U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

August 15, 2008

Mr. Randall H. Walker
Director of Aviation
Las Vegas McCarran International Airport
Postal Box 11005
Las Vegas, NV 89111-1005

Dear Mr. Walker:

Thank you for your June 26 letter explaining the Clark County Department of Aviation's (County) proposals for more effective use of McCarran International Airport (LAS), through fee-based approaches or a regulatory method to manage congestion, and addressing related issues at LAS. We are pleased to provide you with guidance on your proposals.

We base our assistance on this letter on the statutory airport grant assurances on fee reasonableness and unjust discrimination, 49 U.S.C. § 47107(a), and on the airport rates and charges policies issued by the Office of the Secretary (OST) and the Federal Aviation Administration (FAA). See *Notice of Policy Regarding Airport Rates and Charges*, 61 Federal Register 31994 (June 21, 1996), as amended at 73 Federal Register 40430 (July 14, 2008) (together, the Policy). As you know, these statutes and policies provide a framework to ensure that airport fees imposed on aeronautical users of the airport are fair and reasonable, and not unjustly discriminatory. They permit airports to set fees according to a residual or compensatory approach, any combination of the two, or according to another rate-setting methodology that is consistently applied to similarly situated users and confirms to the OST/FAA Policy. Revenues from airfield fees imposed by an airport proprietor may not exceed the costs to the proprietor of providing the airfield services and assets. Policy ¶ 2.2. In addition, fees applied to international flights must confirm to our international obligations. See Policy, 73 Federal Register at 40444.

Citing the FAA publication, *Capacity Needs in the National Airspace System 2007-2025* [FACT 2] (May 2007), you note that LAS is rapidly approaching its maximum practical capacity and indicate that without planned improvements, the FAA projects the airport to be congested by 2015. The County wants to alleviate any capacity crunch at LAS before it adversely affects air travelers or the Las Vegas economy. The County plans to construct a new airport in the Ivanpah Valley, although that may take a decade or more to become operational.

In the Notice published in July, the Department adopted amendments to the Policy intended to allow airport operators to address congestion. In connection with the July Notice, the Department posed, in Docket-FAA-2008-0036, a list of airports considered congested currently and expected to be congested in the future, as defined in the amended Policy. www.regulations.gov/FAA-2008-0036-0100.1. LAS is on both lists. It not only is forecast to be congested in 2015, it is considered currently congested because it generated more than one percent of the delays in the national airspace system in calendar year 2007. The Notice also explained, however, that "while the definition defines an eligible category of airport for use of fees to control congestion, there must be a congestion problem, and those fees must still be reasonable." 73 Federal Register at 40443. While we can discuss the general application of the Policy to the fee methodologies you have proposed, any evaluation of actual fees justified by congestion would require a more thorough explanation of the actual nature of congestion at LAS at the time and the nature of the congestion forecast in the future, and the effect of the proposed fees on that congestion.

We commend you for your intention to undertake meaningful consultations with your aeronautical users before structuring the rates and charges methodology at LAS. We strongly support a full exchange of information between airports and users well in advance of any imposition of a new fee or adoption of a new fee methodology. Meaningful consultation entails providing adequate information and justification to users, enabling them to evaluate the airport proprietor's proposed new fee or fee approach. Due regard should be given to the views of the users and we encourage airports to negotiate with airport users over the establishment of new fees or fee methodologies.

Your first set of questions pertains to Rates and Charges, and the next set of questions refers to a Regulatory Approach. Our answers correspond to your labeling and numbering system.

2.0: RATES AND CHARGES

"2.1 Costs to be included in the rate base"

You inquired as to whether you could include the following costs in the overall airfield rate base: all airfield construction costs, financing costs, operations and maintenance costs, easements and noise-based costs, damages (including those from inverse condemnation cases based on aircraft operations), a share of public use roadway costs a share of the County reliever airports, and a share of the County overhead costs.

