UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In The Matter of
Compliance
With Federal Obligations
By the City of Santa Monica,
California

FAA Docket No. 16-16-13

NOTICE OF INVESTIGATION

Notice is hereby given to the City of Santa Monica (Santa Monica or City), the owner and operator of The Santa Monica Municipal Airport (SMO) that the Federal Aviation Administration (FAA) is initiating an investigation into a series of actions being carried out by the City. These actions may be causing, and appear intended to cause, impairment of the airport, including but not limited to, a *de facto* closure of the airport in violation of applicable law. These actions include:

- A City Council resolution declaring it the policy of the City to close SMO to aviation use "as soon as it is legally permitted with a goal of on or before July 1, 2018," notwithstanding FAA's recent Final Agency Decision that requires the City to operate the airport until at least 2023;

- The adoption of a new Airport Leasing policy which has resulted in the City entering into leases for several non-aeronautical users, while denying such leases to aeronautical users; and

- The City Manager's intent to implement the airport closure resolution by, among other things, phasing out the sale of leaded fuel that is necessary for the operation of most aircraft and entering into contract negotiations to replace it with unleaded fuel.

Additionally, the City has now issued Notices to Vacate to the sole two fixed-based operators (FBO's) at SMO that provide aviation fuel (jet fuel and Avgas), American Flyers Flight School (American Flyers) and Atlantic Aviation (Atlantic).[1] The FAA issues this Notice of Investigation (NOI) in accordance with FAA Rules of Practice for Federally Assisted Airport Proceedings, 14 C.F.R. Part 16.

In accordance with 14 C.F.R. § 16.103, Santa Monica would normally have 30 days from the date of service of this NOI to respond. Pursuant to 14 C.F.R. §16.11(b), FAA may shorten this time period if it finds that circumstances require expedited handling of a particular case or controversy. Because the City's Notices to Vacate require the two private FBOs to vacate SMO within 30 days, or no later than October 15, 2016, the Agency finds that expedited handling of this matter is required. Accordingly, FAA has shortened the response period and the City has ten

[1] The Notices to Vacate were also sent to FAA by electronic mail on September 15, 2016.

(10) days from the date of service of this NOI to respond. Additionally, because expedited handling of this matter is required, pursuant to its authority to direct "such other measures as may be required," 14 C.F.R. 16.11(b)(4), FAA directs that all documents must be served electronically. The FAA strongly recommends that the City withdraw the notices to vacate until such time as this matter can be resolved.

As part of this investigation and under separate cover, FAA is issuing subpoenas that require the City to provide detailed information, plans and assurances with respect to a number of issues, including but not limited to, the City's plan to replace the functions provided by the two private FBOs and the City's plans to provide fuel that can be used by all aircraft. No extensions of time will be granted unless the City withdraws its Notices to Vacate.

I. BACKGROUND

SMO is a public-use airport owned and operated by the City. SMO serves the role of a general aviation airport capable of accommodating a wide range of business and personal aircraft, including corporate and business jets. The 227-acre airport has approximately 269-based aircraft with approximately 452 average aircraft operations per day. The airport is located in a congested air traffic area and serves as a reliever airport for Los Angeles International Airport (LAX), which is located seven miles to the south.

FAA records indicate that the planning and development of SMO has been financed, in part, with funds provided by FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982 (AAIA), as amended, Title 49 United States Code (U.S.C.) § 47101, *et seq*. Between 1985 and 2003, SMO received approximately $9.7 million in Federal airport development assistance.

a. Applicable Federal Law and Policy

The Federal role in civil aviation is established by various laws that authorize programs that provide Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

b. The Airport Improvement Program (AIP)

Title 49 U.S.C. § 47101, *et seq.,* provides for Federal airport financial assistance for the development of public-use airports under the AIP established by the Airport and Airway Improvement Act of 1982, (AAIA) as amended. As a condition precedent to providing airport development assistance under AIP, FAA must receive certain assurances from the airport sponsor. These assurances are set forth in statute, 49 U.S.C. § 47107, along with additional assurances that are part of the grant agreement.

