Federal Aviation Administration
Washington, D.C.

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

Docket No.: **16-02-08**

Appearances:

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INITIAL DECISION OF THE HEARING OFFICER

I. INTRODUCTION

This Initial Decision arises from a dispute between the Federal Aviation Administration ("FAA") Office of Airport Safety and Standards ("AAS") and the City of Santa Monica, California ("City"), the proprietor of the Santa Monica Municipal Airport (hereinafter "SMO" or "Airport"). More specifically, the dispute involves an ordinance enacted by the City that purports to ban certain categories of aircraft from operating at SMO. *See* Santa Monica Municipal Code §10.04.06.220 ("Ordinance"). Following an investigation and related proceedings conducted pursuant to regulations found at 14 C.F.R., Part 16, entitled "RULES OF PRACTICE FOR FEDERALLY-ASSISTED AIRPORT ENFORCEMENT PROCEEDINGS" ("Part 16") the Acting Director of AAS issued a May 27, 2008 Determination ("Director's Determination") concluding that the Ordinance is inconsistent with: the City's obligations under two assurances contained in grant agreements between the FAA and the City ("Grant Assurances"); provisions of the Surplus Property Act of 1944, 49 U.S.C. §§ 47151-153 ("SPA"); and the terms of a Settlement Agreement entered into between the FAA and the City on January 31, 1984 ("1984 Agreement") between the parties. Director's Determination at 66. Finally the Director's Determination also concludes that the Ordinance "is preempted under Federal Law." *Id.* at 67. [1] This Part 16 proceeding constitutes a case of first impression before the Hearing Officer. The instant action represents the first time the FAA has conducted a formal investigation with regard to a safety-based restriction of access imposed by the City (*i.e.*, the categorical ban on use of the Airport by C and D aircraft). Direct Testimony of David L. Bennett ("Bennett Direct") ¶ 49.[2]

[1] Additionally, the FAA, through the United States Department of Justice, sought and obtained injunctive relief, effectively preventing the City's enforcement of the Ordinance pending the outcome of this Part 16 proceeding. Finding of Fact ("FF") No. 217, *infra*.

[2] In the interest of clarity and ease of reference, Appendix A of this decision contains a table listing the significant short citations and acronyms used in this Decision.

In accordance with the Part 16 provisions at 14 C.F.R. §§ 16.109 and 16.201 *et seq.*, the City timely requested a hearing regarding the Director's Determination and a Hearing Officer was appointed to: conduct proceedings in accordance with Part 16; prepare findings of fact and conclusions of law; and issue this Initial Decision. *See* Hearing Order dated June 23, 2008 ("Hearing Order").[3]

A formal adjudication process was conducted in this dispute in accordance with Subpart F of Part 16. The adjudication process included: a formal discovery process; motions practice, the submission of pre-hearing briefs by the parties; a full evidentiary hearing held at the Long Beach, California Federal Building on March 16 through March 19, 2009 and telephonically on March 26, 2009; post-hearing briefs by the parties filed on April 2, 2009;[4] and reply briefs filed by the parties on April 14 and 15, 2009; whereupon the record closed.

Having reviewed and given due consideration to the record evidence, as well as the arguments of the parties and the other participants, I conclude, based on the findings of fact and the applicable law discussed herein, as follows:

1. The Ordinance unreasonably and unjustly discriminates against classes of aeronautical activities, and, thus, is inconsistent with the City's obligations under Assurance 22 of the Grant Agreements between the FAA and the City;

[3] At the joint request of the parties, the adjudication process herein was suspended and the Initial Decision deadline set forth in the Hearing Order was extended to permit completion of an alternative dispute resolution effort. Pursuant to the Second Revised Procedural Schedule, this Initial Decision is due to be issued by no later than May 14, 2009.

[4] Post-Hearing briefs also were submitted by three community-based organizations ("Other Participants"), in accordance with the Part 16 Rules. *See* Discussion at 66 *infra*.

2. The Ordinance does not grant an "exclusive right" within the meaning of 47 U.S.C.§ 47107(a)(4), and, thus, is not inconsistent with the City's obligations under Assurance 23 of the Grant Agreements between the FAA and the City;

3. The Ordinance unreasonably and unjustly discriminates in the operation of the Airport, and, thus, is inconsistent with the obligations of the City under the Instrument of Transfer of the Airport property completed pursuant to the SPA;

4. The Ordinance unreasonably and unjustly discriminates in a manner inconsistent with the 1984 Agreement that expressly reserved final authority over issues of safety to the FAA; and

5. The concept of preemption provides context to consideration of whether, under the circumstances here, the City acted properly in adopting an ordinance that precludes categories of aircraft from utilizing SMO solely on the grounds of safety. The Preemption Doctrine, however, does not provide an independent basis for FAA administrative action against the City under Part 16 inasmuch as the Doctrine is not one of the enumerated "authorities" that authorize and govern Part 16 proceedings involving Federally-assisted airports. *See* 14 C.F.R. § 1601.

II. FINDINGS OF FACT

A. General Background

1. SMO is a public-use airport owned and operated by the City of Santa Monica, California. Director's Determination Item ("DD Item") 26. The Airport is used by general aviation aircraft and provides access to Santa Monica and other surrounding communities in the Los Angeles metropolitan area. The Airport is the base of operations for over 400 aircraft, and serves as a reliever airport for Los Angeles International Airport ("LAX"). DD Item 40.

2. The primary function of a reliever airport is to ease the air traffic congestion at air carrier airports. Direct Testimony ("Direct") of Bryon Huffman ("Huffman") 34:19-20.

3. Implementation of the Ordinance would result in Category C and D aircraft being redirected to other Los Angeles area airports, which would have an impact on the Region's airspace system. Huffman Direct 23:3-6.

4. SMO is capable of accommodating a wide range of business and personal aircraft, including corporate jets. DD at 2. As such, SMO is able to accommodate over 90 percent of aircraft types in the general aviation fleet, and it is capable of serving the vast majority of general aviation aircraft with a maximum take off weight greater than 12,500 pounds. DD at 2 citing Advisory Circular ("AC") 150/5325-4B, *Runway Length Requirements for Airport Design*, 7/1/2005, Chapter 3. SMO is not an airport regulated by Part 139 of the Federal Aviation Regulations ("FAR"). Revised Direct Testimony ("Rev. Direct") of James E. Hall ("Hall") ¶ 21.

5. The City reported 130,000 annual operations in 2004. DD Item 3 at 8. In 2007, the Airport had 165,130 operations. DD Item 26. Annual jet operations have risen from 1,176 operations in 1983 to 18,000 in 2004. DD Item 31 at 8. There were approximately 9,000 jet operations by Category C and D aircraft at SMO in 2007 and 7,670 in 2008. Robert D. Trimborn ("Trimborn") Direct ¶ 30.

6. Category C and D aircraft operations at SMO increased from approximately 6,700 for the year ending in June, 2000 to about 9,000 annually by 2007. DD Item 4 at 42.

7. The City expects the number of aircraft operations at SMO to increase. Trimborn Hearing Transcript ("Hr. Tr.") 420:14-421:10; Patrick Carey ("Carey") Hr. Tr. 624:6-10.

8. The Airport's runway 03-21 is 4,973 feet long and 150 feet wide. There are parallel taxiways on both sides, each 40 feet wide. The runway-taxiway centerline separation is 240 feet on the northwest side and on most of the southwest side. However, there is a taxiway on the south side, 1,100 feet in length, whose centerline is only 200 feet away from the runway centerline. This precludes operation of certain aircraft based on wingspan considerations. DD Item 2, Trimborn Declaration ¶ 6.

9. The Airport sits on a plateau with significant down slopes of approximately 30 to 60 feet on both the East and West ends of the Airport. Trimborn Direct ¶ 6.

10. A steep downward slope extends from an area just beyond either runway to the Airport property boundary. Trimborn Direct ¶ 6.

11. There are public streets just beyond the down slopes on both the East and West ends of SMO. Trimborn Direct ¶ 6.

12. Just across the streets at both the East and West ends of SMO are densely populated residential neighborhoods. Trimborn Direct ¶ 6.

13. The closest residential buildings to the northeast and southwest of the Airport property are approximately 300 feet from the end of the runway. DD Item 2, Trimborn Declaration ¶ 9.

14. Hundreds of homes are in residential neighborhoods to the East and West of SMO, between 300 feet and 1,000 feet from the ends of the runway. Trimborn Direct ¶ 6; Rebuttal Testimony ("Rebuttal") of Trimborn ¶¶ 3-6.

15. Residential buildings are located across a two-lane road from the Airport's property to the Southwest. DD Item 2, Trimborn Declaration ¶ 9.

16. The proximity of the residential buildings to the runway at the Airport is not unusual in comparison with the situation at a number of other airports. Carey Hr. Tr. 618:2-10; Dennis Pratte II ("Pratte") Hr. Tr. 182:1-14.

B. Airport History

17. The City began operating the Airport in 1926. Trimborn Direct ¶ 8; DD Item 2, Exh. A at 2.

18. In December 1941, the City leased two parcels of Airport property, which it owned in fee simple, to the United States Government ("Government") as part of the World War II defense effort. DD Item 4, Exhs. 25-29.

19. Those parcels included the site of the current runway and additional land. DD Item 4, Exhs. 25-29.

20. The Airport was expanded and used by the Government during World War II to accommodate airplane manufacturing there by the Douglas Aircraft Corporation. DD at 17-18.

21. Between 1941 and 1942, a significant amount of funding by the Civil Aeronautics Administration ("CAA") for national defense was used to improve the Airport to accommodate wartime needs. DD Item 80A/B.

22. On May 7, 1946, the Army granted the City of Santa Monica a revocable Interim Permit for the operation of the Airport, effectively returning some operational control of the Airport back to the City pending the disposition of the property as surplus. DD Items 60 and 80A/B.

23. On July 29, 1946, the War Assets Administration ("WAA") issued Form SPB-5, *Declaration Surplus Real Property*, concerning the Airport property and declaring as surplus all leased land and improvements at the Airport. DD Item 80A/B.

24. The WAA, acting upon the recommendation and approval of the CAA, transferred the Airport land and improvements to the City for use as a public civilian airport. DD at 18; DD Item 80 A/B.

25. The Government conveyed its interests in the Airport property and improvements to the City in accordance with and pursuant to the SPA. DD Items 15-20.

26. In completing this transfer, the Government executed an Instrument of Transfer dated August 10, 1948 ("1948 Instrument of Transfer") through which the Government relinquished to the City several easements, and its leasehold interest in the Airport along with airfield improvements, including the entire landing area and the Airport's concrete 5,000-foot runway and taxiway system. DD Items l5 and 80A/B.

27. The Government condemned a parcel of land near the Airport and conveyed it to the City by Quit Claim Deed in 1949. DD Item 4, Exhs. 26 and 28; DD Item 80A/B, Exh. A.

28. On August 10, 1948, the City confirmed its acceptance of the 1948 Instrument of Transfer, including the restrictions stated above, by passing Resolution No. 183, *Resolution of the City of Santa Monica Accepting An Instrument of Transfer From the United States of America*. DD Item 4, Exh. 31. The 1948 Instrument of Transfer conveyed the Airport pursuant to Surplus Property Administration Regulation 16, November 16, 1945, as amended through April 23, 1946, Part 8316 – Surplus Airport Property ("Regulation 16"), DD Item 16, which included

restrictive covenants, and incorporates a reversion clause at the option of the Government, giving title and right of possession. DD Item 15.

29. Turbojet aircraft have operated at SMO since the 1960s. Trimborn Hr. Tr. 368:21-23.

30. In 1979, the City adopted several ordinances including ones that sought to impose a night curfew, a ban on helicopter flight training, a ban on jet landings, etc, one of which was partially invalidated in subsequent litigation. *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).

31. 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), the United States Court of Appeals for the Ninth Circuit upheld the City's aircraft-noise abatement ordinance and a night curfew on takeoffs and landings imposed by the City, but struck down the ban on jet aircraft as violating the Commerce and Equal Protection Clauses of the Constitution.

32. In June of 1981, the Santa Monica City Council enacted Resolution No. 6296, which would have closed SMO. That action resulted in further litigation involving the City, airport associations, and the FAA. DD at 3-4.

33. As a result of the litigation described above, the parties entered into the 1984 Agreement. DD Item 4, Exh. 3. The 1984 Agreement primarily is focused on noise abatement. It confirms the terms and conditions under which the City would continue to operate and maintain the Airport as a viable functioning facility without derogation of its role as a general aviation reliever airport until at least July 1, 2015. DD Item 4, Exhibit 3. The 1984 Agreement specifically provides: "The Airport is to be open and available to and for public use as an airport on fair and reasonable terms, without unjust discrimination, and without

granting any exclusive rights prohibited by law." DD Item 4, Exh. 3 at 2-3. The 1984 Agreement was incorporated into Grant Agreements entered into by the City and the FAA on September 19 and 25, 1985. Grant Agreements for Project No. AIP-3-06-0239-02 at 3, Condition 12; and for Project No. AIP-3-06-0239-03 at 3, Condition 12; DD Item 6.

34. The 1984 Agreement further provides that "pursuant to the Federal Aviation Act of 1958, as amended, exclusive authority is vested in the FAA for the regulation of all aspects of air safety, the management and control of the safe and efficient use of the navigable airspace, and movement of aircraft through that airspace." DD Item 4, Exh. 3 at 3.

35. The 1984 Agreement also states that the "Airport will be capable of accommodating most kinds of general aviation aircraft, generally consistent with Group II Design Standards." DD Item 4, Exh. 3 at 9.

36. Section 9 of the 1984 Agreement requires the City to maintain "continuously" one designated runway (3/21) "which is 5,000 feet long and 150 feet wide." DD Item 4, Exh. 3 at 9. The Airport Layout Plan depicting the Airport's existing runway and taxiway configuration was incorporated by reference into the 1984 Agreement for the purpose of guiding "the development of the Airport for the duration of this Agreement." DD Item 4, Exh. 3 at 6.

37. The 1984 Agreement highlights SMO's role in the regional and national system of air transportation and air commerce. SMO serves a "vital and critical role in its functions as a general aviation reliever for the primary airports in the area . . . by diverting aircraft away from the air carrier airports and other heavily used airports located in the Greater Los Angeles Area." DD Item 4, Exh. 3 at 3-4.

38. The 1984 Agreement confirms the Airport Reference Code ("ARC") designation of SMO as a Group B-II airport, and incorporates FAA AC 150/5300.4B, dated February 24, 1983. Trimborn Direct ¶ 10; DD Item 4, Exh. 3.

39. The 1984 Agreement provides that SMO could "be redesigned so as to maintain the current level, quantity, and type of services provided by the Airport. . . ." DD Item 4, Exh. 3 at 5.

40. In the 1984 Agreement, the City committed to "operate and maintain the airport as a viable facility without derogation of its role as a general reliever airport . . . ." DD Item 4, Exh. 3 at 9.

41. Section 8 of the 1984 Agreement also provides that SMO "be capable of accommodating most kinds of general aviation aircraft, generally consistent with Group II Design Standards." DD Item 4, Exh. 3 at 9.

42. The parties also expressed a concern in section 12 of the 1984 Agreement about the effect that displacing the threshold by 500 feet would have on "air safety and the ability of the Airport to provide the level and type of service described in Sections 2(b)(i) and 8." DD Item 4, Exh. 3 at 11.

43. Section 13 of the 1984 Agreement provides: "The mix of aircraft to be accommodated at the Airport shall be consistent with the present mix of aircraft now based at the Airport and the mix forecast for the future as shown in Chapter III of the Airport Master Plan Study dated October 1983." DD Item 4, Exh. 3 at 13.

44. Sections 17 and 18 of the 1984 Agreement refer to "tiered noise levels for different types or kinds of aircraft." DD Item 4, Exh. 3 at 16-17.

C. Categories of Aircraft and Accident Potential

45. Aircraft operations at SMO are in compliance with all FAA safety regulations and requirements. DD at 4. SMO has operated and continues to operate safely. Rick Marinelli ("Marinelli") Direct ¶ 48.

46. The Airport Reference Code ("ARC") is an FAA coding system used to relate airport design criteria to the operational and physical characteristics of the aircraft types for which the airport was designed. AC 150/5300-13, chapter 1 at 19. The ARC code has two components, both relating to the "critical design aircraft" for the airport. AC 150/5300-13, chapter 1 at 19. The first component delineated by letter is the aircraft approach category (operational characteristics). AC 150/5300-13, chapter 1 at 19. The FAA defines critical design aircraft in the National Plan of Integrated Airport Systems ("NPIAS") as the category of aircraft, which conduct 500 itinerant or more operations per year at the airport (the FAA usually requires 500 itinerant operations in order to be included in the NPIAS). DD Item 40 at 38. The second component, depicted by Roman numerals I-VI, is the airplane design group and relates to airplane wingspan. AC 150/5300-13, chapter 1 at 19.

47. The ARC designation for the Airport is B-II, with "B" standing for the airport approach speed category and "II' standing for the design group terms of wingspan and tail height. Marinelli Direct 265:11-21.

48. The ARC is not intended to be used as a basis for determining which airplanes may operate safely at an airport. Marinelli Hr. Tr. 261:12-262:23 and 266:22-267:5.

49. Aircraft are excluded from operating at an airport based on the wingspan if the aircraft cannot operate on a taxiway and maintain the proper clearances between the taxiway and the runway for takeoff and landing. Huffman Direct 37: 10-14.

50. Category A aircraft, as used in AC 150/5300-4B and AC 150/5300-13, are aircraft that have approach speeds less than 91 knots at their maximum certificated landing weight. AAS Exhibit ("AAS Exh.") 3; AC 150/5300-13, chapter 1 at 1; 14 CFR § 97.3.

51. Category B aircraft are aircraft that have approach speeds of 91 knots or above but less than 121 knots at their maximum certificated landing weight. AAS Exh. 3; AC 150/5300-13, chapter 1 at 1; 14 CFR § 97.3.

52. Category C aircraft are aircraft that have approach speeds of 121 knots or above but less than 141 knots at their maximum certificated landing weight. AAS Exh. 3; AC 150/5300-13, chapter 1 at 1; 14 CFR § 97.3.

53. Category D aircraft are aircraft that have approach speeds of 141 knots or above but less than 166 knots at their maximum certificated landing weight. AAS Exh. 3; AC 150/5300-13, chapter 1 at 1; 14 CFR § 97.3.

54. Category C and D aircraft have been operating at SMO since the 1980s. Trimborn Hr. Tr. 368:13-20.

55. The City commenced a study in 2001 to evaluate safety measures to address potential overrun accidents at SMO. DD Item 2, Exh. A.

56. Twenty-three accidents have occurred at SMO in the past 21 years, each of which involved an A or B category aircraft, including one experimental aircraft. Pratte Direct ¶ 28. In its briefs on this issue, the City did not indentify an accident involving a Category C or D aircraft.

57. According to National Transportation Safety Board ("NTSB") data, from 1981 to 2008, eight accidents occurred at the Airport, two involving fatalities, and were

comprised of seven overruns and one undershoot. DD at 8-9; DD Item 82. Seven of these accidents involved single-engine aircraft with 1 involving a multi-engine aircraft, all of which were small piston propeller driven A-1 or B-1 aircraft. DD at 8-9; DD Item 82. Specifically, Piper PA-28s single-engine piston aircraft had accidents in May 1981 and December 2004, a Mooney M-20 had an accident in July 1995, a Cessna 177RG in December 1993, two Cessna 182s in January 1982 and September 1992, and a twin-engine Cessna 340A in November 2001 (2 fatalities). DD at 11; Trimborn Direct ¶ 32. There was also an overrun in 2008 by an experimental Jabiru J400 single-engine aircraft. Trimborn Direct ¶ 33; DD Items 18 and 82.

58. The Aviation Safety Reporting System ("ASRS") data base shows that from 1988 to 2006, there were between 156 and 223 reports with regard to the Airport, none of which identified the runway length or runway safety areas at SMO as an issue. *Compare* DD at 9 *with* DD Item 17. The incidents all involved small (6,000 lb. and under) propeller driven aircraft, *i.e.*, not Category C and D aircraft. DD at 9. The ASRS is an FAA and National Aeronautics and Space Administration ("NASA") effort to collect incident reports related to aviation safety from pilots, controllers, and others in order to identify deficiencies and discrepancies in the National Aerospace System (NAS). DD at 9, fn. 17. The City has not presented evidence that aggregated incidents or accidents at the Airport.

59. NTSB data shows that jet aircraft (Category C and D) possess a better safety record than propeller driven aircraft (Category A and B). DD at 11. The data shows that jets as a class of aircraft have an accident rate 8 times lower than single-engine propeller aircraft, 5.75 times lower than twin-engine piston, and 4.6 times lower than twin-engine turboprops. DD at 11.

60. An overrun is an accident during the takeoff or landing phase of an aircraft operation in which the aircraft, while in contact with the surface, rolls beyond the end of the pavement designated for the runway. AAS Exh. 1, Appendix 1 at

4(m); AC 91-79; AAS Exh. 2 at 1; AC 150/5220-22A. Hall noted that FAA Advisory Circular 91-79 states that runway overruns during the landing phase are estimated at 10 incidents or accidents annually. Hall Rev. Direct ¶¶ 17; AC 91-79; City Exh. 23 at 2-3. Ninety percent of overruns are by aircraft traveling at a speed of 70 knots or lower. Marinelli Direct ¶ 51.

61. Two overrun accidents at SMO reached the Airport perimeter service road. Trimborn Hr. Tr. 383: 2-3.

62. No overrun accidents have occurred at SMO involving C or D category aircraft. Pratte Direct ¶ 28.

63. No safety reports provided to NASA pursuant to the Aviation Safety Reporting Program have indicated a potential hazard concerning the runway length or lack of runway safety areas at SMO. DD at 9.

64. Overruns have occurred at airports in the United States in the past ten years involving Category C or D aircraft, including but not limited to Little Rock, AK (1999), Burbank, CA (2000), Teterboro, NJ (2005), Midway Airport/Chicago, IL (2005), and Columbia Metropolitan Airport, Columbia, SC (2008). Trimborn Direct ¶34; City Exhs. 4-9; Hall Rev. Direct ¶¶ 19 and 33

65. The actual Challenger CL-600 that was involved in the Teterboro accident had flown into and out of SMO on June 23, 2004, and that aircraft make/model routinely operates into and out of SMO. Trimborn Direct ¶ 35.

66. The Learjet 60, the make/model that was involved in the Columbia, SC accident, is a make/model of aircraft that routinely operates into and out of SMO. Trimborn Direct ¶ 34.

67. Overruns involving Category C and D aircraft that exited the airport have occurred at airports where there had been no previous overruns by such aircraft. Hall Rev. Direct ¶ 53.

68. Historical data shows that Category C and D aircraft are involved in fewer overruns than Category A and B aircraft. Marinelli Direct ¶ 40.

69. Because the stopping performance of a given Category C or D aircraft may be better than that of a given Category B aircraft, the Category C or D aircraft may be able to land in a shorter distance than the Category B aircraft even if the landing approach speed is higher. Donald K. Stimson ("Stimson") Direct ¶ 24.

70. Undershoots and overruns are related to the operational characteristics of the aircraft rather than to the airport runway. For example, if an aircraft lands too fast or too far down a runway, or for a host of operational reasons, an excursion could occur. The fact that a runway is brand new or 50 years old does not impact the aircraft's operation. Huffman Direct 97: 12-17.

71. Based on a simple ballistic arc that would be followed by any falling object with an assumed initial velocity, aircraft exiting the end of the runway at SMO at 70 knots would not reach the residential area at the west end of the runway. Marinelli Direct ¶ 60. To reach the neighborhood area, an aircraft would have to be flying, or at least have lift on the wings. Marinelli Direct ¶ 61.

72. There is no guarantee that an overrun or undershoot of a runway by an aircraft will not occur at any given airport, including at SMO. Hall Rev. Direct ¶¶ 17 and 56.

73. Pilot error is the leading cause of aircraft overruns. City Exh. 24 at 16 (AAS Interrogatory Responses); Trimborn Direct ¶ 31; Hall Rev. Direct ¶ 17; Miguel Vasconcelos ("Vasconcelos") Direct 121: 9-19; Hall Hr. Tr. 160: 9-17.

