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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. 16-02-08

CITY OF SANTA MONICA’S
APPEAL OF THE INITIAL
DECISION TO THE ASSOCIATE
ADMINISTRATOR PURSUANT
TO 14 C.F.R. § 16.241
I. INTRODUCTION

The City of Santa Monica ("City") hereby appeals the Initial Decision Of The Hearing Officer issued in this matter on May 14, 2009 to the Associate Administrator for Aviation Policy, Planning and Environment pursuant to 14 CFR Ch. 1, Part 16, Section 16.241(b) and the Initial Decision, P. 114, n. 26. City respectfully argues that the Hearing Officer's conclusions on several of the ultimate issues for his consideration were in error, because they were not supported by substantial evidence and, in some circumstances, misapplied or misinterpreted the applicable facts and law. In particular, this appeal is directed to the following three conclusions, as summarized by the Hearing Officer on pages 3-4 of the Initial Decision:

1. The Ordinance unreasonably and unjustly discriminates against classes of aeronautical activities, and, thus, is inconsistent with the City's obligations under Assurance 22 of the Grant Agreements between the FAA and the City.

2. The Ordinance unreasonably and unjustly discriminates in the operation of the Airport, and, thus, is inconsistent with the obligations of the City under the Instrument of Transfer of the Airport property completed pursuant to the SPA.

3. The Ordinance unreasonably and unjustly discriminates in a manner inconsistent with the 1984 Agreement that expressly reserved final authority over issues of safety to the FAA.

In addition, the City appeals from the hearing Officer’s conclusions regarding the burden of proof in this matter, set forth at pages 71-75 of the Initial Decision.

This appeal represents the City’s response to the Initial Decision, both as to the findings of fact and conclusions of law of the Hearing Officer. However, City has heretofore presented hundreds of pages of briefs, testimony on direct examination and exhibits both prior to and subsequent to the hearing of this matter. As such, City does not waive, and specifically reserves, its rights to assert any of the evidence and arguments that it has already presented later in this instant appeal process, and thereafter if an appeal
is taken to the Federal appellate courts, and incorporates by this reference such evidence and arguments into this appeal.

II. THE HEARING OFFICER DOES NOT HOLD AAS TO ITS STATUTORY BURDEN OF PROVING THAT THE CITY’S ORDINANCE UNJUSTLY DISCRIMINATES AND VIOLATES THE CITY’S FEDERAL OBLIGATIONS, AND INCORRECTLY ALLOCATES TO THE CITY THE BURDEN OF PROVING THAT ITS ORDINANCE DOES NOT UNJUSTLY DISCRIMINATE

As noted in all of the City’s prior briefs for this matter, the federal regulations governing this proceeding expressly place the burden of proving that the City violated its federal obligations on AAS. Section 16.229(a) states: “The burden of proof of noncompliance with an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act is on the agency.” (14 C.F.R. Section 16.229(a).) Furthermore, at the outset of the hearing, the Hearing Officer confirmed to both parties that AAS bears the burden of proving that the City is in violation of its federal obligations: “[t]he burden of proof … is on the Agency. The burden of proof on an affirmative defense is on the City.…” (Hearing Transcript (“HT”) Vol. I at 6:2-5).

Because the City has not asserted any affirmative defenses in this matter, the burden of proof falls squarely and completely upon AAS. The Administrator must reject those portions of the Initial Decision not supported by affirmative and substantial evidence offered by AAS, where AAS has not met its initial burden of proving that the City’s Ordinance violates its federal obligations.

The Initial Decision should be rejected because the Hearing Officer has incorrectly relied upon mere assertions made by AAS in the Director’s Determination and later reiterated at the hearing if they constituted evidence satisfying AAS’s burden of proof. The Hearing Officer chose to ignore AAS’s failure to present affirmative evidence showing that the Ordinance is unjustly discriminatory, and instead appears satisfied with AAS’s mischaracterization of the City’s arguments as affirmative defenses.
A. The Hearing Officer Incorrectly Characterizes the City’s Arguments in Support of its Ordinance as Affirmative Defenses.

Describing the question as one of “critical importance”, the Hearing Officer mistakenly frames the issue of the allocation of the burden of proof in this proceeding, not as whether AAS has proven noncompliance as required by 14 C.F.R. § 16.229(a), but as “whether the Ordinance is justified on the grounds of safety or civil aviation needs.” This is clearly erroneous reasoning by the Hearing Officer because such reasoning assumes that AAS has already established that the City’s Ordinance is unjustly discriminatory. Although the City has consistently argued, in its briefing and at hearing, that its Ordinance does not discriminate unjustly, the Hearing Officer is mistaken in characterizing the City’s arguments as affirmative defenses and allocating to the City the burden of proving the justification for an affirmative defense it has never made in these proceedings.

This mistake is borne out in the Initial Decision itself. The Hearing Officer cites to Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395 (2008), a recent United States Supreme Court case brought under the Age Discrimination and Employment Act (“ADEA”), for the proposition that “the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.” Meacham, 128 S.Ct. at 2398. The Hearing Officer relies on Meacham as guidance for his decision to allocate the burden of proof to the City, because the City is “the party relying upon an exception to a general prohibition.” (Initial Decision (“ID”), pg. 74). However the Hearing Officer misapplies Meacham and misapprehends the City’s arguments and evidence in support.

The Meacham court reached its conclusion by citing to the language of the ADEA statute itself, and points out that it contains exceptions and exemptions laid out apart from the prohibitions. In this case, the Hearing Officer cavalierly bypasses the Airport and Airway Improvement Act (“AAIA”)—the federal statute providing for the FAA’s
authority to prohibit unjust discrimination at federally obligated airports and to condition the receipt grant funds—and glosses over the fact that the language of the AAIA does not contain any exemptions or exceptions. Instead, the Hearing Officer cites to Grant Assurance 22(i), which simply makes clear that airport proprietors may adopt access restrictions to address local safety issues as the exception or exemption on which City bears the burden of proof. The problem with this approach is that the Hearing Officer is expanding the rule in *Meacham* to apply to non-statutory sources of authority. The grant assurances are not legislative enactments with the binding force of statutory law. Moreover, Assurance 22(i) is not an exception to Grant Assurance 22, but is an illustration of an appropriate type of access restriction -- that is, a safety-based restriction is within the universe of airport actions that may be *justly* discriminatory. AAS is still obligated to prove that a safety-based restriction, like any other airport action, *unjustly* discriminates before a violation of the statute and grant assurance may be found.

