

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
ASSOCIATE ADMINISTRATOR FOR AIRPORTS**

NATIONAL BUSINESS AIRCRAFT ASSOCIATION, KRUEGER AVIATION, INC., HARRISON FORD, JUSTICE AVIATION, KIM DAVIDSON AVIATION, INC., AERO FILM, YOURI BUJKO, JAMES ROSS, PARAMOUNT CITRUS LLC, AND AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Complainants,

v.

CITY OF SANTA MONICA,

Respondent.

Appeal from the Director's Determination
Issued by Director Byron K. Huffman, Dated December 4, 2015

**PETITION OF RESPONDENT CITY OF SANTA MONICA
TO SUPPLEMENT THE RECORD ON APPEAL
PURSUANT TO 14 C.F.R. § 16.33(f)**

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Counsel for Respondent City of Santa Monica

Pursuant to 14 C.F.R. § 16.33(f), the City of Santa Monica (“City”) hereby submits that good cause exists for the Associate Administrator for Airports of the Federal Aviation Administration (“FAA”) to consider limited new evidence presented in the City’s Brief on Appeal from the Director’s Determination, filed concurrently with this petition in the above-captioned docket.

GOOD CAUSE EXISTS TO CONSIDER NEW EVIDENCE

The Director’s Determination issued in this matter on December 4, 2015, held that the City remains obligated until August 27, 2023, by the grant assurances associated with its 1994 Airport Improvement Program grant for Santa Monica Airport (SMO). The Director largely based his holding on a finding that the City’s 2003 grant amendment was “akin to a new grant” because in 2003, City “understood the requirements of the statutorily required grant assurances” including that the City “knew or should have known that acceptance of these new funds would restart the date of that [sic] these assurances would apply.” [Director’s Determination at 17-18].

With this finding, the Director’s Determination advanced a novel theory – that a grant amendment can be “akin to a new grant” – and made factual findings regarding contemporaneous intent not based on evidence offered in this proceeding. In the interest of due process and development of a full and fair administrative record, the City should now be able to submit supplemental evidence in the form of a sworn declaration as to what a City official actually understood in reviewing and executing the 2003 grant amendment.

Accordingly, the City now offers a verified declaration, totaling 4 pages, by a former City official who was personally involved in the decision to seek and accept additional grant funds: Susan McCarthy, who was the City Manager in 2003 and responsible for all matters pertaining to SMO including signing the 2003 grant amendment at issue. The declaration is attached here as

Exhibit A. Ms. McCarthy explains in the declaration her understanding that the 2003 grant amendment did not extend the expiration date of the 1994 grant assurances, and provides detailed context for that understanding. This direct evidence is important to discerning the City's understanding of grant agreements at issue, and its intent in executing the 2003 amendment.

The City prepared and intended to submit a second declaration by Jeff Mathieu, who was the Airport Director in 2003 and was also personally involved in the decision to seek and accept additional grant funds. Due to an ongoing severe weather emergency and power outage in Big Bear Lake, California, where Mr. Mathieu serves as City Manager, he has been unable to verify his declaration by the time of filing of this petition. The City respectfully requests leave to supplement this petition during the week of January 11, 2016, when Mr. Mathieu has signed his declaration.

Therefore, good cause exists for the Associate Administrator to allow this new evidence, in accordance with the FAA's policy at 14 C.F.R. § 16.33(f) allowing for such supplementation of the administrative record.

**THE NEW EVIDENCE WAS NOT AT ISSUE PRIOR TO THE
DATE ON WHICH THE EVIDENTIARY RECORD CLOSED**

The Director's Determination is rooted in a finding on the City's contemporaneous understanding, but the Complaint did not allege that City officials involved in the decision to seek and accept additional grant funds in 2003 had any specific knowledge of implications on the expiration date of grant assurances. Nor did subsequent pleadings by the parties to the Part 16 proceeding address the City's actual contemporaneous understanding in 2003. The City's instant appeal, after the evidentiary record in this matter has closed, represents the first opportunity the

City has to refute the Director's misstatement that the City "knew or should have known" that accepting new funds would restart the date of its grant assurances.¹

Because the City is acting in good faith in bringing limited, new evidence to the attention of the Associate Administrator on appeal, it is appropriate pursuant to the goals of 14 C.F.R. § 16.33(f)(3) for the Associate Administrator to allow admission of this evidence into the agency record.

CONCLUSION

For the foregoing reasons, the City respectfully request that the Associate Administrator admit into the evidentiary record the declaration from Susan McCarthy, attached hereto and included in the City's Brief on Appeal From the Director's Determination, as well as the forthcoming declaration from Jeff Mathieu, and fully consider the facts and arguments therein.

Dated: January 8, 2016

Respectfully submitted,

¹ On December 23, 2015, the City also filed a request for a hearing to address factual and legal issues raised by the Director's Determination pursuant to 14 C.F.R. § 16.31, 16.109(a), (b), and 16.201(a). The FAA has not yet acted on that request.

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** Application to the District of Columbia Bar pending. Practice supervised by principals of firm admitted to District of Columbia Bar.*

Counsel for Respondent City of Santa Monica

CERTIFICATE OF SERVICE

I, G. Brian Busey, counsel for the City of Santa Monica, herby certify that pursuant to 14 C.F.R. § 16.33 I have this day served the foregoing Petition of Respondent City of Santa Monica to Supplement the Record on Appeal Pursuant to 14 C.F.R. § 16.33(f) on the following persons by first class mail, postage prepaid:

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Dated: January 8, 2016

/s/ G. Brian Busey

EXHIBIT A

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
ASSOCIATE ADMINISTRATOR FOR AIRPORTS**

NATIONAL BUSINESS AIRCRAFT ASSOCIATION, KRUEGER AVIATION, INC., HARRISON FORD,
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**DECLARATION OF SUSAN McCARTHY IN SUPPORT OF
RESPONDENT CITY'S APPEAL BRIEF**

I, Susan McCarthy, declare that the following is true and correct based upon my personal knowledge, except as to items on information and belief, and that, if called upon to testify as a witness in any legal proceeding, I could and would competently testify as set forth in this declaration.

