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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

THE CITY OF SANTA MONICA,)

Petitioner,)

v.)

FEDERAL AVIATION)
ADMINISTRATION,)

Respondent)

PETITION FOR REVIEW


(Fed. Rules App. Proc., Rule 15)

Case No. 09-1233

ORIGINAL

NOTICE IS HEREBY GIVEN that Petitioner CITY OF SANTA MONICA ("City"), a municipal corporation duly chartered under the Constitution of the State of California, hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Final Agency Decision and Order issued by Respondent Federal Aviation Administration ("FAA"). Specifically, the City seeks review of FAA Order No. 2009-1, entered on July 8, 2009, and issued by the FAA in the Matter of Compliance with Federal Obligations by the City of Santa Monica, California, FAA Docket No. 16-02-08. A copy of the Final Agency Decision and Order is attached hereto.

DATED: September 1, 2009

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of September, 2009, I caused to be served by first class mail, postage prepaid, a true copy of the City of Santa Monica's Petition for Review on the following persons at the following addresses:

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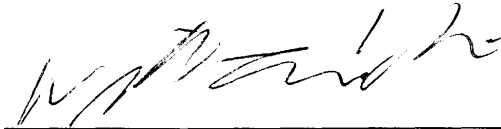
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Dated this 1st day of September, 2009



UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of the City of Santa Monica
FAA Order No. 2009-1 (Part 16, Subpart G)

Docket No. 16-02-08
FDMS No. **FAA-2003-15807**

Served: July 8, 2009

FINAL AGENCY DECISION AND ORDER

I. INTRODUCTION

This case arises from a dispute between the City of Santa Monica (“the City”) and the Federal Aviation Administration’s (“FAA”) Office of Airport Safety (“AAS”)¹ regarding the City’s efforts to ban the operation of Categories C and D **aircraft** (aircraft having approach speeds of 121 knots or more, but less than 166 knots) at Santa Monica **Municipal** Airport (“SMO” or “the Airport”). On March 25, 2008, the **City** enacted Ordinance No. 225 ICCS, (the “Ordinance”) prohibiting operations of Categories C and D aircraft.

The City considers the ban necessary in the interest of safety because the **Airport’s** one runway is not surrounded by a runway safety area (“RSA”), which is a defined surface around the runway that is **prepared** or suitable for reducing the **risk** of **damage** to airplanes if an undershoot, overrun, or excursion from the runway **occurs**. An

¹ In the interest of clarity and ease of reference, Appendix A contains a table listing acronyms used in this decision.

RSA is an airport design feature to enhance **safety** beyond minimum requirements.

(Marinelli Direct at ¶ 42.)²

In the “Director’s Determination” (“DD”), issued on May 27, 2008, the Acting AAS Director, Byron K. Huffman, rejected the City’s contention that the ban **is** necessary for safety **purposes**. The DD found that the Ordinance is contrary to Grant Assurances 22 and 23 given by the City when it accepted Federal funds **under** the Airport Improvement Program (“AIP”). The DD also found that the Ordinance is contrary to similar assurances included in the **1948** Instrument of Transfer under the Surplus Property Act of 1944, and in the **1984** Settlement Agreement, **which** settled various legal disputes between the **FAA** and the City involving SMO.³ The DD held further that the Ordinance **is** preempted under federal **law**.

² References in this decision to materials in the record will be as follows:

- Director’s Determination: “DD at ____.”
- Documents upon which the Director’s Determination was based: “DD, Exh. 1, item ____.” (See Director’s Determination at 2, at which it was explained that the documents comprising the record were attached as Exhibit 1.)
- Direct Testimony (written): “(Last name of witness) Direct at ¶ ____.” (*I.e.*, Bennett Direct at ¶ 9.)
- Rebuttal Testimony (written): “(Last name of witness) Rebuttal at ¶ ____ to (Last name of witness whose testimony is rebutted).” (*I.e.*, **Marinelli** Rebuttal at ¶ 4 of **Trimborn** Direct.)
- Deposition Testimony: “(Last name of deponent) Dep. at ____.” (*I.e.*, Huffman Dep. at 4.)
- Hearing Exhibits: “City Exh. ____” or “AAS Exh. ____.”
- Hearing Transcript: “Tr. ____.”
- Finding of fact set forth in the Initial Decision: “FF ____”
- Text of Initial Decision (other than a finding of fact): “ID at ____.”

³ The 1984 Agreement, which appears in the record at DD, Exh. 1, Item 4, Exh. 3, resolved disputes arising **from** local restrictions on SMO users imposed **by** the City to address community concern about aircraft noise. See *Santa Monica Airport Ass’n v. City of Santa Monica*, **481 F. Supp.** 927 (C.D. Cal. 1979), *aff’d*, *Santa Monica Airport Ass’n v. City & Santa Monica*, **659 F.2d 100** (9th Cir. 1981) (upholding the City’s aircraft noise abatement ordinance and night curfew on takeoffs and landings, but striking down the jet ban **as** violating the Commerce and

The City requested a hearing, which ~~was~~ held on March 16-20,2009, before the Hearing Officer assigned to this **case**, Anthony N. Palladino, F M Associate Chief Counsel and Director of the **FAA** Office of Dispute Resolution for Acquisition. In his initial decision dated May 14,2009, the Hearing Officer held that the Ordinance was contrary to **the** City's obligations under Grant Assurance 22, but not Grant Assurance **23**. The Hearing Officer also held **that** the Ordinance **was** contrary to the City's obligations **under the 1984** Settlement Agreement, **as** well as under the **1948** Instrument of Transfer of the airport property completed under **the Surplus** Property Act of 1944. Finally, the Hearing Officer declined to decide whether the Ordinance **was** preempted by federal law.

Both parties **have appealed** to the Acting Assistant Administrator for **Policy, Planning and the Environment**⁴ under 14 C.F.R. § 16.241(a). After reviewing the extensive **record** compiled in this case, including the **briefs** of **the** parties, the Acting Assistant Administrator **affirms** the Hearing Officer's decision in **part** and reverses it in part.'

This final decision finds **as** follows:

1. Although it is not necessary in an administrative adjudicative proceeding for the agency official issuing **the final agency** decision to rule on preemption, the agency official **may** do *so*. Under the doctrine of field preemption, the FAA has exclusive

Equal Protection Clauses of the U.S. Constitution). The parties also resolved in this agreement a dispute arising from City Council's passage of a resolution to close SMO.

⁴ 'The Associate Administrator for Airports, who has the authority to render a final agency decision in a Part 16 case under 14 C.F.R. § 16.33 or § 16.241(c), delegated his authority as the final decisionmaker to the Assistant Administrator for Aviation Policy, Planning, and Environment. (Hearing Order at 7, n.3; DD, Exh. 1, Item 117.)

⁵ Facts **necessary to support this decision** are set forth **herein** and are supported by substantial evidence.

authority to regulate in the field of aviation safety. Although airport owners may exercise authority in aviation regulation under their proprietary powers, that authority does not extend to a ban on classes of aircraft **and**, therefore, does not exist here. This decision will not expand the **scope of** proprietary powers recognized by the federal courts.

2. The **City** is bound under Grant Assurance 22, “to make its airport available as an airport for public use on fair and reasonable terms **and** without unjust discrimination to all types, kinds and classes of aeronautical uses.” In this case, the discriminatory restriction against operators of Categories C **and** D aircraft is unjust and not necessary **for the safe** operation of the **airport**. **The** Hearing Officer’s decision on the Grant Assurance 22 issues is **affirmed** in its result.

3. Under Grant Assurance **23**, the City agreed that it would “**permit** no exclusive right for the use **of** the airport by any persons providing, or intending to provide, aeronautical services **to** the public.” **AAS** has read this provision too broadly, and it has failed to meet its burden of proof that the Ordinance, if implemented, would conflict with the City’s obligations under Grant Assurance 23 to prevent monopolistic results. Consequently, the Hearing Officer’s decision regarding Grant Assurance 23 is affirmed.

4. The City’s obligations under **the 1984** Settlement Agreement are not a proper subject in a proceeding under 14 C.F.R. Part **16** because that Agreement **was** not incorporated in the Grant Assurances. Consequently, the Hearing Officer’s decision regarding the 1984 Settlement **Agreement** issues **is** reversed,

5. It **is** not necessary to decide whether the Ordinance **is** contrary to the Surplus Property Act **of 1944** because AAS is pursuing remedies in this action that **are** not

available under **the** statute and the **1948** Instrument of Transfer. Consequently, the **Hearing** Officer's decision regarding the Surplus Property Act issues is **reversed**.

11. THE CITY'S OBLIGATIONS UNDER THE AIRPORT IMPROVEMENT PROGRAM

The **FAA** provides more than **\$3** billion annually in Federal funding for airport planning, development, **noise** reduction, capacity and other projects nationwide under the **AIP**. (Bennett Direct at ¶ 8.) The **AIP** was **established under** the Airport and Airway Improvement Act of **1982**, now codified at **49 U.S.C. § 47101 et seq.**

As the courts have recognized, “[a] grant agreement ... **is** not an ordinary contract, but **part** of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will.” *City and County of San Francisco v. Fed. Aviation Admin.*, 942 F.2d 1391, 1396 (9th Cir. 1991). **When** an airport sponsor applies for and accepts **AIP** funds, it agrees to be bound by various assurances included in the grant document.

SMO is considered to be a federally-obligated airport **because** the City, **as** owner and operator, applied for and received **a** total **of** nearly \$10.2 million in **AIP** grants for airport improvements between 1985 and **2003**, (Bennett Direct at ¶ 9; DD, Exh. 1, Items 6 and 41.) The City and the **FAA** entered into various grant agreements between September **1985** and June 1994,⁶ and the City bound itself in **Part V** to various assurances. The **parties** amended **these** agreements from time to time, with the last such

⁶ **The FAA authorized these grants for improvements at SMO including repair of taxiways, pavement of infield areas, construction of blast walls, realignment of a perimeter road, construction of fences (including gates), installation of lights and signs, purchase of aircraft rescue and fire fighting equipment, installation of NAVAIDS, and improvement of airport drainage. (FF 176; DD, Exh. 1, Item 6; Bennett Direct at ¶ 9.)**

amendment occurring in 2003.⁷ The AIP assurances at the center of this case – Grant Assurances 22 and 23 – are based upon Section 511 of the Airport and Airway Improvement Act of 1982, now codified at 49 U.S.C. § 47107.

Grant Assurance 22 is entitled “Economic Discrimination.” In the grant agreements entered into by the City and the FAA between 1985 and 1994, Grant Assurance 22 provided in pertinent part:

a. [The sponsor] will make its airport available as ~~an~~ airport for public use on fair and reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical uses.

* * *

i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the **public**.

(FF 177; DD, Exh. 1, Item 6.) Grant Assurance 22 remains in effect throughout the useful life of the facilities developed or equipment purchased ~~with~~ the grant funds, but not to exceed 20 years from the date of the acceptance of the grant offer. (DD, Exh. 1, Item 6.)

Grant Assurance 23 is entitled “Exclusive Rights.” In the grant agreements signed by the FAA and the City between 1985 and 1994, Grant Assurance 23 provided in pertinent part that the sponsor “will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.” (FF 178; DD, Exh. 1, Item 6.) Grant Assurance 23 is unlimited in duration. (DD, Exh. 1, Item 6.)

⁷ This amendment increased by \$240,600.00 the federal obligation regarding Project No. 3-06-0239-06 (Contract No. DTFA08-94-C-20857, dated June 27, 1994.) (DD, Exh. 1, Items 6 and 41).

III. TECHNICAL BACKGROUND

The disputes concerning Grant Assurances 22 and 23 between the FAA and the City involve a number of areas, including airport design and aircraft operation.

A. Airport Reference Code

An airport reference code (“ARC”) is used by the FAA in airport planning and design, and to support decisions for federal funding of airport capital development, (Bennett Direct at ¶ 56.) It is not an operational safety standard, and it is not intended to be used as a basis for determining which airplanes may operate safely at an airport. (FF 48; Bennett Direct at ¶¶ 58-60; Marinelli Direct at ¶ 36.)

An ARC has two components, both relating to an airport’s “critical aircraft,” which, for federal funding purposes, is the most demanding aircraft that conducts, or is expected to conduct, at least 500 annual operations at that airport. (FF 46; Marinelli Direct at ¶¶ 30, 31.) The ARC components are (1) airplane approach category and (2) airplane design group. (Marinelli Direct at ¶ 33.)

1. Approach Category

The first ARC component, depicted by a capital letter, is the Approach Category which relates to an aircraft’s basic approach speed at maximum certificated landing weight.⁸ (Bennett Direct at ¶ 57.) The basic approach speed at maximum certificated landing weight is published by the manufacturer for each airplane. (DD, Exh. 1, Item 47; see Stimson Direct at ¶ 8.)

⁸ Specifically, 1.3 times the aircraft’s stall speed in landing configuration at the certificated maximum flap setting landing configuration and maximum landing weight at standard atmospheric conditions. See 14 C.F.R. § 97.3; AC 150/5300-13, *Airport Design*, ¶ 2 (definition of airplane approach category.)

