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CITY OF SANTA MONICA

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

IN THE MATTER OF COMPLIANCE
WITH FEDERAL OBLIGATIONS BY
THE CITY OF SANTA MONICA,
CALIFORNIA

FAA DOCKET NO. 16-02-08

**CITY OF SANTA MONICA'S
REPLY TO AAS'S POST-
HEARING BRIEF**

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I. INTRODUCTION

There remains a fundamental difference in how the City of Santa Monica (“City”) and the Office of Airport Safety and Standards (“AAS”) view their roles and responsibilities for the Santa Monica Municipal Airport (“SMO” or “Airport”). As the owner and proprietor of SMO, the City must protect the lives and property of those using, visiting and working at the Airport, and of those living and commuting on a daily basis in the homes and streets immediately adjacent to it, and in so doing limit the City’s potential legal liability and damages exposure. To the City, one catastrophic overrun accident would be one too many, especially if it is preventable. It is the foreseeable consequences of the first occurrence that has caused the City to act. To address this very real safety risk, the City enacted the Ordinance banning Category C&D aircraft because they pose the greatest risk of catastrophic consequences due to their greater likelihood of bursting through the airport boundary in the event of a runway overrun and the lack of any runway safety areas off the ends of the runway.

On the other hand, AAS has repeatedly shown that its main concern with the Ordinance is its restriction on access, as was demonstrated at the hearing by Mr. Bennett when he testified that any limit on access is on its face discriminatory and basically presumed invalid. AAS believes that the limit on access outweighs any concerns that the City has about the possibility of the occurrence of a catastrophic accident involving a Category C or D aircraft. It argues that because there are numerous safety standards for aircraft certification, flight operations, and pilots in place, the likelihood of an overrun accident occurring is very small. However, AAS witnesses acknowledged that these

AAS-cited measures do not address pilot error, the primary cause of overrun accidents, and AAS witnesses can, thus, imagine such an accident occurring at SMO. Whether its focus would be different if it were not insulated from liability for such an accident is not known.

In its Post Hearing Brief (“PHB” or “Brief”), AAS demonstrates once again that it simply does not understand its obligations when challenging a duly enacted Ordinance of an airport proprietor. It is AAS’s burden to prove that the Ordinance violates each of the federal obligations; it is not the City’s burden to prove that it does not violate those obligations. It is AAS’s burden to prove that the Ordinance is unjustly discriminatory. It is AAS’s burden to prove that the Ordinance is unreasonable. It is AAS’s burden to prove that the City does not have legitimate safety concerns for those using and surrounding SMO. It is AAS’s burden to prove that the Ordinance will cause a disruption of operations in the national or regional airspace or at a particular airport. These are not affirmative defenses that the City must prove. The City’s efforts have been to show that AAS has not and cannot meet its burdens. Demonstrating this does not create an “affirmative defense”, but simply a defense to improper agency action. Consequently, AAS has wrongly mischaracterized the City’s evidence as being submitted to support one or more affirmative defenses, when, as explained below, the City has not raised any affirmative defenses.

Moreover, AAS also misinterprets and in some instances misstates facts presented by witnesses for both parties and the law applicable to this proceeding. Although not

highlighting them all, this Reply Brief will focus on the most prevalent and egregious of the errors in the facts and conclusions presented by AAS in its Brief.

II. CITY'S RESPONSES TO AAS'S PROPOSED FACTS

“Physical Environment, History, and Related Materials”

(AAS PHB, pgs. 4-7)

1. **AAS Fact A-10:** “Section 8 of the 1984 Agreement also provides that SMO “be capable of accommodating most kinds of general aviation aircraft, generally consistent with Group II Design Standards.”

City's Response: This is an incomplete quote that provides a misleading understanding of the 1984 Agreement. The complete and accurate quote is: “The Airport will be capable of accommodating general aviation aircraft generally consistent with Group II Design Standards set forth in FAA Advisory Circular 150/5300.4B, dated February 14, 1983.” (DD. Item 3, Ex. 3 at p. 9)

2. **AAS Fact A-11:** “The parties also expressed concern in section 12 of the 1984 Agreement about the effect that displacing the threshold by 500 feet would have on “air safety and the ability of the Airport to provide the level and type of service described in Section 2(b)(i) and 8.”

City's Response: Section 12 of the Agreement sets out a process for resolving noise and other concerns about the displaced thresholds. Nothing in the record indicates how that issue was resolved. That section in no way precludes future

efforts to adopt displaced thresholds or restrict operations to address safety risks posed by overruns in the absence of RSAs. (*Id* at pgs. 11-12)

3. **AAS Fact A-12:** “Section 13 of the 1984 Agreement provides, “The Mix of aircraft to be accommodated at the Airport shall be consistent with the present mix of aircraft now based at the Airport and the mix forecast for the future as shown in Chapter III of the Airport Master Plan Study dated October 1983.”

City’s Response: Section 13 of Agreement. Section 13 of the Agreement relates to “Aircraft Parking Space and Fuel Service.” It is silent with respect to approach speed. It addresses only the requirements for aircraft parking spaces based on the numbers and size of aircraft. Moreover, there is nothing in the record to indicate that 1983 Master Plan included category C&D operations. (*Id* at pgs. 12-13)

4. **AAS Fact A-18:** “The ARC is not intended to be used to decide which airplanes may operate safely at an airport. Marinelli, Tr. 261:12-262:23; *see also* 266:22-267:5.”

City’s Response: It is reasonable to use ARC factors as the basis of an access restriction. *See* Hearing Transcript (“HT”), Vol. 2, 268:10-14 (Marinelli) and DD at 3 (discussing restriction at SMO on Group III aircraft due to inadequate separation between runway and taxiway). *See also Millard Refrigerated Services Inc. v. Omaha Airport Authority*, FAA Docket No. 13-93-19 (8/4/95) remanded on

other grounds in *Millard Refrigerated Services In. v. FAA*, 98 F.3d 1361 (D.C. Cir. 1996).

5. **AAS Fact A-23:** “Category C and D aircraft were operating at SMO since at least the 1980s. Trimborn, Tr. 368:13-20.”

City’s Response: The testimony cited by AAS does not support this proposed finding of fact. Mr. Trimborn did not work at SMO until 1996 and does not know when category C&D aircraft first began operations at SMO. It is pure speculation that the parties to the 1984 Agreement contemplated any operations by category C&D aircraft. Mr. Trimborn testified that “I don’t know the exact dates when they [category C&D aircraft] showed up. I assume it’s probably back in the ‘80’s when the C and D aircraft started coming on the scene.” This does not support AAS’s “factual” assertion that “Category C and D aircraft were operating at SMO since at least the 1980s.” AAS has provided no other evidence on this issue.

6. **AAS Fact A-30:** “The closest residential buildings to the northeast and southwest of the airport property are approximately 300 to 500 feet from the end of the runway. *See id.*”

City’s Response: The closest residential buildings are approximately 300 ft. from the runway ends at SMO. (Direct Testimony of Robert Trimborn at ¶ 6; City Exs. 10-13)

7. **AAS Fact A-31:** “The congestion and proximity of residential buildings to the runway at SMO are not unusual as compared to a number of other airports. *See* Testimony of Patrick Carey, Tr. at 618:2-10; Pratte, Tr. 182:1-14.”

