursement).

In this case, the City has been following FAA guidance that it could lawfully use airport revenue for the pavement removal work; FAA has yet to make even a preliminary determination that it will reverse its position and bar this use of airport revenue; and the City commits to reimburse its Airport Fund if it is ultimately required to do so – but FAA has nevertheless taken the

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1 The complainants correctly note that the initial shortening of the runway by lighting and marking changes (undertaken in 2017) and the removal of pavement from the runway (beyond the required RSA) and from taxiways and adjacent infield areas that are no longer properly in use (to be completed later this year) are distinct “projects” (Reply at 3 & n.2). The complainants’ reply clarified that they are challenging the use of airport revenue for both of these projects. FAA’s April 19 order only relates to the use of airport revenue for the pavement removal project.
precipitous and unjustified step of ordering the City not to use airport revenue to fund the pavement removal project, pending resolution of the complaint.

FAA’s April 19 order is akin to a temporary restraining order or preliminary injunction. Such orders are ordinarily issued only after notice and hearing, and only when the moving party can show that it has a likelihood of success on the merits, that it will suffer irreparable harm in the absence of preliminary relief, that the balance of harms tips in its favor, and that an injunction is in the public interest. See, e.g., Winter v. NRDC, 555 U.S. 7, 20-21 (2008) (vacating a preliminary injunction because there was no showing that irreparable injury was likely in the absence of an injunction). In this case, however, FAA’s mandate was issued without notice or any opportunity for the City to be heard; there is no risk whatsoever of irreparable harm to the complainants or to the federal interests protected by FAA; the City has proceeded in good faith to appropriate monies for the pavement project from its Airport Fund, consistent with FAA’s past guidance; and complainants have made no showing that they are likely ultimately to prevail on the merits.

After receiving the complainants’ April 5 reply – which is twice as long as their complaint and is accompanied by nearly 75 pages of new documentary material and various audio/visual files – on April 9 the City reasonably asked to be given 30 days to file this rebuttal. On April 10, through an email message, the complainants opposed this request (ironically claiming that the City had deliberately limited its own initial submission) and suggested that it would be “appropriate for the City to suspend the pavement removal” pending resolution of their complaint. Importantly, the complainants did not ask FAA to order the City to suspend the project – presumably because there is no doubt that the City can lawfully undertake the pavement removal work – nor did the complainants seek an order prohibiting the City from using airport revenue to fund this work while this matter is still pending. Accordingly, the City saw no reason to respond to the complainants’ April 10 message and awaited what it reasonably expected would be a routine scheduling order from FAA granting the requested time for the City to submit its rebuttal. The City was therefore understandably shocked when FAA elected on its own, without any specific request from the complainants and contrary to all its previous advice and ordinary procedures, to order the City not to use airport revenue for the pavement removal project during the pendency of the complaint, before FAA decides whether to stand by or repudiate its past guidance to the City.

The City is unaware of any precedent for such an extraordinary interim order in a revenue-use case anything like this one – where the airport sponsor’s proposed use of airport revenue is consistent with specific FAA guidance given to the sponsor in the past, and where the sponsor commits to fully reimburse the airport revenue fund if, in the end, it turns out that FAA reverses its past guidance. Indeed, the issuance of such an interim order in a revenue-use case before there has even been a preliminary finding of a violation is inconsistent with FAA’s Revenue Use Policy, which declares, consistent with 49 U.S.C. 47107(m)(3), that FAA will only propose enforcement action if FAA determines, after a hearing, that airport revenue has been unlawfully diverted and the sponsor declines to take […] corrective action.” Revenue Use Policy, ¶ IX.E,
64 Fed. Reg. 7723. This general policy underscores why FAA’s interim order in this particular revenue-use case is completely unjustified: because the City commits to reimburse the Airport Fund if it is ultimately determined that the use of airport revenue for pavement removal is prohibited, there is absolutely no risk of irreparable harm to federal interests or to the complainants if the City is permitted to use airport revenue to fund the pavement removal project while FAA continues to consider their complaint.