You may recover a portion or all of these costs, subject to a number of conditions. First, pursuant to paragraph 2.3 of the Policy, you must employ a reasonable, consistent, and transparent (that is, clear and fully justified) method to establish the airfield rate base and allocate these costs. Second, pursuant to paragraph 2.7.2, none of the costs allocated to the users, that are paid for (or already the subject of obligations from) FAA-issued grants or approved passenger facility charges, may be included in the rate base. See, e.g., Second Los Angeles International Airport Rates: Proceeding, Order 1995-12-33 (*LAX II*),

at 36-41 (December 22, 1995), *affirmed sub nom*., City of Los Angeles v. DOT, 165 F.3d 972 (1999), *reh'g denied*, 179 F.3d 937 1999), *cert. denied*, 528 U.S. 1072 (2000). Third, our Policy provides guidance for the types of costs you may recover for airfield use and the types of allocation methodologies you may use. In our preliminary answers, we assume you are referring to the recovery of actual costs, calculated according to generally approved accounting principles.

Airfield construction costs and *Operations and Maintenance costs* may be recovered pursuant to several provisions in the rates and charges Policy. These include paragraph 2.2 of the Policy, restricting airfield revenues recovered from users to the costs to the airport proprietor of providing airfield services and airfield assets currently in use (unless the airport is congested); paragraph 2.3, which defines the airfield rate bas as "the total of all costs of providing airfield facilities and services to aeronautical users (which may include a share of public-use roadway costs allocated to the airfield in accordance with this policy) that may be received from aeronautical users through fees charged for providing airfield aeronautical services and facilities"; paragraph 2.4.5, providing that capital and operating costs may be allocated among cost centers based on the principle of cost causation; and paragraph 2.4.5(a), providing that costs of airfield facilities and services directly used by the aeronautical users may be fully included in the rate base to establish landing fees.

Financing costs may be recovered pursuant to paragraph 2.4.4 of the Policy, which provides that the rate base may include amounts needed to fund debt service and other reserves and to meet cash flow requirements specified in financing agreements or covenants.

Easements and noise-based costs may be rate-based, pursuant to paragraph 2.4.2 of the Policy, to the extent you incur a corresponding actual expense, including but not limited to the costs of remediating environmental contamination, mitigating the environmental impact of an airport development project, abating aircraft noise and insuring against future liability for environmental contamination.

Damages, including those from inverse condemnation cases based on aircraft operations, would likely constitute operating costs of the airport. The extent to which they may be rate-based to the operations-based component would need to be determined based on the justification for the allocation methodology and types of damages.[1]

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[1] In Footnote 11 of your letter, you note that McCarran Internat'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S.Ct. 1260 (2007) and Vacation Village v. Clark County, Nevada, 497 F.3d 902 (9th Cir. 2007), "are based on a finding of *per se* taking due to flights by aircraft…regardless of their size…." The U.S. clarified its view of the holdings in those cases, in its *amicus* brief on the petition for a *writ of certiorari* in Vacation Village, by noting:

> [I]f the state court awarded significant monetary relief based on the fact of overflights alone, without evidence that the overflights had materially reduced the value of the subadjacent property, its decision might be viewed as the functional equivalent of a state law penalty or tax on the operation of the airport. Such a state law penalty or tax would raise significant preemption concerns. Cf. 49 U.S.C. § 40116(b) (providing

A share of maintaining airport access roads may be rate-based, pursuant to paragraph 2.3 of the Policy, which recognizes that a share of public-use roadway costs may be rate-based and allocated to the airfield cost center. Under paragraph 2.4.5(b), the airfield rate-base may be charged for a portion of a supporting facility or service, even though that facility or service also supports non-aeronautical uses. The airfield rate base may include only a portion of the costs, not to exceed an amount reflecting the respective aeronautical purposes and proportionate aeronautical uses of the facility. The portion must be allocated through a reasonable, transparent, and not unjustly discriminatory methodology. The airfield may not be allocated all the aeronautical share of commonly-used facilities or services unless the airfield is the only aeronautical use the facility or service supports. *Id.*

We held in the Los Angeles International Airport Rates Proceeding (*LAXI*), Order 1995-6-36 (June 30, 1995), at 30-33, *affirmed sub nom.*, City of Los Angeles v. DOT, 103 F.3d 1027 (D.C. Cir. 1997), that an airport may assign part of the costs of building and operating access roads to the airfield and apron cost centers, because access roads are primarily required to enable travelers to reach their flights. A share of access road costs may be allocated to the airfield and apron cost centers, even though the roads are contiguous with the terminal, not with the airfield facilities. We did point out, however, that, to achieve transparency, an airport proprietor should justify its allocation methodology.

