

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC



FAA Docket No. 16-04-08

July 25, 2005

**Pacific Coast Flyers, Inc., Donnya Daubney d/b/a Carlsbad
Aircraft Pilot Supply and Roger Baker,**

Complainants,

v.

County of San Diego, California,

Respondents.

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter before the Federal Aviation Administration (FAA) is based on the Complaint filed under *FAA Rules of Practice for Federally Assisted Airport Proceedings*, 14 Code of Federal Regulations (CFR) Part 16, by Pacific Coast Flyers, Inc., Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Roger Baker (Complainants).

The Complaint was filed against the County of San Diego (County/Respondent/Sponsor), which owns and operates the McClellan-Palomar Airport (CRQ) in San Diego County, California. In this Part 16, the Complainants argue that by granting 30-year leases to Palomar Airport Center (PAC), a master leaseholder¹ at CRQ, the County has violated Grant Assurance 23, *Exclusive Rights*, which prohibits the granting of exclusive rights at federally obligated airports.²

The Complainants also maintain that the displacement of light general aviation (GA) aircraft and related businesses, as a result of the County granting the aforementioned leases, constitutes a violation of Grant Assurance 22, *Economic Nondiscrimination*.³ The Complainants also argue that by not making available reasonable alternatives accommodations and providing relocation expenses, the County has violated Grant Assurance 35, *Relocation and Real Property Acquisition*⁴ and by abdicating its obligation to enforce Federal grant assurances against PAC/Burrows, the County has violated Grant Assurance 5, *Preserving Rights and Powers*.⁵

¹ A master leaseholder is an entity that has a lease with the airport sponsor but then subleases parts of its leasehold to other entities. Those entities are commonly referred to as subtenants.

² FAA Exhibit 1, Item 1, p. 1.

³ FAA Exhibit 1, Item 1, p. 1.

⁴ FAA Exhibit 1, Item 1, p. 1.

⁵ FAA Exhibit 1, Item 1, p. 1.

The Complainants summarize the Complaint by stating that “in light of the anti-competitive nature of the initial award of the master leases by the County to PAC/Burrows,⁶ PAC/Burrow’s unwillingness to reasonably accommodate the light general aviation users, and in light of the County Supervisor’s apparent abdication of oversight responsibilities, the County has committed and allowed violations of Grant Assurances 5 (failure to enforce assurances), 22 (economic nondiscrimination), 23 (exclusive rights) and 35 (failure to provide fair and reasonable relocation expense reimbursement and assistance program).”⁷ The County denies all of these allegations by the Complainants.⁸ Under the particular circumstances existing at the Airport and the evidence of record, as discussed below, the FAA has determined that:

- The County, by granting leases to PAC/Burrows resulting from a right of first refusal as part of the 1993 Settlement Agreement, has not granted an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 U.S.C. § 47107(a)(4),
- The County, by its actions in accommodating as many aircraft as possible that were displaced as a result of the PAC/Burrows development at CRQ, has not violated Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a),
- The County, by granting PAC/Burrows a right of first refusal as part of the 1993 Settlement Agreement, has not violated Grant Assurance 5, *Preserving Rights and Powers*,
- The County has not violated Grant Assurance 35, *Relocation and Real Property Acquisition*, 42 USC § 4601 et seq, since said grant assurance and statutory requirement do not apply to the PAC/Burrows private development at CRQ.

The FAA’s decision in this matter is based on the applicable Federal law and FAA policy, and review of the pleadings and supporting documentation submitted by all the parties, which comprise the administrative record reflected in the attached FAA Exhibit 1.

II. THE COMPLAINANTS

The three (3) Complainants in this proceeding are Pacific Coast Flyers, Inc., Donny Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Mr. Roger Baker. Pacific Coast Flyers, Inc. (PCF) is a California Non-Profit Mutual Benefit Corporation, organized under Cal. Corp. Code 7110-8910 and operates as a flying club at CRQ. PCF’s membership consists of owners of 14 club aircraft and, as of July 31, 2004, 301 instructors and persons who rent the aircraft for business, personal, and instructional purposes. Almost all of PCF’s aircraft are tied down on the Burrows Leasehold and are maintained by Carlsbad Air Service.⁹

Donnya Daubney is the proprietor of Carlsbad Aircraft Pilot Supply situated at CRQ in space subject to a notice to vacate by October 1, 2004.¹⁰ Roger Baker is an aircraft owner and has kept his airplane in a hangar within the leasehold subject to the notice to vacate.

Mr. Baker, as an individual, co-operates the Yak Flying Club, a group of pilots that make these Soviet and Chinese aircraft types available to its members.¹¹

⁶ For the purposes of this Complaint, PAC and PAC /Burrows are the same entity although both are extensively used by all parties in this Complaint. The name varies in part because the interests holding the company changed over time and the leasehold used to be known as Burrows, but today is know as PAC.

⁷ FAA Exhibit 1, Item 1, p. 26.

⁸ FAA Exhibit 1, Item 5, p. 2.

⁹ FAA Exhibit 1, Item 1, p.2, FAA Exhibit 1, Item 5, p. 3.

¹⁰ FAA Exhibit 1, Item 1, p.2, FAA Exhibit 1, Item 5, p. 3.

¹¹ FAA Exhibit 1, p. 2-3, FAA Exhibit 1, Item 5, p. 4.

III. THE AIRPORT AND ITS OBLIGATIONS

The McClelland-Palomar Airport (CRQ) is one of the 383 primary airports in the United States.¹² It is located three miles southeast of Carlsbad at Palomar Airport Road and El Camino Real, 30 miles north of downtown San Diego, in Southern California.¹³ CRQ, situated on 486 acres, is a public-use airport owned and operated by the County of San Diego, California.¹⁴ San Diego County operates an eight-airport system consisting of the following airports: Agua Caliente Airstrip, Borrego Valley Airport, Fallbrook Community Airpark, Gillespie Field, Jacumba Airport, Ocotillo Airport, Ramona Airport, and McClelland-Palomar Airport.¹⁵ CRQ is the only airport in the County system with a precision approach system (an instrument landing system or ILS), which serves the Airport's sole runway.¹⁶ Figure 1 below provides an aerial view of the airport and its one-runway layout, as well as general layout and developed areas.

In 1957, the County of San Diego selected the Carlsbad site to replace another airport called Del Mar Airport with the airport opening to the public in 1958. In 1961, the runway was extended to 4,700 feet while an FAA air traffic control tower (ATCT) was placed into operation in 1973. In 1978, the airport was annexed into the City of Carlsbad. In 1991, American Eagle Airlines began scheduled service from Carlsbad to Los Angeles, while United Express Airlines began its passenger service to and from Los Angeles in 1994. In 1996, the FAA issued a certification and permit to operate aircraft that carry in excess of 30 passengers. By 1999, America West Express had also begun commercial service to and from CRQ.¹⁷ Today, United Express and America West Express have scheduled airline operations at CRQ.¹⁸

The airport serves the spectrum of aviation since it accommodates airline operations, military activity, general aviation, executive aircraft operation and services, and generally provides access to San Diego and other surrounding communities in the Southern California area. The airport, as a commercial service airport, holds a Class I classification under 14 CFR Part 139.¹⁹ CRQ is the base for more than 382 aircraft, ranging from single-engine aircraft to corporate jets.²⁰ Although the number of annual operations reported by FAA data exceeds 130,000,²¹ May 2004 data provided by the County, indicates a level of operations approaching in excess of 200,000 operations annually in 2003.²²

The National Plan of Integrated Airport Systems (NPIAS)²³ indicates that at CRQ, air carrier enplanements have recently exceeded 83,000.²⁴ There are currently six (6) master leaseholders at CRQ, including Palomar Airport Center (PAC/Burrows), and the County has awarded 30-year leases to tenants who develop various aeronautical facilities at the airport.²⁵

¹² Primary Airports are defined as those having more than 10,000 annual enplanements (boardings). See The National Plan of Integrated Airport Systems (NPIAS), <http://www.faa.gov/arp/planning/npias/npias2005/NPIAS05AppAfn1.pdf>, p. 5.

¹³ <http://www.co.san-diego.ca.us/dpw/airports/mcpal.html#Location>

¹⁴ FAA Exhibit 1, Item 1, p. 3; FAA Exhibit 1, Item 5, p. 4; and FAA Exhibit 1, Item 14, Airport Master Record for CRQ.

¹⁵ FAA Exhibit 1, Item 5, Attachment 15.

¹⁶ FAA Exhibit 1, Item 7, p. 3.

¹⁷ <http://www.co.san-diego.ca.us/dpw/airports/mcpal.html#Location>

¹⁸ <http://www.co.san-diego.ca.us/dpw/airports/airskeds.htm>

¹⁹ 14 CFR Part 139 requires the FAA to issue airport operating certificates to airports that (1) Serve scheduled and unscheduled air carrier aircraft with more than 30 seats; (2) Serve scheduled air carrier operations in aircraft with more than 9 seats but less than 31 seats; and (3) The FAA Administrator requires to have a certificate. This Part does not apply to airports at which air carrier passenger operations are conducted only by reason of the airport being designated as an alternate airport. See <http://www.faa.gov/arp/certification/part139/certstat.xls> for additional information.

²⁰ Additional FAA data indicates that the number of based aircraft may increase to 419 by 2010. See <http://www.faa.gov/arp/planning/npias/npias2005/NPIAS05AppAfn1.pdf>

²¹ FAA Exhibit 1, Item 14, Airport Master Record for CRQ.

²² <http://www.co.san-diego.ca.us/dpw/airports/powerpoints/performance.ppt>.

²³ The National Plan of Integrated Airport Systems (NPIAS) is submitted to Congress in accordance with Section 47103 of Title 49 of the United States Code. The plan identifies the 3,344 existing airports (2005) that are significant to national air transportation and, therefore, eligible to receive grants under the Federal Aviation Administration (FAA) Airport Improvement Program (AIP).

²⁴ <http://www.faa.gov/arp/planning/npias/npias2005/NPIAS05AppAfn1.pdf>, FAA Exhibit 1, Item 1, Attachment 16.

²⁵ FAA Exhibit 1, Item 5, p. 4.

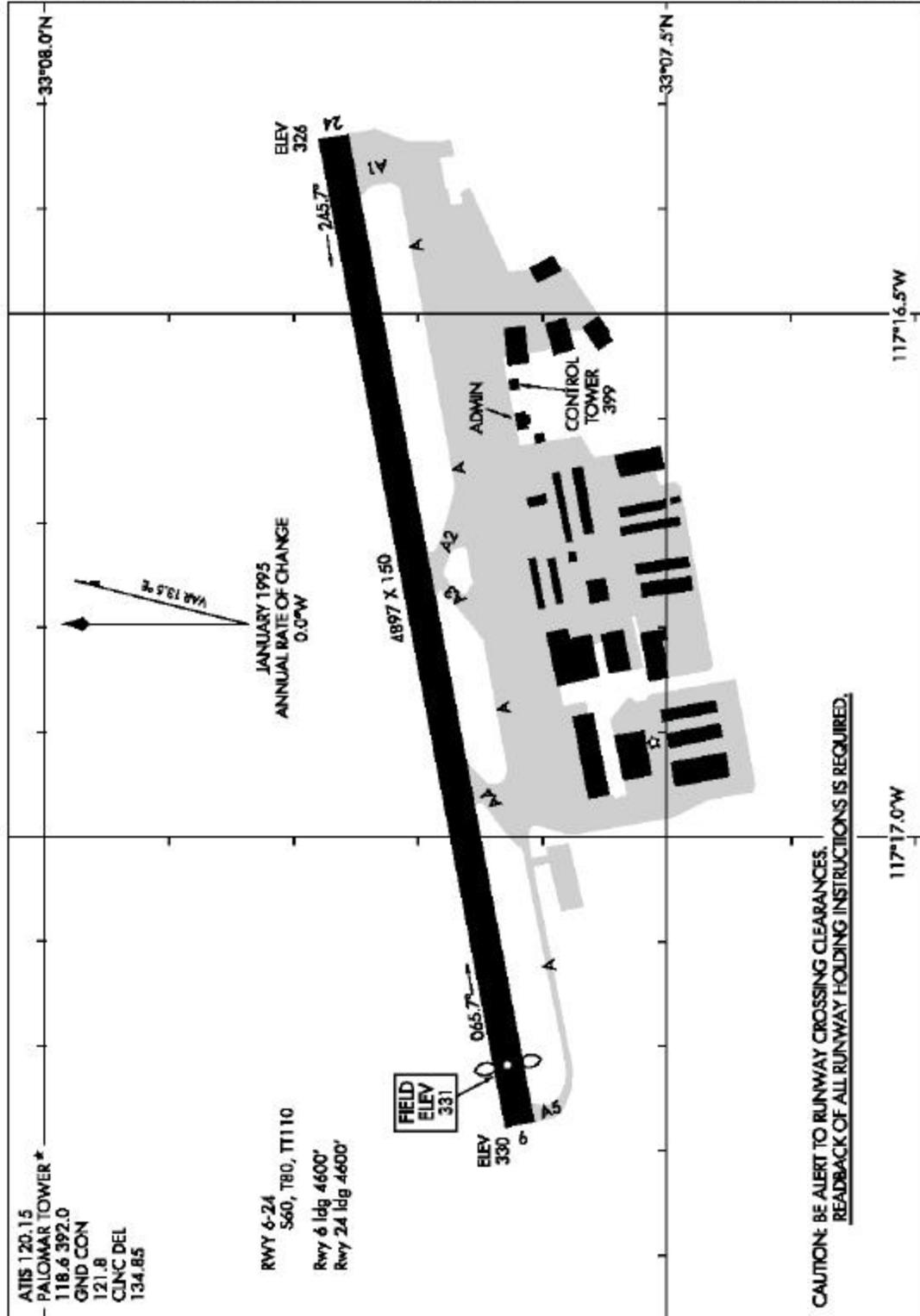
03247

AIRPORT DIAGRAM

AL-5310 (FAA)

CARLSBAD/MC CLELLAN-PALOMAR (CRQ)

CARLSBAD, CALIFORNIA



AIRPORT DIAGRAM

03247

CARLSBAD, CALIFORNIA

CARLSBAD/MC CLELLAN-PALOMAR (CRQ)

**CAUTION: BE ALERT TO RUNWAY CROSSING CLEARANCES.
READBACK OF ALL RUNWAY HOLDING INSTRUCTIONS IS REQUIRED.**

Figure 1 – Airport diagram and aerial photo of the McClelland-Palomar Airport. Sources: Diagram: FAA; Photo: <http://www.terraser-ver-usa.com>

FAA records indicate that the planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 USC § 47101, *et seq.* As depicted in more detail below, between 1983 and 2005 the Airport received a total of \$13.15 million in Federal airport development assistance in the form of AIP grants.²⁶

CRQ Grant History

Grant Number	FY	Description	Entitlement	Discretionary	Total
001-1983	1983	Rehabilitate Taxiway	0.00	352,258.00	352,258.00
		Groove Runway	0.00	204,010.00	204,010.00
002-1988	1988	Rehabilitate Taxiway Lighting	125,000.00	0.00	125,000.00
		Install Runway Lighting	175,000.00	0.00	175,000.00
		Install Apron Lighting	100,000.00	0.00	100,000.00
003-1988	1988	Conduct Noise Compatibility Plan Study	0.00	133,220.00	133,220.00
004-1991	1991	Improve Access Road	128,000.00	0.00	128,000.00
		Install Perimeter Fencing	37,641.00	0.00	37,641.00
005-1992	1992	Rehabilitate Apron	500,000.00	75,000.00	575,000.00
		Construct Apron	500,000.00	75,000.00	575,000.00
006-1992	1992	Noise Mitigation Measures	0.00	390,124.00	390,124.00
007-1993	1993	Conduct Airport Master Plan Study	0.00	126,000.00	126,000.00
008-1994	1994	Acquire Security Equipment	70,000.00	0.00	70,000.00
		Expand Apron	33,443.00	0.00	33,443.00
		Acquire Aircraft Rescue & Fire Fighting Safety Equipment	126,000.00	0.00	126,000.00
009-1995	1995	Acquire Security Equipment	205,934.00	0.00	205,934.00
		Install Guidance Signs	236,099.00	0.00	236,099.00
		Install Apron Lighting	178,246.00	0.00	178,246.00
		Extend Runway	100,000.00	0.00	100,000.00
		Extend Taxiway	100,000.00	0.00	100,000.00
010-1997	1997	Extend Runway	605,451.00	0.00	605,451.00
		Improve Runway Safety Area	200,000.00	150,818.00	350,818.00
		Extend Taxiway	200,000.00	0.00	200,000.00
011-1999	1999	Rehabilitate Taxiway	0.00	806,000.00	806,000.00
		Groove Runway	363,664.00	0.00	363,664.00
		Construct Taxiway	0.00	144,000.00	144,000.00
012-1999	1999	Groove Runway	18,259.00	0.00	18,259.00
013-2000	2000	Construct Taxiway	650,000.00	0.00	650,000.00
014-2001	2001	Conduct Noise Compatibility Plan Study	0.00	200,000.00	200,000.00
015-2001	2001	Construct Taxiway	805,754.00	43,529.00	849,283.00
017-2002	2002	Construct Taxiway	298,552.00	0.00	298,552.00
018-2003	2003	Construct Apron	800,000.00	0.00	800,000.00
		Acquire Land for Development	1,098,552.00	284,783.00	1,383,335.00
019-2004	2004	Conduct Noise Compatibility Plan Study	55,071.00	0.00	55,071.00
		Rehabilitate Taxiway	209,000.00	0.00	209,000.00
		Acquire Land for Development	1,123,238.00	0.00	1,123,238.00
020-2005	2005	Acquire Aircraft Rescue & Fire Fighting Vehicle	0.00	495,000.00	495,000.00
		Improve Runway Safety Area	0.00	630,000.00	630,000.00
TOTAL GRANTS					\$13,152,646.00

²⁶ FAA Exhibit 1, Item 15.

IV. ISSUES UNDER INVESTIGATION

The purpose of FAA's review is to determine whether the County's practices vis-à-vis the Complainants are consistent with Federal law and applicable FAA policy. Therefore, under the particular circumstances existing at CRQ and the entire record herein, and based on *FAA Rules of Practice for Federally-Assisted Airport Proceedings* (Part 16), and the applicable Federal law and FAA policy, the issues under investigation before the FAA are:

Issue 1

- Whether the County, by granting a 30-year lease to PAC/Burrows along with a right of first refusal, constitutes a violation of Grant Assurance 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 U.S.C. § 47107(a)(4),

Issue 2

- Whether the County, by its actions regarding PAC/Burrows, which resulted in the displacement of based aircraft, constitutes a Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a),

Issue 3

- Whether the County, by granting PAC/Burrows a right of first refusal as part of the 1993 Settlement Agreement, constitutes a violation of Grant Assurance 5, *Preserving Rights and Powers*,

Issue 4

- Whether the County's actions regarding the PAC/Burrows leasehold amounts to a violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, 42 USC § 4601 et seq.

V. BACKGROUND

In 1965, the County entered into a lease with an aeronautical service provider called South Coast Flying Service, Inc. In 1978, this lease with South Coast Flying Service, Inc. was assigned to Elden W. Burrows d/b/a Burrows and Sons (Burrows).²⁷ On November 1990, the County entered into a lease directly with Burrows. In August 1993, the County filed an unlawful detainer action in state court against Burrows for various defaults under its lease with Burrows.²⁹ As a result, a Settlement Agreement was reached on December 10, 1993.³⁰

The Settlement Agreement explicitly gave PAC/Burrows (PAC is by then an entity that included Burrows and additional partners),³¹ the right of first refusal to develop the property constituting its leasehold.³² Specifically, the Settlement Agreement stated that while PAC/Burrows remains in possession of the premises, the County "is to complete its Phase 1 of the Master Plan update and prepare a Request for Proposal (RFP) for development of the premises" and that "prior to the publication of the RFP the County will give PAC a right of first refusal."³³

²⁷ FAA Exhibit 1, Item 1, p. 3, FAA Exhibit 1, Item 5, p. 6.

²⁹ FAA Exhibit 1, Item 1, p. 3-4, FAA Exhibit 1, Item 5, p. 6-7.

³⁰ FAA Exhibit 1, Item 5, p. 7. An unlawful Detainer proceeding is an action to return a wrongfully held tenancy (as one held by a tenant after the lease has expired) to its owner. See Black Law Dictionary, 7th Edition, 1999.

³¹ Since there is a legal relationship between Burrows and PAC and both entities are interlaced in the proceedings, we have used, from this point forward and in order to avoid confusion, the term "PAC/Burrows" when referring to PAC or Burrows or both.

³² FAA Exhibit 1, Item 5, p. 7, FAA Exhibit 1, Item 1, p. 4.

³³ FAA Exhibit 1, Item 1, Attachment 1, p. 4. A right of first refusal is a priority arrangement that grants or gives a prospective tenant the right, over others, to enter into a particular agreement, given certain agreed conditions.

In October 1995, the County responded to an inquiry challenging the County's authority to grant the right of first refusal and not issue a competitive bidding (RFP) for the property.³⁴ In responding to this inquiry, the County took the position that under State law, it has the authority to manage, sell, lease, or dispose of its property and that under County law, airport property offered for lease does not have to be competitively bid.³⁵

In December 1997, the County published an Airport Master Plan (Master Plan, or MP).³⁶ The MP addressed several airport planning issues, including accommodating air carriers, commercial operators, and general aviation. In addition, it addressed existing conditions, aviation forecasts, facility requirements and alternatives, Airport Layout Plan (ALP), financial implications, economic impacts, environmental consideration³⁷ and the need for hangars and parking apron, a general aviation terminal building, and fuel storage.³⁸

In June 1998, the County executed the First Amendment to the 1993 Settlement Agreement (Amendment) with PAC/Burrows.³⁹ In this Amendment, both parties agreed, (1) that the Amendment is fully binding, (2) to recognize certain changes in the composition of PAC/Burrows, and (3) to recognize the right of first refusal held by PAC/Burrows.⁴⁰

In May 2000, a study entitled "Feasibility Analysis for Commercial Development and Improvements at CRQ" was issued.⁴¹ This study was commissioned by the County to analyze a proposal, which PAC/Burrows was associated with, to commercially develop and improve CRQ by including a large general aviation terminal, new hangars of varying types, a Jet center, and surface parking.⁴² The study revealed significant issues regarding the County's acceptance of this proposal and concluded that the County should reject that particular development proposal.⁴³

In January 24, 2001, the FAA's Airports Regional Office (Western Pacific Region) provided comments to the County concerning PAC/Burrow's proposal and lease at CRQ. In its e-mail communication, the FAA stated that "based on the review, the FAA does not object to the general outline of the proposed agreement contained in Draft 7 of the county letter. We would like to review the proposed lease agreement when it is drafted." The FAA also stated that "Granting PAC, LLC a first opportunity to negotiate lease terms for a new restaurant appears to be reasonable trade off for closing and relocating the old restaurant from the airfield side to the land side of the airport.