City’s Response: Mr. Pratte testified that he did not know how close the homes were to the ends of the runway at SMO. (HT, Vol. 1, 181:11-18) Mr. Carey’s testimony made it clear that he did not know how close the homes were to the ends of the runways at SMO. (HT, Vol. 3, 615:15—616:17) Neither witness addressed the “congestion” of residential buildings at other airports. Accordingly, the testimony does not support the broad statement asserted by AAS.

8. **AAS Fact A-37:** “The 1,000 foot standard RSA for C&D category airplanes set forth in AC 150/5300-13 represents the distance that would statistically encompass 90% of the overrun accidents in the United States by all civil aircraft. *See* Trimborn, Tr.”

City’s Response: 1,000 ft. standard RSA for Category C&D airplanes represents the distance that would encompass 90% of overrun accidents in U.S. by C/D aircraft, and the 300 ft. RSA standard RSA for Category A&B airplanes represents the distance that would statistically encompass 90% of the overrun accidents in the United States by Category A&B aircraft. (AAS Ex. 2 at 1)

“Purposes of the Ordinance”

(AAS PHB, pgs. 7-8)

9. **AAS Fact B-3:** “The design purpose of an RSA is to minimize damage to the aircraft in the event of an overrun and protect the aircraft’s occupants. See AC 150/5300-13, AAS Exh. 3.”

City’s Response: “FAA believes that the proposed Runway Safety Area will benefit not only aviators but also people and property on the ground. This is part of the rationale for constructing standard runway safety areas.” (City Ex. 32 at 10)

10. **AAS Fact B-4:** “The design purpose of an RPZ is to protect persons and property adjacent to the airport in the event of an aircraft accident. *Id.*”

City’s Response: The purpose of RPZ is not to protect people and buildings near the runway – it is to remove those people from the areas so they are no longer adjacent to the airport.

11. **AAS Fact B-5:** “An overrun is an accident during the takeoff or landing phase of an aircraft operation in which the aircraft, while in contact with the surface, rolls beyond the end of the pavement designated for the runway.”

12. **AAS Fact B-6:** “RSAs are not designed to provide protection in the event an aircraft has sufficient lift to become airborne, which event involves a “crash” rather than an overrun. See Testimony of Rick Marinelli.”

City’s Response to B-5 and B-6: These “facts” do not account for the topography of SMO, in which the runway is on a plateau 30-60 feet above the surrounding area. While an overrun occurs when the aircraft remains in contact with the ground surface as it exits the runway, there is no evidence in this record that such an aircraft would remain in contact with the ground when it drops away at the edge of the plateau given the possibly high speed of the aircraft at that time. (HT, Vol. 1, 28:19—29:25 (Bennett); HT Vol. 2, 298:1—299:10 (Marinelli); *Id.* at 405:21—407:5 (Trimborn)).

13. **AAS Fact B-10:** “The NTSB has at no time recommended to the FAA, as a result of investigating an overrun accident, that any category of aircraft be restricted from operating at an airport due to non-standard or the lack of RSAs. *See* City’s Exhibits 4-8, 18-20; Hall, Tr. 139:3-7, 140:12-17.”

City’s Response: This is too broad to be verifiable. Based on the AAS cites, at most, the recommendation was not contained in those specific accident investigations and the witness could only have stated that he did not recall any such recommendation in “reports that you’ve looked at involving actual overruns.” For example, Mr. Hall testified that he was aware of no such recommendations. (HT, Vol. 1, 139:7; 140:12-17)

“Effectiveness of Ordinance in Achieving Purposes; Alternative Proposals”

(AAS PHB, pgs. 8-11)

14. **AAS Fact C-6:** “Many of the C&D category operations at SMO are conducted pursuant to Part 135 of the FARs. Trimborn, Tr. 371:6-8.”

City’s Response: The cited transcript passage consists entirely of an unrelated question asked by AAS Counsel: “And paragraph 3 of your direct testimony, you say you participate in several national and regional aviation organizations.”

15. **AAS Fact C-8:** “Operators conducting flights under Part 135, Part 121, or Part 91, Subpart K for fractional ownership programs, must ensure that the airplane can land, as per the Airplane Flight Manual limitations, within 60% of the usable runway, or 80% for eligible on-demand operations that meet certain higher standards. *See Pratte*, pp. 8-9; 14 CFR § 135.385(b), (f); 14 CFR § 91.1037(b), (c).¹”

City’s Response: The assertion that operators conducting flights under Part 135, Part 121, or Part 91, Subpart K for fractional ownership programs *must ensure that the airplane can land within 60% or 80% of the usable runway* is belied by the fact that operations by such operators have resulted in runway overruns, that is, the operator did not ensure that they landed within 100% of the usable runway. AAS

¹ *Large aircraft* is defined as an aircraft of more than 12,500 pounds, maximum certificated take-off weight. 14 CFR § 1.1. The aircraft identified in AAS Exhs. 31-52, which are representative of those operating at SMO, are large transport category aircraft.

has acknowledged, for instance, that there have been runway overruns involving air carrier (Part 121) operations. (See AAS PHB, pgs. 44-50; City Exs. 4, 6 & 19; HT, Vol. 3, 649:4—650:4).

16. **AAS Fact C-12:** “The City’s Ordinance would force C and D to operate at other airports.”

City’s Response: The Ordinance would not force any user to use any other airport. Any user could use SMO on a compliant (category A or B) aircraft. Users who chose to use a category C or D aircraft could not use SMO in that aircraft.

17. **AAS Fact C-13:** “The City strongly suggests Hawthorne as a viable alternative. See Direct Testimony of Robert Trimborn, p.22, para. 42.”

City’s Response: Neither the City or nor Mr. Trimborn “strongly” suggest Hawthorne as an alternative airport. (See Trimborn Direct, at ¶ 42) Hawthorne is identified as one of several options for Category C&D aircraft to use instead of SMO. The City provides facts to show that Hawthorne is a viable alternative because AAS argues that Hawthorne is not capable of accepting any category C&D aircraft displaced from SMO.

18. **AAS Fact C-15:** “The same environment exists at Hawthorne – buildings across from runway ends as at SMO. See Testimony of Patrick Carey, Tr. 616:18-24.”

City’s Response: Mr. Carey only testified that he believed there were homes as close to the end of the runway at Hawthorne as at SMO, although it was clear that he did not know how close the homes were to the ends of the runways at SMO. (HT, Vol. 3, 615:15—616:17) He did not testify as to other aspects of the two airports that would establish the “same environment.” Specifically, he did not testify about the topography, the density of residential development, the specific nature of the “buildings,” or any of the particular risk factors at SMO that Mr. Trimborn described.

19. **AAS Fact C-24:** “Over the years, FAA has promulgated and amended rules approving instrument procedures operations at SMO under Part 97 of the Federal Aviation Regulations. Direct Testimony of Harry Hodges, p. 7.”

City’s Response: “Over the years” is vague and potentially misleading. The last changes to instrument approach procedures for SMO for category C&D aircraft were made prior to 2001, when the ACP was developed and the overrun issue was brought to the City’s attention. Moreover, the lack of approach procedures only addresses IFR landings, not VFR landings or any departure. (Direct Testimony of Harry Hodges, pg. 7)

20. **AAS Fact C-30:** “In 2001, the City submitted comments concerning the establishment of regulatory safety standards governing the operation of fractional ownership program airplanes, but submitted no comments relating to their

operation at airports with non-standard or no RSAs. See Trimborn, Tr. 375:25-377:12.”

