March 22, 2019

SENT BY EMAIL

Brian Armstrong, Manager
Safety and Standards
Western-Pacific Region
Office of Airports
Federal Aviation Administration
15000 Aviation Boulevard, Suite 3012
Lawndale, CA 90261

Re: Santa Monica Municipal Airport

Dear Mr. Armstrong:

This is the response by the City of Santa Monica (the “City”) to the February 6, 2019 letter from Kevin Willis to Stelios Makrides and the underlying November 30, 2018 letter to the Federal Aviation Administration (“FAA”) from the National Business Aviation Association (“NBAA”), Aircraft Owners and Pilots Association (“AOPA”) and General Aviation Manufacturers Association (“GAMA”) (collectively, the “complainants”).

We understand FAA is treating the complainants’ November 30, 2018 letter as a Part 13 complaint. As we explain below, FAA only has to consider one question to resolve the complaint: may the City use airport revenue to cover the costs of removing pavement from, and then hydro-seeding, runway and taxiway areas that are no longer in use following the FAA-approved shortening of the runway at SMO? FAA’s Chief Counsel, its Western-Pacific Region and the Los Angeles Airports District Office have already given the correct answer to this question three times: “yes.” The City has reasonably relied upon its Settlement Agreement/Consent Decree with FAA and FAA’s previous guidance, and the complainants offer no conceivable justification for FAA to change its mind now.

In offering this response to FAA’s letter, the City does not waive, but rather expressly reserves, its right to assert that by reason of the City’s Settlement Agreement/Consent Decree with FAA: (a) the United States District Court in which the Consent Decree was entered is the only forum in which any enforcement action may be taken against the City for alleged violations of the standards set forth in Grant Assurances 19, 22, 23, 24, 25 and 30 or any other violations of the Settlement Agreement/Consent Decree; (b) FAA may not seek or impose the penalties and sanctions the complainants contemplate (at 5); and (c) the City is not subject to the statutory obligations of 49 U.S.C. §§ 47107 or 47133.
The complaint raises (and then conflates) two different kinds of questions: *first*, can the City use airport revenue to cover the costs of removing pavement from and then hydro-seeding runway, infield and taxiway areas that are no longer in use following the FAA-approved shortening of the runway at SMO or to cover the costs of pulverizing and stabilizing pavement within the Runway Safety Area (“RSA”); and *second*, can the City rate base these costs and recover them through charges paid by aeronautical users at SMO?

The City has not rate-based any of these costs and will not do so. As a result, the complainants’ baseless claims that the City is somehow violating federal rate-setting requirements are moot, and 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.²

The City also pledges not to use airport revenue to pay for the costs of pulverizing and stabilizing payment with the RSA. These costs will be borne by the City’s General Fund. As a result, the complainants’ claim that the City is unlawfully diverting airport revenue to pay these costs is moot, and there is no reason for FAA even to consider the issue of whether any of the costs associated with this work could lawfully be paid with airport revenue.

This leaves only one issue for review by FAA: does the Settlement Agreement/Consent Decree permit the City to use airport revenue to cover the costs associated with removing pavement from and then hydro-seeding the runway (beyond the required RSA, as prescribed in applicable FAA Advisory Circulars), infield and taxiway areas that are no longer in use because the City has shortened the runway in accordance with the Settlement Agreement/Consent Decree?

The City has used airport revenue and plans to continue to use airport revenue to cover these pavement removal and hydro-seeding costs. The complainants allege in their Part 13 complaint that this is an unlawful use of airport revenue, but FAA has already correctly determined that the City can use airport revenue for this purpose, in accordance with the Settlement Agreement/Consent Decree. The FAA should therefore reject the complainants’ revenue diversion claim.

In response to the City’s inquiry, and with reference to the Settlement Agreement/Consent Decree, FAA’s Chief Counsel unconditionally advised the City in his February 3, 2017 letter that “the City may use revenue derived from airport operations to cover the costs of shortening the runway” (emphasis added). This advice was consistent with and required by the Settlement Agreement/Consent Decree. The Settlement Agreement/Consent Decree provides for the shortening of SMO’s runway in Section II.A: “the Airport’s runway shall have an operational