As for the federal interest: The City commits (without waiving its rights of appeal) that if FAA finds in a binding final order that the City used airport revenue for a prohibited purpose, the City will (after appeal, if any) cause its General Fund to reimburse its Airport Fund for the full amount of any unlawfully diverted revenue, with statutory interest as required by 49 U.S.C. § 47107(n). As FAA’s policies and procedures for the enforcement of the airport revenue-use rules make plain, this is sufficient to protect federal interests – and surely should be adequate when the disputed use of airport revenue is consistent with previous FAA guidance to the City. See, e.g., Revenue Use Policy, ¶ IX.B.1, 64 Fed. Reg. 7722 (FAA enforcement action “will cease if the airport sponsor agrees to return the diverted amount plus interest.”).

As for the complainants: As the City again explains below, the use of airport revenue for the pavement removal project will not have any effect on any airport users. The costs of removing the pavement will not find their way into any rate base or affect what any airport user – aeronautical or non-aeronautical – will be required to pay in the future for their use of the Airport. The Airport Fund currently has a sufficient balance to cover the costs of the project, so the use of airport revenue for this purpose will not undermine the Airport’s ability to remain financially self-sustaining or prevent the Airport from undertaking whatever other airport projects may call for funding in the future.

But if FAA refuses to retract its April 19 order, the City will be forced at the last moment to restructure its municipal budget – even though it followed FAA guidance when it planned to use airport revenue for the pavement removal project. In its current fiscal year, which ends June 30, 2019, the City has already appropriated $3,020,685 from the Airport Fund’s current balance to cover this work. If the previously appropriated Airport Fund money cannot be used for the project, the City will need to replace those funds by including an appropriation of $3,020,685 from the General Fund in the City’s next biennial budget, which will become effective July 1, 2019. The proposed budget will be published by May 23, in advance of public Council hearings scheduled for June 4 and 5. The City Council expects to act on the budget at its June 25, 2019 meeting, to ensure that a budget is in place by the end of the City’s fiscal year on June 30. The City therefore needs to know, well before May 23, whether, as it should, the City will be allowed to proceed to use the monies already appropriated from the Airport Fund to pay for the pavement

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2 An additional $305,900 has been appropriated from the General Fund to cover the pulverization and stabilization of pavement within the runway safety area, in accordance with prior FAA guidance that airport revenues could not be used for this work. In addition, the City is planning to fund $52,500 in annual maintenance costs for the hydro-seeded areas resulting from the pavement removal project out of the Airport Fund beginning with its next biennial budget, which will become effective July 1, 2019.
removal project, as previously planned on the basis of FAA’s guidance, with the understanding that the General Fund could potentially be required to reimburse the Airport in the future, if FAA reverses its position and finds that airport revenue cannot be used for the pavement removal project.

Accordingly, the City respectfully asks that FAA immediately retract the order contained in its April 19 letter and allow the City to proceed to use airport revenue to fund the excess pavement removal project during the pendency of the NBAA/AOPA/GAMA complaint – subject to the City’s commitment (without waiving its rights of appeal) to cause its General Fund to reimburse its Airport Fund for the full amount of any unlawfully diverted revenue, with statutory interest as required by 49 U.S.C. § 47107(n), if FAA finds in a binding final order that the City’s use of airport revenue for removal of excess pavement was not permitted by the standards of Grant Assurance 25.

City’s Rebuttal

On November 30, 2018 the complainants submitted as their complaint a short, five-page letter to FAA, attaching only four brief exhibits: a letter to FAA from the City, and the three letters from FAA advising the City that it may use airport revenue to shorten the runway and remove unneeded runway and taxiway pavement. That was all the evidence the complainants offered to FAA in its failed attempt to show that the City may not use airport revenue for pavement removal work. FAA advised the City on February 6, 2019 that it was treating the complainants’ November 30 letter as a Part 13 complaint (without specifying whether it was a formal or informal complaint) and invited the City to submit a response. The City submitted its response on March 22, 2019. With FAA’s permission, the complainants then submitted an 11-page response, with 74 pages of attachments along with a variety of audio/visual files. The City is now submitting its rebuttal. The City continues to rely upon what it said to FAA in its response on March 22 and will not repeat those arguments here. The focus of the City’s rebuttal will be on the new arguments and evidence offered by the complainants in their reply.3

In its initial response to the complaint, the City highlighted that the complainants have conflated airport revenue-use and rate-setting arguments. Their continuing confusion is apparent in their reply. The City showed in its response that there was no reason for FAA to consider the complainants’ rate-setting arguments because the City has not rate-based any of the disputed costs and there is therefore no basis for any claim that the City’s use of airport revenue for the runway shortening and pavement removal projects affects airport ratepayers in any way (see Response at 2). The complainants nevertheless begin their reply with the following assertion: “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” (Reply at 1). Notably, the complainants then devote the next nine pages of their 11-page reply to a completely different question: whether airport revenue can permissibly be used to fund the

3 The City continues to reserve its rights as set forth in its March 22 response at n.1.
City’s runway shortening and pavement removal projects at the Airport. The City will first address the rate-setting issue and then the issue of revenue use.