74. Historical data shows that Category C and D aircraft are involved in fewer overruns than Category A and B aircraft. Marinelli Direct ¶ 40. There are also more operations of Category A and B aircraft as compared with Category C and D aircraft. Benjamin Harris ("Harris") Hr. Tr. 655:13—656:7. Even allowing for the greater number of operations of Category A and B aircraft as compared with Category C and D aircraft, there is a higher accident rate for Category A and B aircraft. Harris Hr. Tr. 654:19-65.

D. Pilot Certification

75. FAA aircraft certification standards apply to aircraft that operate at airports throughout the United States, including SMO. Troy Zwicke ("Zwicke") Direct 146:6-147:16.

76. FAA-approved flight manuals govern the operation of aircraft at airports throughout the United States, including SMO. Zwicke Direct 146:6—147:16.

77. Pilot training addresses the risk of undershoots and overruns because the pilot has to demonstrate his or her ability to fly the aircraft within its limitations. Stephen Ford ("Ford") Direct 98:1-4.

78. Some of the training also deals with emergencies and abnormal, system-related issues that could occur, so the pilot knows how to deal with those situations should they arise while the pilot is operating the aircraft. Ford Direct 98:8-15.

79. The 60 Percent Rule is a calculation of the shortest runway length that a pilot can use in landing the aircraft and comply with FAR 135. Ford Direct 100:1-4. It is calculated by taking the actual landing distance and dividing it by 60 to determine the maximum legal landing distance for a runway. Ford Direct

100:15-18. The resulting number has to be less than the actual length of the runway. Ford Direct 100: 15-18.

80. Pilots operating Category C and D aircraft possess commercial or airline transport pilot certificates with an instrument rating, as well as an aircraft-specific type rating. Pratte Direct ¶ 12.

81. Category A or B aircraft can be flown by a private pilot with as little as 35 total flight hours of experience. Ford Direct 100:15-18; Pratte Direct ¶¶ 11-12.

82. C and D category pilots have more experience, more training, and meet the highest safety standards. Pratte Direct ¶ 12.

E. Aircraft Certification

83. The probability of a defect leading to a runway excursion or overrun is much higher in a Category A or B aircraft when compared with a Category C or D aircraft. Pratte Direct ¶ 28.

84. With respect to takeoff performance, data shows that Category C and D aircraft have fewer engine failures than Category A and B aircraft. Pratte Direct ¶ 28.

85. Category C and D aircraft are predominantly certificated under Part 25 of the FAR as Transport Category Airplanes ("TCA"). Stimson Direct ¶ 7; Pratte Direct ¶ 8.

86. The Category A and B aircraft operating out of the Airport are predominantly certificated under Part 23 of the FAR. Stimson Direct ¶ 7; Pratte Direct ¶ 7.

87. Certification requirements under the Part 25 regulations are more stringent and set at a higher standard of safety than those under Part 23. Pratte Direct ¶ 12.

88. Pilots acting as pilots in command ("PIC") of a TCA certificated under Part 25 are required to hold type ratings and meet the highest safety standards for the TCA pilot certificate. Pratte Direct ¶ 12.

89. Pilots of aircraft certificated under Part 25 receive greater training and proficiency reviews as opposed to those who do not hold ATP certificates and do not operate Part 25 aircraft. Pratte Direct ¶ 12.

90. Many of the Category C and D aircraft operating at the Airport are certificated under Part 135 of the FAR. Trimborn Hr. Tr. 371:6-8; Trimborn Direct ¶ 39.

91. Operators of aircraft certificated under Part 135 are held to higher level of safety. Pratte Direct ¶ 13.

92. Operators of aircraft certificated under Part 135, Part 121, or Part 91, Subpart K for fractional ownership programs, are required to insure that the aircraft they operate can land, as per the Airplane Flight Manual limitations, within 60 percent of the usable runway (the "60 Percent Rule"), or within 80 percent for eligible on-demand operations that meet certain standards. Pratte Direct ¶ 15; 14 CFR § 135.385(b), (f); 14 CFR § 91.1037(b), (c). *Large aircraft* is defined as an aircraft of more than 12,500 pounds, maximum certificated takeoff weight. 14 CFR § 1.1. The aircraft identified in AAS Exhs. 31-52, which are representative of those operating at SMO, are large transport category aircraft.

93. 47.3 percent of all Category C and D aircraft operations at the Airport are operated pursuant to fractional ownership programs. Trimborn Hr. Tr. 371:1-5; Trimborn Direct ¶ 39.

94. Many corporate jets are Category C and D aircraft certificated under Part 25. Pratte Direct ¶ 8.

95. Corporate jet operations statistically have a good safety record. Hall Hr. Tr. 156:20-24. Incidents involving Category C and D aircraft are rare. Harris Hr. Tr. 655:8-12.

96. Part 23 aircraft are typically used in general aviation, crop dusting, banner towing, aerial surveying, and aerobatics, though they are also used in corporate, air taxi, on demand, and fractional ownership operations. Stimson Direct ¶ 10. Part 23 aircraft generally fall within Categories A or B. *Id*.

97. Part 25 aircraft are typically used in air carrier, corporate, air taxi, on demand, and fractional ownership operations, and generally fall within Categories C or D. Stimson Direct ¶ 11.

98. Part 25 aircraft are required to meet more stringent certification requirements than Part 23 aircraft, including more stringent requirements addressing takeoff and landing performance. Stimson Direct ¶ 12.

99. Part 25 aircraft typically have certain design features that provide added safety benefits compared with Part 23 aircraft, such as enhanced takeoff and/or landing safety devices such as auothrottles, anti-skid and autobrake systems, automatic spoiler deployment, enhanced flight deck displays, and thrust reversers. Stimson Direct ¶ 20.

100. The regulations under which pilots operate aircraft under Part 135 require a higher level of safety than operations under Part 91 because they offer a service to the public. The pilots have to obtain a type rating for a particular aircraft because the aircraft weighs over 12,500 pounds, so the training is specific to that make and model aircraft. The pilot certification requirements to fly such aircraft require a minimum 1,500 hours for PIC. Ford Direct 97:2-22.

101. Part 135 has a requirement that a PIC is reviewed every six months to demonstrate that the PIC can operate the aircraft under instrument conditions. Ford Direct 97:2-22.

F. Advisory Circulars and FAA Orders

102. AC 150/5300-4B, *Utility Airports Air Access to National Transportation Purpose*, dated June 24, 1975, establishes design, operation, and maintenance standards for utility airports. DD Item 24.

103. AC 150/5300-13, *Airport Design*, October 1, 2002; AAS Exh. 3 includes, among other things, the following provisions:

> **2. DEFINITIONS**. As used in this publication, the following terms mean:
>
> *Aircraft Approach Category*. A grouping of aircraft based on 1.3 times their stall speed in the landing configuration at the certificated maximum flap setting and maximum landing weight at standard atmospheric conditions. The categories are as follows:
> Category A: Speed less than 91 knots.
> Category B: Speed 91 knots or more but
> less than 121 knots.
> Category C: Speed 121 knots or more but
> less than 141 knots.
> Category D: Speed 141 knots or more but
> less than 166 knots. . . .
>
> ****
>
> *Runway Protection Zone (RPZ)*. An area off the runway end to enhance the protection of people and property on the ground.
>
> **6. MODIFICATION OF AIRPORT DESIGN STANDARDS TO MEET LOCAL CONDITIONS.**
> "Modification to standards" means any change to FAA design standards other than dimensional standards for runway safety areas. Unique local conditions may require modification to airport design standards for a specific airport. A modification to an airport design standard related to new construction, reconstruction,

expansion, or upgrade on an airport which received Federal aid requires FAA approval. . . .

300. INTRODUCTION. This chapter presents standards for runways and runway associated elements such as shoulders, blast pads, runway safety areas, obstacle free zones (OFZ), object free areas (OFA), clearways, and stopways. . . . At new airports, the RSA and ROFA lengths and the RPZ location standards are tied to runway ends. At existing constrained airports, these criteria may, on a case-by-case basis, be applied with respect to declared distances ends. . . .

305. RUNWAY SAFETY AREA (RSA). The runway safety area is centered on the runway centerline. . . .
****

a. **Design Standards**. The runway safety area shall be:
(1) cleared and graded and have no potentially hazardous ruts, humps, depressions, or other surface variations;
(2) drained by grading or storm sewers to prevent water accumulation;
(3) capable, under dry conditions, of supporting snow removal equipment, aircraft rescue and firefighting equipment, and the occasional passage of aircraft without causing structural damage to the aircraft;
and
(4) free of objects, except for objects that need to be located in the runway safety area because of their function. Objects higher than 3 inches (7.6 cm) above grade should be constructed, to the extent practicable, on low impact resistant supports (frangible mounted structures) of the lowest practical height with the frangible point no higher than 3 inches (7.6 cm) above grade. Other objects, such as manholes, should be constructed at grade. In no case should their height exceed 3 inches (7.6 cm) above grade.

b. **Construction Standards**. Compaction of runway safety areas shall be to FAA specification P-152 found in AC 150/5370-10.

c. **Sub-standard RSAs**. RSA standards cannot be modified or waived like other airport design standards. The dimensional standards remain in effect regardless of the presence of natural or man-made objects or surface conditions that might create a hazard to aircraft that leave the runway surface. Facilities, including NAVAIDs,that would not normally be permitted in an RSA should not be installed inside the standard RSA dimensions even when the RSA does not meet standards in other respects. A continuous evaluation of all practicable alternatives for improving each sub-standard RSA is required until it meets all standards for grade, compaction, and object frangibility. FAA Order 5200.8, Runway

Safety Area Program, explains the process for conducting this evaluation. Each FAA regional Airports division manager has a written determination of the best practicable alternative(s) for improving each RSA. Therefore, runway and RSA improvement projects must comply with the determination of the FAA regional Airports division manager.

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8. RUNWAY PROTECTION ZONE (RPZ).
Approach protection zones were originally established to define land areas underneath aircraft approach paths in which control by the airport operator was highly desirable to prevent the creation of airport hazards. Subsequently, a 1952 report by the President's Airport Commission (chaired by James Doolittle), entitled "The Airport and Its Neighbors," recommended the establishment of clear areas beyond runway ends. Provision of these clear areas was not only to preclude obstructions potentially hazardous to aircraft, but also to control building construction as a protection from nuisance and hazard to people on the ground. The Department of Commerce concurred with the recommendation on the basis that this area was "primarily for the purpose of safety and convenience to people on the ground." The FAA adopted "Clear Zones" with dimensional standards to implement the Doolittle Commission's recommendation. Guidelines were developed recommending that clear zones be kept free of structures and any development which would create a place of public assembly. In conjunction with the introduction of the RPZ as a replacement term for clear zone, the RPZ was divided into "object free" and "controlled activity" areas. The RPZ function is to enhance the protection of people and property on the ground. Where practical, airport owners should own the property under the runway approach and departure areas to at least the limits of the RPZ. It is desirable to clear the entire RPZ of all aboveground objects. Where this is impractical, airport owners, as a minimum, shall maintain the RPZ clear of all facilities supporting incompatible activities. Incompatible activities include, but are not limited to, those which lead to an assembly of people.

104. AC 91-79, *Runway Overrun Prevention*, dated November 6, 2007; AAS Exh. 1; provides as follows:

1. PURPOSE. This advisory circular (AC) provides ways for pilots and operators of turbine-powered airplanes to identify, understand, and mitigate risks associated with runway overruns during the landing phase of flight. It also provides

operators with detailed information that may be used to develop company standard operating procedures (SOP) to mitigate those risks.

2. BACKGROUND. According to Federal Aviation Administration (FAA) and National Transportation Safety Board (NTSB) information, runway overruns during the landing phase of flight account for approximately 10 incidents or accidents every year with varying degrees of severity, with many accidents resulting in fatalities. The FAA is working in partnership with industry to develop strategies to reduce the number of landing overrun incidents/accidents. A review of runway overrun events indicates that most occur due to either a lack of or nonadherence to SOP. These events continue to occur despite efforts by the FAA and industry to ensure that operators develop SOPs and that flight crewmembers are properly trained and operate in accordance with the SOPs. Therefore, an emphasis on SOP development and a risk mitigation approach is employed in this AC.

a. Focused training and testing of crewmembers along with practical planning tools are the keys to avoiding runway overrun events. This emphasis on training and checking should be targeted at initial pilot certification as well as recurrent training and checking events. The training and checking should not be merely academic in nature. These events should emphasize real world aeronautical decision making and use scenario based presentations in order to increase pilot recognition of high risk landing operations.

b. Proper identification of the risks will help pilots employ mitigation strategies or eliminate certain risks prior to the landing event.

c. Operators are responsible for developing SOPs, and all pilots are responsible for ensuring that they are well-trained, qualified for the intended flight, and meet all of the regulatory requirements for the flight. This responsibility includes the self-discipline to follow company SOPs and/or industry best practices and safety procedures that can prevent runway overrun incidents/accidents regardless of the level of managerial or government oversight. Even the best procedures are ineffective if they are not followed.

6. HAZARDS ASSOCIATED WITH RUNWAY OVERRUNS. In order to develop risk mitigation strategies and tools, hazards associated with runway overruns must be identified. A study of

FAA and NTSB data indicates that the following hazards increase the risk of a runway overrun:

• A nonstabilized approach,

• Excess airspeed,

• Landing beyond the intended touchdown point, and

Failure to assess required landing distance to account for slippery or contaminated runway conditions or any other changed conditions existing at the time of landing.

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7. RISK MITIGATION.

a. SOPs. Well-developed SOPs are the primary risk mitigation tools used to prevent runway overruns. These procedures must be relevant and focused on the end user—the flight crew. Once SOPs are developed, it is imperative that the flight crew execute them faithfully to help prevent runway overruns. As a minimum, the SOPs should contain the following procedures directly related to runway-overrun prevention:

• Stabilized approaches, including procedures for executing a go-around if the approach parameters are outside of the stabilized approach criteria,

• Landing distance reassessment at the time of arrival, and

• Use of brakes and other deceleration devices.

b. Training. An effective training program is a secondary tool that provides academic knowledge about the subjects related to landing performance. Effective training also reinforces the practical application of the knowledge and the associated SOPs in the cockpit. At a minimum, the operator's training program should contain the following elements directly related to runway-overrun prevention:

• SOPs-operator specific;

• Stabilized approaches;

• Source and conditions of landing distance data contained in aircraft flight manuals or FAA approved destination airport analysis (airplane type specific);

• Landing distance calculation—preflight;

• Landing distance calculation—reassessment at time of arrival;

• Consequences of excess airspeed;

• Consequences of landing beyond the intended touchdown point;

• Use of brakes to include autobrakes, if installed, and deceleration devices (airplane type specific);

• Landing distance rules of thumb; and

• Reasons to initiate a go-around and execution of the go-around maneuver.

105. AC 150/5220-22A, *Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns*, September 30, 2005, (9/30/2005); AAS Exh. 2, provides as follows:

1. PURPOSE. This advisory circular (AC) contains standards for the planning, design, installation, and maintenance of Engineered Materials Arresting Systems (EMAS) in runway safety areas (RSA). Engineered Materials means high energy absorbing materials of selected strength, which will reliably and predictably crush under the weight of an aircraft.

3. BACKGROUND. Aircraft can and do overrun the ends of runways, sometimes with devastating results. An overrun occurs when an aircraft passes beyond the end of a runway during an aborted takeoff or while landing. Data on aircraft overruns over a 12-year period (1975 to 1987) indicate that approximately 90% of all overruns occur at exit speeds of 70 knots or less (Reference 7, Appendix 4) and most come to rest between the extended runway edges within 1000 feet of the runway end (Reference 6, Appendix 4).

To minimize the hazards of overruns, the Federal Aviation Administration (FAA) incorporated the concept of a safety area

beyond the runway end into airport design standards. To meet the standards, the safety area must be capable, under normal (dry) conditions, of supporting the occasional passage of aircraft that overrun the runway without causing structural damage to the aircraft or injury to its occupants. The safety area also provides greater accessibility for emergency equipment after an overrun incident. There are many runways, particularly those constructed prior to the adoption of the safety area standards, where natural obstacles, local development, and/or environmental constraints, make the construction of a standard safety area impracticable. There have been accidents at some of these airports where the ability to stop an overrunning aircraft within the runway safety area would have prevented major damage to aircraft and/or injuries to passengers.

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4. APPLICATION. Runway safety area standards cannot be modified or waived. The standards remain in effect regardless of the presence of natural or man-made objects or surface conditions that might create a hazard to aircraft that overrun the end of a runway. A continuous evaluation of all practicable alternatives for improving each sub-standard RSA is required. FAA Order 5200.8, *Runway Safety Area Program*, explains the evaluation process. FAA Order 5200.9, *Financial Feasibility and Equivalency of Runway Safety Area Improvements and Engineered Material Arresting Systems*, is used in connection with FAA Order 5200.8 to determine the best practicable and financially feasible alternative for an RSA improvement. The FAA does not require an airport sponsor to reduce the length of a runway or declare its length to be less than the actual pavement length to meet runway safety area standards if there is an operational impact to the airport. An example of an operational impact would be an airport's inability to accommodate its current or planned aircraft fleet. Under these circumstances, installing an EMAS is another way of enhancing safety. A standard EMAS provides a level of safety that is generally equivalent to a full RSA built to the dimensional standards in AC 150/5300-13, *Airport Design*. It also provides an acceptable level of safety for undershoots.

The FAA recommends the guidelines and standards in this AC for the design of EMAS. In general, this AC is not mandatory and does not constitute a regulation. It is issued for guidance purposes and to outline a method of compliance. However, use of these guidelines is mandatory for an airport sponsor installing an EMAS funded under Federal grant assistance programs or on an airport

certificated under Title 14 Code of Federal Regulations (CFR) Part 139, *Certification of Airports*. . . . If an airport sponsor elects to follow an alternate method, the alternate method must have been determined by the FAA to be an acceptable means of complying with this AC, the runway safety area standards in AC 150/5300-13, and 14 CFR Part 139.

8. SYSTEM DESIGN REQUIREMENTS. For purposes of design, the EMAS can be considered fixed by its function and frangible since it is designed to fail at a specified impact load. An aircraft arresting system such as EMAS is exempt from the requirements of 14 CFR Part 77, *Objects Affecting Navigable Airspace*. When EMAS is the selected option to upgrade a runway safety area, it is considered to meet the safety area requirements of 14 CFR Part 139. The following system design requirements must prevail for all EMAS installations:

a. Concept. An EMAS is designed to stop an overrunning aircraft by exerting predictable deceleration forces on its landing gear as the EMAS material crushes. It must be designed to minimize the potential for structural damage to aircraft, since such damage could result in injuries to passengers and/or affect the predictability of deceleration forces. An EMAS should be design for a 20-year service life.

b. Location. An EMAS is located beyond the end of the runway and centered on the extended runway centerline. It will usually begin at some setback distance from the end of the runway to avoid damage due to jet blast and undershoots (Figure A1-2, Appendix 1). This distance will vary depending on the available area and the EMAS materials. Where the area available is longer than required for installation of a standard EMAS designed to stop the design aircraft at an exit speed of 70 knots, the EMAS should be placed as far from the runway end as practicable. Such placement decreases the possibility of damage to the system from short overruns or undershoots and results in a more economical system by considering the deceleration capabilities of the existing runway safety area.

The resulting runway safety area must provide adequate protection for aircraft that touch down prior to the runway threshold (undershoot). Adequate protection is provided by either: (1) providing at least 600 feet (or the length of the standard runway safety area, whichever is less) between the

runway threshold and the far end of the EMAS bed if the approach end of the runway has vertical guidance or (2) providing the full length standard runway safety area when no vertical guidance is provided.

An EMAS is not intended to meet the definition of a stopway as provided in AC 150/5300-13. The runway safety area and runway object free area lengths begin at a runway end when a stopway is not provided. When a stopway is provided, these lengths begin at the stopway end (AC 150/5300-13).

The airport sponsor, EMAS manufacturer, and the appropriate FAA Regional Airports Division/Airport District Office (ADO) should consult regarding the EMAS location to determine the appropriate location beyond the end of the runway for the EMAS installation for a specific runway.

c. Design Method. An EMAS design must be supported by a validated design method that can predict the performance of the system. The design (or critical) aircraft is defined as that aircraft using the associated runway that imposes the greatest demand upon the EMAS. This is usually, but not always, the heaviest/largest aircraft that regularly uses the runway. EMAS performance is dependent not only on aircraft weight, but landing gear configuration and tire pressure. In general, use the maximum take-off weight (MTOW) for the design aircraft. However, there may be instances where less than the MTOW will require a longer EMAS. All configurations should be considered in optimizing the EMAS design. To the extent practicable, however, the EMAS design should consider both the aircraft that imposes the greatest demand upon the EMAS and the range of aircraft expected to operate on the runway. In some instances, this composite design aircraft may be preferable to optimizing the EMAS for a single design aircraft. Other factors unique to a particular airport, such as available RSA and air cargo operations, should also be considered in the final design. The airport sponsor, EMAS manufacturer, and the appropriate FAA Regional Airports Division/ADO should consult regarding the selection of the design aircraft that will optimize the EMAS for a specific airport. . . .

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> **g. Entrance Speed**. To the maximum extent possible, the EMAS must be designed to decelerate the design aircraft expected to use the runway at exit speeds of 70 knots (approach category C and D aircraft) without imposing loads that exceed the aircraft's design limits, causing major structural damage to the aircraft or imposing excessive forces on its occupants. Contact the FAA's Airport Engineering Division (AAS-100) at 202-267-7669 for guidance when other than approach category C and D aircraft is proposed for the EMAS design. Standard design conditions are no reverse thrust and poor braking (0.25 braking friction coefficient).
>
> Generally, when there is insufficient RSA available for a standard EMAS, the EMAS must be designed to achieve the maximum deceleration of the design aircraft within the available runway safety area. However, a 40-knot minimum exit speed should be used for the design of a non-standard EMAS. For design purposes, assume the aircraft has all of its landing gear in full contact with the runway and is traveling within the confines of the runway and parallel to the runway centerline upon overrunning the runway end. . . .

106. FAA Order 5200.9, *Financial Feasibility of Runway Safety Area Improvements and Engineered Material Arresting Systems*, dated March 15, 2004; AAS Exh. 7, provides:

> **1. PURPOSE.**
>
> This is guidance for (a) comparing various runway safety area (RSA) improvement alternatives with improvements that use Engineered Material Arresting Systems (EMAS); and (b) determining the maximum financially feasible cost for RSA improvements, whether they involve EMAS or not. . . .
>
> *****
>
> **5. BACKGROUND**
>
> Improving RSAs that do not meet current dimensional standards is often difficult. Terrain and environmental considerations can result in improvements that cost in the tens of millions of dollars.

Analysis shows that for aircraft overruns, EMAS can provide a safety enhancement, while requiring less land disturbance and lower construction costs, thereby reducing significant overall costs. EMAS does not provide a benefit for short landings, so a standard EMAS installation might also include a displaced threshold. In order to preserve existing runway dimensions where one end of the runway meets RSA dimensional standards, and the other end does not, a runway extension and second EMAS may be required. This does not mean that EMAS should never be installed in other than this standard configuration. EMAS will often be the appropriate safety enhancement even when undershoot protection cannot be provided, if a standard solution is not available.

6. STANDARD EMAS INSTALLATION

a. A standard EMAS installation provides a level of safety that is generally equivalent to a full RSA constructed to the standards of AC 150/5300-13 for overruns. It also provides an acceptable level of safety for undershoots. Studies have shown that a standard EMAS installation will arrest 90% of overruns and accommodate 90% of undershoots. Follow the EMAS design requirements in AC 150/5220-22 in the event of any conflicts with this guidance. A standard EMAS installation must meet the following conditions:

(1) The EMAS is constructed in accordance with AC 150/5220-22.

(2) The EMAS must be capable of safely stopping a design aircraft that leaves the runway traveling at 70 knots. . . .