However, to avoid the appearance of any impropriety, the terms for the new restaurant location should be based on prevailing market conditions and market rates. Terms that are too favorable for the current tenant may appear unjustly discriminatory and smack of an exclusive right when viewed by outside third parties. By basing the terms of the new agreement on prevailing market conditions, the county is ensuring the airport will be as self-sustaining as possible under the circumstances that exist at the airport. The county should be trying to get the best deal possible with PAC, LLC and equivalent to what it would obtain by soliciting bids on the open market."⁴⁴

The final element of FAA's January 24, 2001, comments stated that "based on airport certification requirements, the FAA supports the County's plans to relocate the restaurant from the airfield side to the landside of the airport. The Airport Certification inspectors opine that the restaurant's location presents safety and security

³⁴ FAA Exhibit 1, Item 1, Attachment 2, FAA Exhibit 1, Item 5, p.7.

³⁵ FAA Exhibit 1, Item 1, Attachment 2, p.2.

³⁶ FAA Exhibit 1, Item 1, p. 4-5, FAA Exhibit 1, Item 5, p.8.

³⁷ FAA Exhibit 1, Item 1, Attachment 3, I-1 – I-3.

³⁸ FAA Exhibit 1, Item 1, Attachment 3, 4-8-5-3.

³⁹ FAA Exhibit 1, Item 5, p. 8, FAA Exhibit 1, Item 1, p.6.

⁴⁰ FAA Exhibit 1, Item 1, Attachment 5.

⁴¹ FAA Exhibit 1, Item 1, p. 6, FAA Exhibit 1, Item 5, p. 9.

⁴² FAA Exhibit 1, Item 1, Attachment 6, p.1.

⁴³ FAA Exhibit 1, Item 1, Attachment 6, p. 2-4

⁴⁴ FAA Exhibit 1, Item 1, Attachment 7.

shortcomings for the airport. Therefore, relocating the restaurant at the earliest possible date will eliminate this airport certification concern.”⁴⁵

On August 20, 2002, the FAA’s Airports Regional Office (Western Pacific Region) responded to the County’s request for FAA to ascertain whether a first right to negotiate for a new restaurant would be acceptable to the FAA and for FAA to provide guidance on this matter.⁴⁶ The FAA provided the following comments and guidance:

“Regarding the restaurant, since it represents a non-aeronautical activity, you have more flexibility, subject to local law, to negotiate with PAC/Burrows. To keep things uncomplicated, it may behoove you to negotiate a separate pact for the restaurant, meaning you keep it separate from any aeronautical agreement....

I inject a word of caution concerning the PAC/Burrows negotiations for an aeronautical arrangement at CRQ. As I understand, the settlement agreement with [PAC/Burrows] stipulated that the County would prepare an RFP and then give PAC/Burrows the first right of refusal before opening the RFP to other bidders. County Counsel opined that it was not necessary to develop an RFP. Counsel deemed it a formality that the County could skip and go directly to negotiations with PAC/Burrows. That opinion may have rested on an assumption that PAC/Burrows is the entity that possesses the foremost entitlement to negotiate a lease agreement to the exclusion of all other possible, yet remote, qualified candidates. In other words, Counsel concluded that PAC/Burrows was a shoe-in, so why spend time developing an RFP if PAC/Burrows was going to exercise its right of first refusal and accept the RFP.

The possibility exists that Counsel omitted consideration of the grant assurance obligations in its decision-making deliberations, in particular, [Grant Assurance 5], Preserving Rights and Powers, [Grant Assurance 22], Economic Nondiscrimination, and [Grant Assurance 23], Exclusive Rights.

[Grant Assurance 5] mandates that the airport sponsor will not take any action to deprive itself of its rights and powers to comply with the grant assurances. Grant Assurance 22 mandates that the airport sponsor will make the airport available on reasonable terms without unjust discrimination. Grant Assurance 22 prohibits the granting of an exclusive right.

What follows are my cautionary remarks:

The settlement agreement, per [Grant Assurance 5], cannot be used as a reason to subordinate the County's ability to comply with the grant assurances. In other words, the County should not give away rights under the settlement agreement that would force the County to violate the grant assurances. For example, by eliminating the formality of an RFP, the County is negotiating exclusively with PAC/Burrows without clear preordained, county-established criteria for an agreement. So there was never any doubt in PAC/Burrows’ collective mind about its exercising the right of first refusal. In other words, the County made it easy for PAC/Burrows to be the only entity in contention for a lease.

The nature of the negotiations can be construed as less than ideal because PAC/Burrows has a right of first refusal for the last developable parcel of land at CRQ, opening the door to a perception that the County is perhaps granting an exclusive right. PAC/Burrows, by virtue of a settlement agreement, has won the right of first refusal. The complicating factor at CRQ is that it represents a right of first refusal for the last developable parcel. So, for example, if there are other qualified parties with a desire to bid on an airport parcel, they may yell foul if they are cut out of the negotiations and prevented from

⁴⁵ FAA Exhibit 1, Item 1, Attachment 7.

⁴⁶ FAA Exhibit 1, Item 1, Attachment 10.

competing with PAC/Burrows. In the end, if they feel they were harmed, they may complain to the FM, opening yet another Pandora's box."⁴⁷

On September 27, 2002, an e-mail between two County employees identifies several issues associated with a restaurant lease between the County and PAC/Burrows. Two of the issues discussed were the term of the restaurant lease and the lack of competition in awarding it.⁴⁸

On November 21, 2002, at a meeting of the Palomar Airport Advisory Committee (PAAC), both proponents and those opposing the PAC/Burrows proposal discussed several issues related to recommendations for PAC/Burrows' new leases at CRQ. Among the issues discussed were the impact of the project on existing users, the availability of temporary aircraft hangar and parking services while construction takes place, the fact that the proposed project(s) were not available to public viewing, and that an RFP was not published.⁴⁹

On December 5, 2002, Jet Source, an FBO at CRQ, sent a letter to the County regarding the proposed thirty (30) year PAC/Burrows lease and redevelopment plan and its impact on its own operation and potential litigation. In its comments to the County, Jet Source raised several issues including the statement that the proposal was not unveiled for review and the 1993 Settlement Agreement was not made available for review either. Jet Source also identified the lack of an RFP as a problem (the 1993 Agreement required an RFP), the issue of the right of first refusal, and potential violations of Federal requirements, including exclusive rights.⁵⁰

On December 11, 2002, the County approved four (4) aviation-related leases (and one fuel lease) involving PAC/Burrows.⁵¹ Figure 2 below depicts the location and size of the PAC/Burrows leasehold area in question in this case. These leases effectively continued the PAC/Burrows leasehold first established as part of the 1993 Settlement Agreement and the subsequent 1998 amendment. The leases gave PAC/Burrows three years to complete the planned development, until December 2005.⁵²

On October 2, 2003, the County wrote to the FAA on the issue of additional tie-downs at CRQ. In that letter, the County submitted layout exhibits of the proposed PAC/Burrows project to ascertain whether any airport standards would change as a result of the implementation of the proposal.⁵³ In this letter, the County recognized that as a result of the proposed PAC/Burrows site plans, they "will be experiencing a major loss of tie-down space for general aviation aircraft," that general aviation "pilots' current tie-down positions at available leaseholds will be significantly reduced," and that "there may be in the neighborhood of two hundred (200) lost tie-down locations when these master lessees begin their development projects early next summer."⁵⁴

The County added that it "wishes to be proactive in our attempts to provide as many tie-down alternatives as possible to help soften the effects of this loss of aircraft parking" and that "our objective in respect to the temporary tie-down location is to give the airport time to possibly acquire additional lots for automobile parking, thereby freeing up additional onsite tie-down space. This period would also afford the affected GA pilots time to find alternate locations at other airports. In addition, it will allow us time to develop incentive packages to encourage aircraft owners to willingly relocate."⁵⁵

⁴⁷ FAA Exhibit 1, Item 1, Attachment 10.

⁴⁸ FAA Exhibit 1, Item 1, Attachment 11.

⁴⁹ FAA Exhibit 1, Item 1, Attachment 12.

⁵⁰ FAA Exhibit 1, Item 1, Attachment 13.

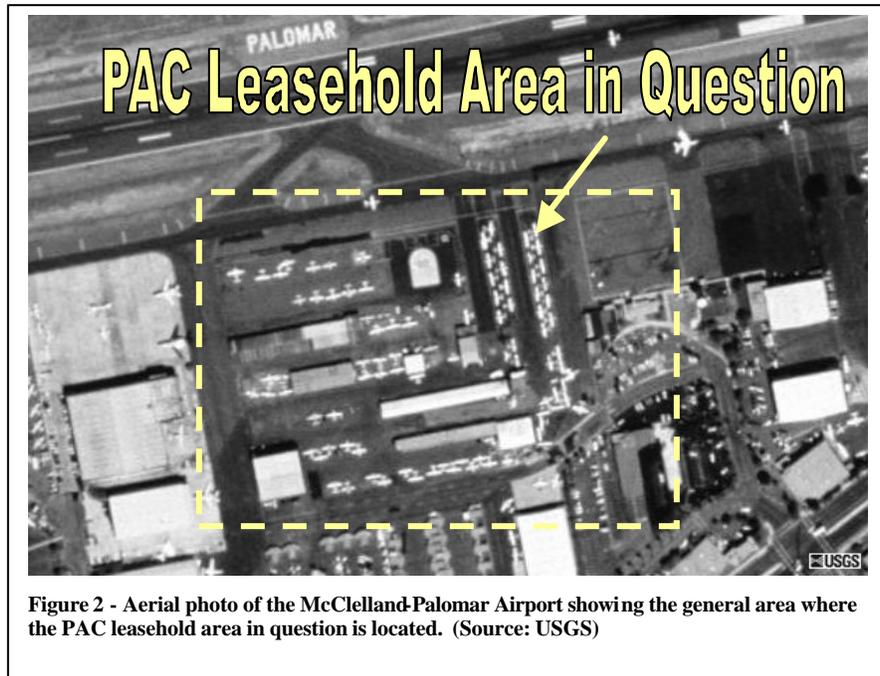
⁵¹ FAA Exhibit 1, Item 1, p. 10, FAA Exhibit 1, Item 5, p. 12.

⁵² FAA Exhibit 1, Item 1, Attachment 23.

⁵³ FAA Exhibit 1, Item 1, Attachment 18.

⁵⁴ FAA Exhibit 1, Item 1, Attachment 18.

⁵⁵ FAA Exhibit 1, Item 1, Attachment 18.



Also in the October 3, 2003 letter to the FAA, the County identifies the need to accommodate a growing corporate jet market and that as a result, the “lessees have indicated that they intend to construct a few large corporate jet hangars to accommodate this market versus accommodating many GA tie-down customers. These lessees plan to convert their tie-down accommodations to facilitate a few large hangars to accommodate a new more lucrative corporate jet customer market.”⁵⁶ It was at this time that the County recognized that “Palomar Airport is currently ‘built out’ and appears politically landlocked with respect to expansion into the City of Carlsbad (the Permitting City authority).”⁵⁷

On October 3, 2003, PAC/Burrows wrote to the County on the issue of the proposed lease. In its letter, PAC/Burrows stated that the redevelopment at CRQ is related to the issue of additional area to accommodate tie-down users.⁵⁸ The letter also stated that PAC/Burrows had forwarded “proposals for the development of alternative space in several locations at Palomar, whether that space was to be master leased to our company [PAC], another company, or was to be operated directly by the County. We want to stress the urgency of developing such space as soon as possible, whoever may be chosen as the operator. We feel that our various proposals all had merit and that the needs of our current tie-down customers should be looked to, irrespective of the undeniable trend towards commercial and jet aviation.”⁵⁹ Finally, PAC/Burrows stated that “if the County is entertaining a retroactive change of our plan [PAC/Burrows proposal], that we be informed of that intention and that appropriate extensions of time be given for any delay resulting from the County's actions.”⁶⁰

On November 21, 2003, the Palomar Airport Advisory Committee (PAAC) held a public meeting where representatives of PAC/Burrows presented several plans related to the proposed PAC/Burrows project and how PAC/Burrows “is working with the County to try to obtain temporary facilities for everyone and try to place hangar and tie-down customers, if possible, in adjacent areas or on other airports.” The issue of whether the

⁵⁶ FAA Exhibit 1, Item 1, Attachment 18.

⁵⁷ FAA Exhibit 1, Item 1, Attachment 18.

⁵⁸ FAA Exhibit 1, Item 1, Attachment 19.

⁵⁹ FAA Exhibit 1, Item 1, Attachment 19.

⁶⁰ FAA Exhibit 1, Item 1, Attachment 19.

development, will not be ready for nearly two years.⁷¹

On July 9, 2004, PAC/Burrows sent commercial tenants notices terminating their month-to-month leases and informing them to vacate on or before October 1, 2004.⁷² On July 14, 2004, the attorney representing the Complainants wrote to the County requesting copies of PAC/Burrows financials to determine whether PAC/Burrows was capable of completing the projects associated with its agreements with the County.⁷³ On July 20, 2004, PAC/Burrows sent notices to vacate to month-to-month tie-down and hangar tenants. PAC/Burrows also stated that it intended to begin redevelopment of its leasehold on or about October 1, 2004.⁷⁴

On July 25, 2004, the attorney for the Complainants wrote to PAC/Burrows regarding tie-down and maintenance hangar space availability. In the letter, impacted business and users stated that they “are willing to enter into negotiations for space provided PAC/Burrows represents in writing that it is making available hangar space and tie-down space on reasonable and equitable terms” and whether PAC/Burrows “is willing to offer standard long-term leases of maintenance hangar space at a rate in the neighborhood of \$0.90 per foot, which we have learned is the current fair market value of hangar space at CRQ.”⁷⁵

On July 28, 2004, aircraft owner John Cornelius wrote to the County stating that the new North Ramp will not be completed for years and raising concerns regarding the County’s plans to accommodate displaced aircraft while construction on PAC/Burrow’s leasehold takes place.⁷⁶ Also on July 28, a County e-mail addressed the impact of PAC/Burrows development on the County’s own transient tie-downs. In the e-mail, the County’s Real Estate Manager states, that “this may put Donnya out of business, although that may be happening anyway if PAC is terminating all tie-downs.”⁷⁷

On July 30, 2004, pursuant to California Public Records Act (CPRA), California Government Code Section 6250, the Complainants asked the County for several documents regarding the PAC/Burrows development project, including operating agreements, correspondence, and e-mails.⁷⁸

On August 3, 2004, PAC/Burrows wrote the County on matters regarding the PAC/Burrows leasehold. In its letter, PAC/Burrows states that a total of 124 aircraft were impacted by the notice to vacate, that the number of temporary spaces available at CRQ is 34, and that the new number of displaced aircraft is 90.⁷⁹ The Complainants believed the actual number to be between 90 and 150 aircraft.⁸⁰

On August 4, 2004, the County held a meeting for airport tenants. At the meeting, the County described the availability of 103 alternative tie-downs and hangar spaces at other County airports, except for Borrego Valley Airport.⁸¹

On August 6, 2004, the Complainants wrote to the County regarding the PAC/Burrows development and its impact on existing tenants as well as a intention to file a 14 CFR Part 16 complaint.⁸² The Complainants thanked the County for the “commitment to search for workable resolutions to the many problems presented by the PAC/Burrows re-development plans” but also expressed concern over PAC/Burrow’s plans “to force

⁶⁹ FAA Exhibit 1, Item 5, p. 17, FAA Exhibit 1, Item 1, p. 17.

⁷⁰ FAA Exhibit 1, Item 5, Attachment 17.

⁷¹ FAA Exhibit 1, Item 5, p. 17, FAA Exhibit 1, Item 1, p.17.

⁷² FAA Exhibit 1, Item 1, Attachment 30.

⁷³ FAA Exhibit 1, Item 1, p. 17.

⁷⁴ FAA Exhibit 1, Item 1, Attachment 33.

⁷⁵ FAA Exhibit 1, Item 1, Attachment 34.

⁷⁶ FAA Exhibit 1, Item 1, Attachment 25.

⁷⁷ FAA Exhibit 1, Item 1, Attachment 36.

⁷⁸ FAA Exhibit 1, Item 1, Attachment 37.

⁷⁹ FAA Exhibit 1, Item 1, Attachment 38.

⁸⁰ FAA Exhibit 1, Item 1, p.18.

⁸¹ FAA Exhibit 1, Item 5, p. 19.

⁸² FAA Exhibit 1, Item 1, Attachment 43.

approximately 150 light general aviation aircraft from the airport for at least 16 -18 months while PAC attempts to convert its leasehold from GA to corporate jet use” and that “PAC adds insult to injury by announcing rates for the new facilities that are double or triple the current rates and at least double the rates of the other FBOs at CRQ.”⁸³ The Complainants also stated that “unfortunately, despite the work that you [County] and I [Complainants’ attorney] have put into this, it appears that PAC’s plans are so oppressive that reasonable alternatives are not possible. In light of the anti-competitive nature of the initial award of the master leases by your predecessors to PAC, PAC’s unwillingness to reasonably accommodate the light general aviation users, and in light of the County Supervisor’s apparent abdication of oversight responsibilities, we believe we have no other alternative but to file a formal Part 16 complaint with the FAA.”⁸⁴

On August 12, 2004, PAC/Burrows distributed an Extension of Tenancy/Notice to Vacate Agreement to month-to-month tenants.⁸⁵ This extension provided for an extension of the term for the tenants; a notice to vacate upon 30 days notice; and a requirement that tenants waive all protests, liquidation damages and attorney fees.⁸⁶ Also on August 12, 2004, the County agreed to mediation.⁸⁷

However, on August 17, 2004, the Complainants filed a Complaint under the Rules of Practice for Federally Assisted Airport Proceedings, 14 CFR Part 16 of the Code of Federal Regulations. The Complaint was docketed by the FAA as docket No. 16-04-08.⁸⁸ On August 29, 2004, the California Pilots Association (CPA) filed a letter in support of the Complainants.⁸⁹

On October 1, 2004, the California Department of Transportation (Caltrans) wrote to the County on the subject of the compliance inspection conducted on August 31, 2004. In the letter to the County, Caltrans stated its support for projects “to replace older decaying and collapsing hangars, relocate the primary airport restaurant...”⁹⁰

On September 1, 2004, the County of San Diego, as the Respondent, filed a Request for Dismissal of the Complaint with the FAA.⁹¹ A Notice of Docket was issued by the FAA on September 3, 2004.⁹² On September 14, 2004, the Respondent’s Request for Extension of Time to File an Answer was accepted by the FAA, effectively granting a sixty (60) day extension.⁹³

In October 22, 2004, Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, one of the Complainants, moved onto Magellan leasehold property, also located at CRQ, along with eight aircraft.⁹⁴ On October 26, two aircraft belonging to the YAK Flight Club, of which one of Complainants is a member [Mr. Roger Baker], relocated from the PAC/Burrows leasehold to the County’s own tie-down ramp on the west end of CRQ.⁹⁵

On November 4, 2004, the Respondent filed an Answer to the Complaint⁹⁶ along with a Motion to Dismiss⁹⁷ and a Memorandum in Support of the Respondent’s Motion to Dismiss.⁹⁸ Finally, the Complainants filed a Reply to

⁸³ FAA Exhibit 1, Item 1, Attachment 43.

⁸⁴ FAA Exhibit 1, Item 1, Attachment 43.

⁸⁵ FAA Exhibit 1, Item 5, p. 20.

⁸⁶ FAA Exhibit 1, Item 1, Attachment 42.

⁸⁷ FAA Exhibit 1, Item 1, p. 19, FAA Exhibit 1, Item 5, p. 20.

⁸⁸ FAA Exhibit 1, Item 1, p. 1.

⁸⁹ FAA Exhibit 1, Item 13.

⁹⁰ FAA Exhibit 1, Item 5, Attachment 12.

⁹¹ FAA Exhibit 1, Item 3.

⁹² FAA Exhibit 1, Item 2.

⁹³ FAA Exhibit 1, Item 4.

⁹⁴ FAA Exhibit 1, Item 5, Attachment 3.

⁹⁵ FAA Exhibit 1, Item 5, Attachment 4.

⁹⁶ FAA Exhibit 1, Item 5.

⁹⁷ FAA Exhibit 1, Item 6.

⁹⁸ FAA Exhibit 1, Item 7.

the Respondent's Answer on November 10, 2004 that included a Declaration by Mr. Roger Baker.⁹⁹ The Respondent's Rebuttal was filed with the FAA on September 16, 2004.¹⁰⁰

Finally on December 5, 2004, Ms. Kate Lister, president of Barnstorming Adventurers, Ltd, filed comments regarding Docket 16-04-08. This filing was followed by a Respondent's Motion to Strike certain documents from the record.¹⁰¹

VI. APPLICABLE LAW AND POLICY

A. The Airport Improvement Program and the Airport Sponsor Assurances

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the AIP established by the AAIA (Airport and Airway Improvement Act) as amended. Section 47107, *et seq.*, sets forth grant assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the grant assurances become a binding contractual obligation between the airport sponsor and the Federal government. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.¹⁰²

FAA Order 5190.6A, *Airport Compliance Requirements* 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 grant assurances.

