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February 5, 2016

Office of the Chief Counsel
Attention: FAA Part 16 Airport Proceedings Docket
AGC-610
Federal Aviation Administration
800 Independence Ave. S.W.
Washington D.C. 20591

Re: Part 16 Complaint

Mark Smith, Kim Davidson Aviation, Inc., Bill's Air Center, Inc., Justice Aviation, Inc., National Business Aviation Association, Inc., and Aircraft Owners and Pilots Association, Inc. v. City of Santa Monica, California

Dear Sir or Madam:

Pursuant to 14 C.F.R. § 16.23, Mark Smith, Kim Davidson Aviation, Inc., Bill's Air Center, Inc., Justice Aviation, Inc., National Business Aviation Association, Inc., and Aircraft Owners and Pilots Association, Inc. (collectively "Complainants") bring this complaint against the City of Santa Monica, California (the "City"), which is the owner, operator and sponsor of Santa Monica Municipal Airport ("SMO" or the "Airport").

This complaint is based on the City's continuing failure and refusal to adhere to its federal statutory obligations, its Grant Assurances and a 1948 Instrument of Transfer, and on the specific actions and conduct alleged hereafter.

Summary

As a matter of well-established public record, the City has for many years sought to close the Airport and to convert the land it occupies to non-aeronautical uses. Unable so far to achieve this goal directly, the City has adopted a program of financially "squeezing" Airport tenants and users with the expectation that the growing expense of operating at the Airport, combined with burdensome operational and leasing restrictions, will eventually

render it unattractive to existing and prospective users, and provide an excuse for a vicious circle of further restrictions and ultimately closure. The City has done this in part by diverting millions of dollars of Airport revenue to the City's general fund, while charging Airport tenants and users excessive fees and rents to compensate for the resulting artificial Airport deficits.

Simply put, the City has created a financial structure which imposes enormous, ongoing, unsustainable – and clearly impermissible – financial burdens and deficits on the Airport, which historically has operated on a breakeven or near breakeven basis, and but for the City's actions would continue to do so today.

In particular:

- The City has diverted Airport revenues by charging the Airport principal and/or interest on purported loans from the City to the Airport without valid – or in some instances any – documentation;
- The City has diverted Airport revenues by charging interest on purported loans at rates exceeding those allowable under Federal Aviation Administration (“FAA”) policy;
- The City has diverted Airport revenues by charging the Airport for purported loans made more than 6 years prior to claimed loan documentation;
- The City has imposed excessive and unreasonable landing fees on both based and transient aircraft, calculated on the basis of an improper methodology, impermissible expense charges and other unallowable or inadequately documented costs;
- The City's landing fees were adopted without reasonable notice to Airport tenants and users or an opportunity for informed comment;
- The landing fees imposed by the City have resulted, and will continue to result, in the accumulation of impermissible revenue surpluses;
- The landing fees also are facially unreasonable, and for some tenants have the practical effect of double-charging them for services already paid for by other means;
- The City has allowed, and continues to allow, Santa Monica College, a non-aeronautical Airport tenant, to pay substantially less than fair market rent for the use of aeronautical property;

- The City has established – at most – short-term leases of less than three years’ duration for commercial aeronautical tenants, without any cognizable justification;
- The City has denied new leases and imposed month-to-month lease terms on certain commercial aeronautical Airport tenants, also without any cognizable justification; and
- The City has unreasonably delayed all aeronautical lease policies, proposals, negotiations, documentation and approvals, leaving the Airport’s aeronautical businesses without any leases since July 2015.

All communications with respect to this complaint should be addressed to Richard K. Simon, 1700 Decker School Lane, Malibu, CA 90265; (310) 503-7286; rsimon3@verizon.net.

Complainants

1. Mark Smith is a pilot and owner of a Mooney 231 aircraft based in a City-leased hangar. He has been an Airport tenant since 1997 and flies frequently, paying landing fees as required by the City.

2. Kim Davidson Aviation, Inc. (“Kim Davidson Aviation”), a California corporation, is an FAA certified Repair Station and a factory authorized Cirrus Aircraft service center located on the south side of the Airport in the so-called “western parcel.”¹ It has been an Airport tenant since 1982, employing a staff of eleven, and is a sub-tenant of Krueger Aviation, a multi-year lessee which has been offered no new lease since June 30, 2015. Accordingly, Kim Davidson Aviation remains on a month-to-month holdover tenancy.

3. Bill’s Air Center, Inc. (“Bill’s Air Center”) is a California corporation, which has operated an aircraft inspection and repair facility on the south side of the Airport, in the so-called “main parcel,” since 1989. It is a tenant of the City. Until March 2014, it had a multi-year lease; since then, the City has refused to offer any new lease terms, and it remains on month-to-month holdover.

4. Justice Aviation, Inc. (“Justice Aviation”), a California corporation, is a full service flight school and aircraft rental facility located on the south side of SMO, also in the so-called “western parcel.” An Airport tenant for 23 years, Justice Aviation currently

¹ As more particularly alleged in ¶ 144(f), *infra*, the “western parcel” is a designation adopted by the City to describe a portion of the property underlying the Airport’s airfield which was, in part, the subject of a 1949 deed between the federal government and the City. The balance of the Airport property is, in the City’s parlance, the “main parcel.”

employs eight flight instructors and maintains between nine and eleven instruction and rental aircraft. Justice Aviation's multi-year lease ended on June 30, 2015 and the City has refused to provide any new lease terms; accordingly, Justice Aviation remains a month-to-month holdover tenant. At the time of this Complaint, the City has refused to accept a rent check from Justice Aviation, stating that the City intends to evict Justice Aviation, but has explicitly refused to provide a reason for its action; only that as owner of the Airport, it can do so.

5. The National Business Aviation Association, Inc. ("NBAA") is a District of Columbia corporation that is the leading voice for companies that operate aircraft in support of their business or are otherwise involved in business aviation. NBAA regularly acts as a spokesperson for business aviation before the U.S. government and in court cases and administrative proceedings, including prior disputes regarding the City. NBAA's membership includes more than 10,000 companies that operate aircraft in connection with their business or are otherwise involved in business aviation, and thus can or do make use of SMO, including but not limited to Complainant Kim Davidson Aviation. NBAA acts as its representative in this proceeding, consistent with FAA precedent. *See, e.g., Bombardier Aerospace Corp. v. City of Santa Monica*, Docket No. 16-03-11, Director's Determination, at 1 n.1 and 22 (January 3, 2005).

6. The Aircraft Owners and Pilots Association, Inc. ("AOPA") is an independent, not-for-profit education and advocacy association incorporated in New Jersey and headquartered in Frederick, Maryland. AOPA is the world's largest aviation membership association, representing approximately 370,000 pilots who fly for personal and business reasons. More than 6,000 of its members are within a 25-mile radius of the City, and many of those members base their aircraft at the Airport, including, but not limited to, Complainant Mark Smith. AOPA acts as his representative in this proceeding consistent with FAA precedent. *See, e.g., id.*

Subject of the Complaint

7. The Airport is a public-use reliever facility, owned and operated by the City, at which approximately 300 general aviation aircraft are based and approximately 85,000 operations are conducted each year.

8. The City is a recipient of Airport Improvement Program ("AIP") grant funds by and through the Federal Aviation Administration ("FAA"), including \$9.7 million that

was disbursed through 2003, and remains obligated under the terms and covenants that have accompanied those grants (the “Grant Assurances”).²

9. The City is also a party to an Instrument of Transfer (“IOT”), dated August 10, 1948, by which SMO was transferred to the City by the United States War Assets Administration, and is obligated under the terms and covenants of that IOT.

10. The names and addresses of the responsible persons at the City are: Rick Cole, City Manager, 1685 Main Street, Room 209, Santa Monica, CA 90401; Marsha Jones Moutrie, Esq., City Attorney, 1685 Main Street, Room 310, Santa Monica, CA 90401; Martin Pastucha, Director of Public Works, 1685 Main Street, Room 116, Santa Monica, CA 90401; Nelson Hernandez, Senior Advisor to the City Manager on Airport Affairs, Airport Administration Building, 3223 Donald Douglas Loop South, Santa Monica, CA 90405; and Stelios Makrides, Airport Manager, Airport Administration Building, 3223 Donald Douglas Loop South, Santa Monica, CA 90405.

Background

11. The following is a summary of the circumstances leading up to the current actions of the City, which are the subject of this Complaint. The City’s consistent conduct and expressed intentions over the past several decades, reaffirmed in recent months, are particularly relevant to consideration of the City’s ongoing violations of its federal obligations, to the likelihood of future compliance and to the specific relief sought by Complainants.

The City’s Continuing Rejection of its Federal Obligations

12. The City and its elected officials are of the view, and have repeatedly stated as a matter of policy: that the City is a special place which is entitled to be free from all “adverse” impacts of airport ownership; that those impacts are uniquely burdensome to the City, and are unlike those affecting other airports and airport environs; that the City, as the owner of the Airport, is entitled to exercise unbridled control over the nature and use of that facility and its underlying property; that the City’s federal contractual obligations have been exhausted or are otherwise not binding upon it; that the FAA must treat SMO in a manner different from other urban airports; and that the FAA has been derelict and/or obstructive in that regard.

² On December 4, 2015, the FAA issued a Director’s Determination in Docket No. 16-14-04 which confirmed its prior guidance that the majority of the assurances are effective at SMO through 2023. But the prohibition on revenue diversion – which is at the core of this complaint – is effective so long as SMO is operated as a public use airport. *See* FAA Order 5190.6B, § 4.3.

13. These contentions have been adopted as City policy, and were reiterated by then City Mayor Kevin McKeown at a meeting with representatives of the FAA and others on July 8, 2015:

Aircraft operations from Santa Monica, located amidst dense residential neighborhoods, rain not only pollution but unacceptable levels of noise on many thousands of households.^[3] Such noise is far from just an annoyance. Medical evidence shows that intermittent loud noise at this level and intensity is a trigger for significant stress, making it a real health threat.

* * *

With the expiration of the 1984 Agreement, Santa Monica now demands that you stop evading responsibility for the airport. All complaints and even lawsuits have been directed at Santa Monica, but it is you, the FAA, who have kept us from responding to legitimate concerns.

We elected officials in Santa Monica, and our staff, have patiently attempted to work with your agency for many years. At every turn, you have blocked our attempts to guarantee our residents and our neighbors what they deserve: safety, clean air, good health, and protection from an outmoded, unsafe facility that degrades their quality of life.

* * *

Yes, we do own and operate the airport. And I'm here to let you know that Santa Monica, freed of the 1984 Agreement, is prepared to act on the rights we have as owners of the land and operator of the airport.

* * *

As Mayor, with the concurrence of our City Council, based on our voters' approval of local control under overwhelmingly passed ballot measure LC, I am fully prepared to proceed with our new concept plan for the airport land. You should either help us with this process, or forthrightly tell us that you won't. Our city, our residents, and our neighbors pose one simple question: Whose side are you on?

³ Actual noise from SMO is negligible. As reported on the City's Airport website, for the most recent annual noise analysis, the 60 dB CNEL contour is almost entirely on Airport property, and noise recorded at six remote monitoring sites was barely, if at all, above the community ambient.

We will fight to protect our residents. The FAA, so far, fights to protect corporate aviation interests. We have no choice but to continue fighting for our land and our residents. We will not be denied. We will not stop. And we truly believe that ultimately, we will prevail. We have come to you here in Washington to make our case, but we will leave to make a new future, for our land and our community.

Ex. 1.

14. Mayor McKeown reiterated the City's intent to "take back" and close the Airport in an August 24, 2015 press release, as reported in the press:

"This unexplained further delay [in issuing a Director's Determination in FAA Docket No. 16-04-04] has no apparent excuse, and just underscores the difficulty we have had in getting the FAA to work with us in good faith to determine when Santa Monica can take back legitimate control of land we unarguably own," said Mayor Kevin McKeown in a statement. "The City Council is fully aware of and totally honors the direction given us by voters last year with Measure LC. We will seek legal advice and, when the Council as a whole can meet on this matter, determine if and how this changes our committed course of action toward control and potential closure."