7. NON-STANDARD EMAS INSTALLATION

a. It will often not be practicable to provide either a standard RSA or a standard EMAS installation, either because the cost of both is above the maximum feasible cost, or because displacing the landing threshold will adversely affect operations. Consider not only the possible loss of runway length, but also effects on taxiing aircraft, including changes in required holding positions. When neither a standard RSA nor a standard EMAS system can be provided within maximum feasible costs, a non-standard EMAS that will stop the design aircraft traveling at 40 knots or more should be considered. An EMAS that cannot provide at least this minimum performance is not considered a cost-effective safety enhancement.

b. While relative benefits have not been quantified, protection against overruns appears to be more valuable than protection against short landings. Short landings are less common and usually

occur close to the runway threshold. Therefore, consider eliminating the displaced threshold when a standard RSA or a standard EMAS is not financially feasible-- i.e. install EMAS to provide maximum protection against overruns by the design aircraft exiting the runway at 70 knots (but no less than 40 knots), and provide protection against short landings to the maximum extent feasible, up to the maximum feasible improvement cost.

107. FAA Order 5200.8 *Runway Safety Area Program*, dated October 1, 1999; AAS Exh. 6, provides:

1. PURPOSE.

This order establishes
a. The Federal Aviation Administration's (FAA) Runway Safety Area (RSA) Program and
b. The procedures that FAA employees will follow in implementing that program.

4. BACKGROUND.

The RSA is an integral part of the runway environment. RSA dimensions are established in AC 150/5300-13, **Airport Design** and are based on the Airport Reference Code (ARC). The RSA is intended to provide a measure of safety in the event of an aircraft's excursion from the runway by significantly reducing the extent of personal injury and aircraft damage during overruns, undershoots and veer-offs.

5. OBJECTIVE

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

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Appendix 2. Supporting Documentation for RSA Determinations

2. CONSIDERATIONS IN EVALUATING ALTERNATIVES.

In evaluating alternatives for obtaining or improving RSAs, there are many factors that could affect the viability of the alternative. What may be viable at one airport may not be viable at another. Factors to be considered include:

a. Historical records of airport accidents/incidents.
b. The airport plans as reflected in current and forecast volume of passengers, number of operations, design aircraft and percent runway use, both for all weather and IFR operations,
c. The extent to which the existing RSA complies with the standard. High performance aircraft, operating at higher loads and speeds have greater requirements than small, low performance aircraft.
d. Site constraints. These include, for example, precipitous terrain drop-off, the existence of bodies of water, wetlands, a major highway, a railroad at a runway end, etc.
e. Weather and climatic conditions. These include conditions such as low visibility, rain, snow, and ice and the frequency of these conditions. Overruns on contaminated runways constitute a significant percentage of runway excursions.
f. Availability of visual and electronic aids for landing.

3. ALTERNATIVES TO BE CONSIDERED.

The first alternative to be considered in every case is constructing the traditional graded area surrounding the runway. Where it is not practicable to obtain the entire safety area in this manner, as much as possible should be obtained. Then, the following alternatives shall be addressed in the supporting documentation. The applicability of these alternatives will vary, depending on the location.

a. Relocation, shifting, or realignment of the runway.
b. Reduction in runway length where the existing runway length exceeds that which is required for the existing or projected design aircraft.
c. A combination of runway relocation, shifting, grading, realignment, or reduction.
d. Declared distances.
e. Engineered Materials Arresting Systems (EMAS).

G. Risk Mitigation at SMO

108. The FAA has undertaken an effort to improve Runway Safety Areas ("RSA") at airports throughout the United States. Between 1983 and 2008, the FAA expended $1.98 billion dollars on the installation or improvement of RSAs at airports, of which $1.972 billion dollars was spent since 1991. City Exhs. 30, 35 and 45; Hall Rev. Direct, ¶¶ 28-29; and the FAA expected to spend $1.68 billion in Fiscal Year 2005. City Exh. 35 at 25.

109. An RSA is "[a] defined surface surrounding the runway prepared or suitable for reducing the risk of damage to airplanes in the event of an undershoot, overshoot or excursion from the runway." Hall Rev. Direct ¶ 22 quoting AC 150/5300-13, *Airport Design*, Appendix 8. An RSA "allow[s] for a potential overrun of an aircraft." Kelvin Solco ("Solco") Direct 77:10-12. Creation of a Runway Protection Zone ("RPZ") involves having "the airport acquire the land so that they can prevent what I call the congestion of people." Solco Direct 77:17-19.

110. The design purpose of an RPZ is to protect persons and property adjacent to the airport in the event of an aircraft accident. Solco Direct 77:17-19.

111. RSAs are established at Part 139 certificated commercial airports, and at federally funded airports, like SMO, "to the extent practicable." AAS Exh. 6 at 1; FAA Order 5200.8. Some factors used to determine practicability at an airport include cost, terrain, and the presence of adjacent structures, highways, waterways, rivers, oceans, lakes, etc. Solco Direct 121:20-123:8.

112. If a runway is shortened too much, the impact on operations could lead to aircraft that previously operated on that runway not being able to operate there anymore. Huffman Direct 98:12-21.

113. RSAs are not intended to provide protection to the residents near the ends of the runway. An RSA provides an additional area to decelerate an aircraft that is in the process of stopping. Marinelli Direct ¶ 59.

114. Whether an airport has an RSA is not a consideration during aircraft certification; nor does it enter into the determination of the minimum runway length required under aircraft operating rules. Aircraft must be able to safely takeoff and land regardless of the presence or absence of an RSA. Stimson Direct ¶ 21.

115. Engineered Materials Arresting Systems ("EMAS") are composed of "Engineered Materials," which are "high energy absorbing materials of selected strength, which will reliably and predictably crush under the weight of an aircraft." AAS Exh. 2; AC 150/5220-22A. Several major airport runways operate without RSAs and EMASs, including Los Angeles International, Boston Logan, and Chicago Midway. City Exh. 22 at 5, 8, and 9.

116. FAA design standards call for RSAs to extend 1,000 feet beyond the runway ends for runways serving Category C or D aircraft. AAS Exh. 3 at 25-26.1; AC 150/5300-13.

117. FAA design standards call for RSAs to extend 300 feet beyond the runway ends for runways serving Category A or B aircraft. AAS Exh. 3 at 25-26.1; AC 150/5300-13.

118. FAA design standards for RSAs were developed through analysis of empirical data of accidents by Category A and B versus Category C and D Aircraft. Marinelli Direct ¶ 51.

119. The design standards for RSAs were established by determining the distance from the runway end within which 90 percent of historical overruns had stopped.

AAS Exh. 2 at 1; AC 150/5220-22A; AAS Exh. 3, Appendix 8 at 139-40; AC 150/5300-13.

120. The design purpose of an RSA is to minimize damage to the aircraft in the event of an overrun and protect the aircraft's occupants. AAS Exh. 6 at 1; FAA Order 5200.8.

121. Advisory Circular 150/5300-13, *Airport Design*, contains the specifications for RSAs and RPZs. AAS Exh. 3.

122. No RPZs have been established in the geographic area abutting SMO. Trimborn Rebuttal ¶¶ 1 and 3.

123. Design standards for an EMAS are discussed in AC 150/5220-13. AAS Exh. 2.

124. RSAs are established at commercial airports certificated pursuant to Part 139 of the FAR and at federally funded airports "to the extent practicable." AAS Exh. 6 at 1; FAA Order 5200.8.

125. Factors that enter into the practicability evaluation include cost, terrain, and the presence of adjacent structures, highways, waterways, rivers, oceans, lakes, etc. Solco Direct 121:20-123:8.

126. The current operations at SMO meet every FAA safety requirement for aircraft operation; operators of C and D Category aircraft not only must comply with the same requirements as operators of Category A and B aircraft, in many cases, the requirements for operation of these aircraft are more stringent. DD at 4.

127. There are no designated RSAs at either end of Runway 3/21 at SMO. Trimborn Direct ¶ 7; Hall Rev Direct ¶ 38.

128. RSAs and RPZs are not a mandatory requirement for an airport such as SMO. AAS Exh. 6 at 1; FAA Order 5200.8.

129. Hundreds of airports in several states throughout the country lack standard RSAs. City Exh. 22.

130. An RSA protects only the people who would have been in that 500 by 1,000 foot rectangle had the RSA not been there. An EMAS is not designed to provide protection in the event an aircraft has sufficient lift to become airborne, only an RPZ will make a difference in the event of an accident. Marinelli Hr. Tr. 317: 14-20.

131. In order to achieve full RSA dimensional standards at SMO would require shortening the runway to the extent that the critical aircraft on which the standard is based would no longer be able to operate at SMO. Marinelli Direct ¶ 46.

132. The City proposed to adopt 1,000 foot overrun areas, which would have severely limited operations due to the shortened runway. Marinelli Direct ¶ 45.

133. The most effective safety enhancements at SMO would be the installation of an EMAS at the west end of the Airport runway for the protection of aircraft and occupants, and the development of RPZs for the protection of nearby residents. Marinelli Direct ¶ 49.

134. An initial evaluation of SMO indicates that with associated earthwork, an EMAS providing 70 knot performance is feasible on one end of the runway. Marinelli Direct ¶ 53. 90 percent of overruns are at 70 knots or lower. AAS Exh. 7 at 3-4; Marinelli Direct ¶ 51; DD Item 7.

135. The current slope at the end of the runway has been associated with a fatal accident. Installing a retaining wall would provide approximately 200 feet of

additional runway length in which an aircraft could stop before reaching the drop-off. Marinelli Direct ¶ 57. Retaining walls are common in airport construction. Marinelli Direct ¶ 58.

136. No airport operator, other than the City, has restricted aircraft based on approach speed category due to lack of an RSA. Pratte Hr. Tr. 191:6-21.

137. The NTSB has accepted, in response to NTSB Recommendations A-03-11 and -12, the FAA's policies and program to address airports with non-standard RSAs. City Exh. 5A at 43.

138. The NTSB has never issued a recommendation to the FAA, as a result of an investigation, that any category of aircraft be restricted from operating at an airport due to non-standard RSAs or the lack of RSAs. City Exhs. 4-8 and 18-20.

139. Category C and D aircraft are predominantly certificated pursuant to Part 25 of the FAR as TCA. Stimson Direct ¶ 7.

140. Category A and B aircraft are predominantly certificated pursuant to Part 23 of the FAR. Stimson Direct ¶ 7.

141. Part 25 certification requirements are more stringent and encompass higher safety standards than Part 23. Stimson Direct ¶ 12 and 20.

142. Pilots acting as PIC of a Part 25 Transport Category Airplane must hold type ratings and meet the highest safety standards for the Airline Transport pilot certificate. Pratte Direct ¶ 11.

143. Pilots of Part 25 aircraft receive greater training and proficiency reviews as opposed to pilots who do not hold ATP certificates or operate Part 23 aircraft. Pratte Direct ¶ 11 and 13.

144. Many of the Category C and D aircraft operations at SMO are conducted pursuant to Part 135 of the FAR. Trimborn Hr. Tr. 371:3-5.

145. Operations conducted pursuant to Part 135 are held to high safety standards. Pratte Direct ¶ 13-15.

146. Operators conducting flights under Part 135, Part 121, or Part 91, Subpart K for fractional ownership programs, must ensure that the airplane can land, as per the Airplane Flight Manual limitations, within 60 percent of the usable runway, or 80 percent for eligible on-demand operations that meet certain higher standards. Pratte Direct ¶ 15; 14 CFR § 135.385(b) and (f); 14 CFR § 91.1037(b) - (c). *Large aircraft* is defined as an aircraft of more than 12,500 pounds, maximum certificated takeoff weight. 14 CFR § 1.1. The aircraft identified in AAS Exhs. 31-52, which are representative of those operating at SMO, are large transport category aircraft.

147. 47.3 percent of the operations of Category C and D aircraft at SMO are operated pursuant to fractional ownership programs. Trimborn Hr. Tr. 371:1-2.

148. Corporate jets are predominantly C and D category airplanes certificated under Part 25. Stimson Direct ¶ 11; Pratte Direct ¶ 8.

149. Corporate jet operations have a good safety record. Hall Hr. Tr. 156:20-24. Events involving Category C and D aircraft are rare. Harris Rebuttal ¶3; Harris Hr. Tr. 655:8-12.

150. The City's airport manager and safety expert believes that the steep 4-degree glide path approach mandated by the City at SMO enhances the risk of an overrun. Trimborn Direct ¶ 38. Hall also stated that "the terrain steeply drops off shortly after both runway ends which makes construction of an RSA or an

equivalent EMAS bed installation extremely difficult without shortening the runway." Hall Rev. Direct ¶ 27.

151. The City has not brought its steep glide path approach to a standard 3 degrees to eliminate risk caused by a steeper slope. Trimborn Hr. Tr. 413:20-415:19.

152. The City's airport manager and safety expert believe that the "full throttle" departure procedure required by the City at SMO for noise abatement purposes enhances the risk of an overrun. Trimborn Direct ¶ 38.

153. The City has not amended the "full throttle" departure procedure to eliminate the overrun risk caused by that procedure. Trimborn Hr. Tr. 416:5-11.

154. The City is concerned about a hazard presented by the location of gasoline station on Bundy Drive across from airport property. Trimborn Direct ¶ 6. The City has not investigated whether the City of Los Angeles approved the gasoline station's location or assessed the potential of a hazard due to its proximity to the Airport runway. Trimborn Hr. Tr. 381:21-382:10.

155. The City has not looked into establishing a partial RPZ that would encompass the same geographic area as an RSA. *See generally* Trimborn Rebuttal ¶ 3-6.

156. The FAA has enacted and amended regulations under Part 97, Standard instrument approach procedures, of the FAR. Harry Hodges ("Hodges") Direct ¶ 7.

157. Part 97 contains instrument procedures for Category C and D aircraft. AAS Exhs. 23-26, 28-30; Hodges Direct ¶ 5; DD Item 27.

158. Amendments to Part 97 are coordinated with the SMO Airport Manager. AAS Exhs. 28-30; Hodges Direct ¶ 11.

159. Proposed Part 97 amendments are published in the Federal Register for public notice and comment pursuant to the Administrative Procedures Act. AAS Exhs. 23-26; Hodges Direct ¶ 13.

160. The City had the opportunity to express its position to the FAA with respect to the FAA's approval of Category C and D aircraft use of the instrument procedures pursuant to Part 97. AAS Exhs. 23-26, 28-30; Hodges Hr. Tr. 235:12-236:12, 239:20-240:1, 240:23-241:7, and 241:13-242:22.

161. The City submitted no comments with respect to the Part 97 regulations pertaining to Category C and D aircraft instrument approach procedures. Trimborn Hr. Tr. 418:1-5.

162. In 2001, the City submitted comments concerning the establishment of regulatory safety standards governing the operation of fractional ownership program aircraft, which includes Category C and D aircraft, but submitted no comments relating to their operation at airports with non-standard or no RSAs. Trimborn Hr. Tr. 375:25-377:12.

163. The minimum requirements with respect to cloud ceiling height and visibility for instrument operations at SMO are high compared to other airports, and close to Visual Flight Rule minimums. Ford Hr. Tr. 443:25-445:2, 441:10-442:15.

164. The runway acquisition program the FAA proposed to the City included the removal of 15 to 20 homes from the most critical areas within the runway safety area. Vasconcelos Direct 127:15-18.

165. The City's proposal of 2002 considered the removal of all homes in an RPZ. The FAA believed that removal of some homes from the runway safety area was a more reasonable consideration. Vasconcelos Direct 130:1-12.

166. The City believes that the Hawthorne, California airport is a viable alternative for Category C and D aircraft. Trimborn Direct ¶ 42.

167. Hawthorne is a B-II ARC airport. Trimborn Hr. Tr. 375:1-6. The overrun hazards for operators of Category C and D aircraft are the same at Hawthorne and at SMO. Trimborn Hr. Tr. 421:23-422:12.

168. At Hawthorne, as at SMO, there are buildings across from runway ends. Carey Hr. Tr. 616:18-24.

169. The Hawthorne airport has made improvements within its boundaries for hangar space. Vasconcelos Direct 218:21-22. However, it is limited for future development and physically limited. Vasconcelos Direct 219:1-2.

170. The State of California, pursuant to its Public Utilities Code, issues state operating permits to Public-Use and Special-Use airports and heliports in California, including SMO. The California Department of Transportation, Aeronautics Division, conducts regular permit compliance safety inspections of all permitted facilities. Gary A. Cathey ("Cathey") Direct ¶ 2.

171. On November 12, 1997, the California Department of Transportation, Aeronautics Program, conducted an FAA Airport Master Record and State permit compliance inspection of SMO. It found, among other things, that SMO did not have standard RSAs. As a result, the California Department of Transportation, Aeronautics Program, recommended that the City work with the FAA to establish declared distances at both ends of the runway. Cathey Direct ¶ 3.

172. On November 30, 1999, the California Department of Transportation, Aeronautics Program, conducted another FAA Airport Master Record and State permit compliance inspection of SMO. It found, once again, that SMO did not have

standard RSAs. As a result, the California Department of Transportation, Aeronautics Program, again recommended that the City work with the FAA to establish declared distances at both ends of the runway. Cathey Direct ¶¶ 4-5.

173. The California Public Utilities Code does not grant the State jurisdiction to regulate aircraft operations. Carey Hr. Tr. 501:4-5.

H. Airport Improvement Grants

174. Title 49 U.S.C. § 47101, *et seq*., provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program ("AIP") established by the Airport and Airway Improvement Act ("AAIA"), as amended. Section 47107, *et seq*., which sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding obligation between the airport sponsor and the Government. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6A, *Airport Compliance Requirements* (1989) ("Airport Compliance Handbook"), provides the policies and procedures to be followed by the FAA in carrying out its legislatively-mandated functions related to Federally-obligated airport owners' compliance with their sponsor assurances. AAS Exh. 9.

175. FAA records indicate that the planning and development of SMO has been financed, in part, with funds provided by the FAA. Between 1985 and 1994, the Airport has received a total of $10,190,163 in Federal airport development assistance. DD Items 6 and 41.

176. The grants supported many projects at the Airport between 1985 and 2003. The table below summarizes the grant history at SMO:

Year	Project No.	General Purposes	Total Amended Amount
1985	3-06-0239-01	Improve service road and apron	$ 1,100,000
1985	3-06-0239-02	Improve service road, apron, taxiway; acquire rescue, firefighting and safety equipment	1,100,000
1985	3-06-0239-03	Rehabilitate aprons, improve lighting and drainage	3,300,000
1989	3-06-0239-04	Improve drainage	300,000
1991	3-06-0239-05	Improve drainage and construct runway	2,304,263
1994-2003	3-06-0239-06	Rehabilitate taxiway and lighting; expand apron; acquire rescue, fire fighting, and safety equipment; improve draining, install NAVAIDS, etc.	2,085,900
		Total Grant Funding to SMO:	$10,190,163

DD Items 6 and 41. The final grant transaction in the record was *Amendment No. 2 to Grant Agreement/or Project No. 3-06-0239-06*, in August 27, 2003. DD Item 6.

177. The record includes the grant assurances for projects 3-06-0239-02 and 3-06-0239-04 through 3-06-0239-06. Each grant includes Grant Assurance 22, which states in relevant part:

> **22. Economic: Nondiscrimination.**
> a. Will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses.
> * * * *
> i. The sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

DD Item 6.

178. The grant documentation for projects 3-06-0239-02 and 3-06-0239-04 through 3-06-0239-06 also include Grant Assurance 23, which states in full:

> **23. Exclusive Rights.** [Sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-based operator

shall not be construed as an exclusive right if both of the following apply:

> a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and
>
> b. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

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

DD Item 6.

I. Regulatory Activities of the City and the FAA

179. In 1991, the City submitted a revised Airport Layout Plan that designated the SMO as an ARC B-II Airport. The 1991 Airport Layout Plan was approved by the FAA. DD Item 8B.

180. With the assistance of Coffman and Associates, the Airport Staff developed a proposal called the Aircraft Conformance Program ("ACP") that would preserve the Airport's use as a B-II facility by reserving the Airport's facility for aircraft consistent with the Airport's design capacity and by creating RSAs for Category

A and B aircraft consistent with published FAA standards. The Airport Commission held public hearings in May and July of 2002 as part of the process of formulating the ACP and presenting it to the City Council for consideration. DD Item 8B.

181. On July 22, 2002, the Santa Monica Airport Commission voted to recommend that the Santa Monica City Council implement, by ordinance, the ACP. DD Item 8A.

182. Before the City Council could take up the ACP, the FAA initiated a Part 16 investigation on October 8, 2002. DD Item 8B.

183. A Notice of Investigation ("NOI") dated October 8, 2002, was initiated by the Director of the Office of Airport Safety and Standards, and supplemented by his March 26, 2008 Order to Show Cause. The NOI and Order to Show Cause were issued in accordance with the FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings, 14 Code of Federal Regulations Part 16. DD Item 1.

184. The City responded to the NOI in November 2002, and did not adopt the proposed ACP but entered into discussions with the FAA. These initial discussions continued until the City adopted the Ordinance. The FAA expedited its investigation because the Ordinance was scheduled to take effect thirty days after it was adopted by the City Council. DD Item 2.

185. On December 10, 2002, the City Council received the Airport Commission's recommendation to approve the ACP and a report on the pending administrative proceeding. Following a public hearing, the City Council approved the ACP concept of implementing 300 foot RSAs at either end of the runway, a 300 foot relocated threshold from the departure end of the runway, and a ban on Category C and D aircraft using SMO. DD Item 8B.

186. On October 1, 2002, FAA representatives from the Air Traffic, Flight Standards, and Airports Divisions and the Regional Counsel for Western Pacific Region met with City officials to discuss the ACP. DD Item 2 at 5.

187. Between 2002 and 2008, there were several meetings and discussions between SMO officials and the FAA that addressed new proposals and counterproposals as alternatives to the ACP. Trimborn Direct ¶¶ 13-29.

188. The City and FAA engaged in negotiations from 2002 to 2007 in an attempt to resolve the City's concerns about SMO. Trimborn Direct ¶¶ 14-29.

189. The FAA rejected the City's proposal to install 300 foot RSAs at both ends of the runway. Trimborn Direct ¶¶ 18-19.

190. The FAA rejected the City's proposal to establish declared distances at both ends of the runway. Trimborn Direct ¶¶ 14-29.

191. The FAA recommended that the City institute a voluntary program by which the City would attempt to acquire, with the FAA's financial assistance, in the residential neighborhoods to the east and west of SMO. Trimborn Direct ¶¶ 26-29; DD Item 4, Exh. 18.

192. There are approximately 647 homes located within the dimensions of what the FAA would define as a standard RPZ, in which City estimates approximately 2,000 people reside. Trimborn Rebuttal ¶¶ 3-6.

193. The acquisition costs for these 647 homes are estimated by the City at $560 million dollars, which does not include administrative costs, relocation expenses, and legal fees. Trimborn Rebuttal ¶¶ 3-6.

194. From communications with neighborhood groups and individual residents, the City believes that there would be near unanimous opposition if one or more governmental entities attempt to acquire the homes within the projected RPZs. Trimborn Rebuttal ¶¶ 3-6.

195. In December of 2006, the FAA hosted a presentation by the City to users of the Airport concerning the City's latest proposal, which included the installation of a 250-foot EMAS unit at the end of Runway 3/21 and a 600- foot declared distance applied off the length of Runway 3/21, for a total loss of approximately 800 feet of runway. Trimborn Direct ¶ 18.

196. A displaced threshold is a point on the runway other than the designated beginning of the runway. Displacement of a threshold reduces the length of runway available for landings. The portion of runway behind a displaced threshold is available for takeoffs in either direction and landings from the opposite direction. AAS Exh. 3, AC 150/5200-13.

197. Declared distances are the distances the airport owner, with FAA concurrence, declares available for the airplane's takeoff run, takeoff distance, accelerate-stop distance, and landing distance requirements. AAS Exh. 3, AC 150/5200-13.

198. The current available EMAS is a bed of highly crushable concrete blocks that is installed at the ends of the runway. When an aircraft leaves the runway traveling at speed, the landing gear will crush the EMAS bed and the aircraft will come to a quick and safe stop. AAS Exh. 2, AC 150/5220-22A.

199. Between December 2006 and March 2007, the FAA and the City received user comments. The City also provided the FAA with public comments. DD Items 19A and 19B.