Furthermore, the City’s consistent and main argument during these proceedings is that its Ordinance does not discriminate unjustly (and AAS must prove otherwise), which is vastly different from staking out a position of discrimination justified only by an exception. The Hearing Officer clearly erred in allocating the burden of proof to the City.

**B. The Hearing Officer Does Not Apply Established Rules of Pleading with Regard to Affirmative Defenses**

Mischaracterizing the City’s multi-pronged arguments as an affirmative defenses based on Grant Assurance 22(i) ignores the actual legal meaning of the term “affirmative defense.” An affirmative defense is, in essence, a defense that either (1) admits the allegations of the complaint but provides some other reason why there is no right of recovery (e.g., statute of limitations), or (2) raises matters beyond those raised by the complaint. *See* C. Wright & A. Miller, *Fed. Proc. and Proc.* § 1271 at 585 (2004).
The City’s Memorandum in Reply to the Notice of Investigation and Supporting Declaration and Exhibits (DD, Item 2), which was the City’s formal response to the Notice of Investigation does not list or otherwise identify any affirmative defenses; it merely provides responses to the specific issues raised in the Notice of Investigation. Similarly, the City did not include any affirmative defenses in its Response to the Order to Show Cause (DD, Item 4), but simply provided responses to the specific issues raised in the Order to Show Cause.

At hearing the City has provided evidence that directly rebuts AAS’s allegations that the Ordinance violates its federal obligations. However the City’s response to these allegations and supporting evidence are not affirmative defenses. Rather, they are arguments supported by evidence showing that AAS has not met its required burden. Indeed, if AAS’s understanding of an affirmative defense were the law, almost any matter raised in opposition to a claim in a NOI or OSC would be considered an affirmative defense.

Once again, it is the AAS’s burden to prove that the City Ordinance violates any federal obligation, including Grant Assurance 22. As result, AAS must prove that the City, by passing the Ordinance, is not operating SMO on reasonable terms. In this proceeding, the City has not asserted as an affirmative defense that its Ordinance is reasonable, and thus it does not have the burden to prove that its Ordinance is reasonable. Of course, City certainly does believe that its Ordinance is reasonable, and it contends that the evidence presented in this case overwhelmingly supports that contention. However, the legal requirement is that AAS proves that the Ordinance is unreasonable, not the other way around. Similarly, AAS must prove not only that the Ordinance discriminates, but that it does so unjustly.

The Hearing Officer has incorrectly characterized the City’s arguments as “affirmative defenses” and relies upon this mistaken characterization to allocate the burden of proof in these proceedings to the City. By doing so, the Hearing Officer has
not held AAS to its statutory burden of proving that the City’s Ordinance is in noncompliance with its federal obligations.

III. THE HEARING OFFICER’S FINDINGS THAT THE ORDINANCE UNREASONABLY AND UNJUSTLY DISCRIMINATES AGAINST CLASSES OF AERONAUTICAL ACTIVITIES AND IS THUS INCONSISTENT WITH THE CITY’S FEDERAL OBLIGATIONS ARE NOT SUPPORTED BY AFFIRMATIVE AND SUBSTANTIAL EVIDENCE AND SHOULD BE REJECTED

A. The Hearing Officer’s Finding That The City’s Ordinance Discriminates is Insufficient Because AAS Did Not Produce Evidence That The Ordinance Unjustly Discriminates

The Hearing Officer found that the “plain language of the Ordinance is discriminatory on its face.” (ID, pg. 84) This is true only in the sense that the City’s Ordinance distinguishes between types of aircraft using the FAA’s own categorization scheme for aircraft. However the ordinance does not discriminate unjustly and AAS had the burden at the hearing to prove that this discrimination is unjust. This is more than just a linguistic game. The Hearing Officer’s analysis settles upon a finding of discrimination but does not acknowledge AAS’s failure to prove the threshold requirement that the category A&B vs. C&D distinction is “unjustly discriminatory.” For the purposes of this Part 16 proceeding it is insufficient for AAS to only prove “discrimination” without producing evidence that such discrimination is unjust.

Instead of undertaking the required analysis as described above, the Hearing Officer attempts to short circuit this analysis by finding that AAS had met its burden of proving unjust discrimination by asserting that AAS’s previous interpretations of its own compliance manual support this finding. (ID, pg. 85) He reasons that “[d]rawing distinctions based on aircraft characteristics is one of the recognized and longstanding ways to establish groups that are excluded in contravention of Assurance 22 and FAA Order 5190.6A, ‘Airport Compliance Manual.’” (ID, pg. 85) The Hearing Officer then
cites several examples of distinctions found in the compliance manual that he states are per se discrimination according to the Airport Compliance Manual and concludes "[t]hus, the record establishes a violation of Grant Assurance 22(a)." However, neither the Airport Compliance Manual nor the record as a whole establish any such thing.

First, what the Hearing Officer cites as examples of unjust discrimination are in fact listed in the Airport Compliance Manual as examples of permissible distinctions based on aircraft characteristics.\textsuperscript{1} Indeed, the Airport Compliance Manual does not state that distinctions based on aircraft characteristics are pre se unreasonable. Second, the Airport Compliance Manual is an internal guidance document that is not regulatory in nature. \textit{AOPA v. City of Pompano Beach}, FAA Docket No. 16-04-01, at p. 12 (Dec. 15, 2005).