City’s Response: Mr. Trimborn testified that the City’s comments on the referenced Notice of Proposed Rule Making were limited to the subject of the rulemaking – “operations of Part 135 versus fractional ownership aircraft” – which did not relate to RSAs. (HT, Vol. 2, 376:22-24)

21. **AAS Fact C-28:** “The City has had the opportunity to make its views known with respect to the FAA’s determinations that C&D category aircraft may use the instrument procedures safely. *See* Hodges, Tr. 235:12-236:12, 239:20-240:1, 240:23-241:7, 241:13-242:22, AAS Exhs. 23-26, 28-30.”

City’s Response: The referenced determinations concerning the approach plates for SMO for Category C&D aircraft were made prior to 2001, before the ACP was developed and the overrun issue was brought to the City’s attention. An AAS witness acknowledged that AAS will act regardless of the views expressed by the airport proprietor or its staff. (HT, Vol. 2, 233:3—234:2) Moreover, the instrument procedure amendment process only addresses IFR operations and not VFR operations, which constitute the majority of operations at SMO. (*Id* at 247:11—248:7)

“Capacity”

(AAS PHB, pg. 11)

22. **AAS Fact D-1:** “An airport sponsor is expected to conduct a detailed analysis of an airport, or system of airports, to accommodate the current and forecast demand and present its findings to the FAA. David Fish Rebuttal Testimony, p. 1.”

City’s Response: The expectation of a detailed analysis being referred to relates to a proposal for a specific improvement or planning project, and not for a proposed access restriction. Such analysis would serve only as guidance for the project for which it was developed. (Barry Yurtis Direct Testimony, ¶26) This fact is therefore irrelevant to these proceedings.

23. **AAS Fact D-3:** “The Director relied on expertise and local knowledge used to prepared [sic] the LAX Master Plan/EIS, the SCAG studies, and other material.

David Fish Rebuttal Testimony, p. 2.”

City’s Response: This statement by Mr. Fish is clearly inconsistent with the testimony of the Acting Director himself. Byron Huffman, who issued the Director’s Determination in his capacity as Acting Director, testified that he specifically did not rely on any documents or any material in reaching the conclusions that he sets forth in the Director’s Determination. (Deposition of Byron Huffman, 15:5—20:4) Because the proposed fact is inconsistent with the testimony of AAS’s own witness, it should be disregarded by the Hearing Officer.

III. ULTIMATELY, AAS MUST SATISFY ITS BURDEN OF PROVING THAT THE CITY'S ORDINANCE UNJUSTLY DISCRIMINATES AND IS NOT REASONABLE

A. AAS Has The Burden Of Proving That The City's Ordinance Violates Its Federal Obligations, And It Cannot Shift That Burden To The City To Prove That It Does Not

In its Post Hearing Brief, AAS fails once again to grasp a very basic concept of law, which applies with full authority in this proceeding. On page 41, AAS boldly contends that "The City has asserted the affirmative defense that its action to ban C and D category airplanes is reasonable and within its proprietary powers." City cannot understand why AAS persists in this erroneous assumption that the City has asserted affirmative defenses, having already alerted AAS of its mistake now on several occasions, and in light of the record in this matter and the legal meaning of the term "affirmative defense."

First, the City's Memorandum in Reply to the Notice of Investigation and Supporting Declaration and Exhibits (DD, Item 2), which was the City's formal response to the Notice of Investigation, does not list or otherwise identify any affirmative defenses; it merely provides responses to the specific issues raised in the Notice of Investigation. Similarly, the City did not include any affirmative defenses in its Response to the Order to Show Cause (DD, Item 4), but simply provided responses to the specific issues raised in the Order to Show Cause. As a matter of basic pleading, therefore, AAS is incorrect in

asserting that the City's arguments in opposition to the NOI and the OSC are "affirmative defenses."

Second, an affirmative defense is, in essence, a defense that either (1) admits the allegations of the complaint but provides some other reason why there is no right of recovery (*e.g.*, statute of limitations), or (2) raises matters beyond those raised by the complaint. *See* 5 C. Wright & A. Miller, *Fed. Prac .and Proc.* § 1271 at 585 (2004). It is clear, both from the face of the City's Replies to the NOI and OSC and from the substance of its denials that it has provided evidence to rebut directly AAS's allegations by demonstrating that the Ordinance does not violate any of the federal obligations AAS claims the City violated. Such denials and supporting evidence are not affirmative defenses. Rather, they are defenses showing that AAS has not met its required burden. Indeed, if AAS's understanding of an affirmative defense were the law, almost any matter raised in opposition to a claim in a NOI or OSC would be considered an affirmative defense.

Once again, it is the AAS's burden to prove that the City Ordinance violates, for example, Grant Assurance 22. As result, AAS must prove that the City, by passing the Ordinance, IS NOT operating SMO on reasonable terms. In this proceeding, the City has not asserted as an affirmative defense that its Ordinance is reasonable, and thus it does not have the burden to prove that its Ordinance is reasonable. Of course, City certainly does believe that its Ordinance is reasonable, and it contends that the evidence presented in this case overwhelmingly supports that contention. However, the legal requirement is

that AAS proves that the Ordinance is unreasonable, not the other way around. Similarly, AAS must prove not only that the Ordinance discriminates, but that it does so unjustly.

The same concept applies to all five of the issues to be determined in this proceeding. As such, AAS must prove that the Ordinance is preempted by Federal law, rather than the City having to prove that the Ordinance is not preempted. Likewise, AAS must prove that the Ordinance violates the 1984 Agreement; City does not have to prove that its Ordinance does not violate the 1984 Agreement.

Perhaps AAS is confused by City's strong and well supported refutations of AAS's arguments against the Ordinance. But simply taking a position counter to that of AAS does not create an affirmative defense. City would agree that if it was arguing that a statute of limitations or a waiver barred this proceeding, these would be affirmative defenses that the City would have the burden to establish. However, as to the contention by AAS that the Ordinance is barred under five different legal theories, the burden to prove each one falls squarely on AAS's shoulders.

B. AAS Conflates “Discrimination” with “Unjust Discrimination”

AAS asserts that the Ordinance is “unjustly discriminatory on its face.” (AAS PHB, pg. 13) This is untrue. The ordinance *discriminates* on its face, but does not do so *unjustly*, and an investigation must be undertaken to determine if the discrimination is *unjust*.² This is more than just a linguistic game. AAS says “Once the City has been

² AAS's footnote 8, which sets forth the “classes” of aircraft, demonstrates that the City has not even discriminated among such classes. “Airplane” is one class, and airplanes are still allowed at SMO. Similarly, single engine vs. multi-engine – some single and multi-engine aircraft are allowed, and some prohibited.

found to have engaged in conduct that unjustly discriminates, it can only be justified if the action is reasonable.” (*Id.*) AAS then goes on to consider whether the Ordinance is reasonable. But AAS fails to prove the threshold requirement that the A&B vs. C&D distinction is “*unjustly* discriminatory.”