200. On July 31, 2007, an FAA letter proposed the installation of one EMAS at each end of the runway. Each EMAS would be contained in a 130 foot bed with 25 foot lead-in ramps on each end of the runway. DD Item 7.

201. On August 28, 2007, the FAA participated in a public meeting on SMO in the City. At the meeting, D. Kirk Shaffer, then the FAA's Associate Administrator for Airports, reiterated that the FAA's proposal provided an actual, physical stopping effect on overrunning aircraft that would directly benefit both persons on the aircraft and the areas off the ends of the runway. He explained that the proposal would significantly enhance safety at SMO while maintaining the utility of the Airport. DD Item 7. The City rejected the FAA's proposal as inadequate. DD Item 4 at 6-7.

202. On November 27, 2007, the proposed Ordinance was read for the first time at the City Council meeting. DD Item 8A. The City Council met in closed session on November 27, 2007 to discuss the proposed Ordinance to "protect public safety, particularly the safety of residents living immediately adjacent to the Santa Monica Airport runway ends and those individuals using and working at the Airport, by conforming Airport usage to the Airport's federal designation which defines it as a facility suitable for Category A and B aircraft." DD Item 8B.

203. On March 7, 2008, the FAA presented an integrated safety enhancement proposal which included modifications to its earlier EMAS proposal, revisions to the hold lines, revision to the departure procedures to achieve better coordination with LAX departures; and sending two electronic Notices to Airmen ("NOTAMs") advising pilots filing flight plans of the absence of RSAs and giving them information on the Santa Monica "Fly Neighborly" program. DD Item 7. The modified EMAS installation would be a 70-knot capable unit to be installed on the departure end of runway 21, on the west side of the Airport, in the direction of 90 percent of the Category C and D aircraft departing the Airport. DD Item 7.

204. On March 11, 2008, the City of Santa Monica City Council took up consideration of the Ordinance. The Preamble states:

> WHEREAS, the City of Santa Monica owns and operates a busy municipal airport which is immediately adjacent to dense residential neighborhoods at both ends of its runway but which has no buffer zones or Runway Safety Areas to protect airport neighbors and users against the risk of accidents occurring during takeoffs and landings; and
>
> WHEREAS, as the proprietor and operator of the Santa Monica Municipal Airport, the City must keep the Airport safe for Airport neighbors, pilots, passengers and others; and
>
> WHEREAS, the City's duty to keep the Airport safe is recognized by both state and federal law; and
>
> WHEREAS, Airport safety is of particular concern to the City because of the Airport's unique circumstances; and
>
> WHEREAS, those unique circumstances include the very close proximity of homes and arterial streets to the ends of the runway, the lack of any buffer zones or Runway Safety Areas between the Airport and surrounding residential and commercial development, and the Airport's physical location on a plateau with steep downhill grades at either end of the runway; and
>
> WHEREAS, in the dense residential neighborhoods bordering the Airport at each end of the runway, homes are within 300 feet of the runway's ends and directly within the flight path; and
>
> WHEREAS, these residential neighborhoods are separated from the Airport only by busy arterial streets which run along the Airport's western and eastern boundaries; and
>
> WHEREAS, in addition to the residential neighborhoods bordering the Airport to the east and west, a gasoline station is situated opposite the eastern end of the runway and heavily utilized public facilities are located in the residential neighborhood to the west, including a child care facility; and
>
> WHEREAS, the Airport is thus entirely surrounded by residential and other urban development with no buffer zones or Runway Safety Areas to separate Airport operations from the densely populated neighborhoods around it; and
>
> WHEREAS, the Airport is situated on a plateau which drops off steeply about 40 feet to the west and southwest and which is bordered by hilly terrain to the east and west; and
>
> WHEREAS, the natural terrain exacerbates the risks inherent in the proximity of homes to the runway ends, and it limits the options for enhancing safety: and

WHEREAS, in past decades, the Airport's lack of buffer zones and safety areas, proximity to homes and unusual topography did not raise the same safety concerns as exist today because of the sharp increase in aircraft with greater Runway Safety Area requirements; and

WHEREAS, the Airport was designed to accommodate a fleet of general aviation aircraft with slow approach speeds; and

WHEREAS, in the last several decades, both the composition of the Airport's fleet and the intensity of operations have changed substantially; and

WHEREAS, in the 1960's jets began using the Airport and disputes arose between the City and the federal government about Airport impacts and operations; and

WHEREAS, these disputes were litigated and eventually settled in 1984 with the Santa Monica Airport Agreement ("1984 Agreement") between the City and the Federal government which guides the City's actions in operating the Airport today; and

WHEREAS, the 1984 Agreement recognizes that the Airport is designed to accommodate general aviation aircraft consistent with Group II Design Standards as set forth in the FAA Advisory Circular 150/5300.4B, dated February 24, 1983; and

WHEREAS, that federal Advisory Circular states that "the standards, recommendations and guidance material in this Advisory Circular define an airport suitable for the less demanding Aircraft Approach Category A and B airplanes, i.e., airplanes with approach speeds of less than 121 knots … ."; and

WHEREAS, consistent with the 1984 Agreement, the Airport Layout Plan, approved by the FAA on August 20, 1991, assigns an Airport Reference Code designation of B-II to the Airport and obligates the City to operate the Airport accordingly; and

WHEREAS, pursuant to federal law, the B-II designation means that the Airport is designed to serve aircraft whose approach speeds are less than 121 knots; and

WHEREAS, current FAA standards require Runway Safety Areas to protect against the dangers of aircraft overruns; and

WHEREAS, FAA Order 5200.8 (Runway Safety Area Program) provides that all federally obligated airports should provide a Runway Safety Area for aircraft overruns consistent with the standards of FAA Advisory Circular 150/5300-13 (Airport Design); and

WHEREAS, the Santa Monica Airport is currently a federally obligated airport because the City accepted federal airport grants through 1994; and

WHEREAS, the Order also applies because the FAA has declared that "Runway Safety Area standards cannot be modified

or waived like other airport design standards" Advisory Circular 150/5300-13CHG7; and

WHEREAS, in the years since 1984, the City's safety concerns arising from the lack of Runway Safety Areas have grown because there has been a rapid increase in Airport use by Category C and D aircraft which exceed the Airport's design standards because their higher landing speeds require 1,000 foot Runway Safety Areas; and

WHEREAS, over the last twenty-five years, the number of category C and D aircraft using the Airport has increased ten fold; and

WHEREAS, in 2002, the Santa Monica City Council addressed these growing safety concerns by approving an Aircraft Conformance Program which would conform operations at the Airport to federal standards applicable to Airport Reference Code B-II airports; and

WHEREAS, to implement a key component of the conformance program, the City submitted an Airport Layout Plan (ALP) to the FAA on September 8, 2004 designed to bring the Airport within FAA standards by establishing Runway Safety Areas for Category A and B aircraft; and

WHEREAS the Airport Layout Plan submitted by the City in 2004 is consistent with both the FAA Runway Safety Area standards to accommodate Category A and B aircraft and the City's obligation to accommodate such aircraft pursuant to the 1984 Agreement; and

WHEREAS, the FAA has failed to approve or disapprove the City's proposed safety plans despite the fact that they reflect federal safety standards and comport with the City's rights and responsibilities under the 1984 Agreement; and

WHEREAS, instead of approving the City's safety plans, the FAA has challenged the City's right to even consider them, disputed their legality, and delayed and forestalled their implementation; and

WHEREAS, the City of Santa Monica has engaged in exhaustive discussions with the FAA for over five (5) years in response to the FAA's insisting upon alternative and lesser proposals; and

WHEREAS, the FAA's proposals are inadequate because they fail to provide Runway Safety Areas that even come close to meeting the FAA's published standard of 1000 feet (or the equivalent stopping power provided by an arresting system bed) for Category C and D aircraft, which are defined by the FAA as those aircraft with approach of 121 knots or more; and

WHEREAS, during the City's lengthy but unavailing attempts to cooperatively resolve its dispute with the FAA, the

number of Category C and D aircraft using the Airport has continued to grow and has increased by about 40%, from about 6,700 in 2001 to about 9,000 in 2006; and

WHEREAS, despite the growing safety risks, on August 28, 2007, the FAA Associate Administrator for Airports made a presentation to the Santa Monica City Council; and his presentation confirmed that the FAA's final offer for resolving the Runway Safety Area issue by agreement with the City would not even come close to meeting the FAA's own published standards for safety areas for Category C and D aircraft; and

WHEREAS, FAA guidance formally recognizes the risk of overruns: "Aircraft can and do overrun the ends of runways, sometimes with devastating results." AC No. 150/5220-22A; and

WHEREAS, a catastrophic overrun may occur at any airport but is particularly likely to occur if there are inadequate Runway Safety Areas and the airport is closely surrounded by residential neighborhoods; and

WHEREAS, runway overruns occur throughout the country every year; and

WHEREAS, in 2002 a Category B aircraft skidded off the west end of the runway at the Airport and the pilot and passenger were both killed in the accident; and

WHEREAS, this year in Santa Barbara a private aircraft overran the runway by over 300 feet; and

WHEREAS, in Burbank a commercial jet overran the runway, traveled through the fence at the airport boundary, and finally came to rest in a gasoline station; and

WHEREAS, recently in Teterboro, a private aircraft overran the runway, crossed an adjacent roadway and came to rest in a commercial center; and

WHEREAS, the overruns at Santa Barbara and Teterboro involved Category C and D aircraft like those currently operating at the Santa Monica Airport; and

WHEREAS, a similar overrun in Santa Monica would likely result in the aircraft plummeting into the residential neighborhood that lies just below the west end of the runway – a risk that the City must take steps to avert; and

WHEREAS, this ordinance will greatly enhance Airport safety, but it will not impose any unlawful or unreasonable burdens; and

WHEREAS, with the addition of appropriate safety areas, the Airport's single runway of less than 5,000 feet in length can safely accommodate general aviation aircraft with slower approach speeds, that is those designated by Federal Aviation Administration as Category A and B aircraft because they have approach speeds of less than 121 knots; and

> WHEREAS, the adoption of this ordinance will not ban or prevent any person from using the Airport or discriminate based upon an aircraft's type of power plant; nor will it unjustly discriminate against any type of aircraft; rather, the distinction made by this ordinance constitutes a reasonable safety measure that is based on distinctions contained in federal standards and that is consistent with the City's legal authority and contractual rights and obligations under the 1984 Agreement; and
>
> WHEREAS, adopting this ordinance will not affect the vast majority of aircraft which utilize the Santa Monica Airport and will impact only the small percentage of aircraft which are not compatible with the Airport facilities; and
>
> WHEREAS, only about 7% of current airport operations will be affected by this
> ordinance; and
>
> WHEREAS, the sole burden caused by this ordinance will be that a small number of persons who travel by private aircraft will need to either use different aircraft to fly to or from Santa Monica or use another of the region's airports; and
>
> WHEREAS, that minimal burden upon private aircraft operators is far outweighed by this ordinance's safety benefits to thousands of Airport neighbors, pilots, passengers, and the City; and
>
> WHEREAS, in striking the balance between, on the one hand, the convenience of a few; and, on the other, the safety of many, the City, as a prudent Airport proprietor, must exercise its authority and fulfill its most basic duty, protection of public safety.

DD Item 8A.

205. On March 25, 2008, the FAA Associate Administrator for Airports gave testimony urging the City council to consider the Agency's proposal in lieu of the Ordinance. DD Item 7; Trimborn Direct ¶ 28.

206. On March 25, 2008, the City adopted the Ordinance. DD Items 3 and 8A. Prior to adopting the Ordinance, the City did not undertake any engineering studies that considered factors such as speed, weight of the aircraft, or the topography of SMO to determine where a Category C or D aircraft would stop in the event of a runway incursion. Trimborn Hr. Tr. 413:12-16.

207. Article 10 Airports and Harbor Regulations, Chapter 10.04 Municipal Airport, Subchapter 10.04.06 Airport Field Regulations, Section 10.04.06.220 Conformance requirements, provides:

> (a) Statement of Purpose and Authority. This Section is enacted pursuant to the authority of the City of Santa Monica as the owner, operator and proprietor of the Airport to make reasonable regulations intended to protect the safety of persons living adjacent to the Airport and flying in aircraft using the Airport. This Section comports with agreements between the City and the Federal Aviation Administration recognizing the City's obligation to serve category A and B aircraft at the Airport and its right to prohibit or limit any other given type, kind or class of aeronautical use of the Airport if such action is necessary for the Airport's safe and efficient operation.
> (b) Prohibition. No person operating a category C or D aircraft, as defined by the FAA's standards, shall land at or depart from the Santa Monica Municipal Airport.
> (c) Emergency Exception. The prohibition contained in this section does not apply to the operator of fixed wing aircraft who believes in good faith, based on special circumstances, that a bona fide emergency exists such that it is absolutely necessary that the aircraft depart or land at the Santa Monica Municipal Airport in order to preserve life or property.
> (d) Penalties and Remedies. Any person who is convicted of violating this section shall be guilty of a misdemeanor and upon conviction shall he punished by a fine not greater than one thousand dollars or by imprisonment in the County Jail for not more than six months, or by both such fine and imprisonment. Additionally, any person, including the City, may enforce this Section by means of a civil action for legal or equitable relief; and, nothing in this Section shall preclude any person from seeking any other remedies afforded by law. (Added by Ord. No. 2251CCS § 1, adopted 3/25/08)

DD Items 3 and 8A.

208. On March 26, 2008, the FAA issued an Order to Show Cause requiring the City to show cause why the FAA should not supplement the existing Part 16 investigation with the facts pertaining to the Ordinance and expedite the investigation and issuance of the initial determination, pursuant to 14 CFR § 16.11. DD Item 3.

209. On April 1, 2008, the FAA issued an Order denying without prejudice the City's request for an extension of time to file its response to the Order to Show Cause. The Order also provided the City with an opportunity to renew its request if the renewal was based upon an agreement to suspend enforcement of the Ordinance while the FAA investigation remained pending. DD Item 10. The Order explained that the requested 20 day extension would extend the response date to one day after the Ordinance banning the 9,000 annual jet aircraft operations went into effect. DD Item 10. The City refused to suspend enforcement of the Ordinance pending the completion of the FAA's investigation. DD Item 10.

210. On April 7, 2008, the City filed its response to the FAA's Order to Show Cause. DD Item 4.

211. By letter dated April 21, 2008, and delivered by e-mail, facsimile, and express mail to the City and its counsel, the FAA requested that, by close of business Tuesday April 22, 2008, the City withdraw its April 14, 2008 letter to the aeronautical users of SMO advising them of the ban, and assure the FAA and those users in writing that the City would refrain from enforcing the ban on Category C and D aircraft operations pending the outcome of the Part 16 administrative proceeding. DD Item 79. The FAA advised the City that if it did not withdraw its letter and refrain from enforcing the Ordinance, the FAA would issue a Cease and Desist Order and take legal action if the City refused to comply with that order.

212. On April 22, 2008, the City responded, and refused to withdraw the April 14, 2008 letter to the aeronautical users, and again stated the City's intention to enforce the Ordinance effective April 24, 2008. DD Item 81.

213. On April 23, 2008, the FAA issued an interim Cease and Desist Order requiring the City to cease and desist immediately from enforcing the Ordinance until a final agency decision is issued by the FAA under 14 CFR Part 16. The Order

afforded the City ten days to respond. DD Item 91. Also on April 24, 2008, the FAA served a complaint and application for temporary restraining order ("TRO") on the City seeking to enforce its Cease and Desist Order. DD Item 93.

214. On April 23, 2008, the City Attorney advised the Department of Justice that the City would accede to the Department of Justice's request and would not enforce the Ordinance until a TRO hearing was held.

215. On April 28, 2008, the United States District Court for the Central District of California granted the FAA's request for a TRO enforcing the Cease and Desist Order. DD Item 98.

216. The FAA issued its Supplemental Interim Cease and Desist Order on May 12, 2008. DD Item 100.

217. On May 15, 2008, the United States District Court for the Central District of California, granted the FAA's request for a preliminary injunction enforcing the Cease and Desist Order pending completion of the Part 16 proceeding. DD Item 98.

218. The Director' Determination concluded that the City of Santa Monica is in violation of its Federal obligations. The Director's Determination found that:

> There is no evidence that C and D aircraft are any less safe than A and B aircraft. There is simply no aspect of the normal operation of aircraft at SMO that can be identified as a problem requiring a ban on use of the airport by these aircraft. In fact, the performance range of many B, C and even D aircraft overlap to such an extent that restricting C and D aircraft would be unjustly discriminatory to the operators of those aircraft. The Director further found that the City is basing its action on the possible consequences of a

> departure from normal operation, specifically an aircraft overrun that does not stop on airport property. However, that kind of event is no more likely to involve the banned aircraft than the types of aircraft not subject to the ban. The FAA recognizes the difficulty of balancing the need for safety enhancements with operational efficiency, but striking that balance is necessary to maintain a national airport system.

DD Item 121.

219. The Director of AAS made the following findings:

- The implementation of the adopted Ordinance prohibiting Category C and D aircraft by the City of Santa Monica is not consistent with the Federal obligation to make its airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities (Grant Assurance 22 *Economic Nondiscrimination*).

- The implementation of the adopted Ordinance prohibiting Category C and D aircraft by the City of Santa Monica is not consistent with the Federal obligation prohibiting the granting of an exclusive right at the airport to conduct any aeronautical activities (Grant Assurance 23 *Exclusive Rights*).

- The implementation of the adopted Ordinance prohibiting Category C and D aircraft by the City of Santa Monica is not consistent with the Surplus Property Act of 1944.

- The implementation of the adopted Ordinance prohibiting Category C and D aircraft by the City of Santa Monica is not consistent with the terms of the 1984 Agreement.

- The implementation of the adopted Ordinance prohibiting Category C and D aircraft by the City of Santa Monica is preempted under Federal Law.

DD Item 121 at 66-67.

220. Subsequently, the FAA Ordered:

> a. The City of Santa Monica and Santa Monica Airport (SMO) present a plan to the Office of Safety and Standards, Compliance Division, of the FAA within 20 days from the date of this Director's Determination on how it intends to address the FAA's concerns by eliminating the violations outlined above;
>
> b. Pending FAA approval of the corrective action plan specified Ordering Paragraph I, or until further notice, the City and SMO are ineligible to apply for new FAA grants pursuant to 49 U.S.C. § 47106(d);
>
> c. If the City and SMO do not submit a corrective action plan in accordance with the Ordering Paragraph 1 above or appeal this determination as set forth below, the FAA proposes to issue a Final Cease and Desist order pursuant to 49 U.S.C. § 47122 and 14 CFR §16.109(a)) directing the City of Santa Monica to permanently cease and desist from banning by Ordinance or otherwise, from Santa Monica Municipal Airport, Category C and D aircraft operations or any other aircraft operations that the FAA considers to be operationally safe to use the Airport;
>
> d. The FAA will provide a copy of this Determination and Order to the Secretary of Transportation to permit the Secretary to notify the appropriate Department operating administrations of the City's noncompliance posture with its Federal obligations when considering an award of future Federal funds that would otherwise be made available to the City, and funds that would be made available to the State of California for the City (including any multi modal transportation agency or transit authority of which the City is a member entity) as part of a Title 49 apportionment or grant;
>
> e. The Supplemental Interim Cease and Desist Order of May 12, 2008 is incorporated by reference herein and continues in effect until such time as the FAA accepts a corrective action plan from the City and SMO resolving this matter or the final cease and desist order is issued. All motions not expressly granted herein are denied.

DD Item 121 at 67 (footnotes omitted).

221. On June 13, 2008, pursuant to the provisions of 14 C.F.R. Part 16, the City requested a hearing. The FAA in a Hearing Order dated June 23, 2008, appointed the Hearing Officer for this matter.

III. POSITIONS OF THE PARTIES

A. The Principal Parties

Both the City and the AAS filed Pre-Hearing Briefs on March 6 and 7, 2009; and Post-Hearing Briefs on April 2, 2009. The Post-Hearing Briefs, in accordance with the Part 16 Rules, included proposed findings of fact and conclusions of law, as well as legal arguments in support of the respective positions of the parties. Both parties also filed Reply Briefs on April 14 and 15, 2009.

1. The City's Briefs

The City's Pre-Hearing Brief ("City Pre Brief") and Post-Hearing Brief ("City Post Brief), urge that the law governing Part 16 proceedings "places the burden of proving a violation of the Act and the regulations implementing it on AAS…" *City Post Brief* at 14; *City Pre Brief* at 11. The City further takes the position that it has not asserted any affirmative defenses in this case, *City Post Brief* at 15; and that the correct standard of review of the Director's Determination is *de novo*. *City Pre Brief* at 11.

The City essentially argues that as the proprietor of the Airport, its Ordinance is entitled to "deference" and that "the Ordinance itself is shielded by a presumption against Federal Preemption." *City Post Brief* at 15. With respect to preemption, the City argues that the issue of "whether or not the Ordinance is preempted by Federal Law is not the proper subject of this proceeding." *Id*; *City Pre Brief* at 14, 15. The City challenges the alleged failure of AAS "to present affirmative evidence showing that the Ordinance ban is unjustly discriminatory or confers exclusive rights upon any corporate or natural person."

City Post Brief at 16. In this regard, the City takes the position that the Director's Determination is not grounded in substantial evidence and is not entitled to deference. *Id. at 17-20.*

With respect to the material facts in dispute in this case, the City takes the position that its Ordinance is justified because: (1) of "the lack of runway safety areas and protection zones at the SMO; (2) the City bears the risk of liability of any damages resulting from flight operations to areas adjacent to the Airport; and (3) the evidence in the record at the Hearing establishes that a significant risk would be posed by allowing C and D aircraft to continue to operate at the SMO. *Id.* at 28.

The City's Post Brief discusses the Findings made by the Santa Monica City Council in support of the Ordinance in the case and to assert that those Findings were supported by evidence adduced at the Hearing. *Id.* at 28, 29. The City states that its ban on C and D aircraft is reasonable in light of the additional risk posed by those aircraft given the unique circumstances of the SMO. *Id. at 31-34.* In that regard the City points out that the potential impact of the ban on Airport users would be minimal, i*d. at 35,* and that alternative airports in the area could handle the category C and D aircraft that would no longer be using SMO. *Id* at 35-39; *City Pre Brief* at 27-29.

The City contends that its actions are consistent both with the 1984 Agreement with the FAA, *City Pre Brief* at 34-38; and with the Grant Assurances, i*d.* at 19-23; *City Post Brief* at 40. The City further contends that the AAS has not followed its own safety regulations and improperly has placed access to the Airport ahead of safety as a primary consideration. *City Post Brief at 41-44.* Finally, the City takes the position that the Ordinance is not preempted by Federal Law; that Preemption is not properly a subject of

these proceedings under Part 16; and that the AAS Motion for Partial Summary Judgment on that ground should be denied. *Id.* at 56-69; *City Pre Brief* at 14-18. [5]

2. The AAS Briefs

Like the City, the AAS Post-Hearing Brief ("AAS Post Brief") sets forth proposed findings of fact as required by the Part 16 Rules. *See AAS Post Brief at 4-11*.

Both the AAS Post Brief and its Pre-Hearing Brief ("AAS Pre Brief") discuss each of the five issues presented to the Hearing Officer for decision. With respect to whether the Ordinance constitutes a violation of Federal Grant Assurance 22, AAS incorporates pages 31 through 51 of the Director's Determination. *See AAS Post Brief* at 11. Essentially, AAS contends that the Ordinance is discriminatory on its face and the ban on category C and D aircraft is not reasonable. *Id* at 11-15; *AAS Pre Brief* at 13-23. In this regard, AAS points out "the City's consultant, Coffman and Associates, did not provide any testimony, or any risk analysis on overruns to support the City's position. Mr. Trimborn testified that no engineer studies using various speeds and weight … were performed to see where airplanes might end up in an overrun." *AAS Post Brief at 14*. AAS goes on to note that:

> other than NTSB reports of accidents at other airports and unsupported safety claims, the City has not provided FAA with data or analysis related to risk or accidents at SMO…. [U]nsupported safety claims do not provide a reasonable basis to ban C and D aircraft from using the airport. As the City has failed to present any risk analysis or support for its contention that C and D category aircraft present a safety risk at SMO, the City Ordinance restricting access to C and D aircraft is unreasonable.