Categories A through D⁹ are defined in 14 C.F.R. § 97.3 as follows:

Category A: Speed less than 91 knots''

Category B: Speed 91 knots or more but less than 121 knots''

Category C: Speed 121 knots or more but less than 141 knots¹²

Category D: Speed 141 knots or more but less than 166 knots.¹³

(FF 50-53; Pratte Direct at ¶ 7; AC 150/5300-13, *Airport Design* at ¶ 2.)

The speeds set out in the Approach Category do not necessarily reflect the speed of the aircraft at the moment it touches down on the runway. (DD, Exh. 1, Item 47.)

Approach speed categories are based upon approach speed at *maximum* landing weight; at lighter weights, the airplane's approach speed will be lower. (Stimson Direct at ¶ 23.)

As a result, just because an airplane falls into Category C or D does not mean necessarily that its actual approach speed on any given landing will exceed that of a particular Category B aircraft. (*Id.*)

⁹ There is an additional approach category, Category E, but Category E airplanes do not operate at SMO.

¹⁰ Generally, Category A aircraft are propeller-driven. (DD, Exh. 1, Item 47.) Examples of Category A aircraft include the Cessna 150 and 172, and the Beech Bonanza. (Stimson Direct at ¶ 10.)

¹¹ Examples of Category B aircraft include the Beech 200 and 300, Cessna 500, 550, S550, 560, 560XL, and the Piper PA-42 (Cheyenne III), PA-46 (Malibu) and PA-31 (Navajo). (Stimson Direct at ¶ 10.)

¹² Examples of Category C aircraft include the Bombardier Regional Jet, Cessna 650 and 750, Gulfstream GIII, G200, and G550, Hawker Beechjet 400, and Learjet 31, 35, 45, 55, 60. (Stimson Direct at ¶ 11.)

¹³ Examples of Category D aircraft include the Gulfstream GII, GIV, GV, GIV-SP. (Stimson Direct at ¶ 11.)

2. *Airplane Design Group*

The second **ARC** component, the Airplane Design **Group**, is indicated by a Roman numeral **and** relates to the airplane's wingspan or tail height. The criteria for the design **groups** pertinent to this **case**, Design Groups I and II, are:

Group I: Wingspan up to, but not including, 49 feet; or **tail** height up to but not including 20 feet.

Group II: Wingspan from 49 feet up to, but not including 79 feet; or tail height **from** 20 feet up to, but not including, **30** feet.

(AC 150/5300-13, *Airport Design*, ¶ 2.)

B. Airplane Flight Manuals and Determining Runway Length Necessary for Takeoff and Landing

1. Airplane Flight Manuals

Determining whether a particular **airplane** can **safely** land on or take off from a particular airport runway must be **made** on a case-by-case **basis** by the pilot. To make **this** determination, a pilot must **refer** to the **data** included in the airplane's **FAA-approved** airplane flight manual ("**AFM**") to calculate **the** runway length needed by the particular aircraft under different conditions.¹⁴ (Tr. 41; DD, Exh. I, Item 47, at 1; Pratte Direct at ¶ 17.) **After** determining **the** runway length that the airplane requires, the pilot must

¹⁴ See 14 C.F.R. § 91.103, entitled "Preflight action" which provides, in pertinent part:

Each pilot in command shall, before beginning a flight become familiar with all available information concerning that flight. This information must include –

(b) For any flight, runway lengths at airports of intended use and the following takeoff and landing distance information:

(1) For civil aircraft for which an Airplane . . . Flight Manual containing takeoff and landing distance data is required, the takeoff and landing distance data contained therein[.]

compare that length with the available runway length to determine whether to operate on that runway. (Tr. 357.)

2. *Additional Regulatory Requirements*

Airplanes in Categories **C** and **D** tend to be used more often in certificated commercial or fractional ownership operations than airplanes in Categories **A** and **B**. (Pratte Direct at ¶ **14**.) Aircraft flown in certificated commercial **and** fractional ownership operations **must**, by regulation, be able to land on even less pavement than allowed under their airplane flight manuals. Under **14 C.F.R. § 135.385(b)**, which is applicable to commuter and on-demand operations, pilots **of large**’ aircraft powered by turbine engines must assure during pre-flight planning that they will be able to land the aircraft within **60 percent of** the useable runway length at the destination **airport**. There is a similar restriction pertaining to fractional ownership operations under **14 C.F.R. Part 91, Subpart K. 14 C.F.R. § 91.1037(b)**; *see also* **14 C.F.R. § 91.1037(c)** (setting forth an **80 percent rule** for eligible on-demand operators.) (FF 92, 146; Pratte Direct at ¶ **IS**.)

C. Runway Safety Area

An **RSA** “is a design feature established by the **FAA** as a safety enhancement to protect’ aircraft arrivals and **departures**.”¹⁶ (DD, Exh. 1, Item 7, Exh, DD at 2.) It is “a

¹⁵ Large aircraft, **as** defined in the Federal Aviation Regulations, means aircraft of more than 12,500 pounds, maximum certificated takeoff weight. **14 C.F.R. § 1.1** (definition of large aircraft.) **Transport** category airplanes, certificated under **14 C.F.R. Part 25**, usually have a **maximum** certificated takeoff weight of more than **12,500 pounds** and must have at least two engines. (Stimson Direct at ¶ 7.) Most Category **C** and **D** aircraft are transport category aircraft certificated under **14 C.F.R. Part 25**. (FF 139, Pratte Direct at ¶ 7.) The aircraft in Categories **C** and identified in **AAS Exhibits 31 through 52** are large transport **category** aircraft. (FF 92.)

¹⁶ **As stated in** an advisory circular:

Aircraft can and do **overrun** the ends **of** runway, **sometimes with** devastating **results...**
To minimize the hazards of **overruns**, the Federal Aviation Administration (FAA)

defined surface surrounding the runway **prepared** or suitable for reducing the risk of damage to airplanes in the event of **an** undershoot, **overshoot**,¹⁷ **or** excursion from the runway.” (AC 150/5300-13, *Airport Design*, at ¶ 2.) (FF 109, 120.) By definition, an **RSA** “extends beyond the ends and sides of **the** runway **and** is not **part** of the runway itself.” (DD, **Exh. 1**, Item 7, **Exh. DD** at 2.) As explained by Rick Marinelli, Director of **the** FAA **Airport** Engineering Division, “[l]ike **many** design standards, **RSA** standards serve to enhance safety beyond minimum requirements.” (Marinelli Direct at ¶ 42.)

The length of the **RSA** beyond **the** runway ends is not included in **the** data that a pilot uses to determine whether the **runway** is long enough **for** a landing or **takeoff** by a particular **airplane**. (FF 114; Stimson Direct at ¶ 21.)¹⁸

For a **runway** built to **ARC A-II** and B-II standards (for visibility minimums not **lower** than $\frac{3}{4}$ statute mile), the **RSA** would extend **300** feet beyond each **runway** end. (AC 150/5300-13, *Airport Design* at 25, Table 3-1.) In contrast, an RSA at a runway built to **ARC C-II** and D-II standards would extend **1,000 feet** beyond **each** runway end. (AC 150/5300-13, *Airport Design*, at 26-1, Table 3-3; Marinelli **Direct** at ¶ 45.) The 1,000-foot standard in AC 150/5300-13, *Airport Design*, for **Categories C** and D aircraft

incorporated the concept of a safety area **beyond** the runway end **into** airport design standards.

AC 150/5220-22A, Engineered Materials Arresting Systems (EMS) for Aircraft Overruns, ¶ 3.

¹⁷ “An overrun occurs when an aircraft passes beyond the end of a runway during an aborted takeoff or while landing.” (AC 150/5220-22A, *Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns*, ¶ 3.) (See FF 60.)

¹⁸ Byron Huffman, former Acting **AAS** Director and currently Airports Division Manager for FAA’s Alaska Region, explained at his deposition that an RSA is not an operational requirement and has **no** effect on an airport’s normal operation. Dennis Pratte, Manager, Part **135** Air Carrier Operations Branch, testified that **RSAs** are irrelevant when a pilot determines during preflight planning whether the airplane can land or take **off** on a particular airport runway. (Tr. 181, see also Tr. 219, 221.) He explained that an RSA does not add usable length to a runway. (Tr. 220.)

applies to *new* runway construction. (Marinelli Rebuttal at ¶ 4 of Trimborn Direct.)”

According to Rick Marinelli, these standards are based upon historical data showing that Categories C and D aircraft **are** involved in fewer overruns **than** Categories A and B aircraft, **but** generally travel farther **than** Categories A and B aircraft when they do. (Marinelli Direct at ¶ 40.)²⁰

Under **FAA policy**,²¹ when runway projects are undertaken using AIP funds, provisions for **RSA** improvement shall be made *to the extent practicable* **if** the **RSA** does not meet current standards **for** new construction, **FAA** Order No. 5200.8, *Runway Safely Program*, at ¶¶ 8 and 10.²² The **FAA**, however, does not require an **airport** to reduce an existing runway’s actual length or declare its length to be **less** than **the** actual **amount** of runway pavement to meet **RSA** standards **if** there would **be** an operational impact, such as making the **airport** unable to handle its current or planned aircraft fleet. **AC** 150/5220-22A, *Engineered Materials Arresting Systems (EMS) for Aircraft Overruns*, ¶ 4. (FF 105.)

¹⁹ **As** will be discussed later in this **decision**, **SMO** is an old airport and its one runway was not built to these standards for new runways. (See *infra* at 37.)

²⁰ **Rick** Marinelli explained at the hearing, however, that this is true for overruns on flat ground generally – not for airports with topography like **SMO**’s. (Tr. 277.) See *infra* at 40-41.

²¹ **As** stated in the applicable **FAA** order:

The objective of the Runway Safety Area Program is that all **RSAs** at federally obligated airports and all **RSAs** at airports certificated under 14[CFR] part **139** shall conform to the standards contained in **AC** 150/5300-13 Airport Design, **to** the *extent practicable*.

FAA Order No. **5200.8**, *Runway Safety Program*, ¶ 5 (emphasis added.) (FF 107.)

²² See FF 107, quoting from **FAA** Order No. 5200.8, *Runway Safety Program*, regarding consideration to be used **by** **FAA** employees in evaluating alternatives for building or improving an **RSA**.

D. Engineered Materials Arresting System (“EMAS”)

An EMAS is “a bed of jet-blast resistant cellular cement:blocks placed **at the end** of a runway **to** decelerate an overrunning aircraft in an emergency,... that will **reliably** and predictably crush under the weight of **an aircraft.**” (DD, **Exh.** 1, Item 113, at 19.) An EMAS is built of high-energy absorbing materials. (FF 105.) Installation of an **EMAS** is an option for enhancing safety when RSA design standards cannot be met without causing an operational impact at the airport. **AC 150/5220-22A, *Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns*, ¶ 4.** “A standard **EMAS** provides a level of safety that is generally equivalent to a full **RSA** built to the dimensional standards in **AC 150/5300-13, *Airport Design***” and “provides an acceptable level of safety for undershoots,” (*Id.*) The design standard for an **EMAS** is to **be** able to stop a particular aircraft traveling at 70 knots.²³ (Tr. 557-559; Marinelli Direct at **60**; **AC 150/5220-22A, *Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns***, at ¶ 8g.) (FF 105.) “The majority of **EMAS** installations, however, **are** ‘non-standard,’ and are designed to provide the most **benefit** in the space available to the **fleet** of aircraft operating **at** the airport.” (Marinelli Direct at ¶ 51; see also Tr. 63.)

E. Airworthiness Certification Standards and Additional Design Features

Airplanes in Categories **A and B** are predominantly certificated under Part **23**, while Categories **C and D** aircraft are mostly certificated under the more stringent standards contained in **Part 25**. (FF 139-141; **Pratte** Direct at ¶ 7; Tr. 332, 335-336.) Airworthiness certification standards regarding performance are higher for airplanes

²³ Ninety percent of overruns are by aircraft traveling at 70 knots or less. (FF 60, 105; **Marinelli** Direct at ¶ 51; **AC 150/5220-22A, *Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns***, at ¶ 3.)

certificated under 14 C.F.R. Part 25, than for airplanes certificated under ~~Part~~ 23. (FF 98, 141; Stimson Direct at ¶¶ 12-17.) *I.e.*, see 14 C.F.R. §§ 25.101 – 25.125.

In addition, airplanes in Categories C and D certificated under Part 25's²⁴ standards typically have safety design features that may not be on aircraft in airplanes in Categories A and B certificated under Part 23. (Pratte Direct at ¶ 23; see Stimson Direct at ¶ 20.) These design features provide additional safety benefits during landing and takeoff. These features include autothrottles, anti-skid and autobrake systems, automatic spoiler deployment, enhanced flight deck displays, and thrust reversers. (FF 99; Stimson Direct at ¶ 20.) The spoilers, thrust reversers, anti-skid **and** leading edge devices help **an** aircraft to slow down after landing.

As a result of the more stringent certification standards for Part 25 aircraft and their additional safety features, an airplane in Category C and D may have a better stopping performance – be able to land in a shorter distance – than a Category B airplane, even if the Category C or D airplane's landing approach speed is higher. (FF 69; Stimson Direct at ¶ 24.)