The FAA has statutory authority to enforce compliance with the sponsor assurances. FAA Order 5190.6, *FAA Airport Compliance Manual* (Order), provides the policies and procedures to be followed by FAA in carrying out its functions related to compliance and enforcement.

Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal Government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system and a safe and efficient national airspace system.

In a recent Final Agency Decision, the Associate Administrator affirmed a determination by the Director of FAA, Office of Airport Compliance and Management Analysis that federal grant assurances require the City to operate the airport until 2023. The City has appealed this decision to the U.S. Court of Appeals for the Ninth Circuit.[2]

i. Grant Assurance 22

Grant Assurance 22(a), Economic Nondiscrimination, provides that the sponsor shall:

> Make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

This assurance obligates the sponsor to make available suitable areas or space on reasonable terms to those willing and qualified to offer aeronautical services to the public or support services (such as fuel, storage, tie-down, or flight line maintenance services) to aircraft operators. Grant assurance 22 is mandated by statue. 49 U.S.C. § 47107(a)(1).

The sponsor's obligation under Grant Assurance 22 to operate the airport for the public's use and benefit is not satisfied simply by keeping the runways open to all classes of users. The assurance obligates the sponsor to make available suitable areas or space on reasonable terms to those

[2] The City must comply with FAA administrative orders until such time as they are vacated by a Circuit Court of Appeals. *United States. v.City of Santa Monica,* No. CV 08-2695, Dkt. No. 20 at 3 (C.D. Cal. May 16, 2008) (order granting preliminary injunction).

willing and qualified to offer aeronautical services to the public (e.g. air carrier, air taxi, charter, flight training, or crop dusting services) or support services (e.g. fuel, storage, tie-down, or flight line maintenance services) to aircraft operators. Sponsors are also obligated to make space available to support aeronautical activity of noncommercial aeronautical users (i.e., hangars and tie-down space for individual aircraft owners). FAA Order 5190.6B, ¶ 9.7.

Grant Assurance 22, Economic Nondiscrimination, requires the sponsor to negotiate in good faith and on reasonable terms with prospective aeronautical service providers. The FAA interprets the willingness of a prospective provider to lease space and invest in facilities as sufficient evidence of a public need for those services.

ii. Grant Assurance 23

Grant Assurance 23 provides that the sponsor "will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." This grant assurance does not expire, but remains in effect as long as the airport is used as an airport. See Assurance B(1). Grant Assurance 23 is mandated by statute. 49 U.S.C. § 47107(a)(4).

A limited exception to the prohibition on exclusive rights is that the airport sponsor itself may exercise the right to provide any or all of the aeronautical services at its airport and to be the exclusive provider of those services. Such an endeavor is commonly referred to as a "proprietary exclusive" operation. If the sponsor elects to conduct such an operation, it must act as a principal using its own employees and resources; otherwise a violation of Grant Assurance 23 may result. FAA Order 5190.6B, ¶ 8.5.

Notably, the manner under which a sponsor exercises a proprietary exclusive operation also remains under the purview of Grant Assurance 22. Limitations imposed by the airport sponsor on aeronautical users, including service providers, are within the sponsor's proprietary power only to the extent that they are consistent with the sponsor's obligations to provide access to the airport on reasonable and not unjustly discriminatory terms and other applicable federal law. FAA Order 5190.6B, ¶ 14.3.

c. The Civil Aeronautics Act of 1938

The Civil Aeronautics Act of 1938 also prohibits exclusive rights at any airport "on which Government money has been expended." 49 U.S.C. § 40103(e). This provision is independent of the grant assurances and the Surplus Property Act.

d. Surplus Property Obligations

The airport is also subject to certain deed restrictions imposed under the Surplus Property Act (SPA). See 49 U.S.C. §§ 47151- 47153. The SPA imposes obligations in exchange for the conveyance of property. SPA obligations include that the property by used for public airport

purposes for the use and benefit of the public on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right. Public Law 81-311 specifically imposes upon FAA the sole responsibility for determining and enforcing compliance with the terms and conditions of all SPA instruments of transfer.