Id. at 15. The AAS Post Brief takes the position that the City has failed to establish any of several affirmative defenses. AAS asserts that airport reference code ("ARC") designation of SMO does not prevent the airport from servicing C and D category

[5] The City's post Brief additionally attempts to raise a purely constitutional argument that the City's actions in adopting the Ordinance are protected by the Tenth Amendment to the United States Constitution. *See* City Post Brief at 69, 70. For similar reasons to those discussed herein regarding preemption, the hearing Officer declines to rule on this constitutional issue in the context of this Part 16 administrative proceeding.

aircraft. *Id. at 15-17.* AAS also takes the position that use of the ARC to support the ban of C and D category aircraft operations is unreasonable and unjustly discriminates against C and D category aircraft by denying those aircraft access to a federally obligated airport capable of handling such aircraft. *Id.* at 17; *AAS Pre Brief* at 16,17.

With respect to the City's arguments regarding a runway safety area ("RSA"), AAS notes that the Advisory Circulars regarding such RSA's are implemented to the extent practicable at the particular airport involved. *Id.* at 19; *AAS Post Brief* at 18-21. AAS notes that "there is no documentation or studies to suggest conditions at SMO makes an accident there more likely than any other airport. Operations into and out of the airport are ordinary and safe." *Id.* at 22, *Citing to Director's Determination Items 45 and 85.* AAS points out "category C and D aircraft overruns are incredibly rare even in relation to the number of operations…..[C]orporate jet operations have an excellent safety record and the record has improved significantly…. [O]f all aircraft types used in general aviation, corporate jets, large or small, like the ones using SMO's, have the lowest accident rates." *Id.* at 23, *citing to Director's Determination.*

AAS contends that:

> [T]he City has not provided documentation or evidence to support its contention that C and D aircraft are more likely to have an overrun at SMO than other category aircraft or create a greater risk. The City's concern for safety rests on the assumption that a overrun by a C or D aircraft would have greater consequences than an A or B category aircraft, because C and D aircraft are typically larger and faster. However, the actual circumstances of each accident are unique, and it is speculation to argue that certain categories of aircraft at an airport result in a certain kind of accident, in a certain place given performance variations and weight among categories of aircraft. This speculation, with no support other than the excellent record types of aircraft operating at SMO, is not a reasonable basis for banning C and D category aircraft from SMO.

Id. at 25. AAS goes further argues that the Ordinance ban of C and D category aircraft would have an adverse impact on air traffic and airport management in the Los Angeles area. *Id. at 26-30.* The AAS Post Brief also takes the position that the City does not have

a proprietary right to ban categories of aircraft from SMO. *See AAS Post Brief* at 31,32. AAS asserts that the proprietary rights exception is limited in scope and does not apply to banning of categories of aircraft from an airport based on safety concerns, where the FAA has already made an express safety determination. *Id.*

Regarding Grant Assurance 23 related to exclusive rights, AAS takes the position that "the City's Ordinance directly confers an exclusive right on category A and B aircraft over C and D aircraft, because the Ordinance absolutely denies the privilege of using the airport's runway to categories C and D aircraft." *Id.* at 33. According to AAS, the City's Ordinance violates the grant restriction because "the City's Ordinance distinguishes between the users by aircraft category approach speed. "As a result, the City creates exclusive rights for one group, the A and B category aircraft approach speeds of less than 121 knots, and denies another group, category C and D aircraft approach speeds more than 121 knots, the same rights." *Id.* at 34, 35; *AAS Pre Brief* at 24-26.

With the respect to the alleged violation of the Surplus Property Act of 1944, the AAS Post Brief incorporates pages 54 thru 62 of the Director's Determination and notes that the City has not in the course of the proceedings provided any additional evidence in support of its position. *AAS Post Brief* at 36; *AAS Pre Brief* at 26-30. Similarly, with regards to the 1984 Agreement, AAS asserts that the City provide no evidence to support of its position. *Id.* AAS urges that "the 1984 agreement must be read as not attempting to restrict the operation of any category; especially given that operations of category C and D category jets were taking place at the time…." *AAS Post Brief* at 37; *AAS Pre Brief* at 30, 31.

The AAS Post Brief reiterates the legal argument set forth in the AAS Pre Brief that the Ordinance is barred by the Doctrine of Preemption. *AAS Pre Brief* at 31, 32; AAS Post Brief at 39-43. Finally, AAS contends that the City has not met it burden of affirmatively demonstrating that its Ordinance is reasonable. *AAS Post Brief* at 41. In this regard,

AAS points out that "no other airport has restricted access based on the lack of RSAs or RPZs or both." *Id*. AAS notes that the City's Ordinance "seeks to ban the safest aircraft at SMO" (*Id.* at 42), and that the City lacks the necessary technical expertise to make safety determinations. *Id*. AAS further points out that the City's position is based on what AAS contends was the unsupported belief of its airport manager and testimony of its expert witness, who had performed no scientific analysis. *Id.* at 43. Finally, AAS urges that the City's reference to overruns at other airports "do nothing to show that an accident is more likely to happen at SMO, that an overrun would have equally or more disaster results at SMO, or that the history of overrun accidents provide support to banning categories C and D airplanes uniquely at SMO." *Id.* at 44.

3. The Reply Briefs

In addition to the Pre-Hearing and Post-Hearing briefs of the parties, both AAS and the City filed replies that reiterate and in some cases expand the arguments of their respective earlier briefs; as well as take issue with the arguments of the other party. For example, the City Reply Brief, among other things, asserts: AAS has failed to meet its alleged burdens of demonstrating that the City violated its Federal obligations or that the Ordinance will adversely impact local airspace, *City Reply Brief* at 14-24; AAS has misconstrued the 1984 Agreement, *id.* at 33-38; and the AAS preemption argument is meritless because the Ordinance falls within "Proprietary Powers" reserved to the City. *Id* at 38,39. For its part, the AAS Reply Brief, among other things, asserts: the City has asserted affirmative defenses and has failed to meet its alleged burden of proving such defenses, *AAS Reply Brief* at 38-46; the City remains obligated under the Surplus Property Act, *AAS Reply Brief* at 47-49; the City, rather than AAS has misconstrued the terms of the 1984 agreement, *AAS Reply Brief* at 50, 51; and Subsection (i) of Grant Assurance 22 provides limited authority to the City, which remains subject to final determinations of the FAA on safety issues. *AAS Reply Brief* at 52-56. Finally, the AAS Reply Brief expands its argument regarding preemption and asserts that preemption is an appropriate issue for determination in a Part 16 proceeding, *AAS Reply Brief* at 52-70.

B. Comments of Other Participants

The Rules of Procedure for Part 16 proceedings include a provision entitled "Intervention and Other Participation." Subsection (c) of that Section provides:

> other persons may petition the Hearing Officer for leave to participate in the hearing. Participation is limited to Post-Hearing Briefs and Reply to the Hearing Officer and the Associate Administrator. Such Briefs shall be filed and served on all parties in the same manor as the parties' Post-Hearing Briefs are served.

14 C.F.R § 16.207. In accordance with the provision of that sub-section, seven organizations and individuals ("Other Participants") petitioned for permission to participate in the hearing in this matter. The Other Participants included the following:

(1) The California Department of Transportation;

(2) Airports Council International - North America;

(3) Susan J. Hartley, Esq., Local Resident;

(4) Mar Vista Community Council;

(5) Jacqueline A. Mangum, Esq., Local Resident;

(6) Concerned Residents Against Airport Pollution; and

(7) Friends of Sunset Park.

The City submitted a Brief supporting the participation of all the Other Participants. *See City Response to Request for Participation* at 1. AAS did not oppose participation by: the California Department of Transportation; the Airports Council International – North America; and by one of two residents living adjacent to SMO. *See AAS Response to Request for Participation* at 2. AAS opposed participation by three community-based organizations and by a second individual resident. The AAS Opposition was based on its assertion that the views of two of the petitioners would already be represented by the

City and that their submissions would be cumulative, repetitious, and burdensome. In an Order On Participation issued by the Hearing Officer on July 31, 2008, all of the Requests for Participation were granted, subject to the terms and conditions set forth in the Order. In so Ordering, the Hearing Officer found that "each of the disputed petitioners has made a showing of direct potential interest in the subject of these proceedings sufficient to warrant the limited participation contemplated by the Rules." *Order On Participation* at 2. It further was Ordered that each of the Other participants could file and serve a single Post-Hearing Brief not to exceed 20 pages in length, double-spaced, and a single Reply Brief, not to exceed 15 pages in length, double spaced. *Id.*

Of the seven who were permitted to participate in the proceedings, three actually filed post-hearing briefs in the cases. In its Brief, the Concerned Residents Against Airport Pollution ("CRAAP") voiced its "full support…for the arguments put forth by the City of Santa Monica in this Part 16 Hearing." *See CRAAP Brief* at 1. The CRAAP Brief also discusses the Organization's views of the legal rights of the City with respect to regulation of aircraft operations and regulation of the SMO. *CRAAP Brief* at 2-4. The CRAAP Brief uniquely raises an issue concerning the environmental impacts of taking off and landing aircraft at SMO and pollution from aircraft on the community. *Id.* at 4-6. CRAAP references increased jet operations at SMO and that, in the view of CRAAP, "purchasing homes and the applications of runway protection zone ("APZ") areas would be unreasonably disruptive to both Santa Monica and Los Angeles cities and would not address the risk to the heavily trafficked runways that are closest to both east and west sides of the airport." *Id.* at 8.

As is noted elsewhere, the scope of these proceedings under the Part 16 Rules and the Hearing Order, is limited to the consideration of five specific issues. Those issues revolve around the Preemption Doctrine and mixed questions of law and fact regarding the Surplus Property Act, grant agreement assurances and the 1984 Agreement. They do not include consideration of the effect of air pollution from jet aircraft on the area immediately surrounding the Airport. Thus, it is beyond the scope of the Hearing and the

mandate of the Hearing Officer to address in this Initial Decision what are undoubtedly sincerely presented concerns of CRAAP. To the extent that the CRAAP Brief does address aviation safety issues, the Hearing Officer expresses appreciation for, and has given consideration to the views expressed in the CRAAP Brief, as well as to the briefs submitted by the two Other Participants, i.e., the Mar Vista Community Council ("MVCC") and the Friends of Sunset Park ("FSP").

The briefs of MVCC and FSP support the positions taken by the City in this case. MVCC represents residents living to the south and east of the SMO. FSP represents residents to the north and west of the Airport. MVCC expressed its particular concern with "large jets that in recent years have become a much larger part of the airport activities, and which have completely changed the character of the airport, and thus the character of all the neighborhoods surrounding the airport." *MVCC Brief* at 2. MVCC also states, as the basis of its concerns that "since the Santa Monica Airport, as currently configured, has no runway safety areas for the larger jets taking off and landing at the airport, MVCC is very concerned about a catastrophic accident in our neighborhoods in the event of a jet aircraft mishap during take off or landing." *Id.* at 3.

In its Brief, FSP makes similar statements to those of MVCC with respect to the alleged effects of an increasing number of category C and D aircraft operating at the Airport. *See FSP Brief* at 2. The FSP Brief further notes that "some Sunset Park homes are located less than 300 feet from the west end of the runway and lie directly under the flight path used for most take offs." *Id* at 1. Enclosed with the FSP Brief, among other things, are a position statement from its Board and a resolution supporting the City Ordinance.

IV. DISCUSSION

A. Standards of Review and Proof

The parties have differing views of the scope of review in hearings under Part 16. Although AAS has not specifically stated that the Hearing Officer must give "deference" to the Director's Determination, the City understandably has inferred such an argument from the AAS pleadings. For example, AAS stated in its Pre Brief, "The evidence in this case establishes ample reliable, probative, and substantial facts that support each finding in the Director's Determination, and each finding accords with the law." *AAS Pre Brief* at 3. Similarly, AAS argued in its Reply Brief, "The [Director's Determination's] findings are to be upheld if they are 'supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and in accordance with law.'" *AAS Reply Brief* at 3, *citing* 14 C.F.R. 16.227. The City, on the other hand, plainly states that the Director's Determination is not entitled to any deference, and that the hearing officer reviews the record *de novo*. *See City Post Brief* at 14-16.

Nothing in the Part 16 procedures or the Hearing Order supports the proposition that the Director's Determination should be afforded deference. Rather, assessing the Part 16 procedures and the regulatory history leads to the conclusion that Part 16 hearings involve *de novo* reviews of both the facts and the law, bounded only by applicable statutes, regulations, and the scope of the specific Hearing Order issued under 14 C.F.R. § 16.201.

14 C.F.R. Part 16 provides the procedures used to ensure compliance with grants under the AAIS and conveyances under the Surplus Property Act. *See* 49 U.S.C. §§ 47111(d) and 49 USC 47151(b); 14 C.F.R. § 16.1. "In the interests of assuring a fair hearing," Part 16 procedures were modeled on several requirements found in the Administrative Procedure Act ("APA"). *Rules of Practice for Federally Assisted Airport Proceedings*, 61 Fed. Reg. 53,998, 54,000 (1996) (codified at 14 C.F.R. Part 16). "For example, the hearing officer is required to issue an initial decision; *ex parte* communications are prohibited; separation of the prosecutorial and decision-making functions are required;

and the hearing officer has virtually all of the authority specified in section 556(c) [of Title 5]." *Id*. Like decisions by administrative law judges for agencies operating under the APA, the Hearing Officer's decision under Part 16 is considered the "initial decision" of the FAA. *Compare* 5 U.S.C. § 557(b); 14 C.F.R. §16.3. Director's Determinations, by contrast, are merely "initial determinations" (14 C.F.R. § 16.3) that are part of the larger body of evidence before the Hearing Officer. *Naples Airport Authority*, Docket No. 16-01-15, at fn. 52 (Final Agency Decision And Order) (August 25, 2003), *rev'd on other grounds*, 409 F.3d 431 (DC Cir. 2005).

Moreover, the "Standard of Proof" regulation in Part 16, states:

> The hearing officer shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and in accordance with law.

16 C.F.R. § 16.227. The APA uses the identical phrase, "… supported by, and in accordance with the reliable, probative, and substantial evidence."[6] In *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981), the United States Supreme Court specifically considered and determined the scope of review and the burden of proof that this phrase describes. After considering the legislative history, the Court held "that the standard adopted is the traditional preponderance-of-the-evidence standard." *Steadman*, 450 U.S. at 102. In reaching this conclusion, the Court specifically rejected the idea that the phrase "substantial evidence" referred to the relaxed appellate standard of deferential review (commonly known as "substantial evidence") used by courts when reviewing prior agency decisions. *Steadman*, 450 U.S. at fn. 20. Given that the regulations in Part 16 were modeled on the APA, the Supreme Court's interpretation is highly persuasive on this point.

The Hearing Order is clear regarding the scope of review in this case. It states in relevant part:

[6] This language is now found in 5 U.S.C. 556(d).

> Toward resolving this appeal, the hearing officer, pursuant to 14 C.F.R. § 16.202(k), should address the following issues, except as settled, limited, or simplified by consent of the parties to the proceeding designated by this order:
>
> 1. Whether the implementation of the adopted Ordinance prohibiting Category C and D aircraft by the City of Santa Monica is consistent with the Federal obligation to make its airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities – Grant Assurance 22.

Hearing Order, at 6-7. The "Issues" section is not phrased in a manner that suggests deference to the Director's Determination. It does not pose questions of whether the Director's Determination was supported by evidence, or whether it was arbitrary, capricious, or an abuse of discretion. Rather, the Hearing Order presents these matters as *de novo* issues of fact and law for the Hearing Officer to resolve. Accordingly, the issues presented herein are reviewed *de novo* with regard to the facts and the law, in light of the traditional preponderance-of-the-evidence standard of proof.

B. Burden of Proof

The parties also have differing views regarding the allocation of the burden of proof in this case. The City asserts generally, and in reliance on 16 C.F.R. § 16.229, that AAS bears the burden "of proving … that the Ordinance is unreasonable and discriminatory, constitutes unjust discrimination, confers an illegal exclusive right, [etc.]" *City Pre Brief*, at 11. The City denies that it has raised any affirmative defense.[7] *City Post Brief*, at 15. AAS, in contrast, cites the same regulation and asserts, "The airport sponsor bears the burden of proving, as an affirmative defense, that any action is not unjustly

[7] It should be noted that the City has not made a formal assertion of safety or civil aviation needs as being affirmative defenses. A formal answer, however, was not required because these matters were initiated by an FAA investigation rather than a private complaint. *Compare* 14 C.F.R. Subparts 16.A and 16.B. The City's response to the Notice of Investigation does not identify formal affirmative defenses. *See* Administrative Record Item 2.

discriminatory or that it is necessary for reasons of safety or civil aviation needs." *AAS Pre Brief*, at 6. These basic positions did not change after the Hearing.

In the broadest of terms, the City is correct in its general assertion under 16 C.F.R. § 16.229 that AAS has the initial burden of proof. The City falls short, however, in defining exactly what elements AAS must prove. Of critical importance, as the AAS Pre Brief suggests, is the allocation of the burden for the issue of whether the Ordinance is justified on the grounds of safety or civil aviation needs.

AAS cites to five published decisions to support its argument. *AAS Pre Brief, at pp. 6-7*. Of these decisions, four are only minimally helpful because they simply contain references to affirmative defenses cautiously pled in answers,[8] or because the decisions wrapped the distinctions between claims and defenses into single discussions that avoided strict application of the burden of proof.[9] The remaining case, *Centennial Express Airlines, Golden Eagle Charters D/B/A Centennial Express Airlines, et. al, v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1 (Part 16, Subpart G), Docket Nos. 16-98-05, 13-94-03, 13-94-25 (February 18, 1999); *aff'd*, 242 F.3d 1213,1223 (10th Cir. 2001), *cert. denied*, 534 U.S. 1064 (2001), thoroughly considers the issue of differentiating between an agency claim of "unjust discrimination" and an affirmative defense based on safety. After first rejecting arguments under irrelevant statutes, the Associate Administrator cited "undisputed facts," paraphrased as:

- The Airport Authority provided the assurance that it would not unjustly discriminate;
- No ban like the one in question existed when the Authority accepted the Federal funds;

[8] *See Thermco Aviation, Inc. et al., v. County of Los Angeles, et al.*, FAA Docket No 16-06-04 (Director's Determination, June 21, 2007). The case has only one cryptic citation, "[*See* FAA Exhibit 1, Item 10, page 10, "Fourth Affirmative Defense."]," and does not have any discussion defining an affirmative defense or an allocation of burden of proof.

[9] *Northwest Airlines, Inc., et al. v. Indianapolis Airport Authority, et al*., FAA Docket 16-07-04 (Director's Determination, August 19, 2008); *Pacific Coast Flyers, Inc. v. County of San Diego*, FAA Docket No. 16-04-08 (Director's Determination, July 25, 2005); and, *Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Authority et al.*, FAA Docket No. 16-02-02 at 27 (Director's Determination, March 7, 2003) ("We do not find any of the Respondents' affirmative defenses to be persuasive, nor do we find them successful in rebutting the Complainant's case.").

- After accepting the funds, a ban was imposed; and,
- There is discrimination between certain classes of public users.

The elements identified in the list above notably do not include a requirement that the agency affirmatively show the Authority's discriminatory action was "unjust." Instead, relying on Wright & Miller, 5 Fed. Prac. & Proc. Civ. 2d § 1271, the Associate Administrator deemed "fairness," "convenience," and possibility of "surprise" to be relevant factors requiring the Authority to prove as an affirmative defense that it acted properly under "safe operation and public civil aviation needs" clause in the applicable assurance. *See Arapahoe,* Docket Nos. 16-98-05 et al., at 9-10. The Court of Appeals for the Tenth Circuit affirmed this allocation of the burden of proof. *See Arapahoe Count Public Airport Authority v. F.A.A.*, 242 F.3d 1213,1223 (10th Cir. 2001), *cert. denied*, 534 U.S. 1064 (2001).

A later case, *Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority*, Docket No. 16-00-03 (July 23, 2001), had a different outcome. That case concerned alleged economic discrimination claims brought by a complainant who showed that terms in leases provided by an airport varied among airport users. The complainant objected to how the Director's Determination had allocated the burden of proof. The decision states it was not enough for the complainant to show discriminatory treatment. Instead, the complainant also had to show that the discrimination occurred "without adequate justification," *i.e.*, that it was "unjust."

While the two cases have differing outcomes, the *Arapahoe* approach, which relies on *Wright and Miller*, is compelling under the circumstances here. Given that the claims in *Aerodynamics of Reading* concerned disparate business transactions by a respondent airport, the airport would have been the party best suited under the *Wright and Miller* analyses to produce the relevant evidence to justify its actions. Moreover, the *Arapahoe* case was affirmed by the Tenth Circuit on appeal, and a recent Supreme Court case reinforces allocating to the City the burden to prove that the Ordinance is justifiable as an appropriate safety measure.

The United States Supreme Court reconsidered an analogous problem in a disparate impact case filed under the Age Discrimination in Employment Act ("ADEA"). The Court framed the question presented in *Meacham Et Al., V. Knolls Atomic Power Laboratory, aka Kapl, Inc., et al*., 128 S.Ct. 2395, (2008) as:

> A provision of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.,* creates an exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age" (RFOA). § 623(f)(1). The question is whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the fact finder of its merit. We hold that the employer must do both.

Meacham, 128 S.Ct. at 2398. In other words, as the Court explained, the question was whether the separately listed exceptions in the statute were to be treated as affirmative defenses, or simply relevant evidence that the plaintiffs must overcome in proving their claim. In determining that affirmative defenses were created, the Court provided the following rationale:

> Given how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). After looking at the statutory text, most lawyers would accept that characterization as a matter of course, thanks to the familiar principle that "[w]hen a proviso ... carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Javierre v. Central Altagracia*, 217 U.S. 502, 508, 30 S.Ct. 598, 54 L.Ed. 859 (1910) (opinion for the Court by Holmes, J.); *see also FTC v. Morton Salt Co*., 334 U.S. 37, 44-45, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits ..."); *United States v. First City Nat. Bank of Houston,* 386 U.S. 361, 366, 87 S.Ct. 1088, 18 L.Ed.2d 151 (1967) (citing *Morton Salt, supra,* at 44-45, 68 S.Ct. 822).

Meacham, 128 S.Ct. at 2398. Thus, the Court reaffirmed a general rule of assigning the burden of proof to the party relying upon an exception to a general prohibition.

In the present case, the FAA statutes (like 49 U.S.C. § 47107) do not actually contain a "safety or civil aviation needs" exemption that relieves a sponsor from the prohibition against unjust discrimination. Instead, the exception lies in the grants, which were written in a manner similar in structure to the ADEA. The pertinent part of the assurance states,

> **22. Economic: Nondiscrimination.**
> a. Will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses.
> ….
> i. The sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

Administrative Record Item 6. Like the ADEA's general prohibition against age based discrimination found in 29 U.S.C. § 623(a), Assurance 22.a. has a general prohibition against unjust discrimination. Further, like the ADEA's specific exemptions found in § 623(f), Assurance 22 has a specific exemption in 22.i. Under the *Meacham* analysis, the exemption in 22.i. should be treated as an affirmative defense.

The logic of the Court's rationale in *Meacham* does not depend on the nature of the case, *i.e*., a civil rights case. The court did not afford special consideration for social policy or similar factors. In fact, the analytical nature of *Meacham* makes it particularly applicable in the present context. The plaintiffs in *Meacham* presented a disparate impact case, so intent to discriminate was not an element of the case. Instead, the plaintiff's case relied on statistical evidence to show the discriminatory effect of the company's action. Similarly, the "elements" stated in Part 16 decision *Arapahoe*, at 9-10 (and paraphrased above), do not include an intent to discriminate as a factor in the matter before the Hearing Officer. Instead, like in *Meacham*, if AAS can show that the Authority took action that now adversely impacts a class of airport users, the burden is properly placed on the Authority to affirmatively produce evidence and persuade the Hearing Officer that the safety exception applies.

