January 9, 2020

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 Reply to Complainants’ Appeal

The Complainants have challenged certain of the rulings in the Director’s Determination, pursuant to their Notice of Appeal and Brief (“Appeal”). The City of Santa Monica (“City”) has filed a reply to the Appeal (“Reply”). The Complainants respectfully move to submit this pleading for good cause, pursuant to 14 C.F.R. § 16.19. This response addresses specific issues raised by the City in its Reply, and will ensure that the Associate Administrator is fully briefed.

The City cannot use any accumulated airport revenue for general fund purposes – now, or if it closes SMO

The City candidly admits what long has been evident: that its goal is to monetize and exploit the Santa Monica Municipal Airport (“Airport” or “SMO”) as a revenue generator for its general fund. Thus, the City devotes a large portion of its Reply to arguing that if it closes SMO, it can re-purpose funds in SMO accounts for general use. See Reply, at 15, et seq. This argument is not abstract or theoretical; if the City did not have such plans, the Appeal’s brief mention of the restriction on the use of accumulated funds would not have triggered such a detailed response.
This is a significant dual concession: that a surplus already exists at SMO and is expected to continue to grow – with the intent that after closure the accumulated funds will benefit the City, not the Airport or even the aviation system at large.

The City’s admission confirms that it is not in current compliance with the requirements of grant assurance #24, grant assurance #25, or 49 U.S.C. § 47133(a). There is no dispute that the City must conform with these obligations prior to any closure – and its admitted intent to accumulate funds for non-Airport purposes is facially non-compliant. Thus, as an initial matter, it is unnecessary to consider the post-closure applicability of Section 47133(a) to resolve the Appeal.

To the extent that the Associate Administrator does consider the post-closure implications of Section 47133(a), the City misrepresents both the law and the consequences of the Settlement Agreement and Consent Decree. The City’s primary argument is that Section 47133(a) has been described as remaining in effect “as long as the airport functioned as an airport.” See Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7698 (February 16, 1999). But that language – and other FAA guidance – had a limited purpose: to distinguish the statute from grant assurance #25, the obligations of which end for no more than 20 years. It was not intended to resolve the post-closure implications of the statute, a rare-to-occur scenario.

The FAA apparently has never addressed the application of Section 47133(a) to revenue accumulated at an airport that is no longer federally obligated to remain open. But the sponsors of the few obligated airports for which premature closure has been authorized typically have been committed to re-purpose funds for airport purposes. See, e.g., Notice of Intent to Rule on Request to Release the Entire Desert Center Airport, Desert Center, California, 66 Fed. Reg. 8461 (January 31, 2001); Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178, 1183 (8th Cir. 2001); Pub. L. 113-285 (December 18, 2014) (Congressional release of St. Clair Regional Airport).

Nothing in Section 47133(a) suggests that the closure of an airport under any other scenario should instead release a sponsor’s obligations vis-à-vis previously-collected revenues. Indeed, the FAA’s interpretations of Section 47133(a) have implied that the statute endures:

Section 47133(a) … impose[s] an indefinite prohibition on revenue diversion, one unrelated to the time limitation embodied in grant assurances. Only this indefinite prohibition could effectively deal with the persistent problem identified by Congress – abuse of monopoly power and neglect of important needs at the airports.

See Brief for Respondents, Los Angeles v. FAA, no. 99-70452, 1999 WL 33612467, *20 (9th Cir. October 18, 1999). If this proceeding should address this issue, the necessary and proper interpretation of the statute is that it governs funds accumulated while an airport was in operation, even post-closure. Otherwise, airports around the country would have an incentive – emulating what the City is doing – to accumulate a surplus on the backs of airport users, and then to re-purpose it for general use, abusing their monopoly power and neglecting important airport needs.

The City alternatively argues that even if Section 47133(a) generally applies post-closure, it was released from that obligation by the Settlement Agreement and Consent Decree. See Reply, at 18. The City asserts that because the language of the statute and grant assurance #25 are similar, both must expire if the City closes SMO. But no authority is cited for that proposition, because
there is none. The FAA has given the statute an expansive interpretation, including obligations exceeding those imposed by grant assurance #25. See, e.g., Policy and Procedures Concerning the Use of Airport Revenue: Proceeds from Taxes on Aviation Fuel, 79 Fed. Reg. 66282, 66285 (November 7, 2014) (“FAA published policy on revenue use refers to airport sponsors, but that fact alone does not deal with the breadth of § 47133”). Moreover, the FAA explicitly has stated the City has not been released from any statutory obligations. See Final Brief for Respondents, NBAA v. Huerta, no. 17-1054, 2017 WL 6040648, *40 (D.C.Cir. December 4, 2017).

