November 30, 2018

By FedEx and Electronic Mail

Ms. Winsome A. Lenfert
Acting Associate Administrator for Airports
Federal Aviation Administration
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RE: Santa Monica Municipal Airport (SMO) Modifications, Pavement Removal and Revenue Diversion

Dear Ms. Lenfert:

The National Business Aviation Association ("NBAA"), the Aircraft Owners and Pilots Association ("AOPA"), and the General Aviation Manufacturers Association ("GAMA") are writing to request that FAA address significant concerns regarding the use of airport revenue to fund the shortening of the runway and the destruction of associated pavement at Santa Monica Municipal Airport ("SMO" or "Airport").

FAA guidance is clear and specific – airport revenue can only be used for legitimate capital or operating costs of an airport. The work already undertaken at SMO to shorten the runway, and the proposed removal of pavement, comprise neither; it is incontestable that the only reason for these projects is the City's desire to reduce aircraft operations and access, primarily by larger jets – not to benefit aviation or SMO.

The specifics of the situation, and the applicable standards, are set forth below, and we hope will be sufficient to resolve our concerns without recourse to more formal proceedings.

The Agreement

In January 2017, FAA entered into a settlement agreement ("Agreement") with the City of Santa Monica ("City"), which resulted in the dismissal of two federal lawsuits brought by the City to challenge the validity and extent of its federal obligations. Neither lawsuit implicated the length of the Airport's runway, nor was that the subject of any City

request for relief. Nevertheless, as a condition for settlement, the City insisted on the right to reduce the length of the SMO runway to 3,500 feet, to which the FAA ultimately agreed. The City repeatedly has acknowledged that the purpose of this provision is to "significantly reduce jet traffic … and stop[] commercial charters." No other rationale has been provided by the City or the FAA, and there is none.

The Agreement required that "[t]he costs to shorten the runway … shall be borne by the City." It properly made no provision for the transfer or allocation of those costs to the Airport. However, in a letter dated February 3, 2017, responding to a request from Acting City Attorney Joseph Lawrence, the then-Chief Counsel of the FAA, Reginald C. Govan, advised:

> Section II(A) of the Settlement Agreement provides that the City shall operate the airport until December 31, 2028 with a 3,500' runway. Under these circumstances, the City may use revenue derived from airport operations to cover the costs of shortening the runway.

The Govan letter provided no analysis of or justification for this opinion, which is inconsistent with long-established FAA policy, as discussed hereafter. It is also inconsistent with the terms of the Agreement itself; indeed, there is simply no logical connection between the Agreement's authorization of runway truncation at the behest of the City and whether expenditures to that end constitute an eligible use of airport funds.

Truncation of the runway was undertaken by the City in late 2017, primarily through lighting and marking changes, at a cost of approximately $3.5 million. Those costs were entirely allocated to the Airport, solely on the basis of the Govan letter.

Pavement Removal

In September 2017, the City Council directed City staff to study options for the removal of "excess" pavement resulting from the shortening of the runway. In September 2018 the City made public its intended plan, based on a consultant report – specifically, full removal of pavement apart from that within the runway safety areas ("RSAs") required for the 3,500' runway and the pulverization and stabilization of the pavement within those RSAs. None of the City or consultant reports proffered a justification for why pavement should be removed or modified; they were solely concerned with how the project might be accomplished.

In October 2018, the City rejected the two bids that had been submitted for the project based on cost grounds, but made clear that the City intended to proceed. As explained at that time by City Councilman and former Mayor Kevin McKeown:

> Hope springs eternal in the aviation press that they're going to get that airport back, and that's not what's going to happen, and so I totally support

> our going back out to a bid … that would be the one that pulverizes everything including the RSAs.

Following its earlier request regarding the costs of runway shortening, on July 9, 2018 the City sought further FAA approval to assess the prospective costs of the pavement removal project to the Airport. In a letter dated August 31, 2018, the Manager of the Los Angeles Airports District Office responded that:

- Pulverizing and stabilizing pavement within the RSAs was unnecessary, as it "does not appear to advance the interests of aviation safety or airport operations" and accordingly "is objectionable";
- With respect to removal of pavement from the former runway beyond the RSAs, "[w]e recommend that the City refrain from assessing the costs of this project upon aeronautical rates or rents"; and
- With respect to removal of pavement from taxiways that no longer were connected to the truncated runway, "[w]e recommend the City refrain from rate basing these costs into aeronautical rates."

The ADO Manager stressed that his "suggestions" applied only to the proposed pavement removal project, which he distinguished from "customary pavement maintenance, marking or signing or geometric improvements toward safety at SMO," thus re-emphasizing that the project involved none of these elements.

On October 1, 2018, the SMO Airport Director responded, agreeing that for runway and taxiway pavement removal, the City would "refrain from rate basing the costs incurred into aeronautical rates," but requesting that FAA revisit its guidance for the RSAs.

On October 15, 2018, the Manager of Airport Safety and Standards for the Western-Pacific Region reaffirmed the conclusions of the August 31, 2018 letter and in addition reiterated that to the extent the FAA did not object to the use of Airport funds for certain aspects of the pavement removal project (apart from the RSAs), it did so solely because of the language of the Agreement.