Furthermore, the Hearing Officer completely misses the points raised by the City regarding the significance of the FAA's own reliance on the distinction between Category A&B aircraft versus C&D aircraft for the purposes of airport design. This distinction cannot be shown by AAS as unjustly discriminatory because it is the same distinction the FAA uses to determine RSA size. The FAA's airport design standards call for different lengths of RSAs for Category A&B aircraft than for Category C&D aircraft. AC 150/5300-13 requires 300 foot RSAs for Category A&B aircraft and 1,000 foot RSAs for

\textsuperscript{1} "This allows the imposition of reasonable rules or regulations (see paragraph 4-7b) to restrict use of the airport. For example, they may prohibit aircraft not equipped with a reasonable minimum of communications equipment from using the airport. They may restrict or deny use of the airport for student training, for taking off with towed objects, or for some other purpose deemed to be incompatible with safety under the local conditions peculiar to that airport. Agricultural operations may be excluded due to conflict with other types of operations or lack of facilities to safely handle the pesticides used in this specialized operation. (The regional enforcement office of the Environmental Protection Agency (EPA) should be contacted in cases pesticide use and control problems.) Also, designated runways, taxiways, and other paved areas may be restricted to aircraft of a specified maximum gross weight or wheel loading." \textit{Airport Compliance Handbook}, Para. 4-8(a)(2).
Category C&D aircraft. (City Ex. 1) The design standards are based on empirical data showing that 90% of runway overruns for these aircraft stop within the prescribed RSA. (Marinelli Direct Testimony, ¶60; Hall Revised Direct, ¶ 58; City Ex. 34, pg. 7) At the hearing, Mr. Marinelli himself acknowledged in his direct testimony that Category C&D aircraft will travel farther in the event of an overrun than Category A&B aircraft. (Marinelli Direct at ¶ 40).

B. The Hearing Officer Relies on Unsound Reasoning and Dangerous Logic in His Dismissal of the Safety Risk Posed By C&D Aircraft and in His Reliance on Unsupported Allegations and Flawed Evidence Produced by AAS

In finding that the City’s Ordinance is unreasonable, the Hearing Officer concludes that the risk posed to the safety of the Airport’s users and to the surrounding community is insufficient to justify the Ordinance. (ID, pg. 87) He reaches this conclusion in part because the “evidence shows that few accidents have occurred at the Airport, and none involved aircraft leaving the Airport property.” (Id.) However the Hearing Officer’s reasoning is flawed because AAS witnesses acknowledged at the hearing that past accident history at a specific airport is not a predictor of future overrun or overshoot events. (HT, Vol. 2, 279:7—280:3) Relying on the absence of accidents of a particular type at a specific airport to evaluate whether a proposed safety measure should be implemented presents a very dangerous waiting game. The City’s witness and former Chair of the National Transportation Safety Board (“NTSB”), James E. Hall, refers to this waiting game as a “tombstone mentality approach to safety.” (Direct Testimony of James E. Hall, ¶33, pg.15) Indeed, the FAA itself has rejected such an approach in pursuing its RSA improvement program, as well as in undertaking other safety measures.

The Hearing Officer gives too much weight to AAS’s evidence that suggests “C and D aircraft have a better safety record than A and B aircraft.” (ID, pg. 87) The
Hearing Officer treats this evidence as dispositive of the City’s arguments in favor of its Ordinance and writes “this evidence by itself undermines the City’s position that its discriminatory Ordinance, which bars the categories of aircraft having the better safety record, is reasonable or necessary.” (Id) (emphasis original). However, it appears patently obvious that the Hearing Officer accepted this evidence at face value and without scrutiny. The cited evidence includes NTSB data for accident rates by aircraft types for the year 2003. (ID, pg. 87, Finding of Fact 59). The Hearing Office relies on this data to find that “[j]ets, as an aircraft type, have an accident rate 8 times lower than single-engine propeller aircraft, 5.75 times lower than twin-engine piston, and 4.6 times lower than twin-engine turboprops.” (FF 59) But this reliance is misplaced because the data does not provide for any sort of breakdown or statistical analysis that specifically accounts for overrun or undershoot events. The data only refers to “accidents”, which is broad in its inclusion of events unrelated to take-off or landing operations.2

This is significant because at the center of these proceedings is that the Ordinance was adopted by the City to primarily address the risk posed by an overrun event involving a category C or D aircraft. AAS’s accident data cannot be interpreted as saying that C&D aircraft are involved in fewer overruns and undershoots than A&B aircraft. In fact, the evidence presented at the hearing showed that C&D aircraft are no less susceptible to overruns than A&B aircraft. (Hall Direct ¶¶18, 53-57; HT, Vol.3, 642:18—643:11) Indeed, AAS relies primarily on a self-serving statement of an aircraft manufacturer and an unsupported assertion from AAS’s engineering manager, Rick Marinelli. (Vasconcelos Depo. 112:5—114:5; DD, Item 86, p. 3; FF 74).

2 Per the NTSB website, an “accident” is defined as an occurrence associated with the operation of an aircraft that takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. See http://ntsb.gov/aviation/report.htm
The Hearing Officer cites to Mr. Marinelli's direct testimony to make the finding that C&D aircraft are involved in fewer overruns than A&B aircraft. (FF 74) However the Hearing Officer does not include Mr. Marinelli’s entire sentence in his finding of fact. Mr. Marinelli’s complete testimony on this point is: “Historical data show that Approach Category C & D aircraft are involved in fewer overruns than Approach Category A & B aircraft, but travel farther when they do.” (Direct Testimony of Rick Marinelli, ¶40, pg. 5) (emphasis added) Although AAS’s reference to “historical data” is vague and unsupported, even if accepted as true it would support the ample evidence in the record detailing the City’s concerns that the consequences of an overrun involving a Category C or D aircraft would be far worse than an overrun involving a Category A or B aircraft.\(^3\)

Furthermore, Mr. Marinelli’s statement, which was made in the context of discussing the evolution of RSA dimensional standards, supports the City’s primary argument that the City’s reliance upon the distinction between categories of aircraft is reasonable in light of differing RSA requirements for those aircraft.