**Airport Rate-Setting.** The complainants address only three short paragraphs, at the end of their reply, to the question they say this proceeding presents: whether the costs of the runway shortening and pavement removal projects can be “imposed on airport tenants and users.” They reiterate their baseless argument that if airport revenue is used to fund these projects, this “necessarily implicates the rate base,” and they claim that because SMO does not maintain “separate accounts for revenues derived from aeronautical uses and from other airport uses,” there is no way the City could honor its pledge not to allocate runway shortening and pavement removal costs to the rate base (Reply at 9-10). Both of these arguments betray a fundamental misunderstanding of airport rate-setting in general, and at SMO in particular.

The fees and charges that aeronautical users and tenants of the Airport pay to the City are established in two ways: the landing fee, fuel flowage fee and transient parking fee are set by municipal ordinance, and all the remaining fees paid to the City by aeronautical (and non-aeronautical) tenants have been established through lease negotiations. There is nothing in the existing leases at the Airport that would allow the City to increase rental charges as a result of the costs of shortening the runway or removing pavement, and the City would never seek to recover these costs from its leasehold tenants. There is also no allowance for these costs in the current landing fee, fuel flowage fee and transient parking fees at the Airport, and the City has not and will not seek to increase these fees to cover these costs. The complainants, therefore, have not made, and cannot make, any showing that the challenged expenditures would affect any of the rates and charges the City collects at the Airport.

FAA’s Compliance Manual offers a useful definition of “rate base”:

> The sponsor allocates capital and operating costs to airport cost centers and formulates rates to recover costs. The [rate base] is the list of costs allocated to a cost center, which are recovered from aeronautical users in aeronautical rates.

Order 5190.6B, § 18.8(i). That is exactly how the City calculated the landing fee at SMO, as the City has thoroughly documented for FAA in its July 1, 2016 Answer (at 22-30) and September 13, 2016 Rebuttal (at 8-14) in the pending matter of *Mark Smith v. City of Santa Monica*, Docket No. 16-16-02, cited by complainants (Reply at 10, n.10).

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4 The cost justification for the landing fee at SMO was also the subject of litigation in California state court. A group of aircraft owners and operators, including some of the same entities that brought the pending Part 16 complaint to FAA in the *Mark Smith* matter, alleged that the City’s landing fee was an unlawfully-imposed “tax” within the meaning of the California state constitution. The state court recently granted the City’s motion for summary judgment, finding among other things that the City’s landing fee was properly cost-justified and reasonably apportioned. See *Justice Aviation, Inc. v. City of Santa Monica*, Case No. BC603327 (Los Angeles Superior Court) (Order Granting Motion for Summary Judgment and Summary Adjudication, Dec. 19, 2018). A copy of the state court order is attached at Tab A.
The City uses two airport cost centers for rate-setting purposes: “airfield” and “non-airfield.” The City will not allocate any of the costs of the pavement removal work to the airfield cost center. These costs will all be allocated to the non-airfield cost center. None of the costs allocated to the non-airfield cost center are recovered from aeronautical users through landing fees, fuel flowage fees or transient parking fees. The Airport covers costs allocated to the non-airfield cost center, and generates some net revenue, from leases with aeronautical and non-aeronautical tenants. Unlike the landing fee, fuel flowage fee and transient parking fees that are set by ordinance, the rental rates set out in the Airport’s leases are negotiated.