A portion of the costs of the County reliever airports may be rate-based under paragraph 2.5.4 of the Policy, which permits the County to rate-base airfield costs associated with another airport currently in use if, as relevant here, the County is also the proprietor of the other airport and the other airport is designated as a reliever airport for the first airport in the FAA's National Plan of Integrated Airport Systems. The amended policy explains, in paragraph 2.5.4(e), that customary airfield cost center charges may be rate-based to the first airport and that the total airfield revenue recovered from users of both airports may not exceed the total allowable aggregate costs of the two airports.

An allocable share of the County administrative overhead costs may be recovered as director indirect costs allocated to the appropriate cost centers. The principles enunciated in paragraph 2.7.1 require that indirect costs may be based on a reasonable, transparent cost allocation formula calculated consistently for other units or cost centers within the County's control. Common costs (costs not directly attributable to a specific user group or cost center) maybe recovered, under paragraph 3.4.1, which requires that the costs must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation methodology applied consistently, and which does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups.

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that a State or political subdivision "may not levy or collect a tax, fee, head charge, or other charge" on the transportation of individuals in air commerce)."

Brief of the U.S. as *Amicus Curiae* in Clark County, Nevada v. Vacation Village, No. 07-373, dated May 2008, pages 14-15.

"2.2 Allocation of costs between general aviation and commercial airport users"

You indicated that you are considering allocating airport costs between air carriers, on the one hand, and general aviation users, on the other hand, based on their respective uses of airport facilities. Your proposed allocation methodology would recognize that general aviation users make use of separate hangars, ramps and FBOs on the west side of LAS whereas commercial service airline facilities are located on the east side of LAS.

As a general rule, LAS may distinguish among groups of users, such as commercial service airlines and general aviation users, to allocate airport costs based on the uses made by these groups, including uses applicable to different locations. Under paragraphs 3 and 3.1 of the Policy, a properly structured allocation of fees based on user grouping need not be unjustly discriminatory, if (1) LAS applies a consistent methodology in establishing fees for comparable aeronautical users, and (2) assuming a cost-based methodology is utilized, aeronautical fees imposed on a particular group did not exceed the costs allocated to that group. LAS must also adhere to the principles articulated in paragraph 3.4, that allowable costs must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting method. LAS must apply the rate methodology consistently and not require any user group to pay costs properly allocable to another user group.

As you know, we have reviewed disputed fees for purposes of determining whether they are reasonably allocated to the complaining airlines, under the airport-air carrier fee dispute program. 49 U.S.C. § 47129 (Section 47129). Below is a brief distillation of some of our pertinent decisions in fee allocation disputes, to offer you further guidance and caution on proper allocation methodologies.

In some cases we heard under Section 47129, the evidence showed that certain allocation methodologies were unreasonable. For example, we found the Port Authority of New York and New Jersey's expense reclassification costs for abandoned projects at Newark Liberty International Airport unreasonable for lack of adequate justification. Brendan Airways, LLC v. The Port Authority of New York and New Jersey, OST Order 2005-7-11 (June 14, 2005), *affirmed sub nom.*, Port Auth. of N.Y & N.J. v. DOT, 479 F.3d 21 (D.C. Cir. 2007). In that case, we also found that the Port Authority's chosen methodology for allocating rent payable to the City of Newark was unreasonable and inconsistent with the rates and charges policy. *Id.*

In *LAX II*, we found the City of Los Angeles' allocation of a fire department unit to the landing fee rate base was unreasonable because it was not based on actual use. In that case we also found it improper for the city to charge the work of its organized crime intelligence unit to airport users and, similarly, that the cost of the policy department's off-airport activities was not suffciently related to the provision of airport services to be reasonably charged to the airport. Additionally, we determined that debt service coverage charge was unreasonably allocated to the airfield cost center because it

insufficiently accounted for cash flows that the airport realized through amortization and depreciation charges it had charged to the airfield cost center. *LAX II*, at 44-45.