As discussed in more detail below, several grant assurances apply directly or indirectly to this complaint. They are the prohibition against exclusive rights, Grant Assurance 23, economic nondiscrimination, Grant Assurance 22, relocation and real property acquisition, Grant Assurance 35, preserving rights and powers, Grant Assurance 5, and Airport Layout Plan, Grant Assurance 29. In addition, applicable FAA policies relevant to this case include the FAA's Policies on Minimum Standards and FAA's Policy Regarding Airport Rates and Charges.

B. The FAA Airport Compliance Program

The FAA ensures that airport owners comply with their Federal grant obligations through the FAA's Airport Compliance Program. The program is based on the contractual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws. The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. As a general rule, the FAA Compliance Program is designed to monitor voluntary compliance with Federal obligations.

In addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable Federal obligations. FAA will make a judgment of whether the airport sponsor is meeting the Federal obligations. FAA may also take into consideration any action or program the sponsor has taken or implemented or proposed action or program the sponsor intends to take, which in FAA's judgment, is adequate to reasonably carry out its obligations under the grant assurances.¹⁰³ Thus, the FAA

⁹⁹ FAA Exhibit 1, Item 8 and 9.

¹⁰⁰ FAA Exhibit 1, Item 10.

¹⁰¹ FAA Exhibit 1, Item 12.

¹⁰² See, e.g., 49 U.S.C. § 40101 et seq; 46101 st seq; and 47104 et seq.,

¹⁰³ See FAA Order 5190.6A, Sec. 5-6.

can take into consideration reasonable corrective actions by the airport sponsor as measures to resolve alleged or potential violations of applicable Federal obligations, and as measures that could prevent recurrence of noncompliance and ensure compliance in the future.

C. Enforcement of Airport Sponsor Assurances

49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. Various legislative actions augment the Federal role in encouraging and developing civil aviation. These actions authorize programs providing funds and other assistance to local communities for the development of airport facilities. In each program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as, ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances. FAA Order 5190.6A details aspects of the airport compliance program.¹⁰⁴ Finally, Federal Regulation 14 CFR Part 16 *FAA Rules of Practice for Federally-Assisted Airport Proceedings* was published in the Federal Register (61 FR 53998, October 16, 1996) and implemented on December 16, 1996.

D. The Prohibition Against Exclusive Rights - Grant Assurance 23

49 USC § 40103(e), provides, in relevant part, that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.” An “air navigation facility” includes an “airport.”¹⁰⁵ 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that “a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport.”

Grant Assurance 23, “Exclusive Rights,” of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a Federally obligated airport:

“... will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public... 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...”

An exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. 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.¹⁰⁶

Therefore, based on the above statutes, the sponsor of a federally obligated airport must not permit an exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public...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. FAA Order 5190.6A clarifies the applicability, extent and duration of the prohibition against exclusive rights under 49 USC § 40103(e) with regard to airports developed with FAA administered grant assistance and Federal property conveyances.¹⁰⁷ The exclusive rights prohibition remains in effect as long as the airport is operated as an airport. FAA takes the position that the grant of an exclusive right for the conduct of any aeronautical activity on such airports is contrary to the requirements of the

¹⁰⁴ See also Sec. 6-2.

¹⁰⁵ See 49 USC §§ 40102(a)(4), (9), (28).

¹⁰⁶ See FAA Order 5190-5 *Exclusive Rights at Airports*.

¹⁰⁷ See FAA Order 5190.6A, Sec. 5-6.

applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means.

E. The FAA's Policy on Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied.¹⁰⁸ The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies an aeronautical activity access to a public-use airport.

FAA Advisory Circular 150/5190-5, *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*, June 10, 2002, discusses FAA policy regarding the development and enforcement of airport minimum standards. The FAA policy for recommending the development of minimum standards serves the objective of promoting safety in all airport activities, maintaining a higher quality of service for airport users, protecting airport users from unlicensed and unauthorized products and services, enhancing the availability of adequate services for all airport users, and promoting the orderly development of airport land. Therefore, airport sponsors should strive to develop minimum standards that are fair and reasonable to all on-airport business operators and relevant to the activity that the minimum standards concern. The use of minimum standards as a vehicle to effect an exclusive business operation is prohibited. The FAA recognizes that some sponsors might attempt to design their minimum standards to protect only the interests of one business operator, which can be interpreted as the grant of an exclusive right and a potential violation of the FAA's policy.¹⁰⁹

F. Economic Nondiscrimination (Public Use of the Airport) – Grant Assurance 22

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. Grant Assurance 22, Economic Nondiscrimination, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

...will 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, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a)]

...may establish such reasonable and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)]

FAA Order 5190.6A describes in detail the responsibilities assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those aeronautical users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination.¹¹⁰

¹⁰⁸ See FAA Order 5190.6A, Airport Compliance Requirements, Sec. 3- 12, 3-17 (b),(c); See also FAA Advisory Circular 150/5190-5..

¹⁰⁹ See Section 2.2 of FAA Advisory Circular 150/5190-5.

¹¹⁰ See Order, Sections 3-1 and 4-14(a)(2).

G. FAA's Policy Regarding Airport Rates and Charges

The FAA's Policy Regarding Airport Rates and Charges (Rates and Charges Policy), dated June 21, 1996, established the requirements to be followed by airport sponsors when establishing airport rates and charges.¹¹¹ Rates, fees, rentals, landing fees, and other service charges (fees) imposed on aeronautical users for aeronautical use of airport facilities must be fair and reasonable.¹¹² Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.¹¹³ Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.¹¹⁴

Among others, the Policy distinguishes between nonaeronautical,¹¹⁵ airfield-aeronautical, and non-airfield-aeronautical airport facilities and services. When establishing aeronautical rates and charges, the airport sponsor must use a rate methodology that is reasonable, transparent, and consistent.

Under the FAA grant assurances, all aeronautical users¹¹⁶ are entitled to airport access on fair and reasonable terms without unjust discrimination. Therefore, the principles and guidance set forth in the Policy apply to all aeronautical uses of the airport. The FAA recognizes, however, that airport proprietors may use different mechanisms and methodologies to establish fees for different facilities, e.g., the airfield. The FAA takes these differences into account when called upon to resolve a dispute over aeronautical fees or, to otherwise consider whether an airport sponsor is in compliance with its obligation to provide access on fair and reasonable terms without unjust discrimination.¹¹⁷

The prohibition on unjust discrimination does not prevent a sponsor from making reasonable distinctions among aeronautical users and assessing higher fees on certain categories of aeronautical users based on those distinctions. Airport sponsors must allocate rate-base costs to their aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology.

Sponsors may set fees by ordinance, statute, resolution, regulation, or agreement. Federal law does not require a single rate-setting approach. Accordingly, sponsors may use a residual, compensatory, hybrid, or any other rate-setting method as long as the methodology is consistent for similarly situated aeronautical users and conforms to the Policy. In general, the Policy permits fees to be set by any reasonable method. Fees may be generally

¹¹¹ See 61 Fed. Reg. 31994.; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. Subsequently, United States Court of Appeals for the District of Columbia vacated and remanded portions of the Policy Statement setting forth guidance on fair and reasonable airfield and non-airfield fees. See *Air Transport Association of America v. Department of Transportation (ATA v. DOT)*, 119 F.3d 38 (D.C. Cir. 1997), amended 129 F. 3d 625. Specifically, the Court vacated: paragraphs 2.4, 2.4.1, 2.4.1(a), 2.5.1, 2.5.1(a), 2.5.1(b), 2.5.1(c), 2.5.1(d), 2.5.1(e), 2.5.3, 2.5.3(a), 2.6, the Secretary's supporting discussion in the preamble, and any other portions of the rule necessarily implicated by the holding of the August 1, 1997 opinion. Consequently, we will only use those valid portions of the Final Policy that were not vacated when considering the reasonableness of rates in this proceeding.

¹¹² See Paragraph 2 (no decimal place) of the Policy, found at 61 Fed. Reg. 31994, 32019; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. see also 49 U.S.C. § 47107(a)(1).

¹¹³ See Paragraph 3 (no decimal place) of the Policy, found at 61 Fed. Reg. 31994, 32021; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. see also 49 U.S.C. § 47107(a)(1).

¹¹⁴ See Paragraph 4 (no decimal place) of the Policy, found at 61 Fed. Reg. 31994, 32021; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. see also 49 U.S.C. § 47107(a)(13)(A).

¹¹⁵ The FAA defines aeronautical use as all activities that involve the operation of aircraft including, activities that make the operation of aircraft possible, activities that make the operation of aircraft safe, and any activity otherwise directly related to the operation of aircraft. Services located on the airport that are directly and substantially related to the movement of passengers, baggage, mail, and cargo on the airport are also considered aeronautical uses. Persons, whether individuals or businesses, engaged in aeronautical activities involving the operation of aircraft or providing flight support directly related to the operation of aircraft are aeronautical users. See e.g., FAA Order 5190.6A, Appendix 5 (1989).

¹¹⁶ The FAA considers the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of aircraft. See e.g., FAA Order 5190.6A, Appendix 5 (1989). Persons, whether individuals or businesses, engaged in aeronautical uses involving the operation of aircraft, or providing flight support directly related to the operation of aircraft, are considered to be aeronautical users.

¹¹⁷ See Section A of the Policy, found at 61 Fed. Reg. 31994, 32017; <http://www.faa.gov/arp/pdf/txt/rates1.htm>.

established through direct negotiations with individual users. The FAA has, therefore, adopted a flexible approach to preserve the discretion of airport proprietors and aeronautical users to negotiate terms.¹¹⁸

H. Grant Assurance 35 Relocation and Real Property Acquisition

Grant Assurance 35, *Relocation and Real Property Acquisition*, requires an airport sponsor to be guided in acquiring real property, to the greatest extent practicable under State law, by the land acquisition policies in Subpart B of 49 CFR Part 24 and will pay or reimburse property owners for necessary expenses as specified in the Subpart. In addition, the airport sponsor is to provide a relocation assistance program offering the services described in Subpart C and fair and reasonable relocation payments and assistance to displaced persons as required in Subpart D and E of 49 CFR Part 24.

Finally, the airport sponsor must make available within a reasonable period of time prior to displacement, comparable replacement dwellings to displaced persons in accordance with Subpart E of 49 CFR Part 24. The purpose of 49 CFR Part 24¹¹⁹ is to promulgate rules to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 et seq.), in accordance with the following objectives:

- (a) To ensure that owners of real property to be acquired for Federal and federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally-assisted land acquisition programs;
- (b) To ensure that persons displaced as a direct result of Federal or federally-assisted projects are treated fairly, consistently, and equitably so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and
- (c) To ensure that Agencies implement these regulations in a manner that is efficient and cost effective.

I. Grant Assurance 5, Preserving Rights and Powers

Grant Assurance 5, *Preserving Rights and Powers* implements the provisions of the AAIA, 49 USC Section 47107(a), et seq., and requires, in pertinent part, that the sponsor of a federally obligated airport "...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

FAA Order 5190.6A, *Airport Compliance Requirements*, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport.¹²⁰ Under Grant Assurance 5, an airport sponsor cannot take any action that may deprive it of its rights and powers so it can direct and control airport development and comply with the grant assurances. Grant Assurance 5 requires the airport sponsor not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A without the prior approval of the FAA.

Of particular interest to the FAA would be the granting of property interests to entities on the airport that may restrict the airport sponsor's ability to preserve its rights and powers to operate the airport in compliance with

¹¹⁸ See Policy, found at 61 Fed Reg. 31994, 32021; <http://www.faa.gov/arp/pdf/txt/rates1.htm>.

¹¹⁹ [54 FR 8928, Mar. 2, 1989; 54 FR 24712, June 9, 1989]

¹²⁰ See Order, Secs. 4-7 and 4-8.

the Federal obligations. One of the most common violations of Grant Assurance 5 may occur when airport sponsors enter into agreements with terms that result in subsequent actions that may place the sponsor in noncompliance with its Federal obligations. Therefore, clauses in the airport agreements that subordinate the terms of the agreement to the applicable Federal obligations can preserve the airport sponsor's rights and powers to amend an agreement and operate the airport in compliance with the Federal obligations.

J. Grant Assurance 29, Airport Layout Plan

Grant Assurance 29, *Airport Layout Plan* (ALP), requires an airport sponsor to keep up-to-date the ALP. Specifically, Grant Assurance 29 requires the airport sponsor to show on its ALP the boundaries of the airport and all proposed additions thereto, the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), and the location of all existing and proposed nonaeronautical uses.

Airport layout plans and amendments, revisions, or modifications thereto, are subject to the approval of the FAA. What this means from a practical standpoint is that an airport sponsor must not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan.

From a compliance standpoint, if a change or alteration in the airport or its facilities is made which the FAA determines adversely affects the safety, utility, or efficiency of any Federal investment on or off the airport and which is not in conformity with the ALP as approved by the FAA, an airport sponsor may be required to eliminate such an adverse effect in a manner approved by the FAA. This may include relocating the property (or replacement thereof) to a site acceptable to the FAA and bearing the costs of restoring the property (or replacement thereof) to the level of safety, utility, and efficiency existing before the unapproved change was made in the airport or its facilities.

VII. ANALYSIS AND DISCUSSION

A. Compliance with 14 CFR Part 16.21(b) and 14 CFR Part 16.23(j)

1. Compliance with 14 CFR Part 16.21(b)

In its defense, the County argues that the Complainants did not make substantial and reasonable good faith efforts to resolve this matter informally prior to filing the Complaint as required by 14 CFR § 16.21(b).¹²¹ The Director finds this argument without merit. First, the record unequivocally shows that all parties have been involved with each other for several years and more recently since 2003 with the specific issue of the PAC/Burrows development.¹²² Second, the notices to vacate that were issued by PAC/Burrows with County consent are themselves an action that limits further informal resolution for those directly affected by the notices. Finally, if FAA had doubts regarding compliance with 14 CFR § 16.21(b), the FAA would not have docketed this Complaint as complete.

2. Compliance with 14 CFR Part 16.31(j)

In its Motion to Dismiss, the County argues that the Complaint should be dismissed under 14 CFR Part 16.23 (j).¹²³ 14 CFR Part 16.23 (j) is a provision permitting a respondent to include a motion to dismiss the complaint with a supporting memorandum of points and authorities.¹²⁴ Upon consideration for the County's Motion to Dismiss, the Director finds that since the arguments presented in the Motion to Dismiss, namely items 1, 2 a-d,

¹²¹ FAA Exhibit 1, Item 1, p. 19.

¹²² See Background section f this determination.

¹²³ FAA Exhibit 1, Item 6.

¹²⁴ See 14 CFR Part 16.23 (j).

and 3, are also represented in the County's Affirmative Defense, the analysis in Section B, concerning Affirmative Defenses, is the appropriate place to respond to each of the arguments and statements in the Motion to Dismiss. Specifically, the Director points to Affirmative Defenses 1, 4, 5, 7, 8, 9, 10, and 12, discussed in more detail below.

B. Defenses

The following list of Defenses were raised by the County

1 - The Complaint Does not Establish a Reasonable Basis for Further Investigation by the FAA (First Affirmative Defense)

2 - Complainants Do Not Have Standing to Pursue a Complaint under 14 CFR Part 16 (Second Affirmative Defense)

3 - The Complainants Have No Standing to Bring a Challenge Under 14 CFR Part 16 On Behalf of Other Tenants or Businesses at CRQ (Third Affirmative Defense)

4 - The Complaint Does Not Contain Sufficient Evidence to Meet the Complainants' Burden of Proof to Establish That the County Has Violated Grant Assurance 23 (Fourth Affirmative Defense)

5 - The Complaint Does Not Contain Sufficient Evidence to Meet the Complainant's Burden of Proof to Establish That the County Has Violated Grant Assurance 5 (Fifth Affirmative Defense)

6 - The County's Redevelopment of CRQ is Reasonable and Not Unjustly Discriminatory (Sixth Affirmative Defense)

7 - The Complaint Does Not Contain Sufficient Evidence to Meet the Complainant's Burden of Proof to Establish That the County Has Violated Grant Assurance 22 (Seventh Affirmative Defense)

8 - Complainants' Allegations of Violation of Grant Assurance 22 Fail, as a Matter of Law, to State a Violation of Federal Law or Applicable Grant Assurance Upon Which Relief Can be Granted Under Part 16 (Eight Affirmative Defense)

9 - The Complaint Does Not Contain Sufficient Evidence to Meet the Complainant's Burden of Proof to Establish That the County Has Violated Any Provision of Grant Assurance 35, 49 CFR Part 24, or the Uniform Relocation Assistance and Real Property Acquisition Act (Ninth Affirmative Defense)

10 - Complainants Have Not Alleged and Could Not Prove That They Have Been Directly and Substantially Affected by Any Violation by the County of Grant Assurance 35, 49 CFR Part 24, or the Uniform Relocation Assistance and Real Property Acquisition Act Because These Provisions Only Apply to Federally Assisted Projects (Tenth Affirmative Defense)

11 - Complainants' Allegations of Violation of Assurances With Respect to the Lease for a New Restaurant Site Fail, as a Matter of Law (Eleventh Affirmative Defense)

12 - The FAA Lacks Authority Under 14 CFR Part 16 or Otherwise to Grant the Relief Sought by the Complainants (Twelfth Affirmative Defense)

13 - The Complaint is Time-Barred (Thirteenth Affirmative Defense)

Upon review of Defenses numbers 1, 2, 3, 10, 13, the Director notes that the FAA initially found the Complaint procedurally complete under 14 CFR Part 16.23 and 16.27, and thus rejects these defenses. In further regard to Defense number 3, the Director notes the County's position that the Complainants have no standing to bring a

challenge under 14 CFR Part 16 on behalf of other tenants or businesses at CRQ.¹²⁵ As an element in the Complaint, the Complainants argue the County's actions not only have negative impacts on them, but also on other aviation entities operating at CRQ.¹²⁶ The record confirms that the Complainants argue in support of entities not directly named in the Complaint.

The Complainants in this case are clearly identified as Pacific Coast Flyers, Inc., Donny Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Roger Baker. These three entities are the ones to which Part 16.21 and Part 16.23 are applied as the parties directly and substantially affected by the alleged noncompliance, and identified as responsible for initiating and engaging in informal resolution. Other entities mentioned in the Complaint are not complainants for the purpose of this Part 16 action. Any consideration given to these entities would be inconsistent with Part 16.3, which defines a Complainant as "the person submitting the complaint."¹²⁷

As to Defenses numbers 4-9, the record contains sufficient evidence for complainants to allege the violations and are subsequently discussed in more detail below. In response to Defense number 10, the Director discusses the merit of the allegation regarding Grant Assurance 35 in Section G of the Analysis.

As to Defense number 11, the County states the "Complainants' allegations of violation of assurances with respect to the lease for a new restaurant site fail, as a matter of law, to state a violation of federal law or applicable grant assurance upon which relief can be granted under Part 16. The Complainants' allegations, even taken as true, fail to constitute a violation of law or grant assurance, because the cited assurances do not apply to leases for nonaeronautical uses."¹²⁸ The County's statements are in response to the Complainants' argument that the particular steps taken by the County in dealing with the restaurant essentially "gives PAC a lucrative restaurant lease, excluding from consideration all other potentially interested parties."¹²⁹

A review of the record shows that on December 11, 2002, as part of the County's approval of the five leases with PAC/Burrows, the County developed a Memorandum of Understanding regarding the relocation of the restaurant to a site outside the secure area (airside) of the airport.¹³⁰ On January 14, 2004, the County awarded a 30-year lease to PAC/Burrows for approximately 0.24 acres for a restaurant on a landside location where car parking used to be located.¹³¹

Complainants argued that PAC/Burrows was given without competition the new restaurant lease in a landside location¹³² or that the "County 'gave' PAC the new restaurant lease without publishing an RFP..."¹³³

¹²⁵ FAA Exhibit 1, Item 5, p. 21.

¹²⁶ Complainants argue that "other businesses within the Burrows leasehold subject to the eviction notice include Barnstorming Adventures, a company owned and operated by Kate Lister and Tom Hamish that offer the public rides and adventures in classic bi-planes, war-birds and vintage aircraft" and that "Dan and Mary Older, who operate Aviation Service Co., an airplane mechanic shop, will also be displaced and effectively priced out of business and deprived of its customers. They use two hangars and six tie-downs. In addition, light aircraft technician Ron Gregory and his wife, Kate, will also be displaced and will no longer be a valuable resource to the local aviation community. Smaller businesses include an upholsterer, avionics repair station, painters, and detailers." FAA Exhibit 1, Item 1, p. 2.

¹²⁷ See Part 16.3 *Definitions*.

¹²⁸ FAA Exhibit 1, Item 5, p. 22.

¹²⁹ FAA Exhibit 1, Item 1, p. 9. As mentioned in the Background section, on September 27, 2002, an e-mail between two County employees identifies several issues associated with a restaurant lease between the County and PAC. The issues discussed in this e-mail exchange include the term of the restaurant lease and the lack of competition in awarding it. FAA Exhibit 1, Item 1, Attachment 11.

¹³⁰ FAA Exhibit 1, Item 1, Attachment 16.

¹³¹ FAA Exhibit 1, Item 5, p. 16 and Attachment 7 and Exhibit A of Attachment 8.

¹³² FAA Exhibit 1, Item 1, p. 12.

¹³³ FAA Exhibit 1, Item 1, p. 16.



Figure 4 – The existing airside restaurant at CRQ. (Source: FAA Exhibit 1, Item 5, Attachment 16).