As noted above, the distinction between Category A&B aircraft versus C&D aircraft is not unjust because it is the same distinction FAA uses to determine RSA size – and thus reflects the far greater likelihood that a C or D overrun will blow past the airport boundary into the street or a nearby neighborhood; there is ample evidence in the record to support the City’s concerns that the consequences of an overrun involving a Category C or D aircraft would be worse than an overrun involving a Category A or B aircraft.³ AAS does not even attempt to explain why the A&B vs. C&D distinction is unjust.

IV. AAS HAS FAILED TO MEET ITS BURDEN OF PROVING THAT THE ORDINANCE IS AN UNREASONABLE OR UNJUSTLY DISCRIMINATORY RESPONSE TO THE VERY REAL POTENTIAL FOR A CATASTROPHIC OVERRUN AT SMO

AAS rests its challenge to the Ordinance on the startling proposition that, notwithstanding the total absence of runway safety areas (“RSAs”) beyond SMO’s

³ It is the more devastating consequences of a C or D overrun that concerns the City, rather than simply the relative likelihood of an overrun. However, the AAS citation at pg. 25 that “Statistics indicate that C or D category jets have a lower overrun rate than B category aircraft. (DD, Item 86) is misleading. Item 86 does not refer to overruns at all. It refers to take-off and landing operations. In fact, there is *no* documentary evidence in the record that C&D aircraft have lower overrun rates than A&B aircraft.

runway ends, there is no safety risk posed by Category C&D aircraft operating at SMO. (AAS PHB, pg. 13) This position is remarkable because it ignores the evidence introduced in this matter, including the testimony of AAS's own witnesses, and amounts to a repudiation of the FAA's *multi-billion dollar* effort to address the serious safety issues created by inadequate RSAs at airports throughout the United States.⁴

AAS argues that Category C&D aircraft pose no safety risk at SMO, citing only selective items of evidence. (AAS PHB, pgs. 13-14) Yet AAS ignores the fact that (1) the safety measures upon which it relies – FAA-approved flight manuals, aircraft certification, and Terminal Instrument Procedures (TERPS) – do not address pilot error, the leading cause of overruns (City Ex 24 at p. 16), and thus, do not prevent overruns (City's PHB, pgs. 11-12, Facts I.55-58); (2) AAS's own witness acknowledges that an overrun by a Category C or D aircraft would travel farther than an overrun by a Category A or B aircraft (Marinelli Direct, ¶ 40); (3) FAA airport design standards for RSAs are three times longer for Category C&D aircraft than for Category A&B aircraft (1000' v. 300') based on historical overrun data of where 90% of overruns have stopped. (AAS Ex. 2 at 1; AAS PHB, pg. 7, Fact A.37); (4) Overruns of Category C&D aircraft at other airports demonstrate that such aircraft overruns can occur at high rates of speed and the

⁴ FAA has spent over \$1.9 Billion on RSA improvements over the last 20 years, and has committed to spend over \$1.6 Billion from 2005-2015—a total of over \$3 Billion. (City Exs. 45 & 35 at 25) FAA has adopted an affirmative Runway Safety Area Improvement Program that applies to airports like Santa Monica, and Congress has mandated that RSAs at other, commercial service airports meet RSA standards by 2016.

aircraft may travel many hundreds of feet beyond the runway ends,⁵ (*See e.g.*, City Exs. 5, 6, 9 & 19); and (5) AAS and City witnesses acknowledge that a C or D overrun could reach the busy streets or crowded neighborhoods near SMO’s runway ends. (HT, Vol. 1, 28:19—29:25 (Bennett); HT, Vol. 2, 298:1—299:10 (Marinelli); *Id.* at 405:21—407:5 (Trimborn)) Similarly, while AAS chides the City for not providing any risk analysis, it is AAS that bears the burden of proof in this case and it has failed to provide any risk analysis, or indeed any analysis of any sort, that would support its assertions that Category C&D aircraft do not pose a safety risk.

A. AAS Attempts to Divert Attention from the Fundamental Issues in This Case By Focusing on Irrelevant Issues and Unsupported Assertions

Instead of addressing the evidence most directly on point, AAS devotes its attention to irrelevant, and often contradictory, technical arguments regarding FAA guidance documents and flight standards that in no way aid AAS in meeting its burden. For example, AAS argues that SMO’s designation as a B-II airport does not mean that SMO cannot routinely serve category C&D aircraft. (AAS PHB, pgs. 15-17) However, in asserting that there are not adequate alternative airports to handle any C&D operations displaced by the City’s Ordinance, AAS cites a SCAG report finding that only 5 airports

⁵ AAS spends a considerable portion of its post-hearing brief arguing that the specific overruns at other airports cited by the City and its witnesses could not have occurred at SMO due to differing factors such as weight of aircraft, length of runway, or temperature. AAS Br. at 44-50. This misses the fundamental points that the measures AAS claims will ensure safe operations (flight manual, aircraft certification, TERPS) at SMO did not prevent overruns at those other airports, including overruns that involved the highest trained pilots flying the most sophisticated aircraft -- operations that should have been the “safest” by AAS’s reasoning.

can routinely handle category C & D aircraft— because they are the only ones whose ARC designation includes category C or D aircraft. (AAS PHB, pg. 29, *citing to* DD Item 64 at 6-7) Because SMO is a designated B-II airport, the AAS-cited SCAG report *does not include SMO among the airports that now routinely accept category C or D operations. Id.*

AAS asserts that runway length, not ARC designation, determines whether a given aircraft can land safely at an airport. (AAS PHB, pgs. 15-17) But this line of argument ignores the fact that the safety of an aircraft operation is also determined by whether or not there is pilot error. AAS witnesses acknowledge, as they must, that an overrun is not a “safe operation.” (Deposition of Troy Zwicke; 145:8—146:5; HT, Vol. 1, 31:6-21 (Bennett)) For the reasons detailed above and ignored by AAS, the possibility of an overrun by Category C or D aircraft poses a safety risk, and the City sought to mitigate that risk by aligning its airport facilities (particularly RSAs or EMAS equivalents) with the fleet of aircraft that use SMO. When AAS precluded the installation of RSAs or EMAS that met FAA’s full published dimensional standards for stopping aircraft overruns, the City then sought to limit the fleet that used the Airport by banning those aircraft for which the largest (1,000 ft.) RSAs are prescribed by FAA.⁶ This is hardly unreasonable, and, not surprisingly, AAS has been unable to show that it is. It is notable that AAS’s reason for precluding the installation of compliant RSAs or EMAS was that it was impracticable, due to impacts on utility of the airport, i.e., operational impacts. (HT

⁶ The City has not abandoned its goal of providing the 300’ RSAs, or their functional equivalent, for Category A/B aircraft, in order to bring SMO into full compliance with B-II design standards. But such steps will require FAA approval, which AAS has withheld to date.