NBAA/AOPA/GAMA bear the burden of proof on their complaint. See Compliance Manual, Order 5190.6B, § 5.8(c) (in an informal Part 13 proceeding, FAA must “separate facts from unsubstantiated allegations,” and “[t]he complaining party has the responsibility to provide sufficient factual information to support the allegation(s).”); Seasands Air Transp., Inc. v. Huntsville-Madison Cnty. Airport Auth., FAA 16-05-17, 2006 WL 4393154, at *12 (Aug. 28, 2006) (Director’s Determination) (noting that in Part 16 proceedings, “[t]he proponent of a motion, request, or order has the burden of proof …. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law.”). The complainants, however, have not offered any factual proof, or even a cogent argument, that “the use of airport revenue, even if previously collected, necessarily implicates the rate base” (Reply at 10). Nor is there any justification for their assertion that the City would somehow need to have “separate accounts” for aeronautical and non-aeronautical revenue in order to “honor its pledge not to allocate pavement removal costs to the rate base” (id.). FAA has never required any airport sponsor to maintain such “separate accounts” for aeronautical and non-aeronautical airport revenue. The City assures FAA that it will not allocate any of the costs of pavement removal (or of the markings-only shortening of the runway completed in late 2017) to any rate base that is used to derive fees or charges that must be paid by aeronautical users of the Airport.

Accordingly, FAA should promptly and unequivocally find, contrary to what complainants say, that this case actually does not present “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” (Reply at 1). The City does not contend that it could charge airport users for the costs of shortening the runway or pavement removal; it has never done so; and the City has no intention of charging these costs to any airport users in the future. There is no basis whatsoever for the complainants’ overheated claim that the City has burdened them “with the costs of projects destructive of the facilities that they rely upon” in ways that are “particularly offensive – and antithetical to the fundamental concepts governing the use of airport revenues” (Reply at 10).

FAA has previously advised the City that it could not rate-base the costs of pavement removal. The City once again confirms that it will comply with this FAA guidance. There is no reason for FAA even to consider the issue of whether any of these costs could lawfully be rate-based by the City. Accordingly, FAA should dismiss the complaints’ rate-setting claim.
Airport Revenue Use. Consistent with the guidance FAA has provided in the past, the City has used and plans to continue to use airport revenue to fund two projects: (a) the initial project (already completed) that shortened the runway by painting new markings for the runway, required RSA and taxiways, with new lighting and navaids; and (b) the subsequent project (to be completed later this year) that will render the runway shortening more permanent by removing pavement that is now out of use as a result of the markings-only shortening of the runway. All of this work is consistent with the Settlement Agreement/Consent Decree. The complainants ask FAA to repudiate its past guidance to the City and to rule that the use of airport revenue to fund these projects is prohibited. There is no reason for FAA to do so. FAA’s past guidance to the City was consistent with applicable law. The installation of appropriate lighting and markings to accomplish the FAA-approved runway shortening and the removal of out-of-use pavement in anticipation of the FAA-approved closure of the Airport are permissible uses of airport revenue.  

There is no dispute that until it issued its April 19 order, FAA had consistently told the City that it could fund both of these projects with airport revenue. The complainants concede, as they must, that FAA’s then-Chief Counsel explicitly authorized the City to use airport revenue “to cover the costs of shortening the runway” (Reply at 3) and they also acknowledge that both the local ADO and the Region “did not object to the use of airport revenue for the removal of out-of-use pavement beyond the RSAs” (id. at 4). The City has reasonably relied upon this guidance in appropriating airport revenue to pay for all of this work.

This is not a typical case in which FAA offered general regulatory advice to a sponsor. In this case, the questions addressed by FAA arose under a unique, binding contract between FAA and the City: the Settlement Agreement/Consent Decree. The letter to the City from FAA’s Chief Counsel wasn’t an “opinion letter” that can easily be swept aside; it was an admission by FAA that in accordance with the binding contractual terms of the Settlement Agreement (which the Chief Counsel drafted and negotiated), the City could use airport revenue to pay for the costs of shortening the runway. The advice given by the ADO and the Region was also obviously consistent with FAA’s expectations and intent when it entered into a binding contract relationship with the City. FAA knows what his role was in the drafting and negotiation of the Settlement Agreement/Consent Decree, which he signed on behalf of FAA. Nowhere in his letter did the Chief Counsel caution that it “does not constrain future FAA action” or constitutes only an “advisory response,” as have other letters from FAA, as complainants note (see Reply at 4). While the City understands that, were FAA to reverse itself and repudiate its prior guidance, the City might ultimately have to use General Fund moneys for the runway shortening and pavement removal projects (see Reply, Att. H), the City believes FAA correctly advised the City that it could use airport revenue for these purposes, and the City has justifiably relied upon that prior guidance in appropriating money for this work from its Airport Fund.

