

MARSHA JONES MOUTRIE – Bar No. 69711
City Attorney
JOSEPH LAWRENCE – Bar No. 99039
Assistant City Attorney
LANCE S. GAMS (Bar No. 125487)
MARTIN T. TACHIKI – Bar No. 083044
Deputy City Attorneys
1685 Main Street, Room 310
Santa Monica, California 90401-3295
Telephone: (310) 458-8336
Facsimile: (310) 395-6727

ARTHUR P. BERG, ESQ.
Kaplan Kirsch & Rockwell LLP
730 Fifth Avenue, Suite 900
New York, New York 10019
Telephone: (212) 265-7008
Facsimile: (646) 514-5440

THOMAS R. DEVINE, ESQ.
W. ERIC PILSK, ESQ.
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW, Suite 905
Washington, DC 20036
Telephone: (202) 955-5600
Facsimile: (202) 955-5616

Attorneys for Respondent
CITY OF SANTA MONICA

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

**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
MEMORANDUM IN RESPONSE
TO FAA'S CEASE AND DESIST
ORDER AND SUPPORTING
DECLARATION AND
EXHIBITS**

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INTRODUCTION

The City of Santa Monica (“City”) has enacted an ordinance banning Category C and D aircraft from operating at Santa Monica Airport because the Airport lacks sufficient Runway Safety Areas (“RSAs”) to allow safe operation of those aircraft under the FAA’s own standards. Due to the unique topography of the airport, there is inadequate land on which to build compliant RSAs or their equivalent without encroaching on the runway, which FAA has prohibited the City from doing. In the event a C or D aircraft were to overshoot the runway, it would likely plow into homes or other areas where people congregate, including a gas station, resulting in catastrophic losses. In order to eliminate the very real chance of such a catastrophe, the City determined that it was in the best interests of the City, its residents, and airport users, to ban Category C and D aircraft rather than subject residents and airport users to an unacceptable safety risk and subject the City to an unacceptable risk of liability.

Despite the reasonableness of the City’s decision, the FAA has aggressively attacked it. As detailed below, and elsewhere in the record of this proceeding, the FAA’s zeal has driven it to violate its own procedures and ignore other applicable legal requirements. Although the FAA has initiated a Part 16 proceeding ostensibly to investigate the propriety of the Ordinance under federal aviation obligations, the FAA has repeatedly demonstrated that it has prejudged the outcome of that investigation by voicing its view that the Ordinance is illegal.

The Cease and Desist Order (“Order”) is the latest example of the FAA’s misconduct.¹ Ignoring the presumptive validity of the Ordinance, and the City’s inherent power to restrict operations at its Airport, the FAA has moved to block enforcement of a facially valid ordinance without providing a shred of evidence warranting such action. Ignoring its own regulations prohibiting the issuance and enforcement of a cease and desist order until an investigation has been completed, a hearing has been completed and the Associate Administrator has made an on-the-record decision to issue a cease and desist order, the FAA has sought judicial enforcement of a cease and desist order issued by the Acting Director before any of those procedures have been completed. Moreover, the Acting Director’s basis for this extraordinary action is pure speculation based on conclusory assertions that are demonstrably false.

In short, the Order represents agency misconduct at the most elemental level. The FAA has prejudged the outcome of its own investigation and is taking action without regard to applicable law, procedure, or even the relevant and accurate facts. For the reasons detailed below, the Cease and Desist Order must be withdrawn.