Vol. 2, 273:20—274:15 & 294:6—295:11; HT Vol. 3, 572:10—573:9 (Marinelli); *see also* Huffman Depo., at 187:9-15) However, in AAS’s Proposed Finding of Fact A-40, “practicable,” does not include any consideration of utility or operational impacts. (AAS PHB, pg. 7)⁷

Furthermore, AAS relies on the technical notion that FAA’s airport design standards in themselves do not restrict operations. (AAS PHB, pg. 19) But, AAS has acknowledged in this proceeding that an access restriction at SMO based on the design standards relating to aircraft wingspan can be used to restrict operations of aircraft in Design Group III. (*See* DD at 3; DD Item 7; *see also* HT, Vol. 2, 268:10-14 (Marinelli)) AAS may not agree with the City’s consideration of FAA’s published RSA dimension standards in developing the Ordinance, but AAS has failed to demonstrate that the City’s action is unreasonable or that the Ordinance violates any federal obligation.⁸

⁷ AAS’s later citation (AAS Post-Hearing Brief at 18) to DD Item 88 for the concept that “practicable” includes effect on operations does not provide legal support for this AAS assertion – it is merely an AAS PowerPoint presentation that makes the same assertion. AAS witnesses could not point to any legal support for its assertion that “practicable” necessarily includes consideration of operational impacts. *See* H.T. Vol. 2, 271:22-273:6 (Marinelli).

⁸ To attempt to bolster this point, AAS cites its earlier Director’s Determination in *Skydive Paris Inc. v. Henry County, Tenn*, FAA Docket No. 16-05-06 (January 20, 2006). However, AAS did not determine there that standards in the *Airport Design Advisory Circular* could never be used as the basis for a restriction on aeronautical activities, only that parachute drop zones were permissible in Object Free Areas, which were the specific design standards at issue. In any event, AAS’s unreviewed conclusions regarding a restriction on parachute drop zones in *Henry County, Tennessee* are simply irrelevant to the facts of this case. Moreover, AAS (and the FAA) have determined that an airport’s inability to comply with airport design standards was a reasonable basis for an airport excluding aircraft that exceeded the design standards. *Millard Refrigerated Services Inc. v. Omaha Airport Authority*, FAA Docket No. 13-93-19 (8/4/95) remanded on other grounds in *Millard Refrigerated Services In. v. FAA*, 98 F.3d 1361 (D.C. Cir. 1996).

B. AAS Assertions that FAA is the Final Arbiter of Safety Matters are Unsupported by Its Citations and Should be Given No Consideration by the Hearing Officer.

AAS attempts to bolster its argument by proclaiming boldly and repeatedly that the “FAA is the final arbiter of safety.” (*E.g.*, AAS PHB, at 16, 17, 20, 21, 32) But it does not follow that AAS is the final arbiter of safety, and certainly does not mean that AAS is excused from meeting its burden of proof in this case. In any event, AAS’s proclamation is greatly overstated, and unsupported by the statutes it cites. First, 49 U.S.C. § 40101 *et seq.* does not provide that the FAA is the “final arbiter” of safety. Section 40101 and 47101 state that the FAA is to give safety the highest priority. Section 40103 contains a general statement that the United States controls the airspace. As noted in the preemption sections of the City’s Pre & Post- Hearing Briefs, this does not preempt the City’s proprietary powers to restrict access at any given airport for safety or other reasons. AAS’s citation to FAA Order 5190.6A, ¶ 4-8(a)(1) is even less availing because the Order “sets forth policies and procedures for the FAA Airport Compliance Program. *The Order is not regulatory and is not controlling with regard to airport sponsor conduct.*” *AOPA v. City of Pompano Beach*, FAA Docket No. 16-04-01, at p. 12 (Dec. 15, 2005) (emphasis added). AAS’s citation of other Part 16 cases adds nothing, since the cited cases were never reviewed by a hearing officer or a court. They are simply additional self-declarations of AAS’s own purported powers.

C. AAS Has Not Met Its Burden of Showing That Enacting the Ordinance Was Unreasonable or Violated Any of the City's Federal Obligations

AAS touts the overall safety record of category C&D aircraft in corporate fleets, improvements in aircraft performance, technology and safety, and pilot training and experience as reasons why they City's concerns are unfounded. (AAS PHB, pgs. 23-25) But, as the NTSB reports of overruns involving Category C or D aircraft at other airports demonstrate, overruns occur, and continue to occur, despite all of those factors. Indeed, overruns occur in the most sophisticated aircraft operated by the highest trained flight crews. Advances in aircraft technology, pilot training, and improvements in safety cannot prevent overruns and have not slowed down the efforts of the FAA or Congress to address the serious problem of overruns. (HT, Vol. 3, 642:18—648:25 (Hodges); Hall Direct at ¶¶ 52-56) These indisputable facts demonstrate that it was not unreasonable for the City to address the particular problems of potential overruns at SMO by banning the relatively small number of operations of Category C&D aircraft – 6-7% of total SMO operations – that pose the greatest safety risk in the event of an overrun.

Given the FAA's open acknowledgment that "aircraft can and do overrun the ends of runways, sometimes with devastating consequences," (DD, pg. 42; *see also* AAS Ex. 2 at 1), and FAA's commitment to addressing deficiencies in RSAs nationwide, it is shocking that AAS would advocate a "don't worry, be happy" solution at SMO. AAS has offered no analysis showing that the City's fears are unfounded. Rather than follow FAA's statutory mandate to make safety its highest priority, AAS urges that the City, in effect, roll the dice and hope that a catastrophe never happens at SMO. The City cannot

do so. As a responsible public body that owns the Airport and bears the liability for accidents at the Airport, it must protect the safety of Airport users and the residents and visitors who live and travel in the shadow of the Airport's runways. Given AAS's consistent refusal to allow SMO to implement the level of overrun protection that FAA's standards call for, the City's decision to adopt the Ordinance was not at all unreasonable, and AAS has failed to meet its burden of showing that the Ordinance violates any of the City's federal obligations.

D. AAS Has Provided No Substantive Response to the City's Assertion that AAS's Interpretation of Exclusive Rights Is Contrary to the Clear and Unambiguous Language of the Applicable Statutes

AAS's argument on exclusive rights makes explicit that AAS's conclusion, that the Ordinance confers an impermissible exclusive right, rests entirely on its view that the prohibition applies to aircraft: "The City's ordinance directly confers an exclusive right on *Category A and B aircraft* over *Category C and D aircraft* because the ordinance absolutely denies the privilege of using the Airport's runway to *Category C and D aircraft*." (AAS PHB, pg. 33) (emphasis added). Plainly, AAS's exclusive rights argument rests on the notion that an *aircraft* is protected by the prohibitions against exclusive rights. As the City has explained in both its Pre & Post Hearing Briefs, the prohibition against exclusive rights applies only to "persons" (including corporations and firms), but not to things such as aircraft, and AAS's construction of the exclusive rights statutes is contrary to their plain language. (*See* Grant Assurance 23 (DD, Item 6, pg. 18); *see also* 49 U.S.C. §§47107(a)(4); 40103(e); 40102(a)(37); and 49 U.S.C. § 1)

AAS has not offered a real response to that fundamental flaw in its position. AAS does not argue that any “person” is granted an exclusive right to operate Category C or D aircraft at SMO, or that any “person” or group of persons would be denied the ability to use the airport. Instead, AAS relies on a verbal slight of hand to argue that the Ordinance “distinguishes between the users by aircraft category approach speeds.” (AAS PHB, pg. 34) But the Ordinance only relates to aircraft approach speed, and makes no attempt to favor any user or group of users over another. Second, AAS justifies its construction of the exclusive rights statutes by arguing that “FAA has consistently interpreted one or more parties to include type and class of aeronautical activity.” *Id.* However, the statutes refer to a “person” and not to a “party”, and the statutory definition of person is quite clear in its reference to natural persons, corporations, and the like, as reflected in the language of Grant Assurance 23. AAS may be consistent in its position, but that position is incorrect and indefensible, and must be rejected under the plain terms of the very laws AAS invokes.