The City has engaged in revenue diversion additional to that identified in the Director’s Determination, via inadequately documented loans

The Appeal seeks a ruling that certain transfers between the City and SMO should not have been construed to constitute loans because they did not comply with the FAA’s Revenue Use Policy. To qualify, a transfer must be “clearly documented as a … loan at the time it was made.” See Appeal, at 4-6, citing 64 Fed. Reg. at 7718. The City asserts that the transfers actually were sufficiently documented to qualify as loans. See Reply, at 4, et seq. The City is wrong.

As an initial matter, the City argues that based on the 1996 statutory amendment that added 49 U.S.C. § 47107(k)(5)(a) and In re Los Angeles, docket no. 16-96-01, the Revenue Use Policy should be interpreted to only prohibit documentation that is created many years or decades after the fact – but not to prohibit documentation that is created months after the fact. See Reply, at 5.

Neither the 1996 statutory amendment nor the Los Angeles Part 16 proceeding cross-referenced the FAA’s policy for loan documentation, nor vice versa. The City attempts to discern a linkage where none exists, in order to create a basis for the otherwise unsupported “reasonably contemporaneous” standard utilized in the Director’s Determination. But the purpose of Section V(A)(4)(a) was not to provide sponsors a short timeframe to enter into undocumented loans with their airports; it was to specify that such practices were entirely prohibited. The documentation at issue in the Appeal – finalized no less than 3 months and potentially more than a year after the fact – simply were not dated “at the time” the transfers were made and thus do not evidence loans.

The City disputes the relevance of the case law and other authority cited by the Complainants (see Reply, at 8), but offers no countervailing authority of its own. The City does assert that its CAFRs must prove the transfers to be loans, because it could be subject to sanctions if its transactions were not recorded consistently with Generally Accepted Accounting Principles (“GAAP”). See Reply, at 5. But the Director’s Determination already has rejected the City’s reliance on its CAFRs, explaining that an “advance” or “payable” entry therein do not sufficiently

1 The FAA also confirmed that it can enforce the requirements of Section 47133(a) against entities that are not airport sponsors, via 49 U.S.C. § 47111(f). See id., at 66285.

2 The City does not dispute that there are errors and omissions in the Director’s Determination. See Reply, at 3-4. As a result, it presumably does not and cannot object to any document requests necessary for the computation of the exact amount of reimbursement due to SMO. Further, as previously emphasized in the Complaint, “only a full audit of relevant City and Airport books and records by an experienced, independent firm will provide the necessary clarity and transparency for current and any future fees, charges and financial obligations imposed by the City on the Airport and its users.” See id., at 46. See also United Airlines v. Port Authority of New York and New Jersey, no. 16-14-13, Director’s Determination (November 19, 2018), at 17 (finding that the Port Authority “did not maintain an adequate audit trail for the allocation of its expenses, and engaged in deficient accounting practices and record keeping”).
document the terms of a transfer for it to constitute a loan for FAA purposes. See id., at 6-7. The City offers no explanation of why the FAA cannot impose standards that exceed GAAP definitions, to ensure that sponsors conform with grant assurance #25 and 49 U.S.C. § 47133(a). See also In re Albany County Airport, 15 U.S. Op. Off. Legal Counsel 26, 1991 WL 499884, at footnote 7 (February 12, 1991) (“the FAA [has] discretion to impose documentation and accounting requirements on airport owners and operators”).

Additionally, the City concedes that its CAFRs were not created until after the end of the relevant fiscal years, and months after the relevant transfers occurred. See Reply, at 6-7. Thus it did not comply with the Revenue Use Policy in any event. The City also cites a prior statement by the Complainants to the effect that statements in the CAFRs should be considered definitive. See Reply, at footnote 5, quoting Complaint, at footnote 12. But it concerned the reconciliation of inconsistent dollar figures published by the City; that statement in no way suggested that the City’s post hoc characterization of its CAFRs was definitive, or entitled to any deference at all.

The City alternatively argues that for a transfer to qualify as a loan, “all the FAA should require” is that “the City had an expectation that the Airport Fund would repay the General Fund.” See Reply, at 4. No authority is cited for this standard, and it is facially inconsistent with the Revenue Use Policy.