IV. THE AIRPORT

A. The Airport and Its Environs

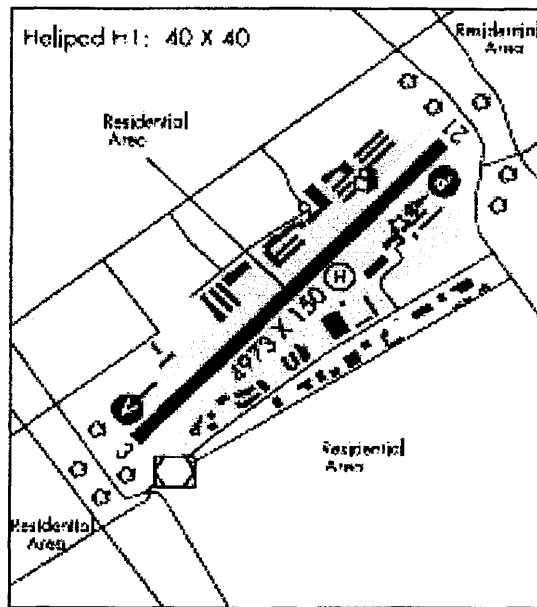
SMO was established in 1919,²⁵ and **has** been owned by the City since 1926. Since its establishment, residential communities and other urban development have been constructed around it. The ends of its only **runway** are within approximately 200 to 325 feet of homes in the adjacent densely populated neighborhoods. (Trimborn Direct at ¶ 6.)

²⁴ 14 C.F.R. Part 25, “*Airworthiness Standards: Transport Category Airplanes.*”

²⁵ DD, Exh. 1, Item 51.

The Airport is located on a plateau approximately 30 to 60 feet above the surrounding residential neighborhoods. (FF 9; Trimborn Direct at ¶ 6.) Within a short distance of both ends of the runway, there are steep slopes leading down to streets and neighborhoods. (FF 10 and 11; Trimborn Direct at ¶ 6; Hall Rev. Direct at ¶ 35.)

The runway has a southwest/northeast orientation and is 4,973 feet long by 150 feet wide. (FF 8; Airport Facility Directory (“AFD”) for Southwest U.S., effective May 7, 2009 to July 2, 2009.) (Chart below is copied from the AFD).



Runway 3 serves aircraft which are landing or taking off to the northeast (compass heading of 30 degrees), and Runway 21 serves those aircraft which are landing or departing to the southwest (compass heading of 210 degrees). (Hall Rev. Direct at ¶ 35.) The vast majority of aircraft use Runway 21.²⁶

²⁶ Robert Trimborn testified that more than 90 percent of the operations at SMU use Runway 21, instead of Runway 3. (Tr. 378.) Rick Marinelli testified that 95 percent of flights take off on Runway 21. (Marinelli Direct at ¶ 52.)

B. Operations at SMO

SMO is classified as a reliever airport²⁷ in the National Plan of Integrated Airport Systems (“NPIAS”). (DD, Exh. 1, Item 2, Exh. A at 2.) It serves as an alternative to Los Angeles International Airport (“LAX”) for general aviation operations. (FF 1; DD, Exh. I, Item 2, **Exh. A at 2**; City **Exh. 30** at § 1.1; City **Exh. 35** at 22; Huffman Dep. at 34.) It does not have **any** scheduled air carrier operations, and therefore, is not certificated under 14 C.F.R. Part 139,²⁸ (FF **4**; Huffman Dep. at 76.) It does, however, have unscheduled air taxi operations. (DD, Exh. 1, Item 26 (2007 Airport Master Record.))

SMO is able to accommodate over 90 percent of aircraft types used for general aviation purposes. (FF **4**.) Runway 3/21 is long enough for certain, but not all, aircraft in Categories C **and** D to operate under the standards set forth in their aircraft flight manuals. (Tr. 41.) For example, a Boeing 737, which is a Category C aircraft, cannot land at SMO under the standards incorporated in its aircraft flight manual, because the runway is too short. (Tr. 425.) In contrast, the Bombardier Challenger CL-600 and

²⁷ The term “reliever airport” is defined as “an airport the Secretary [of Transportation] designates to relieve congestion **at** a commercial service airport and to provide more general aviation access to the overall community.” 49 U.S.C. § 47102(22).

²⁸ The **FAA** requires only certain airports to obtain airport operating certificates. See **49** U.S.C. § 44706(a) (pertaining to airport operating certificates), and 14 C.F.R. § 139.1 for the applicability requirements of 14 **C.F.R.** Part 139. Holders of airport operating certificates **must**, under **14 C.F.R. § 139.309**, provide and maintain RSAs for each runway and **taxiway** available for **air** carrier use. **Further**, under Public **Law 109-115**, owners or operators of airports holding airport operating certificates **issued** under Part **139** “shall improve the airport’s runway safety areas to comply with the Federal Aviation Administration design standards required by **14** CFR part 139” by December 31, 2015. See **49 U.S.C. § 44706 note. Pub. L. 109-115, Div. A, Title I, Nov. 30, 2005**. These provisions **regarding** RSAs do not apply to SMO because SMO does not hold an airport operating certificate.

LearJet 60, which are Category C aircraft, routinely fly into SMO. (FF 65-66; Tr. 425-427.)²⁹

Approximately 7 percent of the current operations at SMO involve Categories C or D aircraft. (DD, Exh. 1, Item 8 at 5.) There were approximately 9,000 operations of Categories C and D aircraft at SMO in 2007 (on average 25 per day), and 7,670 operations in 2008 (on average 21 per day). (FF 5; Trimborn Direct at ¶¶ 30, 39; Yurtis Direct at ¶ 23.) The business jets that most frequently use SMO fall into Categories B, C, and D. (DD, Exh. 1, Item 2, Exh. A at 12, Table E.) About half of the operations of Categories C and D aircraft are fractional ownership program operations under 14 C.F.R. Part 91, Subpart K. Many of the other Categories C and D aircraft operate at SMO under 14 C.F.R. Part 135.³⁰ (FF 90, 93, 144, 147; Tr. 370-371.)

C. Design Features

According to SMO's current Airport Layout Plan, ("ALP")³¹ approved by the FAA in 1991, SMO's **ARC is B-TL**. (FF 47, 179; DD, **Exh. 1**, Item 4, Exh. 2 (1991 Airport Layout Plan), Trimborn Direct at ¶ 11.) Rick Marinelli testified that the airport now qualifies for a D-II ARC because there are currently more than 500 operations by

²⁹ "The types of aircraft the City is attempting to prohibit from Santa Monica airport are the corporate jet (examples are Learjets, Gulfstreams, Challengers, Citations)." (DD, Exh. 1, **Item 47** at 2.)

Exhibit **AAS-32** illustrates, among other things, that Runways 3 and 21 are long enough for certain aircraft in Category C, including the Learjet 31 and 60, the Cessna 750 (Citation) and the Gulfstream G550, **as well as in Category D, such as the Gulfstream IV-SP**. This chart also shows that there is a significant overlap in the distance required for landing by the Categories B, C, and D aircraft included in the chart. (See Stimson Direct.)

³⁰ The percentage of aircraft operating under Part 135 at SMO is not in the record.

³¹ "**An Airport Layout Plan (ALP)** is a scaled drawing of existing and proposed land facilities necessary for the operation and development of the airport . . ." **AC 150/5300-13**, Airport Design, at 5, ¶ 5.

Category D aircraft per year. (Marinelli Direct at ¶ 35; Tr. 268,277.) However, he acknowledged, the achievement of D-II **design** standards at SMO is impracticable. (Tr. 268-269.)

There is no formally designated RSA extending beyond either end of Runway 3/21 (FF 127)³² (Tr. 28-29) because there is limited space beyond the runway ends before the land slopes steeply down to public roads. There is no FAA regulation requiring general aviation airports, like SMO, to build RSAs.³³ (Bennett Direct at ¶ 67.) At SMO, it would be impossible to establish an RSA that extends 1,000 feet beyond each end of the runway without affecting the neighborhoods across from the airport property. Alternatively, **establishing** such an **RSA** within the airport boundary would be impractical because it could only be accomplished by dramatically reducing the length of the runway, virtually eliminating **its usefulness**.³⁴

V. HISTORY OF THESE PROCEEDINGS UNDER PART 16

A. Design Study

In 2001, due to **its** concern about the increasing number of operations of larger and faster aircraft using SMO, the City hired Coffman Associates, a consulting **firm**, to

³² While Robert Trimborn **has** stated that there is no RSA at either end of Runway 3/21 (*i.e.*, Trimborn Direct at ¶ 12, 31, 37), David Bennett testified that there is some limited space at both runway ends that **may** serve the **purpose** of an **RSA** (Tr. 29). Rick Marinelli testified that while there is some land at the west end of the runway, for all practical **purposes**, there is no RSA beyond the runway ends at SMO. (Tr. 276.) There is approximately 100 feet beyond the runway end to the west and 50 feet beyond the other runway end to the east before the land slopes steeply downward to public streets. (DD, Exh. 1, Item 14.)

³³ The **only** regulation requiring **airports** to provide **and** maintain **RSAs** is 14 C.F.R. § 139.309, which only applies to **holders** of airport operating certificates. SMO is not certificated under Part 139. (See **n.28, supra.**)

³⁴ *See* DD, Exh. 1, Item 7, Exh. T (letter written to Robert Trimborn by David Bennett, dated January 20, 2006.)

study whether the Airport conformed to **FAA** airport design standards related to the Airport's B-II ARC. (DD, Exh. 1, Item 2, **Exh. G.**) In the firm's report, released in 2002, it recommended that the runway threshold at each end should be displaced **up** to 300 feet, thereby creating, in essence, **RSAs** on the existing **runway**, to conform the runway to design standards for Categories **A** and **B** aircraft, (See DD, Exh. 1, Item 2, **Exh. A** at 21 and 23.) **The firm** recognized in its report that as a result of displacing the **runway** thresholds and **making** the runway shorter, the airport might lose its instrument approaches for Categories **C** and **D** aircraft. (*Id.*, at Table H.)

Coffman Associates worked with the **airport** staff to develop a proposal ~~for~~ a program to **conform the** airport to the B-II ARC. (FF 180.) On July 22, 2002, **the** Santa Monica **Airport** Commission, which is an advisory body, voted *to recommend* to the City Council that it adopt and implement that **program**, (FF 181; Trimborn Direct at ¶ 13.)

B. Notice of Investigation

On October 8, 2002, the **AAS** Director **issued** a Notice of Investigation (NOI), under 14 C.F.R. § 16.103, to inform **the** City that the **FAA** was looking into the Commission's "apparent decision to recommend" that **the** City Council adopt **and** implement the conformance program. (FF 183; DD, Exh. 1, Item 1, at 1 and 6.) The Director explained that the agency would investigate whether the **proposal** was inconsistent with Grant Assurances 22 **and** 23. **He also** noted that the investigation would consider whether the implementation of **the** proposal would be consistent with federal preemption law and the terms of the 1984 Settlement Agreement. (DD, Exh. 1, Item 1 at I, 8-9.)

The Director requested that the City suspend further consideration of implementation of the proposal until after the matter **was** resolved. (DD, Exhibit 1, Item 7, **Exh. PP** (Letter by David L. Bennett, to Robert Trimborn, dated October 8, 2002, enclosing the NOI.)) In its response to the NOI, the City contended that: (1) the NOI **was** “premature **and** unnecessary” because the Airport Commission had only made a recommendation; and (2) the recommendation, if implemented would not violate the **City’s** obligations under federal law, the grant agreements, or **the** 1984 Settlement Agreement. The City accepted the **FAA’s** invitation to cooperate to find **a way** to resolve the issues. (DD, Exh. 1, Item 2.)

Subsequently, in December 2002, **the** City Council approved of the proposal. (FF 185.) Nonetheless, the City Council directed the airport **staff** to continue discussions with FAA officials regarding **airport** design safety issues. (DD, Exh. 1, Item 7, Exh. LL.)

C. City and FAA Efforts to Resolve Issues Related to SMO

Between 2002 and 2008, City and **FAA** officials sought to resolve the City’s concerns about safety at **SMO**. (See FF 187 and 188.) For example, by letter dated July 31, 2007, D. Kirk Shaffer, Associate Administrator **for** Airports, proposed measures to bring about “a real enhancement of safety at SMO,” including **the** installation of 40-knot performance **EMASs** with 130-foot beds at both ends of the runway. (FF 200; DD, **Exh. 1**, Item 7, **Exh. I-1**.) Shaffer proposed in March 2008, that the City install either a 40-knot **EMAS** at each runway end or a 70-knot **EMAS** with **a** 250-foot bed at the departure [west] end **of** Runway 21. The **FAA** recommended that **the** City “select the 70-knot installation, **as** it clearly addresses whatever safety **risk** may exist on **this** already **safe** airfield; **that is**, coverage of 97% of your operations including 90% of the Category

C and D operations.” (FF 203; DD, Exh. I, Item 7, Exh. B) The FAA also proposed that a pilot awareness program be designed and implemented, that the hold lines be moved, **and** that “a realistic Runway Protection Zone (“RPZ”)³⁵ property acquisition program to protect people on the ground” be adopted. (DD, Exh. 1, Item 113, at 14.) The City rejected this proposal. (DD, **Exh.** 1, Item 7, Exh. A.)