C. The Doctrine of Preemption

The Hearing Order in this case states that "the hearing officer, pursuant to 14 CFR § 16.202(k), should address . . . [w]hether the implementation of the City's Ordinance prohibiting Category C and D aircraft is preempted under Federal law." *Hearing Order* at 6-7. The judicially created Preemption Doctrine ("Doctrine"), which is grounded in the Supremacy Clause of the United States Constitution, allows federal courts to invalidate state laws if such laws conflict with or otherwise obstruct federal law. *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). It is axiomatic that state and local laws are preempted by federal law where: (1) Congress has enacted a statute explicitly preempted state law; (2) the regulatory scheme enacted by Congress is so pervasive that no room is left for the states to act; (3) the act undertaken by the state touches upon a field where the federal interest is dominant in such a way as to preclude enforcement of the states law; or (4) the state law is inconsistent with the results sought by the federal scheme. *Id.* As discussed below, Congress has preempted the field of aviation through the Federal Aviation Act of 1958 ("FAA of 1958"), the Airport and Airway Improvement Act of 1982 ("AAIA"), and the Airline Deregulation Act ("ADA").

1. Aviation Safety

The FAA of 1958, as amended, states: "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). Through the FAA of 1958, Congress has preempted the entire field of aviation safety through implied field preemption. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468, 471 (9th Cir.2007)("[T]he regulations enacted by the Federal Aviation Administration, read in conjunction with the FAA [of 1958] itself, sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety and carry out Congress' intent to preempt all state law in this field."); *see also American Airlines, Inc. v. U.S. Department of Transportation*, 202 F.3d 788 (5th Cir. 2000)(Congress, through its constitutional and statutory authority, "has preempted the areas of airspace use and management, air traffic control and aviation safety."); *British Airways Board v. Port Authority of New York and New Jersey* ("*Concorde I*"), 558 F.2d 75, 83 (2nd Cir. 1977)(the "legitimate concern for

safe and efficient air transportation requires that exclusive control of airspace be concentrated at the national level.") *citing City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); 49 USC 40101, et seq. and 40103(b).

The City does not challenge the FAA's authority to promulgate regulations in the field of aviation safety. In this regard, the City's expert witness testified:

> In Title VII Section 401 of the FAA Reauthorization Act of 1996 (City Exhibit No. 33), Congress changed what had been the FAA's dual mandate of "ensuring safety" in aviation and "promoting aviation" by making safety the FAA's sole mandate. Specifically, the Act eliminated "promoting aviation" from the FAA's mandate and designated "assigning, maintaining and enhancing safety and security as the highest priorities in air commerce."

Hall Rev Direct ¶ 38.

The AAIA vests the FAA with authority to provide grants to airports for improvements subject to certain restrictions or assurances. 49 U.S.C. § 47107. The FAA, through Grant Assurance 22(i), has given the City limited authority to regulate Airport activities, subject to FAA approval. So long as the City is taking reasonable measures to insure the safe operation of the Airport subject to the FAA's imprimatur, it is acting within its authority under Assurance 22(i) and the subject action is not preempted. However, where the City acts to regulate aeronautical activities on grounds of safety in a manner contradictory to federal statute, FAA regulations, or a grant, its actions are subject to review and sanctions by the FAA under 14 C.F.R. Part 16, in accordance with 49 U.S.C. § 49111(d).

2. Airline Deregulation Act

The City argues that, notwithstanding its explicit obligations under Grant Assurance 22 and the Settlement Agreement, it may enact and implement the Ordinance pursuant to the proprietary powers exception under the ADA. The ADA states:

> § 41713(b) (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.[10]

49 U.S.C. § 41713(b)(1). The ADA states with regard to proprietary powers:

> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

49 U.S.C. § 41713(b)(3). The Supreme Court has broadly interpreted the ADA's preemption provision, holding that the ADA prohibits "the States from enforcing any law 'relating to rates, routes, or services' of any air carrier." *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 378-379 (1992). The Court concluded that "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Id*. at 384. The Supreme Court reaffirmed its broad interpretation of the ADA's preemption provision in *Rowe v. New Hampshire Motor Transportation Association*, 128 S.Ct. 989, 994-96 (2008). The Ninth Circuit Court of Appeals took a similar approach in *Air Transport Association of America v. City and County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001), by striking down a City Ordinance barring discrimination against employers that provided fringe benefits to domestic partners to the extent that the Ordinance effects market competition. *Id.* at 1187.

The City's Ordinance in this case constitutes a regulation of routes because it forces C & D aircraft to be redirected to other airports in the surrounding area. FF 3. The record shows that the Ordinance, if implemented, would have an impact on the national airspace surrounding those airports. FF 3. Thus, the inquiry rests on whether any air carriers

[10] The ADA's original preemption provision, section 41713(a)(1) of the Airline Deregulation Act of 1978, states: "[n]o State or political subdivision . . . [s]hall enact or enforce any law, rule, regulation, standard . . . relating to rates, routes, or services . . ." Congress revised this language in 1994 to its current form, but the revision was not intended to effectuate a substantive change. American Airlines, Inc. v. Wolens, 513 U.S. 219, 223 n.1 (1995).

within the statutory meaning of the ADA would be affected by implementation of the Ordinance. If the answer is in the affirmative, then the Ordinance is preempted. If the Ordinance is preempted under the ADA, the next inquiry is whether the proprietary powers exception, as argued by the City, applies.

An "air carrier" is "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a) (2). This includes both direct air carriers (those that actually operate the aircraft) and indirect air carriers (entities that offer transportation services to passengers and contract with underlying aircraft operators to provide the actual transportation), which includes public charter operators. 14 C.F.R. § 380.2. There is no evidence in the record that any air carriers within the meaning of the ADA operate at SMO. Rather, the representations of counsel at an oral argument in this case, suggest the opposite.

> HEARING OFFICER PALLADINO [to AAS counsel]: Do you have a position as to whether any of the operators of C and D aircraft that operate in and out of Santa Monica constitute air carriers within the meaning of the Airline De-regulation Act?
> MR. BRICE: Not to my understanding.
> * * * *
> MR. BRICE: I haven't researched that issue thoroughly for this case. . . .

Hr. Tr. 675:22-676:2.

> HEARING OFFICER PALLADINO [to City counsel]: Do you know whether any of the operators of category C and D aircraft at the Santa Monica Airport constitute air carriers within the meaning of the Airline De-regulation Act?
> MR. PILSK: I don't believe they do.

Hr. Tr. 696:1-5. Thus, the City has not proven that the Ordinance falls within its proprietary powers since there is no evidence in the record that SMO is an airport served by an air carrier to support such a finding. In any event, a proprietary power exception for aviation safety is not dispositive in this case.

The courts have never defined proprietary powers under the ADA, preferring instead to evaluate circumstances on a case-by-case basis. *American Airlines, Inc.*, 202 F.3d at 806. The courts have held that airport proprietors play an "extremely limited" role in the regulation of aviation. *Id*. The courts have found proprietary powers to enact perimeter rules, airport operating hours, and landing fees. An airport owner's proprietary powers are not absolute. The U.S. Court of Appeals reasoned that if there were no limits to the exercise of proprietary powers, "impermissible parochial concerns [would] unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *British Airways Board v. Port Authority of New York and New Jersey* ("*Concorde II*") citing *Douglas v. Seacoast Products*, 431 U.S. 265 (1977). Accordingly, the court held that any regulation promulgated pursuant to an airport owner's proprietary powers must also be reasonable, non-arbitrary, and nondiscriminatory. *Id.* at 1011.

The regulation of aviation safety on airport premises as a proprietary power exception is an open question of law. The issue arose before the Tenth Circuit Court of Appeals, which merely assumed "without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the 'proprietary powers' umbrella." *Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213, 1223 (10th Cir. 2001). The court noted that all regulations under the exception must be reasonable, and explicitly rejected the notion that so long as an airport proprietor invokes safety, it enjoys "carte blanche" authority to regulate. *Id.* at 1223. The court proceeded to find that Centennial Airport's ban on scheduled passenger service from the Airport was unreasonable. *Id.* at 1224. Assuming that a proprietary power over safety on an airport premises exists, any regulation pursuant to that power must still be reasonable. The standard of reasonableness does not vary depending on whether it is founded in the Grant Assurances or as an exercise of proprietary powers.

To some degree, the open question described in *Arapaho*e is academic in this case. . In *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed. 2d 171 (1987), the

United State Supreme Court upheld conditions that Congress placed on a state or locality receiving federal funds, regardless of state powers to the contrary. *See also Westside Mothers v. Haveman*, 289 F.3d 852, 859 (6th Cir. 2002). The City, through Grant Assurance 22(i) and the 1984 Agreement, agreed that the FAA is the final arbiter of safety of aeronautical uses at the SMO. Thus, the outcome of these administrative proceedings is centered on the City's compliance with its Part 16 obligations, rather than on an administrative application of the Doctrine of Preemption

3. Preemption and Part 16 Administrative Action

The Preemption Doctrine does not provide an independent ground for FAA administrative action against the City under Part 16. The Doctrine is not one of the enumerated "authorities" that authorize and govern Part 16 proceedings involving Federally assisted-airports, *See* 14 C.F.R. § 1601. Part 1601, explicitly provides the Hearing Officer with jurisdiction only over claims involving:

> (a) *General.* The provisions of this part govern all proceedings involving Federally-assisted airports, except for disputes between U.S. and foreign air carriers and airport proprietors concerning the reasonableness of airport fees covered by 14 CFR part 302, whether the proceedings are instituted by order of the FAA or by filing with the FAA a complaint, under the following authorities-
>
> (1) 49 U.S.C. 40103(e), prohibiting the grant of exclusive rights for the use of any landing area or air navigation facility on which Federal funds have been expended (formerly section 308 of the Federal Aviation Act of 1958, as amended).
>
> (2) Requirements of the Anti-Head Tax Act, 49 U.S.C. 40116.
>
> (3) The assurances contained in grant-in-aid agreements issued under the Federal Airport Act of 1946, 49 U.S.C. 1101 *et seq.* (repealed 1970).
>
> (4) The assurances contained in grant-in-aid agreements issued under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. 1701 *et seq.*
>
> (5) The assurances contained in grant-in-aid agreements issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended, 49

> U.S.C. 47101 *et seq.*, specifically section 511(a), 49 U.S.C. 47107(a) and (b).
>
> (6) Section 505(d) of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. 47113.
>
> (7) Obligations contained in property deeds for property transferred pursuant to section 16 of the Federal Airport Act (49 U.S.C. 1115), section 23 of the Airport and Airway Development Act (49 U.S.C. 1723), or section 516 of the Airport and Airway Improvement Act (49 U.S.C. 47125).
>
> (8) Obligations contained in property deeds for property transferred under the Surplus Property Act (49 U.S.C. 47151–47153).

14 C.F.R. § 16.1. While preemption provides a context for consideration of compliance with Grant obligations under the Airport Improvement Program, ultimately the application of the Doctrine is the province of the federal courts.[11] *See, e.g., Hagan v. Lavine*, 415 U.S. 528 (1974). The following sections focus on the reasonableness of the City's ban on Category C and D aircraft under the enumerated authorities of Part 16.

D. The Grant Assurances

The Airport and Airway Improvement Act ("AAIA") of 1982 vests the FAA with authority to allocate money from the Airport and Airway Trust Fund ("Fund") in order to finance the operation and improvement of airports. 49 U.S.C. §§ 47101-131. Funds are disbursed only after an airport owner or proprietor submits an application for a grant, and that application is approved by the FAA. 49 U.S.C. § 47107(a)(1). The United States Court of Appeals for the Ninth Circuit has held that these grants are "not an ordinary contract, but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will." *City and County of San Francisco v. Federal Aviation Administration*, 942 F.2d 1391 (9th Cir. 1991). *See also Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656, 670, 105 S.Ct. 1544, 1552, 84 L.Ed.2d 590 (1985) ("[F]ederal grant programs originate in and remain governed by statutory provisions

[11] The *de novo* nature under the Hearing Order and Part 16 confirm this conclusion. As discussed in Section IV.A, *supra*., this opinion, rather than the Director's Determination, represents the initial decision of the FAA. Until a final agency decision and order of the FAA is rendered, the administrative process has not concluded.

expressing the judgment of Congress concerning desirable public policy."); *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (DC Cir. 1985). Interpretation of terms in grants should "be informed by the statutory provisions, regulations, and other guidelines provided by the [agency] at that time" the grant was made. *Kentucky Dept. of Ed.*, 470 U.S. at 670.

The AAIA requires airports receiving grants from the Fund to give assurances regarding public access on reasonable, nondiscriminatory, and non-exclusive terms. *49 U.S.C. § 47017*. Specifically, the statute mandates:

> The Secretary of Transportation[12] may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—
>
> (1) the airport will be available for public use on reasonable conditions and without unjust discrimination;
>
> . . .
>
> (4) a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport, with a right given only to one fixed-base operator to provide services at an airport deemed not to be an exclusive right if –
>
> (A) the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and
>
> (B) allowing more than one fixed-based operator to provide the services would require reducing the space leased under an existing agreement between one fixed-based operator and the airport owner or operator.

49 U.S.C. § 47107(a). Pursuant to this statutory scheme, the FAA has incorporated written assurances into its grants ("Grant Assurances"). Grant Assurances 22 and 23, which implement the quoted statutory language, are at issue in the instant case.

[12] The Secretary delegated that authority to the FAA Administrator through 14 C.F.R. Part 16. *See* 14 C.F.R. § 16.1.

1. Grant Assurance 22

As discussed earlier, the FAA bears the burden to prove by a preponderance of the evidence that the City is not in compliance with Grant Assurance 22(a), which obligates the City to "make the [A]irport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the [A]irport." The City, on the other hand, bears the burden of proof regarding its affirmative defense under Paragraph 22(i), which provides the City with limited authority to "prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Careful consideration of the entire record, described in the following paragraphs, shows that the preponderance of the evidence establishes that AAS has met its burden to prove that the Ordinance is unjustly discriminatory, and that the City has failed to show that the Ordinance is reasonably justified based on safety or the civil aviation needs of the public.

a. The Ordinance Discriminates Against Operators of C and D Aircraft

After providing the statutorily required Assurance 22 (FF 77), and after accepting over $10 million in federal grant funds (FF 175-176), the City adopted the Ordinance to completely prohibit operators of Category C and D aircraft from using the Airport. The Ordinance states, in relevant part:

> SECTION 1. Section 10.04.06.220 is hereby added to the Santa Monica Municipal Code to read as follows:
> Section 10.04.06.220. Conformance Requirements.
> . . .
> (b) Prohibition. No person operating a category C or D aircraft, as defined by the FAA's standards, shall land at or depart from the Santa Monica Municipal Airport. (DD, Item 8.)

DD Items 3 and 8A; FF 207. The plain language of the Ordinance is discriminatory on its face. It relies on distinctions based on type, class, or kind of aircraft; and proposes to regulate use of the Airport for aeronautical activities (*i.e.,* the operation aircraft that

would land or depart from the Airport). The evidence in the record does nothing to refute the text of the Ordinance, either in regards to the categorization by type, class or kind, or in regards to the relationship to aeronautical activities.

The City used the FAA's own classification system in the Ordinance. Specifically, Category C and D aircraft are defined by FAA regulations as follows: Category C aircraft have an approach speed between 121 and 141 knots, and Category D aircraft have an approach speed between 141 and 166 knots. FF 52-53. Categories A and B, have slower approach speeds. FF 50-51. Drawing distinctions based on aircraft characteristics is one of the recognized and longstanding ways to establish groups that are excluded in contravention of Assurance 22 and FAA Order 5190.6A, "*Airport Compliance Manual*," (October 2, 1989) at ¶4-8(2), AAS Exh. 9, contains examples that include distinctions between aircraft based on communication equipment, gross weight, wheel loading, presence of towed objects, etc. Further, the landing and departure of Category C and D aircraft is an aeronautical activity within the plain meaning of the statute, and the definition of found in Appendix 5 to FAA Order 5190.6A, "*Airport Compliance Manual*," (October 2, 1989), AAS Exh. 9, ("any activity which involves, makes possible, or is required for the operation of aircraft").

Thus, the record establishes a violation of Grant Assurance 22(a). The City received federal funds pursuant to FAA grants under the Airport Improvement Program, and the City provided the FAA with the requisite assurance that it would "make the [A]irport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities." FF 177. The record also establishes that the Ordinance prohibits a segment of the public from engaging in the aeronautical activity of landing or departure depending on the class, type or kind of aircraft in operation. Therefore, unless the City can prove its affirmative defense that the Ordinance was a reasonable measure based on the safety exception found in 22(i), the AAS has proven that the City will violated Assurance 22 if it implements the Ordinance. *Centennial Express Airlines, Golden Eagle Charters D/B/A Centennial Express Airlines, et. al, v. Arapahoe County Public Airport Authority,* FAA Order No.

1999-1 (Part 16, Subpart G), Docket Nos. 16-98-05, 13-94-03, 13-94-25 (February 18, 1999); *aff'd*, 242 F.3d 1213,1223 (10th Cir. 2001), *cert. denied*, 534 U.S. 1064 (2001).

b. The Ordinance Is Not a Reasonable Safety Measure

Most of the evidence and substantial portions of the briefs focus on issues pertaining to safety at the Airport. The City asserts that the ban on Category C and D aircraft is a reasonable restriction, because "[a]s a responsible public body that owns the Airport and bears liability for accidents at the Airport, it must protect the safety of Airport users and the residents and visitors who live and travel in the shadow of the Airport's runways." *City Reply Brief* at 24. The City further argues that its Ordinance was reasonable "[g]iven AAS's consistent refusal to allow SMO to implement the level of overrun protection that FAA's standards call for …." *Id.* The City charges that the AAS wants to "role the dice and hope that a catastrophe never happens as SMO." *Id.*, at 23. Rhetoric aside, and as discussed below, the City has not met its burden to establish that the Ordinance is a necessary safety measure under Assurance 22(i) given the degree of risk, the availability of other safety measures, the impact on the public, and the uncertainties of potential liability. In short, the City has not shown that the Ordinance is a reasonable or necessary safety measure that justifies discrimination against operators of Category C and D aircraft.

(i) The Risk Allegedly Posed by C and D Aircraft

The City argues that there is a high risk of a catastrophic overrun by Category C and D aircraft at SMO based on the unique topography of the Airport, and the close proximity of the runway to surrounding residential neighborhoods. The Airport rests on a plateau with down slopes leading to residential neighborhoods on the East and West ends of the Airport. There are public streets just beyond these slopes on both ends of the runway. The closest residential buildings to the northeast and southwest of the airport property are approximately 300 to 500 feet from the end of the runway. Hundreds of homes are in residential neighborhoods to the East and West of SMO, between 300 feet and 1,000 feet from the ends of the runway. Residential buildings are located across 23rd Street, a two-

lane road, from the Airport property to the southwest, and across Bundy Drive, a four-lane road, from the Airport property to the northeast. *See generally*, FF 9-15.

Any major accident at SMO, particularly one involving aircraft colliding with residential structures, has the potential to be a "catastrophe" in the City's terminology, or to be "devastating" to use the term in AC 150.5220-22A. No party belittles the concern for neighborhood or the citizens who live there. The question presented in this appeal, however, concerns whether the Ordinance is necessary to address the risk demonstrated by the evidence. That evidence shows that few accidents have occurred at the Airport, and none involved aircraft leaving the Airport property. More specifically, the historical records show that seven overruns and one undershoot have occurred in the last 27 years, and all of these involved that Category A and B aircraft, rather than C and D. FF 57. Further, from 1988 to 2006, there were 156 to 223 incident reports with regard to A and B aircraft at the Airport, but none of which identified the runway length or runway safety areas at SMO as an issue. FF 58. The evidence at the hearing further demonstrates that C and D aircraft have a better safety record than A and B aircraft. FF 59, 74. This evidence by itself undermines the City's position that its discriminatory Ordinance, which bars the categories of aircraft having the *better* safety record, is reasonable or necessary.

The City's case regarding the safety of Category C and D aircraft at SMO rests largely on the testimony of James Hall, principal of Hall and Associates and a former chair of the National Transportation Safety Board (NTSB). Hall Hr. Tr. 112. Hall was not a technical member of the NTSB, and does not have an engineering background or hold a pilot's certificate. *Id.* Hall testified "that the risk of an overrun or undershoot by an Approach Category C or D aircraft at SMO creates a genuine and substantial safety risk that should be addressed by providing a full-size Runway Safety Area or its equivalent EMAS bed at both ends of the runway or by banning Approach Category C or D aircraft." Hall Rev. Direct at ¶ 45. Hall also testified that "given the length of the runway, the lack of runway safety areas, and the FAA's failure to approve alternatives to address the safety risk posed by Category C and D aircraft, the City of Santa Monica's ban on the operation of these aircraft at Santa Monica Airport is a reasonable and

appropriate response to a serious safety problem." Hall Rev. Direct at ¶ 15. Hall did not testify that Category C and D aircraft are inherently unsafe, but instead stated to the contrary that "I do not doubt that Category C and D aircraft 'can land safely' at SMO." Hall Rev. Direct ¶ 57. Hall, however, based his assessment on the fact that there is no "guarantee that they [Category C and D aircraft] will land safely." Hall Rev. Direct at ¶ 57. Hall emphasized that "[d]espite both the FAA's recognition of and attempts to mitigate these clauses of overruns, the agency's own literature admits that it is *impossible to eliminate the risk entirely*." Hall Rev. Direct at ¶ 17 (emphasis added). Thus, the City relies on Hall's testimony for the proposition that so long as the *possibility* exists of a Category C or D aircraft undershooting or overrunning the runway, and full-sized RSAs or EMASs are not installed on the Airport runways, the Ordinance is the only reasonable measure to insure the safe operation of the Airport. *See City Post Brief,* at 11.

Much of Hall's testimony regarding the risks of an undershoot or overrun by Category C and D aircraft at SMO is not supported by scientific or other technical analysis, and therefore unpersuasive. Hall Hr. Tr. 153. Hall and Associates did not perform engineering studies to determine the likelihood of an undershoot or overrun at SMO or whether a Category C or D aircraft would reach the residential areas in the event of such an incident. In fact, Hall admittedly relies on "common sense" in reaching his conclusions.[13]

The City also presented the testimony of Robert Trimborn, the Airport Manager. He indicated that the City had not undertaken any engineering studies that considered factors such as speed, weight of the aircraft, or the topography of SMO to determine where a Category C or D aircraft would stop in the event of a runway incursion. FF 206. Trimborn provided information regarding an exhibit, prepared by the City's consultant,

[13] On cross-examination, Hall testified as follows:

> Q: Has anything been done, in this case, to analyze like the NTSB would do, using accepted scientific methodology to determine the likely consequences of an overrun, where the airplane would go, on various scenarios?
> A: I don't know that you need that as a substitute for common sense in this situation.

Hall Hr Tr. at 155: 5-10.

Coffman and Associates, which provided an overlay of actual runway overshoots at other airports, including Teterboro, New Jersey and Columbia, South Carolina. City Exhibits 10-13; Testimony of Robert Trimborn Hr. Tr. 403: 10-13; *see also* Direct Testimony of James Hall P 43; Direct Testimony of Trimborn P 36. The overlays, however, do not take into account conditions at the airports where the incursions occurred or the conditions at SMO, and, at the Hearing, the City stated that these overlays are "not supposed to be scientific." Tr. 410: 5-12. The City also relies on several NTSB reports and recommendations concerning Category C and D overruns at *other* airports. City Exhibits 2-13, 18-20, 25 & 26, and 32.

In contrast, AAS provided testimony based on technical analysis of the risks of an overrun at SMO. Rick Marinelli, a supervisory engineer who manages the Office of Airport Safety and Standards, testified that, based on a simple ballistic arc that would be followed by any falling object with an assumed initial velocity, aircraft exiting the end of the runway at SMO at 70 knots (the design criteria for standard EMAS improvements) would not reach the residential area at the west end of the runway. FF71. To reach the neighborhood area, an aircraft would have to be flying, or at least have lift on the wings. *Id*. The rationale for the AAS position on this point is also found in the Director's Determination:

> In making this determination, the FAA fully recognizes that any kind of accident could happen at any time. The FAA works to anticipate the causes of accidents, and to minimize the probability of future accidents and also to minimize the risk of injury and damage when they occur. However, the C and D aircraft operations banned by the City are now being conducted safely, in accordance with all FAA operating requirements, including the safety margins built into those requirements and into runway length calculations. If these operations could be banned because an accident involving a C or D aircraft is conceivable, then any aircraft operation at any airport could be banned for the same reason.