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5 The complainants continue to assert that the City is bound to comply with the statutory requirements of 49 U.S.C. §§ 47107 and 47133 (Reply at 2). The City disputes this assertion but concedes that by reason of the Settlement Agreement/Consent Decree, the City is subject to the substantive standards of Grant Assurance 25. Accordingly, for purposes of this Part 13 proceeding, it makes no difference whether the City has any independent legal obligations under § 47107 or § 47133 and there is no reason for FAA to address in the issue here. The City reserves its right to contest the applicability of §§ 47107 and 47133.

6 The City does not claim that the then-Chief Counsel’s letter warrants “deference”; the City argues that it could reasonably rely upon this letter because as the agency’s top lawyer, he was offering an admission of FAA’s expectations and intent when it entered into a binding contract relationship with the City. FAA knows what his role was in the drafting and negotiation of the Settlement Agreement/Consent Decree, which he signed on behalf of FAA. Nowhere in his letter did the Chief Counsel caution that it “does not constrain future FAA action” or constitutes only an “advisory response,” as have other letters from FAA, as complainants note (see Reply at 4). While the City understands that, were FAA to reverse itself and repudiate its prior guidance, the City might ultimately have to use General Fund moneys for the runway shortening and pavement removal projects (see Reply, Att. H), the City believes FAA correctly advised the City that it could use airport revenue for these purposes, and the City has justifiably relied upon that prior guidance in appropriating money for this work from its Airport Fund.
considered carefully and calibrated with reference to the unusual particulars of the present situation in Santa Monica.\(^7\)

FAA should stand by its previous determinations not just because in a case like this, an airport sponsor should be able to rely upon such particularized guidance, but more importantly because FAA’s past determinations were correct. None of the advice FAA gave to the City about the payment of costs for the initial markings-only runway shortening or the subsequent removal of pavement was "directly at odds with prior FAA guidance," as the complainants assert (Reply at 4). There is, therefore, no reason for FAA to revisit or revise the guidance FAA gave to the City in the past.

To the best of the City’s knowledge, FAA has never before prohibited an airport sponsor from using airport revenue to fund the removal of obsolete airport infrastructure, such as the removal of runway or taxiway pavement that is no longer needed for aviation use. Such a ruling would be especially inappropriate in this case, where the work to be funded with airport revenue is all in connection with the FAA-approved shortening of the runway at SMO, and all this work meets applicable FAA airport safety and design specifications.

The complainants again assert that the guidance FAA purportedly provided in the Stapleton International Airport and Meigs Field and cases is controlling precedent and requires FAA to reverse its stance on the City’s use of airport revenue for pavement removal projects at SMO (Reply at 6). They say “the City cannot dispute that FAA has opined that deactivating an airport and its runway, and redeveloping aviation properties for non-aviation use, is an impermissible use of airport funds” (\(id.\)). But the City does dispute this improper characterization of FAA’s precedents. While the redevelopment of aviation properties for non-aviation use may raise genuine airport revenue-use issues, the removal of obsolete or unused airport infrastructure does not.\(^8\) Neither the Stapleton nor Meigs precedents support the complainants’ position. The complainants have not shown that FAA has ever ruled that airport revenue cannot be used to pay

\(^7\) The complainants assert that 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 officers at the headquarters level – and if needed provides clarifications and/or corrections to this guidance,” citing one such letter (Reply at 5 & Att. I). The one precedent complainants point to involved two inconsistent interpretations and found that the interpretation issued by the Assistant Chief Counsel for Regulations took precedence (Att. I at 2). In this case, in contrast, the advice given to the City by the ADO and Region is consistent with what the then-Chief Counsel told the City, and there is evidence that their advice was coordinated with the relevant program office at the headquarters level. The ADO’s letter was sent not only to the City, but also to the Director of FAA’s Office of Airport Compliance and Management Analysis (who oversees the enforcement of the airport revenue-use rules) and to the agency’s Assistant Chief Counsel, as well as to the Region.