Ex. 2 (emphasis supplied).

15. Most recently, on December 4, 2015, the City notified Airport FBOs that they would be required to immediately evaluate and possibly remediate fueling facilities in preparation for Airport closure. As further described by the Mayor:

We have begun the process of cleaning up the damage to our land while it has been in airport use, to prepare it for community use, such as parks, public open spaces, public recreational facilities, culture, arts and education uses.

Ex. 3.

16. This "process" includes City Council examination of restrictions on fuel sales and "implementing security measures to make airport travel less convenient and reducing the hours of operation of the FBOs which service aircraft. These are steps that should fall

under the purview of our proprietor's powers while we pursue the end game of local control in the courts." **Ex. 4.**⁴

17. The Mayor's depiction of City victimization and special entitlement, as well as the City's intent to close SMO, are not new. They have in fact been the foundation for decades of City actions and decisions, all of which have been, and remain, inconsistent with the City's responsibilities and legal obligations as an airport sponsor and operator.

18. The City's position is not the product of ignorance; the City has had ample opportunity over the decades to inform itself – and in fact has been informed by the courts, the FAA and its own counsel – as to its rights and obligations as an airport sponsor. Nor is it mere political rhetoric. The City's contention that its ownership of SMO gives it entitlements and privileges not afforded other airport sponsors – including the unilateral right to close the Airport – underlies its past and ongoing efforts to achieve that long-term end, and in the short term to restrict Airport operations. It also underlies the actions which are the subject of this complaint. As the Mayor has made abundantly clear, neither the City's position nor its behavior will change going forward without meaningful intervention by the FAA.

Past City Actions

19. From at least the 1960s, and continuing through the present, the City has unwaveringly sought to close SMO, and has candidly acknowledged that closure was and remains its primary objective. This objective was formalized by the Santa Monica City Council's (the "City Council") adoption in 1981 of Resolution No. 6296, which provided, in pertinent part:

It is the policy of the City of Santa Monica to effect the closure of the Santa Monica Municipal Airport as soon as possible and to devote the property on which it is located to its highest and best use, consistent with the needs of the City for a continuous base of revenue, for provision of affordable housing, for parks and open space, and for an environment consistent with the City's generally residential character.

Ex. 6.

20. In 1962, the City Council requested an opinion from the Santa Monica City Attorney as to whether the City could unilaterally "abandon the use of [SMO] as an airport." The City Attorney opined that it could not. **Ex. 7.**

⁴ The specific City Council directives to staff are summarized in **Exhibit 5, pp. 16-18.**

21. In 1975, the City posed the same question to the California Attorney General, who also opined that the City's federal obligations precluded such an action. 58 Ops. Cal. Atty. Gen. 345 (May 30, 1975).

22. Prevented from closing the Airport by federal obligations and regulations, as enforced by the FAA and the courts, the City turned instead to measures to restrict operations of jet aircraft, flight schools and other airport businesses and users.

23. In 1977-1978, the City adopted a series of ordinances designed to limit operations at the Airport, including one which simply banned all jet aircraft operations. That ordinance was stricken as unconstitutional by a federal District Court in *Santa Monica Airport Association v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd* 659 F.2d 100 (9th Cir. 1981).

24. In March 1982, the City began to implement Resolution No. 6296 by issuing Notices of Termination of leases to Airport tenants, including Fixed Base Operators ("FBOs"). Several tenants filed lawsuits, and the City Council was eventually forced to rescind the terminations. *See, e.g., Ex. 8*. The City nevertheless remained adamant that its goal was closure. As stated by then-City Attorney Robert Myers:

They [the City Council] would like to close the airport at the earliest possible time. The earliest possible time may be 2015 and it may be earlier than 2015.

Id.

25. In 1984, as a result of the tenant lawsuits, and following extensive negotiations, the City and the FAA entered into an agreement (the "1984 Agreement") which, *inter alia*, obligated the City to maintain the Airport through July 1, 2015. **Ex. 9**.

26. As alluded to in the comments of Mayor McKeown, *supra*, the City has taken the position that it is not obligated to maintain the Airport once the 1984 Agreement has expired. This position was stated formally in the City's portion of the Joint Rule 26 Report of Early Meeting of Counsel filed on January 16, 2014 in *City of Santa Monica v. United States of America, et al.* (C.D.Cal. No. 13-8046):

A 1984 Settlement Agreement with the Federal Government confirms that the City's obligation to operate the Airport Property as an airport will end in July of 2015.⁵

⁵ This contention was firmly rejected by Judge Walter in his February 13, 2014 Order Granting Defendants' Motion to Dismiss (at 13). *See also* footnote 2.

27. Under the 1984 Agreement, principal aeronautical facilities were to be relocated and consolidated on the north side of the Airport. By 1990, two full-service FBOs had been developed and opened north of the runways offering ramps, hangars, service and fuel for both jet and piston aircraft.

Post-1984 Actions

28. Following the opening of the north-side FBOs in 1990, in disregard of the intent of both the 1984 Agreement and the IOT that the City operate the Airport for the use and benefit of the public in a non-discriminatory manner, the City began to take steps to limit the actual utilization of those FBOs and to restrict Airport operations generally, with particular emphasis on limiting jet activity.

29. As an example, in the fall of 1994, Krueger Aviation (“Krueger”), an existing Airport tenant, began negotiations with the City to take over its neighboring FBO, California Aviation, which had gone out of business. California Aviation had provided both Jet A and avgas fuel. After several months of negotiations, the City tendered Krueger a draft lease that restricted fuel sales to avgas, precluding sales to either jet or turboprop aircraft. City representatives explained to Krueger that the Airport’s neighbors were upset over jet noise, a justification confirmed by Krueger declining to accept this restriction, which made the proposed lease uneconomic for it. The facility was instead acquired and is currently operated by American Flyers, which accepted the City’s fueling restriction, despite its non-compliance, and dispenses only avgas.

30. The Santa Monica Airport Commission (“Commission”) was established as an advisory board for the City Council. Beginning in the early 1990s, the City Council: a) selected only anti-Airport advocates to sit on the five-person board of the Commission, b) directed the Commission to review all Airport Commercial Operating Permits (“COPs”), which were required of all Airport businesses, and to recommend acceptance or rejection thereof to the City Council and c) rubber-stamped all such recommendations, thereby effectively empowering the Commission with decision-making authority over Airport businesses and operations.

31. The COP process has since been repeatedly utilized by the Commission and the City to restrict the types of business and operations allowed at the Airport, and in particular to bar or limit jet operations.

32. As intended, the City’s COP decisions have discouraged prospective Airport tenants, including those operating jet aircraft, from locating at the Airport.

33. In July 2002, the Commission recommended to the City Council that it adopt an ordinance prohibiting Category C and D (jet) aircraft from operating at the Airport (the “C/D ban”). *In the Matter of Compliance with Federal Obligations by the City of Santa Monica, California*, FAA Docket 16-02-08, Director’s Determination, at 4 (May 27, 2008).

34. In October 2002, the FAA issued a Notice of Investigation regarding the proposed C/D ban, and extended negotiations between the FAA and the City ensued. *Id.* at 5.

35. In June 2003, while discussions with the FAA were ongoing, the City Council adopted an ordinance imposing a landing fee only on aircraft weighing 10,000 pounds or more. The Ordinance was challenged in a Part 16 Complaint (*Bombardier Aerospace Corp. v. City of Santa Monica*, FAA Docket No. 16-03-11), and in a Director’s Determination, dated January 3, 2005, was found to violate Grant Assurances 22 and 23, as well as the IOT and the 1984 Agreement. The City thereafter rescinded the landing fee ordinance.

36. In March 2008, over the objections of the FAA, the City Council formally adopted the C/D ban ordinance. The C/D ban was challenged, first before a federal District Court which granted an injunction barring its implementation, then in an FAA-initiated Part 16 proceeding (FAA Docket No. 16-02-08). The FAA found, in a Director’s Determination, Hearing Officer’s Determination and Final Decision that the City’s ban violated Grant Assurance 22. In 2011, the FAA’s Final Decision was affirmed by a federal Court of Appeals in *City of Santa Monica v. Federal Aviation Administration*, 631 F.3d 550 (D.C. Cir. 2011).

37. In 2011, the City commenced a “visioning” process to consider the future of the Airport, predicated on the assumption that some or all of the Airport could be decommissioned after the expiration of the 1984 Settlement Agreement on July 1, 2015. **Ex. 10.**

The City’s Continuing Implementation of Its Closure Agenda

38. The City’s efforts to close the Airport and to avoid its federal obligations have continued. In October 2013, the City filed a federal court action, *City of Santa Monica v. United States, et al.* (C.D.Cal. No. 13-8046), in which it asserted that it is not bound by the provisions of the IOT. The City is currently appealing an adverse District Court decision (2014 WL 1348499, February 13, 2014) – holding that the claim is untimely – to the Ninth Circuit Court of Appeals (No. 14-55583).

39. More recently, with all Airport leases expiring on July 1, 2015 (*see* ¶ 142, *infra*), the City allowed at least one full-service FBO to remain on a short-term holdover only if it agreed, as it was forced to do, **to waive any right to challenge City conduct**

before the FAA. Exs. 11a, ¶ 6 and 11b, ¶ 6. While not a subject of the current Complaint, this kind of bullying and intimidation is characteristic of the City's continuing disregard of its obligation as an airport sponsor to deal fairly and reasonably with tenants and users, as more fully alleged hereafter. It is also itself a facial violation of the Grant Assurances. See *Maxim United v. Board of County Commissioners*, Director's Determination, No. 16-01-10, at 18 (April 2, 2002) ("[t]he Respondent cannot avoid its Federal obligation by securing an agreement to the contrary from the tenant, when that agreement is required as a condition of reasonable access to the airport.").

Moreover, the City has continued to confirm that its specific desire and intent is to shutter SMO. In its January 8, 2016 appeal of the FAA's recent Director's Determination in docket No. 16-14-04, Santa Monica re-asserted its "long-expressed policy to seek closure of the airport." And in a "State of the City" presentation given to the Santa Monica Chamber of Commerce on January 28, 2016, the City Manager stated: "The Council's next strategic goal is local control of our airport. ... Santa Monica voters have spoken and we will assert local control and we will re-use those buildings and hangars for creative business uses and will generate the revenue we need to build a great park." See <https://youtu.be/GCcsDXSFGNQ> at 23:15.

40.

41. And, as alleged in ¶ 4, the City now has announced its intention to evict Justice Aviation, the oldest of the few flight schools operating at the Airport, with no cause or even an explanation.

42. In sum, the City has expended enormous amounts of time, money and other City and Airport resources over the past decades, and has adopted a variety of legal and political strategies, all to avoid or negate its federal obligations as an airport sponsor and to advance its unwavering commitment to closing SMO. As alleged hereafter, it continues on the same path today, and there is no reason to believe that it will not remain on that path in the future.

The Present Violations

I. The City Has Knowingly Diverted Airport Revenues by Charging the Airport for Questionable and Improperly Documented Loans

43. The City contends that the Airport is currently indebted to it in the amount of approximately \$16 million. **Ex. 12.** A significant portion of this amount bears interest, which has been paid annually by the Airport to the City's general fund. As alleged hereafter, both the underlying documentation and the interest computations for these loans are inconsistent with federal requirements. These deficiencies have resulted in ongoing

revenue diversion and are violations of statute (49 U.S.C. § 47133), the City's Grant Assurances (No. 25), and its deed-based obligations.