The Hearing Officer also disregarded the testimony of Mr. Hall and his opinions regarding the safety risk posed by a potential overrun or undershoot by a category C or D aircraft. Despite his being the former Chair of the NTSB and someone who presided over the successful completion of some of the most complex accident investigations in the agency’s history (TWA 800, US Air 427, Korean Air 801, Egypt Air 990, and Alaska Air 261), as well as someone who oversaw the investigation into dozens of accidents involving overruns and undershoots, Mr. Hall’s testimony was unceremoniously disregarded because it was “not supported by scientific or other technical analysis,” and

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\(^3\) It is the more devastating consequences of a C or D overrun that concerns the City, rather than simply the relative likelihood of an overrun. However, AAS’s claim that “Statistics indicate that C or D category jets have a lower overrun rate than B category aircraft,” (DD, Item 86) is misleading. Item 86 does not refer to overruns at all. It refers to take-off and landing operations. In fact, there is no documentary evidence in the record that C&D aircraft have lower overrun rates than A&B aircraft.
because Mr. Hall did not possesses "an engineering background or hold a pilot's certificate." (ID, pg. 87-88; Hall Direct ¶¶7-8) Apparently unimpressed with Mr. Hall's credentials, the Hearing Officer relied on the testimony of Mr. Marinelli based on his engineering background. Specifically, the Hearing Officer found credible Mr. Marinelli's testimony that "based on a simple ballistic arc that would be followed by any falling object with an assumed initial velocity, aircraft exiting the end of the runway at SMO at 70 knots...would not reach the residential area at the west end of the runway." (ID, pg. 89, FF 71)

What is troubling about the Hearing Officer's over-reliance on this piece of evidence is that Mr. Marinelli also testified that he reached this conclusion based upon his own calculations that did not involve aircraft and thus did not account for distance traveled by an object with lift under its wings. (HT, Vol. 2, 303:8-20) Mr. Marinelli assumes that an aircraft would exit the end of runway at 70 knots and remain on airport property, but the City has cited to several examples of overruns at other airports involving aircraft that have exited the runway at much higher speeds. In fact, Mr. Marinelli testified that if an aircraft overran the west runway end at SMO with sufficient velocity, that it could reach the residential street bordering the Airport's west boundary. (HT, Vol. 2, 299:7-10) The Hearing Officer clearly erred by giving too much weight to Mr. Marinelli's calculations because they were not subject to scrutiny by the City or by the Hearing Officer, and they are not part of the administrative record. Mr. Marinelli's calculations were not described in any detail, were not part of any sort of engineering analysis or study that was produced to the City and made a part of this record, and Mr. Marinelli testified that they did not take into account the lift under an aircraft's wings under real-world overrun speeds and taking into account the steep drop-off at the ends of the runways at SMO. Again, it is AAS that bears the burden of proving that the City's Ordinance is unjustly discriminatory; it is not the City's burden to prove that the Ordinance is not unjustly discriminatory.
C. The City Has Presented Substantial Evidence of the Safety Risk
Posed By Category C&D Aircraft

The Hearing Officer concludes that the City has offered little credible evidence to support its claims regarding safety and has failed “to show a nexus between operations of Category C and D aircraft at SMO and an increased risk to residential areas adjacent to the Airport.” (ID, pg. 90) This conclusion is remarkable because it ignores the evidence introduced in this matter, including the testimony of AAS’s own witnesses, and amounts to a repudiation of the FAA’s multi-billion dollar effort to address the serious safety issues created by inadequate RSAs at airports throughout the United States.⁴

AAS argued that Category C&D aircraft pose no safety risk at SMO, citing only selective items of evidence. Yet AAS ignores the fact that (1) the safety measures upon which it relies – FAA-approved flight manuals, aircraft certification, and Terminal Instrument Procedures (TERPS) – do not address pilot error, the leading cause of overruns (City Ex 24 at p. 16), and thus, do not prevent overruns (City’s Pre Hearing Brief (“PHB), pgs. 11-12, Facts I.55-58); (2) AAS’s own witness acknowledges that an overrun by a Category C or D aircraft would travel farther than an overrun by a Category A or B aircraft (Marinelli Direct, ¶ 40); (3) FAA airport design standards for RSAs are three times longer for Category C&D aircraft than for Category A&B aircraft (1000’ v. 300’ based on historical overrun data of where 90% of overruns have stopped. (AAS Ex. 2 at 1; AAS PHB, pg. 7, Fact A.37); (4) Overruns of Category C&D aircraft at other airports demonstrate that such aircraft overruns can occur at high rates of speed and the

⁴ FAA has spent over $1.9 Billion on RSA improvements over the last 20 years, and has committed to spend over $1.6 Billion from 2005-2015—a total of over $3 Billion. (City Exs. 45 & 35 at 25) FAA has adopted an affirmative Runway Safety Area Improvement Program that applies to airports like Santa Monica, and Congress has mandated that RSAs at other, commercial service, airports meet RSA standards by 2015.
aircraft may travel many hundreds of feet beyond the runway ends,⁵ (See e.g., City Exs. 5, 6, 9 & 19); and (5) AAS and City witnesses acknowledge that a C or D overrun could reach the busy streets or crowded neighborhoods near SMO’s runway ends. (HT, Vol. 1, 28:19—29:25 (Bennett); HT, Vol. 2, 298:1—299:10 (Marinelli); Id. at 405:21—407:5 (Trimborn)) Similarly, while the Hearing Officer chides the City for not providing any risk analysis, AAS has failed to provide any risk analysis or study, or indeed any analysis of any sort that would support its assertions that Category C&D aircraft do not pose a safety risk of overruns.

D. Existing Safety Measures Do No Address Pilot Error, Which is the Leading Cause of Overrun Accidents

The Hearing Officer cites to “existing safety measures” that, in his view, undermine the City’s arguments regarding safety. Such measures include more stringent design standards for category C&D aircraft, improvements in aircraft performance, technology and safety, and higher levels of pilot training and experience for C&D aircraft pilots. (ID, pg. 90) But as the NTSB reports of overruns involving Category C or D aircraft at other airports demonstrate, overruns occur, and continue to occur, despite all of those factors. Indeed, overruns occur in the most sophisticated aircraft operated by the highest trained flight crews. Advances in aircraft technology, pilot training and improvements in safety cannot prevent overruns and have not slowed down the efforts of the FAA or Congress to address the serious problem of overruns. (HT, Vol. 3, 642:18—648:25 (Hodges); Hall Direct at ¶¶ 52-56) These indisputable facts demonstrate that it was not unreasonable for the City to address the particular problems of potential overruns

⁵ AAS claims that the specific overruns at other airports cited by the City and its witnesses could not have occurred at SMO due to differing factors such as weight of aircraft, length of runway, or temperature. This misses the fundamental points that the measures AAS claims will ensure safe operations (flight manual, aircraft certification, TERPS) at SMO did not prevent overruns at those other airports, including overruns that involved the highest trained pilots flying the most sophisticated aircraft -- operations that should have been the “safest” by AAS’s reasoning.
at SMO by banning the relatively small number of operations of Category C&D aircraft – 6-7% of total SMO operations – that pose the greatest safety risk in the event of an overrun.