\(^8\) The City does not dispute that airport revenue cannot be used for “general economic development.” See 49 U.S.C. § 47107(k)(2)(B); Revenue Use Policy, ¶ VI.B.3, 64 Fed. Reg. 7720. But as the resolution of the Stapleton matter (discussed in the text below) makes clear, even where economic redevelopment is immediately contemplated (not the situation here, where closure of the airport cannot occur for another ten years), runway shortening and pavement removal projects of the type that are the subject of this proceeding are not “general economic development” projects for which the use of airport revenue would be inappropriate.
for the removal of airport infrastructure that is no longer needed for aviation purposes – whether
in anticipation of an FAA-approved airport closure or otherwise.⁹

The closure of Stapleton is instructive. As the OIG report noted, the airlines serving Denver
were deeply concerned with the costs of disposition at Stapleton because they would be borne by
the airlines at the new Denver airport (OIG Report No. AV-1999-052, “Use of Airport Revenue,
Denver International Airport,” at 11).¹⁰ In fact, the airlines serving the Denver market
aggressively pursued a Part 13 complaint against the City of Denver alleging that the city was
unlawfully using airport revenue in connection with the closure and redevelopment of Stapleton.
Ultimately, however, the airlines entered into a “Stipulated Agreement” with the city in 1999 that
resolved their complaint and caused FAA to close the Part 13 case. A copy of the Stipulated
Agreement is attached at Tab B. The Stipulated Agreement provided in ¶ 4.3 that the City could
use up to $85 million in airport revenue to pay for and rate base up in the new Denver airport
what were called “nonattributable environmental remediation” projects at Stapleton. Notably,
the airlines stipulated that Denver could use airport revenue for:

   Removal of concrete and other paved surfaces, including certain underground
improvements, fixtures and equipment, pipe lines and hydrants on the Stapleton
property, and removal, backfill and grading of the underlying soils on the
Stapleton property.

   Demolition, removal and backfill of buildings and other improvements and
structures on the Stapleton property.

Stipulated Agreement, ¶¶ 1.4.C.5 & 1.4.C.6. The airlines explicitly agreed that this use of airport
revenue complied with the city’s federal obligations. Stipulated Agreement, ¶ 6.8.

Agreements between airport sponsors and airline tenants cannot make lawful what would
otherwise be a prohibited use of airport revenue. See Policy Regarding Airport Rates and
Charges (“Rates and Charges Policy”), 78 Fed. Reg. 55330, 55333 (Sep. 10, 2013), ¶ 1.3 (“the
requirements of any law, including the requirements for the use of airport revenue, may not be
waived, even by agreement with the aeronautical users”). FAA would not have permitted the
City of Denver to use airport revenue for pavement removal or the demolition of airport
improvements – even with the airlines’ agreement – if that were a prohibited use of airport
revenue, but it does not appear that FAA ever called the Stipulated Agreement into question, and

⁹ The complainants say that “although FAA’s guidance regarding Meigs and Stapleton is the most relevant, it
is hardly unique” (Reply at 6). But they have not pointed to any other even remotely similar situation. They cite the
FAA Director’s Determination in the protracted Boca Aviation matter where FAA observed, in passing, that airport
revenue cannot be used for “general economic development” and to two DOT OIG reports that stand for the
unremarkable proposition that a municipal airport sponsor cannot bill the airport for off-airport municipal fire or
police services (id.).

¹⁰ FAA should not lose sight of the fact that, as the City has demonstrated, the costs of the runway shortening
and pavement removal projects at SMO will not be included in any rate base that is used to derive fees or charges
which must be paid by aeronautical users.
in accordance with its terms, the then-pending Part 13 complaint against the City was dismissed by FAA.

The Stapleton Stipulated Agreement is consistent with the principle that the costs of pavement removal and the demolition of other obsolete airport infrastructure are capital or operating costs of an airport that can lawfully be paid with airport revenue – and this is surely so when such projects are undertaken with FAA approval, as they have been at SMO. 11