A. The City Loans

44. The City's records concerning its purported Airport loans are far from clear or consistent, but an Airport loan summary, entitled "Advances from the City to the Airport" (the "City Loan Summary"), provided by the City in response to a 2013 Public Records Act ("PRA") request on behalf of NBAA, **Ex. 13**, identifies the following advances from the City's general fund to the Airport:

| | |
|--------------|--------------------------|
| FY 1987 – 88 | \$575,000 |
| FY 1988 – 89 | \$1,035,200 |
| FY 1989 – 90 | \$ 857,236 |
| FY 1993 – 94 | \$1,889,322 |
| FY 1998 – 99 | \$2,000,000 |
| FY 2002 – 03 | \$414,155 |
| FY 2004 – 05 | \$2,839,575 |
| FY 2006 – 07 | \$115,000 |
| FY 2008 – 09 | \$400,000 |
| FY 2011 – 12 | \$3,309,648 ⁶ |

B. Deficient, Missing and Questionable Loan Documentation

45. Section V.A.4.a of the FAA's Policies and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696 (the "Revenue Policy") requires that a loan from an airport sponsor to its airport be "clearly documented as an interest-bearing loan at the time it was made" (emphasis supplied). The Revenue Policy and 49 U.S.C § 47107(*l*) also provide that "[a]n airport owner or operator can seek reimbursement of contributed funds only if the request is made within 6 years of the date the contribution took place" (emphasis supplied). Most of the City's loans violate one or both of these provisions.

46. The City's loans were documented by the City in two sets of ostensible loan agreements, attached hereto as **Exhibits 15 (a-g) and 16 (a-d)**.

⁶ City documents also indicate that an additional advance of \$89,444 was anticipated for FY 2014-15, but it is not evident whether that actually occurred. *See, e.g., Ex. 14.*

1. FY 1987-88 – FY 2004-05

47. The first loan-related exhibit, **Exhibit 15**, comprises seven documents, each entitled “Interfund Loan/Grant Agreement,” purporting to cover loans through fiscal year 2004-05 – a total, based upon the figures used in the City Loan Summary (**Ex. 13**), of \$9,610,488.

48. Each of these documents is manifestly insufficient to support the subject loans:

- a) Two of the “agreements,” identifying purported loans of \$2,000,000 effective December 1, 1999, and \$414,154 effective January 1, 2002, contain no signatures, no interest rates, and no substantive terms. **Exs. 15 e and f**.
- b) The other five “agreements” comprising Exhibit 15, **Exs. 15 a-d and g**, all bear identical City signatures dated in June 2005 and August 2005 for loans purportedly made in June 1988, March 1989, April 1990, June 1994 and November 2004. In addition to the obvious post-dating, these documents also contain no interest rates or substantive provisions.
- c) It is not clear whether there is any loan documentation at all for the advance of \$1,889,322 identified in the City Loan Summary as having been made in June of 1994; no loan instrument reflects this amount.

2. FY 2005-06 – FY 2012-13

49. The four documents in the second loan-related exhibit, **Exhibit 16**, appear to be more formal agreements. They include terms and interest rates. Importantly, the most recent of these also incorporate, and by their terms operate to “supersede,” the earlier (FY 1987-88 – FY 2005-06), deficient loan documentation.

- a) **Exhibit 16 a**, an Interfund Loan Agreement, which is undated but executed in June and July 2005 (the “June 2005 Interfund Loan Agreement”), is for the amount of \$2,414,000, which “the City’s General Fund (01) shall advance . . .” (emphasis supplied). This is in direct conflict with **Exhibits 15 e and f**, as well as with the City’s Loan Summary (**Ex. 13**), all of which identify the amounts of \$2,000,000 and \$414,154 as having been advanced years earlier, in 1999 and 2002 respectively.
- b) In **Exhibit 16 b**, the next Interfund Loan Agreement executed in July 2009, but effective July 1, 2008, the City apparently attempted to address the inadequacy of its earlier loan documentation by “bundling” a portion of its earlier loans together with a new advance of \$400,000. It provides:

This Agreement sets forth the terms under which the City advances certain funds to the Airport and the terms under which the Airport will repay the City and supersedes agreements entered into prior to July 1, 2008, relating to an installment made in November 2004 totaling \$2,839,729 and an installment made in June 2005 totaling \$2,414,000.

The only agreement relating to the first amount of \$2,839,729 is **Exhibit 15 g**, which identifies a loan date of November 30, 2004, is retroactively signed (respectively on June 23, 2005, June 25, 2005, and August 3, 2005) and identifies no interest charge or rate. **Exhibit 16 b** thus: is executed in 2009; effective in 2008; and purports to charge interest on a 2004 loan for which no interest was charged in the applicable 2005 loan agreement.

As previously alleged, the second amount of \$2,414,000 identified in **Exhibit 16 b** is the subject of conflicting documentation.

- c) **Exhibit 16 c**, an Interfund Loan Agreement effective July 1, 2011, but executed more than a year later in October 2012, not only incorporates the more recent loans identified in **Exhibits 16 a and b**, but “advances totaling \$3,745,759 made prior to June 30, 1999” (emphasis supplied). It also changes the interest rate on the entire post-1999 loan balance to 7.5%. (It is not clear if **Exhibit 16 c** is itself intended as a new loan agreement. It does not identify any new loan directly, but simply describes the total loan balance “after an additional advance of \$3,309,648.” The date of that purported advance is unknown.)
- d) **Exhibit 16 d**, an Interfund Loan Agreement effective July 1, 2012 but, as with the other agreements, executed months later in March 2013, incorporates and changes the interest rate again on the entire post-1999 loan balance to 5.4%.

50. None of the documents in either **Exhibit 15** or **Exhibit 16** meets the requirements of Revenue Policy § V.A.4.a that loans from an airport sponsor to its airport be “clearly documented as an interest-bearing loan at the time it was made” (emphasis supplied). In fact, the loan agreements comprising **Exhibit 16** appear to be little more than post-facto fig leaves created by City in a flawed attempt to make up for the lack of contemporaneous documentation of earlier purported loans. Indeed, given the dubious and inconsistent documentation, it may even be reasonable to question whether those earlier loans were ever actually made to the Airport.

51. The **Exhibit 16** loan agreements also clearly violate the requirement of the Revenue Policy (§ V.A.4) and 49 U.S.C. § 47107(*I*) that “[a]n airport owner or operator can

seek reimbursement of contributed funds only if the request is made within 6 years of the date the contribution took place,” because they purport to memorialize otherwise-undocumented or inadequately documented loans entered into more than 6 years earlier.⁷

52. Moreover, it appears that the City continues to maintain the principal obligations of the early, insufficiently documented loans on the Airport’s books. While **Exhibit 16 b** as of April 1, 2009 incorporates only the two (questionable) loans described in ¶ 49(b), totaling \$5,653,729, beginning in 2012 the total loan balance, as described in **Exhibit 16 c**, rises to \$9,589,280, a figure which does not include an additional \$3,745,759 of pre-June 1999 loans. Although **Exhibits 16 c and d** both provide (retroactively) that that \$3,745,759 amount will not bear interest, those loan agreements are silent on the subject of principal repayment. Presumably, there would be no purpose in maintaining a loan balance on the Airport and City books unless eventual repayment was intended – but such repayment on pre-June 1999 loans would clearly be barred under the 6-year statute of limitations on loan reimbursement, and in any case, the issue is ripe for resolution at this time, given its recurring and ongoing consequences for the Airport’s finances.

53. The same statute of limitations problem is applicable to principal balances existing prior to the date of **Exhibit 16 c**. The actual amount of those balances depends on whether the 6-year limitation period runs back from the ostensible date of that agreement – July 1, 2011 – or from the first signature date it bears, October 10, 2012. Given the City’s habitual backdating of its loan agreements, as previously alleged, Complainants believe that only the latter date has any possible credibility and should be used. Accordingly, the principal balances purportedly incurred between fiscal years 1987-88 and 2004-05, identified in ¶ 44, exceed the 6-year statute of limitations and cannot be valid Airport obligations.

54. In sum, given the City’s deficient loan documentation, Complainants believe that only as to the \$3,309,648 loan referred to in **Exhibit 16 c** and ¶ 49(c) could the City argue that it established a valid obligation of the Airport, within the 6-year window of the Revenue Policy and 49 U.S.C § 47107(I) – but even this agreement lacks contemporaneous documentation, having been executed more than a year after its effective date, and, as noted in ¶ 49(c), may not be sufficient to establish the purported obligation.

55. Moreover, as is more fully alleged hereafter, Airport budget documents for the period of the purported loans fail to reflect any of the foregoing loans or payment

⁷ To the extent that a 6-year statute of limitation also applies to the recovery of diverted revenue, *see* 49 U.S.C. § 47107(m)(7), Complainants understand that it does not allow the Airport to continue to make payments of interest and/or principal on facially invalid loans, even if the loan was incurred more than 6 years ago.

obligations. Neither do the City's own budgets prior to 2013, which identify only modest interfund transfers from the Airport fund to the City general fund. A representative example is **Exhibit 17** (identifying \$294,330 in debt service for both interest payments to the City and payments on bonds and loans to the California Department of Transportation).

56. In 2011, the City engaged HR&A Advisors, Inc. ("HR&A") to conduct an analysis of the Airport's economic impacts. The resulting study ("Santa Monica Airport Campus – Current Economic and Fiscal Impacts in the City of Santa Monica"), **Exhibit 18**, evaluated, among other elements, "Santa Monica Airport Campus Fiscal Impacts on the City Budget." The Study found that in fiscal year 2010-11, "the Airport Campus generated enough revenue to offset nearly all operating costs." *Id.* at 27. Again, no interfund loan obligations or payments were identified.

C. **The Illegal Interest Rates**

57. The FAA's Revenue Policy, § V.A.4.a, establishes the basis upon which a sponsor may charge interest on loans to an airport it owns:

Interest should not exceed a rate which the sponsor received for other investments for that period of time.

Similarly, FAA Order 5190.6B, at § 15.9(c), provides:

The interest rate may not exceed the interest rate on the sponsor's other investments for that time period.

58. The City was aware of this policy. Specifically, **Exhibit 16 a**, the June 2005 Interfund Loan Agreement, provides:

Interest: Interest on the Loan will be calculated on an annual basis at the same rate of interest earned by the City on its investment portfolio.

59. Despite the FAA's interest rate policy, and the City's knowledge thereof, the City has in fact charged, and received from the Airport, interest based on rates substantially in excess of those earned by its own investments.

60. In **Exhibits 16 c** and **d**, the City represents that it is not charging interest on loan balances prior to June 30, 1999. Because the City's loan documents are inconsistent with respect to the dates advances were supposedly made, it is not clear whether interest has in fact been charged on that balance. However, under the June 2005 Interfund Loan Agreement, **Exhibit 16 a**, interest on the \$2,414,000 – although clearly not advanced at that time, but as early as FY 1998-99 (**Ex. 13**) – was properly set based on the City's own

investment earnings. This was then changed in the 2009, 2012 and 2013 agreements, **Exhibits 16 b, c, and d**, to 8%, 7.5% and 5.4%, respectively.

61. **Exhibit 19**, a March 14, 2013 memorandum from Gigi Decavalles-Hughes, the City's Director of Finance, explains the methodology used by the City in establishing the interest rates it has actually charged the Airport:

The average of the spread of 130 basis points between a AAA tax-exempt rate of 2.9% and a BBB tax-exempt rate of 4.2%, and 380 bps between a 30 yr US Treasury taxable rate of 2.9% and a 20 year BBB corporate bond of 6.7%, the average spread is approximately 250 bps. Taking these factors into consideration, we've applied the average spread of 250 basis points, to the AAA rate, to reach an interest amount of 5.4%.