Under its Federal obligations, an airport sponsor must not cause or permit any activity or action that would interfere with the intended use of the airport for aeronautical purposes. The FAA has an interest in ensuring that any lease, property transfer, easement, or use will not adversely affect the Federal investment in the development, improvement, operation, or maintenance of the airport. That is why the grant assurances require FAA concurrence, in advance, if aeronautical property displayed on the ALP is to be used for a nonaeronautical purpose. The FAA must ensure that nonaeronautical uses do not act to restrict or undermine the utility of the Federal investment in the airport. In this case, CRQ has space limitations in serving aeronautical needs. The County recognizes this when it states “Palomar Airport is currently built out and appears politically landlocked with respect to expansion into the City of Carlsbad (the permitting City authority).”¹³⁴

The FAA has, since 2001, stated that based on airport certification requirements, the FAA supports the County's plans to relocate the restaurant from the airfield side (see Figure 4 above) to a landside site and that FAA inspectors have taken the position that the restaurant's location presents safety and security shortcomings for the airport and relocating it at the earliest possible date would eliminate this airport certification concern.¹³⁵ Accordingly, the lease of the restaurant when viewed in the context of the effect on the aeronautical uses is appropriate for review.¹³⁶

¹³⁴ FAA Exhibit 1, Item 1, Attachment 18, p.1.

¹³⁵ FAA Exhibit 1, Item 1, Attachment 7.

¹³⁶ FAA Exhibit 1, Item 1, Attachment 7 and 10.

In any event, the terms and conditions for the relocation of the restaurant, a non-aeronautical facility, are not applicable to the FAA grant assurances unless such relocation adversely affects the aeronautical use of the airport, which in this case, it does not.

Under Defense number 12, the County contends that the FAA lacks authority under 14 CFR Part 16 or otherwise to grant the relief sought by the Complainants.¹³⁷ Specifically, the County argues that “the Complaint does not contain any prayers for relief, so there is some uncertainty about what the Complainants would ask the FAA to do if their complaint were sustained. Complainants suggest in its Reply that County’s transgressions “be carefully weighted and considered, and if deemed appropriate, sanctioned.”¹³⁸

As stated in the Applicable Law and Policy Section of this determination, the FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners’ Federal obligations and the public’s investment in civil aviation. Many of these Federal obligations specifically relate to the use of airport property, availability of airport property for aeronautical uses, reasonable access, prohibition in granting exclusive rights, and preservation of rights and powers.¹³⁹

Since any action by a sponsor that compromises its ability to comply with the above-mentioned Federal obligations is a matter under FAA jurisdiction, the lack of a specific prayer for relief in the complaint is not fatal and the Director will avail himself to the remedies available under Part 16.

Finally, under Defense number 13, the County argues that the Complaint is time-barred.¹⁴⁰ Since the County fails to offer any specific arguments or support for its contention and the record does not indicate any reason why or how it is time barred, the argument by the County that the Complaint is time-barred is rejected.

C. Issue 1 - Exclusive Rights

Whether the County, by granting leases to PAC/Burrows resulting from a right of first refusal, has granted an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 U.S.C. § 47107(a)(4).

The Complainants argue that “the County’s Grant of a 30-year lease of the last developable parcel of airport property to an inexperienced and unproven party pursuant to a “confidential” RFP and right of first refusal constitutes an “Exclusive Right” prohibited by Grant Assurance 23.¹⁴¹ The Complainants also argue that “without responsible leasing practices, without an open and above-board planning and bidding process and without any “minimum standards” to speak of, the current development project, disguised as a “performance lease,” is merely an exclusive private enterprise feeding on the public trust.”¹⁴²

As discussed above, Grant Assurance 23, *Exclusive Rights*, requires that the County will prohibit any exclusive right for the use of CRQ, by any person providing, or intending to provide, aeronautical services to the public.¹⁴³ This includes PAC/Burrows. More specifically, the County cannot, either directly or indirectly, grant or permit any person, firm, or corporation, such as PAC/Burrows, the exclusive right at the airport to conduct any aeronautical activity. FAA Order 5190.6A specifically states the “advance grant of options or preferences

¹³⁷ FAA Exhibit 1, Item 5, p. 22.

¹³⁸ FAA Exhibit 1, Item 8, p. 6.

¹³⁹ For example, see Grant Assurances 22, 23, 5, and 29 at <http://www.faa.gov/arp/financial/aip/assurances.cfm?ARPnav=financial>

¹⁴⁰ FAA Exhibit 1, Item 5, p. 22.

¹⁴¹ FAA Exhibit 1, Item 1, p. 20.

¹⁴² FAA Exhibit 1, Item 9, p. 5.

¹⁴³ As discussed in more detail in the applicable law section of this decision, 49 U.S.C. § 40103(e) prohibits exclusive rights and states, in pertinent part, that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.” 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that “a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport.”

(including right of first refusal) on all future sites to the incumbent enterprise must be viewed as an exclusive right.”¹⁴⁴

The County challenges the Complainants' reference to this section in FAA Order 5190.6A arguing that the reference in FAA Order 5190.6A relates to such rights granted on "all future sites," not just on a site that is the subject of a disputed leasehold, and that “if an incumbent FBO were given options to *all* future sites at the airport, that might constitute the granting of an illegal exclusive right. Here, in contrast, the option was for the very parcel that was the subject of the lease dispute between the County and Burrows; that lease arguably gave Burrows a right to 27 more years on the leasehold.”¹⁴⁵

The County reasons that Grant Assurance 23 does “not forbid the County from entering into long-term leases with FBOs” and that it “does not mandate any particular method of selecting leaseholders and did not require the use of an RFP or competitive bidding before the PAC leases were made.”¹⁴⁶ The County adds that it “is not a per se violation of Assurance 23, as the Complainants contend, for an airport sponsor to enter into a long-term lease with an FBO even if the consequence is to give the FBO the right to develop and use a particular site within the airport for a number of years.”¹⁴⁷

The County maintains that the “Complainants have not alleged, and could not prove, that PAC has an exclusive right to act as an FBO at the Airport. There are, in fact, a total of *five* full-service FBOs at CRQ, as well as an FBO for helicopter operators.”¹⁴⁸

The County contests that the PAC/Burrows leasehold is the "last developable parcel" at the airport ¹⁴⁹ and that the “Complainants in this case are not other qualified parties seeking to develop the PAC parcel.”¹⁵⁰ In fact, the County argues the PAC/Burrows leasehold is redevelopment of an existing leasehold.¹⁵¹ In this case, the issue before the Director is whether there is evidence that an exclusive right, as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right, was conferred by the County to PAC/Burrows but not to another by the means of the right of first refusal.

Based on the arguments by both parties and the documents and information contained in the record, the Director considered the following arguments: (1) consideration of previous FAA comments regarding the right of first refusal and the 1993 Settlement Agreement, (2) the request for proposal (RFP), (3) the availability of minimum standards, (4) whether other entities attempted or desired to develop the PAC/Burrows leasehold, and (5) whether the PAC/Burrows leasehold is the last developable parcel of land.

1. Previous FAA Comments Regarding the Right of First Refusal and the 1993 Settlement Agreement

The 1993 Settlement Agreement between the County and PAC/Burrows gave PAC/Burrows the right of first refusal to develop the leasehold.¹⁵² A review of the record clearly shows that the FAA provided the County with specific comments and concerns regarding the first right of refusal granted to PAC/Burrows as part of the Settlement Agreement and subsequent amendments.

In its January 24, 2001, comments, the FAA stated that granting PAC/Burrows “a first opportunity to negotiate lease terms for a new restaurant appears to be a reasonable trade off for closing and relocating the old restaurant

¹⁴⁴ FAA Order 5190.6A, 3-9 (c)(2).

¹⁴⁵ FAA Exhibit 1, Item 7, p. 8.

¹⁴⁶ FAA Exhibit 1, Item 10, p. 2.

¹⁴⁷ FAA Exhibit 1, Item 10, p. 2.

¹⁴⁸ FAA Exhibit 1, Item 7, p. 7.

¹⁴⁹ FAA Exhibit 1, Item 5, p.11.

¹⁵⁰ FAA Exhibit 1, Item 5. p. 11

¹⁵¹ See FAA Exhibit 1, Item 5, Attachment 7, PAC Overall Project Master Site Plan, September 15, 2004.

¹⁵² FAA Exhibit 1, Item 1, Attachment 1, p. 4.

from the airfield side to the land side of the airport,”¹⁵³ this comment was specifically and clearly directed at the issue of the restaurant relocation only. The relocation of the restaurant away from the airside areas was the issue of concern to the FAA and not the method the County may have used in awarding a new restaurant lease. The Director reasons the restaurant, as a nonaeronautical activity, is not covered by the grant assurances at issue here. Therefore, the Director rejects any arguments by the Complainants that the award of the restaurant lease is a basis for a claim against the airport for noncompliance as alleged by the Complainants.

That said, the comments provided by the FAA on August 20, 2002, raised specific concerns related to the County’s compliance with the grant assurances, including Grant Assurance 23, the assurance covering exclusive rights. As part of its comments, the FAA warned of potential problems with the County’s leasing practices and negotiations for aeronautical development at CRQ, particularly with regard to exclusive rights.¹⁵⁴

The FAA stated that the Settlement Agreement could “not be used as a reason to subordinate the County’s ability to comply with the grant assurances” and that “the County should not give away rights under the settlement agreement that would force the County to violate the grant assurances” and ... The nature of the negotiations can be construed as less than ideal because PAC/Burrows has a right of first refusal for the last developable parcel of land at CRQ, opening the door to a perception that the County is perhaps granting an exclusive right. PAC/Burrows, by virtue of a settlement agreement, has won the right of first refusal [on its existing leasehold]. The complicating factor at CRQ is that it represents a right of first refusal for the last developable parcel” and “if there are other qualified parties with a desire to bid on an airport parcel, they may yell foul if they are cut out of the negotiations and prevented from competing with PAC/Burrows...”¹⁵⁵

As mentioned above, the 1993 Settlement Agreement between the County and PAC/Burrows¹⁵⁶ gave PAC/Burrows the right of first refusal to develop the leasehold.¹⁵⁷ More specifically, the Settlement Agreement allowed PAC/Burrows to remain in possession of the premises, and was cause for the County to prepare a Request for Proposal (RFP) for redevelopment of the premises.

Complainants argue that the record “establishes a decade-long course of secretive dealing that clearly confers on PAC rights and privileges and concurrently excludes others from enjoying or exercising similar rights by withholding all opportunity for others to meaningfully engage in the FBO selection, bidding, and planning processes. The suspect dealings began with the “confidential” settlement agreement that obligated the County to honor a right of first refusal...”¹⁵⁸

In its defense of the right of first refusal, the County contends that granting a 30-year lease to PAC/Burrows for redevelopment is not a granting of an exclusive right within the meaning of Grant Assurance 23 and disagrees with the Complainants that such an action was a *per se* violation of Assurance 23.¹⁵⁹ The County asserts that the FAA has recognized that it is reasonable to grant a tenant a long-term lease in return for capital investment in the property. *Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County*, Docket No. 16-02-02, Director’s Determination, 2003 WL I 1524500, at *23 (FAA March 7, 2003)...¹⁶⁰ In *Skydance*, the investment was \$300,000, which FAA found warranted granting a 30-year lease *Id.* at *22-26. PAC is investing about \$33 million, on its site at the Airport. Such a substantial investment, which will result in improvements that benefit the public, warranted entering into a long-term lease with PAC.¹⁶¹

¹⁵³ FAA Exhibit 1, Item 1, Attachment 7.

¹⁵⁴ FAA Exhibit 1, Item 1, Attachment 10.

¹⁵⁵ FAA Exhibit 1, Item 1, Attachment 10.

¹⁵⁶ FAA Exhibit 1, Item 5, p. 7

¹⁵⁷ FAA Exhibit 1, Item 5, p. 7, FAA Exhibit 1, Item 1, p. 4.

¹⁵⁸ FAA Exhibit 1, Item 8, p. 3.

¹⁵⁹ FAA Exhibit 1, Item 7, p. 7.

¹⁶⁰ (“Prospective tenants considering a substantial investment in the airport generally seek a lease term sufficiently long to ensure that the tenant gets not only a return *of* its investment, but a return *on* its investment as well” [emphasis added] *Id.*).

¹⁶¹ FAA Exhibit 1, Item 7, p. 8-9.

The record shows that with regard to length of leases, the County's policy states that "to allow the County the greatest flexibility in making land use decisions over time, lease terms are generally limited to the shortest term possible."¹⁶² When necessary, fixed-term leases are granted for the minimum number of years adequate to allow a lessee to amortize, and receive a reasonable return on, the lessee's investment in leasehold improvements. Historically, Airports has granted one year of lease term for each \$5,000 invested, per acre of leased land, with a maximum term for aviation leases set at 30 years. Accordingly, to qualify for a 30-year term on a 5-acre parcel, a lessee would have to invest \$750,000 in approved leasehold improvements (\$5,000 x 5 acres x 30 years = \$750,000). Leases where there is no investment by the lessee are usually kept on a month-to-month basis. The \$5,000 per acre, per year formula for determining the length of lease term is a minimum requirement. Virtually all new projects constructed on County aviation land within the past ten years have exceeded this minimum investment requirement."¹⁶³ By providing these examples, the County attempts to show that a 30-year lease with PAC/Burrows does not constitute the granting of an exclusive right.

The record establishes that the initial lease for the property to be for 28 years (1965-1993)¹⁶⁴ and that the County's action against Burrows in 1993¹⁶⁵ effectively terminated that lease. The subsequent 1993 Settlement Agreement¹⁶⁶ then became the basis for a new leasing arrangement that are collectively referred to in this case as the PAC/Burrows leasehold. Therefore, the four operating leases executed in 2002, granting PAC/Burrows a lease for 30 years in return for a \$33 million investment, is not per se unreasonable.

In reviewing this case, the Director did not expect the County to refrain from entering into long-term leases. The Director would agree with the County that "providing long-term lease opportunities for one set of commercial operators constructing hangars while denying the same to another commercial operator desiring to invest in hangar construction results in the constructive grant of an exclusive right to those operators given the preferential long-term leases."¹⁶⁷

At first glance, the right of first refusal is the cause for the PAC/Burrow lease awards. In response to the allegations made by the Complainants, the County takes the position that the right of first refusal was included as part of a Settlement Agreement that resolved all issues in the unlawful detainer action between the County and PAC/Burrows, including PAC/Burrows' claim for damages.¹⁶⁸ In other words, the County argues that it was a necessary step in settling the legal case at the time between the County and PAC/Burrows. Although the Director has reviewed the reasons behind the 1993 Settlement Agreement and the fact that settlements dealing with disputes between airport sponsors and tenants are not unusual, the granting of rights of first refusal are generally inconsistent with applicable Federal obligations.

Having said this, the Director notes that the offer or a right of first refusal in this case was a means of establishing a new leasing arrangement to gain a significant investment at the airport and settle a dispute. As

¹⁶² FAA Exhibit 1, Item 18, San Diego County Airports Leasing Practices.

¹⁶³ FAA Exhibit 1, Item 18, San Diego County Airports Leasing Practices, p. 2.

¹⁶⁴ See Section V Background of this document.

¹⁶⁵ FAA Exhibit 1, Item 1, Attachment 1, p. 2.

¹⁶⁶ FAA Exhibit 1, Item 5, p. 7

¹⁶⁷ FAA Exhibit 1, Item 7, p. 9. The County adds in its defense, that "since other FBOs at the Airport have 30-year leases, it could be argued that failing to grant PAC a long-term lease for its investment would have constituted a grant of prohibited exclusive rights to other FBOs at the Airport" and that "the FAA has acknowledged that "[providing long-term lease opportunities for one set of commercial operators constructing hangars while denying the same to another commercial operator desiring to invest in hangar construction results in the constructive grant of an exclusive right to those operators given the preferential long-term leases." FAA Exhibit 1, Item 7, p. 9.

¹⁶⁸ FAA Exhibit 1, Item 5, p. 11. The October 27, 2004 PAC/Burrows memorandum, submitted as an exhibit to its Answer by the County, states that "that the history of the settlement between Burrows and the County, which granted Burrows or its successor a right of first refusal to redevelop the leasehold in question is factually misstated in the complaint. The underlying dispute between the County and Burrows included Burrows' allegation that it became impossible for Burrows to perform capital improvements that would have increased the term of the lease up to twenty-seven years because of a discrepancy in the legal description of the parcel. Specifically, the Burrows lease required Burrows to redevelop the leasehold over a three-year period commencing in August 1, 1990. Unfortunately, the lease contained errors in the property lines of the leasehold estate. It took the County two years to correct this error, during which time, it became impossible for Burrows to finance the leasehold improvements because it could not obtain title insurance. The matter was finally resolved through Alternative Dispute Resolution. d.

noted in the Sedona case, at 29, tenants considering a substantial investment in the airport generally seek a lease term sufficiently long to ensure that the tenant gets not only a Return *of* investment, but a Return *on* its investment. In this case, the right of first refusal was employed at the beginning of the lease term and was limited to one property and not a majority of the airport's properties that would have manifested the granting of an exclusive right.¹⁶⁹ In this particular case, the right of first refusal to redevelop an existing leasehold as part of the 1993 Settlement Agreement, achieved a much more limited effect. Since the Settlement Agreement was not an operating lease, but rather an agreement to enter into a leasing arrangement, the right of first refusal only gave PAC/Burrows the ability to enter into a lease with the County. Something the two parties, through negotiation or any number of other means, could have agreed to in 1993. Effectively, the 1993 Settlement Agreement and the right of first refusal only delayed the leasing agreements the two parties entered into. It was the method the parties selected to settle and assure the County that the property would be redeveloped if PAC/Burrows would not perform.

The record clearly shows that the FAA warned the County that the 1993 Settlement Agreement and the right of first refusal may result in allegations of violations of the grant assurances, including Grant Assurance 23, *Exclusive Rights*. However, the Director finds, the right of first refusal in this case, does not grant an exclusive right contrary to Grant assurance 23.

Therefore, based on the above, the Director finds that the 30-year lease to PAC/Burrows, per se, is not an exclusive right within the meaning of Grant Assurance 23¹⁷⁰ and that the right of first refusal in this particular case, is not tantamount to granting of an exclusive right contrary to Grant assurance 23.

2. Request for Proposal (RFP)

A review of the 1993 Settlement Agreement reveals that it made reference to the County issuing an RFP.¹⁷¹ The Settlement Agreement clearly states that while PAC/Burrows remains in possession of the premises, the County "is to complete its Phase 1 of the Master Plan update and prepare a Request for Proposal (RFP) for development of the premises" and that "prior to the publication of the RFP the County will give PAC a right of first refusal."¹⁷² Nothing in the record suggests an RFP was ever issued in this case.¹⁷³

In October 1995, the County responded to an inquiry challenging the County's authority to grant the right of first refusal and not issue an RFP for the property.¹⁷⁴ The County took the position that under State law, it has the authority to manage, sell, lease, or dispose of its property and that under County law, airport property offered for lease does not have to be competitively bid.¹⁷⁵ The County has also stated that when the lease for PAC/Burrows "[was] approved by the Board of Supervisors...the lease for the planned development [was] presented to the public advisory group for Palomar Airport, the Palomar Airport Advisory Committee (PAAC) twice, both in October and November of 2002, and went to the County Board of Supervisors (Board) in December 2002. All three meetings complied with Brown Act [state of California] guidelines regarding public notice and gave opportunities for the public to address the PAAC and the Board on this matter."¹⁷⁶

The Complainants have stated that they "do not object to the re-development of the airport center. Rather, they support removal of dilapidated and outdated structures and re-development of the leasehold in a fashion reasonably consistent with the 1997 Master Plan by a leaseholder selected in an open and fair manner."¹⁷⁷ The Complainants also stated that to achieve a resolution to the matter that led to this Complaint, the Complainants

¹⁶⁹ *Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County*, Docket No. 16-02-02, Director's Determination, 2003 WL I 1524500, at *23 (FAA March 7, 2003)

¹⁷⁰ FAA Exhibit 1, Item 7, p. 7.

¹⁷¹ See FAA Exhibit 1, Item 1, Attachment 1, p 4.

¹⁷² FAA Exhibit 1, Item 1, Attachment 1, p. 4. A RFP is generally the first step in a competitive bidding process to obtain a contract.

¹⁷³ FAA Exhibit 1, Item 1, Attachment 13, p. 7.

¹⁷⁴ FAA Exhibit 1, Item 1, Exhibit 2, FAA Exhibit 1, Item 5, p.7.

¹⁷⁵ FAA Exhibit 1, Item 1, Exhibit 2, p.2.

¹⁷⁶ FAA Exhibit 1, Item 1, Attachment 23.

¹⁷⁷ FAA Exhibit 1, Item 8, p. 1.

initially sought “the issuance of a public RFP based on the requirements set forth in the Master Plan [1997]” and “a competitive bidding process open to interested parties.”¹⁷⁸ The Complainants state that “had an RFP been properly issued for the subject lease, the market would have truly dictated the type of re-development demanded by the community, the charges for related aeronautical services and the profits to be realized by contracting private organizations.”¹⁷⁹

The County argues that “there is no basis for this claim” and that Grant Assurance 23 “did not require the County to provide public notice, solicit competitive bids, or conduct qualification investigations for the redevelopment of the site, as the Complaint presupposes, nor did the Assurance prohibit the County from entering into long-term leases with PAC.”¹⁸⁰ The Director agrees that Grant Assurance 23 does not require an airport sponsor to provide public notice, solicit competitive bids, or conduct qualification investigations for the redevelopment of airport property consistent with the approved ALP. Grant Assurance 23 does not prohibit the County from entering into long-term leases with PAC/Burrows¹⁸¹ or any other commercial entity, by negotiation, solicitation, or other means. Regardless of Complainant’s opinion on redevelopment of the leasehold, it is the County that is charged with maximizing the aeronautical use of the airport. In this case, there is no evidence that the County violated Grant Assurance 23 by permitting the PAC/Burrows development at CRQ.

The fact that the 1993 Settlement Agreement called for an RFP¹⁸² does not require the County, under its grant assurances, to issue one. Therefore, the Director finds that not issuing a Request For Proposals for the PAC/Burrows property does not constitute the granting of an exclusive right under the applicable Federal obligations.