¹ In this Part 16 proceeding and related proceedings, to date FAA has: issued a Notice of Investigation prior to any action by the City Council; failed to dismiss the action when the City pointed out that it was unripe; purportedly resurrected the proceeding after it expired by the express terms of the Part 16 proceedings (120 days after filing of the City’s brief, 14 C.F.R. §§16.105, 16.31, since FAA neither issued a decision nor extended the time for doing so; provided the City with only 10 days to respond to FAA’s Show Cause Order that purportedly resuscitated the proceeding, instead of the 30 days required by regulation for responses to Notices of Investigation §16.105; refused to grant the City’s request for additional time to respond, purportedly to allow the FAA to issue an initial decision before the Ordinance went into effect on April 24, 2008, although the Department of Justice indicated at the Temporary Restraining Order hearing last week that the FAA does not intend to issue its initial decision before May 23, 2008; explicitly and definitively prejudged the outcome of the proceeding, *see* City’s Memorandum in Response to Show Cause Order (Memorandum) at 12-18); purported to have the authority to adjudicate issues it is not competent to judge, *see id.* at 9-12); made reckless and unfounded assertions for which there is no basis in fact or in law (*e.g.*, that there are deed restrictions limiting Santa Monica’s actions when in fact there is no deed, and asserting it has the authority determine unilaterally whether there has been a violation of an agreement to which the FAA is a party) *see id.* 9-12, 19-24); and, denied the City timely access to relevant documents in FAA’s possession which remain in their possession and still have not been delivered to the City pursuant to the Freedom of Information Act. Ex. 55.

If the FAA does not withdraw the Cease and Desist Order and dismiss *United States v. City of Santa Monica* by May 9, 2008, the City will file a Petition for Review in the appropriate Court of Appeals challenging the Cease and Desist Order.

ARGUMENT

I. The Acting Director, Office of Safety and Standards, Lacks the Legal Authority to Issue an Immediately Enforceable Cease and Desist Order Based on the Acting Director's Preliminary Belief that Santa Monica May Have Violated Some Law or Other Obligation

The Acting Director claims the power to issue a “cease and desist order” that is immediately effective and enforceable based on his self-described “preliminary finding” that the City’s Ordinance would violate federal law. He made this “finding” and issued his order prior to the completion of his own investigation into the lawfulness of the Ordinance and before any of the statutory or regulatory procedures for issuing an enforceable order have been completed. Not only is such an action “unusual,” as the Acting Director acknowledges, Order at 10, but the Cease and Desist Order is flatly barred by the FAA’s own regulations, and none of the statutes cited by the Acting Director provides an exception that would allow it. Most importantly, the FAA’s own regulations make clear that there is no final agency determination of any violation of any aviation law, grant assurance, or regulation and there can be no enforcement of any such finding until the Associate Administrator issues a decision following completion of a number of specific steps. These steps include the conclusion of the kind of investigation that is still ongoing here, and, if such investigation indicates a possible violation, a hearing, and an opportunity to appeal to the Associate Administrator.² Accordingly, the Cease and Desist Order

² The City notes, as it has argued elsewhere in these proceedings, that the Associate Administrator, Acting Director and other FAA staff have prejudged this matter. In addition to the premature Cease and Desist Order at issue here, FAA officials have made a number of statements indicating their conclusion that the City’s Ordinance violates federal law, even though none of the required Part 16 procedures have been completed. Memorandum at 12-16.

has no legal effectiveness and cannot halt Santa Monica's enforcement of a duly enacted City Ordinance necessary to protect the health, safety and welfare of the City and its citizens.

A. 14 C.F.R. Part 16 Prohibits the Issuance of Interim or Preliminary Cease and Desist Orders by the Director

The alleged violations at issue here are the subject of an investigation initiated by the FAA pursuant to 14 C.F.R. Part 16, Subpart D.³ Nothing in Subpart D, or in any other regulation or statute, authorizes the Acting Director to issue an immediately enforceable interim cease and desist order to prevent a municipal airport proprietor from enforcing an ordinance that was validly enacted pursuant to its proprietary and police powers.

Subpart D provides for an investigation by the FAA into whether or not a violation has occurred, including an opportunity for a response and good faith efforts to resolve any issues. 14 C.F.R. § 16.103. If the matter is not resolved at that stage, the regulations provide only one option for FAA: it "may issue" a Director's determination pursuant to 14 C.F.R. § 16.31. 14 C.F.R. § 16.105. A "Director's determination" is defined as "the initial determination made by the Director [of the office of Airport Safety and Standards] following an investigation, *which is a non-final agency decision.*" 14 C.F.R. § 16.3 (emphasis added).