The City has filed a complaint in U.S. District Court for the Central District of California seeking, in part, a declaration that the SPA covenants are no longer in effect. The District Court has ordered the parties to participate in private mediation to be completed no later than March 7, 2017. It has scheduled the matter for trial in August 2017.

II. FACTS AND ANALYSIS

1. On information and belief, the leases for most or all aeronautical tenants at SMO expired in July of 2015.

2. On October 27, 2015, the City Council voted to include provisions in SMO leases that limit the sale of aircraft fuels for piston-engine aircraft to "simply unleaded fuels" and fuels for turbine-engine aircraft to biofuels or other sustainable fuels by a date or dates certain. The Council also voted to include provision in flight school leases that prohibit lessees from using leaded fuels for flight training. This may constitute in improper restriction on aircraft since not all aircraft are certified or otherwise capable of using unleaded or alternative fuels.

3. On March 22, 2016, the City Council approved an Airport Leasing and Licensing Policy. The policy expressly authorizes the use of SMO for "parks and open space, arts/cultural, creative space, professional theaters, museums, artist studios, art galleries, photograph studios," and restaurants, among other non-aviation uses. The policy prohibits any use involving products "which by nature of the operation is likely to be obnoxious or offensive to the surrounding environment," as well as "high intensity uses that are incompatible with the surrounding residential uses." Despite being a leasing policy for an airport, the only category of authorized uses that might ostensibly apply to aviation is a catch-all category for "uses required by law."

4. On information and belief, the City has entered into a number of nonaeronautical leases at SMO, but has agreed to no lease renewals for aeronautical tenants.

5. On information and belief, both American Flyers and Atlantic Aviation have attempted to enter into leases with the City, but the City has refused to enter into such leases.

6. According to a complaint filed by Atlantic Aviation it has been in lease negotiations with the City since March 2015. In June 2015 the parties entered into a Holdover Agreement that raised Atlantic's rent by over 32%. The agreement was extended by one month to November 30, 2015. It was extended again to December 31, 2015. On December 31, the agreement expired and Atlantic operated without a lease or agreement of any kind.

On March 11, 2016, the parties entered into another Holdover Agreement with an 80% increase in rent that was backdated to January 1, 2016. Less than a month later that agreement expired and to the present time Atlantic remains operating without a lease or agreement of any kind.

7. On August 15, 2016, FAA issued a Final Agency Decision (FAD) finding that the City's AIP grants remain in effect until August 2023, after which on August 26, 2016, the City filed a Petition for Review of the FAD with the U.S. Court of Appeals for the Ninth Circuit.

8. On August 23, 2016, the City Council passed a resolution declaring that it is the policy of the City to close the airport to aviation uses as soon as legally permitted with the a goal of on or before July 1, 2018.

9. At the August 23, 2016 meeting the City Council also directed the City Manager to replace all private FBOs with fixed based operations provided by the City on an exclusive proprietary basis. The City Manager also was directed to cause the removal of such FBOs by September 15, 2016 or as soon as practicable thereafter. To carry out the airport closure resolution, the City Manager reported on August 23, 2016 his intent to phase out the sale of leaded fuel "as soon as legally possible" and enter into contract negotiations to replace it with unleaded fuel.

10. By letter dated August 30, 2016, FAA wrote to the Mayor Tony Vazquez to express concern regarding recent actions at SMO and to urge the City, pending legal actions notwithstanding, to abide by its Federal grant assurance obligations. The letter also requested that prior to implementation, the City prepare and submit its plan for proprietary exclusive fixed based operations to FAA for review.