V. AAS DOES NOT MEET ITS BURDEN OF SHOWING THAT A BAN OF C&D AIRCRAFT OPERATIONS AT SMO WILL RESULT IN SIGNIFICANT IMPACTS OR ACTUAL HARM.

As discussed above, AAS must establish by credible evidence that the City’s Ordinance is not a reasonable exercise of its recognized proprietary power to ensure safety at SMO. In attempting to do so, AAS argues that the Ordinance is unreasonable because there is no capacity at other area airports or in the regional airspace for the

Category C or D aircraft that may be displaced from SMO by the Ordinance. However this claim falls short due to its lack of credible and substantive evidentiary support. In addition to the arguments made by the City in its Brief on this particular issue (City's PHB, pgs. 24, 35-39), which are hereby incorporated by reference, it is worth highlighting AAS's problems with its evidence on this point.

A. AAS Post Hearing Brief Cites to No Credible Evidence to Support its Argument That the Ordinance will Impact the Local Airspace System and Capacity at Los Angeles Area Airports

As its primary support for its claim of significant operational impacts on regional airspace and airport capacity, AAS offers the expertise and opinions of its program analyst David Fish in an attempt to rebut the testimony of Barry Yurtis. Mr. Yurtis testified on behalf of the City as the former manager of the Los Angeles Air Route Traffic Control Center ("ARTCC"), which is the entity that is responsible for controlling high altitude airspace over the south-western United States and has controlling authority for all airspace in the Southern California area. (Yurtis Direct, ¶¶4-5) Yet Mr. Fish testified at hearing that: (1) he has no specialized knowledge or expertise in the area of air traffic control (HT, Vol. 3, 525:19-23); (2) he has no knowledge or expertise regarding the ability of the Los Angeles air traffic control system to handle an additional 9,000 operations (HT, Vol. 3, 528:7-12); (3) he has never conducted a capacity analysis for any specific airport (HT, Vol. 3, 525:11-17; 530:12-23); (4) he has never conducted a capacity analysis specific to the Los Angeles area (HT, Vol. 3, 529:3-20); (5) his only experience conducting a capacity analysis was a group effort that looked at the national

airspace system and analyzed commercial airports but did not consider GA airports such as SMO, Hawthorne, or Van Nuys (HT, Vol. 3, 538:7-25; 528:25—529:10); (6) he did not take part in the preparation of the Director’s Determination and did not review it before it was issued (HT, Vol. 3, 534:13—535:2); and (7) he has not given an opinion, much less a rebuttal to Mr. Yurtis, as to whether the operations affected by the Ordinance can be accommodated at other regional airports (HT, Vol. 3, 543:17-23).

Despite Mr. Fish’s admitted lack of expertise with the Los Angeles area airspace and air traffic system, and admitted lack of familiarity with the capacity of the area airports and their ability to accommodate operations potentially affected by the Ordinance, AAS incredibly cites to Mr. Fish anyway for the proposition that SMO’s ban forces operations to other area airports and “affects air traffic and airspace, and airport management in the greater Los Angeles region.” (AAS PHB, pg. 26) And, inexplicably, AAS continues to argue that LAX, Van Nuys, and Burbank airports are currently at or near capacity and cannot accommodate SMO’s displaced traffic, despite the fact that both of its key witnesses acknowledge that AAS has not conducted any sort of capacity study of the surrounding regional airports and has not performed any analysis into whether those airports can accommodate the affected operations. (AAS PHB, pg.26; Fish Rebuttal Testimony, ¶7; Vasconcelos Depo., 189:19—191:16) In fact, Mr. Vasconcelos admits that “it is possible” for the Los Angeles area airports to accommodate the 25—at most—daily operations that may be displaced from SMO under the Ordinance. (Vasconcelos Depo., 189:19—191:16)

Lacking support from witnesses and expert empirical analysis, AAS attempts to satisfy its burden of showing operational impacts by tying its fortune to irrelevant project-specific documents that do not support its positions. For example, AAS cites to the LAX Master Plan Final EIR/EIS—a planning study that looks at available options for improving LAX to meet regional demand for air transportation. (Yurtis Direct, ¶27) However this document does not discuss nor suggest that regional GA airports cannot accommodate the 25 daily operations that may be displaced by the City’s Ordinance. (*Id.*) In fact, the document itself states that it specifically excludes GA airports from its analysis. (Vasconcelos Depo., 193:17—194:5)

Nonetheless, AAS repeatedly cites language in the LAX Master Plan Final EIR/EIS that refers to a “concern to avoid” displacing operations from GA airports into the surrounding commercial airports. (AAS PHB, pg. 27; DD pgs. 46, 47) But AAS has cherry picked this phrase and does not give it any context. AAS does not explain what specific “concern” is being referred to and it assumes without any analysis of its own that this “concern” relates to capacity and not to the “market share” or “economic efficiency” considerations referenced in the preceding paragraphs above the sentence that AAS quotes from.⁹ (Vasconcelos Depo., 193:17—195:3) Both the Post Hearing Brief and the

⁹ Although not in the record, the LAX Master Plan Final EIS/EIR was reviewed and analyzed by Mr. Yurtis during the course of his work on this matter. (Yurtis Direct, ¶11) It was also shown to Mr. Vasconcelos during his deposition and was attached as Exhibit 11 to the original transcript. The language cited by AAS appears in Chapter 1 (Regional Context), Section 1.2.2 (Allocation of Air Service Among Regional Airports), page 1-12. AAS does not include the language at the beginning of Section 1.2.2 that states: “This section discusses how demand is distributed among regional airports on the basis of market forces.” The entire document is available to the public at LAX’s website at http://www.ourlax.org/pub_final_eiseir_v1_5.cfm, and the Hearing Officer is free to take judicial notice of it as matter that is not reasonably subject

Director's Determination cite to this sentence in several places, but AAS never included the document as part of the administrative record for this investigation. (AAS PHB, pg. 27; DD pgs. 46, 47)

Mr. Vasconcelos testified that AAS cited to the LAX Master Plan Final EIR/EIS "only" for the proposition that regional airports—including the GA airports that the document itself says it specifically excluded from its analysis—"are not underutilized." (Vasconcelos Depo., 195:4-14) Even though nowhere in the document does it say such a thing, Mr. Vasconcelos divined that it did. His testimony was that this was "the only conclusion to be derived." (*Id.*) And even if Mr. Vasconcelos's dubious conclusion were true, the vague notion that airports "are not underutilized" does not support the assertion in AAS's Brief that the airports in question are at or near capacity and could not, collectively, accommodate up to 25 operations per day that may be displaced from SMO.¹⁰

AAS also cites to an airport and airspace study commissioned by the Southern California Association of Governments ("SCAG") and to an unrelated SCAG PowerPoint. (AAS PHB, pg. 28) However none of the cited SCAG materials even

to dispute and capable of accurate determination from an undisputable source. Fed. R. Evid. §201c. A review of the document reveals that the context for the quote relied upon by AAS is a discussion and rejection of the concept of expanding GA airports in order to handle expected growth in air carrier operations at LAX as an alternative to expanding LAX. Obviously the inability to enlarge a GA airport to accommodate air carrier traffic does not address the capacity of those GA airports to accommodate up to 25 additional general aviation operations per day.