3. Minimum Standards

The Complainants argue that airport sponsors should establish and utilize “reasonable minimum standards” and that “the Complainants find it particularly troubling that during the entire time it dealt with PAC, it had never, and still has never, assembled or established minimum standards that can be applied objectively and uniformly to all similarly situated on-airport aeronautical activities and services.”¹⁸³ Without the thoughtful establishment of such standards, dealings can only be arbitrary and subject to abuse. This potential for arbitrary management and abuse is particularly acute when the leases themselves contain virtually no direction as to what is an acceptable re-development plan.”¹⁸⁴ The Complainants go on to state that the County “repeatedly stated in public forums that the County has a policy of not dictating to its master leaseholders how to develop their sites.”¹⁸⁵

As mentioned in the Applicable Law and Policy section, the FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied.¹⁸⁶

Although minimum standards may have been of assistance to the County and prospective developers at CRQ, the FAA must rely on the County’s judgment and its proprietary right as the airport sponsor, to achieve planned development at the airport. While recommending the use of minimum standards to avoid violations of Federal law and to ensure adequate public service, the FAA cannot mandate minimum standards at airports. In this particular case, the Complainants’ argument that the County has not imposed minimum standards on

¹⁷⁸ FAA Exhibit 1, Item 8, p. 2.

¹⁷⁹ FAA Exhibit 1, Item 8, p. 3.

¹⁸⁰ FAA Exhibit 1, Item 7, p. 7.

¹⁸¹ FAA Exhibit 1, Item 7, p. 7.

¹⁸² FAA Exhibit 1, Item 1, Attachment 1, p. 4.

¹⁸³ FAA Exhibit 1, Item 8, p. 3-4.

¹⁸⁴ FAA Exhibit 1, Item 8, p. 4.

¹⁸⁵ FAA Exhibit 1, Item 8, p. 4.

¹⁸⁶ See FAA Order 5190.6A, Airport Compliance Requirements, Sec. 3- 12.

PAC/Burrows, does not, per se, mean that the County is in noncompliance with its Federal obligations or has otherwise violated a particular grant assurance, such as Grant Assurance 23.

Consequently, the Director rejects the argument that the lack of the application of minimum standards in this case has resulted in a violation of the grant assurances.

4. Other Entities' Attempts to Developed the PAC/Burrows Leasehold

The Complainants have argued that it is “the exclusion of the Complainants and all other airport users from the processes that steer the direction of the airport since the adoption of the 1997 Master Plan that has now deprived them of the benefits they were led to believe they would realize a balanced use airport, accessible on reasonable terms to all classes of users.”¹⁸⁷

This argument raised in the context of exclusive rights directs the issue of whether other entities attempted to develop the PAC/Burrows leasehold and indeed the Complainants argued that the County, by the manner in which it handled the PAC/Burrows leases, the selection process, and the right of first refusal, effectively avoided open and fair bidding by qualified organizations and persons like one of the Complainants.¹⁸⁸ This is followed by the argument that one of the Complainants “makes it clear he could have, and would have, bid on the subject lease had it not been misrepresented to the public.”¹⁸⁹ It is also argued by the Complainants that PAC/Burrows did not properly manage and maintain its leasehold in good shape and failed to provide adequate services such as fuel services; in essence questioning PAC’s ability to operate the upcoming development project.¹⁹⁰

The County responds by stating that the Complainants’ arguments “[are] to offer a belated declaration by Complainant Roger Baker speculating that in conjunction with undisclosed sources of expertise and assets he might have bid (without any particulars) for the rights given to PAC in its leases if he had been given an opportunity to do so. There is no record, however, that Baker or his anonymous collaborators put the County on notice of their desire to develop the site before the County entered into the settlement agreement with Burrows in 1993 or even before the leases with PAC were executed in 2002. If Baker had been interested in developing the site at that time, he presumably would have alerted the County after it commenced its well-publicized action to evict Burrows from the site in 1993.”¹⁹¹

In its defense, the County asserts that when it gave PAC/Burrows the right of first refusal that ultimately led to the PAC/Burrow leases, the County had not received any overtures from any other potential FBOs to provide services on the site and that the airport is not required to reserve a parcel on the chance that another potential provider may later seek to use it.¹⁹² This current lease is born out of a litigation settlement. The fact remains PAC/Burrows now enjoys a long-term lease which requires it to re-develop the property. The County was not obligated to seek out competition or consult with PAC/Burrows tenants.

Upon review, the Director finds the record supports the County’s position that the “Complainants in this case are not qualified parties seeking to develop the PAC parcel,”¹⁹³ and Complainants have failed to provide documents or information indicating an exclusive right was conferred on PAC/Burrows by the County.¹⁹⁴

Therefore, the Director rejects the argument that there has been a violation of Grant Assurance 23.

¹⁸⁷ FAA Exhibit 1, Item 8, p. 3.

¹⁸⁸ FAA Exhibit 1, Item 9, p. 2.

¹⁸⁹ FAA Exhibit 1, Item 8, p. 2.

¹⁹⁰ FAA Exhibit 1, Item 9, p. 3.

¹⁹¹ FAA Exhibit 1, Item 10, p. 3, Footnote 3.

¹⁹² FAA Exhibit 1, Item 7, p. 7-8. The County cites Ashton v. City of Concord, Docket No. 16-99-09, Director's Determination, 2000 WL 132770, at *23 (FAA January 28, 2000), petition for review denied, 2001 WL 1103253 (4th Cir. 2001), cert. denied, 535 U.S. 906 (2002) (“Ashton II”).

¹⁹³ FAA Exhibit 1, Item 5, p. 11

¹⁹⁴ FAA Exhibit 1, Item 9, p. 2.

5. Last Parcel of Land

The Complainants argue that the County has granted a 30-year lease to PAC/Burrows that involves the last developable parcel of airport property, and that, as such, it is a to the violation of Grant Assurance 23, *Exclusive Rights*.¹⁹⁵ The County refutes this by stating that the PAC/Burrows leasehold is not the "last developable parcel" at the Airport and that "it was already developed, and would have to be redeveloped. Other leaseholders have developed their parcels, and some are in the process of undertaking redevelopment on them now."¹⁹⁶

Early in its review of this case, the FAA cautioned the County that "the complicating factor at CRQ is that it represents a right of first refusal for the last developable parcel" and that "the nature of the negotiations can be construed as less than ideal because PAC/Burrows has a right of first refusal for the last developable parcel of land at CRQ, opening the door to a perception that the County is perhaps granting an exclusive right."¹⁹⁷ In 2004 the "County paved an additional area to add 37 new aircraft tie-down spaces on the west side of the airport, and has received FAA approval to develop 84 additional tie-down spaces on a vacant parcel north of the runway," and that "these facilities have been or will be built to accommodate the light aircraft that Complainants say need to be served by the Airport. They could not be built if the PAC site were truly the last parcel available for aeronautical use."¹⁹⁸ In retrospect, it appears the FAA was misinformed as to the character of the leasehold when it issued the warning to the County.

Upon review of the record, it is clear that the PAC/Burrows leasehold has been developed since at least 1965. The PAC/Burrows leasehold does not represent an undeveloped parcel at CRQ, but rather the re-development of one aviation parcel; on an airport that contains a number of other aviation parcels, some developed, and some not. As such, it cannot be represented as the last developable parcel capable of accommodating aeronautical activities. This is supported by the fact that additional unused property at the airport is in the process of being developed to accommodate tie-downs.

The Director rejects the allegation that the County leased to PAC/Burrows the last parcel of developable property at CRQ, and the contention that the leasehold conferred an exclusive right.

6. Conclusion of Exclusive Rights

Based on the foregoing analysis and record presented, the Director finds the County has not granted an exclusive right to PAC/Burrows or violated its Federal obligations under 49 USC § 40103(e) and 49 U.S.C. § 47107(a)(4).

D. Issue 2 – Grant Assurance 22 – Economic Nondiscrimination

Whether the County, by its actions regarding the displacement of based aircraft, has violated Grant Assurance 22, *Economic Nondiscrimination*, implementing the provisions of 49 USC 47107(a).

The Complainants argue that the PAC/Burrows leases result in the displacement of based aircraft and that such an action constitutes a violation of Grant Assurance 22, *Economic Nondiscrimination*.¹⁹⁹ Grant Assurance 22, implementing the provisions of 49 USC 47107(a)(1); (2); (3); (5) and (6), requires that the County make its airport available to all types, kinds, and classes of aeronautical uses on reasonable terms and without unjust discrimination. In other words, the Complainants argue that the County, as the airport sponsor, has not made CRQ available to all types, kinds, and classes of aeronautical users on reasonable terms and without unjust discrimination. In this Section, the Director reviews the County's action vis-à-vis the PAC/Burrows leasehold for compliance with Grant Assurance 22 with respect to reasonableness.

¹⁹⁵ FAA Exhibit 1, Item 1, p. 20.

¹⁹⁶ FAA Exhibit 1, Item 5, p.11.

¹⁹⁷ FAA Exhibit 1, Item 1, Attachment 7.

¹⁹⁸ FAA Exhibit 1, Item 7. p. 8, Footnote 4.

¹⁹⁹ FAA Exhibit 1, Item p. 1, 22.

Part 1 – Availability and Reasonableness

Complainants argue that County officials policy of not interfering with the business relationships of its master leaseholders creates “an unreasonable economic discrimination effectively denies airport access to a significant class of the aviation community in violation of Grant Assurance 22.”²⁰⁰ Specifically, the general aviation businesses and their clientele will be economically denied access, and small aircraft owners, pilots, renters and tenants will lose the ability to place their aircraft on the airport.²⁰¹

No documentation was submitted to the record that would demonstrate the County has limited the access of any airport users for unrestricted operations at the airport. Complainant’s allegations are more accurately characterized as to whether they have access to aircraft storage space under reasonable terms and conditions and without unjust discrimination.

In defending its actions, the County asserts “the economic nondiscrimination assurance relates to an airport’s obligation to make the airport available without unjust discrimination to all types, kinds, and classes of aeronautical users. Grant Assurance 22 does not guarantee any particular individual aeronautical user access to the airport on whatever terms that user may desire.”²⁰² As the FAA held in Santa Monica Airport Association v. City of Santa Monica, FAA Docket 16-99-21 Final Decision and Order (Feb. 4, 2003), “a sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise [its] proprietary rights and powers to develop and administer the Airport’s land in a manner consistent with the public’s interest” and that “is exactly what the County is doing at CRQ consistent with its FAA-approved Airport Layout Plan.”²⁰³

The County asserts that Grant Assurance 22 does not prevent it, as the airport sponsor, from developing facilities for new or different markets.²⁰⁴ And that the “Complainants are not being asked to pay more than others will pay for comparable facilities. They have been and will be offered the same rates as any other tenant for the facilities in question or for any other facilities at the Airport.”²⁰⁵

In reviewing the numerous alleged arguments, and to ascertain whether the County has made CRQ available to the public on reasonable or discriminating terms, the Director reviewed several related issues and arguments. These were (1) the role of the 1997 Master Plan in the County’s decisions, (2) the actions taken by the County in accommodating displaced aircraft, and (3) the assessment of the rental charges for new facilities on the PAC/Burrows site.

1. The Role of the 1997 Airport Master Plan

Airport planning is a systematic process utilizing established guidelines to plan for the development of an airport that reflects local, state and national interests. A key objective of airport planning is to ensure an effective airport design that satisfies aviation demand in a financially feasible manner. Airport planning may be as broad based as a national system plan or a more locally focused Airport Master Plan (MP) for a specific airport. As such, the FAA recognizes that the County, as the sponsor of CRQ, can identify the airport MP for CRQ as a representation of the airport’s blueprint for long-term development.

²⁰⁰ FAA Exhibit 1, Item 1, p. 22.

²⁰¹ FAA Exhibit 1, Item 1, p. 22.

²⁰² FAA Exhibit 1, Item 7, p. 11.

²⁰³ FAA Exhibit 1, Item 7, p. 11.

²⁰⁴ FAA Exhibit 1, Item 7, p. 12. County cites Ashton II, Final Decision and Order, 2000 WL 1387887 (FAA July 3, 2000) (dismissing complaint where complainant claimed that the City of Concord attempted to keep out certain aircraft and small aviation businesses and to attract wealthy owners of expensive aircraft) and that “as defined by the FAA, economic discrimination prohibits disparate treatment of similarly situated aeronautical users.

²⁰⁵ FAA Exhibit 1, Item 7, p. 12.

In December 1997, the County published an Airport Master Plan (Master Plan or MP) for CRQ.²⁰⁶ The MP,, addressed many airport-planning issues, including the accommodation of air carriers, commercial operators, and general aviation. In addition, the MP inventoried existing conditions, forecast future activity and facility requirements, evaluated alternative development considerations as well as financial, economic and environmental considerations.²⁰⁷ The Complainants challenge that the MP and the PAC/Burrows development unreasonably relied in part on the need to accommodate growing corporate jet activity.²⁰⁸ Complainants imply that County’s development plans discriminate against certain airport users in that accessibility through the leaseholds is reduced for certain aircraft.

The County argues that “the area near the Airport is home to many corporate headquarters and other entities that are making increased use of corporate jets, a growing segment of general aviation...”²⁰⁹ Accommodating “the corporate jet segment of general aviation is a responsible way of managing the County’s airport system.”²¹⁰ In other words, the 1997 MP demonstrated the County sought to accommodate business jets at CRQ as well as smaller aircraft types.²¹¹

The MP reflects a balanced mix of aeronautical facilities at CRQ to accommodate an ever-increasing number of commercial, general aviation, and military operations well into the 2015 forecast timeframe.²¹² The table below, as Figure 5 below, represents the forecast for all types of civilian aircraft operations reflected in 1997 MP for CRQ. It shows that the two categories that better represent small single-engine piston aircraft and corporate jet operations, namely, General Aviation and Air Taxi, show a similar growth rate of about 20%²¹³ into the 2015 timeframe forecast.

	2000	2005	2010	2015
Annual Itinerant Operations				
Commercial	6,534	8,182	9,650	10,484
Air Taxi	12,683	14,546	15,745	15,726
General Aviation	150,800	159,800	170,400	182,000
Military	2,800	2,800	2,800	2,800
Annual Local Operations				
General Aviation	74,200	75,200	76,600	78,000
Military	100	100	100	100
Total Annual Operations	247,117	260,628	275,295	289,110

Figure 5 – 1997 Master Plan Forecast at CRQ. Source: FAA Exhibit 1, Item 17, p. 1-12.

²⁰⁶ FAA Exhibit 1, Item 1, p. 4-5, FAA Exhibit 1, Item 5, p.8.

²⁰⁷ FAA Exhibit 1, Item 1, Attachment 3, I-1 – I-3.

²⁰⁸ FAA Exhibit 1, Item 9, p. 3.

²⁰⁹ FAA Exhibit 1, Item 7, p. 3.

²¹⁰ FAA Exhibit 1, Item 7, p. 3-4.

²¹¹ FAA Exhibit 1, Item 7, p. 5

²¹² FAA Exhibit 1, Item 17, p. 1-12.

²¹³ The ratio between 12,683 Air Taxi operations in 2000 and 15,726 in 2015 is approximately 20%. The same holds true for the General Aviation operations between in 2001 (150,800) and 2015 (182,000).

Figure 6 – The table below provides Fleet Mix information at CRQ. Referring to the column entitled “INM Aircraft Type,” we note that the aircraft types classified as turboprops and jets are: CL600, CAN441, CNA500, CNA750, FAL20, GIIB, GIV, GV, IA1125, LEAR25, LEAR35 and MU3001. All of these aircraft types combined constitute 44% of the total number of operations by fixed wing aircraft at CRQ. 98% of operations at CRQ are by fixed wing aircraft. Source: FAA Exhibit 1, Item 17, p. 1-27.

Table 1.9
FLEET MIX FORECAST
(continued)

INM Aircraft Type	Forecast Year								
	2003			2008			2013		
	Itinerant	Local	T&G	Itinerant	Local	T&G	Itinerant	Local	T&G
General Aviation Fleet Mix									
BEC58P	10%	1%	5%	10%	1%	5%	10%	1%	5%
CL600	4%			4%			4%		
CNA172	16%	51%	45%	16%	51%	45%	16%	51%	45%
CNA206	8%	27%	20%	8%	27%	20%	8%	27%	20%
CNA441	3%			3%			3%		
CNA500	7%			7%			7%		
CNA750	2%			2%			2%		
DHC6	5%			5%			5%		
FAL20	1%			1%			1%		
GASEPF	12%			12%			12%		
GASEPV	8%			8%			8%		
GIIB	1%			1%			1%		
GIV	3%			3%			3%		
GV	1%			1%			1%		
IA1125	1%			1%			1%		
LEAR25	1%			1%			1%		
LEAR35	9%			9%			9%		
MU3001	6%			6%			6%		

98% of Operations at CRQ Are Fixed Wing Operations. Jets and Turboprops Account for 44% of Fixed Wing Operations

The record reveals an increase in all operations well into the forecast year of 2015.²¹⁴ Figure 6 above provides a depiction of the break down of GA operations at CRQ. The data shows that turboprop and jet aircraft, the types mostly used in corporate aviation, conducts approximately 44% of GA operations at CRQ.²¹⁵ These data contradict the argument that there is no justification to provide new facilities for corporate jet operations at CRQ since corporate operations at CRQ are as important as small piston GA operations.²¹⁶

The September 14, 2004 PAC/Burrows general layout of the project reveals that the existing leasehold would be significantly altered by the proposed construction.²¹⁷ It shows that the project is composed of four major elements, including hangars and tie-downs for small piston aircraft, corporate type hangars for large turboprops and jets, vehicular parking facilities and aircraft ramp space, and administrative space and roadway facilities. The facility PAC/Burrows proposed appears to balance the needs of GA aeronautical users, including corporate and small piston aircraft operations. The layout of the PAC/Burrows facility does not allocate much more space for corporate facilities as it does for smaller GA operations. The ratio of space allocated to these two types of GA operations is approximately 48% for corporate operations and 52% for small piston operations.²¹⁸ Therefore, the record does not substantiate the Complainants allegations the PAC/Burrows plan “for the construction of 19

²¹⁴ Although the information in this table is a fleet mix forecast (2003 –2013) from a noise modeling analysis, it still is reasonably representative data of the mix of aircraft that are using CRQ.

²¹⁵ See FAA Exhibit 1, Item 17, p. 1-27. The aircraft types classified as turboprops and jets are: CL600, CAN441, CNA500, CNA750, FAL20, GIIB, GIV, GV, IA1125, LEAR25, LEAR35 and MU3001, for a total of 44%.

²¹⁶ See FAA Exhibit 1, Item 9, p. 5.

²¹⁷ See FAA Exhibit 1, Item 5, Attachment 7, PAC Overall Project Master Site Plan, September 15, 2004.

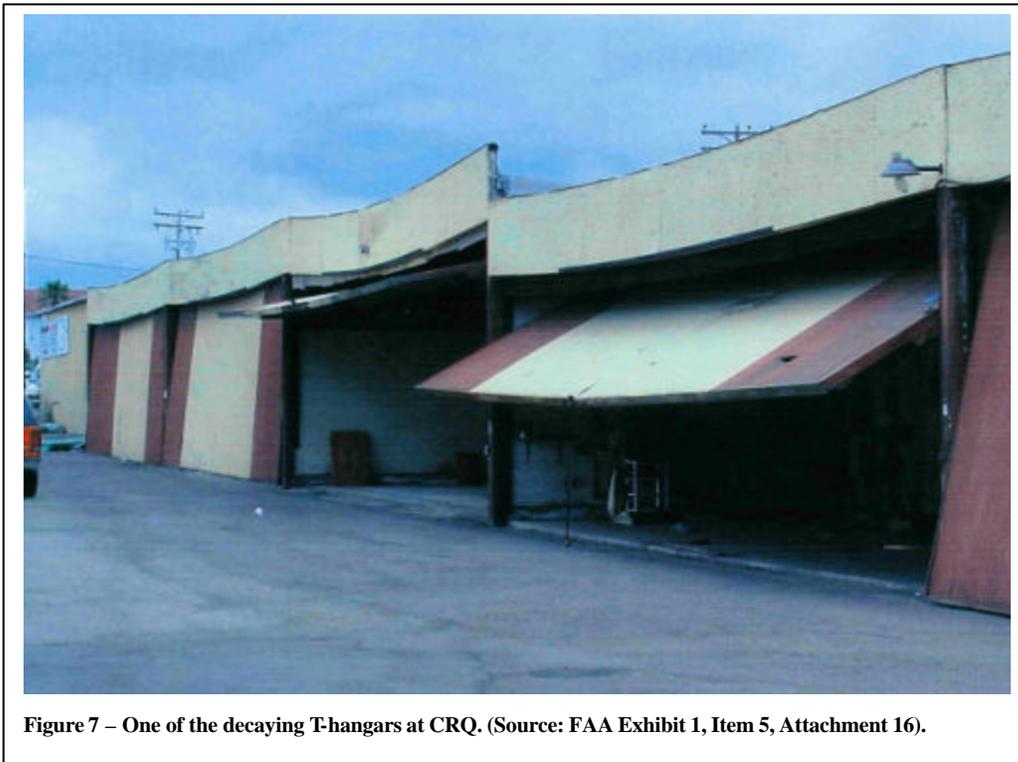
²¹⁸ These figures are approximations. The total area in question was estimated to be 175 units. The area allocated to small piston GA was estimated at 91 units and the area allocated for corporate operations was estimated to be 84 units, hence 52% (91x100/175) and 48% (84x100/175) respectively. The Director does not assume that the area allocated to small piston GA is actually greater than the area assigned to corporate operations. The number indicates that the size of the areas allocated to both types is very similar in square footage.

large business jet hangars” is accomplished “at the expense of virtually all of the light general aviation aircraft within the leasehold”²¹⁹ or that any user is denied access to the airport.

