

Jol A. Silversmith, Esq.
Barbara M. Marrin, Esq.
KMA Zuckert LLC
888 17th Street, N.W., Suite 700
Washington, DC 20006
(202) 298-8660
jsilversmith@kmazuckert.com
bmarrin@kmazuckert.com

Richard K. Simon, Esq.
1131 Camino San Acacio
Santa Fe, NM 87505
(310) 503-7286
rsimon3@verizon.net

December 30, 2019

BY ELECTRONIC MAIL AND HAND DELIVERY

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

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

Response of the Complainants to City of Santa Monica's
Opposition to Motion for an Interim Order

The Notice of Appeal and Brief (“Appeal”) filed by the Complainants on December 9, 2019 incorporated a motion for an interim order (“Motion”) prohibiting the collection of landing fees at Santa Monica Municipal Airport (“SMO” or “Airport”) until and unless the FAA issues a final agency decision holding the fees to be compliant with agency requirements. The Motion is premised on both the previously-briefed lack of a proper foundation for the fees and the growing surplus at SMO, which renders the fees unnecessary in the short-term, if not permanently. The City of Santa Monica (“City”) has filed an opposition to the Motion. To the extent necessary, the Complainants move to file this response pursuant to 14 C.F.R. § 16.19, for good cause – to ensure that the Associate Administrator is fully briefed.

I. The Motion for an Interim Order Is Properly Before the FAA

The City’s initial argument is that only the U.S. District Court for the Central District of California (“Central District”) has jurisdiction over the requested remedy, premised on the settlement agreement entered into by the FAA and the City on January 30, 2017 (“Settlement

Agreement”), and the consent decree subsequently entered by the Central District in docket no. 13-CV-8046-JFW on February 1, 2017 (“Consent Decree”). See Opposition, at 2. The City has not previously challenged the FAA’s jurisdiction, and now has stated that it does not intend to challenge two of the four rulings in the Director’s Determination. See id., at footnote 4. That should be a bar to its belated challenge – but in any event, the City is mistaken about the FAA’s jurisdiction:

- The City asserts that the only matter before the FAA is the City’s compliance with certain grant assurances. But, as specified in the Director’s Determination, this case also concerns statutory obligations, such as 49 U.S.C. § 47133, which also provide a foundation for a Part 16 complaint. See 14 C.F.R. § 16.1(a). The FAA previously confirmed that the City’s statutory obligations were not changed by the Settlement Agreement and the Consent Decree. See Final Brief for Respondents, NBAA v. Huerta, D.C.Cir. no. 17-1054 (December 4, 2017), at 40.
- The Settlement Agreement and the Consent Decree provided that the City would continue to conform with certain grant assurances, and the FAA publicly confirmed that any City non-compliance could continue to be resolved through Part 16. Then-FAA Administrator Michael Huerta stated that: “The Part 16 process is still there. ... That process is still available during the operation of the airport.” See Exhibit 1, at 13:47. Further: “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 id., at 18:41.
- The City quotes a section of the Settlement Agreement and the Consent Decree which states that the Central District is the exclusive venue for one of the parties to allege and obtain a remedy for a breach thereof. But it is well-established that a consent decree cannot obligate a third party to litigate its claims in that same forum. See, e.g., Cleveland County Association v. County Board of Commissioners, 142 F.3d 468, 473-74 (D.C.Cir. 1998) (“unless one is joined as a party to an action, one is generally not bound by the result, no matter whether that result is reached voluntarily by the parties or imposed upon them by the court”).
- The City also entirely ignores the section of the Settlement Agreement and the Consent Decree which specifically provides that Part 16 and its remedies remain available in this case: “The Parties acknowledge that the FAA does not have authority to require private parties to withdraw their Part 16 complaints and that the FAA must consider any complaints not withdrawn. Thus, the Parties further acknowledge that no action of a private party in a Part 16 proceeding can constitute a breach of this Agreement.” See id., at § I, ¶ 2.

II. FAA Has the Authority and the Responsibility to Suspend Landing Fee Collection

The City next asserts that there is no precedent for the Complainants’ request for an interim order. See Opposition, at 3. Respectfully, that is only because no other airport sponsor has for so long, and so consistently, defied its federal obligations – creating the circumstances which now require FAA intervention at the Airport while a Part 16 appeal is proceeding.

The Complainants do not dispute that the landing fees should be recalculated to reflect current circumstances, nor that the Director's Determination did not determine whether the current landing fees are unlawful. But that does not mean that the FAA lacks the authority – or the responsibility – to order the City in the interim to stop collecting landing fees. The existing record, alongside subsequent City documents subject to notice, provide a sufficient foundation to conclude that an interim order is warranted to ensure that aeronautical users of SMO – the individuals and entities that the Airport's federal obligations are intended to protect – are not overcharged and/or effectively forced to utilize other airports while this appeal is in progress.¹

The City endeavors to distinguish U.S. v. Santa Monica, 2008 WL 11432066 (C.D.Cal. May 16, 2008), affirmed 330 Fed. Appx. 124 (9th Cir. 2009). But that decision upheld an interim order which prevented the City from banning certain aircraft from operating at SMO while a Part 16 proceeding was in progress to determine the ban's lawfulness. The Central District's ruling confirms that an airport sponsor cannot reap the benefits of facially unlawful restrictions while FAA review is underway. The City's primary assertion is that this case differs from docket no. 16-02-08 because on this occasion the City's restrictions are financial instead of operational. But the City cites no authority for that proposition. Complainants are not aware of any.