If the Director's determination "finds the respondent in noncompliance and *proposes* the issuance of a compliance order, the initial determination will include notice of opportunity for a hearing under subpart F of this part, if such an opportunity is provided by the FAA." 14 C.F.R. § 16.31(d) (emphasis added). The FAA has already represented to the United States District

Thus, the City does not concede, by references in this Response to limitations on the authority of the Acting Director, and to the general authority of the Associate Administrator under Part 16, that the Associate Administrator has authority to issue a final agency decision *in this case*.

³ The entire ongoing Part 16 proceeding is *ultra vires*, because FAA cannot resurrect a Part 16 proceeding that expired, per 14 C.F.R. §§16.105 & 16.31, 120 days after the filing of the City's Answer on November 7, 2002. FAA neither stayed the initial proceedings in 2002/2003 nor extended its time to issue a decision. Thus, contrary to FAA assertions, *see* Order at 1, the NOI and Order to Show Cause were not issued in accordance with FAA's rules of practice.

Court that it will provide for such a hearing in this proceeding, if the Director determines that Santa Monica is in noncompliance, as indeed it is required to do. *See* Memorandum in Support of U.S. Department of Transportation’s Application for a Temporary Restraining Order (TRO Application) at p. 7.

14 C.F.R. § 16.109 speaks specifically to the issuance of cease and desist orders. That section provides that “the agency will provide an opportunity for a hearing if, in the Director’s determination, the agency *proposes* to issue . . . a cease and desist order . . . or any other compliance order issued by the Administrator to carry out the provisions of the Acts, and required to issue after notice and opportunity for a hearing.” 14 C.F.R. § 16.109(a) (emphasis added). Thus, the only regulation regarding a cease and desist order provides that it may only be *proposed* in a Director’s Determination following completion of an investigation, which is then subject to a hearing and further proceedings. Moreover, § 16.31, which relates to compliance orders generally, similarly provides that such orders may only be *proposed* by the Director, in a Director’s Determination.

The preliminary, non-final nature of a proposed enforcement action is underscored by the FAA’s own explanation of Part 16 in the Federal Register Notice publishing Part 16. The FAA explained:

Under § 16.31(d), a case proceeds to a hearing only after the FAA has found against respondent in an initial determination that proposes the issuance of a compliance order. *Thus at the hearing the FAA has the burden of proof to establish the validity of its initial determination, including the proposed order of compliance under § 16.109.*

Rules of Practice for Federally-Assisted Airport Proceedings, 61 Fed. Reg. 53,998, 53,999 (Oct. 16, 1996) (emphasis added). *See also, id.* at 54,001 (discussing need to provide a hearing before imposing sanction).

Simply put, FAA's regulations contain no provision or authority for the agency to issue an immediately enforceable cease and desist order prior to the completion of an investigation, a hearing, and a finding of noncompliance by the Associate Administrator.

Part 16, Subpart F provides detailed and specific procedures for such hearings. These procedures are consistent with the fundamental proposition that in the absence of a final determination that there has been a violation of any law, "*the burden of proof of noncompliance* with an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act *is on the agency.*" 14 C.F.R. § 16.229(a) (emphasis added). Following a hearing, a hearing officer issues an initial decision. 14 C.F.R. § 16.241.

After an initial decision is issued by a hearing officer, the initial decision may be appealed to the Associate Administrator for a final agency decision. 14 C.F.R. § 16.241. After consideration of the "entire record," the Associate Administrator will issue the "final agency decision and order." *Id.* at 241. "Final decision and order" is defined as "a final agency decision that disposes of a complaint or determines a respondent's compliance with any Act, as defined in this section, and *directs appropriate action.*" 14 C.F.R. § 16.3 (emphasis added). "If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement or document of conveyance issued under such Act, the final agency order includes a statement of corrective action, if appropriate, and identifies sanctions for continued noncompliance." 14 C.F.R. § 16.241(f)(3).