We mention these cases to emphasize that an airport must determine cost allocation in a reasonable, transparent manner, free of unjust discrimination. On your essential question, however, about whether an allocation that meets these requirements may consider different uses of the airport based on the respective locations of the users, the Department's Policy would permit such consideration.

"2.2.1 Taxiways and Ramps"

You indicate that you may justify allocating airfield fees separately for commercial service airlines and for general aviation users, based on the location and use, respectively, of each user group. For example, the LAS taxiways and ramps servicing these two groups are separately located and used by the groups. In this regard, you correctly note that aeronautical use fees must not be unjustly discriminatory, and the airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users.

Allocating the costs of the taxiways and ramps used by commercial airlines separately from the costs of the taxiways and ramps used by the general aviation users would be consistent with the rates and charges policy as long as such allocation were reasonable, transparent, justified, and not unjustly discriminatory.

"2.2.2 Runways"

You also mentioned that you are considering designing a landing fee that may account for the time an aircraft uses a particular runway. Such a fee would be partly weight-based and partly per-operation-based. By adopting a dual-element landing fee, appropriate pricing signals could be sent to aircraft operators. You indicated that you have not developed a mathematical formula for such a two-part landing fee, and may consider a minimum landing fee per operation and a weight-based fee in addition. You also expressed a desire to allocate, to all aircraft equally, the costs of runway maintenance resulting from environmentally-caused runway degradation; you stated that you had not yet decided upon the proper allocation for certain County overhead costs.

We recently clarified that a dual-element landing fee, in general, would be permissible. Our clarified rates and charges policy now expressly states that a combination of a per-operation charge and a weight-based charge that is reasonably allocated to users on a rational and economically justified basis, and that does not exceed allowable airfield costs, would be allowed. Policy ¶ 2.1.4. Your letter notes that LAS "faces real and growing congestion." As stated in paragraph 2.1.4(a) of our Policy, which applies to all airports, congested or otherwise, "The proportionately higher costs per passenger for aircraft with fewer seats that will result from the per-operation component of a two-part fee may be justified by the effect of the fee on congestion and operating delays and the total number of passengers accommodated during congested hours." While an airport

need not be congested to apply a two-part fee, the fee must be justified separately, if not based on congestion.

The Policy clarification was intended to provide more flexibility for airport operators to price facilities and services for optimal and efficient use. Although the Policy does not define the elements of a "per operation" charge, the term is sufficiently flexible to cover a charge calculated to correspond to the rating time for an aircraft's runway encumbrance during a flight operation. This type of measurement, which would refer to the performance characteristics of aircraft types, would be derived through rating aircraft types under controlled conditions, such as certifications. That is, under the same constant operating conditions, aircraft type A will perform a landing operation in 100 seconds while aircraft type B requires 50 seconds. Of course, airport-specific runway configuration and runway exists would need to be factored into such an evaluation.

We note, however, that our Policy would not permit an airport proprietor to include in a "per operation" charge the amount of time an aircraft uses in the air on its approach or landing. Such flight time occurs in navigable airspace, which is within the exclusive sovereignty of the U.S. Government. 49 U.S.C. § 40103(a)(1), (2). Further, the navigable airspace includes airspace more than 500 feet above the ground and any airspace below 500 feet needed for takeoff or landing. 49 U.S.C. § 40102(32); Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206 (Fed. Cir. 2005). In addition, Federal statutes on airport fees provide for fee assessments based on the use of an airport landing area or airport facilities, not for use of the overlying airspace. 49 U.S.C. § 40116, 47107.

We assume that any fee related to time on the runway would be justified by congestion and applied only in hours of actual or anticipated operating delays. This is because a user's occupation of the runway typically would have no effect on other operators unless there were other operators seeking use of the runway at the same time, resulting in delays.