This method does not consider, much less comport with, the requirements of the Revenue Policy.⁸

62. In fact, throughout the time period of the City loans, the City's own investments have earned far less than the amounts charged to the Airport. For example, **Exhibit 21 e** – excerpts from the City's Comprehensive Annual Financial Report ("CAFR") dated June 30, 2012 – shows that in fiscal year 2011-12, at the time it documented the new loan of \$3,309,648 at an interest rate of 7.5% (as seen in **Exhibit 15 d**), the City earned \$6,917,052 on invested funds of \$766,036,731, or 0.90%. In fiscal year 2012-13, when the interest rate on Airport Fund loans was reduced to 5.4%, the City's CAFR reported that it earned \$1,442,576 on investments of \$680,989,708, or 0.21%. **Ex. 21 f**.

63. Thus the City's Interfund Loan Agreements from 2009 forward on the one hand reset interest rates on earlier loans in excess of \$6 million to impermissibly high levels, and on the other hand charged similarly impermissible interest on new loans of more than \$4 million.

64. Because the interest rates charged by the City to the Airport and its own investment earnings during the same period, reported in the City's CAFRs,⁹ were considerably different, the Airport paid excessive interest to the City, assuming the

⁸ In an earlier, August 3, 2012 email, the City Finance Department described two different methodologies for computing interest on the Airport loans: "The rate of 8% established in FY 08/09 was consistent with the rate of interest charged residents for street assessments. In FY 11/12, GF [General Fund] and Airport staff agreed to reduce the interest rate to 7.5%, to reflect the rate of interest applied by CalPERS to payments against the City's unfunded PERS liability." **Ex. 20**. These methodologies are equally non-compliant with FAA's requirements.

⁹ Relevant pages from the CAFRs for the fiscal years 2008-09 through 2013-14 are **Exhibits 21 a-g**.

predicate validity of those loans. The following table sets forth the two sets of interest rates, the annual payments of interest recorded by the city in its CAFRs, and what the annual interest payments should have been if the rates earned by the City on its investments had been applied instead:

| <u>Fiscal Year</u> | <u>Interest Rate Charged to Airport¹⁰</u> | <u>Rate of Return on City Investments¹¹</u> | <u>Airport Interest Payments¹²</u> | <u>Adjusted Airport Interest Payments</u> |
|--------------------|--|--|---|---|
| 2008-09 | 8.0% | 3.15% | \$432,773 | \$170,404 |
| 2009-10 | 8.0% | 2.09% | \$455,283 | \$188,943 |
| 2010-11 | 8.0% | 1.24% | \$453,792 | \$70,338 |
| 2011-12 | 7.5% | 0.90% | \$486,954 | \$58,434 |
| 2012-13 | 5.4% | 0.21% | \$488,681 | \$19,004 |
| 2013-14 | 5.4% | 1.35% | \$530,170 | \$135,542 |

65. Based upon the adjusted interest payments, over a 6-year period the Airport was overcharged by the City for interest in the amount of at least \$2,278,008, assuming the underlying validity of the subject loans and that the City is entitled to any interest at all.

D. The City’s Land Swap Compounds its Improper Loan Activity

66. On July 1, 2015, the City completed an exchange of land among itself Santa Monica College (“SMC”) and the Exposition Metro Line Construction Authority, by which, in substance, the City leased to SMC a 2.71 acre portion of income-generating Airport property (the “Airport Parcel”) for no cost in exchange for the City’s no-cost lease from SMC

¹⁰ Ex. 16 b-d.

¹¹ Ex. 21 b-g (comparing annual investment earnings as reported in CAFRs against annual investment holdings, including common stock, as also reported in CAFRs).

¹² Ex. 21 b-g. A separate document produced by the City in response to a PRA request, Ex. 22, includes slightly higher figures for interest due for these fiscal years (totaling \$2,867,843) – but a significantly different figure for interest actually paid by the Airport (totaling \$1,241,849). There is no explanation for these differing figures, but the City’s CAFRs are stated to have been prepared according to generally accepted accounting principles, and are attested to by an independent auditor, and thus should be considered definitive.

of certain non-Airport property. As described in the November 27, 2012 City Staff Report, **Exhibit 12:**

Beginning July 1, 2015, the City would no longer collect lease payments from the 38 tenants who would be displaced from [the Airport Parcel] when SMC begins its lease. These lease payments, which are counted as revenue to the Airport Fund, would have reached an annual amount of \$565,651 in FY 2014-2015. Depending on the circumstances at the time and the law that may then apply, one future option for the City may be that, if the Airport Fund has to be made whole for this loss in revenue, any lost revenue to the Airport Fund may be accounted for and recovered as part of the repayment of the loan from the General Fund to the Airport Fund, which is expected to have reached a total of over \$16 million by FY 2014-15.

67. Consistent with this Staff Report, the City in fact intends to reimburse the Airport Fund for the amount it would have received from ongoing rental of the swapped Airport Parcel and thereafter to apply that amount to credit loan interest allegedly due the City. This is confirmed in the City's fiscal year 2015-17 Proposed Biennial Budget, **Ex. 23**, which notes:

33431.409230 3400-3500 Airport Ave Reimbursement -
Reimbursement/Repayment of Airport Loan from the General Fund for lost revenue from the properties at 3400-3500 Airport Ave. due to the Expo land swap. FY 2015-16 and FY 2016-17 revenues are anticipated to be \$630,349 each fiscal year.

68. Setting aside the propriety of trading an Airport asset for non-Airport land to benefit the City,¹³ and assuming that the foregone Airport Parcel lease payments were previously at fair market value, the City's proposal to credit the equivalent of those payments against the excessive interest charged on demonstrably improper loans cannot be a legitimate use of Airport revenue. Unless the lease amounts which would have been received for the swapped Airport Parcel, as properly calculated and adjusted annually, are credited against actual Airport operating costs, or used to offset landing fees, they will constitute another continuing diversion of Airport revenue.

¹³ Although the use of Airport land to barter for off-airport land benefitting the City's other interests (here a "buffer" area for a light rail facility) is clearly questionable, the "swap" itself is not challenged in the present complaint; only the computation and use of the revenues which have been lost to the Airport is at issue.

II. The City Has Imposed Excessive and Unreasonable Landing Fees on Both Based and Transient Aircraft Using Artificial, Unsupported Numbers and Improper Accounting Methods

69. In a space of 30 days in April 2013, with virtually no opportunity for public review or input, and with constantly changing supporting materials, the City adopted a resolution nearly tripling Airport landing fees and imposing them for the first time on both based and transient aircraft. The justification for the imposition of these landing fees stems primarily from artificial Airport deficits created by the revenue diversion alleged *supra*, as well as by the additional financial manipulation described below. The landing fees are also facially unreasonable, contrary to the requirements of Grant Assurance 22.

A. The City's Adoption of New Landing Fees

70. On April 30, 2013, the City Council adopted a resolution, effective August 1, 2013, increasing the Airport landing fee from \$2.07 to \$5.48 per 1,000 pounds maximum gross landing weight ("MGLW") and applying it, for the first time, to both based and transient aircraft. **Ex. 24, pp. 2-4.**

71. In 2005, subsequent to the *Bombardier* decision (Docket No. 16-03-11), the City had implemented a flat rate landing fee of \$2.07 per thousand pounds MGLW, applicable only to transient aircraft. *Id.*

72. In May 2012, as part of the City's "visioning" process, the Airport Commission recommended that landing fees at the Airport be increased, **Ex. 25, pp. 4-5**, without any supporting financial analysis.¹⁴

73. In a memorandum dated February 25, 2013, staff of the Airport submitted a proposed budget to the Airport Commission for fiscal year 2013-14. **Ex. 26.** The accompanying executive summary stated that "[a]irport revenues are expected to exceed operational expenses for both fiscal years" (emphasis supplied). This was consistent with prior budget submissions for earlier fiscal years. It also is consistent with the October 4, 2011 economic benefit analysis performed by HR&A for the City (**Ex. 18, ¶ 56**) as part of the City's Airport "visioning process."

¹⁴ The Commission's rationale was simply the generality that "the City should, as soon as practicable, increase landing fees to cover the cost of aviation operations and maintenance of the airport property. Currently the city subsidizes aircraft operations with rents from facilities and with public funds which are not required under the Grant Assurances." **Ex. 25, p. 4.**

74. At its April 1, 2013 meeting, the Airport Commission reviewed a memorandum, dated April 1, 2013 (**Ex. 27**), and a report dated March 13, 2013 (**Ex. 28**), both prepared by the City's Department of Public Works, which purported to justify an increase in the landing fee at the Airport. The Airport Commission deferred action on the proposal until its April 22, 2013 meeting. **Ex. 29.**

75. On April 18, 2013, a meeting was held for users of the Airport at which the Department of Public Works provided a revised version of the March 13, 2013 report, dated April 17, 2013 (**Ex. 30**), and excerpts from the City's CAFRs (**Ex. 31**). Notably, the data in the two items was not consistent – for example, the latter indicated that the Airport earned approximately \$140,000 less in revenue for FY 2010-11 – FY 2012-13 than was reported by the former, but had considerably higher expenses – yet no explanation or reconciliation was provided. This was the only meeting afforded affected parties before the City Council acted on the staff proposal.

76. At its April 22, 2013 meeting, the Airport Commission again reviewed the March 13, 2013 report and an additional memorandum, but ultimately did not vote to recommend that the proposal be adopted by the City Council. **Ex. 32.**

77. At its April 30, 2013 meeting, the City Council reviewed a further memorandum, **Ex. 33, Agenda Item No. 11-A**, and a report nominally dated March 13, 2013 but incorporating the revisions from the version provided to Airport users on April 17, 2013, *id.*, **Agenda Item No. 11-A, Attachment 2**. The City Council then formally adopted the proposed resolution increasing the landing fees to \$5.48 per 1,000 pounds MGLW on both based and transient aircraft.

78. The resolution was anticipated to increase the annual collections of landing fees by about \$1.4 million, *id.*, **Agenda Item No. 11-A**, and the City subsequently has reported that figure to be accurate. **Ex. 34.** On an aircraft-by-aircraft basis, the effects are significant. For example, a Hawker 800XP, which previously would have paid no landing fee if based at the Airport, or \$45.54 if transient, now pays \$120.56 per landing. A Gulfstream IV, which previously would have paid no landing fee if based, or \$122.13 if transient, now pays \$323.32 per landing.

B. The Landing Fee Increase Was Without Economic Justification and Will Result in the Accumulation of Annual Surpluses

79. Grant Assurances 24 and 25 – together with 49 U.S.C. § 47107 and § 47133, the FAA's "Rates and Charges Policy" (78 Fed. Reg. 55330 (September 10, 2013)) and FAA Order 5190.6B – require that all revenues earned from activities on airport property,

whether from aeronautical or non-aeronautical users, must (with a few non-pertinent exceptions) be expended for airport purposes, and that airport fees must be “fair and reasonable.” They also require that an airport must endeavor to be self-sustaining.

80. A further bedrock compliance principle is that an airport cannot accumulate a substantial revenue surplus. The creation of such a surplus is strong evidence that landing fees are unreasonable in violation of Grant Assurance 24 (and revenue diversion would further be a violation of Grant Assurance 25). As the FAA has explained, airports:

[S]hould not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenue may be spent. ... [T]he progressive accumulation of substantial amounts of surplus aeronautical revenue could warrant an FAA inquiry into whether the aeronautical fees are consistent with the sponsor’s obligation to make the airport available on fair and reasonable terms.

FAA Order 5190.6B, at § 17.9.

81. Until April of 2013, there apparently was no question that the Airport was operating on a near breakeven basis, and that no additional revenue from landing fees or any other source was required. On February 25, 2013, the Airport made its annual budget submission to the Airport Commission, which indicated that in fiscal year 2013-14, revenues were expected to be \$4.4 million and expenses to be \$4.3 million. There would thus be a minimal operating surplus, projected to decrease in the following fiscal year. Operating revenue also was expected to increase from an additional land lease for a parking lot (**Ex. 32**, ¶ 73). This is a good example of the sustainability principle working well, and the numbers speak for themselves.