Given the FAA’s open acknowledgment that “aircraft can and do overrun the ends of runways, sometimes with devastating consequences,” (DD, pg. 42; see also AAS Ex. 2 at 1), and FAA’s commitment to addressing deficiencies in RSAs nationwide, it is shocking that the Hearing Officer would embrace AAS’s “don’t worry, be happy” solution at SMO. Rather than follow FAA’s statutory mandate to make safety its highest priority, the Hearing Officer, by way of his Initial Decision, has suggested that AAS may legitimately place a higher priority on access than safety, forcing the City, in effect, to roll the dice and hope that a catastrophe never happens at SMO. The City cannot do so. As a responsible public body that owns the Airport and bears the liability for accidents at the Airport, it must protect the safety of Airport users and the residents and visitors who live and travel in the shadow of the Airport’s runways. Given AAS’s consistent refusal to allow SMO to implement the level of overrun protection that FAA’s standards call for, the City’s decision to adopt the Ordinance was not at all unreasonable, and AAS has failed to meet its burden of showing that the Ordinance violates any of the City’s federal obligations.

E. There is No Evidence in the Record That Supports the Finding That the Implementation of the Ordinance Will Impact the Regional Airport and Airspace Systems

From the outset of this proceeding AAS has consistently maintained that the City’s Ordinance is unreasonable based on its claim that there is no capacity at other regional area airports or in the regional airspace for the Category C or D aircraft that may be displaced from SMO by the Ordinance. (DD, pgs. 44-51) AAS claims that the resulting impact from the implementation of the City’s Ordinance “would be significant and not
de-minimus,” and thus “unreasonable.” (ID, pg. 98; DD, pg. 51) However at the hearing, AAS chose not to offer any testimony from a witness with expertise to support its claim of significant operational impacts, and chose not to examine the City’s expert witness. In fact, AAS’s principal investigator conceded in his testimony that no empirical analysis or study had been performed in support of AAS’s claim of significant operational impacts. (Vasconcelos Direct at 190:5-191:16.) He also conceded that “it is possible” that other Los Angeles area airports could accommodate the Category C&D operations affected by the City’s ban. (Vasconcelos Direct at 189:11 - 191:16.)

In contrast, the City has offered substantial and unrebutted evidence to support its position that the implementation of the Ordinance will have no impact on the regional airports and airspace systems. The City presented the testimony of Mr. Barry Yurtis. Mr. Yurtis is a former manager of the Los Angeles Air Route Traffic Control Center (“ARTCC”), which is the entity that is responsible for controlling high altitude airspace over the south-western United States and has controlling authority for all airspace in the Southern California area. He has “conducted hundreds of reviews of the National Airspace System and Air Traffic Control performance following aircraft accidents, near mid-air collisions, runway incursions, air traffic control operational errors and pilot deviations.” (Direct Testimony of Barry Yurtis, ¶¶ 3-4) Mr. Yurtis is “intimately familiar with all aspects of air traffic, airport and airspace management within the geographic area encompassed by the Director’s Determination.” (Id at ¶5)

It is Mr. Yurtis’s opinion that there is “ample capacity” in the Los Angeles area airport and airspace system to accommodate operations displaced by the City’s Ordinance. (Id at ¶15) He also gave the opinion that relocating operations from SMO to other local airports would in no way affect air traffic and airspace management in the region, except in a positive way. (Id at ¶37) Mr. Yurtis based his opinions on the empirical research and analysis that he performed specifically for this investigation, which included site visits to regional airports and interviewing their staffs, interviewing
fix-based operators, and analyzing FAA operational statistics, traffic counts, delay and ATC data. *(Id at ¶15)*

Despite the testimony from Mr. Yurtis, which was unchallenged by AAS at the hearing and is based on his familiarity with the regional airport and airspace system and on his own empirical research and data analysis, the Hearing Officer reduces this evidence to one paragraph of analysis in his Decision. *(ID, pg. 98)* His simplistic reasoning—where he notes that the City argues “insignificant” impacts and AAS argues “significant” impacts—includes a superficial attempt to find the common ground between the parties, and culminates with the Hearing Officer’s conclusion that any impact is unreasonable. *(Id.)* However the presence of an impact is not the standard set forth in the Director’s Determination which refers to “significant” impacts. *(DD, pg. 51)* Nor was it the basis upon with AAS issued its Interim Cease and Desist Orders or sought injunctive relief to block enforcement of the City’s Ordinance. Furthermore, the Hearing Officer’s superficial analysis completely ignores both the substantial evidence presented by the City on this point and the conspicuous dearth of evidence from AAS. The Hearing Officer erred in reaching this conclusion without any supporting evidence and by failing to require AAS to meet its burden of proof to support the assertion that the implementation of the City’s Ordinance would be detrimental to the regional airport and airspace systems.

IV. The Hearing Officer Mistakes AAS’s Unsupported Allegations as Evidence and Misinterprets the 1984 Agreement

The plain language of the 1984 Agreement defines the scope of the City’s federal obligations as requiring that the City maintain SMO as a B-II facility for category A&B aircraft with no obligation to provide access to category C&D aircraft. *(DD, Item 4, Ex. 3, pg. 9 & Ex. 4, pg. 1)* The Advisory Circular referenced in the Agreement *(AC 150/5300.4B)* applies only to category A&B aircraft and specifically instructs that a
separate advisory circular (AC 150/5300-12) is to be consulted for “other airports”
designed to accommodate category C&D aircraft. (DD, Item 4, Ex. 4, pg. 1) The
Advisory Circular covering airports serving Category C&D aircraft (AC 150/5300-12)
was not referenced anywhere in the 1984 Agreement. Therefore the plain meaning of the
Agreement, based on the reference to the Advisory Circular applicable only to airports
serving category A&B aircraft, and its lack of any reference to the advisory circular
applicable to airports serving category C&D aircraft, is that the 1984 Agreement does not
obligate the City to provide access to Category C or D aircraft.

However the Hearing Officer’s interpretation of the Agreement suggests that
dueling interpretations are afoot and creates ambiguity where none otherwise exists. He
begins his analysis of the City’s argument by citing to the words “generally consistent
with,” and refers to these words as “qualifying language.” (ID, pg. 111) He somehow
reads into this language some suggested uncertainty, and then proceeds to dismiss the
City’s reliance on it along with the rest of the City’s plain-language interpretation of the
Agreement.