As the City showed in its initial response (at 5, n.5), the FAA’s later actions at Meigs Field are not inconsistent with this principle. There, the runway was destroyed without FAA’s approval and the city immediately sought to convert the entire airport into a public park. While it is true that FAA alleged in its Notice of Investigation that Chicago could not lawfully use airport revenue to deactivate Meigs as an airport, the city disputed that claim. FAA never made any finding in the Meigs proceeding that Chicago could not use airport revenue to remove runway or taxiway pavement. Ultimately, FAA and the city entered into a “consent order” in which they agreed that airport revenue could not be used to redevelop the property as a public park, but otherwise simply agreed to disagree about whether other uses of airport revenue (apart from allowable environmental remediation costs) were permissible. The city reimbursed its Airport Development Fund $1 million, but there was never a conclusive finding by FAA that airport revenue could not be used to cover pavement removal costs. In the Matter of Compliance with Federal Obligations of the City of Chicago, Illinois, FAA Docket No. 16-04-09, Consent Order, September 18, 2006, ¶ 5. A copy of the Meigs “Consent Order” is attached at Tab C.

The complainants’ revenue diversion claims rest upon a misconception of applicable legal standards. Although they concede that “the City is correct” that FAA’s Revenue Use Policy does “not expressly state that airport capital and operating costs must serve a legitimate aeronautical purpose” (Reply at 6), the complainants nevertheless contend that airport revenue can only be used for projects with “a purpose beneficial to aviation,” which “support and foster the nation’s aviation system” and “promote a safe and efficient nationwide aviation infrastructure” (Reply at 1-2). They assert that to be lawful, an expenditure of airport revenue must have “a legitimate aeronautical purpose” (Reply at 5).

The Rates and Charges Policy provides in ¶ 2.5.4(c) that “[i]f an airport proprietor closes an operating airport as part of an approved plan for the construction and opening of a new airport, reasonable costs of disposition of the closed airport facility may be included in the rate base of the new airport, to the extent that such costs exceed the proceeds from the disposition.” 78 Fed. Reg. 55534. This policy statement necessarily reflects the underlying premise that the reasonable costs of disposition of a closed airport are “capital or operating costs” of an airport. Otherwise, this provision would contravene the statutory mandate of 49 U.S.C. § 47107(b)(1). The City acknowledges, of course, that ¶ 2.5.4(c) also provides that “[t]he Department would not ordinarily consider redevelopment costs to be a reasonable cost of disposition.” Id. (emphasis added). But as the Stapleton precedent demonstrates, the costs of pavement removal are not redevelopment costs. The City, therefore, simply asks that FAA stand by the previous, correct advice it gave the City that airport revenue can be used to remove airport pavement that is no longer serving an aviation use by reason of the FAA-approved runway shortening.

Contrary to what the complainants say (Reply at 2), the City has never offered the proposition that “any non-discriminatory on-airport expenditure is an eligible use of airport revenue.”
The complainants’ theory is a variation on a theme that has been pressed by the leading airline trade association, Air Transport Association of America (known as “A4A”). A4A has claimed that to qualify as allowable capital or operating costs of an airport for purposes of 49 U.S.C. §§ 47107(b) and 47133 (and hence for Grant Assurance 25), expenditures of airport revenue must be “directly and substantially related to the air transportation of passengers or property” because that phrase appears in both statutory provisions. They have argued on this basis that unless expenditures of airport funds further air transportation, they are prohibited forms of airport revenue diversion. The Court of Appeals for the D.C. Circuit soundly rejected this interpretation in its very recent decision in Air Transport Association of America, Inc. v. FAA, __ F.3d __, 2019 WL 1768937 at *4 (D.C. Cir., Apr. 23, 2019):

Contrary to the Association’s view that airport operating costs must be “substantially and directly related to air transportation of passengers or property . . ., the plain text of section 47107(b) and section 47133 provides that payments of capital or operating costs are permissible uses of airport revenue, rather than unlawful revenue diversion.

The Court of Appeals explained that the modifying clause A4A relied upon only applies to how airport revenue can be used for non-airport facilities that are owned or operated by an airport sponsor (id. at 9). It has nothing to do with the nature of the cost that are allowable expenses for an airport itself. A copy of the Court of Appeals’ decision is attached as Tab D.\(^{13}\)

FAA should reject the complainants’ theory that airport revenue can only be used for projects that will continue to benefit aeronautical users in the future. No federal statute, agency regulation or grant assurance mandates that allowable airport costs must “benefit the airport” (Reply at 7). The City can properly use airport revenue for its runway shortening and pavement removal projects in accordance with the Settlement Agreement/Consent Decree.\(^ {14}\)