82. Similarly, as alleged in ¶ 56, the HR&A study (**Ex. 18**) found that the Airport revenues and expenses were closely matched, and that in addition to revenue attributable to the Airport under FAA requirements, SMO also generated \$1 million per year in additional tax and license revenues for the City’s General Fund and had a total positive economic impact on the community of \$275 million per year.

83. The reports provided to the Airport Commission (**Ex. 28**) and City Council (**Ex. 33, Agenda Item No. 11-A**) likewise suggest (most notably, if data on p. 6 and p. 9 of Attachment 2 of the latter are compared) that the overall airport revenue and overall airport expense figures were in sync. However, those reports also postulate that the airfield itself (rather than the Airport as a whole) generates considerably greater expenses than revenues, and thus argue that if the airfield is considered in isolation, an additional

approximately \$1.4 million in landing fees should be collected each year in order to erase the deficit between airfield revenues and airfield expenses.

84. The City's reasoning is flawed in several respects:

- As an initial matter, many of the key assumptions lack support, such as how the City determined what percentage of costs should be allocated to the airfield cost center and to other cost centers.¹⁵
- Further, the reports fail to count as revenues attributable to the airfield certain types of revenue that should be attributed to the airfield, such as tie-down and hangar charges; aircraft parking is defined by the FAA to be part of the airfield. *See, e.g.*, FAA Order 5190.6B, at § 12.2(b) and § 18.4(a).
- As a result, the gap between airfield expenses and airfield revenues that the reports purport to exist is exaggerated at best, and may not exist at all; it is a product of "creative accounting" by the City.

85. Moreover, the purported airfield deficit cannot be analyzed in a vacuum. Even if the City reports were presumed to be factually correct, their methodology is to isolate airfield costs; omit all revenues from non-airfield and non-aeronautical uses of the Airport; and divide the airfield costs by landing weights to determine the landing fee. This methodology treats non-airfield and non-aeronautical revenues as if they were earned on City property off the Airport, or as if they simply did not exist. But they do exist – and because of them, the Airport as a whole has been reported to be operating at breakeven, even if an airfield deficit exists on paper.

86. Analyzing the airfield in a vacuum is nothing less than a complete abandonment of the principle of sustainability. Indeed, the FAA warned Santa Monica in a prior compliance proceeding that the City must look to all sources of revenue and not just landing fees to resolve any alleged deficit; adjustments to landing fees only were deemed inappropriate because:

[T]he record contains no information, financial or otherwise, that would indicate that as part of this budgetary process, the City considered revising other airport fees to balance the deficit.

¹⁵ In response to California Public Records Act requests, the City provided only limited information about the allocations, which did not explain the underlying reasoning. **Exs. 35 a-d**. The City refused to provide further explanation, citing a deliberative process privilege, **Exhibits 36 a-d**, despite the FAA's instruction that adequate information must be provided to the public to allow the evaluation of airport fee increases. *See* 78 Fed. Reg. at 55332.

Bombardier Aerospace Corp. and Dassault Falcon Jet Corp. v. City of Santa Monica, FAA Docket No. 16-03-11, Director’s Determination, at 42-43 (January 3, 2005).

C. City Financial Documents Used to Justify the Landing Fees Are neither Transparent nor Complete

87. At the sole meeting with users of the Airport on April 18, 2013, the City attempted to “fix” the various problems in its reports by providing a second set of documents – extracts from its CAFRs – which suggested that the Airport was running a persistent overall deficit. **Ex. 32.** No effort was made to explain the different figures for the Airport in these documents in contrast to the previously-cited Airport-specific data, which told a much more favorable story about the Airport (for example, the CAFR assigns considerably higher costs for overhead, materials and supplies to the Airport than did the reports). For that reason alone, data based on the CAFRs cannot be mixed-and-matched with the different calculations in the reports to justify a landing fee increase – and to the extent that the City Council was provided with a memo that did just that (**Ex. 33, Agenda Item No. 11-A**) the inconsistent data fatally undermines its landing fee resolution.

88. In fact, none of the financial analyses provided by the City in support of the landing fees offers a consistent picture of the true financial status of the Airport or any evidence to contradict the Airport and City budgets, which reflect decades of Airport operations on a breakeven basis.

89. Page 6 of **Exhibit 28**, a statement of actual Airport expenses for fiscal years 2010-11 onward (together with budgeted future expenses) used by the City to explain the need for new landing fees, provides a useful snapshot of a basic problem with the City’s landing fee rationale. Of the line items presented, four stand out:

| | <u>FY 2010-11</u> | <u>FY 2011-12</u> | <u>FY 2012-13 (budget)</u> |
|--|-------------------|-------------------|----------------------------|
| Indirect Cost Allocation | \$799,455 | \$823,439 | \$864,611 |
| Professional Services | \$331,817 | \$441,817 | \$460,000 |
| Indirect Cost Allocation ¹⁶ | \$68,994 | \$71,064 | \$74,617 |
| Amortization charges | \$566,777 | \$745,744 | \$783,836 |

90. None of these line items has sufficient supporting documentation to determine whether the inclusion of the items in the landing fee calculations complies with

¹⁶ No explanation is provided for the two categories of Indirect Cost Allocation.

FAA policy, and yet the line items together add between one and two million dollars of annual expense to the Airport.

91. FAA Order 5190.6B, §§ 15.11 and 12 and Revenue Policy § V.B, together with Office of Management and Budget (“OMB”) Circular A-87, Attachment A, establish the standards for documentation of reimbursements made to airport sponsors for both capital and operating expenditures. Those standards require either appropriate journal and ledger entries together with supporting invoices or other corroborating evidence or audited financial statements identifying the specific expenditures.

92. None of the documents used by the City to justify the imposition of new landing fees meet these criteria.

1. Indirect Cost Reimbursement

93. FAA Order 5190.6B, §§ 15.11 and 15.12, Revenue Policy § V.B, and OMB Circular A-87, Attachment A, also establish the standards governing the allocation of indirect sponsor costs to an airport. These standards require that such costs be allocated under “a cost allocation plan” which, in substance: does not result in disproportionate allocation of general sponsor costs to the airport; uses a methodology similar to other comparable units of the sponsor; and employs proper documentation, as described in ¶ 91.

94. The City justification for the landing fee increase did not include any “cost allocation plan,” and the records it has provided, in response to PRA requests, clearly fail to meet the aforementioned standards.

95. Moreover, the City has been unable to locate any records detailing its indirect cost allocation charges to the Airport for three critical fiscal years: 2009-10, 2010-11 and 2011-12:

- a) On April 25, 2014, Airport tenant and Complainant Mark Smith served a PRA request on the City seeking, among other items, a list of all Airport indirect cost allocations from 1997 to the present. The City responded on May 15, 2014, providing a group of documents and the following explanation:

Enclosed are copies of the only lists of Indirect Costs paid from Airport account number 544340 [the Airport Fund] that the City has in response to your request.

Ex. 37 (emphasis supplied).

- b) The documents provided by the City cover fiscal years 2004–05 through 2008-09 and 2012–13. No records were provided for fiscal years 2009-10, 2010-11 or 2011-12. These were the years in which Airport expenses, including indirect costs, were used as a basis for justifying landing fees and for computing the amount of those fees.
- c) In July 7, 2014, Mr. Smith again served a PRA request on the City requesting an itemization of indirect costs charged to account number 544340. On July 16, 2014, the City responded:

The City already provided you with responsive documents in our May 15, 2014 response to your previous request. The City has no other lists responsive to your request. Please note that the City does not have a duty to create a record or provide a copy of a record if the requested record is not one that is prepared, owned, retained or used by the agency. Government Code § 6252(c).

Ex. 38 (emphasis supplied).

- d) On June 29, 2015, Mr. Smith served a new PRA request seeking additional materials, and reiterated his request for the indirect cost information not provided by the City:

12. Please provide Airport Admin Indirect FY 2010-2011. A request has been made for this several times and this data seems to still to be missing.

Ex. 39.

On July 23, 2015, the City responded:

Response to No. 12: The City has responded to your request for these records many times and has provided you with all publicly available records. No further records are available.

Ex. 40 (emphasis supplied).

96. In sum, the City is unable to support the indirect cost numbers it has used to justify the new landing fees, and these charges should be disallowed as part of the landing fee rate base.

97. Additionally, as alleged in ¶ 118, *infra*, the City's CAFRs show that indirect costs allocated to the Airport have grown significantly and inexplicably – by more than 61% between fiscal years 2006-07 and 2011-12 – and that no other City enterprise fund

bears as great a share of City indirect costs. These facts, standing alone, call into question the legitimacy of the allocation of such expenses and underscore the significance of the missing supporting materials.

2. Impermissible Legal Fees and Costs

98. As alleged in ¶ 89, it appears from City documents used to justify the August 1, 2013 increase in landing fees that, among the expenses borne by the Airport, are “Professional Services” in the amounts of \$331,817 (FY 2010-11) and \$441,817 (FY 2011-12).

99. At least a portion, and possibly all, of these charges are comprised of legal fees, which were not incurred, as required by FAA Order 5190.6B § 15.9(d), “for services in support of airport capital or operating costs that are otherwise allowable” (emphasis supplied).¹⁷

100. Over the course of several years, beginning (publicly) with the Airport Commission’s July 2002 recommendation, (*see* ¶ 33) the City developed, negotiated and litigated the C/D ban on jet aircraft, which was found by the FAA, and thereafter by a federal Court of Appeals, to violate the City’s various federal obligations.

101. The City’s ostensible justification for the ban on jet aircraft was safety, and, as the record in FAA Docket No. 16-02-08 demonstrates, this rationale was rejected by the FAA from the beginning as unfounded and unnecessary, as well as beyond the City’s authority. The FAA’s position, that the proposed ban was simply an excuse to eliminate jet aircraft operations at the Airport and was not supported by the City’s own analyses, was maintained through its negotiations with the City, through Part 16 proceedings and to the ultimate court decision, where it was found to be supported by the evidence.

102. Through the course of the C/D ban, between 2007 and 2013, the City paid its legal counsel, the firm of Kaplan, Kirsch & Rockwell, LLP a total of \$1,325,464.02. **Exs. 41-42.** At least \$648,794.76 of this amount was paid to the firm from and after December 2009.

¹⁷ A separate Part 16 proceeding, involving another airport (FAA Docket No. 16-15-08), requests that the FAA confirm that legal expenditures in defense of impermissible efforts to restrict access to an airport are not an allowable use of airport revenue. In addition to the authorities cited by the complainants thereto, *see also Office of the Inspector General Audit Report, Augusta-Richmond County Commission*, No. AV-1998-093, at 9-10 (March 12, 1998) (finding that the costs of an audit of revenue diversion at the airport could not be reimbursed from airport funds because it did not comprise an airport operating cost; the FAA concurred).

103. Additionally, a significant portion of the indirect costs that have been assessed to the Airport are for City Attorney expenditures, and appear to have been, in significant part, for the same impermissible purposes. In FY 2010-11 (e.g., during the pendency of the C/D litigation), the Airport was assessed \$480,721.56 for City Attorney expenses – in contrast, in FY 2012-13, the indirect allocation to the Airport for the City Attorney was \$187,431.45. **Ex. 43 a-b.**¹⁸

104. At no time up through and including fiscal year 2009-10 did the annual Airport budgets reflect any prospective or past payments or obligations to the City for legal fees and costs relating to the C/D ban, or any significant legal expenses of any kind.