DD at 46.

Thus, the City offers little credible evidence to support its case regarding the risk posed by C and D aircraft. Unscientific overlays of unrelated accidents at other airports, assertions of "common sense" by non-technical witnesses, and other speculation are not

sufficient evidence to support a conclusion that Category C and D aircraft operations pose a higher risk of an undershoot or overrun than Category A and B aircraft at the Airport. The evidence presented by the City fails to show a nexus between operations of Category C and D aircraft at SMO and an increased risk to residential areas adjacent to the Airport.

The absence of a showing of increased risk posed by C and D aircraft is fatal to the City's affirmative defense. However, other evidence in the voluminous record pertaining to safety measures that either are currently in place or are possible to construct at the Airport, further undercut the City's position. Existing safety measures include higher design standards required of C and D aircraft, higher levels of training for C and D certified pilots, and certain landing rules that many pilots must follow to use the runway. All of these current requirements likely contribute to the successful safety record of C and D aircraft operations nationwide and at SMO. In addition, creating new physical features at the Airport could address the City's concern. Such measures include the construction of non-standard Runway Safety Areas (RSAs), Engineered Materials Arresting Systems (EMAS), and Runway Protection Zones (RPZs). The existence and availability of each alternative safety measure weighs heavily against the conclusion that the City's discriminatory Ordinance is a necessary safety measure.

(ii) C and D Aircraft and the Part 25 Certification Requirements

FAA regulations describe the differences between Category A and B aircraft and Category C and D aircraft. The differences are significant, and likely contribute to the impressive safety record shown in the operation of C and D aircraft.

The Category A and B aircraft operating at SMO are predominantly certificated pursuant to Part 23 of the Federal Aviation Regulations ("FAR"). Part 23 aircraft are typically used in general aviation, crop dusting, banner towing, aerial surveying, and aerobatics, though they are also used in corporate, air taxi, on demand, and fractional ownership operations. FF 96.

Category C and D aircraft operating at SMO are predominantly certificated pursuant to Part 25 of the FAR as Transport Category Airplanes. FF 97. Part 25 aircraft are typically used in air carrier, corporate, air taxi, on demand, and fractional ownership operations.[14] *Id.* Many Corporate jet operations are Category C and D aircraft certificated under Part 25. FF 94. Corporate jet operations have a well established safety record. FF 95.

Part 25 aircraft certification requirements are more stringent and encompass higher safety standards than Part 23. FF 98. In particular, Part 25 includes more stringent requirements addressing takeoff and landing performance. *Id.* Part 25 aircraft also have additional design features to provide safety benefits when compared with Part 23 aircraft. For example, many Part 25 aircraft are manufactured to provide enhanced takeoff and/or landing safety features like autothrottles, anti-skid and autobrake systems, automatic spoiler deployment, enhanced flight deck displays, and thrust reversers. FF 99.

The evidence demonstrates that the probability of equipment failure, leading to a runway excursion or overrun, is much higher in Category A and B aircraft, when compared with Category C and D aircraft. FF 83. With respect to takeoff performance, data collected by the FAA demonstrates that Category C and D aircraft have fewer engine failures than Category A and B aircraft. FF 84. Because the stopping performance of a given category C or D aircraft may be better than that of a given category B aircraft, the category C or D aircraft may be able to land in a shorter distance than the category B aircraft even if the landing approach speed is higher. FF 69. Although there are more overruns and undershoots involving Category A or B aircraft as compared to Category C or D aircraft, the City points out that there are also more operations of Category A and B aircraft as compared to C and D aircraft. FF 74. Nevertheless, adjusting for the more operations by Category A and B aircraft as compared with C and D aircraft, there is still a higher accident *rate* for A and B aircraft than for C and D aircraft. FF 74.

[14] Almost half of the Category C and D aircraft operations at SMO are pursuant to fractional ownership programs. Trimborn Hr. Tr. 371:1-5.

The conclusions drawn from this evidence are that design and certification requirements make C and D aircraft generally safer than A and B aircraft, which further supports the conclusion that the City's Ordinance is unnecessary as a safety measure.

(iii) Pilot Certification and Flight Manual Requirements

The City asserts that the FAA's certification requirements and approved flight manuals do not guarantee that an overrun or undershoot of a runway by an aircraft will never occur at any given airport, including SMO. Hall noted that FAA Advisory Circular 91-79 states that runway overruns during the landing phase are estimated at 10 incidents or accidents annually. FF 60. Nevertheless, while Hall's direct testimony noted that "aircraft and pilot certifications, training and flight procedures have failed to prevent overruns in the past" (Hall Rev. Direct ¶ 64), Hall also agreed on cross examination that pilot training contributes to preventing overruns. Hall Hr. Tr. 164:22-165:6.

The FAA has extensive regulatory scheme of pilot certification and aircraft certification for safety. FF 75-135. While the certification requirements do not depend specifically on the categories of aircraft used in the Ordinance or the ARC standards, the evidence shows that the pilots of C and D aircraft, because of the uses and characteristics of the planes, are generally held to the highest standards of training and experience to maintain their pilot certification. FF 77-82 and 88-92. The FAA's Manager of Air Carrier Operations Branch, Dennis Pratte II, provided a detailed analysis of the certification requirements, and summarized:

> For the most part, pilots operating Category C and D aircraft possess commercial or airline transport pilot certificates with an instrument rating, as well as have an aircraft specific type rating. There are some exceptions for surplus military aircraft. Pilots of Category C and D aircraft are typically trained in advanced full motion simulators certified under 14 C.F.R. Part 142.
>
> Category A or B aircraft could potentially be flown by a private pilot with as little as 35 total flight hours of experience. If one must make a generalization comparing the typical pilots of A and B category aircraft with the typical pilots of C and D category aircraft, the C and D category

> pilots have more experience, more training, and meet the highest safety standards.

Pratte Direct ¶ 11-12; FF 80-81.

Although SMO is not an airport regulated by Part 139 of the FAR, FF 4, many of the Category C and D aircraft operations at SMO are conducted pursuant to Part 135, Part 121, and Part 91, Subpart K, which require operators to comply with the Airplane Flight Manual limitations. FF 92. This means that the aircraft must be able to land within 60% of the usable runway, or 80% for eligible on-demand operations that meet certain higher standards. FF 92.[15] This "60 percent rule" requires that "no person operating a turbine engine powered airplane may take off that plane unless its weight on arrival, allowing for normal consumption of fuel and oil in flight . . . would allow a full stop landing at the intended destination airport within 60 percent of the effective length of each runway described below from a point 50 feet above the intersection of the obstruction clearance plane and the runway." Hall Rev Direct ¶ 21 quoting AC 91-79 Appendix 1; *see also* FF 79.

Thus, the record establishes that the pilots of C and D aircraft are better trained, have more experience, and in certain circumstances, operate under more stringent landing rules than pilots of A and B aircraft. This evidence weighs heavily against finding that the Ordinance was a reasonable safety measure necessary at the Airport.

(iv) Availability of Alternative Safety Measures

The City argues that only full-sized RSAs at each end of the runway, EMAS beds, or RPZs will insure the safe operation of the Airport. An RSA is defined as "[a] defined surface surrounding the runway prepared or suitable for reducing the risk of damage to airplanes in the event of an undershoot, overshoot or excursion from the runway." AC 150/5300-13, *Airport Design*, Appendix 8; FF 109. An EMAS is composed of

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

"Engineered Materials," which are "high energy absorbing materials of selected strength, which will reliably and predictably crush under the weight of an aircraft."[16] FF 115. An RPZ is designed to "have the airport acquire the land so that they can prevent what I call the congestion of people." FF 109; Solco Direct 77:17-19. The City asserts that since full-sized RSAs or, in the alternative, EMASs cannot be established without shortening the runway, and the risk of an undershoot or overrun by a Category C or D aircraft cannot be mitigated completely, only a total ban on use of the Airport by C and D aircraft can reasonably accomplish the City's objective of insuring the safe operation of the Airport.

To support this argument, the City again relies on the testimony of James Hall, who explained that "the terrain steeply drops off shortly after both runway ends which makes construction of an RSA or an equivalent EMAS bed installation extremely difficult without shortening the runway." Hall Rev Direct ¶ 27 citing FAA Standard Runway Safety Areas at Santa Monica Beyond Runway 3 and FAA Standard Runway Safety Areas at Santa Monica Beyond Runway 21; FF 150. The record shows that the City indeed proposed to adopt 1,000 foot overrun areas at the Airport, which would severely limit operations due to the shortened runway. FF 132. The FAA objected, however, because the City would effectively ban the aircraft through airport design methods rather than by legislative action. FF 131. Hall concluded that the only viable alternative to insure the safe operation of SMO is a total ban on its use by Category C and D aircraft. Hall Rev Direct ¶ 62.

Hall's testimony also relies extensively on AC 150/5300-13, *Airport Design* (*see* Hall Direct ¶¶ 22-24, 38, and 57), but his conclusions and the City's position improperly rely on the standards used to construct *new* airports. In contrast, Rick Marinelli, who is in charge of AC 150/5300-13, *Airport Design*, testified on behalf of AAS. Marinelli Direct ¶ 11. According to Marinelli, as confirmed by the FAA Orders 5200.8 and 5200.9, RSAs are required at older airports like SMO "to the extent practical," as determined by

[16] An EMAS is a bed of highly crushable concrete blocks that are installed at the ends of the runway. When an aircraft overshoots the runway, the landing gear will crush the EMAS bed to assist the aircraft in coming to a stop. Advisory Circular 150/5220-22A (9/30/2005), Engineered Materials Arresting Systems (EMAS) for Aircraft Overruns. A standard EMAS provides a level of safety that is generally equivalent to a full RSA built to the dimensional standards in AC 150/5300-13, *Airport Design.*

consider the engineering feasibility, cost, and effect on operations at the airport.[17] FF 124-125. EMASs – and even non-standard EMASs – can be used as an alternative to standard RSAs after assessment of these factors, as FAA Order 5200.9 explains,

> **7. NON-STANDARD EMAS INSTALLATION**
> a. It will often not be practicable to provide either a standard RSA or a standard EMAS installation, either because the cost of both is above the maximum feasible cost, or because displacing the landing threshold will adversely affect operations. Consider not only the possible loss of runway length, but also effects on taxiing aircraft, including changes in required holding positions. When neither a standard RSA nor a standard EMAS system can be provided within maximum feasible costs, a non-standard EMAS that will stop the design aircraft traveling at 40 knots or more should be considered. An EMAS that cannot provide at least this minimum performance is not considered a cost-effective safety enhancement.

FF 106. Aside from Hall's assertions that FAA policy statements should be changed, (*see* Hall Direct ¶¶ 32-33), the City offers no convincing basis to support its position that the standards for new airports justifies the rejection of non-standard measures that are acceptable to the FAA.

The record demonstrates that the parties have identified and discussed possible alternatives to full-sized RSAs or EMASs. For example, the FAA proposed to build two 130 foot EMAS beds with 25 foot lead-in ramps on each end of the runway at SMO. DD Item 7. The City rejected the FAA's proposal. DD Item 4 at 6-7. Marinelli testified that, in his expert opinion, the most effective safety enhancements at SMO would be the installation of an EMAS at the west end of the runway for the protection of aircraft and occupants, and the improvement of RPZs for the protection of nearby residents. FF 133. An initial evaluation of SMO indicates that with associated earthwork, an EMAS providing 70 knot performance is feasible on one end of the runway. FF 134. Ninety

[17] Moreover, hundreds of airports in several states throughout the country lack standard RSAs. FF 129. Whether an airport has an RSA is not a consideration during aircraft certification or the determination of the minimum runway length required under aircraft operating rules. Aircraft must be able to safely takeoff and land regardless of the presence or absence of an RSA. FF 114. The record shows that no other airport owner or proprietor, other than the City, has restricted an entire category of aircraft due to lack of RSAs or EMASs. FF 136. In fact, several major airport runways operate without RSAs and EMASs including Los Angeles International, Boston Logan, and Midway Chicago. FF 115.

percent of overruns are at 70 knots or lower. FF 60. Also, the current slope at the end of the runway is far from gentle, and already has been associated with a fatal accident. FF 135 and 150. A retaining wall would provide approximately 200 feet of additional length in which to stop before reaching a drop-off. FF 135. Marinelli testified that retaining walls are common in airport construction. FF 135. In addition, the FAA proposed a runway acquisition program, which included the removal of 15 to 20 homes from the most critical areas within a runway safety area. FF 164. The City's proposal of 2002 only considered the removal of *all* homes in the runway protection zone. FF 165. The FAA believed that removal of some homes from the runway safety area was a more reasonable consideration. FF 165.

The Hearing Officer finds the testimony by the FAA's witnesses was credible and persuasive on this issue. The existence of alternative approaches as proposed by the FAA to the City demonstrates that the total ban on Category C and D aircraft was not the sole action that is available to the City to enhance safety in the area surrounding the Airport.

(v) The City's Argument on Potential Liability

The City argues that it will be liable for an overrun into the neighborhood surrounding the Airport, stating specifically,

> … should an overrun into one of the neighborhoods occur, the parties do not dispute that it is the City, as owner and operator, and not the federal government, that would be subject to liability. California Government Code Section 835 provides that "*a public entity is liable for injury caused by a dangerous condition of its property*". AAS has stated that the FAA does not accept liability for overruns.

City Post Brief, at 20-21 (emphasis added). While California Government Code § 835 truly provides a waiver of sovereign immunity for dangerous conditions on property owned by public entities, the City overstates the risk to the extent that it implies a presumption of strict liability if an overrun occurred. Rather, the cited statute requires potential plaintiffs to prove several elements of a claim, and related statutes establish several applicable defenses.

Under California Government Code § 835, a public entity's liability in California is premised on the following elements:

1. There must be a "dangerous condition" at the time of the injury;
2. The dangerous condition proximately caused the injury;
3. The injury was a reasonably foreseeable result of the dangerous condition; and,
4. The public entity had notice of the dangerous condition with sufficient time to take protective measures.

Cal. Gov't Code § 835. Recognizing that accidents can occur based on many combination of events, FF 56, it would be mere speculation to conclude that any future overrun will meet each of these four elements. The first element, listed above, merits particular discussion regarding the speculative nature of the City's argument.

The first element of the cause of action described in § 835 uses the phrase "dangerous condition." That phrase is defined as,

> [A] condition of property that creates a *substantial (as distinguished from a minor, trivial or insignificant) risk* of injury when such property or adjacent property is *used with due care* in a manner in which it is reasonably foreseeable that it will be used.

Cal. Gov't Code § 830(a) (emphasis added). Cross-examination testimony at the Hearing indicates that no class C or D overrun has ever occurred at the Airport, and the City's own witness accepted the FAA counsel's statement that C and D aircraft conduct 13 million landings each year, and that in the last 10 years, there have only been 10 overruns. Hall Hr. Tr. 165-166. If presented with this evidence, a trier of fact certainly could conclude that these risks are insignificant.

Secondly, several overruns explored at the Hearing involved human error. Stimson Hr. Tr. 338-341 (addressing the Cleveland, Pinnacle and Midway accidents); Harris Hr. Tr. 650-651 (addressing Teterboro). Again, if presented with evidence regarding pilot error in a future overrun at the Santa Monica Municipal Airport, a trier of fact certainly could

conclude that the pilot did not exercise the due care required to establish that the City maintained a "dangerous condition."

California's Government Code also affords affirmative defenses to public entities. Section 830.6 provides immunity for practical impossibility to remedy a dangerous condition, lack of funds, or compliance with design standards issued by a legislative body or other body. Indeed, with regard to design standards, the evidence in this Part 16 Hearing supports the conclusion that California looks to the FAA regulate runway safety. FF 171-172. The FAA's non-concurrence with the ban or other proposed corrective measures certainly would be evidence the City would use as a defense in any future tort action. Section 835.4(b) provides another defense that considers probability of an accident, practicability of corrective measures, and cost of corrective measures. These issues were extensively explored at the Hearing, and similar evidence would likely form the basis of the City's legal defense if some future overrun actually reached the roads or the buildings that lie beyond the runways. These defenses are just two of several found in California's Government Code.

The foregoing discussion demonstrates that the City's bald assertion that it automatically will be held strictly liable for any damages resulting from an overrun by a Category C or D aircraft is speculative and unsupported in this record.

(vi) Impact on the Regional Airspace

The evidence shows that about 9,000 C and D aircraft operations occur each year at the Airport. FF 5. The parties differ on the degree of the impact that shifting these operations would have on the other airports in the region, with the City's witnesses claiming the impact would be "insignificant" (*see e.g.*, Yurtis Direct ¶ 105) while the Director's Determination called it "significant and not de minimus." DD at 51. Nevertheless, regardless on the degree of impact on the Los Angeles Regional Airport System, it is clear that both parties recognize that the ban at SMO will require air traffic to be diverted to other regional airports. Thus, unlike the options for building new

physical improvements like RSAs or EMASs, the Ordinance unnecessarily limits the usefulness of the Airport.

(vii) The Ordinance is not Reasonably Justified on the Grounds of Safety

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

2. Grant Assurance 23

The AAS contends that implementing the Ordinance will violate Grant Assurance 23. That assurance, found in the grants between the FAA and the City as the sponsor, states:

> **23. Exclusive Rights.** [Sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:
>
> a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and
>
> b. If allowing more than one fixed-based operator to provide such services would require the reduction of space

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

FF 178. AAS asserts that "[a]n exclusive right arises when an airport disparately treats similarly situated users," and that the Ordinance establishes "exclusive rights for one group, the A and B [C]ategory aircraft … and denies another group, Category C and D aircraft …, the same rights." *AAS Pre Brief*, at 25. *See also, AAS Post Brief*, at 33-35.

The City counters with two arguments. The first, which is easily determined, asserts that imposing restrictions on *aircraft* is permissible under Assurance 23 because 49 U.S.C. §§ 40103(e), 4701(a)(4), and Grant Assurance 23, refer to "persons" and that an "aircraft" is not a "person" under the statutes. *See City Post Brief*, at 52; *City Reply Brief*, at 24-25. AAS in its Reply Brief argues that "[t]he Ordinance targets a person as the user of certain equipment. The ordinance reads, 'No person operating a C or D category aircraft …" *AAS Reply Brief*, at 46, *citin*g DD, Item 8. The AAS is correct that the distinction the City draws between "aircraft" and a "person" does not withstand scrutiny. The "person" referenced in the Ordinance would be an operator of a Category C or D aircraft, not the Category C or D aircraft themselves. A "pilot" operating an aircraft is a "person" under the statute and implementing regulations. 49 U.S.C. §§ 40103(e) and 4701(a)(4); 14 C.F.R. § 1.1 (definition of "person" incorporated into the definition of a "pilot"); 1 U.S.C. § 1; 49 U.S.C. § 40102(37). The statutes, Assurance, and the Ordinance all use the word "person."

The City's second argument has merit. The City asserts that the Ordinance does not establish a "noxious" monopoly contrary to the intent of Assurance 23. *City Pre Brief* at 23. AAS does not address this issue directly in its briefs, but does state that "[i]mplementing an equipment change will impose a hardship of varying degrees and may be an impossibility for some if not many." *AAS Reply Brief*, at 46.

As stated above, any interpretation of Assurance 23 should "be informed by the statutory provisions, regulations, and other guidelines provided by the [agency] at the time the grant was made." *Kentucky Dept. of Ed.*, 470 U.S. at 670. Although Assurance 23 does not provide a precise definition of what constitutes an "exclusive right," it does contain the statutory exception that describes one instance (not relevant here) for what "shall not be construed as an exclusive right." The second paragraph continues with many examples of "aeronautical activities" that typically could be the subject of improperly exclusive rights, *e.g.*, "pilot training," "crop dusting," "aircraft sales," or other business activities. To understand the meaning of an "exclusive right," therefore, it is appropriate to consider the 70 years of legislation, legislative history and administrative policies showing that its purpose is to prohibit anti-competitive, monopolistic behavior at airports receiving federal funds.

Prior to the enactment of the Airport and Airway Improvement Act of 1982, the statutes authorizing improvement grants to airports did not have a specific statutory requirement that all grant agreements include a specific assurance against granting "exclusive rights" to a class of persons.[18] Rather, the practice of including assurances in the agreements like the one at issue in the instant case evolved during and after World War II to ensure

[18] For example, the Airport and Airway Development Act of 1970 (AADA of 1970) established a grant program that predated the AAIA. Section 18 of the AADA of 1970 required the Secretary to receive 10 enumerated assurances. The first required that the airport would be "available for public use on fair and reasonable terms and without unjust discrimination." The statute did not have a separately stated ban against airports granting "exclusive rights." *See* Airport and Airway Development Act of 1970 § 18, Pub. L. 91-258, 84 Stat. 219, 229 (1970). Significant amendments in 1976 did not add the prohibition against granting exclusive rights. *See* Airport and Airway Development Act Amendments of 1976, Pub. L. 94-353, 90 Stat. 871 (1976).

compliance with section 303 of the Civil Aeronautics Act of 1938 ("CAA"),[19] and identical language later used in section 308 of the Federal Aviation Act of 1958 ("FAA of 1958").[20] *See* FAA Order 5190.6A, "*Airports Compliance Manual*," October 2, 1989, at Chap. 3, ¶ 3-2; see also FAA Order 5190.6, "*Airports Compliance Manual*," August 24, 1973 (cancelled), at ¶ 31. Both general statutes stated that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

In 1941, the United States Attorney General issued a legal opinion on the scope of section 303 of the CAA. The issue concerned whether the language under the statute prohibited only exclusive rights to use the airport as a whole or exclusive right related to an aeronautical activity. According to the U.S. Attorney General, "the legislative history which shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the act (sec. 2)." 40 U.S. Op. Atty. Gen., at 72, *citing*, 83 Cong. Rec. 6729, 6730.[21] This opinion also provided the definition of an "exclusive right" found, and later incorporated into subsequent FAA Advisory Circulars and Orders. The Opinion stated, "the term 'exclusive right' as used in the section was intended to describe a power, privilege, or other right excluding or debarring another or others from enjoying or exercising a *like* power, privilege, or right." 40 U.S. Op. Atty. Gen., at 72 (emphasis added). The Attorney General's opinion remained relevant when section 308(a) of the FAA of 1958 incorporated the identical language from section 303 of the CAA.

[19] Civil Aeronautics Act (CAA) of 1938 § 303, June 23, 1938, ch. 601, 52 Stat. 973.

[20] Federal Aviation Act of 1958 § 303, Pub. L. 85-726, 72 Stat. 731.

[21] As Senator McCarran explained, "The Senator from Missouri [Truman] and myself have tried to work into this proposed law provisions which would guard against anything savoring of monopoly." 83 Cong. Rec. 6729. The legislative history also indicates that the language was written or suggested by the Secretary of Commerce in conjunction with Senator Truman. Senator Truman confirmed during the hearing, "[W]e wanted to write it so that there will not be monopoly." *Id.*, at 6730.

The practice of including prohibitions against giving exclusive rights also evolved in the context of conveyances of surplus property. Consistent with section 303 of the CAA and the anti-trust requirements in section 20 of the Surplus Property Act of 1944, early transfers of surplus airport property included prohibitions against granting exclusive rights. Later transfers after the War ended used more explicit language, which included listing examples of exclusive rights to engage in particular business activities as required under the 1947 amendment to the Surplus Property Act.[22] Thus, the FAA established a longstanding practice of requiring an assurance against granting exclusive rights based on anti-monopoly principles, and with this history in mind, the Congress passed the AAIA of 1982.