The costs of environmental degradation to the runways may also be recovered, as long as those costs are allocated to operations in a reasonable, transparent, justified, and not unjustly discriminatory manner. In this respect, we point out that, unlike the situation in Bombardier Aerospace Corp. and Dassault Falcon Jet Corp. v. City of Santa Monica, FAA Docket No. 16-03-11 (January 3, 2004) (Director's Determination) – involving a single runway subject to more or less equal use by all Santa Monica Airport users – at LAS, many general aviation users require and use far less of the runway system, which was provided for air carrier aircraft.

"2.2.2 Aircraft Rescue and Firefighting Facilities"

You indicated that the County is considering including all Aircraft Rescue and Firefighting Facilities (ARFF) costs in the overall rate base, and allocating the costs on a per-aircraft-operation basis. You pointed out that LAS serves many general aviation users operating large aircraft, which benefit from the ARFF Index. You requested our guidance on the allocation of ARFF costs between air carriers and general aviation users,

noting that we had previously permitted LAX to allocate a share of costs pertaining to a back-up ARFF unit – used for both airfield and non-airfield incidents – to the airfield cost center, when justified by purpose (using stand-by time as a proxy) and by use. You asked whether the same reasoning would prevail for allocating costs *within* the airfield cost center, between commercial operations and general aviation operations. Specifically, you ask whether DOT is "open" to the proposition "that all aircraft operators should pay equally for facilities and equipment that will serve any aircraft that needs assistance."

An airport proprietor may be justified in allocating ARFF costs among aeronautical users on the basis of both "aeronautical purposes" and "proportionate aeronautical uses." We would indeed rely, at least for preliminary guidance, on the analogous principles articulated in paragraph 2.4.5 of the Policy relating to costs of facilities shared by aeronautical and non-aeronautical users, in reviewing any allocation of ARFF costs to commercial service airlines, on the one hand, and to general aviation users, on the other hand. We believe this method would be consistent with our *LAX I* and *LAX II* holdings.

In *LAX I*, we found that an airport proprietor's allocation of the cost of such services as police and ARFF to the airfield and apron cost centers must be justified and transparent, and consider both purpose and use (of a back-up fire unit). *LAX I*, at 42-43. We found, as you pointed out, that Los Angeles may not allocate most of the costs of a back-up fire unit to the airfield cost center, because the fire unit use was mostly attributable to incidents that occurred in the terminal and parking lots. We elaborated on this finding in *LAX II*, where we referred to the purpose and use considerations in the rates and charges policy and also required that the airport sponsor's allocation method should be applied consistently. *LAX II*, at 20-24. We would apply these principles in evaluating any allocation of ARFF costs between air carriers and general aviation users.

"2.3 Credit for Non-Airfield Revenues"

You stated the County's intention to change its fee methodology at LAS to provide credits against overall airport charges to commercial service airlines and general aviation users. For example, commercial service airlines would receive credits of net concession revenues, generated in the terminals and related ground facilities, on a per-passenger basis. General aviation operators would receive credits of net FBO rents and fuel flowage fees based on the number of operations.

We believe that such a methodology would be a permissible form of rate-making, consistent with paragraph 2.1 of the Policy, which explains that Federal law does not require a single approach to airport rate-setting, and fees may be set according to a residual or compensatory methodology, or a combination of both, as long as the methodology is applied consistently to similarly situated aeronautical users.

"2.4 Peak-Period Pricing"

You indicated that the County is considering a peak-hour pricing methodology to alleviate airfield congestion during the busiest times at LAS.

The County may be able to implement a revenue-neutral peak pricing landing fee system at LAS under paragraph 3.2 of the Policy, which provides that a properly structured peak pricing system that allocates limited resources using price during periods of congestion will not be considered unjustly discriminatory. Peak period fees must be consistent with the principles expressed in the rates and charges policy and enhance the efficient utilization of the airport. *Id.* We may find it reasonable for the airport operator to apply peak period pricing charges, however, when there is, or there is an expectation of, a certain level of operating delays at the airport (under paragraph 6(c)), when aeronautical users are consulted well in advance, and when revenue neutrality would be maintained by reducing landing fees to adjust for revenue received from peak hour surcharges.