D. The Ordinance

On March 25, 2008, the City adopted Ordinance No. 2251 CCS, adding Section 10.04.06.220 to the Municipal Code to conform the use of SMO to its ARC B-II designation.³⁶ (FF 206; DD, Exh. 1, Item 8A.) Under the Ordinance, “[n]o person operating a category C or D aircraft . . . shall land at or depart from the Santa Monica Municipal Airport” except in an emergency.” Sec. 10.04.06.220(b) and (c). (FF 207.) In effect, only aircraft in Categories A or B could operate at SMO. The City’s stated purpose in adopting the Ordinance was “to protect the safety of persons living adjacent to the Airport and flying in aircraft using the Airport.” Sec. 10.04.06.220(a). (FF 207.)

³⁵ A runway protection zone (“RPZ”) is defined as “[a]n area off the runway end to enhance the protection of people and property on the ground.” (AC 150/5300-13, *Airport Design*, ¶ 2) (definition of runway protection zone.) An RPZ is larger than an RSA. RPZs are trapezoidal areas off the end of the runway. As Rick Marinelli testified, “At SMO, the dimensions of the RPZ corresponding to Aircraft Approach Categories C and D with approach visibility minimums of not lower than one mile, as shown on the current ALP [airport layout plan], are 500 feet wide at the runway end, widening to 1010 feet at a distance of 1700 feet from the runway end.” (Marinelli Direct at ¶ 64.) (See DD, Exh. 1, Item 4, Exh. 2 (1991 Airport Layout Plan,))

RPZs must be free of “noncompatible uses,” although they do **not** have to be flat or clear of obstacles. Houses and places of public assembly are prohibited land uses in RPZs. (Marinelli Direct at ¶ 64; AC 150/5300, *Airport Design*, ¶ 212.) However, there are residences in the RPZs at SMO. (DD, Exh. 1, Item 4, **Exh. 2 (1991 Airport Layout Plan; City Exh. 46.)**)

³⁶ The first reading of that proposed ordinance was on November 27, 2007. (DD, Exh. 1, Item 8B.)

³⁷ All of the aircraft covered by the ban are jet aircraft. (City Admission No. 42)

Violation of the ban would be a misdemeanor, punishable by a fine not greater than \$1,000 or by a **jail** sentence for not more ~~than~~ **6** months, or both. (FF 207; DD, Exh. 1, **Item 8A**.) The Ordinance was scheduled to go into effect on April 24,2008. Enforcement of **the** Ordinance has been stayed **by** court order.³⁸

E. Order to Show Cause

In response, on **March** 26,2008, the Acting **AAS** Director issued an Order to **Show** Cause, providing the City ~~with~~ **an** opportunity to demonstrate why the FAA should not include the Ordinance in the agency's investigation under I4 C.F.R. Part 16 begun in 2002. (FF **208**; DD, **Exh. 1**, Item 3.) He stated **that** the issues under investigation would include whether the implementation of **the** Ordinance **would** be contrary to Grant **Assurances** 22 and 23, preempted by federal **law**, **and** consistent with the **1984** Settlement Agreement and the Surplus Property **Act** of 1944.³⁹ On April 7,2008, the City responded to the Order to Show Cause, and argued, among other things, that **the FAA** lacked jurisdiction to decide the issues. (FF 210; DD Exh. 1, **Item 4**.)

³⁸ The City sent letters to users of SMO on April 14,2008, to inform them about the Ordinance, which was scheduled to go into effect on April **24,2008**. (DD, Exh. 1, Item 59.) By letter dated April 21,2008, the Associate Administrator for **Airports** requested that the City withdraw its April 14,2008, letter and assure the FAA and users that the City would refrain from enforcing the ban pending the outcome of the **Part 16** proceeding. (FF 211 ;DD, Exh. 1, Item 79.) The City **refused**. (FF 212; **DD**, Exh. 1, Item 81.)

The **AAS** Acting Director issued an Interim Cease and Desist Order on April 23,2008, and a Supplemental Cease and Desist Order on May 12,2008. The United States District Court for the Central District of California granted a preliminary injunction on May 16,2008. The judge ordered the City to refrain from enforcing the Ordinance until the Part **16** proceedings were concluded. (FP 217; DD, Exh. 1, Item **98**.) **On May 8,2009**, the Court of Appeals issued an order affirming the issuance of the preliminary injunction, and dismissing the City's petition for direct review as moot. *City of Santa Monica v. O'Donnell*, No. **08-72192** (9th Cir. **May 8,2009**).

³⁹ He referred to a **1948 Surplus Property** Instrument of Transfer (see DD, **Exh. 1**, Item 15) which obligated the City to maintain the Airport for the use and benefit of the public on reasonable terms and without unjust discrimination and without grant **or** exercise of **any** exclusive right for **the** use of **the** airport. (DD, Exhibit 1, Item 3, at 6-7.)

F. Director's Determination

On May 27, 2008, the Acting AAS Director issued the Director's Determination, finding that implementation of the Ordinance would be inconsistent with the City's obligations under:

- Grant Assurance 22, requiring that SMO be available **as** an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities;
- Grant Assurance 23, prohibiting the granting of an exclusive right to conduct any aeronautical activities at SMO;
- The Surplus Property Act of **1944**; and
- The **1984** Settlement Agreement.

(FF 219; DD at 66.) The Acting Director also found that the City was preempted under federal law from issuing this ordinance. (FF 219; DD at 67.)⁴⁰

At the conclusion of the determination, the Acting Director ordered the City to submit a corrective action plan within 20 days and directed that the City and SMO were ineligible to apply for new **FAA** grants under 49 U.S.C. § 47106(d) until the **FAA** approved of the corrective action plan or until further notice. The May **12, 2008**, Supplemental Cease **and** Desist Order⁴¹ was incorporated by reference in the determination. The Acting Director ordered that if the City and SMO did not submit a corrective action plan or file a timely appeal, then the FAA would issue a Final Cease and Desist Order under 49 U.S.C. § 47122 and 14 C.F.R. § **16.109(a)**, directing the City to

⁴⁰ The Director noted that "restricting C and D aircraft, in addition to being inconsistent with the City's Federal obligations, is not an effective means to enhance safety at SMO." (DD at 67, n.135.)

⁴¹ See n.38, *supra*.

permanently cease and desist from banning Categories C and D aircraft operations at SMO. (DD at 67.) (FF 220.)

G. Request for Hearing

On June 13, 2008, the City filed a request for hearing under **14 C.F.R.** § 16.109(c)(1) to review the Director's **Determination**.⁴² (FF 221.)

H. Hearing Order

The **FAA** Deputy Chief Counsel for Operations issued a hearing order under **14 C.F.R.** § 16.201(a) on **June 23, 2008**, designating a Hearing Officer (**FF 221**) and directing that the Hearing Officer resolve the issues regarding obligations under **Grant Assurances 22 and 23**, the property transfer **under** the Surplus Property Act, and the **1984 Settlement Agreement**, **and** determine whether the Ordinance **was** preempted under federal law. The Deputy Chief Counsel for Operations directed **the** Hearing Officer to issue the initial decision on or before **September 15, 2008**, and the Assistant Administrator for Aviation Policy, Planning **and** Environment to issue the final agency **decision by** November 10, 2008, in **the** event of an **appeal**,

I. Alternative Dispute Resolution Efforts

The deadlines **for** the initial decision and the final agency decision were suspended to permit the parties to engage in alternative dispute resolution ("ADR") efforts. Their efforts, **however**, failed, and **the** parties **agreed** to resume the adjudication process on **January 5, 2009**.

⁴² The Director's Determination noted that the **FAA** was not required under statute to afford the City a hearing. The FAA is required **to** provide an opportunity for a hearing to an airport sponsor if the agency denies an application for a grant (49 U.S.C. § 47106(d)(1)(A)) or decides to withhold payment to an airport sponsor under a grant agreement (49 U.S.C. § 47111(d)(1)(A)). In this **case**, the FAA is neither denying a grant application nor withholding payment under a grant agreement. The **FAA** explained that regardless, it **"is** affording **the City this** opportunity here in the **exercise** of the **FAA's** discretion." (DD at 68.)

J. Hearing

The parties filed declarations containing the direct testimony of their witnesses, as well as exhibits to accompany the declarations, under 14 C.F.R. § 16.223. During the hearing, the witnesses were subjected to cross-examination and redirect examination, and the parties presented argument on the issue of preemption. Excerpts of some of the pre-hearing depositions were accepted into evidence. After the hearing, each party filed a post-hearing brief and post-hearing reply brief.⁴³

K. The Initial Decision

On May 14, 2009, the Hearing Officer issued his written initial decision, including 220 findings of fact and a thorough analysis of the factual and legal issues. He concluded **as** follows:

1. The Ordinance unreasonably and unjustly discriminates against classes of aeronautical activities, and thus, is inconsistent with the City's obligations under Grant Assurance 22 because the Ordinance is not a necessary safety measure under Grant Assurance 22(i);
2. The Ordinance does not grant an "exclusive right" within the meaning of 49 U.S.C. § 47107(a)(4), and therefore, is not inconsistent with the City's obligations under Grant Assurance 23;
3. The Ordinance unreasonably and unjustly discriminates in the operation of the Airport, and therefore, is inconsistent with the City's obligations under the Instrument of Transfer of the airport property completed under the Surplus Property Act of 1944;
4. The Ordinance unreasonably **and** unjustly discriminates in a manner inconsistent with the 1984 Agreement; and

⁴³ In addition, the Hearing Officer granted permission to seven petitioners to participate in the proceedings. Three of these participants filed post-hearing briefs. (ID at 67.)

5. The Preemption Doctrine does not provide an independent basis for **FAA** administrative action under 14 C.F.R. ~~Part~~ **16**.⁴⁴

(ID at 3-4.)

VI. RESOLUTION OF THE ISSUES IN THIS CASE

A. Standard of Review

Section 16.241(c) of the Rules of Practice does not limit the Associate Administrator's review of a Hearing Officer's decision. It provides that "[i]f an appeal is filed, the Associate Administrator reviews the entire record **and** issues a final **agency** decision and order" 14 C.F.R. § 16.241(c).

B. Burden of Proof

In proceedings conducted under Part 16's procedural rules, AAS has the burden of proof of noncompliance with any statute listed in 14 C.F.R. § 16.1, or any regulation, order, agreement or document of conveyance issued under the authority of an **Act**. 14 C.F.R. § 16.229(a). (See 14 C.F.R. § 16.3 (definition of "Act.)) Grant assurances connected with the Airport and **Airway** Improvement Act of 1982, as amended, 49 U.S.C. § 47101 *et seq.*, are included in Section 16.1's list of authorities. 14 C.F.R. § 16.1(a)(5). Hence, **AAS** has the burden of proof with regard to the alleged breach of the Grant Assurances and of any of the other agreements or **statutes** alleged in the complaint. The City, however, has the burden of proving any affirmative defenses. 14 C.F.R. § 16.229(c).

In this context, the phrase "burden of proof" means burden of persuasion. See *Director, Office of Workers' Compensation Programs, Dept of Labor v. Greenwich*

⁴⁴ For reasons similar to his ruling on the preemption issue raised by AAS, the Hearing Officer declined to rule on the City's argument that its enactment of the Ordinance was protected by the Tenth Amendment to the U.S. Constitution. (ID at 62, n.5.)

Collieries, 5 12 U.S. 267 (1994) (discussing the difference between the burden of persuasion and the burden of going forward with the evidence, **and** holding that the meaning of the phrase “burden of proof” **as** used in the APA, 5 U.S.C. § 556(d),⁴⁵ means burden of persuasion.)

In applying these principles, the Hearing Officer held that **AAS** had the burden of **proving** that the Ordinance is discriminatory and that the City had the burden of proving the affirmative defense that the Ordinance is necessary for safety. (ID 72-75.) The **City** correctly argues that the Hearing Officer erred when **he** held that the City bore the burden of proving that the Ordinance is necessary for safety. Where, as here, **AAS** alleged the violation of a particular Grant Assurance, **AAS** bore the burden of proof regarding that violation. Should a respondent, such as the City, not **put** forth any evidence, **the** decisionmaker would examine the evidence to determine whether **AAS** had met its burden of **persuasion** as to all elements of the alleged violation. For **example**, in the case of Grant Assurance 22(a), it is not sufficient for **AAS** to prove **only** that the Ordinance is discriminatory, it also bears the burden of **persuasion** that it is “unjust.” **As** a practical matter, however, it is difficult to envision a case such **as** this where the respondent would not offer any evidence of its own to counter that submitted **by** **AAS**. Whether such evidence **is** sufficient to demonstrate that **AAS**’s allegations are unfounded is for the decisionmaker to determine, but it **does** not **mean that** the burden of proof has shifted.⁴⁶

⁴⁵ Part 1.6 proceedings do not come under the APA. See 61 Fed. Reg. 53998,54000 (1 996).