¹⁰ Moreover, AAS has not proven that all operations that may be prohibited by the Ordinance would need to be accommodated by other airports, since AAS ignores the option available to aircraft operators to substitute Category B aircraft in order to continue their operations at SMO. (Trimborn Direct, at ¶ 39; Yurtis Direct, at ¶ 22)

remotely supports AAS's contention that other airports in the region could not accommodate operations that may be displaced from SMO as a result of the Ordinance, let alone be considered as persuasive. And in some cases, the documents are taken so far out of context that they actually support the City's position.

The SCAG study was commissioned as part of the process for updating SCAG's Regional Transportation Plan, a planning document that proposes to decentralize the regional airport system through the development of aviation facilities to serve unmet and future demand for air transportation. (DD, Item 62, pg. 4) The study was intended to investigate how the regional airports and airspace system should evolve to provide the capacity to meet the projected growth in demand. (*Id.*) It does not conclude that there is insufficient capacity to meet future demand. (*Id.* at 34-35) Nor does it conclude that the current or future regional airport system is unable to accommodate the displacement of up to 25 daily operations from SMO to other region airports.¹¹ (*Id.*; Yurtis Direct, ¶¶ 92-93) To the contrary, the SCAG study concludes that, with anticipated optimizations that will eliminate impacts, the regional airport and airspace system will have sufficient capacity through 2030 to meet projected demand. (DD, Item 62, pg. 35)

What's more is that AAS cites to this SCAG study without the slightest regard to its stated limitations with its primary traffic modeling tool. (*Id.* at 1, 10-11) The study states on page 35 that:

¹¹ Any operations displaced from SMO by the ordinance would not be added to the airspace system. They are already in the airspace system, and would merely be entering or departing the system from a different airport at the very beginning or end of their trip. (Yurtis Direct, at ¶ 23)

“TAAM [Total Airport & Airspace Modeler] cannot reproduce interactions between separate airports. It is a commonly known limitation of TAAM that it models airports as distinct units. As a result, it can only address runway interactions within each unit. Due to this limitation, the results of this Study reflect neither the impact of these airport interactions on regional delay, nor the sometimes severe local impact on individual aircraft at affected airports.”

Not only does the SCAG study that AAS relies on conclude that there will be sufficient capacity through 2030, but it expressly disclaims itself as being so limited that it cannot properly analyze airport interactions or airspace congestion. This study is completely superfluous to these proceedings and should not be considered.

The PowerPoint presentations that AAS cites are no better. AAS claims that SCAG determined that the airports at LAX, Burbank, Long Beach and Ontario “have either physical, policy-based or legal constraints.” (AAS PHB, pg. 28) For this claim, AAS quotes language from a presentation slide titled “Airport Constraints”. (DD, Item 66, slide 11) Here again AAS does not bother to explain the significance of the stated constraints or how they are relevant to its argument that the listed airports cannot accommodate SMO’s displaced operations. In fact, the entire presentation appears to be about decentralizing air passenger and air cargo services to meet demand at other airports in the region since those airports have extra capacity. (*Id* at slides 7-9) Moreover, the presentation does not discuss GA airports such as SMO, Van Nuys, or Hawthorne.

B. AAS Chose Not To Rebut the Testimony of Barry Yurtis With Analysis of its Own

Aside from being the former manager of the Los Angeles ARTCC and having had oversight of 400 employees (300 air traffic controllers and 100 staff and subordinate managers), Barry Yurtis has “conducted hundreds of reviews of the National Airspace System and Air Traffic Control performance following aircraft accidents, near mid-air collisions, runway incursions, air traffic control operational errors and pilot deviations.” (Yurtis Direct, ¶¶ 3-4) Unlike Mr. Fish, Mr. Yurtis is “intimately familiar with all aspects of air traffic, airport and airspace management within the geographic area encompassed by the Director’s Determination.” (*Id* at ¶5) It is Mr. Yurtis’s opinion that there is “ample capacity” in the Los Angeles area airport and airspace system to accommodate operations displaced by the City’s Ordinance. (*Id* at ¶15)

Despite Mr. Yurtis’s qualifications, AAS ignores the empirical research and analysis that Mr. Yurtis performed specifically for this investigation, which included site visits to regional airports and interviewing their staffs, interviewing fix-based operators, and analyzing FAA operational statistics, traffic counts, delay and ATC data. (*Id.*) Instead of offering its own analysis, AAS criticizes Mr. Yurtis for not doing what AAS itself did not bother to do. AAS poses several questions about Mr. Yurtis’s methodology and the parameters of his analysis that AAS feels are critical to the inquiry. (AAS PHB, pg. 29; Fish Rebuttal, ¶9) But AAS neither answered nor analyzed those issues itself, even though AAS bears the burden of proof in this proceeding. And it also chose not to ask Mr. Yurtis these questions directly, when AAS decided not to cross examine Mr.

Yurtis at the hearing. AAS cannot meet its burden of proof by raising and failing to answer questions whose relevance it never established.

The fact remains that Mr. Yurtis is the only witness in these proceedings who is familiar with the regional airport and airspace system, conducted interviews and analyzed relevant data, and offered a substantiated opinion based on empirical research. Mr. Yurtis's analysis demonstrates conclusively that there is ample capacity at other airports and in the airspace system for any category C or D aircraft displaced by the Ordinance. AAS failed to meet its burden by rebutting that evidence or presenting any evidence of its own that even tends to support its assertion that there is simply no place for category C or D aircraft affected by the Ordinance to go.

VI. AAS SELECTIVELY READS THE 1984 AGREEMENT AND ASSUMES FACTS NOT FOUND IN THE RECORD

The City has maintained throughout this matter that the plain language of the 1984 Agreement defines the scope of the City's federal obligations as requiring that the City maintain SMO as a B-II facility for Category A&B aircraft with no obligation to provide access to Category C&D aircraft. (DD, Item 4, Ex. 3, pg. 9 & Ex. 4, pg. 1; Trimborn Direct, ¶10) Implicitly recognizing that the plain language of the 1984 Agreement does not support its contrary argument, AAS shifts its position to argue that facts outside the four corners of document show that the parties did in fact anticipate Category C&D aircraft operations at SMO. Specifically, AAS mischaracterizes SMO Airport Manager Robert Trimborn's testimony about the history of Category C&D aircraft operations at

SMO and argues for an interpretation of the 1984 Agreement that approaches a complete rewrite. (AAS PHB, pgs. 36-39)

At the hearing Mr. Trimborn testified that he did not know the exact dates but he “assumes” that C&D aircraft began operating at SMO during the 1980’s. (HT, Vol.2, 368:3-12) He testified that he did not know if C&D aircraft first began operating at SMO during the 1960’s. (*Id* at 368:18-22) He himself did not begin to work at SMO until 1996. (Trimborn Direct, at ¶ 1) The entire exchange, reproduced below, confirms that Mr. Trimborn does not have personal knowledge of the extent of C&D jet operations at SMO during the 1980’s, a period of time that predates his association with the Airport:

Q: On paragraph 1 of your direct testimony—do you have a copy of that?