Stating that the new jet center is achieved “at the expense of light aircraft at CRQ is not in the public interest”²²⁰ is a decision left to the County as the airport sponsor based on reasonable planning documentation such as the 1997 MP, in addition to other factors affecting aeronautical demand and services at CRQ. Statements that PAC/Burrows “plan to convert their tie-down accommodations in order to facilitate a few large hangars to accommodate a new more lucrative corporate jet customer market”²²¹ is not, per se, grounds for a violation of the grant assurances. This is supported by the fact the proposed new facilities will accommodate both types of GA operations, albeit not in the ratio the Complainants would expect, i.e. accommodating all existing small piston aircraft types. One class of aeronautical user cannot expect to indefinitely lay claim to airport facilities at the expense of another class of aeronautical users or jeopardize the airport’s ability to manage its facilities.

The County states, “the facilities that Complainants leased on a month-to-month basis on the PAC site were old, substandard buildings that long ago exceeded their useful lives. Built in approximately 1965, they did not meet current code requirements and were structurally suspect” and that in a report on a State inventory and permit compliance inspection of the Airport conducted on August 31, 2004, the California Department of Transportation, Division of Aeronautics, urged among others that the County “replace these buildings” and to pursue projects “on the airport to replace older decaying and collapsing hangars...”²²²

The PAC/Burrows improvements have been described in the aviation media as “new metal hangars with electric lift doors, fire sprinkler and security systems, and treated floors. Additional waterlines will be installed and utilities will be placed underground. Rent for the new buildings, obviously, will be more than tenants paid for the old ones.”²²³ The record shows that on October 1, 2004, the California Department of Transportation (Caltrans) wrote to the County that Caltrans welcomed projects at the airport to “replace older decaying and



²¹⁹ FAA Exhibit 1, Item 1, p. 7.

²²⁰ FAA Exhibit 1, Item 9, p. 5.

²²¹ FAA Exhibit 1, Item 1, Attachment 18.

²²² FAA Exhibit 1, Item 7, p. 4.

²²³ See FAA Exhibit 1, Item 19.

collapsing hangars, relocate the primary airport restaurant...²²⁴ Caltrans' observations are supported by evidence in the record, in this case photographs, as shown in Figure 7 above. Actions by the sponsor to replace airport facilities that have reached the end of their useful lives is consistent with the provisions of Grant Assurance 19, *Operation and Maintenance*. Grant Assurance 19 requires, in part, that the County ensure that the airport and all related aeronautical facilities are operated at all times in a safe and serviceable condition. This includes aircraft storage facilities.

The threshold for assessing an alleged compliance violation lies with the County's action in reasonably accommodating the demand for all types and classes of aeronautical users. The County, as the airport sponsor, may accommodate the needs of the small piston aircraft operators in any variety of means and is not restricted to only the PAC/Burrows leasehold. That is, some small piston aircraft operators may be accommodated on other leaseholds at CRQ or other County airports. There is no Federal requirement that all existing tenants on the existing PAC/Burrows leasehold must be accommodated in the future PAC/Burrows facility.

The Director recognizes that the current MP for CRQ, as the County's "vision" for the future of the airport, plays a role in its decision-making process, and for development of the airport. Having said that, the Director also notes that deviating from the MP, to accommodate changing airport conditions or new requirements, is not only permissible, but may be necessary and expected.

Therefore, based on the record and analysis presented above, the Director finds that the County's action in replacing certain substandard facilities with newer ones, even if it results in the relocation of some tenants in those substandard facilities is not inconsistent with the County's Federal obligations and in addressing the future needs of all classes of aeronautical users, the County is acting in a reasonable manner in meeting its responsibilities as an airport sponsor.

2. Actions to Accommodate Existing Small Aircraft

One of the Complainants' key allegations is that the proposed PAC/Burrows development has resulted in a large number of displaced general aviation (GA) aircraft and, as such, constitutes a violation of Grant Assurance 22, *Economic Nondiscrimination*, on the part of the County.²²⁵ Specifically, the Complainants argue that "the displacement of 150 light general aviation aircraft and related businesses to make way for 19 new jet hangars constitutes prohibited economic discrimination in violation of Assurance 22" and that the proposed development "unreasonably discriminates against two classes of general aviation users: general aviation businesses and their clientele who will be economically denied access and small aircraft owners, pilots, renters and tenants who will lose the ability to place their aircraft on the airport."²²⁶

Complainants focus on the number of displaced aircraft and challenge the number of impacted aircraft advanced by the County. For example, the Complainants argue that "the County claims that only 33 aircraft will need to 'relocate temporarily' to other airports" is "erroneous and misleading" and that "by the County's own admission in County's letter of October 2, 2003 to the FAA, the actual number of displaced aircraft is significantly more. The Respondent [County] now asserts that 47 aircraft will be accommodated on the leasehold. We agree that when completed, there will be 19 jet hangars and 28 tie-downs (47 total)."²²⁷

The Complainants provide data claiming it shows the difference in available spaces in a post-development scenario compared to a pre-development one. It is argued by the Complainants that a pre-development scenario includes 1 medium maintenance hangar, 3 small maintenance hangars, 1 medium sightseeing operator hangar, 122 tie-downs (includes 12 rented back by the County for transient parking) and 30 small T-hangars for piston singles/light twins, for a total of 157 spaces. The post-development scenario, the Complainants argue, provides

²²⁴ FAA Exhibit 1, Item 5, Attachment 12.

²²⁵ FAA Exhibit 1, Item 1, p. 1.

²²⁶ FAA Exhibit 1, Item 1, p. 22.

²²⁷ FAA Exhibit 1, Item 8, p. 5.

for 5 large hangars, 14 medium hangars for business jets or a maintenance facility, 28 tie-downs, and 11 new small hangars, for a total 47 spaces, with 28 providing storage for piston single/light twins.²²⁸

In response to these various allegations regarding the number of displaced aircraft, the County asserts that “while the Complainants quibble about the exact number of aircraft that may be displaced based upon an undisclosed ‘informal census,’ it is undisputed that before and after development of the PAC site, the Airport will have abundant capacity for the storage of piston-driven GA aircraft and that during construction, the Airport is making efforts to accommodate aircraft owners who must be displaced.”²²⁹

In an October 2, 2003, letter to the FAA, the County submitted layout exhibits of the proposed PAC/Burrows temporary tie-down location.²³⁰ In this letter, the County recognizes that as a result of the PAC/Burrows development proposal, there will be a loss of tie-down space for general aviation aircraft, and that general aviation “current tie-down positions at available leaseholds will be significantly reduced” and that “there may be in the neighborhood of two hundred (200) lost tie-down locations when these master lessees begin their development projects early next summer.”²³¹ On November 21, 2003, the Palomar Airport Advisory Committee (PAAC) held a public meeting. At the meeting, PAC/Burrows representatives stated that they were working with the County to try to obtain temporary facilities for everyone and try to place hangar and tie-downs customers, if possible, in adjacent areas or on other airports but admitted that there is not room for everyone under this plan but that there will be tie-downs and general aviation hangars available to the public on the PAC leasehold.²³²

The Director agrees that the number of displaced aircraft is relevant in this case even though the parties to this Complaint do not agree on the exact number.²³³ The reason the number is important is because the County’s ability to accommodate displaced aircraft diminishes as the number increases. Although, as mentioned above, there might be some argument as to the actual number of displaced aircraft, the record does show that the County has recognized, albeit a little late in the process, that there would be an impact on small aircraft at CRQ.²³⁴

The County’s position that it has taken steps towards accommodating aircraft and aircraft owners that are impacted by the PAC/Burrows-related construction at the airport is also illustrated by the County’s Web site.²³⁵ The Web site provides guidance and information to airport users on the Voluntary Aircraft Storage Relocation Program (VSRP), associated forms, and the availability of tie-down spaces within the County.

²²⁸ FAA Exhibit 1, Item 8, p. 5. The Complainants add that the County’s statements that 102 aircraft were given notices to vacate ignores a number of recipients that have responsibility for multiple aircraft, hence the difference between 102 notified and the 157 actual impacted, as presented by the Complainants. FAA Exhibit 1, Item 8, p. 5. The Complainants conclude that as a “result of the PAC development” there is a “net loss of 124 storage spaces for piston singles/light twins, of which 30 were permanent hangars” and that “the new County tie-down ramp at the West end can accommodate 37 (12 transient and 25 permanent spaces), leaving 87 aircraft which are displaced.” FAA Exhibit 1, Item 8, p. 6.

²²⁹ FAA Exhibit 1, Item 10, p. 3, Footnote 4. In October 2003, the County recognized that “Palomar Airport is currently ‘built out’ and appears politically landlocked with respect to expansion into the City of Carlsbad (the Permitting City authority).” FAA Exhibit 1, Item 1, Attachment 18. The County also states “at most, this case involves the temporary displacement of a few dozen aircraft from facilities on the Palomar Airport Center (PAC) site that may not be accommodated at the PAC site or at other sites at the Airport during reconstruction.” FAA Exhibit 1, Item 7, p. 4. The County states that of the 102 aircraft for whom notices to vacate were provided to their owners by PAC, 47 have been accommodated on the PAC site and 22 have been relocated elsewhere on the airport, leaving only 33 to be relocated off site. FAA Exhibit 1, Item 7, p. 6. Also see FAA Exhibit 1, Item, Attachment 1.

²³⁰ FAA Exhibit 1, Item 1, Attachment 18. This was done to ascertain whether any airport standards would change as a result of the implementation of the development proposal that would adversely affect either the airport or airport users. FAA Exhibit 1, Item 1, Attachment 18.

²³¹ FAA Exhibit 1, Item 1, Attachment 18.

²³² FAA Exhibit 1, Item 1, Attachment 20.

²³³ On August 3, 2004, PAC wrote the County on matters regarding the PAC leasehold. In its letter, PAC states that a total of 124 aircraft were impacted by the notice to vacate, that the number of temporary spaces available is 34 and that the new number of displaced aircraft is 90. FAA Exhibit 1, Item 1, Attachment 38. Complainants believe the numbers to be between 90 to 150 aircraft. Exhibit 1, Item 1, p. 18. Complainants also argue that the number can be 87, see FAA Exhibit 1, Item 8, p. 6. Also see FAA Exhibit 1, Item 1, Attachment 20.

²³⁵ FAA Exhibit 1, Item 5, p. 13.

The Web site also addresses the CRQ Voluntary Storage Relocation Program²³⁶ in the form of a memorandum to aircraft owners occupying tie-down spaces at CRQ along with a related relocation form application²³⁷ and a listing of all available tie-down space at other County owned and operated airports.²³⁸ In explaining the VSRP, the County provided in its October 25, 2004 memorandum to aircraft owners, information such as the design and construction of the North side aircraft parking ramp, alternative location, and the incentive program.²³⁹

The record shows that on August 4, 2004, the County held a meeting for airport tenants. At the meeting, the County described the availability of 103 alternative tie-downs and hangar spaces at other County airports, except for Borrego Valley Airport.²⁴⁰ A review of the County's hangar and tie-down availability table for three other County airports, Gillespie Field, Ramona Airport, and Fallbrook Airpark, showed among all service providers a total of 163 hangars and tie-down spaces at these three airports from September 2004 to January 2005.²⁴¹

The County adds that it "wishes to be proactive in our attempts to provide as many tie-down alternatives as possible to help soften the effects of this loss of aircraft parking" and that "our objective in respect to the temporary tie-down location is to give the airport time to possibly acquire additional lots for automobile parking, thereby freeing up additional onsite tie-down space. This period would also afford the affected GA pilots time to find alternate locations at other airports. In addition, it will allow us time to develop incentive packages to encourage aircraft owners to willingly relocate."²⁴²

In fairness to the arguments presented by the Complainants and the County, the Director notes that some of the airports advanced as able to accommodate some of the displaced aircraft, especially Gillespie and Ramona, are located approximately one hour's driving time from CRQ, and may not be convenient for some displaced tenants. The excerpt of the aeronautical chart shown in Figure 8 below provides a visual depiction of the airports located near San Diego and those owned and operated by the County as well as the distance between Fallbrook, Ramona, and Gillespie, and CRQ.

²³⁶ FAA Exhibit 1, Item 16.

²³⁷ FAA Exhibit 1, Item 16.

²³⁸ FAA Exhibit 1, Item 16.

²³⁹ FAA Exhibit 1, Item 16. In its memorandum (October 25, 2004), the County stated: "in order to resolve the immediate short-term overcrowding problem during construction of this ramp and other projects, County Airports is initiating a voluntary aircraft storage relocation program available to persons who currently store their aircraft in tie-down spaces at McClelland-Palomar Airport. As an incentive for aircraft owners to temporarily relocate their aircraft to Fallbrook Airpark, Gillespie Field, or Ramona Airport, County Airports is prepared to offer free rent on County tie-down ramps at these locations for a period of two (2) years for any aircraft relocated there from McClelland-Palomar Airport. Those electing to take part in this program will maintain their place on a waiting list for both the North side and West-end tie-down ramps at McClelland-Palomar Airport. There are a limited number of County tie-down spaces available for this two-year relocation program: Five (5) at Fallbrook Airpark; Twenty (20) at Gillespie Field; and Ten (10) at Ramona Airport. These spaces are available on a first-come, first-served basis, to eligible participants only. Those who are interested in participating in this program are asked to complete the attached application and forward a copy to County Airports as early as possible. This offer shall also apply to any aircraft proved to County's satisfaction to have relocated from McClelland-Palomar Airport to another County Airport within the past two months, due to a lack of storage capacity at McClelland-Palomar Airport. ...Spaces include the far west end of the airport and 84 proposed spaces on the North side of the runway. Aircraft operators presently on the airport who have received eviction notices from an FBO will take priority over operators/owners who are new to the airport." See FAA Exhibit 1 Item 16 and <http://www.co.san-diego.ca.us/dpw/airports/mcpal.html#Location>. Including space at other FBOs at CRQ and at the other airports in the County as a solution to the task of accommodating displaced aircraft is consistent with the County's attempt to accommodate displaced aircraft and meet its statutory obligation to provide for reasonable access. As of August 2004, the County represents that "76 tie-downs were available at other County-owned airports (14 tie-downs at Fallbrook Airport; 25 tie-downs were available at Gillespie Field; and 37 tie-downs were available at Ramona Airport). In addition, the following hangar spots have been or will soon be available: 19 shade shelters and 19 T-hangars at Fallbrook Airpark as of September 1, 2004, and 33 spots in hangars at Gillespie Field (20 available as of January 1, 2005)." FAA Exhibit 1, Item 7, p. 6-7.

²⁴⁰ FAA Exhibit 1, Item 5, p. 19.

²⁴¹ FAA Exhibit 1, Item 1, Attachment 40, FAA Exhibit 1, Item 16.

²⁴² FAA Exhibit 1, Item 1, Attachment 18.

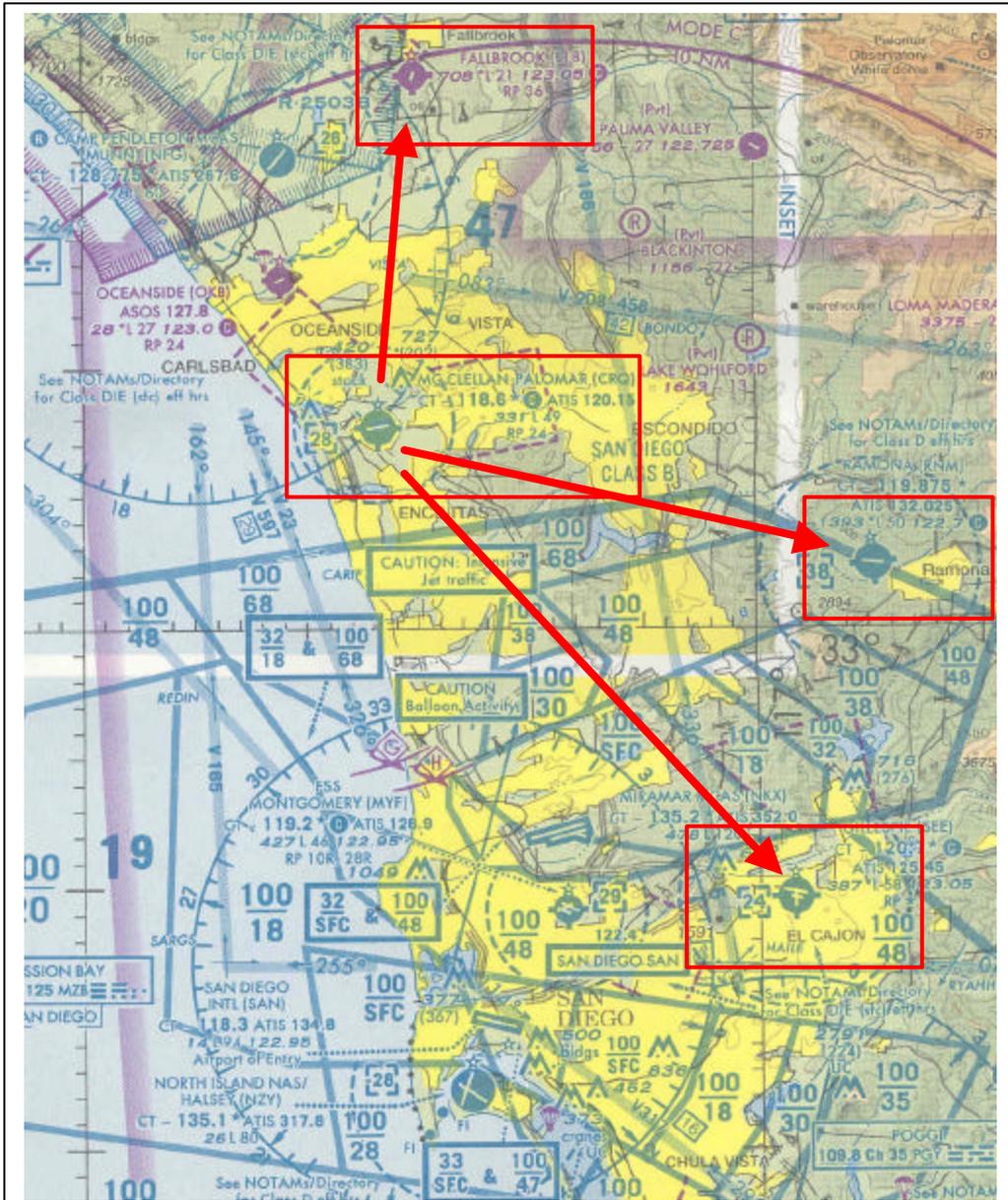


Figure 8 – This excerpt of an aeronautical chart depicts the four related County airports; McClellan-Palomar, Fallbrook, Ramona and Gillespie. For reference, the distance between CRQ and Ramona, to the Southeast on the right side of the chart, is approximately 22 statute miles. (Source: FAA)

The County’s plans to accommodate displaced aircraft is also illustrated by documentation related to PAC/Burrows’ concerns for the existing tenants. The record shows that on October 3, 2003, PAC/Burrows wrote to the County on the issue of accommodating displaced aircraft “a long-standing issue has been our request for additional area to accommodate our tie-down customers.”²⁴³ This letter suggests that PAC/Burrows requested (from the County) additional property to accommodate impacted users. Countering the County, the Complainants argue “this would not have been a problem if the County and PAC had pursued the re-development in three phases as originally represented. Displaced aircraft could simply be housed on non-active portions of the PAC leasehold while other phases were completed. As a result, most of the Burrows-based

²⁴³ FAA Exhibit 1, Item 1, Attachment 19. The letter also stated that PAC/Burrows had forwarded “proposals for the development of alternative space in several locations at Palomar, whether that space was to be master leased to our company [PAC], another company or was to be operated directly by the County. We want to stress the urgency of developing such space as soon as possible, whoever may be chosen as the operator. We feel that our various proposals all had merit and that the needs of our current tie-down customers should be looked to, irrespective of the undeniable trend towards commercial and jet aviation.” FAA Exhibit 1, Item 1, Attachment 19.

light aircraft, including mine, have been forced to leave the leasehold and the airport for 2 years Even when the North side tie-downs are complete, the light aircraft owners and users will be forced to house their aircraft in the elements and deal with poor vehicle parking and difficult access to the airport center.”²⁴⁴

The Director recognizes that some of the displaced aircraft owners will be inconvenienced. However, the fact that there will be some inconvenience due to a temporary relocation to other airports or other locations at CRQ, does not, per se, reach the level where it is an unreasonable term or condition being imposed by the County on airport users. Furthermore, the Director points out that PAC/Burrows is not the sponsor; the County is. Although there is disagreement on the number of impacted users, the number of available replacement locations, PAC/Burrows’ ability to handle the development, and the historic number of available hangars, it is the County’s responsibility, as the airport sponsor, to accommodate aeronautical users.

It appears “Complainant Pacific Coast Flyers’ 14 aircraft have been relocated, on a temporary basis, to another site on the PAC parcel that is available for nine months, until a longer term solution is found; that the pilots’ shop of Complainant Donnya Daubney has been relocated from the PAC site to another FBO site on airport; and that Complainant Roger Baker with interests in several aircraft at the airport... has relocated to two of the 37 new tie-downs created by the County at the west end of the Airport...” and that “he also had two personal aircraft, which the County believes he has relocated to Ramona Airport, another County facility.”²⁴⁵

The threshold for assessing a compliance violation for Grant Assurance 22 lies in the County’s ability to reasonably accommodate aeronautical users at the airport. The record of evidence indicates that the County has, since 2003, been involved in dealing with both subtenants and PAC/Burrows in attempting to accommodate as many of PAC/Burrows displaced aeronautical users as possible. Even though there are differences between the parties as the exact number of displaced aircraft, and to some extent as to the number of available replacement hangars and tie-down spaces, the Director finds ample evidence that the County did provide reasonable access to a majority of the displaced aeronautical users at either CRQ or other County owned airports.

Therefore, based on the above, the Director finds that the County has acted reasonably and therefore without discrimination as the record suggests several concrete steps have been made towards accommodating as many displaced aeronautical users as possible that were impacted by the proposed PAC/Burrows development at CRQ.

3. Assessment of the Rental Charges for New PAC/Burrows Facilities

The County’s obligation to make CRQ available for public use on reasonable terms and without unjust discrimination can also be reflected by the rents imposed by those providing services on behalf of the County to the public.