The Hearing Officer settles upon Section 13 of the Agreement as being
sufficiently certain. Specifically, he cites to the following language from Section 13 as
supporting AAS’s position that the 1984 Agreement contemplated the use of category
C&D aircraft at the time of its execution:

“the mix of aircraft to be accommodated at the Airport shall
be consistent with the present mix of aircraft now based at the
Airport and the mixed forecast for the future as shown in
chapter III of the Airport Master Plan Study of October
1983.” (ID, pg. 111) (emphasis added)

However the glaring problem with the Hearing Officer’s reliance on this language is the
fact that there is no evidence in the record that suggests that C&D aircraft were “based”
at SMO at the time of the 1984 agreement. Even if we were to accept as true AAS’s
claim that C&D aircraft were operating at the airport at the time of the Agreement, there
is nothing in the record that AAS or the Hearing Officer can point to that suggests that those aircraft were based there. So it would be pure speculation to suggest any were based at the airport 25 years ago. Furthermore, Section 13 refers to accommodating an aircraft mix forecasted by the 1983 Airport Master Plan Study. However the 1983 Study is not part of the record in this investigation, and it is pure speculation on AAS’s part that the study foresaw the basing of Category C&D aircraft at the Airport. Finally, Section 13 relates only to providing parking spaces and other ground support services for based aircraft. Nothing in Section 13 implies an intent to trump the specific provisions in the Agreement relating to access by Category A and B aircraft, but not Category C and D aircraft.

Equally confounding is the Hearing Officer’s token consideration of the evidence on this issue and subsequent reliance on an unsupported allegation in the Director’s Determination to conclude that C&D aircraft were operating at SMO at the time of the Agreement. (ID, pg. 111) The Hearing Officer cites to the following sentence from the DD:

“[w]hen the 1984 agreement was executed, Category C and D aircraft were qualified to operate and were operating safely at SMO and have continued to so qualify and operate through the present day.”

This self-serving sentence, as appearing in the DD, has no citation or reference to any authority or documentation. (DD, pg. 63) It is merely an unsupported allegation offered by AAS. It is irresponsible for the Hearing Officer to rely on this statement as evidence, and worse, for the Hearing Officer to imply an obligation by the City to rebut this unsupported assertion.

At the hearing Mr. Trimborn, the Airport Manager, testified that he did not know the exact dates but he “assumes” that C&D aircraft began operating at SMO during the 1980’s. (HT, Vol.2, 368:3-12) He testified that he did not know if C&D aircraft first began operating at SMO during the 1960’s. (Id at 368:18-22) He himself did not begin
to work at SMO until 1996. (Trimborn Direct, at ¶ 1) Mr. Trimborn does not have personal knowledge of the extent of C&D jet operations at SMO during the 1980’s, a period of time that predates his association with the Airport. His response to whether there were C&D operations at SMO “around that time” is certainly not evidence that there were any such operations prior to the execution of the 1984 Agreement. “Around that time” could encompass a period that began some months or even years after the agreement was executed. Indeed, the Hearing Officer found Mr. Trimborn’s testimony on this point to be inconclusive. ID at 111. As such, it is certainly not substantial evidence that could support AAS’s position.

The Hearing Officer’s also over-relies on the language: “exclusive authority is vested in the FAA of the regulation of all aspects of safety...” This language is taken from the Agreement’s background and recitals, and should be interpreted in a manner consistent with the Agreement’s attempt at balancing the competing interests of the City and the FAA. The Hearing Officer’s interpretation of the Agreement is inconsistent with its balancing of the competing interests because it would allow for the FAA to regulate all aspects of airport management and control. This was clearly not the intent of the parties.

Finally, neither AAS nor the Hearing Officer has the authority to construe the 1984 Agreement for the simple reason that construction of a contract is not a permitted enforcement matter under Part 16 and because the FAA cannot at once be a party to a contract and the judge of what that contract means. The Hearing Officer attempts to get around this by stating that the 1984 Agreement can be considered in the context of the Part 16 proceeding, because the “1984 Agreement expressly was incorporated by reference into Grant Agreements entered into between the City and the FAA on September 19 and 25, 1985. See FF 33” and “[t]hus, the City’s obligations under the 1984 Agreement also are obligations under Grant Agreements and properly are a subject of these proceedings.” ID at 110, including n. 25.
But this finding lacks any merit because the obligations contained in the 1985 grant agreements expired in 2005, twenty years after the agreements were executed. In contrast, the grant assurances that are still in effect, i.e., those executed in 1994, do not contain any provision incorporating the 1984 Agreement by reference. See DD Item 6.

V. The Hearing Officer Misconstrued and Misinterpreted The Instrument of Transfer and The Surplus Property Act, and The Parties' Understanding and Obligations Thereunder

The Hearing Officer was in error in his finding that the Ordinance is inconsistent with the obligations of the City under the Instrument of Transfer of the Airport property completed pursuant to the Surplus Property Act. AAS’s evidence at the hearing did not establish its claim that the ban on Category C & D aircraft somehow violates the Surplus Property Act and nor did the AAS even refute the arguments on this issue made in the City’s Pre-Hearing Brief. In summary, the Surplus Property Act does not impose any obligations on the City over and above those that are required by the grant assurances. Thus, there is no reason to separately consider the post-World War II transfers in this proceeding.

Moreover, the federal government merely leased the Airport from the City during the War; and the City retained its fee interest. After the War, the federal government surrendered its leasehold, and the leases expired. Thus, as a mere tenant, the federal government could not impose restrictive conditions on the City or its reversion. In fact, both the FAA’s Compliance Handbook, which confirms the federal government’s inability to exceed the scope of its property interest as lessee, and the 1984 Agreement, which expressly obligates the City to operate the Airport through 2015 only, show that no ongoing obligations were imposed on the City by any post-War deed.

Additionally, although AAS has argued that obligations were created by the transfer of certain improvements to the City at the War’s end, AAS has not met its burden to establish that the useful life of any such improvements has not long-since expired.
Finally, it should be noted that neither the parties nor the Hearing Officer intended for the Hearing Officer to address or apply a timeframe for this issue beyond the present dispute, and thus City would object to any implication to the contrary. As with other issues that may become under consideration or relevant at a later time, City reserves its right in the future to address and argue this issue anew.