To summarize, FAA's position regarding the use of SMO funds for runway restructuring has been premised on treating the Agreement as if it <u>required</u> the City to shorten the SMO runway, a requirement never imposed (and long opposed) by FAA. Moreover, while both of the FAA's recent letters suggested (and the City readily agreed) that the City could not rate-base any of the costs of the proposed pavement removal project, this is a convenient fiction. All of those costs have been and will be borne by the existing surplus in the Airport fund, which derives in part from existing landing fees and other charges to aeronautical tenants and users. The costs of pavement removal, in short, are already in the rate base.

Federal Compliance

NBAA and AOPA respectfully submit that: (1) the prior lighting and marking changes implemented to truncate the SMO runway, and (2) the removal of the former runway and taxiway areas beyond the current RSAs, both comprise ineligible uses of airport revenue. These projects did not and would not amount to capital and operating expenses of the Airport, for the same reasons that the project to pulverize and stabilize the RSAs is ineligible: these projects were not required by FAA, nor is there any independent justification for them – they do not improve safety or otherwise benefit SMO.

The City's letters to the FAA set forth no safety need for the pavement removal project, and the City repeatedly has emphasized that its only purpose is to reduce and discourage operations at SMO. To the extent the pavement removal project may be intended to facilitate the subsequent conversion of SMO to non-aeronautical uses, given the City's stated position that it will close the Airport at the end of 2028, it also is an improper premise for the expenditure of airport revenue.

Nor is there any record before the FAA of safety or any other issues that would justify the pavement removal project, much less any analysis of such issues. The FAA's position that certain project costs are not properly included in the Airport rate base but are otherwise chargeable to the Airport is an acknowledgment that such charges have no aeronautical purpose. Allowing them would be a departure from FAA's long-established limitations on the use of Airport revenues, however derived.

As a matter of first principle, the prohibition on revenue diversion is intended to ensure that airport tenants and users finance only expenditures that benefit an airport, and certainly not expenditures intended to limit their access and use or to repurpose aeronautical assets for other ends. FAA was unequivocal that a project virtually identical to that now at issue constituted an ineligible use of airport revenue. In 2003, after the closure of Meigs Field in Chicago, FAA "became concerned that the City had used or planned to use Chicago airport funds for the costs of removing pavement and other abandoned facilities from Meigs and remediating the site so that it could be converted from a public airport benefiting aviation users into a local park." In its Notice of Investigation in In the Matter of Compliance with Federal Obligations by the City of Chicago, FAA docket no. 16-04-09 (October 1, 2004), FAA was emphatic that "costs related to the deactivation of Meigs as an airport … were not incurred for airport purposes and are not capital or operating costs of an airport." Id., at 2. Although the proceeding was closed without a decision, Chicago was required to reimburse $1 million from its general funds to its airport funds. See also DOT Inspector General, Report on Audit of Use of Airport Revenue, Denver International Airport, report no. AV-1999-052, at 11 (January 27, 1999) ("costs to help the sponsor realize its goal of urban renewal and redevelop the property … should be borne by the sponsor").

Nor is there any authority for the FAA's position that the pavement removal project at SMO can be funded with airport revenue so long as those funds are not derived from aeronautical rates or rents. Previously, FAA has advised that *aeronautical* projects with limited benefits – such as an exclusive-use ramp – can be funded with airport revenue derived from non-aeronautical sources but not via the rates and rents paid by other aeronautical users. But FAA has never suggested that a project with no aeronautical benefits of any kind can be funded from any pot of airport revenue.

Even if that were not the case, it is not clear how SMO could utilize previously-collected revenue for pavement removal, given that those funds include existing landing fees and other charges to aeronautical tenants and users.

* * * *

FAA's guidance to the City is thus at odds with long-standing and widely-applicable requirements, with implications not limited to SMO but also for the FAA's oversight of revenue diversion issues nationwide. As you are aware, the diversion of airport revenue by Santa Monica is prohibited by both the Agreement and the continuing statutory obligations of 49 U.S.C. § 47133, subject to enforcement measures including a civil penalty amounting to 300% of the misused funds and the suspension of all DOT-administered grant programs to the City, as well as a complaint by affected parties pursuant to Part 16 of FAA's regulations.

In sum, NBAA, AOPA and GAMA believe that the existing and proposed use of airport funds by the City so clearly conflicts with the standards established for the use of such funds that the advice provided by FAA to date is erroneous and must be reevaluated. Absent a legitimate aeronautical purpose, beneficial to the tenants and users of SMO, the FAA should have concluded, and should now confirm, that costs of runway restructuring are entirely ineligible for funding with Airport revenue. If the City is to proceed with this project, it must do so in sole reliance on taxpayer funds.

Sincerely,

Steven J. Brown
Chief Operating Officer
National Business
Aviation Association

Jim Coon
Senior Vice President
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CC:

- Mr. Kevin Willis, Director, Office of Airport Compliance and Management Analysis, Federal Aviation Administration – kevin.willis@faa.gov
- Mr. David Cushing, Manager, Manager, LAX Airport District Office, Federal Aviation Administration – dave.cushing@faa.gov

ATTACHMENTS:

- **Attachment A** – Feb. 3, 2017 Govan Letter
- **Attachment B** – Aug. 31, 2018 Cushing Letter
- **Attachment C** – Oct. 1, 2018 Makrides Letter
- **Attachment D** – Oct. 15, 2018 Armstrong Letter