105. Unmistakably, the City has included most, if not all, of these legal fees and costs in the “Professional Services” component of the rate base justifying the imposition of landing fees. They may appear, as well, as a basis for a portion of the loans advanced to the Airport by the City. Unfortunately, the intentional opacity of City financial documents precludes a more specific analysis, but whatever the precise amount proves to be, charging the Airport for the costs of attempting to ban Class C and D aircraft is not a permissible use of airport revenue, whether viewed as revenue diversion, as an improper component of the landing fee calculus, or both. The City must bear its own expenses for its repeated, quixotic, and unlawful efforts to restrict operations at the Airport.

3. Amortization Charges

106. Included in the landing fee rate base computation is a charge entitled “Amortization of City funded assets” in the amount of \$442,081 for FY 2013-14 (**Exhibit 33, Agenda Item No. 11-A, Attachment 2, p. 3**). This charge is purportedly supported by a summary prepared by the City entitled “Amortization Charges – Completed Capital Projects,” *id.* at p. 7, also excerpted as **Exhibit 44**, which attributes annual amortization charges to the airfield and non-airfield portions of the Airport.

107. As with other components of the landing fee rate base, these amortization numbers for FY 2013-14 are mysterious and unsupported. They cannot be reconciled with any figures in the City’s CAFRs (**Ex. 21**) or in the Airport budgets (**Ex. 45 a-c**) for that year or other years for which actual and budget data is provided in **Ex. 44** – FY 2010-11, FY

¹⁸ The City has denied public records requests for more detailed documentation of its legal expenditures, but pursuant to its obligations to the FAA, can and should be required to produce more specific records for review by the agency. *See, e.g.*, 14 C.F.R. § 16.29(b). **Ex. 36 c**; *see also* footnote 15.

2011-12 and FY 2012-13.¹⁹ Nor does the City provide an explanation as to its allocation between airfield and non-airfield capital expenditures.

108. In fact, the amortization charges appear to be no more than disguised principal payments on the City's improper loans to the Airport. No significant capital expenditures are identified in any of the Airport's annual budgets (*id.*), and it is clear, as acknowledged by the City and its consultant HR&A, that the Airport was operating on an approximately breakeven basis (**Ex. 18**; *see also* **Ex. 32**). SMO had no funds sufficient to underwrite significant capital improvements, and the HR&A analysis identified no such expenditures (**Ex. 18**). Thus it is clear that all Airport capital projects since at least 2003 were paid for by City loans, and amortization of those project costs, however calculated, necessarily becomes repayment of loan principal.

109. Moreover, as most of the identified capital projects predate the purported loan agreements by more than 6 years, it would not be acceptable accounting practice to depict such payments as amortization, and, as alleged in ¶ 49 any form of repayment of such loans, whether direct or through charges to users through landing fees, would violate the provisions of the Revenue Policy and 49 U.S.C § 47107(l).

110. Further, the addition of amortization expenses for capital expenditures incurred in years prior to the institution of the landing fee should be understood to constitute "intertemporal" discrimination between past users (i.e., that operated at the Airport when the capital expenditures were made) and current/future users of the airport (that are subject to the increased landing fees resulting, in part, from the amortization of those capital expenditures). In effect, the City is subjecting current and future users to the liability of loans made by the City to the Airport that date back to FY 1987-88 – 1998-99.

111. When any or all of the amortization payments, unsupported indirect costs, and impermissible legal fees are removed from the landing fee rate base, there is clearly no economic justification for the enormous increase in landing fees adopted by the City.

¹⁹ For example, the FY 2011-12 Airport budget estimated overall Airport capital expenditures of \$130,760, and the actual capital expenditures for that were only \$34,865 (**Ex. 45 a-b**), yet the amortization charges summary (**Ex. 45**) records capital amortization payments of \$745,744 for that fiscal year. Similarly, **Ex. 44** budgets \$783,836 in amortization payments for FY 2012-13 and forecast \$902,273 for FY 2013-14; **Ex 45 c** establishes that the actual Airport capital expenditures in those years were only \$71,387 and \$15,410, respectively.

D. The Landing Fee Will Result in an Impermissible Double Charge to Based Operators

112. Grant Assurance 22 prohibits “unjust discrimination to all types, kinds and classes of aeronautical activities.”

113. Previously, the City assessed landing fees only on transient aircraft, and exempted based aircraft. In a memorandum to the City Council, the City Attorney and Director of Public Works specifically stated that: “[t]he exemption is based on the theory that the owners of based aircraft pay rent for their use of Airport property and that their rental payments include the cost of runway usage.” **Ex. 46.**

114. By imposing landing fees on based aircraft, the landing fee resolution is inconsistent with Grant Assurance 22, as understood both by the FAA and the City’s own staff.

115. In past Part 16 proceedings, the FAA has indicated that although an airport is not inherently prohibited from imposing landing fees on both based and transient aircraft, caution must be taken to ensure that based aircraft are not effectively double-charged by having to pay both landing fees and other types of fees – such as tie-down fees, hangar leases, and fuel flowage fees. *See generally R/T-182, LLC v. Portage County Regional Airport Authority*, FAA Docket No. 16-05-14; *Wadsworth Airport Association, Inc. v. City of Wadsworth*, FAA Docket No. 16-06-14. In this case, the City adopted landing fees without any consideration of how based aircraft already contribute to the Airport – and whether the proposed landing fees would result in them being double-charged (or more) – even though the report that was provided to the City Council (**Ex. 33, Agenda Item No. 11-A, Attachment 2**) establishes that the City was aware that the Airport had other revenue streams and thus was on notice of this deficiency.

116. For example, in fiscal year 2011-12 SMO revenues from based entities included \$687,305 from hangar rental, \$616,224 from office/shop rental, and \$1,952,985 from land leases. These revenues far exceed the Airport’s revenue from the landing fee then in effect or the revenue from the new fees. **Ex. 33, Agenda Item No. 11-A, Attachment 2, p. 9.** They should have been evaluated in a proper analysis of the landing fee proposal, but were simply disregarded in the City’s rush to adopt a new landing fee resolution.

E. Analysis by GRA, Incorporated Confirms the Lack of Justification for the Landing Fee Increase

117. In 2013, at the request of Complainants, aviation consultant GRA, Incorporated (“GRA”) conducted an analysis of the then-proposed and since adopted

landing fees, and the City documents used to justify imposition of the fees. **Ex. 47.** GRA found, in relevant part:

- The City separates the Airport into two entities for rates and charges, airfield and non-airfield, and proposes that the airfield operate on a breakeven basis. The City defines the cost recovery base as direct operating expenses, allocations of administrative costs from other City offices, and amortization charges, including undefined amortization of past loans for capital expenditures.
- Even if the revenue and expense figures for the Airport in the reports actually submitted to the City by its staff are accepted at face value, non-aeronautical activities produce an annual surplus of at least \$400,000 that is not credited against airfield costs. As a result, even in the scenario most favorable to the City, the landing fee increase will generate an impermissible surplus; and the surplus likely is even larger, given that various data cited in the reports appears to be unsubstantiated and unreliable.
- There is no supporting documentation for how the cost center allocation was conducted. It is not evident if the allocation was made in manner consistent with FAA policy. The City's data show that the airfield reports a deficit of approximately \$1 million from FY 2011-2012 to FY 2012-2013.
- There are differences in how the Airport's financial picture is captured in the City's CAFRs and how they are captured in the Airport budget. The Airport budget includes the entire operating budget and capital budget for the current year as well as current year revenues. The CAFR uses an accrual accounting approach and includes annual operating costs and revenues, as well as an allocation of investment via depreciation and amortization. These differences in accounting policies cannot be traced or reconciled with the available information from the Airport budget or the CAFR.
- Additionally, a footnote to the revised City Staff Report – **Exhibit 33, Agenda Item No. 11-A, Attachment 2, p. 5** – states that the figure for indirect allocation to the Airport in future years is “32.9 percent lower due to revised assumptions and cost analyses to be incorporated beginning that fiscal period.” No explanation is provided as to why the revised assumptions and cost analyses have not been applied to prior fiscal years. If the Airport has been overcharged, the City has an obligation to correct the calculations – which in turn likely would require modifications to other data points, such as the Airport's purported debt and interest obligations to the City, and in turn require modifications to the landing fee calculations.

In sum, despite the lack of transparent data, GRA confirmed that the Airport would have a consistent annual surplus of more than \$400,000, even after applying the assumptions most favorable to the City.

118. GRA also reviewed the CAFR excerpts and additional data from CAFRs made available on the City website. While GRA was not able to provide a full analysis (or reconciliation), due to the general lack of specifics, GRA did identify additional issues that should be of concern to the FAA. Notably, the CAFRs show that the indirect costs allocated to the Airport grew significantly – by more than 61% between fiscal years 2006-07 and 2011-12 – and that the Airport was allocated a much greater share of indirect costs than any other City enterprise fund. Although the FAA Revenue Policy does not require identical allocations among enterprise funds (*see* 64 Fed. Reg. at 7707), the significant and growing allocations to the Airport, both in terms of dollars and percentages, should raise compliance concerns and require justification from Santa Monica.

F. The Landing Fee Is Facially Unreasonable

119. Grant Assurance 22 requires a sponsor to make its airport available “for public use on reasonable terms...”

120. The City has a documented history of using, or attempting to use, landing fees to achieve impermissible ends. The Director’s Determination in *Bombardier Aerospace Corp. and Dassault Falcon Jet Corp. v. City of Santa Monica*, FAA Docket No. 16-03-11, *supra*, examined the reasonableness of the City’s proposal to charge a sliding scale landing fee (only on aircraft weighing 10,000 pounds or more) ranging from \$0.29 per 1,000 pounds GLW for the lightest aircraft to a maximum of \$5.81 per 1,000 pounds GLW for the heaviest. In addressing the reasonableness of the proposed fees, as required by the City’s federal obligations, the decision observed:

The FAA recognizes that for many airports, especially commercial airports, landing fees are the main source of revenue used to recover airfield capital, operations and maintenance costs. However, from the data presented above, it is clear that landing fees above \$3.00 per 1,000 lb./ are rare. The landing fee at SMO for aircraft weighing 60,000 lb. is \$5.81 per 1,000 lb. while Los Angeles International Airport charges \$2.00 per 1,000 lb. We also note that the landing fee collected at JFK International Airport in New York is \$5.25 per 1,000 lb, \$.56 lower than the top scale in place today at SMO. While this comparison, by itself, is not sufficient to make a finding of whether the landing fees are reasonable, in this particular case it does illustrate that the SMO landing fee methodology is not the result of generally accepted practices used within the industry.

* * *

What becomes apparent from this analysis is that no other airport in the United States has a maximum landing fee rate per 1,000 lb. that equals or exceeds what is in use at SMO, regardless of aircraft type or class of airport.

121. The current Airport landing fee of \$5.48 per 1,000 pounds “across the board” is even further beyond the bounds of reasonableness and, like its predecessor, exceeds fees in place elsewhere, including at comparable general aviation facilities.

122. In its April 30, 2013 staff report to the City Council (**Exhibit 32**), the City reported on staff’s evaluation of landing fees at other airports:

As part of the landing fee study, staff conducted a survey to identify airports that have landing fee programs for general aviation aircraft. The research analyzed an extensive FAA database that identified 443 public-use airports that charge landing fees. Staff excluded heliports and seaports from the list and concentrated on:

- Airports located in highly urbanized areas;
- Airports that are known by staff to have an active landing fee program for general aviation aircraft; and
- Airports known to charge landing fees for based tenants.

Out of the 58 airports that met the above criteria, seven have landing fee programs that charge their based aircraft tenants landing fees.

(Emphasis supplied.)

None of the seven given further review by staff was found to maintain a landing fee remotely near to that adopted by the City.

123. The City staff also noted that even the few airports that impose landing fees on both based and transient aircraft include a variety of exceptions, such as a weight threshold below which reduced or no fees are charged. Accordingly, the practices of the other airports identified by the City do not serve as an independent justification for the City’s fee regime.