Thus, there is no final, binding determination that a respondent is in noncompliance with a federal obligation unless and until the Associate Administrator issues an order making such a finding, following the mandatory procedures set forth in Part 16. In other words, no FAA official, at an earlier stage of the proceedings, has the legal authority to determine that there has

been a violation of any of the statutes or grant assurances at issue. The views of the Acting Director may form the basis of an investigation and a Director's Determination. But those views are preliminary as a matter of law; he may only "propose" enforcement through a cease and desist order. Actual enforcement must wait for a determination by the Associate Administrator, after a hearing, based on his or her review of the entire record.

B. The FAA Has Not Followed Any of the Procedures Necessary to Issue an Enforceable Order

"It is elementary that an agency must adhere to its own rules and regulations." *AT&T Corp. v. FCC*, 448 F.3d 426, 434 (D.C. Cir. 2006) (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986)). *See also Riverkeeper, Inc. v. Environmental Prot. Agency*, 475 F.3d 83, 117 (2d Cir. 2007) (same, holding further that "an agency cannot interpret a regulation contrary to its unambiguous meaning . . ."). It is plain that the Acting Director has failed to follow the FAA's regulations applicable to this proceeding and has taken a position regarding his powers that is flatly contrary to the unambiguous meaning of Part 16.

The Acting Director admits that he has "not yet concluded his initial determination." Order at 10. All he has done is made a "preliminary finding that the City's ban on operations of these aircraft is unlawful." *Id.* He has not completed his investigation and has not issued an initial Director's Determination proposing that a cease and desist order be issued. As discussed above, 14 C.F.R. § 109(a) expressly limits the Acting Director's authority to "proposing" the issuance of a cease and desist order as part of his Director's determination following an investigation. Although the Acting Director acknowledges that Section 16.109(a) applies, he simply ignores its express language and arrogates to himself the invented authority to issue and enforce the very kind of order that Section 16.109(a) bars him from issuing.

Moreover, Santa Monica has not been afforded the required opportunity for a hearing and the Acting Director has not been put to his burden of proving to the hearing officer that there has been a violation. Finally, the Associate Administrator has not reviewed that record and made the final agency decision and order finding that a violation has occurred and directing enforcement actions. Accordingly, by the express terms of the FAA's regulations applicable to this proceeding, there is no legal authority or basis for the Acting Director to have issued an immediately enforceable interim cease and desist order.

Because the so-called Cease and Desist Order was issued in a Part 16 proceeding,⁴ the FAA is legally bound to follow its own procedures under Part 16. It has plainly failed to do so here. Accordingly, the FAA's purported Cease and Desist Order is *ultra vires* and a legal nullity.

C. None of the Statutes or Regulations Cited by the Acting Director Permit Him to Avoid Part 16's Mandatory Procedures

The Acting Director cites a number of regulations and statutes in an effort to find an escape clause from these regulations. None are availing.

First, the Acting Director cites 14 C.F.R. § 16.11, which provides general authority to issue orders and take other actions "as are necessary to fulfill the purposes of this part" Section 16.11, however, which is entitled "Expedition and other modification of process," relates only to procedural matters such as shortening and extensions of time. There is nothing in Section 16.11 authorizing the Director to issue an enforceable compliance order before any of the procedures and processes required by Part 16, have been completed. Indeed, Section 16.11(a) allows the Director to issue orders necessary to "carry out" Part 16, not to *override* its express provisions. This is seen clearly in Section 16.11(b), which *does* authorize the Director to make certain orders "notwithstanding any other provision of this part" in "circumstances [that]

⁴ The Order, like the Show Cause Order, was issued in this FAA Docket No. 16-02-08,