1. From November, 1999 to December, 2005, I was the City Manager of the City of Santa Monica. Prior to this I was employed by the City in several capacities: Assistant City Manager (1996 - 1999), Director of Cultural Recreation Services (1992 - 1996), Director of Human Resources (1981 - 1985), Assistant Director of Administrative Services (1979 - 1981), Human Resources Administrator (1976 - 1979), and as an Administrative Assistant in the Personnel Division (1975 - 1976).

2. As City Manager, I was the chief executive officer for the City of Santa Monica. I reported to the Santa Monica City Council and I was responsible for the proper administration of all City affairs as provided for in the City Charter, including all matters pertaining to the Santa Monica Airport. Jeff Mathieu was the Airport Director and he reported directly to me. Mr. Mathieu supervised onsite Airport staff and was responsible for the City's operation and management of the Airport. Bob Trimborn worked under Mr. Mathieu and was the City's Airport Manager. Mr. Trimborn managed all aspects of the Airport's daily operations and was the direct supervisor for Airport Staff. Decisions that had the potential to affect the City's rights or obligations regarding its ownership and/or management of the Airport were considered in coordination between myself and my staff, Mr. Mathieu and his staff, and the City Attorney's office, and were ultimately decided by the City Council.

3. Coinciding with my arrival at the City, yet well before I became City Manager, the City had taken several actions to alleviate adverse impacts on the surrounding neighborhoods from Airport operations. In 1975, the City Council adopted a series of ordinances that sought to reduce aircraft noise, restrict flight operations, and ban

jet aircraft. In 1979, the Council enacted an ordinance imposing a lower decibel limit on all aircraft operations. In 1981, the Council adopted a resolution declaring its intent to close the Airport when legally permissible. In 1983, the Council approved a master plan that released aviation land on the south side of the Airport for non-aviation purposes. These actions prompted litigation initiated by the aviation community and resulted in an administrative proceeding brought by the FAA. The Council's actions during this time confirm that addressing Airport impacts and alleviating residents' quality of life issues were paramount priorities for City management and staff as early as 1975.

4. In 1984, the City and the FAA were able to resolve their disputes by entering into a comprehensive 30-year operational agreement for the Airport that provided, among other things, that any FAA grant funding received by the City for projects covered by the agreement would not extend or alter the City's obligation to operate the Airport under the agreement. This agreement became known to City staff and to concerned residents as the "1984 Agreement," and by the time that I became Assistant City Manager and then City Manager, it represented the definite end of the City's legal obligation to operate the Airport. As a result, the policy of the City became to not take any action that could extend the time beyond July 1, 2015 that the City would be obligated to operate the Airport.

5. In 1994, the City accepted its last federal grant for Airport capital projects contemplated in the 1984 Agreement. In exchange, the City committed to operating the Airport for 20 years from the date it executed the grant agreement, or until 2014. During the time that I was City Manager it was widely known and well understood by myself and by Airport staff that it was the City's policy to not accept any new Airport grants in order to preserve the City Council's flexibility to address Airport impacts when the 1984 Agreement expired in 2015. Mr. Mathieu and Mr. Trimborn enforced the City's established practice in the wake of the 1984 Agreement to not assume any contractual obligation at the Airport that would extend past the 1984 Agreement's expiration on

July 1, 2015. The term of every contract, license agreement, and lease agreement related to the Airport was either month-to-month or expired before the expiration of the 1984 Agreement.

6. On August 27, 2003, I signed on behalf of the City a document titled "Amendment No. 2 to Grant Agreement for Project No. 3-06-0239-06." It was, and still remains, my understanding that this document represented an amendment to the original 1994 Airport grant which only changed the grant amount to reflect a cost-overrun occurring during construction. At the time that I signed the amendment I believed that it did not change any of the other terms or conditions of the original 1994 grant agreement because the amendment document itself stated as much. By executing the 2003 Amendment on behalf of the City, I did not understand that the grant assurances accepted in the 1994 grant agreement were being extended nine years – until 2023.

7. The FAA's current contention that the City knew or should have known that the 2003 Amendment extended the City's obligation to operate the Airport until 2023 is entirely inconsistent with the City's policy and practice at that time to take all precautions to preserve the City Council's flexibility to make operational changes at the Airport once the 1984 Agreement expired. Because the 2003 Amendment was prepared for my signature, I am confident that I discussed it, and the consequences of my signing it, beforehand with my staff and with Mr. Mathieu. I do not recall ever discussing with my staff the possibility that the Amendment could extend the City's obligation to operate the Airport past the expiration of the 1984 Agreement. I also do not recall having any conversations or reviewing any information suggesting that the FAA took this position at the time that I signed the Amendment in 2003.

8. I do not believe that the FAA ever communicated to City staff its current position on the implications of the 2003 Amendment before the Amendment was signed by the City. Had the FAA done so, I am certain that my office would have sought the advice of the City Attorney and would have discussed the matter with the City Council

before taking any action that could extend the City's obligation to operate the Airport beyond July 1, 2015. Given what I recall about the contentious climate and the degree of scrutiny City staff received from the public regarding Airport issues, I do not think that City staff would have knowingly extended the City's grant obligations past the expiration of the 1984 Agreement without the City Council's express authority.

Executed on January 6, 2016, in Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



SUSAN McCARTHY