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² The complainants assert (at 3) that although the City has agreed not to rate base any of the costs of the pavement removal project, this is “a convenient fiction.” The FAA should swiftly reject their misguided and illogical argument. The complainants’ theory apparently is that because these costs will be borne by what they call “the existing surplus in the Airport fund,” it must follow that “[t]he costs of pavement removal … are already in the rate base.” This is nonsense. The rate base only includes costs properly allocable to the runway and taxiways. The City has not allocated, and has pledged not to allocate, any of the costs of the pavement removal project to the rate base.
runway length of 3,500 feet.” The Settlement Agreement/Consent Decree further provides in Section II.B that “[t]he costs to shorten the runway … shall be borne by the City.” The complainants assert (at 2) on the basis of this language that the Chief Counsel’s letter is “inconsistent with the terms of the Agreement itself.” They argue that this provision requires that the costs to shorten the runway be borne by the City’s General Fund, and not by the City’s Airport Revenue Fund, but that is not what Section II.B says.

FAA has properly understood Section II.B of the Settlement Agreement/Consent Decree to mean that, as between the two parties to the Agreement, the costs of shortening the runway are to be borne by the City, and not by FAA. If the Settlement Agreement/Consent Decree had been intended to prohibit the City from using airport revenue for the costs of shortening the runway, it could have and would have said so. It did not. Instead, the Settlement Agreement/Consent Decree goes on to provide in Section II.B that “[i]f sought by the City,” FAA would provide “technical support” to assist the City “in obtaining federal funds to support the shortening of the runway, as consistent with federal laws, regulations and the availability of federal funds.” FAA would never have agreed to offer this assistance if the costs of shortening the runway were categorically ineligible for federal funding. But if such costs could be eligible for federal funding, they must be costs FAA’s airport revenue-use rules would permit the City to pay with airport revenue. Accordingly, the only reasonable interpretation of Section II.B is that it is the City’s responsibility to pay for the costs of shortening the runway, but these costs may be borne by the City’s Airport Revenue Fund.

The Chief Counsel’s February 2017 advice is, as a result, consistent with the unambiguous terms of the contract – the Settlement Agreement/Consent Decree – between FAA and the City. But even if the terms of the Settlement Agreement/Consent Decree were deemed to be ambiguous, the Chief Counsel’s letter conclusively resolves any ambiguity in the City’s favor. What better extrinsic evidence of FAA’s intent could there possibly be? FAA’s Chief Counsel personally negotiated the Settlement Agreement/Consent Decree with the City and was the principal scrivener of the contract – and he properly understood and, in his official capacity, confirmed that the City could use airport revenue to cover the costs of shortening the runway.

After FAA’s Chief Counsel properly advised the City in his February 3, 2017 letter that airport revenue could be used for the costs of shortening the runway, FAA has twice, at the City’s request, offered written guidance to the City with respect to the City’s “Excess Pavement Reuse Project.” On August 31, 2018, the Manager of the Los Angeles ADO wrote to recommend that the City refrain from rate-basing any of the costs of removing pavement from former runway or taxiway areas or of pulverizing and stabilizing payment within the RSA. The City has accepted this recommendation. The ADO also objected to the City using any airport revenue “to pursue pulverizing or degrading of the pavement within the RSA.” Notably, however, the ADO did not object in its August 31, 2018 letter to the City’s use of airport revenue to remove pavement from the former runway (beyond the required RSA), infield and taxiway areas.

After receiving this letter, the City asked the ADO to reconsider FAA’s objection to the use of airport revenue for the work within the RSA. On October 15, 2018, as Manager for Safety &
Standards for FAA’s Western-Pacific Region you responded, reiterating FAA’s objection to the use of airport revenue to pulverize and stabilize pavement within the RSA. The City has reluctantly accepted FAA’s recommendation and will not use airport revenue for this purpose. But FAA’s October 15, 2018 letter did more than just repeat FAA’s previous objection to the use of airport revenue for work within the RSA. The Region expressly reaffirmed that based upon the language in the Consent Decree, FAA had “no objection” (emphasis added) to the use of airport revenue to remove pavement from former runway (beyond the required RSA), infield and taxiway areas. The City should be able to rely upon what the Settlement Agreement/Consent Decree actually says and how the FAA has consistently (and correctly) interpreted its terms. The complainants may not like the Settlement Agreement/Consent Decree, but they, too, must live with what it provides.3