124. In fact, there is no basis on which the City could have justified the landing fee as reasonable. In connection with *Bombardier*, the FAA reviewed the landing various fees at other airports, and as discussed at ¶ 120 found in the Director’s Determination that even

the rates at large commercial airports were lower than the fee than at issue for SMO. *Id.* at 38. Similarly, the current landing fee at SMO also appears to exceed those at the majority of those airports, based on current data from examples of the airports studied more than a decade ago.²⁰

G. The Landing Fee Was Adopted and Imposed without Reasonable Notice or an Opportunity for Input from Affected Parties

125. Both the FAA’s Rates and Charges Policy and Grant Assurance 24 make clear that airports must engage in “meaningful” discussions with their users before implementing any changes to their rates and charges, and also specify that certain categories of background information must be provided. *See* 78 Fed. Reg. at 55332 (§ 1.1.1 and § 1.1.2) and 55336 (Appendix 1) (September 10, 2013). *See also* FAA Order 5190.6B, at § 18.6(b). In other words, the process must be transparent, open and collaborative.

126. The City’s 30-day rush to legislate, by contrast, was opaque, closed and unilateral. As an initial matter, the Airport users were ultimately provided only twelve days in which to review the last set of documents provided by Santa Monica before the City Council voted upon the resolution – not nearly enough to review and understand them, even limited and incomplete as they were. The studies provided to the Airport Commission (**Ex. 28**), City Council (**Ex. 33, Agenda Item No. 11-A, Attachment 2**), and ultimately the public relied on numerous assumptions that were never explained – such as the methodology used to determine what percentage of costs are attributable to the airfield cost center and to other cost centers. Without explanatory information that the City never made available, users of the Airport could not make a meaningful evaluation or provide meaningful input. The requirements of the Rates and Charges Policy (and the underlying Grant Assurance and statute) were simply ignored.

²⁰ Examples (*see* **Ex. 48 a-f**) include:

| | |
|--------------------------------------|--------|
| Boston Logan, Massachusetts (BOS) | \$4.84 |
| Denver International, Colorado (DEN) | \$4.59 |
| Hanscom, Massachusetts (BED) | \$2.32 |
| Reno Tahoe International (RNO) | \$3.15 |
| Fort Myers, Florida (RSW) | \$2.62 |
| Santa Fe (SAF) | \$0.00 |

III. The City Has Charged Sub-Market Rents to Santa Monica College

127. There is substantial evidence that the City has for years charged, and continues to charge, less than fair market rent to Santa Monica College (“SMC”) for Airport property.

128. The FAA repeatedly and continuously has emphasized that an airport’s compliance obligations require the rates charged for non-aeronautical use of an airport to be based on fair market value. *See, e.g.*, Order 5190.6B, §§ 17.11 – 17.12.

129. Not only was the City well aware of this requirement, but as part of its discussion of prospective lease rates to be charged both aeronautical and non-aeronautical tenants after July 1, 2015 (as then-current leases expired), City Staff and the City Council stressed the importance of charging fair market rent, especially for non-aeronautical tenants. **Ex. 49.**

130. Beginning in 1988 and continuing to the present, the City has leased approximately 110,547 square feet of Airport aeronautical property to SMC (which is not a City entity) for use as the SMC’s Airport Arts Campus.

131. The original lease term was for ten years from July 1, 1988 and was renewed for another ten years through June 30, 2008. Since that time, SMC has occupied the property as a month-to-month holdover tenant. The original lease called for base rent of \$100,000 per year, triple net, with annual Consumer Price Index (“CPI”) adjustments.

132. **Exhibits 50 and 51** list the annual rent paid SMC between the beginning of the lease renewal in 1998 and 2013.

133. The SMC lease rate as of 2013 was \$21,411 per month (\$256,930 annually), or \$0.19 per square foot. This is substantially below a fair market rate, despite periodic CPI-based adjustments.

134. In September 2013, GRA conducted an analysis of the rents being charged SMC. **Ex. 52.** It found the \$0.19 per square foot rate to be “substantially lower than the price per square foot paid by all [Airport] tenants” other than certain unique tenants such as the Museum of Flying and the Santa Monica Airport Park. *Id.* at p. 4. *See also Ex. 53.*²¹

²¹ FAA policy explicitly allows flight museums and parkland to be assessed less-than-market rent. *See* FAA Order 5190.6B, §§ 17.15(a), 17.16(a).

135. GRA also compared the SMC rate to those of comparably large commercial spaces elsewhere in the City, and found those rates to range from \$1.50 to \$4.50 per square foot. Smaller spaces ranged from \$0.48 to \$3.20 per square foot. **Ex. 52** at p. 5.

136. In short, the City and SMC have a continuing “sweetheart” deal, which the Complainants understand continues to be the case today. This arrangement both violates Grant Assurance 25 and comprises a form of past and ongoing revenue diversion; the consequences redound to the detriment of other Airport tenants and users.

IV. The City’s Proposed Airport Leases and its Leasing Process Blatantly Disregard Federal Requirements

137. As in the matters previously alleged, the City’s consideration of renewed or new Airport leases has been governed by considerations – in particular its continuing intention to close or substantially restrict the Airport – which are inconsistent with its obligations as an airport sponsor and which have been extremely damaging to Complainants and to all Airport aeronautical businesses. In fact, the City Council has abrogated its responsibilities as an airport sponsor both by unreasonably delaying lease renewals and in adopting restrictive, short-term leases based solely on the arguments of homeowner organizations and anti-Airport advocates rather than on market considerations and the requirements of federal policy.

A. Lease Renewals Have Been Delayed Unreasonably and Without Justification, to the Detriment of Tenants

138. The FAA’s Rates and Charges Policy encourages negotiation of all airport fees, including lease rates, between a sponsor and tenants, but stresses the importance of timely and open communication:

Airport proprietors should consult with aeronautical users well in advance, if practical, of introducing significant changes in charging systems and procedures or in the level of charges. The proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor’s justification for the change and to assess the reasonableness of the proposal. For consultations to be effective, airport proprietors should give due regard to the views of aeronautical users and to the effect upon them of changes in fees. Likewise, aeronautical users should give due regard to the views of the airport proprietor and the financial needs of the airport.

§ 1.1.1, 78 Fed. Reg. at 55332.

139. In Part 16 proceedings, the FAA has confronted instances of intentional delay by airport sponsors in lease negotiations. As it emphasized in *United States Construction Corporation v. City of Pompano Beach, Florida*, FAA Docket No. 16-00-14 (Director's Determination), at 18 n.63 (August 16, 2001):

[T]he extended period of time and delays in negotiating a lease between [applicant] and the City [of Pompano Beach] . . . was unjustly discriminatory [having] the effect of granting exclusive right to the use of the [Airport].

140. The FAA has also cautioned that a sponsor's desire (or even its pending request) to close its airport cannot be used to affect lease negotiations or terms:

While at no time were the Complainants denied access to their leased hangars, the Director cautions the Respondent that the continued practice of using its closure petition as a means to dissuade, intimidate or otherwise turn away potential tenants could potentially be a violation of Assurance 24 in the future.

Jim De Vries, et al. v. City of St. Clair, Missouri, FAA Docket No. 16-12-07 (Director's Determination), at 39 (May 20, 2014).

141. Implicit in these guidelines and decisions, and explicit in § 1.1.1 of the Rates and Charges Policy, *supra*, is the premise that it is the airport sponsor, not outside interests or citizens groups, that must timely propose and negotiate lease terms.

142. Virtually all Airport leases terminated by their terms on July 1, 2015. Yet the City undertook little effort before, or even after, that date to develop leasing criteria, negotiate leases or finalize lease negotiations and terms. Ultimately, the City simply caved in to anti-Airport groups in lieu of exercising its responsibilities as an airport sponsor by holding over all Airport business tenants, with no new leases at all.

143. Thus, for example, Complainants Bill's Air Center, Kim Davidson Aviation, and Justice Aviation have for months been forced to operate their established businesses solely on a holdover, month-to-month basis since July 1, 2015. The adverse impacts of this uncertainty on business planning, finances and the retention of employees are self-evident.

144. The intentional "go-slow" and irresponsible process leading up to the present "no-lease" impasse can be briefly summarized as follows:

a) March 2014

A Staff Report is presented to the Commission on March 24, 2014 and to the City Council on March 25, 2014. **Ex. 54.** The Staff Report devotes most of its discussion to Airport closure options, but advises that such options must await the outcome of pending legal and administrative actions and suggests that “lease revenues be maintained to promote the Airport’s ongoing self- sufficiency, avoid future subsidies from the General Fund, and begin repayment of the principle on the General Fund loan to the Airport Fund.” **Id. at 22.** Accordingly, staff recommends:

- Non-aviation space be leased for 5-year terms with five 1-year renewal options at the City’s discretion;
- Aviation space be leased for 1-year terms with two 1-year options to renew at the City’s discretion; and
- Existing FBO tenants would be offered renewal of non-aviation portions for five years with options as above and aviation portions for one year with options as above.

Staff’s justification to the City Council for the proposed maximum three-year aeronautical lease terms is that then-current litigation and Part 16 proceeding would take three years to resolve.

The City Council votes to modify the staff’s recommendations and to renew all current leases for three years with one-year options at the City’s discretion. Staff is directed to develop leasing guidelines for use in connection with the lease renewals. **Ex. 55, p. 5.**

b) July 2014

Staff presents proposed Leasing Guidelines (“Guidelines”) to the Commission, calling for three-year leases for all Airport tenants. **Ex. 49.**

c) August 2014

The Leasing Guidelines are presented to the City Council, which votes to return them to the Commission for its recommendations. **Ex. 56, p. 8.**

d) October 2014

The Guidelines are marked up by Commission Chair Goddard and entered into the Commission record at its October 27, 2014 meeting, but the Commission takes no further action. **Ex. 57.**

e) February 2015

The Commission approves revisions to the Guidelines providing for only month-to-month leases for all Airport tenants, to be based on undefined “commercial” rates. **Ex. 58.**

f) March 2015

On March 23, 2015, the Commission reviews a revised Staff Report (**Ex. 59**) but takes no action.

On March 24, 2015, the City Council reviews the revised Staff Report, which recommends renewal of existing FBO and other aeronautical leases for three years. **Ex. 60, p. 1.** The City Council votes instead to divide the Airport into two segments, purportedly reflecting the portions delivered to the City by the IOT (the “main parcel”) and a 1949 deed (the “western parcel”). Properties on the main parcel are to be offered approximately three-year lease renewals (not to exceed July 1, 2018); those on the western parcel (including aeronautical businesses) are to be offered month-to-month tenancies. The City Council approves having staff proceed with negotiation of five specified lease renewals. **Ex. 61, pp. 5-7.**

g) July 2015

Staff presents tentative lease terms negotiated with Airport tenants at the July 14, 2015 City Council meeting: two FBO leases for three years, two month-to-month aeronautical leases on the so-called western parcel and various 3-year non-aeronautical leases. **Ex. 62.** The City Council approves only the non-aeronautical leases, deferring action on the aeronautical leases and directing staff to study whether the City should take over one or both FBO properties and operate them itself. **Ex. 63, pp. 15-17.**

h) August – October 20, 2015

No Airport-related items are considered by the City Council in public session.

i) October 27, 2015

Staff presents the City Council with recommendations, *inter alia*, for adding restrictions on fuel sales to aeronautical leases **Ex. 64**, and the City Council directs staff to develop and present specific proposals to that end. No further action is taken regarding Airport leases. **Ex. 5**.

j) December 3, 2015

Staff meets with Airport tenants, including FBOs and flight schools, and advises participants that staff is continuing to evaluate various lease provisions, including the fueling restrictions recommended by the City Council on October 27, 2015. **Ex. 3**.