⁴⁶ Hence **the Hearing Officer’s** reliance upon *Meacham v. Knolls Atomic Power*, 128 S. Ct. 2395 (2008) was misplaced. In that case, the Court held that Section 623(f)(1) exempts *otherwise illegal* conduct by reference to a further item of proof, **and** as a result, that section creates a defense for which the burden of persuasion falls on the party claiming its benefit. In this case, the issue of whether the restriction is just depends upon whether it is necessary for safety. There is no additional “fact” to be shown.

Accordingly, AAS had the burden of proving noncompliance with the Grant Assurances, as set forth in the Director's Determination.

C. Preemption

The doctrine of federal preemption arises from the U.S. Constitution's Supremacy Clause, which provides that "[t]his Constitution, and the Laws ... made in pursuance thereof... shall be the Supreme Law of the Land." Article VI, Paragraph 2. The Supremacy Clause **further** provides that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." *Id.*

Federal preemption involves preclusion of state action in one or more of the following three ways: "by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field,

The Hearing Officer also relied upon an earlier **Part** 16 case, *Centennial Express Airlines v. Arapahoe County Pub. Airport Auth.*, FAA Order No. 1999-1 (Part 16, Subpart G) (February 18, 1999), *aff'd*, *Arapahoe County Pub. Airport Auth. v. Fed Aviation Admin.*, 242 F.3d 1213 (10th Cir. 2001). That case involved a local restriction prohibiting scheduled operations at the airport. In that case, the Associate Administrator for Airports, relying upon Wright & Miller, FEDERAL PRACTICE & PROCEDURE, held that the Airport Authority was in the best position to produce the evidence on which it **based** its determination that safety and the civil aviation needs of the public required the ban against scheduled passenger service. She also noted that the agency and the complainants would have been surprised if the Airport Authority had not affirmatively pleaded the "safe operation and public civil aviation needs defense in its answer." *Centennial Express*, at 20. Based on these factors – fairness, convenience and surprise – the Associate Administrator held that the Airport Authority had the burden of proving **as** an affirmative defense that the ban **was** necessary for the safe operation of the airport or to serve the civil aviation needs of **the** public. On appeal, the U.S. **Court** of Appeals for the Tenth Circuit stated, "[w]e agree with the FAA [that] this determination is a factual one for which the Authority, as the party asserting the justification, bears the burden of proving before the agency." *Arapahoe County Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213, 1223 (10th Cir. 2001).

The rationale in that case does not justify making the City's necessary-for-safety contention an affirmative defense on which the City should bear the burden of persuasion. The City does not have better access to the evidence pertaining to the issue and AAS cannot argue that it is surprised by the City's argument.

or by implication because of a conflict with a congressional enactment.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525,540 (2001) (citations omitted).

1. *Consideration & Preemption*

The Hearing Officer held that application of the preemption doctrine is the province of the federal courts, and declined to **rule** on the preemption claim, in **part**, because the FAA did not **expressly** list it in 14 C.F.R. § 16.1(a) as an authority under which disputes may be litigated under Part 16. However, while administrative agencies are not *required* to consider constitutional claims, they are *entitled* to do so. *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Comm’n*, 838 F.2d 536, **544** (D.C. Cir. 1988), citing *Motor and Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979), *cert. denied*, *General Motors Corp. v. Costle*, **446 U.S. 952** (1980). AAS argues **in** its appeal brief **that** the preemption doctrine is a proper subject of **Part 16** proceedings because **the** City’s Ordinance conflicts with several of the federal statutes listed in **Section 16.1(a)** as ones that may **be** litigated under Part 16.

The City counters **that** AAS’s argument should not be considered because it is a **new** theory raised for **the** first time on **appeal**. Preemption is not a new theory. The Director’s Determination discusses preemption at some length. (*See, e.g.*, DD at **63-66.**)

AAS is correct that this case **involves a** dispute concerning whether there is a conflict between the City’s Ordinance and the statutes that are listed in Section 16.1(a).⁴⁷

⁴⁷ These statutes include, for example, 49 U.S.C. § 47107 and 49 U.S.C. §§ 47151-53, Section 16.1(a)(5) provides that **the** authorities governed **by** Part 16 include: “[t]he assurances contained in grant-in-aid agreements issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended, 49 U.S.C. **47101 et seq.**, specifically section 511(a), 49 U.S.C. **47107(a) and (b).**” (Emphasis added.) Section 16.1(a)(8) provides that the authorities governed **by** Part 16 include “[o]bligations contained in property deeds for property transferred under the Surplus Property Act (**4Y USC 47151-47153**).” (Emphasis **added.**)

Therefore, it is appropriate to consider the question of federal preemption.

2. *Implied Field Preemption*

Whether implied field preemption exists is “a question of ascertaining the [congressional] intent underlying the federal scheme.”” *Hillsborough County, Fla. v. Automated Medical*, 471 U.S. 707, 714 (1985). To determine that intent, one looks not just to the legislation and legislative history, but also to the regulations. In *Montalvo v. Spirit Airlines*, 508 F.3d 464,473 (9th Cir. 2007), the **court** found that the pervasiveness of the federal aviation regulations, among other things, showed Congress’ intent to displace state law. Similarly, in *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173(1st Cir. 1989), the court stated that, “we believe the evidence is overwhelming that there is pervasive administrative regulation and control of the field of aviation.”

Congressional intent exclusively to occupy the entire field of aviation safety is reflected in the Federal Aviation Act of 1958, as amended, codified at 49 U.S.C. §§ 40101-50104. Specifically, 49 U.S.C. § 40103(a) provides that “[t]he United States Government has exclusive sovereignty of airspace of the United States.” (Emphasis added). In this statute, Congress mandated **that** the FAA “develop plans and policy for

⁴⁸ **AAS** argues that express statutory preemption exists in this case. It states **that** “preemption under 49 U.S.C. § 41713(b) [part of the Airline Deregulation Act (**ADA**)], would provide another ground for nullifying the City’s ordinance.” (Appeal Brief at 21, n.14.)

In 49 U.S.C. § 41713(b), the **ADA** expressly preempts state action related to a price, route, or service of air carriers. As the Hearing Officer pointed out, counsel for both parties have declined to state that air carriers operating Category C or D aircraft **fly** into or out of the **SMO**. **AAS** counsel stated at the hearing that “not to [his] understanding” were any air carriers within the meaning of the **ADA** operating Category C or D aircraft into or out of the Airport. (Tr. 676.) **As** for City counsel, he stated that “I don’t believe” that any of the operators of **Category C** or **D** aircraft operating at the Airport were air carriers within the meaning of the **ADA**. (Tr. 696.) If air carriers do in fact operate Category C or D aircraft into or out of the Airport, **AAS** did not show it, and thus, it did not show express statutory preemption under **49 U.S.C. § 41713(b)**.

the use of the *navigable airspace* and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” 49 U.S.C. § 40103(b)(1). “*Navigable airspace*” includes “airspace needed to ensure safety in the *takeoff* and *landing* of aircraft,” 49 U.S.C. § 40102(a)(32) (emphasis added). The City’s Ordinance attempts to regulate the takeoff and landing of aircraft.

As AAS has pointed out, the legislative history of the Federal Aviation Act of 1958 shows that the Senate recognized that “aviation is unique among transportation industries in its relation to the federal government – it is the only one whose *operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities.*” S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958) (emphasis added). The Senate stated that the federal government “bears *virtually complete responsibility* for the ... supervision of this industry in the public interest.” (Id.)

The House Report states that the principal purpose of the Federal Aviation Act of 1958 was “to establish a new federal agency with powers *adequate to enable it to provide for the safe and efficient use of the navigable airspace* by both civil and military operations.” H.R. Rep. No. 2360, *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741 (emphasis added). The legislation gave the FAA “*full responsibility and authority* for ... the promulgation and enforcement of safety regulations.” (Id.; emphasis added.)

Under its congressional mandate to promulgate aviation safety regulations, 49 U.S.C. § 44701(a), the FAA has issued broad and sweeping safety regulations, including those involving aircraft design, certification, maintenance, and operation; airspace; and pilot qualifications, proficiency, and training. These extensive regulations are contained in 14 C.F.R. Chapter I—Federal Aviation Administration, Department of

Transportation.

The courts have determined that Congress has preempted the field of aviation safety through implied field preemption. In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-639 (1973), the Supreme Court stated that, “the interdependence of [safety, efficiency, and the protection of persons on the ground] requires a *uniform* and *exclusive* system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.” (Emphasis added.) In *Montalvo*, 508 F.3d at 473, the court stated: “We .., hold that federal law occupies the entire field of aviation safety. Congress’ intent to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of control over air safety.” See *also World Airways, Inc. v. Int’l Broth. of Teamsters, Airline Div.*, 578 F.2d 800, 803 (9th Cir. 1978) (stating that “Federal law **has** pre-empted the area of aviation”).

The sole – and very limited – exception to federal preemption is when airport owners or operators are exercising their *proprietary rights*. See, e.g., *American Airlines v. Dep’t of Transp.*, 202 F.3d 788, 805 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000). While “[t]he precise scope of an airport owner’s proprietary powers has not been clearly articulated,” courts have “recognized that local proprietors play an ‘extremely limited’ role in the regulation of aviation.” (Id.; citation omitted). Local proprietors have “the power only to promulgate reasonable, non-arbitrary, and non-discriminatory regulations ... [which] avoid even the appearance of irrational or arbitrary action.” *National Helicopter Corp. of America v. City of N.Y.*, 137 F.3d 81, 89 (2d Cir. 1998) (citing *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 564 F.2d 1002, 1005

(2d Cir.1977). “Further, [a city] may regulate only a narrowly defined subject matter – aircraft noise and other environmental concerns at the local level.” National Helicopter, 137 F.3d at 89 (citing *Western Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 658 F. Supp. 952,957 (S.D.N.Y. 1986), *aff’d*, 817 F.2d 222 (2d Cir. 1987)).⁴⁹ Although courts have found that the proprietary powers exception applies in the **areas** of noise and congestion,⁵⁰ no court has yet found that the proprietor exception applies in a case involving a local authority’s determination regarding aviation safety.” We decline to extend the proprietor exception to aviation safety and operation cases. For these reasons, we find that the FAA fully occupies the field of aviation safety, no proprietor’s right exists in this case, and federal law preempts the City’s Ordinance.

D. Grant Assurance 22, “Economic Nondiscrimination”

The determination that federal law preempts the Ordinance banning Categories C and D aircraft at SMO is dispositive regarding the validity of the Ordinance. However, the Ordinance also should be struck down based on our interpretation of Grant Assurance 22.

⁴⁹ The FAA recognizes that airport proprietors may issue temporary restrictions to address such local environmental issues as runway contamination.

⁵⁰ Examples of cases in which the courts held that the proprietor exception applied are: *Alaska Airlines v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991) (involving an ordinance designed to control airport noise by reducing number of permitted daily carrier flights to 40); *Santa Monica Airport Ass’n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981) (involving a noise ordinance establishing a maximum single event noise exposure level of 100 decibels); *Western Air Lines, Inc., v. Port Auth. of N.Y. and N.J.*, 817 F.2d 222 (2d Cir. 1987) (involving a “perimeter rule,” designed to reduce congestion, prohibiting nonstop flights to or from the airport in excess of 1,500 miles); *British Airways Board v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977) (involving a ban on supersonic Concorde flights to control noise).

⁵¹ In *Arapahoe County Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213, 1223 (10th Cir. 2001), the court did not decide whether safety needs may “fall under the ‘proprietary powers’ umbrella.” Instead the court stated that it would “assume [this], without deciding” it.

Grant Assurance 22, in the grant agreements entered into by the City and the FAA between 1985 and 1994, provided in pertinent part:

a. [The sponsor] will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical uses.

* * *

i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

(FF 177; DD, Exh. 1, Item 6.)

In the Initial Decision, the Hearing Officer methodically reviewed the evidence, and concluded that that the preponderance of the evidence demonstrated that the discriminatory effect of the Ordinance is not reasonably justified as necessary for safety under Grant Assurance 22(i). (ID at 99.) He wrote:

[T]he record as a whole demonstrates that C and D aircraft have the better safety record, the more experienced pilots, and better safety equipment ~~than~~ category A and B aircraft. The record also does not support a finding that the runway at SMO, combined with the risk of an undershoot or overrun of Category C or D aircraft, requires a full-sized RSA or EMAS at the ends of the runway to insure the safe operation of the airport. Further, ... the Ordinance also cannot be justified by the City's speculative allegations of potential liability, or arguments that impact on the Regional Airport System is minimal.⁵² Thus, the Ordinance is not a necessary safety measure under Grant Assurance 22(i) and the City will not be in compliance with Grant Assurance 22 if the Ordinance is implemented.

(ID at 99.)

⁵² The parties have disputed the potential impact of the Ordinance on the regional airspace system. Even if there were a significant negative impact, it would not help prove the alleged violations. (See AAS's Reply Brief at 19, stating that "the discussion of impact in the DD was not to prove any element of a violation of an authority listed in 14 C.F.R. § 16.1(a), but to explain how the City's assertion of minimal impact lacked proper support.") For this reason, it is unnecessary to decide the issue of whether there would be a negative impact, and if so, to what degree.