VI. CITY’S OBJECTIONS TO THE HEARING OFFICER’S FINDINGS OF FACTS

The City objects to the following Findings of Fact ("FF") made by the Hearing Officer and presented in the Initial Decision at pages 4-60:

Finding of Fact No. 3. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. There is no evidence that C and D aircraft would be redirected to other Los Angeles area airports. Moreover, most if not all potentially affected may choose to continue to use SMO in Category A and B aircraft. Finally, there is no evidence in the record, and certainly nothing that would constitute substantial evidence, that implementation of the Ordinance would have any impact on the Region’s airspace system.

Finding of Fact No. 16. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrase "not unusual in comparison with the situation at a number of other airports." Although there was some evidence introduced as to a number of other airports with buildings in proximity to their runways, there was no substantial evidence as to residential buildings and no substantial evidence that it was the usual situation at other airports in the Los Angeles area.

Finding of Fact No. 21. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrase "significant amount of funding."
Finding of Fact No. 28. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrase "including the restrictions stated above." Similarly, it is vague, ambiguous and overly broad with regard to the phrase "incorporates a reversion clause at the option of the Government, giving title and right of possession." Finally, it should be noted that neither the parties nor the Hearing Officer intended for the Hearing Officer to address or apply a timeframe for this issue beyond the present dispute, and thus City would object to any implication to the contrary.

Finding of Fact No. 35. Objection: This Finding is not supported by substantial evidence in the record. Moreover, it is an incomplete and inaccurate quote that provides a misleading understanding of the 1984 Agreement. The complete and accurate quote is: “The Airport will be capable of accommodating general aviation aircraft generally consistent with Group II Design Standards set forth in FAA Advisory Circular 150/5300.4B, dated February 14, 1983.”

Finding of Fact No. 41. Objection: This Finding is not supported by substantial evidence in the record. Moreover, it is an incomplete and inaccurate quote that provides a misleading understanding of the 1984 Agreement. The complete and accurate quote is: “The Airport will be capable of accommodating general aviation aircraft generally consistent with Group II Design Standards set forth in FAA Advisory Circular 150/5300.4B, dated February 14, 1983.”

Finding of Fact No. 42. Objection: This Finding is not supported by substantial evidence in the record. Moreover, it is an incomplete quote that provides a misleading understanding of the 1984 Agreement. Section 12 recognizes that the City wanted to displace the threshold by 500 feet, but that because there was some uncertainty about potential impacts the issue should be studied. Nothing in the record indicates how that issue was resolved. Section 12 of the Agreement sets out a process for resolving noise and other concerns pertaining to displaced thresholds. That section in no way precludes
future efforts to adopt displaced thresholds or restrict operations to address safety risks
posed by overruns in the absence of RSAs.

Finding of Fact No. 43. Objection: This Finding is not supported by substantial
evidence in the record. Moreover, it is an incomplete quote that provides a misleading
understanding of the 1984 Agreement. Section 13 of the Agreement relates to “Aircraft
Parking Space and Fuel Service.” It is silent with respect to approach speed. It addresses
only the requirements for aircraft parking spaces based on the numbers and size of
aircraft. Moreover, there is nothing in the record to indicate that the 1983 Master Plan
included category C and D operations.

Finding of Fact No. 45. Objection: This Finding is not supported by substantial
evidence in the record, and assumes facts not in the record. Moreover, it is vague,
ambiguous and overly broad. It implies that all aircraft operations at SMO are in
compliance with all FAA safety regulations and requirements, which concept is not
supported in the record. It also ignores and is refuted by the evidence in the record of
aircraft accidents and fatalities that have occurred at SMO.

Finding of Fact No. 48. Objection: This Finding is not supported by substantial
evidence in the record, and assumes facts not in the record. In fact, it is reasonable to use
ARC factors as the basis of an access restriction. For example, as indicated in Finding of
Fact No. 49, ARC is used by the FAA to exclude aircraft from operating at certain
airports based upon the wingspan of those aircraft and the distances and sizes of and
separations between taxiways and runways at those airports.

Finding of Fact No. 54. Objection: This Finding is not supported by substantial
evidence in the record, and assumes facts not in the record. Specifically, the testimony
cited by AAS does not support this finding of fact. Mr. Trimborn did not work at SMO
until 1996 and does not know when category C&D aircraft first began operations at
SMO. It is pure speculation that the parties to the 1984 Agreement contemplated any
operations by category C&D aircraft. Mr. Trimborn testified that “I don’t know the exact
dates when they [category C&D aircraft] showed up. I assume it’s probably back in the ‘80’s when the C and D aircraft started coming on the scene.” This does not support the Hearing Officer’s finding that “Category C and D aircraft were operating at SMO since the 1980s.” No other evidence was presented on this issue.

Finding of Fact No. 59. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad. It asserts or infers that all jet aircraft are Category C or D, and that all propeller driven aircraft are A or B. This is not the case, as there are many Category B aircraft that are jet aircraft. Similarly, the accident rates are not broken down to overruns and undershoots, as opposed to all other types of accidents that are not at issue in this matter. As a result, the accident rates cited are incorrect and misleading.

Finding of Fact No. 70. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. It is also overly broad. It implies that the condition or length of the runway can have no relation to an overrun or undershoot, a proposition which is not supported by the evidence.

Finding of Fact No. 71. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. It is also overly broad. There was no engineering analysis submitted, nor any evidence that an aircraft exiting both the east and west ends of the runway would stay within the airport boundaries, or behave as a rock or a piano or any other dead weight, or would not have lift from the wings.

Finding of Fact No. 74. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. As to the last sentence, the testimony of Harris was that the numbers of A and B overruns compared to C and D overruns was not as high, percentage wise, as the relative percentage of A and B operations compared to C and D operations.

Finding of Fact No. 77. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague,
ambiguous and overly broad with regard to the phrase "addresses the risk of undershoots and overruns." It implies that pilot training by itself sufficiently addresses the risk and that no other actions need be taken to prevent undershoots and overruns, whereas there was substantial evidence that undershoots and overruns occur regularly despite all of the pilot training that occurs.

**Finding of Fact No. 82.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad, in that it implies that all C and D category pilots have more experience and training than all A and B Category pilots.