145. In sum, the City began the lease renewal process in March 2014 with an inherently unreasonable proposal – a maximum of three 1-year leases for all aeronautical business tenants, based solely on the possibility of a favorable outcome in both federal court and before the FAA – and then foot-dragged for the next year-and-a-half, after which those aeronautical businesses still had neither lease terms nor even a glimmer of what the City might propose beyond month-to-month for western parcel tenants. Thus, the City and its City Council have engaged in no consultation with tenants, no negotiation with tenants,²² and have proffered no lease policy, much less lease terms, beyond the City Council’s original bare-bones, patently insufficient and still not finalized 3-year/month-to-month “allocation” of Airport properties.²³

146. Moreover, nowhere in any of the staff reports or other materials presented to the Airport Commission and to the City Council is information provided or consideration given to market factors such as lease duration at comparable facilities, the needs of Airport tenant businesses, or the actual costs of Airport operations. Rather, the City Council’s March 24, 2015 decision, and subsequent actions, were based entirely on the likely duration of pending litigation, on the demands of anti-Airport groups that any lease terms be minimal and, so far as “western parcel” tenants are concerned, on the whims of City Council members, in utter disregard of federal policy and the City’s federal obligations.

²² In the few meetings with aeronautical tenants which did occur before all aeronautical leasing discussions were frozen by the City Council in July 2015, lease duration was presented on a strictly “take-it-or-leave-it” basis, not subject to negotiation.

²³ In its August 14, 2014 Motion to Dismiss the Complaint in FAA Docket No. 16-14-04, the City asserted that “the City Council has previously voted to offer three (3) year lease extensions which would run through June 30, 2018 and is in the process of considering proposed leasing guidelines.” *Id.* at 3. More than a year later, neither the offer nor the guidelines have appeared.

B. The City's Proposed Short-Term Leases are Unjustified and Plainly Illegal

147. The basic standard for all aeronautical user charges, including lease rates, is set forth in Grant Assurance 22(a), which requires both non-discrimination and “reasonable terms.” This requirement is also part of the FAA’s Rates and Charges Policy:

Rates, fees, rentals, landing fees, and other service charges (“fees”) imposed on aeronautical users for aeronautical use of airport facilities (“aeronautical fees”) must be fair and reasonable.

78 Fed. Reg. at 55332.

148. Both the Rates and Charges Policy and FAA Order 5190.6B also require reasonableness in the negotiation process:

Airport proprietors should consult with aeronautical users well in advance, if practical, of introducing significant changes in charging systems and procedures or in the level of charges. The proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor’s justification for the change and to assess the reasonableness of the proposal.

78 Fed. Reg. at 55332; *see also* FAA Order 5190.6B, § 18.6(b).

149. As described in a recent Director’s Determination (FAA Docket No. 16-12-07):

If a sponsor wishes to require lease terms that the FAA considers fair and reasonable, and a potential lessee does not wish to agree to those terms, neither party is under obligation to lower their standards in order to sign a lease.

Jim De Vries, et al. v. City of St. Clair, Missouri, at 26 (May 20, 2014) (emphasis supplied). Inherent in this statement is the right of an airport tenant to challenge unacceptable terms, if likely to be deemed unreasonable.

150. The adopted, but not yet implemented, City decision to offer most aeronautical businesses leases not to extend beyond July 1, 2018 (a date seemingly picked at random), and to offer those located on the so-called “western parcel” only month-to-month leases, is a very clear violation of the “reasonableness” requirement. To the extent the City has now taken the *de facto* position that no leases beyond month-to-month will be

offered at all to aeronautical tenants (even though non-aeronautical tenants have been granted multi-year terms), the violation is even more glaring.

151. While there is no bright-line test for the reasonableness of any particular lease term, the FAA has approved the use of short-term leases for aeronautical businesses in only limited situations where justified by legitimate circumstances, such as pending relocation or construction which would affect the subject facilities. For example, in *McDonough Properties, L.L.C., et al., v. City of Wetumpka, Alabama* (FAA Docket No. 16-12-11, Final Agency Decision and Order, at 21 (January 15, 2015), a one-year lease term was found to be appropriate in view of proposed reconstruction or relocation of the airport (subject to FAA approval), and a 10-year lease was ultimately offered after the sponsor's plans were abandoned. Similarly, in *Santa Monica Airport Association v. City of Santa Monica*, FAA Docket No. 16-99-21, Final Decision and Order, at 23 (February 4, 2003), the City was justified in denying long-term leases to south-side tenants (while granting long-term leases for north-side FBOs) in light of the terms of the 1984 Agreement and its approval of plans to eliminate most aeronautical uses on the south side. And in *United States Construction Corporation v. City of Pompano Beach, Florida*, FAA Docket No. 16-00-14, Final Agency Decision, at 22 (July 10, 2002) the FAA found that a ten-year lease with a ten-year renewal option was not inherently improper, but that the sponsor's additional requirement of a two-year cancellation clause rendered it unreasonable.

152. The City's notion that it need not presently offer reasonable, long-term leases in light of its intention to close the Airport is simply unfounded. In *Jim De Vries, et al. v. City of St. Clair, Missouri*, FAA Docket No. 16-12-07, the Director's Determination addressed this contention in the context of an actual pending petition to close the subject airport:

However, the Director is concerned that the Respondent appears to have used its active petition to close the airport as part of its justification to postpone hangar negotiations. As previously discussed, an airport sponsor's federal obligations are not altered or suspended based on its intent and desire to close the airport. The Director notes that the Respondent's continued practice of waiting until November to begin lease negotiations for the following year – particularly if rate increases are involved – could create a situation in the future in which it may fail to make a good-faith effort to reach an agreement. While at no time were the Complainants denied access to their leased hangars, the Director cautions the Respondent that the continued practice of using the City's airport closure petition as a means to dissuade, intimidate, or otherwise turn away potential tenants could potentially be a violation of Grant Assurance 22, Economic Nondiscrimination, or Grant Assurance 24, Fee and Rental Structure, in the

future.

Id. at 26-27 (May 20, 2014) (emphasis supplied). Moreover:

Sponsors have the obligation to negotiate in such a way that does not deter potential tenants from doing business with the airport. Because the Respondent had requested permission from the FAA to close the St. Clair airport it appears that it believed it could begin to close out services to its aeronautical users. This is not the case.

Id. at 36.

153. To reiterate, the evidence is overwhelming that the City's lease renewal process and proposals have nothing to do with aeronautical markets, comparable facilities, federal requirements or the needs of the Airport and its tenants. They are driven solely by the goals of restricting and ultimately closing the Airport and by the anti-Airport agendas of parochial political interests.

IV. Impact on Complainants

154. Each of the Complainants has been directly and significantly affected by the violations heretofore alleged. Complainant Smith must pay excessive landing fees and, as a tenant of the City, is already charged for the use of Airport property, facilities and fuel, and is thus double-charged as well. Complainant Justice Aviation likewise pays landing fees, and as the operator of a flight school bears the additional, unfair burden of having such fees imposed on all flight training operations, including multiple touch-and-go landings. Complainants Justice Aviation, Bill's Air Center and Kim Davidson Aviation are all victims of the City's continuing refusal to do more than maintain aeronautical businesses on a month-to-month holdover basis and its decision to (some day) offer only short-term leases. As a consequence of the City's continuing disregard of its obligation to offer fair and reasonable lease terms, these tenants and sub-tenants, and their employees, are unable to plan for even the near future, much less anticipate longer-term needs. And all of the Complainants are necessarily adversely affected by the City's financial manipulations, which have burdened the Airport with excessive loan obligations and raised the costs of operation for all Airport tenants and users.

V. Pre-Complaint Resolution Efforts

155. On December 2, 2015, Complainants' counsel directed a letter to the respondents advising of Complainants' intent to file the present action and requesting an opportunity to discuss possible settlement of the claims identified therein. **Ex. 65.**

156. The issues presented in **Ex. 65** had previously been raised with the City by NBAA in correspondence concerning landing fees prior to their adoption by the City (**Exs. 66-67**), the importance of airport tenants being provided with leases beyond month-to-month terms (**Exs. 68-70**) and environmental restrictions (**Exs. 71-72**). Nor was NBAA the only complainant to previously have objected to issues now raised (**Ex. 73**).

157. On December 29, 2015, after urging a response to Complainants' initial letter (**Ex. 74**), Complainants' counsel met with City Attorney Marsha Moutrie and Deputy City Attorney Ivan Campbell. Complainants' counsel detailed the issues presented in **Ex. 65**, and answered questions concerning the factual and legal basis of Complainants' proposed claims. The parties agreed to communicate further in the near future, Complainants' counsel explaining that time was of the essence.

158. Unfortunately, the City subsequently proved unresponsive, despite efforts by Complainants to communicate the importance of the timely resolution of the pending issues, and a request that the City at least indicate whether it was willing to engage further. **Ex. 75**. Ultimately, the City declined to offer any response to Complainants' detailed exposition of their claims, suggesting only that the issues could be discussed at a future meeting called by the FAA for another purpose (**Exs. 76-77**). Meanwhile, the City has continued to advance, indeed accelerate, its agenda of re-purposing the Airport for non-aeronautical development and imposing unreasonable terms and conditions on its users, including Complainants.

159. As the FAA is well aware, complainants are not required to engage in further one-sided efforts to resolve a dispute with officials who have "for all practical purposes" made clear that they will not comply with the Grant Assurances, such as by the adoption of ordinances that are at odds with the sponsor's federal obligations, or remaining silent in response to correspondence. *See Bombardier Aerospace Corp., and Dassault Falcon Jet Corp. v. City of Santa Monica*, Docket No. 16-03-11, at 19-23 (January 3, 2005).

Conclusion

As detailed in the first sections of this Complaint, the City regrettably has a long record of seeking to find means by which to restrict operations at SMO, in defiance of its federal obligations. The current situation at the Airport, which demonstrates that the City has no intention of changing its ways, requires the strictest possible federal response.

As alleged in this Complaint, the City is in violation of its Grant Assurances (including no. 22, no. 24, and no. 25), IOT, and federal statutory obligations: i) Airport revenue has been and continues to be diverted through undocumented loans to the Airport from the City and excessive interest thereon; ii) the current landing fee regime at the

airport is both procedurally and substantively flawed, with the consequences that the fees are excessive and unjustified; iii) SMC, for years if not decades, has paid below-market rent for non-aeronautical property, a further form of revenue diversion; iv) in apparent – and mistaken – anticipation of closing the Airport, the City has refused to extend the leases of aeronautical tenants beyond month-to-month holdover terms and has formally adopted short-term leases as a matter of City policy.

The FAA’s standard remedy for an airport sponsor’s non-compliance with its federal obligations, in addition to requiring a corrective action plan, is the interim suspension of its eligibility for further AIP grants. But because the City has made clear that it has no intention of applying for additional AIP grants, this is a case in which the City needs to be on notice that if its non-compliance is not corrected, including the return of diverted revenue, the result will be the suspension of all transportation grants (e.g., for mass transit) to the City, pursuant to 49 U.S.C. § 47111(e).

Moreover, given the deficiencies in, or complete absence of, City documentation of its loans and landing fees, as well as its improper rate base cost allocations, as heretofore alleged, Complainants urge that, in implementing remedies, only a full audit of relevant City and Airport books and records by an experienced, independent firm will provide the necessary clarity and transparency for current and any future fees, charges and financial obligations imposed by the City on the Airport and its users.

Lastly, Complainants request that the FAA consider judicial enforcement of City obligations pursuant to 49 U.S.C. § 46106 and § 47111(f) should the City continue to engage in the conduct alleged herein.

Accordingly, Complainants request that the FAA take any and all actions that are necessary and appropriate to ensure that the City is in compliance with its obligations as the sponsor of SMO.

Respectfully submitted,


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Certificate of Service

I hereby certify that I have this day caused the foregoing complaint to be served on the following persons by first-class mail with a courtesy copy by electronic mail:

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Dated this 5th day of February, 2016.


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