



September 11, 2020

Sent via First Class U.S. Mail and via email to: Michelle.Steel@ocgov.com

Michelle Steel, Chairwoman
Orange County Board of Supervisors
333 W. Santa Ana Blvd.
Santa Ana, CA 92701

**RE: Orange County Board of Supervisors Meeting on September 15, 2020
Agenda Item No. S21A, John Wayne Airport, Approval of Fixed Base
Operation Leases**

Chairwoman Steel and Members of the Board of Supervisors:

On September 15, 2020, the Orange County Board of Supervisors ("Board") will consider approving Fixed Base Operator ("FBO") leases ("Leases") with Clay Lacy Aviation, Inc., for the Northwest Parcel and Aviation Consultants, Inc. for the Northeast Parcel. As you are aware, the City of Newport Beach ("City") has requested that the Board of Supervisors include the following provisions in the Leases:

- A term that eliminates the ability of any lessee to construct and operate a General Aviation Facility ("GAF").
- A term that restricts the operational hours of the FBOs to match the hours of the commercial curfew at John Wayne Airport ("JWA").
- A term that requires any future modifications to the terms pertaining to commercial use of an FBO, prohibiting a GAF, preserving the majority of the space for small general aviation, and restricting the FBOs' operating hours to go before the Board for review and approval, after reasonable public notice.

Previously, counsel for the County of Orange ("County") has raised concerns that the suggested modifications to the Leases violate the Airport Noise and Capacity Act of 1990 ("ANCA") and Grant Assurances.

As counsel for the County is aware, ANCA is only applicable if a restriction limits the operation of a Stage 2 or Stage 3 aircraft. However, the vast majority of small general aviation ("GA") aircraft, and many propeller-driven commuter aircraft flying in the United States, are non-stage aircraft certificated under Part 36, Subpart F, Propeller Driven Small Airplanes and Propeller-Driven, Commuter Category Airplanes. Hence, ANCA is not applicable to the vast majority of aircraft that will utilize the FBOs at JWA.

In regards to the applicability of ANCA to the limited number of GA aircraft to which ANCA may apply, the question becomes whether the proposed provisions the City has requested be included in the Leases unlawfully restricts the operation of Stage 2 or Stage 3 aircraft. As mentioned above, the City is only requesting that the County include provisions limiting the ability of the lessees to construct and operate a GAF and that the FBOs match the hours of operation of the commercial curfew at JWA. Neither of these provisions have any potential of unlawfully restricting the operation of Stage 2 or Stage 3 aircraft, which would still be allowed to operate at JWA 24 hours per day. ANCA thus has no impact on the City's modest and sensible request that the County implement reasonable and non-discriminatory provisions in the Leases.

Concerns have also been raised that the inclusion of the requested provisions violates the federal Grant Assurances, specifically Grant Assurance 22 concerning economic non-discrimination. The City respectfully notes that the Grant Assurances have no such impact on the County's ability to implement reasonable regulations on the operation of aeronautical businesses to whom it leases property. (See, FAA Order 5190.6b, § 10; and Grant Assurance 22(h).) The County has the clear right to impose reasonable limits on the time at which certain amenities are offered. Indeed, in the context of aeronautical services performed at an airport, it is well settled that "[p]rohibitions and limits are within the sponsor's proprietary power" so long as they are applied "on reasonable and not unjustly discriminatory terms." (See, FAA Order 5190.6b, § 14.3.) The FAA has also expressly stated in the leasing context that a sponsor's lease with an aeronautical services provider complies with the federal Grant Assurances and other applicable law so long as the lease ensures that "the facilities of the airport are made available to the public on reasonable terms without unjust discrimination." (See, FAA Order 5190.6b, § 12.5.)

Here, the City is merely asking that the County exercise its rights as the owner and sponsor of JWA to reasonably limit the hours of operation of the FBOs and decide when and what amenities will (and will not) be offered. The City is requesting that *all* leases contain this provision, meaning that it would be applied in a non-discriminatory manner. This is perfectly compatible with applicable federal law and is a common component of airport minimum standards. (See, FAA Order § 5190.6b, § 10.2.) The Grant Assurances simply do not affect the County's ability to adopt reasonable airport rules and regulations, including non-discriminatory limitations on the hours certain amenities are offered.

As demonstrated, the City's proposed lease provisions are reasonable and do not discriminate and instead provide the same opportunities to all similarly situated tenants. Moreover, these proposed lease provisions will result in the safer and more efficient operation of JWA by: (1) encouraging operators to utilize non-curfew hours to the extent FBO services are required; and (2) ensuring consistency in providing international federal inspection services. (See, Grant Assurance 22(h).) It will also support JWA's GANO "nighttime" rules in that larger GA aircraft may opt to arrive or depart when FBO services are provided. The City invites the County to consult with the FAA regarding the safety, efficiency, and legality of this approach. (See, Grant Assurance 22(i); FAA Order 5190.6b, § 14.4.)

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In addition, the City is requesting that Board approval be required prior to modifying terms pertaining to commercial use of an FBO, prohibiting a GAF, preserving the majority of the space for small general aviation, and restricting the FBOs' operating hours. Having the Board approve any modifications does not raise any ANCA or Grant Assurance issues and we believe that operating in a transparent manner is an important step that will allow the parties to continue to work together. (See, FAA Order 5190.6b, § 12.)

Finally, to the extent that the Board is still reluctant to include the requested provisions, we request that Board direct County staff to seek a written determination from the FAA as to whether the requested provisions are lawful.

Thank you considering these issues that we view as critical to ensuring the safety of our community.

Sincerely,

CITY ATTORNEY'S OFFICE



Aaron C. Harp
City Attorney

Cc: Honorable Mayor and City Council (*via email only*)
Grace K. Leung, City Manager (*via email only*)