As explained below, we agree with the Hearing Officer's conclusion that the preponderance of the evidence demonstrates that the discriminatory Ordinance is unjust because it is not necessary for safety. This is so despite the fact that AAS has the burden of proving unjust discrimination.

1. Aircraft In categories C And D Can Operate Safely At SMO

SMO is a safe airport, and its runway is safe for operations by certain airplanes in Categories C and D, despite the fact that the runway does not have an RSA extending 1,000 feet beyond the runway ends. **As** discussed at length in the Hearing Officer's decision, these aircraft can operate safely at SMO for a variety of reasons including the regulations under which these aircraft operate.⁵³

When deciding whether to land at SMO, a pilot must consider not only whether the airplane is physically capable of landing on SMO's approximately 5,000-foot runway, but also whether the runway is long enough under the applicable operational rules, *i.e.*, 14 C.F.R. Part 135 or Part 91, subpart K, which may prohibit operation unless the aircraft can land in an even shorter distance. Almost half of the operations of Categories C and D aircraft at SMO are part of fractional ownership programs under 14 C.F.R. Part 91, Subpart K, and ~~many~~ of the Category C and D aircraft operations are under ~~Part~~ 135.

⁵³ **Other factors making** aircraft in **Categories C and D** safer than those in Categories A and B include:

- (1) aircraft features improving the **stopping** performance of **these** aircraft, such as autothrottles, thrust reversers; and leading edge devices, which aircraft in Categories C and D tend to have;
- (2) greater pilot **training** and experience levels of **pilots of Categories C and D aircraft** (Pratte **Direct at ¶¶ 12-15; DD Exh. 1, item 47; FF 80-82); and**
- (3) higher aircraft certification standards for Categories C and D aircraft (Stimson Direct; **FF 83-87).**

Pilots flying under those **rules must** comply with 14 C.F.R. § 135.185(b)'s or § 91.1037(b)'s "60 percent **rule**" (or Section 91.1037(c)'s "80 percent rule" for applicable operations.) Under the 60 percent rule, an aircraft must **be** able to land at SMO in no more than approximately 3,000 feet, taking into account the relevant performance parameters and calculations.⁵⁴ James Hall, former chairman of the National Transportation Safety Board (NTSB), **described** the 60 percent rule **as** one tool to mitigate the **risk** of overruns (Hall Rev. Direct at ¶ 21), and Dennis Pratte, Manager of the **FAA Part** 135 Air Carrier Operations Branch, explained that the 60 percent rule gives the pilot **a** margin of safety of **40 percent** (Tr. 222-223).

In making the necessary preflight calculations pertaining to the sufficiency of runway length, a pilot does not consider the existence of an **RSA**. In other words, the **RSA** does not provide additional runway length **for** a pilot to use in determining whether the runway is long enough for operation. (Tr. 220.) That is why the **FAA** considers an **RSA as "a safety enhancement** beyond what's required for a normal safe operation" (Tr. 47) (emphasis added). An RSA "is there for that rare event when **an** aircraft **exceeds its** normal operating **envelope.**" (Huffman Dep. at 101.) **RSAs** and **EMASs** provide additional safety benefits, which is one reason why the **FAA** has funded **RSA** and **EMAS projects** nationwide. (FF 108.) The absence of an **RSA** or of **an EMAS** does not mean that a pilot cannot land safely or that the runway is **unsafe**. (Tr. 45-46.) Even **James Hall**

⁵⁴ **James Hall wrote in his revised direct testimony that the 60 percent rule only applies to commercial operations, that is Part 121 and Part 135 operations, which, can only take place at Part 139 airports. He concluded that since SMO is not a Part 139-certificated airport, none of the operators at SMO are required to comply with the 60 percent rule. (Hall Rev. Direct at ¶ 21.) This is incorrect. There are no scheduled commercial operations under Part 121 or Part 135 at SMO, but there are Part 135 commercial on-demand operations at SMO and the operators of those flights are required to comply with the 60 percent rule. Also, the pilots of Category C and D aircraft in fractional ownership programs must comply with the comparable regulations.**

acknowledged that he did “not doubt that Category C and D aircraft ‘can land **safely**’ at **SMO.**” (Hall **Rev. Direct** at ¶ 57.)

Significantly, as **the Hearing Officer recognized**, the 1,000-foot standard in **AC 1506300-13, Airport Design**, for Categories C and D aircraft applies to *new* runway construction. (See ID at **94**; Marinelli Rebuttal of Trimborn Direct at ¶ 4.) The **FAA** design standard for older airports, like **SMO**, is “to the extent practicable,” taking into account such factors as engineering feasibility, cost and impact upon operations. (ID at 94-95.) Hence, while a 1,000-foot **RSA** beyond each runway end “would **be** ideal” for an airport with a fleet mix like **SMO**’s (including aircraft in Categories **A** through **D**) (Tr. 33), improvements to **SMO**’s existing runway environment need to be made only to the extent practicable. (Marinelli Rebuttal at ¶ 4 of Trimborn Direct.)

The **FAA**’s “to-the-extent-practicable” standard for **RSAs** and **EMASs** is premised on the fact that a runway is safe without an **RSA or EMAS** – **but** can be made even **safer**. Many airports do not **have** standard **RSAs** (Tr. 141), and operations continue there safely. As the Hearing Officer wrote:

[H]undreds **of** airports in several states throughout the country lack standard **RSAs**. FF 129. ... The record shows that no other airport owner or proprietor, other than **the** City, has restricted **an** entire category of aircraft due to lack of **RSAs** or **EMASs**. FF 136. In fact, several **major** airport **runways operate** without **RSAs and EMASs** including Los Angeles International, Boston Logan, and Midway Chicago. FF 115.

(ID at 95, n. 17.)

The **City** argues **that** the Ordinance cannot **be** unjustly **discriminatory** because it is **based** upon the distinction drawn by the **FAA** in its design standards for new airports. However, **the** design standards are not operational requirements and are **not** mandatory

for existing facilities. For all of these reasons, the City's use of design standards as the basis for the discriminatory operational ban is unjust,

2. Safety Records of Airplanes in Categories C and D, as compared to Categories A and B

While aircraft can land safely at SMO and at other airports which lack an RSA, overruns and undershoots do happen from time to time. The preponderance of the evidence shows that the likelihood of an overrun or undershoot at SMO by Category C or D airplanes does not justify the discriminatory ban, because those aircraft have fewer of those incidents than do Categories A and B aircraft?

The evidence pertaining specifically to the likelihood of overruns and undershoots is as follows:

- Historical data, generally, show that Category C and D aircraft are involved in fewer overruns than Category A and B airplanes (Marinelli Direct at ¶ 40);
- Data compiled by the NTSB show that from 1981 to 2008, there have been seven overruns and one undershoot at SMO. Small piston propeller-driven Category A-I or B-I aircraft were involved in these overruns and the one undershoot. An experimental Jabiru J400 single-engine aircraft was involved in one overrun. (DD at 8-9; DD Exh. 1, Items 18 and 82; Trimbom Direct at ¶ 33; FF 57.)
- Benjamin Harris, FAA Supervisory Air Safety Investigator and Manager of the Accident Investigation Division, testified that while his office receives a large number of reports of overruns by airplanes in Categories A and B

⁵⁵ As Stephen Ford, FAA Aviation Safety Inspector for the Long Beach Aircraft Evaluation Group, testified:

Certainly, an aircraft that has the most power, the most technological sophistication, one that's probably going to require the pilot be more highly trained would be the safer choice. That would be the turbo-jet, principal category-type aircraft. It would be the aircraft in approach categories C and D.

(Tr. 440.)

nationwide each day, the reports pertaining to overruns or overshoots by airplanes in Categories C or D are “incredibly rare.” (Tr. 655.)

The City has argued that the likelihood of an overrun **or** undershoot in the future does not depend on the history of no overruns or undershoots of Category C and D aircraft at SMO in the past. However, that history does suggest that the likelihood of an overrun or undershoot at SMO by an airplane in Category **A** or **B** is greater than that of a Category **C** or **D** airplane. Contrary to the City’s assertion in its appeal brief, the evidence shows that aircraft in Categories C and D are **less** likely to be involved in an overrun.

AAS also introduced ample evidence that airplanes in Categories **C** and **D** are less likely to be involved in accidents and incidents. For example, there have been **23** accidents at **SMO** in the last 21 years, all involving Categories **A** and **B** airplanes. (FF 56; Pratte Direct at ¶ 28.) The Hearing Officer referred to the NTSB data cited in the Director’s Determination indicating that **jets** have **an** accident rate **8** times lower than single-engine piston aircraft, **5.75** times lower than twin-engine piston aircraft, and **4.6** times lower than twin-engine turboprops. (FF 59; DD at 9-10.) Even James Hall, who testified on behalf of **the** City, acknowledged that airplanes **in** Categories **C** and **D** **have** an excellent safety record even though they operate at non-commercial airports. (Tr. 158.)

The City **argues** on appeal that the Hearing Officer gave too much weight to the evidence **pertaining** to accident and incident rates because overruns **and** undershoots constitute only **a** subset of accidents and incidents. The evidence pertaining to accidents and incidents, however, **does show** that airplanes in Categories **C** and **D** have the superior safety record, and is consistent with, and **supports, the** finding **that it is unjustly**

discriminatory to prohibit airplanes in Categories C and D from operating at SMO. Moreover, this history **shows** that “the probability of defect, leading to a runway excursion **or overrun**, is much higher in a category **A** or B aircraft, when compared to category C or D aircraft.” (Pratte Direct at ¶ 12; *see* ID at 91, FF 83-84.)

There is no indication that the Hearing Officer gave this evidence excessive weight. The evidence pertaining to the greater risk of an overrun or undershoot **by** an airplane in Category A or B, rather **than** in Category C or D, is only one aspect of **AAS’s** case that the ban of operations by airplanes in Categories C and D is unjust. The Hearing Officer recognized this, and considered that evidence pertaining to **risk** along with other factors including safety measures currently in place and those that could be implemented.

3. Distance Travelled in the Event of an Overrun

The City contends that **the** Ordinance is justified **because** the effects of an undershoot or **overrun** at SMO by aircraft in Category C or D allegedly would be more devastating than those by a Category **A** or B aircraft. This is so, the City contends, because of the topography and proximity of the adjacent neighborhoods. The preponderance of the substantial evidence in the record does not **support** this contention. Instead, **the** evidence shows that an aircraft overrunning the runway at 70 knots – the speed **at** which 90% **of** overruns occur – would not reach the neighborhoods.

Rick Marinelli, **Manager**, Airport Engineering Division in **AAS**, who is a licensed professional engineer, testified that Categories C and D aircraft tend to go farther when involved in overruns or undershoots on *flat ground*. SMO, however, is situated **on** a plateau, and there is little flat land between the runway ends and the steep declines to the

streets. **As a** result, he testified, if a Category C or D aircraft overran the runway at SMO, it would not travel further **than** a Category A or B aircraft. (Tr. 277.)

According to Marinelli's calculations, if an aircraft overran Runway 21 at SMO at 70 knots, it would impact the ground 35 feet below the runway about 180 feet from the end of the runway, and about 20 feet before the airport property line. (Tr. 298.) He wrote in his direct testimony that he based these calculations "on a simple ballistic arc that would be followed by any falling object with an assumed initial velocity," **and** that an aircraft would have **to be** flying, or at least have lift under the wings to reach the neighborhood area. (Marinelli Direct at ¶¶ 60-61.) (FF 71-72.) (See also, Marinelli Rebuttal at ¶ 10 to Trimborn Direct.)

The City failed to introduce substantial evidence to rebut Marinelli's conclusion that **an** airplane overrunning Runway 21 at 70 knots would not reach the neighborhood. James Hall, who testified on behalf of the City that the **ban** is reasonable, did not provide any engineering studies concerning the likelihood of an overrun or where an overrunning aircraft would stop. Also, he **was** not **aware** of any engineering analysis **performed** by the City. (Tr. 153-154.) He testified that "I don't know that you need that [analysis using accepted scientific methodology regarding the likely consequences of **an** overrun] **as** a substitute for common sense in this situation." (Tr. 154.) Consequently, the Hearing Officer correctly found that Hall's testimony deserved less weight than Marinelli's regarding risk to individuals **off** the airport property.

The testimony of Robert Trimborn, **the** Acting **Airport** Director, likewise, was not **based** upon scientific analysis. He testified that if an **airplane** went 1,000 feet beyond the **runway** end, it would **stop** in a residential neighborhood. I-owever, he acknowledged,

this was based on a straight-line measurement, not taking the terrain or obstacles into account. (Tr. 378.) **He** testified that he did not perform any engineering studies, or have any performed **for** him, using various speeds and weights, and the topography of Santa Monica, to determine where airplanes might **stop** in the event of **an** overrun at SMO. (Tr. 413.)

The City introduced “overlays” – superimposed diagrams of overruns by aircraft at other airports on top of photographs of **SMO** and its environs. Specifically, these exhibits were composites of the following overruns on top of photographs of Runways 3 and 21 at SMO:

- Challenger 600 at Teterboro Airport, New Jersey, on February 2, 2005, (City Exhibits 10 and 11); and
- Learjet **Model 60** at Columbia Metropolitan Airport, Columbia, South Carolina, on September 19, 2008 (City Exhibits 12 and 13.)