In 1982, Congress passed the AAIA, which established a mandatory requirement to obtain an assurance against exclusive rights. The statute states:

> (2) there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport;

Airport and Airway Improvement Act of 1982 § 511, Pub. L. 97-248. In addition, Congress added language to section 308 of the FAA of 1958 "…modeled after that which is contained in existing sponsorship agreements now used by Secretary of Transportation in awarding grants-in-aid to federally assisted airports." H.R. CONF. REP. 97-760, 719, 1982 U.S.C.C.A.N. 1190, 1481 (1982). Section 524 (a)(1) of Pub. L. 97-248 states:

[22] *See* Pub. L. 80-289, § 2, 61 Stat. 678, 679. Similar, but not identical to the current Assurance 23, the 1947 amendment gave examples of exclusive rights "to engage in the sale or supplying of aircraft, aircraft accessories, equipment, or supplies … or aircraft services necessary for operation of aircraft (including maintenance and repair of aircraft, aircraft engines, propellers, and appliances).

> Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349(a)) is amended by adding at the end thereof the following new sentence: "For purposes of the preceding sentence, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing

Id. In 1994, these provisions were re-codified by Pub.L. 103-272, 1994 HR 1758, and now the revised language of section 308 of the FAA of 1958 is found in 49 U.S.C. § 40103(e) and the assurance requirement of section 511 of the AAIA of 1982 in 49 U.S.C. § 40107(a)(4).[23]

The FAA has not deviated from this longstanding legislative and administrative correlation of the assurance against exclusive rights with anti-competition policies. FAA Order 5190.1A, "Exclusive Rights at Airports," October 10, 1985, still uses the language from the 1941 Attorney General's Opinion, "Such a right *conferred on one or more parties but excluding others* from enjoying or exercising a similar right or rights would be an exclusive right." *Id.*, at ¶ 6 (emphasis added). The examples of "aeronautical activities" found in FAA Order 5190.1A contain business descriptions similar to those found in the 1947 amendment to the Surplus Property Act. FAA Order 5190.1A., "Exclusive Rights at Airports," October 10, 1985, establishes that the policy against exclusive rights is to promote fair competition at public-use airports. Specifically, the Order states:

> 11. ADMINISTRATION OF POLICY.
> …
> c. Imposition of Standards. *It is the intent of the foregoing policies to promote fair competition at public-use airports.* It is expected that public-use airport owners will adopt and enforce minimum standards

[23] The 1994 recodification was simply "An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, "Transportation", and to make other technical improvements in the Code." Aside from rearranging the older provision (§ 308 of the FAA of 58) from 49 U.S.C. § 1349 to 49 U.S.C. § 40103(e), the text was changed to state that "*A person does not have* an exclusive right to use an air navigation facility ." (Emphasis added.)

> and qualifications to be met by those who propose to engage in commercial aeronautical activities. Primarily such standards should protect the interest of the public. The application of any unreasonable requirement or standard to the proposed activities, or any requirement or standard which is applied in *a discriminatory manner, shall be considered to be a constructive grant of an exclusive right contrary to applicable laws and the provisions hereo*f.

Id. (emphasis added). The FAA Advisory Circular, AC 150.5190-6, *Exclusive Rights at Federally-Obligated Airports*, (January 4, 2007) at ¶ 1.2 (AAS-11) also correlates exclusive right with anti-monopoly purposes, stating, "The purpose of the exclusive rights provision as applied to civil aeronautics is to prevent monopolies and combinations in restraint of trade and to promote competition at federally obligated airports." Thus, given the underlying statutory and regulatory purpose pertaining to this grant program, and consistent with *Bennett v. Kentucky Dept. of Ed.*, the FAA must establish a nexus between the restriction at issue and results that are contrary to the public's interest in promoting fair competition.

The parties cite cases that confirm the need for a nexus between the alleged exclusive right and violations of the public's interest in promoting fair competition. The cases generally involve enforcement actions initiated by aggrieved parties whose ability to freely conduct their specific trade was allegedly denied by an airport sponsor through anti-competitive actions. *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) (Airplane storage operator denied similar leasing opportunities provided to incumbent storage operators); *Aircraft Owners and Pilots Assoc. v. Port Authority of New York*, 305 F. Supp. 93, 105 (E.D.N.Y. 1969) (Legislative history of §308 suggests "the type of exclusive' right … forbidden is one of the sort noxious to the anti-trust laws"); *United Aerial Advertising Inc. v. County of Suffolk Board of Commissioners*, FAA Docket No. 16-99-18 (May 8, 2000) (Towed banner company denied use of airport where two other towed banner companies operated); *Skydance Helicopters, Inc. d/b/a Skydance Operations Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona*, FAA Docket No. 16-02-02 (Mar. 7, 2003) (long-term leases at the airport given to some commercial operators but not to specified complainant); *Boca Raton Jet Center, Inc. v. Boca Raton Airport Authority*, FAA Docket No. 16-97-06 (Final Agency Decision

incorporating Director's Determinations, August 20, 1999) (Differing leases for commercial tenants "deprives the using public of the benefits of competitive enterprise.").[24]

In the instant case, there is no private intervener alleging harm from anti-competitive behavior. Further, the record does not cite to any specific party adversely affected by the Ordinance. Instead, AAS merely asserts that "[i]mplementing an equipment change will impose a hardship of varying degrees and may be an impossibility for some if not many." *See AAS Post* at 46. Such speculation, however, is not sufficient for AAS to meet its burden of proof. Stated simply, a nexus cannot be drawn based on this record between the Ordinance and any actual anti-competitive result. Accordingly, the Ordinance does not establish an "exclusive right" that violates Assurance 23.

E. The Surplus Property Act

In 1941, the United States Government ("Government") leased a substantial portion of what is now the Airport from the City for use in World War II. *See* FF 18. The Government made a series of improvements to the Airport, including expanding the size of the Airport property, related to the War effort. FF 20. After the War ended, the Government relinquished its interest to the City, including the original leasehold, and the additional property and improvements. FF 22. The transfer to the City was accomplished pursuant to the Surplus Property Administration Regulation 16 through an Instrument of Transfer dated August 10, 1948. FF 26. Regulation 16 and the Instrument of Transfer imposed certain obligations on the City, and were accepted by the City, including operation of the Airport for the use and benefit of the public "on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport." DD Item 80 A/B; *see also* FF 28.

[24] AAS also cites to *Skydive Paris Inc. v. Henry County, Tenn.*, FAA Docket No. 16-05-06 (Jan. 20, 2006), but that case specifically decline to decide the issue under the Exclusive Rights Assurance, stating, "[i]n view of the finding below on unjust discrimination, it is unnecessary to consider the related allegation regarding exclusive rights."

The City now argues that since the Government only leased the Airport (actually the lease pertained to most but not all of the Airport Property) any restrictions were not conveyed by the Instrument of Transfer or by the SPA. *See City Post Brief* at 54. The City does not contest that the transfer was made pursuant to and in accordance with the SPA or that the Instrument contains covenants and restrictions, Rather, the City contends that the express covenants and restrictions are not valid and thus do not constrain the city's actions in adopting the Ordinance. *See City Pre-Brief* at 31-34.

The City's current legal argument in this regard is completely meritless in that it is inconsistent with: express and unambiguous provisions of the SPA and the Instrument of Transfer; the documentation of record in the case; and positions taken by the City Attorney and by the Attorney General of the State of California. The City cites no persuasive authority for its argument that the Instrument of Transfer is not a deed because it only involved in a lease. This position ignores the undisputed fact that the property it obtained through the Instrument of Transfer was greater than the property originally leased by the City to the Government and that the property was significantly improved by the Government during the lease period. Moreover, the record documentation in this case reflects that the City agreed to the terms and conditions imposed on it through the Instrument of Transfer and that the City Attorney and the Attorney General of California have opined on the validity and continuing effect of the Instrument of Transfer. DD Items 13 and 48.

It is clear that under the SPA that a surplus property interest conveyed by the Federal Government may include property that had been leased by the Government. *See* Surplus Property Administration Regulation 16; FF 28. Moreover, all covenants contained in such Instruments of Transfer continue in effect until released pursuant to Federal Law. *Id.* The Instrument of Transfer in this case expressly contains a covenant requiring that SMO "shall be used for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport…." *See* DD Items 16 and 15A/B. The Restrictive Covenant set forth in the original Surplus Property Act and in the Instrument of Transfer

currently is codified at 49 U.S.C. § 47152(2)2 and is consistent with the obligations imposed by Grant Assurances 22 and 23.

The covenant also makes reference to Regulation 16 which itself confirms that leasehold interests are covered under the SPA. Section 8316.1 of Regulation 16 defines an airport for purpose of the SPA as including any improvements that have been made to the property. The Section also contemplates declaring both a leasehold interest and other government property at an airport to be surplus. *See Regulation 16, Section 8316.9(d).* It is well established in the record that during its lease of the Airport from the City during World War II, the Government made a number of improvements to the Airport property and acquired additional land through a condemnation proceeding that substantially increased the size of the Airport property. FF 20 and 27. Many of these improvements were paid for with Federal funds. DD Item 1, 4, 25 and 26; *see also* FF 21.

It is undisputed that the Airport, as it existed at the end of World War II, including all the improvements made and additional property acquired since the beginning of the lease, was declared to be surplus by the Government in accordance with the rules and regulations implementing the SPA. FF 23. It also is undisputed that the Government leasehold and its other property interests in the Airport were transferred to the City through the Instrument of Transfer in 1948. FF 26. The Instrument of Transfer was recorded on August 24, 1948 within the Los Angeles property records as Document 1746. DD Item 15. Evidence in the record supports a finding that the City understood and specifically recognized in 1948 that it was receiving improved airport property subject to provisions and covenants of the SPA, the Instrument of Transfer and Regulation 16. The City expressly requested that the Airport be designated for "disposal as an airport or airport facilities subject to such conditions as the Administrator may desire to impose under the provisions of the Surplus Property Regulation 16 and amendments thereto." *See* DD Item 80A/B.

In 1962, the City Attorney issued a written opinion to the City Council similarly stated that the City could not unilaterally decommission the Airport and that the City was bound by the Instrument of Transfer. *See* DD Item 13. Finally, The Attorney General of the State of California issued Opinion Number 74-317 in 1975, as the City was contemplating decommissioning the Airport. *See* DD Item 13 and 48. The Attorney General's Opinion recognized the City was bound by the terms of the Instrument of Transfer and could not unilaterally designate the Airport property for use as other than an airport. *Id.*

The City has offered no substantial evidence in the record that would contravene the above referenced authorities supporting the continued applicability of the Instrument of Transfer and Surplus Property Act to the City's operation of the SMO. The Hearing Officer therefore concludes that: (1) compliance with SPA obligations is expressly recognized as a basis for administrative action under Part 16; (2) the covenants, knowingly accepted by the City at the time of the Transfer of the Airport to it in 1948 pursuant to the SPA and the Instrument of Transfer, remain binding on the City and require it to not unreasonably and unjustly discriminate in the operation of the Airport; and (3) the Ordinance does not satisfy the City's obligations under the SPA for the reasons stated in the discussion regarding Grant Assurance 22.

F. The 1984 Agreement

On or about January 31, 1984, the City and the FAA executed the 1984 Agreement, which was entitled "Santa Monica Airport Agreement". *See* FF33. The 1984 Agreement was designed to resolve a series of disputes involving:

> (a) impact on the community surrounding the Airport of noise from aircraft operating into and out of the airport. (b) various restrictions and limitations imposed by the City on the users of the Airport, and the effect of these restrictions on air traffic in the Los Angeles metropolitan region.

S*ee* 1984 Agreement at 1, DD Item, Exh.3. The 1984 Agreement expressly was incorporated by reference into Grant Agreements entered into between the City and the FAA on September 19 and 25, 1985. *See* FF 33.[25]

The Director's Determination found and AAS contends that in enacting the Ordinance, the City is not in compliance with its obligation under the 1984 Agreement. *See* FF 219*;* AAS Post-Brief at 36-38. AAS contends that the plain language of the 1984 Agreement supports the finding that the City is obligated to permit access to the Airport by Category C and D aircraft. *See* AAS Post-Brief at 36-38. Additionally, AAS contends that the 1984 Agreement does not grant the City additional authority over air safety management control; but rather maintains the FAA's position as "the final arbiter" on safety issues. *AAS Reply Brief at 50, 51*.

For its part, the City contends that under the 1984 Agreement it "has no obligation to provide access to category C and D aircraft." *City Post-Brief at 55.* Moreover, the City contends that the 1984 Agreement is dispositive of "the City's obligations with respect to airport operations, specifically provides that it resolves the issues of unjust discrimination and exclusive rights regarding access restrictions, and requires that interpretations of future Grant Assurance obligations be consistent with the 1984 Agreement." *Id at 55.* The City also takes the position that AAS has mischaracterized testimony regarding the history of operations of the category C and D aircraft at the Airport. *City Reply at 33, 34.*

The 1984 Agreement contains, among other things, the following provision:

> The City will operate and maintain the Airport as a valuable functioning facility without derogation of its role as a general aviation reliever Airport as described in section 2 (b)(i) of this agreement or its capacity in terms of runway length and width, taxiway system, and runway weight bearing

[25] Notwithstanding the argument of the City to the contrary, the issue of whether the City has satisfied its obligations under the 1984 Agreement can be considered in the context of these Part 16 proceedings. The City's position ignores the fact the 1984 Agreement expressly is incorporated into two subsequent Grant Agreements. Thus, the City's obligations under the 1984 Agreement also are obligations under Grant Agreements and properly are a subject of these proceedings.

> strength until July 1, 2015. The Airport will be capable of accommodating most kinds of general aviation aircraft, *generally consistent with* group II design standards set forth in FAA Advisory Circular 150/5300.4 B dated February 24, 1983.

See DD Item 4, Exh.3 at 9. FF 41. (emphasis added). The City attempts to argue that because FAA Advisory Circular 150-5300.4B applies only to category A and B aircraft, *i.e.* airplanes with approach speeds of less than 121 knots, *See* DD Exhibit 4, the City has the right to ban Category C and D Aircraft, notwithstanding its other obligations under the 1984 Agreement, or the Grant Agreements. *See* City Pre Brief at 36, 37. Significantly, the Section includes the qualifying language "generally consistent with…" when it references Circular 150-5300.4B. No such qualifying language is found in Section 13 of the 1984 Agreement, which provides, among other things, that:

> the mix of aircraft to be accommodated at the Airport shall be consistent with the present mix of aircraft now based at the Airport and the mixed forecast for the future as shown in chapter III of the Airport Master Plan Study of October 1983.

Id at 12, 13. FF 43. The record is clear in this case that turbojet aircraft have been operation at SMO since the 1960s. FF 29. Moreover, C and D category aircraft have been operating at SMO for decades. In this regard, the Director's Determination found that:

> [w]hen the 1984 agreement was executed, Category C and D aircraft were qualified to operate and were operating safely at SMO and have continued to so qualify and operate through the present day.

DD at 63. The only testimony presented on this point at the Hearing was vague and ambiguous, and did not directly contradict the Director's Determination on this point. *See Trimborn testimony, Hearing Transcript at 368; 13.20*. Thus, a preponderance of the evidence supports a conclusion that Category C and D aircraft were operating at SMO at the time of the 1984 Agreement and that the 1984 Agreement was clear and specific in reflecting the intent of the parties that they would continue to do so, notwithstanding the more general and qualified reference to Circular 150-5300.4B.

Moreover, the 1984 Agreement is unambiguous on the question of which of the parties is the ultimate authority in the area of safety. In that regard, the 1984 Agreement "is based on a recognition of the legal rights and duties of the parties….." DD Item 4, Exh. 3. FF 34. Among other things, Section 2. (a) of the Agreement identifies three applicable legal principles as follows:

> (i) the Airport is to be open and available to and for public use as an Airport on fair and reasonable terms, without unjust discrimination, and without granting any exclusive rights prohibited by law
> (ii) pursuant the Federal Aviation Act of 1958, as amended, exclusive authority is vested in the FAA for the regulations of all aspects of safety, the management and control of the safe and efficient use of the navigable airspace, and movement of aircraft through that airspace. See 611 of that Act. The FAA also has substantial responsibility of aircraft noise.
> (iii) the City has a responsibility to manage the airport, including the ability to take reasonable action designed to abate the impact of noise for aircraft operations on surrounding communities, in accordance with the principles of (citations submitted)….

Id. at 2-3*;* FF 33, 34.

The Agreement does not support the City's position that the Agreement controls the relative rights of the parties with respect to the City's grant obligations or the City's ability to regulate categories of Aircraft operating at Santa Monica on grounds of safety. A review of the 1984 Agreement reveals that its primary focus was on the issue of noise abatement, rather than on the safety issue of this case and the Agreement did not alter the City's obligations under subsequent grant agreements in the area of regulation of airport safety. The City has conceded that the proprietary powers of the City were not expanded in any way by the Agreement. *See City Post-Brief at 2*. Moreover, the 1984 Agreement expressly incorporated the Clause, which recognized that "exclusive authority is vested in the FAA of the regulation of all aspects of safety, the management of control and efficient use of the navigable airspace, and the moving of aircraft through that airspace." *Id.* at section 2(a). (ii).

For the reasons discussed above, the weight of the evidence supports the conclusions that: (1) the Ordinance unreasonably and unjustly discriminates in regulating the categories of aircraft on grounds of safety (*see* discussion regarding Grant Assurance 22, *supra* at 83-99); and (2) if the Ordinance is enforced, the City will be acting in a manner inconsistent with the express terms of the 1984 Agreement, which "vested in the FAA" authority to regulate "all aspects of safety, the management and control of the safe and efficient use of the navigable airspace, and movement of aircraft through that airspace." DD Item 4, Exh. 3., at 2-3; FF 34.

V. CONCLUSION

For the reasons discussed above, I conclude that the Ordinance is inconsistent with the City's obligation under Grant Assurance 22. More specifically, the Ordinance's absolute ban on use of the Airport by Category C and D Aircraft is not consistent with the City's obligation to make the airport available for public use, on reasonably terms without unjust discrimination, to all types, kinds and classes of aeronautical activities. The City has failed to establish that the Ordinance falls within the limited exception found in Subsection (i) of Grant Assurance 22.

I further conclude with respect to Grant Assurance 23 that the Ordinance does not constitute the granting of an "exclusive right" within the meaning of 47 U.S.C. § 47108(a)(4). It therefore does not violate Grant Assurance 23, which is directed at precluding actions by the City that create monopolies or otherwise prevent persons or businesses from utilizing the Airport.

I further conclude that the City's adoption of the Ordinance is not consistent with its obligations under the Instrument of Transfer of the Airport property to the City under the Surplus Property Act. The Instrument of Transfer is a duly recorded legal document that conveyed property interests to the City in accordance with the SPA. The Instrument of Transfer included covenants that remain in full force and effect and that, among other things, require that the City make the Airport available "on reasonable terms and without

unjust discrimination…" As is discussed above in the context of Grant Assurance 22, the Ordinance is not consistent with the Covenant.

I further conclude that the Ordinance unreasonably and unjustly discriminates in a manner inconsistent with the 1984 Agreement, which expressly reserved final authority over issues of safety to the FAA.

Finally, I conclude that the concept of Federal preemption provides context for the above conclusion that the City does not have authority to issue an ordinance that precludes categories of aircraft from SMO solely on grounds of safety, under the circumstances here. The Doctrine of Federal Preemption does not, however, in and of itself, constitute a ground for administrative action by the FAA against the City under Part 16. Ultimately, applicability of the Doctrine properly is the province of the federal courts.[26, 27]

-*S*-

Anthony N. Palladino
Designated Hearing Officer,
Associate Chief Counsel/ Director
FAA Office of Dispute Resolution for Acquisition

May 14, 2009

[26] Pursuant to 14 C.F.R. § 16.241, either of the parties adversely affected by this Initial Decision may file an appeal with the Associate Administrator for Aviation Policy, Planning and Environment within 15 days of the date of this Initial Decision, *i.e.*, by no later than May 29, 2009. Any such appeal must be: (1) filed by personal delivery to the Federal Aviation Administration Part 16 Hearing Docket, and to the Litigation and General Legal Services Division, AGC-400, Wilbur Wright Building, 600 Independence Avenue, SW, Suite 2W1000, Washington, DC, 20591 (Attn: Vicki Leemon, AGC-430); and (2) served by personal delivery to the opposing party. In the event of such an appeal, the reply, if any, of the opposing party must be filed and served by personal delivery no later than 10 days after the opposing party's receipt of service of the appeal. *See* 14 C.F.R. § 16.241(b). If an appeal is filed, the final agency decision and order will be issued by the Associate Administrator within 30 days of the due date for the reply to the appeal. *See* 14 C.F.R. § 16.241(c). In the absence of an appeal, or further review taken *sua sponte* by the Associate Administrator pursuant to 14 C.F.R. § 16.241(c) and (f), this Initial Decision will become the final agency decision and order on June 1, 2009. *See* 14 C.F.R. § 16.241(d). The Part 16 Rules and the Hearing Order in this case do not contemplate requests for reconsideration. The Hearing Officer therefore will not entertain such requests from either party in the case.

[27] At the suggestion of the Hearing Officer, prior to the completion of this adjudication the parties engaged in a significant alternative dispute resolution ("ADR") effort in this matter. Since the record herein strongly suggests that there are a number of options available to address the sincere concerns of the City, AAS and the Other Participants, the Hearing Officer urges the parties to re-convene the ADR effort in this case. Such a step might well lead to a resolution that addresses the interests of the parties in a manner not available through the adjudicative process.

APPENDIX A
TABLE OF SHORT CITATIONS

In the interest of clarity and easy reference, the following table lists formal titles and short citations used in this decision. In the short citation forms of "Depo." and "Hr. Tr." the numbers that follow refer to the page and line number (page:line) of the transcript.

Formal Title	**Short Citation**
14 C.F.R. Part 16, entitled "RULES OF PRACTICE FOR FEDERALLY-ASSISTED AIRPORT ENFORCEMENT PROCEEDINGS"	Part 16
AAS Exhibits (3 Binders containing Exhibits 1-52)	AAS Exh.
Acting Director of AAS May 27, 2008 Determination	Director's Determination or DD
Administrative Procedure Act	APA
Advisory Circular	AC
Aircraft Conformance Program	ACP
Airport and Airway Improvement Act	AAIA
Airport and Airway Trust Fund	Fund
Airport Reference Code	ARC
Aviation Safety Reporting System	ASRS
Bennett, David L.	Bennett
Carey, Patrick	Carey
Cathey, Gary A.	Cathey
City Exhibits (2 Binders containing Exhibits 1-46)	City Exh.
City of Santa Monica, California	City
Community-Based Organizations, *i.e.*, CRAAP, MVCC and FSP	Other Participants
Concerned Residents Against Airport Pollution	CRAAP
Deposition	Depo.
Direct Testimony	Direct
Director's Determination Items [Exhibits]	DD Item
Engineered Materials Arresting Systems	EMAS
Federal Aviation Administration	FAA
Federal Aviation Regulations	FAR
Fish, David	Fish
Ford, Stephen	Ford
Friends of Sunset Park	FSP
Hall, James E.	Hall
Harris, Benjamin	Harris
Hearing Order dated June 23, 2008.	Hearing Order
Hearing Transcript, March 16 – March 19, 2009	Hr. Tr.
Hodges, Harry	Hodges
Huffman, Bryon	Huffman

Mar Vista Community Council	MVCC
Marinelli, Rick	Marinelli
National Airspace System	NAS
National Transportation Safety Board	NTSB
Notice of Investigation	NOI
Office of Airport Safety and Standards	AAS
Pilot in Command	PIC
Pratte, Dennis	Pratte
Pre-Hearing Brief	Pre Brief
Post-Hearing Brief	Post Brief
Santa Monica Municipal Airport	SMO or Airport
Santa Monica Municipal Code §10.04.06.220	Ordinance
Settlement Agreement between the FAA and the City, dated January 31, 1984	The 1984 Agreement
Solco, Kelvin	Solco
Surplus Property Act	SPA
Surplus Property Administration Regulation 16	Regulation 16
Rebuttal Testimony	Rebuttal
Revised Direct Testimony	Rev. Direct
Runway Protection Zone	RPZ
Runway Safety Area	RSA
Transport Category Airplanes	
Trimborn, Robert D.	Trimborn
Vasconcelos, Miguel	Vasconcelos
War Assets Administration	WAA
Zwicke, Troy	Zwicke