In a broader sense, the FAA Policy on Rates and Charges expounded the requirements to be followed by airport sponsors when establishing airport rates and charges.²⁴⁶ That is, rates, fees, rentals, landing fees, and other

²⁴⁴ FAA Exhibit 1, Item 9, p. 4. Complainants’ allegation that the County has allowed PAC to save itself a reported \$1 million by performing the entire re-development in one phase is unsubstantiated. Even it were, we note that the County does have the right to work with a developer in setting out timelines for construction and development, and that nothing contained in the record would allow this type or argument to reach a level that would show or imply a violation of the County’s Federal obligations. As for the issue of 2 years period, the Director is familiar with time lines necessary to accommodate major airport development projects and the PAC/Burrows project and the North side project is not excessive, unreasonable or otherwise unrealistic.

²⁴⁵ FAA Exhibit 1, Item 7, p. 6.

²⁴⁶ See 61 Fed. Reg. 31994.; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. Note: The United States Court of Appeals for the District of Columbia vacated and remanded portions of this. See Air Transport Association of America v. Department of Transportation (ATA v. DOT), 119 F.3d 38 (D.C. Cir. 1997), amended 129 F. 3d 625. Specifically, the Court vacated: paragraphs 2.4, 2.4.1, 2.4.1(a), 2.5.1, 2.5.1(a), 2.5.1(b), 2.5.1(c), 2.5.1(d), 2.5.1(e), 2.5.3, 2.5.3(a), 2.6, the Secretary’s supporting discussion in the preamble, and any other portions of the rule necessarily implicated by the holding of the August 1, 1997 opinion. Consequently, today we will only use those valid portions of the Final Policy that were not vacated.

service charges imposed on aeronautical users for the use of airport facilities must be fair and reasonable²⁴⁷ and may not unjustly discriminate against aeronautical users or user groups.²⁴⁸ This is also the standard that applies in this case. More specifically, the County carries the responsibility to ensure that the fees and charges imposed on aeronautical users of CRQ by the County and by its commercial aeronautical service providers and developers, such as PAC/Burrows, comply with applicable Federal law and FAA policy.

Although the setting of rates and charges is generally best addressed by agreement between aeronautical users and airports,²⁴⁹ under the FAA Policy on Rates and Charges (Policy),²⁵⁰ the County must ensure that reasonable, consistent, and transparent (i.e., clear and fully justified) methods are used in establishing the fee structure assessed on airport users.²⁵¹ This means that the County shall ensure that aeronautical service providers and developers acting on behalf of the County assess fees for the use of the airport that are reasonable and not unjustly discriminatory when applied to similar users and/or facilities.

To ascertain whether the rates and charges at CRQ are consistent with the grant assurances and FAA Policy, the Director assessed the PAC/Burrows proposed Pre-paid lease and Short-term lease and the net changes to lease rates for displaced tenants. In the following pages, the Director assesses the impact of the PAC/Burrows project on rates and charges for compliance with Grant Assurance 22 with respect to reasonable ness. Compliance with the unjust discrimination requirements was addressed in Part 2 of this Section.

a. Proposed Pre -Paid Lease

The issue of whether aeronautical fees imposed at CRQ are reasonable is dependent on the assessment of several factors, including the proposed pre-paid lease²⁵² being offered by PAC/Burrows to its tenants. The pre-paid lease is one of the methods by which PAC/Burrows and hence the County, would make CRQ facilities available to aeronautical users.

In this case, the Complainants argued that PAC/Burrows delivered proposals to several businesses and potential jet hangar tenants in June 2004. It is claimed by the Complainants that these proposals were actually pre-paid, 26-year leases of a hangar shell for roughly \$235 per square foot and that in addition to paying to purchase, the proposal added an estimated monthly cost of \$.47 per foot as "Triple Net" fees.²⁵³ In the case of Complainant Donnya Daubney, the Complaint states that PAC/Burrows proposed to lease 4,919 square feet for approximately 26 years and that the amount to be pre-paid was valued as \$1,155,965.²⁵⁴

Complainant Donnya Daubney, was asked to come up with nonrefundable deposits of \$346,788 just to preserve a lease she could not enjoy until construction is complete.²⁵⁵ When complete, the Complaint continues,

²⁴⁷ See Paragraph 2 (no decimal place) of the Policy, found at 61 Fed. Reg. 31994, 32019; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. see also 49 U.S.C. § 47107(a)(1).

²⁴⁸ See Paragraph 3 (no decimal place) of the Policy, found at 61 Fed. Reg. 31994, 32021; <http://www.faa.gov/arp/pdf/txt/rates1.htm>. see also 49 U.S.C. § 47107(a)(1).

²⁴⁹ See Page 32017 of the Policy, found at 61 Fed Reg. 31994, 32021; <http://www.faa.gov/arp/pdf/txt/rates1.htm>.

²⁵⁰ Section 2.3 of the FAA Policy on Rates and Charges (Policy). Also see Section G of this decision.

²⁵¹ Relevant to this case is that the Grant Assurance 22 does not prevent a sponsor from making reasonable distinctions among aeronautical users and assessing higher fees on certain categories of aeronautical users based on those distinctions. Sponsors must allocate costs to their aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology. They must apply the methodology consistently, and when practical, they must quantitatively determine cost differences. So that aeronautical users or user groups pay only properly allocated costs, sponsors must allocate common costs (costs not directly attributable to a specific user group or cost center) according to a consistently applied, reasonable, transparent, and not unjustly discriminatory cost-allocation methodology.

²⁵² A pre-paid lease is a lease where rent is paid in advance. The pre-paid rent would be the present value of the periodic rent payments owed over the lease term. Future rent payments would be discounted at the appropriate market discount rate to calculate the present value.

²⁵³ FAA Exhibit 1, Item 1, p. 23. A Triple Net lease is a lease where the lessee pays rent to the entity leasing the property as well as taxes, insurance, and other expenses that may be related to the property in question.

²⁵⁴ FAA Exhibit 1, Item 1, p. 23.

²⁵⁵ FAA Exhibit 1, Item 1, p. 23.

“...Daubney will have to then pay a final non-refundable deposit of \$809,172 or lose all prior deposits.”²⁵⁶ Finally, Complainants argue that PAC’s proposal in this case creates several unreasonable terms such as the improbability of obtaining financing, the impossible monthly burden and outrageous nature of certain other terms.²⁵⁷ The Complainants also state that even if Complainant “would agree to pay PAC’s rates, the combined agreements present an economic model that is so outrageous that it would be impractical for even the most affluent tenant.”²⁵⁸ In other words, Complainants argue that the pre-paid nonrefundable lease option being offered by PAC/Burrows is unreasonable.

In response to Complainants statements that “lenders have told claimants counsel if one could obtain financing, rates would be more than 12%”, the County again put forth the PAC memorandum of October 27, 2004. In it, PAC states “the Complaint speculates that Complainant would need to finance the \$225 per square foot over the life of the lease at an assumed annual rate of 12%. Of course, Complainant would not have to take a long-term lease”²⁵⁹ and “Complainant could sign up for a five-year lease and have no financing costs. Moreover, tenants with acceptable credit histories would likely be eligible for an SBA [Small Business Administration] loan or a lower rate private loan. Currently, SBA loans are in the range of 6%. This would result in a monthly rate of \$1.10 per square foot for both principal and interest on a 25-year loan.”²⁶⁰

The County through the PAC/Burrows memorandum maintains that “the Complaint estimates the total cost for long-term hangar tenants to be \$2.93 per square foot per month. As demonstrated above, the actual number is approximately \$1.57 per square foot per month: \$1.10 principal and interest on base rent + \$.47 for triple net expenses. The Complainant compares this number to the rental rate Complainant was paying for a substandard, forty five year old hangar of \$.80 per square foot per month. Current rental rates at the airport for older, but serviceable hangar space is running \$1.25 and \$1.60 per square foot based on the relative age of the structures and the amenities offered. Nevertheless, a proper comparison would have to take into account the likely increases in costs for other hangar space over the next thirty years. (The PAC rate is guaranteed for the full 30-year term). Assuming an average rental increase of 3% per year over the life of a lease, a lease starting at \$1.50 per square foot has an actual rental rate over the life of the lease of approximately \$2.56 per square foot. Thus, even accounting for financing costs, a prospective tenant may well find it cheaper to enter into a 30-year fixed rate lease rather than a short-term lease.”²⁶¹

²⁵⁶ FAA Exhibit 1, Item 1, p. 23.

²⁵⁷ FAA Exhibit 1, Item 1, p. 24.

²⁵⁸ FAA Exhibit 1, Item 1, p. 24. Complainants adds that:

- “No element of the combined agreements provides any asset to the tenant that could be used as collateral to finance execution of the lease reservation or hangar lease or that could be shown on a balance sheet.
- The prepaid lease amount is actually referred to as a reservation fee only, although it is characterized to the County as the total lease fee. This characterization appears to be wholly disingenuous.
- The substantial prepaid fees which include the reservation fee and the lease portion of the lessor's obligation to the County are wholly nonrefundable, even in the event of a default by the lessor.
- Any event that causes termination of a tenant's right to occupy the premises, including failure by the lessor to perform his (minimal) duties under the agreements, results in unrecoverable forfeiture of all prepaid fees.” See FAA Exhibit 1, Item 1, p. 24.

Complainants contend if a business were to accept the PAC proposal, it would need to obtain financing but that Complainants have been unable to find any lender willing to finance non-refundable deposits on a non-equity long term lease, with an unknown lessor-developer. FAA Exhibit 1, Item 1, p. 24. Complainants states that “lenders have told claimants counsel if one could obtain financing, rates would be more than 12%. Effectively then, Ms. Daubney would need to secure a loan for the entire \$1.2 Million, to be advanced over 2 years, or risk the loss of the prior deposits. Lenders tell us that: a) Progress draws over such extended periods are unheard of in requests such as these; b) the sub-sub land lease nature of the development reduces the financiability of the request; c) If available, approvals of loans like this would typically take 60-90 days after submission of all required information; and d) Such financing would require detailed plans, proof that the lessor has the ability to perform, and proof that the lessor has conducted the required environmental studies - none of which has been provided by Mr. Sax [PAC representative]. In fact, the proposed Prepaid Lease places the burden of providing such documentation on the lessee, Ms. Daubney.” FAA Exhibit 1, Item 1, p. 24.

²⁵⁹ FAA Exhibit 1, Item 5, Attachment 1, p. 2.

²⁶⁰ FAA Exhibit 1, Item 5, Attachment 1, p. 2. FAA notes that a \$225 loan for a 25-year term at 6% results in a principal and interest payment of \$1.44.

²⁶¹ FAA Exhibit 1, Item 5, Attachment 1, p. 3.

With both these arguments, the County is in fact representing the proposed total lease costs associated with the new facilities under the long-term lease option. Based on the review of the pre-paid lease option, it appears that what PAC/Burrows has proposed, as a master tenant and with the County's approval, is to have tenants in the PAC/Burrows facility secure their own financing for the premises they lease instead of PAC/Burrows securing long-term financing and then charging the tenants a rental that includes a debt service component.

As such, pre-paid leases can reflect a reasonable representation of the total cost of developing the new facilities; a situation where the lessees (tenants) carry some of the financial risk for the premises they lease instead of the lessor (PAC/Burrows). This is not necessarily unreasonable, although it may appear to be a nonstandard practice to tenants accustomed to having the lessor carry the risk of the permanent financing.

Moreover, the record contains no documentation or information that the pre-paid lease terms offered to displaced tenants are unreasonable or misleading. What the record shows is that this particular financing option, in which the lessee carries the permanent financing for its leased premises instead of the lessor, is different than a rental option, to which the Complainants may be accustomed.

The fact that PAC/Burrows chooses not to carry all of the financial risk and offers pre-paid leases for those tenants seeking a longer term lease (i.e. 26 years) is not evidence that the prepaid option is unreasonable.

Therefore, based on the above, the Director finds that the terms of the pre-paid lease option are reasonable within the meaning of Grant Assurance 22.

b. Proposed Short Term Lease

As with the prepaid option discussed above, the issue of whether aeronautical fees imposed at CRQ are reasonable also includes an assessment of the PAC/Burrows proposed short-term lease offer.

Complainants contend that "PAC has purportedly offered to lease bare wall commercial space on a "short-term" 5-year basis with a base rent of \$1.25 per square foot [per month] and an additional \$.47 per foot expense burden [per month]. Thus, the total monthly rent would be \$1.72 per square foot, still more than double current prevailing rates. This would, of course, not include improvements that the tenant would have to try to recover over the 5-year term. If, in our example Ms. Daubney wished to install \$50,000 of improvements financed over 5 years at 12%, she will incur an additional monthly debt of \$1,220 or \$.25 per foot. Thus, her total outlay for space will be \$9,690, or \$1.97 per foot."²⁶²

In response, the County submitted information discussing this short-term lease in detail and stated that "concerning base rents and triple net costs, the Complaint accurately states that they are currently fixed at \$1.72 per square foot per month. While this may be somewhat higher than rents charged by other FBOs at Palomar, those other facilities are older, with fewer amenities. In fact, the next newest facility is approximately twenty years old and does not offer amenities such as individual hangars or extra wide modern roll up doors. Using a 3% per year deflator for age, \$1.72 per square foot for new hangar space is equivalent to paying \$0.93 per square foot for hangar space at the next newest hangar at the Airport, which currently charges \$1.50 per square foot. PAC also offers a tenant improvement credit of \$30 per square foot for minimum leases of five years. (The only requirement is that the tenant use a PAC approved contractor for the work. This is common in many such leases because it insures continuity of workmanship and better pricing.) If a tenant enters into a 5-year lease for a 1000 square foot office, the tenant would have a \$30,000 credit against leasehold improvements to be built by PAC's contractor."²⁶³

The Director concurs with the County that while the rate imposed by PAC/Burrows on its short-term lease may be somewhat higher than that charged by other FBOs at CRQ, the other facilities are older. In other words,

²⁶² FAA Exhibit 1, Item 1, p. 24.

²⁶³ FAA Exhibit 1, Item 5, Attachment 1, p. 3.

differences in the lease rates for different facilities reasonably reflect a like difference in the age and condition of the different facilities. The current base rent and triple net costs total \$1.72 per square foot per month does not appear to be unreasonable, or inconsistent with the FAA's Policy on Rates and Charges and Grant Assurance 22. The FAA accepts differences in lease rates between facilities because of differences in the location, age, condition and utility of these facilities. The fact that PAC/Burrows also offers a tenant improvement credit of \$30 per square foot for leases of five years, adds to the reasonableness of the rate methodology.²⁶⁴

Therefore, based on the above, the Director finds that the terms of the PAC/Burrows short-term lease option is reasonable within the meaning of Grant Assurance 22.

c. Net Change in Lease Rates for Displaced Tenants

In arguing that the PAC/Burrows proposal constitutes a violation of Grant Assurance 22, Complainants provide an example of how the increase in lease rates for displaced tenants is per se unreasonable. That is, Complainants attempt to show the difference in their leasing costs if they remain on-site and accept a lease in the new PAC/Burrows facilities. As compared to what they paid in the existing 40 year old facilities. It is argued that a new PAC/Burrows 70x70 foot hangar, capable of accommodating 4 aircraft and leasing at \$14,412.67 per month, would cost each owner \$3,603.75, and that this amount is excessive. Complainants also state that "even if PAC were to make the aircraft hangars available on the same terms as those proposed to the businesses, total rent would be \$8,460 per month" and that "thus each sharing owner would have to pay \$2,115 per month."²⁶⁵ The Complainants allege that as a result of the PAC/Burrows proposal, the current monthly rate would go from approximately \$500 per month to a proposed rate ranging from \$2,115 to \$3,603.²⁶⁶ Complainants also assert that in October 2003, PAC/Burrows publicly represented that "rates for small aircraft would be roughly 30% more than they were currently paying."²⁶⁷ Had that been a true statement, the Complainants continued, "users would have the option to remain and pay the difference. The new pricing structure eliminates all reasonable options and shuts the door to the community members who use, patronize and support general aviation at CRQ."²⁶⁸

The October 27, 2004 PAC/Burrows memorandum states that "today, the going price for hangars is between \$1.25 and \$1.60 per square foot per month. Magellan [another FBO at CRQ] is the oldest and is charging about \$1.25. Jet Source is the newest and is charging about \$1.60. On average, it takes about 1000 sq. ft to hangar a GA aircraft. Thus the going rate now at Palomar would be between \$1,250 and \$1,600 per month"²⁶⁹ and that "pricing for portable hangars is lower. These smaller facilities have no electrical or other utility services and so they are not comparable to other hangar facilities. However, the PAC site includes 52 portable hangars subleased to the Palomar Airport Pilots Association ("PAPA"). PAC has no direct involvement in rates charged by PAPA. However, PAC understands that the smallest of these units currently rents for approximately \$600 per month which computes to \$.82 per square foot."²⁷⁰

The Complainants present the argument that their costs will increase from approximately \$600 per month in an existing 40-year-old hangar to between \$2115 to \$3,603 per month²⁷¹ in a new shared hangar in the PAC/Burrows development and such an increase would be unreasonable. However, the 40-year-old facility that reportedly contains no electricity or utility services are not comparable with the new full service facilities proposed by PAC/Burrows or offered by other FBOs at CRQ. In order to strike such a comparison, PAC/Burrows would need to be erecting new below standard hangars instead of the alternative, full service

²⁶⁴ FAA Exhibit 1, Item 5, Attachment 1, p. 3.

²⁶⁵ FAA Exhibit 1, Item 1, p. 24-25.

²⁶⁶ FAA Exhibit 1, Item 1, p. 25.

²⁶⁷ FAA Exhibit 1, Item 1, p. 25.

²⁶⁸ FAA Exhibit 1, Item 1, p. 25.

²⁶⁹ FAA Exhibit 1, Item 5, Attachment 1, p. 4.

²⁷⁰ FAA Exhibit 1, Item 5, Attachment 1, p. 4.

²⁷¹ The July 30, 2004 study entitled "Aeronautical Rental Rates at San Diego County Airports" and discussed in detail under sub section f) provides a greater level of detail to these values. See FAA Exhibit 1, Item 18, p. 4.

design that is proposed for the PAC/Burrows development. In other words, PAC/Burrows would need to scale the development down and essentially erect like-sized replacement facilities on the PAC/Burrows site.

The differences in the rental figures shown above reflect the age, location, condition and utility of two completely different types of hangars. The FAA recognizes that the County, as the airport sponsor, has the ability to enhance the facilities at the airport. It is also recognized that this enhancement would, in most instances, result in an increase in fees or lease rates that would properly reflect the new level of investment involved. There is nothing in the record that suggests the fees or lease rates imposed by PAC/Burrows are inconsistent with the level of investment for the new facilities the County has agreed to pursue. Moreover, the grant assurances and FAA Policy do not require the County to provide displaced tenants with the historic lower rent structure they have enjoyed in older facilities or to replace those facilities with new ones of the exact size and design that would be more economical and preferable to the Complainants.

Therefore, based on the above, the Director finds that the increase in lease rates and charges for the new PAC/Burrows facilities are is not unreasonable, and as such, does not constitute a violation of Grant Assurance 22.

4. Conclusion on Availability and Reasonableness

In assessing the reasonableness of the County's actions with regards to the PAC/Burrows project, the Director considered the County's justification for approving the project to replace certain substandard facilities with newer ones, the actions taken by the County in accommodating as many displaced aircraft as possible, and the reasonableness of the structure of rates and charges on aeronautical users at CRQ. Therefore, based on the above information and record, the Director finds that the County has not violated Grant Assurance 22, *Economic Nondiscrimination*, implementing the provisions of 49 USC 47107(a).

Part 2 – Unjust Discrimination

The Complainants must show that the current development of the PAC site unjustly discriminates against a class of aeronautical users to sustain a claim that the County violated Grant Assurance 22 *Economic Nondiscrimination*.

The County states that Grant Assurance 22 “does not guarantee any particular individual aeronautical user access to the airport on whatever terms that user may desire”²⁷² and that “as the FAA held in Santa Monica Airport Association v. City of Santa Monica, No. 16-99-21 Final Decision and Order (Feb. 4, 2003), 2003 WL 1963858, “a sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise [its] proprietary rights and powers to develop and administer the Airport's land in a manner consistent with the public's interest.”²⁷³

The County asserts “the assurance does not prevent an airport from developing facilities for ‘new or different markets....’”²⁷⁴ and that “as defined by the FAA, economic discrimination prohibits disparate treatment of similarly situated aeronautical users. That is not happening at the Airport. Complainants are not being asked to pay more than others will pay for comparable facilities. They have been and will be offered the same rates as any other tenant for the facilities in question or for any other facilities at the Airport.”²⁷⁵

The Director agrees with the County in that CRQ has been and will be available for use by operators of piston-driven GA aircraft, notwithstanding the fact that some aircraft will be displaced by the construction of the

²⁷² FAA Exhibit 1, Item 7, p. 11.

²⁷³ *Id* *17 (Feb. 4. 2003).

²⁷⁴ County makes reference here to Ashton II, Final Decision and Order. 2000 WL 1387887 (July 3. 2000) FAA Exhibit 1, Item 7, p. 12 (Dismissal of complaint where complainant claimed that the City of Concord attempted to keep out certain aircraft and small aviation businesses and to attract wealthy owners of expensive aircraft.)

²⁷⁵ FAA Exhibit 1, Item 7, p. 12.

project. Grant Assurance 22 does not require any airport sponsor to provide at all times exactly the facilities any particular segment of the aeronautical community might prefer.

At issue here is whether the County attempted to keep certain aircraft and small aviation businesses out of CRQ. A review of the record and arguments fail to demonstrate that Complainants or other users at CRQ were expelled or asked to pay more than others would pay for comparable facilities at the airport. The record indicates that the PAC/Burrows leases are being offered to all aeronautical users under the same terms and conditions for similar facilities.