Nor is there any foundation for the City's alternative proposition – that the FAA can enjoin wrongdoing only before it occurs. In docket no. 16-02-08, the FAA stopped an ordinance already adopted by the City from entering effect – and the Central District confirmed that “the City has not cited to any case law which supports its limitation on the Administrator's power to issue interim cease and desist orders.” See id., at *5. Indeed, as the agency repeatedly has confirmed – in virtually every Part 16 decision – “[t]he FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.” See, e.g., In re Santa Monica, California, no 16-02-08, Director's Determination (May 27, 2008), at 12. The FAA's authority – and responsibility – to ensure sponsor compliance does not dissipate merely because the City already is non-compliant.²

III. There Is No Legal or Policy Basis for the FAA to Defer Action on the Motion

The City's final argument is that no action should be taken on the Motion because it may discuss with the Western-Pacific Region “a financial plan for the future collection and use of all airport revenue” under the auspices of 14 C.F.R. Part 13. See Opposition, at 5. The City states that it has “decided to voluntarily engage in discussions with the FAA” and “to commence these discussions with the FAA within 90 days.” But the City continues to question the Region's authority, and does not propose to even start discussions for a further three months. That the City might engage with the Region to discuss future financial issues does not provide a foundation for the Associate Administrator to decline to fulfill his mandate to prevent past and current revenue diversion and other financial improprieties by airport sponsors.

¹ The City concedes that the recalculations will not occur quickly. See Opposition, at footnote 1. Nor does the City appear to dispute that the Airport has accumulated a significant and growing surplus. See also Appeal, at 13-15.

² The City also asserts that the landing fees should remain in effect because they embody the “status quo.” See Opposition, at 4. But the City also acknowledges that since they were adopted “the operational and financial situation has changed significantly at SMO.” See id., at 3. Simply put, there is no status quo to be preserved, by virtue of the City's own actions to truncate the runway, which undercut any prior rationales for the landing fees.

Moreover, the matters identified for discussion by the Region are quite different than those here at issue. There is no indication that the Region intends to discuss the amount of or the foundation for the landing fees, which are central to the Motion. Nor is there any indication that the Region intends – or even could – discuss the other issues on appeal, such as the revenue diversion that has resulted from the City’s improperly documented loans, and the associated errors in the Director’s Determination’s calculations, all of which impact any landing fee calculus.

Any SMO-related financial discussions – of the landing fees, or otherwise – should occur through the Appeal process. The Region cannot moot an appeal under the auspices of Part 16. See, e.g., Centennial Express Airlines v. Arapahoe County Public Airport Authority, no. 16-98-05, Final Agency Decision (February 18, 1999), at 4 (duplicative Part 13 proceedings consolidated to ensure compliance with Part 16 requirements). See also Rules of Practice for Federally-Assisted Airport Proceedings, 61 Fed. Reg. 53998, 53998 (October 16, 1996) (Part 16 “remove[d] from the coverage of Part 13 ... airport-related matters”); 59 Fed. Reg. 29880, 29882 (June 9, 1994) (Part 16 is intended to “avoid duplicate complaints and investigations on the same subject”); FAA Order 5190.6B, § 5.7 (regions should coordinate with headquarters as appropriate).

The City further argues that the FAA having been alerted to potential noncompliance, the Complainants’ role is at an end. See Opposition, at 7. But the City selectively quotes from an FAA rulemaking (77 Fed. Reg. 13027, 13030 (March 5, 2012)), incorrectly implying that the mere issuance of a Director’s Determination is enough. In fact, a complainant must have prevailed on all issues. If the FAA does not concur with all allegations of noncompliance, the complainant is adversely affected and has a right to appeal. See 14 C.F.R. § 16.31(c). And on appeal, the Associate Administrator must apply certain principles to review factual and legal issues. See 14 C.F.R. § 16.33(e). There is simply no basis for the City’s claim that the FAA can instead resolve the issues presented by the Appeal via informal, *ex parte* discussions at the regional level.

Nor, as the City lastly suggests, are the Complainants somehow “better off” because the Director’s Determination failed to rule on all of their allegations, thus necessitating the Motion (and also the Appeal). See Opposition, at 8. Any “unnecessary workload” imposed on the Associate Administrator in conjunction with landing fees exists only because the Director’s Determination did not reach legal issues that had been fully briefed for three years – and must be resolved independent of the acknowledged changes in the Airport’s factual situation, in order for the recalculations of the landing fees to be meaningful. But to be clear: Complainants (and SMO users generally) are the ones who has been burdened – not the FAA, and certainly not the City.

Conclusion

For the reasons stated above, and previously briefed, the Complainants’ motion for an interim order should be granted.

Respectfully submitted,



Jol A. Silversmith, Esq.
Barbara M. Marrin, Esq.
KMA Zuckert, LLC
888 17th Street, N.W., Suite 700
Washington, DC 20006
(202) 298-8660
jsilversmith@kmazuckert.com
bmarrin@kmazuckert.com

Richard K. Simon, Esq.
1131 Camino San Acacio
Santa Fe, NM 87505
(310) 503-7286
rsimon3@verizon.net

Certificate of Service

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

- Rick Cole, City Manager, City of Santa Monica, 1685 Main Street, Room 209, Santa Monica, CA 90401, rick.cole@smgov.net
- Lane Dilg, Esq., City Attorney, City of Santa Monica, 1685 Main Street, Room 310, Santa Monica, CA 90401, lane.dilg@smgov.net
- Susan Cline, Director of Public Works, City of Santa Monica, 1685 Main Street, Room 116, Santa Monica, CA 90401, susan.cline@smgov.net
- Stelios Makrides, Airport Manager, Airport Administration Building, 3223 Donald Douglas Loop South, Santa Monica, CA 90405, stelios.makrides@smgov.net
- Scott Lewis, Esq., Partner, Anderson & Kreiger LLP, 50 Milk Street, 21st Floor, Boston, MA 02109, slewis@andersonkreiger.com

Dated this 30th day of December, 2019



Jol A. Silversmith