The only case in which DOT has formally considered the applicability of the statutory requirements on fee reasonableness to a congestion pricing plan at an airport is the Opinion and Order issued December 22, 1988, on the Investigation into MassPort's Landing Fees. The U.S. Court of Appeals for the First Circuit upheld that Order. New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989). In its administrative decision, DOT found that a prior congestion pricing plan adopted by MassPort was unreasonable, unjustly discriminatory, and preempted under Federal law. However, the decision also noted that a properly structured peak period pricing plan would not be considered discriminatory, meaning that DOT would not find it unjustly discriminatory *per se* to impose greater costs on users choosing to operate in peak hours and reduced costs on operations in off-peak hours. DOT reiterated this policy on peak period pricing in its regulations implementing the Airport Noise and Capacity Act of 1990 (49 U.S.C. § 47521, *et seq.*). See 14 CFR §161.5 (exempting from the definition of "noise or access restrictions" a peak pricing program designated for the purpose of aligning the number of aircraft operations with airport capacity). We also stated this policy in paragraph 3.2 of our Policy, and in a June 10, 2004 FAA letter to the Massachusetts Port Authority on its proposed Demand Management Plan or Boston Logan International Airport.

Your letter indicated your opinion that LAS will become a "congested" airport, under the amended rates and charges policy. As discussed above, LAS may technically be considered "congested" at this time because it has been found to generate more than one percent of national system delays, but it is not clear which hours or conditions have this effect. It is also forecast to be congested in 2015. We find that LAS qualifies under paragraph 6(b) of our Policy as a "future congested" airport, because it is forecast to meet a defined threshold level of congested reported in the future Airport Capacity Task 2study. A "future congested" airport, as explained in paragraph 6.2 of the Policy, may adopt measures to address congestion, which would be effective when the airport meets the definition of a congested airport or is anticipated to do so. Such measures may include revenue-neutral two-part landing fees calculated to reduce delays and congestion

at congested hours, pursuant to paragraph 2.1; rate-basing a portion of the costs of an airfield project under construction pursuant to paragraph 2.5.3, assuming the airport operator has obtained all planning and environmental approvals and financing, construction has commenced, added costs would reduce or prevent congestion and delays, and appropriate cost allocations and calculations are performed; and adding a portion of the airfield costs of another airport currently in use to the rate-bas of the first airport during congested hours, if this would reduce or prevent congestion and operating delays at the first airport during those hours, pursuant to paragraph 2.5.4(a).

3.0 REGULATORY APPROACH

You state that, as an alternative to a new fee methodology, the County is considering relocating Category A and B aircraft operations (as their leases expire) from LAS to HND and VGT, County-owned reliever airports. As justification, you suggest that this would ensure that all classes of aeronautical needs would be fully accommodated within the County airport system, and the relocation would not affect Category C and D general aviation. You also say that removing those operations using an excessive amount of runway capacity would benefit the overall aviation system capacity. Additionally, you support this approach as necessary for the safe operation of the airport or to serve the civil aviation needs of the public by alleviating congestion at LAS, increasing the capacity of the southern Nevada airport system, and providing access to Category A and B aircraft at reliever markets. Further, you believe that the Airport Noise and Capacity Act procedures, 14 CFR Part 161, would not apply to the relocation of Category A and B aircraft because the County would be engaging in a permissive allocation of traffic within its airport system, affecting mainly non-stage-related propeller-driving aircraft, enhancing capacity in the Las Vegas region, and it would not be abating noise. Additionally, you refer to the FAA Compliance Handbook for the proposition that a proprietor of a multiple system of airports may allocate traffic within its system. You also suggest that we consider such a reallocation similar to a peak-pricing concept, which is exempt from the ANCA process.