Finally, the City asserts that any resolution of its exact liability – apparently for both the transfers discussed above, and other issues identified in the Appeal – should be deferred because of supposedly forthcoming discussions between the City and the Western-Pacific Region. See Reply, at 9. As Complainants previously have observed, there is no certainty that these discussions will occur, nor that they would or even could address the issues on appeal. In any case, the Region cannot moot a Part 16 appeal. See Response of the Complainants to City of Santa Monica’s Opposition to Motion for an Interim Order, at 3-4. Accordingly, there is no basis to defer consideration of any of the revenue diversion issues identified in the Appeal.

The Director’s Determination should have addressed the issue of whether the methodology used by the City to compute landing fees was compliant, to ensure that it does not evade review and that the City’s corrective action is meaningful

The City asserts that the fully-briefed allegation that unlawful methodologies have been used for rate-setting at SMO need not be resolved. See Reply, at 11. There is no dispute that the factual situation at SMO has changed – and the City apparently does not intend to appeal the directive in the Director’s Determination that the rates be recalculated. The City suggests for those reasons, and because it “has yet to determine how it will go about revising the landing fee at SMO,” the legal questions raised in the Complaint need not be addressed. See Reply, at footnote 8. But the City is wrong. The City itself has stated that it will argue that its rate-setting methodologies

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3 The City has acknowledged that its CAFRs cannot justify interest-bearing loans. See its Conditional Opposition to Petition to Expand the Record (December 19, 2019), at 2. The City also – in footnote 2 to its Reply – misrepresents Exhibit Q to its Rebuttal (September 13, 2016). For a transfer to constitute a loan, the cited treatise specifies that a journal entry must not only identify it as a “payable” but also must specifically identify it as a “loan.” See id., at 50.
are compliant (see id., at footnote 1) – a preview of its forthcoming appeal. That line of argument would make no sense unless the City intends to recycle its prior rate-setting methodologies. 4

Nor, as the City claims (see Reply, at 12), are the methodological issues raised in this docket sui generis to Santa Monica (although even if they were, they would still require the FAA’s attention, to ensure SMO’s compliance). The questioned practices are of general and national significance, such as how airfield/non-airfield costs and indirect costs must be identified and allocated as part of a rate-setting process. See Appeal, at 11. Further, the City effectively concedes that these issues are capable of evading review if not addressed now. The City states that if they do not agree with the revised landing fee, the Complainants may “renew their complaint” in a new proceeding. See id., at 11. But Part 16 is not a shell game, and the FAA may act when there is a high likelihood of a future violation – and this is just such a case. See Appeal, at 10. 5

The City also argues that there is no basis for the FAA to order a refund of landing fees (see Reply, at footnote 9), but does not dispute that 14 C.F.R. § 16.109(a) since 1996 specifically has authorized the FAA to order the refund of fees unlawfully collected. The City itself has framed the issue in this proceeding to be whether the SMO landing fees are lawful. See, e.g., the City’s Opposition to Motion for Interim Order (December 19, 2019), at 3; Answer (July 1, 2016), at 22; and Rebuttal (September 13, 2016), at 15. The notion that the Part 16 process does not include a mechanism to compensate complainants for damages incurred does not address – or override – the distinct authority confirmed in Section 16.109(a).

Finally, Complainants do not dispute that some effort by the FAA would be required to rule upon exactly how much SMO users have been overcharged – and then some effort by the City to actually issue refunds of landing fees. But Complainants ask for nothing more than a remedy which the FAA deliberately has made available. It is decades too late for the City to object to the agency’s procedure for mandating refunds.

Conclusion

For the reasons stated above, and previously briefed, the Complainants’ appeal to the Associate Administrator is meritorious and an appropriate final agency order should so issue.

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4 The City also asserts that it does not bear the burden of showing that its recalculations are compliant. See Reply, at 11. But it conflates the Part 16 appeal process with the separately-pending corrective action directive, which remains before the Office of Airport Compliance. See 14 C.F.R. § 16.11(c). The Director’s Determination places the burden of corrective compliance on the City, stating that the recalculations must be “acceptable to the FAA.” See id., at 13.

5 The City also suggests that a ruling on this issue would constitute an improper “advisory opinion.” See Reply, at 12. But this is not an Article III proceeding, and the FAA under the authority of 49 U.S.C. § 46101(a) may “provide equitable remedies such as injunctive relief and declaratory relief.” See Compass Airlines v. Montana, 2013 WL 4401045, *14 (D.Mont. August 12, 2013). See also NAACP v. FCC, 46 F.3d 1154, 1161 (D.C.Cir. 1995).
Respectfully submitted,

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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:

- Rick Cole, City Manager, City of Santa Monica, 1685 Main Street, Room 209, Santa Monica, CA 90401, rick.cole@smgov.net

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Dated this 9th day of January 2020,

Jol A. Silversmith