Since there is no evidence that the terms and conditions for the PAC/Burrows leases offered to tenants are unreasonable or that Complainants are being asked to pay more than others will pay for comparable facilities, the Director finds the County's actions consistent with the requirements under Grant Assurance 22.

E. Issue 3 – Grant Assurance 5 – Preserving Rights and Powers

Whether the County, by granting PAC/Burrows a right of first refusal as part of the 1993 Settlement Agreement, has violated Grant Assurance 5, *Preserving Rights and Powers*.

The Complainants argue that the right of first refusal provision in the PAC/Burrows Settlement Agreement constitutes a failure to preserve its rights and powers and an abrogation of the County's obligations under Grant Assurance 5 and that “the County may not rely on its misguided formerly confidential settlement agreement as justification for granting exclusive rights to PAC/Sax²⁷⁶ in violation of assurance 5.”²⁷⁷ More specifically, the Complainants state that the County clearly violated Grant Assurance 5 by entering into a settlement agreement with Burrows that granted Sax/PAC a right of first refusal.²⁷⁸

The County denies the Complainants allegations by stating that “the rights of first refusal in the Burrows Settlement agreement does not constitute a failure to preserve the County's rights and powers.”²⁷⁹ “The County understands that under Assurance 5 it may not give away its ability to comply with its grant assurances, and the County has not done so.”²⁸⁰

The County believes that “to sustain a finding of failure to preserve rights and powers, the FAA requires a showing that there is some mechanism or agreement which prevents the airport from exercising its powers to comply with its grant assurances” and that Complainants have not shown, nor can they show, any agreement or mechanism that bars the County from exercising its powers to adhere to FAA grant obligations and that it has reserved sufficient powers under the settlement agreement to ensure its ability to comply with all applicable grant assurances and that the lease agreements explicitly contain language to this effect as required by FAA.²⁸¹

The record shows that the FAA warned the County that the Settlement Agreement and the right of first refusal may result in violations of the grant assurances, including Grant Assurance 5, *Preserving rights and Powers*.²⁸² On August 20, 2002, the FAA's Airports Regional office (Western Pacific Region) stated that the 1993

²⁷⁶ Mr. Sax is a representative of PAC/Burrows.

²⁷⁷ FAA Exhibit 1, Item 1, p. 21.

²⁷⁸ FAA Exhibit 1, Item 1, p. 21.

²⁷⁹ FAA Exhibit 1, Item7, p. 9.

²⁸⁰ FAA Exhibit 1, Item7, p. 9; See also Town of Fairview v. City of McKinney, Docket No. 16-9904, Final Decision and Order, 2001 WL 88072, at *14 (FAA January 23, 2001) County writes “A sponsor's resistance to complying with FAA guidance, whether that guidance is in a grant assurance, advisory circular, Order, DDR and/or verbal recommendation does not necessarily constitute a violation of grant assurance #5. Without some showing of a mechanism or agreement that acts to prevent [the airport sponsor] from exercising powers to adhere to FAA's interpretation of the sponsor's Federal obligations, there can be no violation of this assurance.”

²⁸¹ FAA Exhibit 1, Item 7, p. 10. The County states that “Complainants' argument is not really that the County is without sufficient power to meet the grant assurances, but rather that the County has not sought to preserve the dilapidated facilities that Complainants prefer to use. Grant Assurance 5 does not compel such an undesirable result, and the Complainants' claim under this assurance should be dismissed.” FAA Exhibit 1, Item7, p. 10.

²⁸² FAA Exhibit 1, Item 1, Attachment 10.

Settlement Agreement, per Grant Assurance 5, “cannot be used as a reason to subordinate the County's ability to comply with the grant assurances. In other words, the county should not give away rights under the settlement agreement that would force the county to violate the grant assurances.”²⁸³

The Director notes that the opinion by the FAA’s Western Pacific Regional office is tempered by the fact that the right of first refusal in this case was granted at the beginning instead of the end of the lease term and that it was limited to one property and not a majority of properties on the airport. Both of these factors do not elevate the granting of the right of first refusal to a scale that violates Grant Assurance 5. The granting of a right of first refusal in this case was a first refusal to redevelop the leasehold in settlement of a related dispute. The use of a right of first refusal clearly established the County’s power to force PAC/Burrows to either perform or be replaced through the RFP process with another developer. Clearly, the limited scale in the use of the right of first refusal in this case did not result in the control of the majority of the properties at CRQ or extend control of the PAC/Burrows leasehold beyond its current expiration date, and thus, does not rise to the level of derogating the rights and powers of the County.

Moreover, the County proves that its has not subordinated itself to PAC/Burrows by offering copies of its leases containing clear flow-down language specific to preserving its rights and powers under Grant Assurance 5.²⁸⁴

Therefore, based on the above, the Director finds that the County by granting PAC/Burrows a right of first refusal as part of the 1993 Settlement Agreement, is not in violation of Grant Assurance 5, *Preserving Rights and Powers*, 49 USC Section 47107(a).

F. Issue 4 – Grant Assurance 35 – Relocation and Real Property Acquisition

Whether the County’s actions regarding the PAC/Burrows leasehold amounts to a violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, 42 USC § 4601 et seq.

Complainants argue that by not making available reasonable alternative accommodations and providing relocation expenses, the County has violated Grant Assurance 35, *Relocation and Real Property Acquisition*.²⁸⁵

Grant Assurance 35, *Relocation and Real Property Acquisition*, requires an airport sponsor to be guided in acquiring real property by the land acquisition policies in 49 CFR Part 24. The purpose of these requirements is to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 et seq.), which guide acquisition of real property to be acquired for Federal and federally assisted projects. Since the PAC/Burrows development at CRQ does not involve the acquisition of real property for Federal and federally-assisted projects, Grant Assurance 35 and 49 CFR Part 24 do not apply.

Therefore, the Director rejects the Complainants argument and concurs with the County that the “PAC development is not a federally-assisted project causing permanent displacement...it is a private development” causing some temporary displacements of based aircraft at CRQ.²⁸⁶ Accordingly, the County has not violated Grant Assurance 35.

G. Motion to Strike Certain Records

The County filed a Motion to Strike certain evidence from the record. The County asserts that “the letter dated December 5, 2004 sent to the docket in this proceeding by Kate Lister, President of Barnstorming Adventures, Ltd. (the "Lister Letter")” should be stricken from the record.

²⁸³ FAA Exhibit 1, Item 1, Attachment 10.

²⁸⁴ FAA Exhibit 1, Item 5, Attachments 20-25, Articles 2.4.

²⁸⁵ FAA Exhibit 1, Item 1, p. 1, 24.

²⁸⁶ FAA Exhibit 1, Item 7, p. 13.

The County maintains that “under the applicable provisions of the FAA’s Part 16 regulations, the pleadings were completed when the County filed its Rebuttal on November 24, 2004....²⁸⁷ The Complainants, who are all represented by Ronald J. Cozad, had no right to file a response to the Respondent’s Rebuttal” and that “it now appears that the Complainants’ counsel, Ronald J. Cozad, may have instigated or condoned a concerted effort to subvert the orderly procedures to be followed by the FAA in its review of Part 16 complaints.”²⁸⁸

Upon a review of the records and subsequent to the filing of the instant Complaint, Answer, Reply and Rebuttal to the Complaint, two third-party entities submitted information and documentation to the FAA which they perceive to be generally related, either directly or indirectly, to the County’s compliance with its federal obligations at issue in this proceeding. The Lister Letter precipitated the County’s Motion to Strike.

14 CFR Part 16 does contemplate instances where FAA may request additional information to be submitted to the FAA from either party or both parties, or seek information on its own. In this particular case, the FAA did not request any additional documents. The third parties providing information were not requested to do so by the FAA, and the information was not submitted in accordance with the procedures set forth in 14 CFR Part 16. In addition, neither party submitted amended pleadings to raise any new allegations or assertions related to the Lister Letter and the Jay White Letter, nor submitted motions requesting permission to amend the pleadings to seek consideration by the FAA based on the third-party submissions. On occasion, and at the discretion of the FAA, such documents may be added to the docket as well as given consideration.²⁸⁹

Consequently, upon due consideration, the Director strikes the Lister Letter and the Jay White Letter dated August 29, 2004 from the record.

VIII. FINDINGS AND CONCLUSIONS

Upon consideration of the evidence and argument presented by the parties, applicable law and policy and for the reasons stated above, the Director finds that based on a preponderance of reliable, probative and substantial evidence, and under the particular circumstances existing at the airport:

- The County, by granting leases to PAC/Burrows resulting from a right of first refusal, has not granted an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 U.S.C. § 47107(a)(4),
- The County, by its actions in accommodating as many aircraft as possible that were displaced as a result of the PAC/Burrows development at CRQ, has not violated Grant Assurance 22, *Economic Nondiscrimination*, implementing the provisions of 49 USC 47107(a),
- The County by granting PAC/Burrows a right of first refusal is not in violation of Grant Assurance 5 *Preserving Rights and Powers*, 49 USC Section 47107(a) because of the right of first refusal was used at the outset of the lease term as a way to ensure the redevelopment of one property on the airport, and the County specifically preserved its rights and powers in its contract with PAC/Burrows.
- The County has not violated Grant Assurance 35, *Relocation and Real Property Acquisition*, 42 USC § 4601 et seq, since said grant assurance and statutory requirement do not apply to the PAC/Burrows private development at CRQ.

²⁸⁷ See 14 CFR § 16.24 for additional information.

²⁸⁸ FAA Exhibit 1, Item 12, p.2.

²⁸⁹ See *Martyn v. Port of Anacortes, WA*, FAA Docket No. 16-02-03, Director’s Determination (April 14, 2003).

ORDER

ACCORDINGLY, it is ordered that:

1. The Complaint is dismissed.
2. All motions not expressly granted herein are denied.

RECOMMENDATIONS

In addition, it is recommended that in order to avoid future problems with its Federal obligations throughout its airport system, the County take action regarding the following two recommendations:

1. The County review its airport leases or related documents to verify the existence of a clause in each lease or agreement subordinating those documents to all current and future Federal obligations.
2. The County implement commercial minimum standards that would address service providers at its airports.

RIGHT TO APPEAL OR REQUEST A HEARING

Pursuant to 14 C.F.R. Part 16, the County may request a hearing under subpart F of Part 16 within 30 days after service of the Director's Determination. The County may waive a hearing and appeal the Director's Determination directly to the FAA Associate Administrator within 30 days after service of the Director's Determination.²⁹⁰ Alternatively, the County may submit, jointly with FAA counsel, a proposed consent order under §16.243(e) disposing of the case.²⁹¹ This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 U.S.C. § 46110.²⁹² Any party to this proceeding adversely affected by the Director's Determination may appeal this initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's Determination. However, if the County elects not to request a hearing or to file an appeal in writing within the time period specified in 14 C.F.R. §16.109(c), the Director's Determination becomes final.²⁹³

Date: July 25, 2005



David L. Bennett, Director
Office of Airport Safety and Standards

²⁹⁰ 14 C.F.R. §§ 16.31(c), 16.33, and 16.109(c)(2). The FAA and the County may agree to extend the date for the County to Appeal directly to the FAA Associate Administrator for agreeing to extend the 180 day period for issuing a final decision pursuant to 49 U.S.C. § 47106 (d)(2)(A).

²⁹¹ 14 C.F.R. §16.109(c)(4).

²⁹² See also 14 C.F.R. § 16.247.

²⁹³ 14 C.F.R. §16.109(d).

FAA Docket No. 16-04-08

FAA Exhibit 1

INDEX OF THE ADMINISTRATIVE RECORD

The following items constitute the administrative record in this proceeding:

Item 1

Complaint No. 16-04-08 dated August 17, 2004, including appendices containing the following documents:

- Attachment 1 Settlement Agreement & General release, 12/20/1993.
- Attachment 2 County/Page letter to Sam Talpalatsky, Esq., 10/10/1995.
- Attachment 3 Airport Master Plan (portions), 12/1977.
- Attachment 4 Sax (as attorney for Burrows) letter to County, 4/28/1998.
- Attachment 5 First Amendment to Settlement Agreement and General Release, 6/18/1998.
- Attachment 6 URS Feasibility Analysis, 5/2/2000.
- Attachment 7 FAA/Garcia e-mail, 1/24/2001.
- Attachment 8 County/Darland e-mail, 5/9/2001.
- Attachment 9 County/T. Barry letter to C. Connelly, Esq., 4/17/2002.
- Attachment 10 FAA/Garcia e-mail. 8/20/2002.
- Attachment 11 County/Kitchen e-mail, 9/27/2002.
- Attachment 12 PAAC Minutes, 11/21/2002.
- Attachment 13 Peterson & Price letter to Board of Supervisors, 12/5/2002.
- Attachment 14 Staff Responses to Peterson & Price letter, Undated.
- Attachment 15 County/PAC Power Point presentation, 12/11/2002.
- Attachment 16 Board of Supervisor's Minute Order No. 13, 12/11/2002.
- Attachment 17 County handwritten notes, 2/14/2003.
- Attachment 18 County/Drinkwater letter to FAA, 12/2/2003.
- Attachment 19 Sax letter to County, 10/2/2003.
- Attachment 20 PAAC Minutes, 11/20/2003.
- Attachment 21 Drinkwater e-mail, 11/21/2003.
- Attachment 22 Hutter e-mail exchange with T. Bosworth, Asst. County Counsel, 1/2/2004.
- Attachment 23 Drinkwater e-mail to S. Kaats, 11/17/2003; Drinkwater e-mail to F. Best, 1/1/2004.
- Attachment 24 Lohr letter to Supervisor Slater, undated.
- Attachment 25 BYCOR/Kaats letter, 1/8/2004.
- Attachment 26 Board of Supervisors Land Use Agenda Item, 1/14/2004.
- Attachment 27 CAA/Cozad letter to FAA, 1/16/2004.
- Attachment 28 Sample "pre-paid lease."
- Attachment 29 PAC letter, 7/1/2004.
- Attachment 30 PAC Notice to Vacate to commercial tenants, 7/9/2004.
- Attachment 31 (No Attachment 31 provided).
- Attachment 32 Cozad/Lardy e-mail exchange, 7/14/2004.

- Attachment 33 PAC Notice to Vacate to tie-down and hangar users, 7/20/2004.
- Attachment 34 Cozad letter, 7/25/2004.
- Attachment 35 Cornelius letter, 7/28/2004.
- Attachment 36 Lardy e-mail, 7/28/2004.
- Attachment 37 Cozad FOIA request, 7/30/2004.
- Attachment 38 PAC letter, 8/3/2004.
- Attachment 39 PAA list of Issues, 8/4/2004.
- Attachment 40 County Hangar & Tie-down availability, 7/31/2004.
- Attachment 41 Letters re County e-mails, 8/15-16/2004.
- Attachment 42 PAC proposed Extension Agreement, 8/10/2004.
- Attachment 43 Cozad letter, 8/6/2004.
- Attachment 44 County/Drinkwater letter 8/12/2004.

Item 2

Notice of Docket No. 16-04-08, September 3, 2004.

Item 3

Respondent's Request for Dismissal of Complaint, September 1, 2004.

Item 4

Respondent's Request for extension of Time to File an Answer, September 14, 2004.

Item 5

Respondents Answer to the Complaint, November 4, 2004, including appendices containing the following documents:

- Attachment 1 Letter from Palomar Airport Center concerning issues related to the complaint, from Laurie Orange to Peter Drinkwater, 10/27/2004.
- Attachment 2 Letter from Peter Drinkwater of the County of San Diego to Airport Owners Occupying Tie-down Space at McClellan-Palomar Airport, dated October 25, 2004.
- Attachment 3 Email from Martha Greenlaw to Peter Drinkwater confirming the relocation of Carlsbad Airport Supply and the sublease agreement between Magellan and Carlsbad, dated October 22,2004.
- Attachment 4 Letter from Floyd Best to Peter Drinkwater confirming that the aircraft from the YAK Flight Club relocated to the PAC leasehold to the County tie-down ramp, and confirming that no federal funds were approved for, or used in conjunction with, the PAC Development Project, dated October 26, 2004.
- Attachment 5 Letter from John Milligan to Peter Drinkwater relating to FAA approval for tie-downs on the North side of the Airport, 06/29/2004.
- Attachment 6 Aviation Lease between County of San Diego and Burrows Southcoast, Inc., dated November 6,1990.
- Attachment 7 Airport layout plans, May 13, 2004 and 09/14/2004.
- Attachment 8 Restaurant lease between County of San Die go and Palomar Airport Center, LLC commenced as of February 1, 2004.

- ❑ Attachment 9 Restaurant Rights Agreement between Palomar Airport Center, LLC and The Blue Max Palomar Airport Company, LLC, dated September 10, 2004.
- ❑ Attachment 10 Assignment and Assumption of Lease Agreement between Palomar Airport Center, LLC and The Blue Max Palomar Airport Company, LLC, dated September 10, 2004
- ❑ Attachment 11 Board of Supervisors meeting minutes of December 11, 2002 (Minute Order No. 13).
- ❑ Attachment 12 Letter from Kurt Haukohl from the California Department of Transportation, Division of Aeronautics, to Floyd Best of McClellan-Palomar Airport, regarding the State inventory and permit compliance inspection of the Airport that occurred on August 31, 2004.
- ❑ Attachment 13 Email from Cyril Flavin to Peter Drinkwater confirming that extensive documentation is not required when existing tenants of long standing renew their leases, dated October 20, 2004.
- ❑ Attachment 14 Letter Ronald Cozad sent to Laurie Orange stating that he recommends that his client withdraw from mediation, dated September 3, 2004.
- ❑ Attachment 15 Overview of County of San Diego airports, rev. 08/01.
- ❑ Attachment 16 Photographs of PAC area.
- ❑ Attachment 17 Letters from George Buley of the Federal Aviation Administration, addressing the proposed hangars and adjoining structures, dated June 29, 2004, July 14, 2004, August 1, 2004, and October 18, 2004.
- ❑ Attachment 18 Letter from Bo Donovan at Ramona Airport confirming that Roger Baker has two planes that he has relocated to Ramona Airport, dated October 26, 2004.
- ❑ Attachment 19 Email from Peter Drinkwater to Thomas Devine confirming that the west side tie-downs and Taxiway Alpha are part of the FAA project and that there are presently 37 tie-downs at the west end tie-down area, dated October 27, 2004.
- ❑ Attachment 20 Lease between County of San Diego and Palomar Airport Fuel LLC for Parcel 1, dated December 11, 2002.
- ❑ Attachment 21 Lease between County of San Diego and Palomar Airport Center LLC for Parcel 2, dated December 11, 2002.
- ❑ Attachment 22 Lease between County of San Diego and Palomar Airport Center LLC for Parcel 3, dated December 11, 2002.
- ❑ Attachment 23 Lease between County of San Diego and Palomar Airport Center LLC for Parcel 4, dated December 11, 2002.
- ❑ Attachment 24 Lease between County of San Diego and Palomar Airport Center LLC for Parcel 5, dated December 11, 2002.
- ❑ Attachment 25 Answer to the complaint in County of San Diego v. Burrows Southcoast, Inc., dated August 1993.

Item 6

Respondent's Motion to Dismiss, November 4, 2004.

Item 7

Memorandum in Support of respondent's motion to Dismiss, November 4, 2004.

Item 8

Complainants' Reply in Support of Complaint & Opposition to Motion to Dismiss, November 5, 2004.

Item 9

Declaration of Robert Baker (Complainant), November 10, 2004.

Item 10

Respondent's Rebuttal, November 30, 2004.

Item 11 – NOT USED

Item 12

Respondent's Motion to Strike, December 21, 2004.

Item 13 – NOT USED

Item 14

Airport Master Record for CRQ, 03/01/2005.

Item 15– NOT USED

Item 16

County of San Diego, Department of Public Works, McClelland-Palomar Airport Web page and associated documents, 03/01/2005.

Item 17

McClelland-Palomar Airport FAR Part 150 Study Update: Preliminary Forecast of Aviation Activity, Revised November 5, 2003.

Item 18

Aeronautical Rental Rates at San Diego County Airports, July 30, 2004.

Item 19

News Article in General Aviation News, entitled *Forcing the little guy out?* (1/28/2005).
<http://www.generalaviationnews.com/editorial/articledetail.lasso?-token.key=11042&-token.src=column&-nothing>

FAA Exhibit 2

List of Acronyms

AAIA	Airport and Airway Improvement Act of 1982
AC	Advisory Circular
AIP	Airport Improvement Program
ALP	Airport Layout Plan
ATC	Air Traffic Control
CAA	Civil Aeronautics Administration
Caltrans	California Department of Transportation
CFR	Code of Federal Regulations
CPI	Consumer Price Index
CPRA	California Public Records Act
CRQ	McClelland-Palomar Airport
DD	Director's Determination
DOT	Department of Transportation
FAA	Federal Aviation Administration
FAR	Federal Aviation Regulations
FBO	Fixed Base Operator
GA	General Aviation
ILS	Instrument Landing System
NPIAS	National Plan of Integrated Airport Systems
PAC	Palomar Airport Center
PCF	Pacific Coast Flyers, Inc.
RFP	Request for Proposal
VSRP	Voluntary Storage Relocation Program
USC	United States Code

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on _____, 2005, I caused to be placed in the United States mail (first class mail, postage paid) a true copy of the foregoing document addressed to:

Ronald J. Cozad
Magellan Aviation Building
McClellan-Palomar Airport
2006 Palomar Airport Road, Suite 214
Carlsbad, CA 92008

John J. Sansone, County Counsel
County of San Diego
By Laurie J. Orange
Thomas L. Bosworth
County of an Diego
Office of County Counsel
1600 Pacific Hwy #335
San Diego, California 92101
Telephone: (619) 531-4860
Fax: (619) 531-6005

Thomas R. Devine
Palmer & Dodge LLP
1776 I Street, N. W.
Washington, DC 2006
Telephone: (202) 756-1486
Fax: (202) 756-1301

Scott P. Lewis
William L. Lahey
Palmer & Dodge LLP
111 Huntington Avenue
Boston, MA 02199

Suzanne Ball
Office of Airport Safety and Standards