These exhibits **were** misleading and unrealistic straight-line measurements, which did not account for terrain or obstacles. **As** counsel for the City conceded, these overlays were “not **supposed** to be scientific” (Tr. 409), but merely were intended to show where an airplane would stop if it overran the runway at SMO **and** traveled the **same** number of feet as the aircraft involved in these past **overruns** at other airports.

The **City argues** that even **AAS** witnesses acknowledged that an aircraft with sufficient velocity might land off airport property. **AAS** witnesses testified that a scenario is *conceivable* in which an overrun at SMO would end up in **the** neighborhood. For **example**, when asked **if**, in the absence of an **KSA**, an aircraft *could* fall off the edge **of** the plateau and **land** in the street, on homes, **or** somewhere **else** off **the** airport, David Bennett replied, “That could happen. *Anything could happen, so* you could imagine **any**

kind of accident” (Tr. 29.) Likewise, when asked if it is *possible* that an aircraft with enough velocity could overrun the **runway** and **reach the** street, Rick Marinelli replied, “**If** it had enough initial velocity, certainly.” (Tr. 299.)

The City argues on appeal that Marinelli did not take into consideration that an airplane is **not just any** falling object **and** because **of its** design, it may have lift when it overruns the plateau. The City, however, **failed** to introduce any evidence to **show** that a Category C or D aircraft **would** have sufficient lift to **fly** if it overran the runway and went off the plateau **at 70 knots**.⁵⁶

The City argued that Marinelli did not **take** into account an aircraft’s **lift** under “real-world **overrun** speeds.” However, seventy knots is an analytically significant speed because, “data shows that 90% of overruns **are** at 70 knots or lower.” (Marinelli Direct at ¶ 51; FF 60.)⁵⁷

The City’s only evidence on this point was provided by Robert Trimborn, and it **was** hardly a persuasive scientific analysis. Trimborn testified that **he** did not know whether the Bombardier Challenger CL-600 involved in the overrun **at** Teterboro, New Jersey, on February 2, 2005, would travel as **far** at SMO **as** it did **at** Teterboro **if** that accident occurred **at** SMO. He testified:

⁵⁶ Further, Marinelli testified that he did not consider the effect of lift because if an aircraft **has** lift and is involved in an impact, that is a crash, not an overrun. (Tr. 303,305.) An overrun involves wheels on the ground. **If an** airplane has lift, then an **RSA or EMAS** would be ineffective. The stated reason for the Ordinance, **however**, is that the runway **at SMO** lacks **an RSA or EMAS**. Robert Trimborn testified that there would be no reason for the Ordinance if the runway had an RSA extending 1,000 feet beyond the runway ends. (Tr. 401-402.)

⁵⁷ **AC 150/5220-22A** at ¶ 3 states:

Data on aircraft overruns over a 12-year period (1975 to 1987) indicate that **approximately** 90% of **all** overruns occur **at** exit speeds of 70 knots or less ... and most **come to rest** between the extended runway edges within **1000 feet** of **the** runway end

It's **hard** to tell, because at that speed [110 knots], had the aircraft left the runway at Santa Monica, the wings are configured for takeoff. So they're developing lift. It actually could have sailed across – into homes. It could have gone over three or four **homes** before it slammed to the ground. I don't know.

(Tr. 406.)

Further, Category C **and D** aircraft do not have a monopoly on high rates of speed. The City introduced evidence about an overrun at Santa Barbara, California, on June 10, 2007, involving a Falcon 900, which is a Category B jet aircraft. (City Exhibit No. 8, Tr. 399.) The evidence indicated that pilots aborted the takeoff after the aircraft's speed was well into the **upper** 130-knot range because the airplane did not **respond when** the pilot **pulled** back on **the yoke**. (City Exhibit No. 8.) The speed of an overrun – **particularly on departure** – does not necessarily depend on the airplane's approach category. (Tr. 412.) The approach speeds of airplanes in Categories B and C may overlap, depending upon **flap** settings and the weight **of** the aircraft. (Stimson Direct at ¶ 23.) **However**, aircraft in Category B may not **have** the stopping ability of an airplane in a higher approach category certificated under Part 25. Further, even if **the** landing approach speed of **a** given Category B airplane is less than the approach speed of a given **Category C or D** airplane, the Category C or D airplane **may be able** to land in **a** shorter distance than the Category B airplane because of **the** better stopping performance of the Category C or D airplane. (Stimson Direct at ¶ 24.) Thus, while a possibility exists that aircraft at high speeds may overrun the runway at SMO, this safety concern does not justify **a** ban that discriminates against airplanes in Categories **C and D**.⁵⁸

⁵⁸ **The overruns at other airports discussed by the City's witnesses do not prove that the Ordinance is needed. The overrun at Little Rock, Arkansas, on June 1, 1999, involved a MD-82 and the overrun at Midway Airport in Chicago, Illinois, on December 8, 2005, involved a Boeing 737-700, neither of which operate at SMO. (Tr. 387 and 425.) The overrun at Midway, further,**

4. Mitigation Of Risk Through Installation Of An EMAS Or RPZ.

Risk associated with overruns and undershoots at SMO by airplanes in Categories C and D can be mitigated – although not eliminated completely – without implementing a total ban **and** without affecting the utility of the runway. **As** the Hearing Officer found, “the existence of alternative approaches as proposed by the **FAA** to the City **demonstrates** that the total ban on Category C and D aircraft was not the sole action that is available to the City to enhance safety in the area surrounding the Airport.” (ID at 96.)

For example, in March 2008, **AAS** proposed a 70-knot **EMAS** with a 250-foot **bed and** a 25-foot setback at the departure end of Runway 21. **AAS’s** information provided by ESCO, indicated that the proposed EMAS would stop **the** following aircraft: G-IV at 57,000 lbs, CL-600 at 37,000 lbs, the Falcon 900 at 35,500 lbs, the **ERJ-135** at 41,500 lbs, **and** the **Hawker** 125 at 20,500 lbs.⁵⁹ (DD, **Exh.** 1, Item 4, **Exh.** 24, at 17.) While this alternative would provide only a limited safety enhancement to aircraft operating on Runway 3, it would provide an extra margin of **safety** for operations on Runway 21, which **accounts** for approximately 95% of SMO’s operations. For this reason, **AAS** concluded that the “greatest safety enhancement would be achieved by addressing [the operations on Runway 21].” (Marinelli Direct at ¶ 52.)

AAS also proposed **as** an alternative a **40-knot EMAS** at the ends of both Runways 3 and 21. **As** Rick Marinelli explained, an **EMAS** providing 40-knot **stopping**

involved reduced braking effectiveness due to snow (Tr, 394), which is a condition not likely to occur at SMO.

⁵⁹ The data indicated that the EMAS would not stop the Lear 35 at 41,500 lbs or the Cessna 750 at 29,000 lbs, but would slow them down, so that the Lear 35 at that weight would have an exit speed from the EMAS bed in the low 40’s (knots) and the Cessna 750 at that weight would have an exit speed of 10 knots. (DD, **Exh.** 1, Item 4, **Exh.** 24, at 17.)

power will slow an aircraft exiting the runway at a higher speed. (Marinelli Direct at 251.)

Finally, the City **has** the option of installing Runway Protection Zones (“RPZ”) beyond the ends of the runway. Although this would require acquiring local property **and** keeping that property clear of incompatible objects and activities, it would mitigate the impact in the highly unlikely event that **an** aircraft overran the runway at such a velocity that it went beyond the current airport boundaries.

5. Conclusion

Hall testified that the ban on operations against aircraft in Categories C and D **was** reasonable because there is no guarantee that the pilots of these aircraft will always land safely on SMO’s runway. Likewise, there is no guarantee that pilots of airplanes in Categories **A** or **B** will not overrun SMO’s runway, but the City has not banned operations by Categories **A** and **B** aircraft, and these aircraft may be more likely to be unable to stop before reaching the runway end. It is unreasonable to discriminate against aircraft in Categories C and D that are capable of landing safely at SMO and have the better safety record, and Grant Assurance 22 prohibits such an unjust discriminatory measure. In light of the foregoing, AAS met its burden of proving by a preponderance of the evidence that the Ordinance is unjust because it is not necessary for safety.

E. Grant Assurance 23, “Exclusive Rights”

1. Intent to Prohibit Anti-Competitive, Monopolistic Results

Grant Assurance 23 implements two statutes: (1) 49 U.S.C. § 47107(a)(4), which states that “a person providing, or intending to provide, aeronautical **services to** the public will not be given an exclusive right to use the airport;” and (2) 49 U.S.C. § 40103(e),

which provides that, “a **person** does not have an exclusive **right** to **use** an air navigation facility on which Government money has been expended.”

At all relevant times, Grant Assurance 23 stated, in pertinent part, as follows:

[The airport sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.

[The airport **sponsor**] further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct **any** aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, **aerial** photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair **and** maintenance of aircraft, sale of aircraft parts, and any **other** activities which **because** of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such **an** airport before the grant of any assistance under the **Airport** and Airway Improvement Act of **1982**.

(DD, **Exh. 1**, Item **6**.) The Hearing Officer held that Grant **Assurance 23** was intended to prohibit “anti-competitive, monopolistic behavior at airports receiving Federal funds.”

(ID at **101**.) We agree.

The language of 49 U.S.C. § 47104(a)(4) – “*providing or intending to provide aeronautical services to the public*” – indicates that Congress had competitive enterprises in mind. Although the second statute, **49 U.S.C. § 40103**, does not **expressly state** that it prohibits anti-competitive or monopolistic behavior, its legislative history **makes** clear that this **was** Congress’ intent.

As the Hearing Officer noted, a **1941** opinion issued by the **U.S.** Attorney General **states** that “the legislative history [regarding a predecessor statute to **49 U.S.C. § 40103**]⁶⁰

⁶⁰ This predecessor statute was Section 303 of the Civil Aeronautics Act of 1938, 52 Stat. 973 (June 23, 1938). Section 303 provided that “there shall be no exclusive right for the use of any

shows that the purpose of the provision is *to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics ...*” 40 U.S. Op. Att’y Gen., at 72, citing 83 Cong. Rec. 6729, 6730 (emphasis added). According to the Hearing Officer, the legislative history referenced by the Attorney General consisted of statements from Senators McCarran and Truman to the effect that they had tried to **write** the law in such a **way** as to prevent monopolies. (ID at 102n.21, citing 83 Cong. Rec. at 6729-30.) The Hearing Officer also noted that the court in *Aircraft Owners and Pilots Ass’n v. Port Auth. of N.Y.*, 305 F. Supp. 93, 105 (E.D.N.Y. 1969), stated **that** “the type of exclusive right ... forbidden **is** one of the sort noxious to the anti-trust laws.” The court **further** stated that the legislative history suggested a narrow interpretation of what is **now** 49 U.S.C. § 40103.⁶¹

Grant Assurance 23 implements these statutes and should be interpreted so as to be consistent with them. The pertinent language of Grant Assurance 23 – “[t]he airport sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public” -- closely tracks the language in 49 U.S.C. § 47107(a)(4). Just **as** with 49 U.S.C. § 47107(a)(4), **such language** in the grant **assurance indicates** that the prohibition on the grant of **an** exclusive right **was a** prohibition on anti-competitive behavior.

The Hearing Officer pointed to two FAA publications **that** supported **his** reading of Grant Assurance 23. First, he cited **FAA Order No. 5190.1A, Exclusive Rights at Airports**, § 11(c) (October 10, 1985), which states that, “It is the intent of the foregoing

landing area or air navigation facility upon which Federal funds have been expended.” Section 303 was followed by Section 308 of the Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 731, whose language **was** identical. These statutes were predecessors to 49 U.S.C. App. § 1349(a) (1982), which in turn was the predecessor to the present statute, 49 U.S.C. § 40103.⁶¹ This statute was then 49 U.S.C. § 1349.

policies to promote fair competition at public-use airports.” Second, he cited Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports*, ¶ 1.2 (January 4, 2007) (emphasis added), which states that, “The purpose of the exclusive rights provision as applied to civil aeronautics is to *prevent monopolies and combinations in restraint of trade and to promote competition* at federally obligated airports.”

In addition to these materials cited by the Hearing Officer, FAA Order No. 5190.6A, *FAA Airport Compliance Requirements*, ¶ 3-8(a) (October 2, 1989) provides that “[t]he FAA has concluded that the existence of [an] exclusive right to conduct any aeronautical activity at **an** airport limits the usefulness of the airport and deprives the using public of the benefits of a competitive *enterprise*.” (Emphasis added.) The same paragraph provides that “the FAA considers it inappropriate to provide Federal funds for improvements to airports where the benefits of such improvements will not be fully realized due to the inherent restrictions of an *exclusive monopoly* on aeronautical activities.” (Id.)

AAS points to an FAA order **and** several advisory circulars that purportedly support its expansive reading of “exclusive right” as a right that applies broadly to use of an airport **and** not just to activities that involve competition. (See, e.g., FAA Order 5190.6A, ¶ 3-1, which states that “this covenant enjoins the airport owner from granting **any** special privilege or monopoly in the use of public use airport facilities.” AAS contends that the term “special privilege” supports its position that “exclusive right” should be read **broadly**.⁶²) These materials, however, must be read consistently with the statutes, legislative history, and other FAA publications.