A: Yes.

Q: And feel free to refer to that as you need to. Now, you say you’re very familiar with the history of Santa Monica Airport?

A: Yes.

Q: How long have—based on your knowledge of that history, wherever that comes from—how long have C&D category airplanes been flying in and out of Santa Monica?

A: I don’t know the exact dates when they first showed up. I assume it’s probably back in the ‘80s when the C&D aircraft started coming on the scene.

Q: And you’re familiar with the 1984 agreement?

A: Yes.

Q: So is it pretty safe to say that C&D category airplanes were flying in to Santa Monica around that time?

A: Yes.

Q: And jets actually started flying into Santa Monica in the '60s?

A: Yes.

Q: Do you know if those were C&D category?

A: I don't.

Q: But they could have been?

A: They could have been. (HT, Vol.2, 367:25—368:24)

AAS manages to somehow interpret the above vague and speculative testimony of Mr. Trimborn on a subject that about which he has no personal knowledge as direct evidence of “substantial” C&D operations at SMO at the time of the execution of 1984 Agreement. (AAS PHB, pg. 36) This is a brazen mischaracterization of the evidence. Mr. Trimborn does not testify that there were *any* category C&D operations at SMO prior to the execution of the 1984 Agreement, much less a “substantial” number. He said that he did not know. His response to whether there were C&D operations at SMO “around that time” is certainly not evidence that there were any such operations prior to the execution of the 1984 Agreement. “Around that time” could encompass a period that began some months or even years *after* the agreement was executed.

AAS points to nothing else for its flat assertion that there were substantial Category C and D operations at SMO prior to the 1984 Agreement. In fact, there is absolutely no evidence in the record for AAS to draw upon to support the assertions that

it makes in its Brief. AAS's argument about C&D operations at SMO at the time of the Agreement's execution is pure conjecture and speculation. Moreover, such speculative evidence is irrelevant given that the plain meaning of the language of the Agreement itself precludes AAS's interpretation.

AAS makes the argument that because the 1984 Agreement did not specifically mention approach speed categories, the parties did not intend to restrict aircraft based on this category. (AAS PHB, pg. 37) The problem with this argument is that AAS selectively quotes the language of the Agreement. AAS does not include the rest of the quoted sentence from the 1984 Agreement¹² that refers to FAA Advisory Circular 150/5300.4B, which by its own terms, is limited to "the less demanding Aircraft Approach Category A&B airplanes, i.e., airplanes with approach speeds of less than 121 knots." (DD, Item 4, Exhibit 3, pg. 9; Trimborn Direct, ¶10) The Advisory Circular referenced in the Agreement specifically instructs that a separate advisory circular (AC 150/5300-12) is to be consulted for "other airports" designed to accommodate category C&D aircraft. (DD, Item 4, Ex. 4, pg. 1; Trimborn Direct, ¶10) AC 150/5300-12, covering airports serving Category C&D aircraft, was *not* referenced in the 1984 Agreement.

AAS's interpretation thus ignores the language of the 1984 Agreement itself. The plain meaning of the Agreement based on the reference to the Advisory Circular

¹² The entire sentence from the 1984 Agreement reads as follows: "The Airport will be capable of accommodating general aviation aircraft generally consistent with Group II Design Standards set forth in FAA Advisory Circular 150/5300.4B, dated February 14, 1983." (DD, Item 3, Ex. 3 at p. 9)

applicable only to airports serving category A&B aircraft, and its lack of any reference to the advisory circular applicable to airports serving category C&D aircraft, is that the 1984 Agreement does not obligate the City to provide access to Category C or D aircraft. Contrary to its assertion, it is AAS's strained interpretation of the Agreement that would read out important qualifying language in the Agreement, specifically the reference to Advisory Circular 150/5300.4B. Moreover, to reach AAS's conclusion, one would have to read into the 1984 Agreement a reference to AC 150/5300-12 that does not appear in the Agreement.

Also strained is AAS's interpretation of Section 13 of the Agreement. AAS believes that this section can be read to say that the City had agreed to accommodate category C&D aircraft. (AAS PHB, pg. 38; DD, Item 4, Exhibit 3, pgs. 12-13) But, again, AAS's interpretation ignores the plain language of the Agreement. Section 13 relates to parking spaces, and is concerned with ensuring that the spaces are adequately sized for the size of aircraft to be accommodated – thus, there is no discussion or contemplation of aircraft approach speed in the cited section. (DD, Item 4, Exhibit 3, pgs. 12-13) Section 13 also refers to accommodating an aircraft mix forecasted by the 1983 Airport Master Plan Study. (*Id*) However the 1983 Study is not part of the record in this investigation, and it is pure speculation on AAS's part that the study foresaw the use of the Airport by category C&D aircraft.

The fact that the City may have allowed category C or D aircraft to operate at SMO does not undercut the City's position that it is not obligated to continue to allow such operations. As testified to by Mr. Trimborn, the City acted to ban category C&D

aircraft when the danger posed by the consequences of an aircraft overrunning the runway into the neighborhood became apparent due to overrun accidents at SMO and elsewhere, as well as the increasing number of C&D operations. (Trimborn Direct, ¶¶ 12-13, 30-34)

VII. THE ORDINANCE IS WITHIN THE CITY'S PROPRIETARY POWERS AND IS NOT PREEMPTED

AAS argues that the Ordinance is not within the City's proprietary powers (AAS PHB, pgs. 31-32) and that it is preempted. (*Id.* at 39-40) For reasons thoroughly detailed in the City's Post Hearing Brief at 56 - 69, both arguments are incorrect. AAS's reliance in its Brief on snippets of testimony taken out of context from AAS witnesses (and counsel), is of no weight, and certainly cannot overcome the clear weight of legal authority cited in the City's brief. (AAS PHB, pgs. 39-40)

Moreover, the plain language of Grant Assurance 22(i) makes it clear that safety rules such as the Ordinance are expressly within the City's proprietary powers. AAS's argument to the contrary boils down to the notion that if the Ordinance is ultimately held to violate the City's federal obligations, it will be preempted. But this misunderstands the concept of preemption. Preemption is the principle that Congress has occupied an aspect of regulation – whether an entire field or some specific issue – such that no state or local regulation is permitted at all. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 625 (1973) (quoting *Cooley b. Board of Wardens*, 13 L.Ed. 996, 319)). Grant Assurance 22(i) and the proprietor's exception cases all acknowledge, however, that

Congress has not preempted airport proprietors from taking action to address local safety and other problems. At most, however, Congress has provided that such actions are subject to limited FAA oversight and review. But such after-the-fact oversight authority proves that Congress did not preempt the proprietary power to adopt a local safety rule.

VIII. CONCLUSION

For the foregoing reasons, and as has been established by the evidence of record, the Hearing Officer should uphold the Ordinance and find in favor of the City on the basis that the FAA has failed to meet its burden of proving that the Ordinance violates the City's federal obligations or is otherwise unlawful.

DATED: April 14, 2009



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2009, I served a true copy of the foregoing document on the following persons at the following addresses:

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Executed on April 14, 2009 at Santa Monica, California



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