11. On September 6, 2016, the City replied that it was "unaware of any legal requirement mandating" it to submit its plans for proprietary exclusive operations, but noted the City intends to "consult cooperatively" with FAA personnel. The City has neither provided the requested plan nor otherwise consulted with FAA on the details of its plan.

12. On September 15, 2016, the City issued two Notices to Vacate to the sole two private FBOs that provide fuel at SMO.

13. On information and belief, Atlantic Aviation provides full service fueling of both Avgas and jet fuel; and a full suite of aviation services including maintenance, towing, and cleaning.

14. On information and belief, American Flyers provides self-service Avgas and flight training.

15. FAA has no knowledge that the City currently possesses any experience or expertise in operating a full-service aviation FBO.

16. The removal of the FBO tenants and failure to enter into leases with the FBOs constitutes a probable violation of Grant Assurance 22 unless certain conditions are satisfied. Grant Assurance 22 requires the City to "make the airport available as an airport for public use on reasonable terms . . . to all types . . . of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport."

17. To avoid a finding of a violation of it Grant Assurances, the City must be able to demonstrate that it is ready, willing, and able to provide the full range of services that the current FBOs are providing on or before the date that the private FBOs have been ordered to vacate. Until the Federal Government certifies the use of unleaded fuel in all aircraft, then the City may not phase out leaded fuel or take any actions related to fuel that would conflict with or undermine federal law and airport access consistent with the grant assurances. The City may work in cooperation with users to increase use of unleaded fuels. The City must demonstrate that there will be no break in FBO services at SMO. The City must provide assurance that once it involuntarily removes the private FBOs, it will continue to provide such services on similar terms. The City is not permitted to exercise its right to provide exclusive FBO services as a strategy to close or materially restrict airport operations and access.

18. The city may exercise an exclusive right to operate FBO services, but it may not grant an exclusive right. In order to exercise an exclusive right the City is required to use its own employees to provide the FBO services and may not use contractors. The use of third parties would constitute a violation of Grant Assurance 23, the SPA and the prohibition against exclusive rights contained in 49 U.S.C. § 40103(e).

19. The use of contractors by the City to provide FBO services on an exclusive basis may constitute a *de facto* grant of an exclusive right to those contractors.

III. ISSUES UNDER INVESTIGATION

The issues under investigation include, but are not limited to the following:

- Whether Santa Monica's refusal to enter into leases with aeronautical tenants violates grant assurance 22.

- Whether Santa Monica's planned proprietary exclusive operation violates grant assurance 23 and 49 USC § 40103(e).

- Whether Santa Monica's notices of removal to the only two FBO's that provide fuel at SMO constitutes a violation of grant assurances 22.

- Whether Santa Monica is ready, willing, and able to offer FBO services substantially similar services on substantially similar terms to those offered by the private FBOs without any interruption or diminution of service.

- Whether the actions of Santa Monica set forth above also violate the SPA.

IV. OPPORTUNITY TO RESPOND

The City of Santa Monica must reply to this Notice no later than 10 days from service of this Notice. The FAA invites demonstrable good faith actions by the City of Santa Monica to resolve informally the matters that are addressed in the Notice. Information provided by the City after the 10-day timeframe may not be considered by FAA. Possible noncompliance with Federal requirements is a serious matter. If the issues addressed in this Notice are not resolved within the 10-day time period, and FAA's investigation establishes violations of Federal law and related sponsor obligations, FAA may issue a Director's Determination in accordance with 14 C.F .R. § 16.31 making findings on the above-identified issues.

Kevin C. Willis

Kevin C. Willis, Director
Office of Airport Compliance
and Management Analysis

Sept 26, 2016

Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **September 26, 2016**, the foregoing **Notice of Investigation** has been served on the City of Santa Monica via Federal Express and Electronic Mail, to:

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Care/of

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Copy to:

FAA Part 16 Airport Proceedings Docket

FAA Airport Compliance and Management Analysis, ACO-100

Cynthia L. Powell
Administrative Officer
Office of Airport Compliance
and Management Analysis