⁶² See also Advisory Circular 150/5190-6’s statement, in the background section, that: “It is FAA policy that the sponsor of a federally obligated airport will not ...either directly or indirectly,

AAS also points to two Determinations by the Director of AAS that, according to AAS, do not involve a benefit to one commercial operator over another. These Director's Determinations, neither of which was apparently appealed, are *Bombardier*,⁶³ which

grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct *aeronautical activities*." (Emphasis added.) AAS contends that "aeronautical activities are not limited to solely commercial activities" under the following broad definition of "aeronautical activity" in Advisory Circular 150/5 190-6, App. ¶ 1.1(a) (emphasis added):

Any activity that involves, makes possible, or is required for the operation of aircraft or that contributes to or is required for the safety of such operations. Activities within this definition, commonly conducted on airports, include, but are not limited to, the following: general and corporate aviation, air taxi and charter operations, scheduled and nonscheduled air carrier operations, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, aircraft sales and services, aircraft storage, sale of aviation petroleum products, repair and maintenance of aircraft, sale of aircraft parts, parachute or ultralight activities, and *any other activities that, because of their direct relationship to the operation of aircraft, can appropriately be regarded as aeronautical activities*. Activities, such as model aircraft and model rocket operations, are not aeronautical activities.

The listed categories are commercial in nature. The catchall provision beginning "any other activities ..." should be read narrowly to be consistent with the statutes, legislative history, and other FAA publications cited in the text.

The following definition of the term "exclusive right" should also be read narrowly to be consistent with the statute, legislative history, and other FAA publications cited in the text:

A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right.

Advisory Circular 150/5 190-6, Appx. 1, ¶ 1.1f (January 4, 2007).

Further, AAS points out that the same advisory circular, Advisory Circular 150/5 190-6 provides in paragraph 4 as follows: "The exclusive rights prohibition applies to both commercial entities engaging in providing aeronautical services *and individual aeronautical users* of the airport." (Emphasis added.) This statement, however, is immediately followed by the statement that "The intent of the prohibition on exclusive rights is to promote fair competition at federally obligated, public use airports for the benefit of aeronautical users." (Id.)

⁶³ *Bombardier Aerospace Corp. and Dassault Falcon Jet Corp. v. City of Santa Monica, FAA* Docket No. 16-03-11, 2004 WL 3198208 (January 3, 2005).

involved landing fees only for aircraft of more than 10,000 pounds but none for aircraft of 10,000 pounds or lighter, and *Maxim*,”⁶⁴ which involved an airport tenant denied the right to self-fuel although the airport sponsor permitted other similarly situated tenants to self-fuel. In both cases, the Director found that the airport sponsor had granted an exclusive right. AAS contends that these cases show the FAA’s interpretation that exclusive rights exist apart from commercial activity. To the extent that these decisions conflict with the instant decision, they are incorrect.

In summary, the Hearing Officer did not err in finding that Grant Assurance 23’s prohibition on the grant of an exclusive right **was** intended to prohibit “anti-competitive, monopolistic behavior at airports receiving Federal funds.” AAS, therefore, needed to prove that an anti-competitive result would occur if **the** Ordinance were implemented.

2. Lack of Nexus Between the Ordinance and an Anti-Competitive Result

The Hearing Officer found that “a nexus cannot be drawn based on this record between the Ordinance and any actual anti-competitive result.” (ID 106.) He pointed out that in the instant case, no intervener was alleging harm from anti-competitive behavior. Further, the Hearing Officer stated, AAS **had** asserted that “implementing an equipment change will impose a hardship of varying degrees and may **be** an impossibility for **some** if not many.” The Hearing Officer concluded that **this assertion was** speculative (ID at 101, citing AAS Reply Brief at 46), **and held** that the evidence did not **support** the **conclusion** that the Ordinance **granted an** exclusive right in violation of Grant Assurance 23.

On appeal, AAS **takes issue** with the Hearing Officer’s finding that a **nexus** could

⁶⁴ *Maxim United LLC v. Bd. of County Commissioners for Jackson County, Colorado, FAA Docket No. 16-01-10, 2002WL 963590 (July 3, 2001)*.

not be drawn between the Ordinance and **an** anti-competitive result. AAS claims that “it is not uncommon” for persons to operate Category A and B aircraft under 14 C.F.R. Part 135⁶⁵ at the Airport, including charter operators. (Appeal Brief at 11 n.7.) The sole example AAS gives of such an operator is Justice Aviation, although **AAS** does not point to anything in the record to support this example. Further, AAS argues that the City’s Ordinance would put **Part** 135 operators of Category C and D aircraft at a competitive disadvantage because they would have to change aircraft or stop operating at the Airport, while **Part** 135 operators of Category A **and** B aircraft would not be required to change aircraft or stop operating.⁶⁶

AAS’s relies on appeal in large part on comments submitted to AAS in a document dated March 2, 2007, that is entitled, “Compilation of User Comments/Santa Monica’s (SMO) RSA/EMAS Proposal (December 2006 – February 2007).” (DD, Exh. 4, Item 10.) The comments did not involve the Ordinance and were not intended to address the issue of whether the Ordinance would competitively disadvantage commercial operators of Category C and D aircraft vis-a-vis commercial operators of Category A and B aircraft. An example of a comment AAS relies on is the following excerpt from a letter from Supermarine Aviation Contract Services, Inc. to

⁶⁵ Part 135 covers on demand operations like those that occur at SMO. The definition of *on-demand operations* includes operations for compensation or hire that involve certain passenger-carrying operations and certain all-cargo operations. For more detail, see the text of 14 C.F.R. § 119.3.

⁶⁶ **AAS** also contends that there would be an indirect anti-competitive result for **fixed** base operators (FBOs) and for others who perform aircraft fueling, sales, and flight training services. (Appeal Brief at 12-13 n.9.) **AAS** argues that those who service Category C and D aircraft would suffer financially while those servicing only Category **A** and B aircraft would not, although there is nothing in the record to indicate that FBOs and others limit their services to either only Category **A** and B aircraft or only Category C and D aircraft. (Id.) AAS admits that this theory **regarding** FBOs “has not been argued in this case.” (Appeal Brief at 12-13 n.9.)

Robert Trimborn, SMO **Airport** Manager, dated February 13, 2007 (DD, Item **4**, Exhibit 10, at **57**):

We have communicated with approximately 250 of our users In general, **what** we have learned is that almost all of the current users of the larger jet aircraft ... would not use the Airport.

The problem with this and the other comments cited by **AAS** is that they are vague **and** insubstantial and do not **show** a disparate impact on commercial **operators** of Category C and D aircraft. These comments may constitute a **basis** for further study, **but** alone they deserve minimal weight because they are unsubstantiated by other evidence. Moreover, there is no evidence in the record that certificate holders of airplanes in Categories C and D compete in the same market, *i.e.*, for the same potential **passengers** or cargo, with certificate holders operating airplanes in Categories A and B.

Finally, while AAS asserts that there are several operators identified in **the** record **as** doing business at the **Airport** – NetJets, Inc., FlexJets, **and** Flight Options, Inc. – **AAS** failed to submit evidence of how **these** fractional share operators (DD, **Exh.** 1, Item 59) would be at **a** competitive disadvantage vis-a-vis their competitors or how a monopoly would **be** created if the Ordinance were implemented.

For these **reasons**, the record shows that **AAS** has failed to **prove** a nexus between the Ordinance and **an** anti-competitive result. While **AAS**'s claims potentially could relate to anti-competitive issues, **AAS** failed to provide **supporting** evidence during these proceedings.

F. 1984 Settlement Agreement

The Hearing **Officer** held that he had the authority in this proceeding under **14 C.F.R. Part 16** to determine whether the Ordinance violated **the** 1984 Settlement

Agreement. He held further that the preponderance of the evidence supports the conclusion that the Ordinance unreasonably and unjustly discriminates against Categories C and D aircraft, and that if enforced, the City will be acting in a manner contrary to the express terms of the 1984 Settlement Agreement. On appeal, the City argues (1) that the Hearing Officer erred when he decided that he had the authority under 14 C.F.R. § 16.1 to resolve the parties' dispute regarding the 1984 Settlement Agreement and (2) that the Hearing Officer's decision misinterpreted the 1984 Settlement Agreement and was not based upon substantial evidence.

The Hearing Officer held that issues arising under the 1984 Settlement Agreement may be resolved in this proceeding because the 1984 Settlement Agreement ~~was~~ incorporated by reference into two subsequent grant agreements entered into by the City and the FAA in 1985. As a result, he held, "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, n. 25.)

The Hearing Officer's conclusion in this regard is in error. The 1984 Settlement Agreement was incorporated by reference into Part I of the two 1985 grant agreements. The process of incorporation by reference did not convert the 1984 Settlement Agreement obligations into grant assurances, which are set forth specifically in ~~Part~~ V of the grant agreements. Part 16 provides authority to resolve disputes arising specifically under AIP grant assurances. 14 C.F.R. § 16.1(a)(5). Consequently, resolution of issues arising under the 1984 Settlement Agreement is not properly addressed in this proceeding under Part 16.

G. Surplus Property Act

In 1941, the City leased much of the Airport to the **U.S.** Government, which used the Airport for World War II military purposes, (DD, Exh. 1, Item **4**, Exhs. 25-29.) The Government improved the Airport significantly as part of the war effort, spending \$1.12 million on it before 1947. (DD at 18; DD Exh. 1, Item 80(A-M).)

After the war, in 1948, the Government conveyed the Airport and the improvements to the City under the Surplus Property Act of 1944⁶⁷ (“SPA”) by a document entitled “Instrument of Transfer.” (DD, Exh. 1, Item **15A.**) The Instrument of Transfer included covenants that required the City to make the Airport available “on reasonable terms **and** without unjust discrimination and without grant or exercise of any exclusive right for use of the airport.” (Id.)

The Hearing Officer agreed with AAS that the City’s Ordinance is inconsistent with its obligations under the SPA **and** the Instrument of Transfer. (ID at 4.) The City, however, argues on appeal that the Government only leased the Airport from the City, and as a mere tenant, the government could not impose restrictions on the City in connection with the termination of a tenancy.

As a remedy for default – that is, the failure to meet all relevant obligations – the SPA **and** the Instrument of Transfer both provide for reversion of the property to the Government after a certain amount of time, at the Government’s option. AAS has not sought the remedy of reversion under the SPA and the Instrument of Transfer. Instead, AAS is pursuing other remedies – specifically, a final cease **and** desist order to keep the

⁶⁷ **58 Stat. 765.**

Ordinance from going into effect, and ineligibility on the part of **the City** to apply for new FAA grants. Because AAS is pursuing remedies outside of the SPA and Instrument of Transfer, it is unnecessary to decide any issues concerning either the SPA or the Instrument of Transfer.⁶⁸

VII. CONCLUSION

This final decision concludes as follows:

1. Federal law preempts the City's Ordinance.
2. The Ordinance violates Grant Assurance 22.
3. AAS has not shown that the Ordinance would violate Grant Assurance 23.
4. It is inappropriate to resolve disputes arising under the 1984 Settlement Agreement in **this** Part 16 proceeding.
5. There is no need to **decide** whether the Ordinance violates the Surplus Property Act of 1944.

Accordingly, the FAA hereby orders and incorporates by reference the corrective action set forth on page 67 of the Director's Determination.⁶⁹



NANCY D. LOBUE

Acting Assistant Administrator for Aviation Policy,
Planning, and the Environment

⁶⁸ In *City of Pompano Beach v. FAA*, 774 F.2d 1529, 1532 n3 (11th Cir. 1985), the court analyzed the case under the Federal Aviation Act of 1958, later codified at 49 U.S.C. App. § 1349(a) (1982), instead of the SPA, 50 U.S.C. App. § 1622b (West Supp. 1985). The court did so because the FAA was seeking a cease and desist order under the Federal Aviation Act rather than the reversion remedy contained in the instrument of conveyance. (*Id.*)

⁶⁹ A person may seek judicial review in a United States Court of Appeals from a final agency decision and order of the Associate Administrator (or, as in the instant case, the Associate Administrator's delegate). See 14 C.F.R. § 16.247 for information regarding appeal rights,

APPENDIX A**ACRONYMS**

Administrative Procedure Act	APA
Advisory Circular	AC
Aircraft Conformance Program	ACP
Airplane Flight Manual	AFM
Airport and Airway Improvement Act	AAIA
Airport Improvement Program	AIP
Airport Layout Plan	ALP
Airport Reference Code	ARC
Aviation Safety Reporting System	ASRS
Engineered Materials Arresting Systems	EMAS
Federal Aviation Administration	FAA
Federal Aviation Regulations	FAR
National Airspace System	NAS
National Transportation Safety Board	NTSB
Notice of Investigation	NOI
Office of Airport Safety and Standards	AAS
Pilot in Command	PIC
Runway Protection Zone	RPZ
Runway Safety Area	RSA
Santa Monica Municipal Airport	SMO or Airport
Surplus Property Act	SPA
Transport Category Airplanes	TCA