FAA told the City three times that it could use airport revenue for the costs of shortening the runway and removing runway and taxiway pavement that is no longer needed for aviation use because FAA allowed the City to shorten the runway. There is no sound reason for FAA to change its mind and bar the City from using airport revenue to for this purpose. The costs of shortening the runway and removing runway and taxiway pavement that is no longer in use are

\(^{13}\) Even if airport revenue could only be used for capital or operating costs “substantially and directly related to air transportation,” airport revenue could be used to for the costs of removing abandoned airport infrastructure because such costs would, by necessity, be “related to” airport transportation, because the airport infrastructure to be removed was initially constructed for air transportation.

\(^{14}\) The complainants assert on the basis of two letters written by U.S. Department of Transportation and FAA representatives in 1996, before the agency promulgated its Revenue Use Policy, that to be lawful, “expenditures of airport revenue must have ‘a valid airport purpose’” (Reply at 6 & Att. J). These letters simply reached the uncontroversial conclusion that the State of Hawaii had committed unlawful revenue diversion when it used airport revenue to purchase land it knew would never be used for any airport purpose.
allowable capital or operating costs of the Airport. Accordingly, FAA should reject the complainants’ airport revenue-use claims.

**Airport Safety.** The City continues to believe that in the wake of the FAA-approved shortening of the runway, the removal of runway and taxiway pavement that should no longer be used enhances, and surely is consistent with, airport safety and future aircraft operations that will continue until the airport is closed in accordance with the Settlement Agreement/Consent Decree. The complainants do not dispute that the City’s runway shortening and pavement removal projects have been approved by FAA and comply with all applicable FAA design and safety standards. Although they stress that “FAA is the final arbiter of operational, safety and aeronautical matters” (Reply at 7), the complainants nevertheless suggest that even if the City has complied with all applicable federal standards, “the City’s plans could actually degrade safety at SMO” (Reply at 9; original emphasis). FAA should reject this irresponsible claim. SMO is safer today than it was before its runway was shortened.

The complainants point to a study they commissioned which concludes that although the newly-configured RSAs comply with FAA design standards, it “seems unwise” to remove runway pavement beyond the required RSAs (Reply, Attachment M at 3). This is ironic because when NBAA was challenging efforts by the City to ban certain jet aircraft from SMO, NBAA repeatedly claimed that the then 5000-foot runway was safe even though its RSAs did not meet FAA safety standards, as they did in an August 24, 2007 letter to FAA. A copy of NBAA’s letter is attached at Tab E. The City has no legal obligation to “respond” to the recent study tendered by NBAA and AOPA.

The complainants next assert that if the City waits for some time after pavement is removed to complete hydro-seeding, it could create “dirt and particle hazards at SMO” (Reply at 9). The City anticipated that it would wait until the rainy season is expected to begin to undertake hydro-seeding, but it will not wait until then if the pavement removal is completed sooner.

Finally, the complainants suggest that the City has not consulted with experts about potential wildlife hazards associated with the introduction of grass to the airfield (id.). In fact, the City requested expert advice from AECOM about the type of seed mix to use, seeking a mix that is compatible with use near aircraft movement areas, that would not attract wildlife and that has been used elsewhere in the region. AECOM’s biologist recommended use of the same seed mix that has been used successfully at Los Angeles International Airport. A copy of AECOM’s technical memorandum is attached at Tab F.

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15 The City is not seeking FAA approval to use airport revenue to improve the airport for the benefit of a future, non-airport use, such as a public park. Compare Order 5190.6B, § 18.18. The City acknowledges, as it has in the past, that airport revenue cannot be used for the capital or operating costs of a community use, such as a public park. See Revenue Use Policy, ¶ VII.D, 64 Fed. Reg. 7721. This is what the City Manager told FAA in July 2000 (see Complainants’ Reply, Att. K at 2). The City Manager did not say then that airport revenue can only be used for expenditures which “actually benefit an airport,” as complainants misleadingly assert in their Reply (at 7).
For all of these reasons, and the reasons the City offered in its initial March 22, 2019 response, the FAA should promptly dismiss the Part 13 complaint by NBAA, AOPA and GAMA.

Thank you again for your careful consideration of the City’s position.

Sincerely,

/s/ Scott P. Lewis

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