The complainants nevertheless argue that the FAA cannot allow the City to use airport revenue for the pavement removal project unless it has a “legitimate aeronautical purpose.” FAA, however, has never interpreted the revenue-use constraint imposed by Grant Assurance 25 to limit the use of airport revenue to projects with an “aeronautical purpose.” Such a restriction is not found in the language of the grant assurance, the underlying statutory requirement set forth in 49 U.S.C. § 47107(b)(1) or FAA’s” Policy Concerning the Use of Airport Revenue,” 64 Fed. Reg. 7676 (Feb. 16, 1999). “Aeronautical purpose” may be a relevant consideration in airport rate-setting, but it is not a limitation on the permissible use of airport revenue. Airport revenue can lawfully be used for a wide variety of both aeronautical and non-aeronautical projects.4

In any event, the removal of runway and taxiway pavement no longer needed as a result of the FAA-approved shortening of the runway at SMO has an operational, safety and aeronautical justification: The removal of runway and taxiway pavement that is no longer within the authorized movement areas of the Airport is prudent and necessary to prevent aircraft operators from continuing to use closed surfaces. Since the runway was officially shortened, aircraft operators have persistently ignored the new pavement markings referenced by complainants (at 2) and have continued to use closed surfaces the City has no obligation to maintain as movement areas. Making matters worse, FAA has been unable or has failed to cite operators when they have used former runway areas (beyond the current 3,500-foot operational length and the additional required RSA) to depart from the Airport because, as the City understands, FAA has not felt it could meet FAA’s burden of proof to establish violations under FAR Part 91.123(a)

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3 The complainants’ real beef, as FAA knows, is with the Settlement Agreement/Consent Decree itself. NBAA, joined by AOPA and GAMA as amici curiae, asked the Court of Appeals for the D.C. Circuit to invalidate the Settlement Agreement. See NBAA v. Huerta, Case No. 17-1054. Their collateral attack on the Settlement Agreement was properly rejected by the Court of Appeals in a Judgment entered on June 12, 2018 (ECF #1735490).

4 The complaint (at 5) offers a bizarre argument that because FAA has advised in the past that the costs of aeronautical projects reserved for the exclusive use of only one tenant may not properly be charged to all users, it must follow that a project benefitting no aeronautical user cannot be funded with airport revenue. Like much of the complaint, this illogical assertion conflates rate-setting rules with revenue-use principles. The reason why FAA has frowned upon the use of revenue derived from other aeronautical users to fund projects such as an exclusive-use ramp that benefits only one is because that can in some circumstances be unjustly discriminatory. This has nothing to do with the permissible or prohibited uses of airport revenue.
and FAR Part 91.13(a). In these circumstances, the pavement removal project serves a lawful aeronautical purpose.\(^5\)

For all of these reasons, the FAA should promptly dismiss the Part 13 complaint by NBAA, AOPA and GAMA.

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

Sincerely,

/s/ Scott P. Lewis

Scott P. Lewis

cc: Kevin C. Willis, Director, Office of Airport Compliance and Management Analysis
    Mark McClardy, Director, AWP Airports Division
    Dave Cushing, Manager, LAX ADO
    Jol A. Silversmith
    Lauren L. Haertlein, Director, Safety and Regulatory Affairs, GAMA
    Jim Coon, Senior Vice President, AOPA
    Stephen J. Brown, Chief Operating Officer, NBAA
    City of Santa Monica

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\(^5\) The issue before FAA in this case is nothing like what happened at Meigs Field in Chicago or at Stapleton International Airport in Denver, the only two precedents offered by complainants (at 4). Here, the City has shortened the runway at SMO with FAA’s prior court-approved agreement; is removing runway and taxiway pavement that should no longer be in use while SMO continues to operate until December 31, 2028; and is relying on FAA’s own interpretation of the Settlement Agreement/Consent Decree in using airport revenue to defray the costs of pavement removal. At Meigs Field, in contrast, the City of Chicago destroyed the runway without FAA’s approval and then immediately sought to convert the entire airport into a public park. FAA alleged in its Notice of Investigation that Chicago could not lawfully use airport revenue to deactivate Meigs as an airport, but Chicago disputed that claim. Ultimately, FAA and Chicago entered into a “consent order” in which they agreed that airport revenue could not be used to cover pavement removal costs. 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.

At Stapleton, the situation was also very different. With FAA approval, Denver was converting Stapleton to non-airport use after the new Denver International Airport opened. The OIG acknowledged that airport revenue could be used for the reasonable costs of getting Stapleton ready for disposition; the issue was whether airport revenue could be used for the costs of redevelopment. That issue is not before FAA in this case. Nothing in the OIG’s report on Stapleton suggests that airport revenue could not be used for the costs of pavement removal associated with an FAA-approved shortening of a runway at an active airport.