We have considered your request for guidance on this regulatory approach and must disagree that you may lawfully ban Category A and B aircraft from LAS and relocate them to available reliever airports within the County system. In the matter of Compliance with Federal Obligations by the City of Santa Monica, FAA Docket No. 16-02-08 (May 27, 2008) (Director's Determination). See also, AOPA members v. City of Pompano Beach, FAA Docket No. 16-4-01 (December 15, 2005) (Director's Determination), pp. 25-26; Ultralights of Sacramento v. County of Sacramento, FAA Docket No. 16-00-11 (August 9, 2001) (Director's Determination), pp. 11-12; United Aerial Advertising v. Suffolk County, FAA Docket No. 16-99-18 (May 8, 2000) (Director's Determination), p. 13. As a condition to the County's receipt of AIP grants, the County agreed to make the airport available for public use on fair and reasonable terms, without unjust discrimination, and to permit no exclusive right for use of the airport. 49 U.S.C. §§ 47107(a), 40103(e). These grant assurance obligations, by their terms, continue in effect for 20 year for development projects, and in perpetuity for obligations in surplus property deeds and grants used for purchase of airport land. These

assurances apply to LAS, and to some extent to each airport within the County's airport system.

An airport proprietor's rights to adopt limitations on access are extremely limited. It may exercise its proprietary powers only in a manner that is reasonable, nondiscriminatory, nonburdensome to interstate commerce, advances a legitimate local need, and is designed not to conflict with the Airline Deregulation Act of 1978 and its policies. Arapahoe County Public Airport Auth. v. FAA, 242 F.3d 1213.1221-22 (10th Cir. 2001).

Access restrictions are not favored and may be found to violate an airport's grant assurances. For example, the FAA found that Arapahoe County's ban on scheduled service at Centennial Airport was not justified by legitimate safety, environmental, or ground congestion concerns and violated the grant assurances. Arapahoe County, *op cit.* Although there has been no final agency decision, the City of Santa Monica's ban on Category C and D aircraft from operating at Santa Monica Airport has been determined initially to violate the airport's grant assurances and not be justified on safety grounds. City of Santa Monica, *op cit.*

The FAA Compliance Handbook mentioned in your letter narrowly permits a multi-airport proprietor to designate a certain airport for use by a class or classes of aircraft only when the volume of air traffic approaches or exceeds the maximum capacity of the first airport, the classes of aircraft can be fully accommodated within the system without unreasonable penalties, and the restriction is fully supportable as beneficial to overall system capacity. Order 5190.6A ¶ 4-8d. This provision requires extensive, documented justifications of air traffic volume, reasonableness of accommodations, and system capacity benefits. It also requires FAA approval, because restrictions at one airport can affect the national airspace system, and inconsistent, uncoordinated local restrictions can impede the national air transportation system. Finally, in the same paragraph, the Handbook makes clear that the multi-airport policy may not be used to justify a ban on general aviation operations at a commercial airport.

The Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47521 *et seq.*, and DOT's regulations at 14 CFR Part 161, describe the means by which an airport proprietor may restrict Stage 2 or Stage 3 aircraft at its airport. See also, City of Naples Airport Auth. v. FAA, 409 F.3d 431 (D.C. Cir. 2005). The FAA has relied on airport proprietors to utilize the Part 161 process when imposing restrictions on Stage 2 or Stage 3 aircraft.

We commend your efforts to obtain guidance for the purpose of proceeding in a manner consistent with law and DOT policy, and we are pleased to provide you with that guidance in this letter. We note, however, that we do not intend this letter to prejudge any issues or facts that may be adjudicated pursuant to the filing of a complaint by an air carrier or aeronautical user, or a request by an airport, pursuant to the airport air carrier or aeronautical user, or a request by an airport, pursuant to the airport-air carrier fee dispute program, 49 U.S.C. Section 47129 (see also 14 CFR §302.601 *et seq.*); or that may be heard either pursuant to a complaint or an FAA investigation initiated against the County as an AIP grant sponsor under 14 CFR Part 16 regarding compliance with its grant assurance obligations (see 49 U.S.C. § 47107(a)). Although we hope you find this

guidance useful, we have neither seen the details of fully developed fee proposals nor had the benefit of user comments on those proposals. Understandably, we cannot take any position on the propriety of any specific fees that would follow implementation of the methodologies discussed in your letter, which are yet to be finalized. To provide any further guidance, we would need more information concerning the nature of the congestion problem and how these fees would address that problem.

Please feel free to contact me should you have any further questions.

Sincerely yours,

/s/

D.J. Gribbin