**Finding of Fact No. 83.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrases "defect" and "much higher".

**Finding of Fact No. 90.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. The evidence referenced does not stand for the proposition asserted.

**Finding of Fact No. 95.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Specifically, the second sentence is vague, ambiguous and overly broad with regard to the word "rare".

**Finding of Fact No. 108.** Objection: This Finding is not supported by substantial evidence in the record. This objection would be withdrawn if "2005" read "2015" in the last sentence.

**Finding of Fact No. 110.** Objection: This Finding is not supported by substantial evidence in the record. According to the evidence, the purpose of an RPZ is not to protect people and buildings adjacent to the airport, but rather to remove those people from the areas so they are no longer adjacent to the airport.

**Finding of Fact No. 113.** Objection: This Finding is not supported by substantial evidence in the record. Moreover, it is vague, ambiguous and overly broad. It
does not account for the topography of SMO, in which the runway is on a plateau 30-60 feet above the surrounding area. While an overrun occurs when the aircraft remains in contact with the ground surface as it exits the runway, there is no evidence in this record that such an aircraft would remain in contact with the ground when it drops away at the edge of the plateau given the possibly high speed of the aircraft at that time. Finally, it is specifically contradicted by Finding of Fact No. 201, wherein Mr. Shaffer reiterated that the FAA's proposal would enhance safety and directly benefit persons off the ends of the runway.

**Finding of Fact No. 120.** Objection: This Finding is not supported by substantial evidence in the record. Moreover, it is vague, ambiguous and overly broad. It does not account for the topography of SMO, in which the runway is on a plateau 30-60 feet above the surrounding area. While an overrun occurs when the aircraft remains in contact with the ground surface as it exits the runway, there is no evidence in this record that such an aircraft would remain in contact with the ground when it drops away at the edge of the plateau given the possibly high speed of the aircraft at that time. Finally, it is specifically contradicted by Finding of Fact No. 201, wherein Mr. Shaffer reiterated that the FAA's proposal would enhance safety and directly benefit persons off the ends of the runway.

**Finding of Fact No. 126.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrases "current operations" and "every FAA safety requirement".

**Finding of Fact No. 130.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrase "that 500 by 1,000 foot rectangle".

**Finding of Fact No. 131.** Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague,
ambiguous and overly broad. It implies that all critical aircraft would be unable to operate at SMO, and the evidence does not support that proposition.

Finding of Fact No. 133. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is overly broad. It implies that safety enhancements on the east end of the airport are unnecessary and/or ineffective. It cannot be disputed that the establishment of RSAs and/or installation of EMAS at both ends of the runway would be the most effective safety enhancements at SMO. It also presupposes that the "nearby residents" that the RPZs would be designed to protect would have any interest in relocating in order to develop RPZs, which the evidence submitted demonstrated is not the case.

Finding of Fact No. 134. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrases "associated earthwork" and "feasible".

Finding of Fact No. 135. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrase "has been associated with". Finally, it improperly relies on facts stricken from the record by the hearing officer.

Finding of Fact No. 152. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it improperly implies that the City requires "full throttle" departure procedures at its airport.

Finding of Fact No. 155. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it is vague, ambiguous and overly broad with regard to the phrase "looked into". The evidence submitted demonstrates that nearby residents would overwhelmingly oppose even a voluntary buy-out program.
Finding of Fact No. 160. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it improperly implies that this occurred recently or that City's position would have impacted the FAA's approval. The referenced determinations concerning the approach plates for SMO for Category C and D aircraft were made prior to 2001, before the ACP was developed and the overrun issue was brought to the City’s attention. Moreover, an AAS witness acknowledged that AAS will act regardless of the views expressed by the airport proprietor or its staff. Finally, the instrument procedure amendment process only addresses IFR operations and not VFR operations, which constitute the majority of operations at SMO.

Finding of Fact No. 161. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Mr. Trimborn testified that the City's comments on the referenced Notice of Proposed Rule Making were limited to the subject of the rulemaking – “operations of Part 135 versus fractional ownership aircraft” – which did not relate to RSAs. This finding implies that the City should be faulted and perhaps waived any arguments not made at that time, even though such comments would have been outside the scope of the rulemaking under consideration at that time.

Finding of Fact No. 162. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Mr. Trimborn testified that the City's comments on the referenced Notice of Proposed Rule Making were limited to the subject of the rulemaking – “operations of Part 135 versus fractional ownership aircraft” – which did not relate to RSAs. This finding implies that the City should be faulted and perhaps waived any arguments not made at that time, even though such comments would have been outside the scope of the rulemaking under consideration at that time.
Finding of Fact No. 167. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. The evidence as to this issue is mischaracterized. Mr. Carey only testified that he believed there were buildings as close to the end of the runway at Hawthorne as at SMO, although it was clear that he did not know how close the homes were to the ends of the runways at SMO. He did not testify as to other aspects of the two airports that would establish the “same environment.” Specifically, he did not testify about the topography, the density of residential development, the specific nature of the “buildings,” all of which were particular risk factors at SMO that Mr. Trimborn described in his testimony and that would differentiate the overrun hazards at the two airports.

Finding of Fact No. 176. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. As indicated in Finding of Fact No. 175, the grants were received between 1985 and 1994.

Finding of Fact No. 183. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Specifically, the second sentence contains a legal conclusion, and improperly implies that the Order to Show Cause was issued pursuant to Part 16.

Finding of Fact No. 195. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Specifically, it improperly states or implies that the presentation was made to the users by the City alone, as opposed to by the City and the FAA through Dave Bennett which is what actually occurred.

Finding of Fact No. 203. Objection: This Finding is not supported by substantial evidence in the record, and assumes facts not in the record. Moreover, it improperly states that the proposal was 70-knot capable for all aircraft that used SMO, which it in fact was not.
CONCLUSION

For the foregoing reasons, the Administrator should reject the Hearing Officer’s conclusions and findings of facts as described above and find in favor of the City on the basis that AAS has failed to meet its burden of proving that the Ordinance violates the City’s federal obligations or is otherwise unlawful.

DATED: May 29, 2009

MARSHA JONES MOUTRIE
City Attorney, LANCE S. GAMS, IVAN O. CAMPBELL, Deputy City Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2009, I served a true copy of the foregoing document on the following persons at the following addresses:

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