



MEMORANDUM

TO: Peter B. Camp, Executive Director
SNOHOMISH COUNTY

FROM: KAPLAN KIRSCH & ROCKWELL

DATE: January 7, 2009

SUBJECT: Obligations to Accommodate Commercial Service

I. Introduction and Summary

Summary

Snohomish County has received letters from two airlines indicating an interest in providing commercial passenger service to Snohomish County Airport, Paine Field. This *non-confidential white paper* examines Snohomish County's legal obligations for responding to those requests to accommodate commercial passenger service at Paine Field and sets out three options for satisfying the County's legal obligations. We have avoided any privileged discussion in this memorandum to assist the County Executive and County Council in their public discussions so that they can collectively provide direction to staff and counsel on a negotiation strategy.

We have concluded that the County is legally and practically obligated to negotiate a use-and-lease agreement with these two airlines. While there are both legal and practical impediments to successful negotiations, the County's legal obligations under federal law place a heavy burden on the County to attempt to accommodate these carriers. The manner in which they are accommodated and the County's role in constructing facilities are subject to more discretion. We conclude that the optimal approach *to best protect the County's interests* is for the County to offer to build a *minimal* terminal facility that satisfies the County's legal obligations and the carriers' needs, but does not provide unfettered opportunity for growth.

Airline Expressions of Interest

Allegiant Air has indicated an interest in providing service between Paine Field and Las Vegas and potentially other west coast destinations.¹ Allegiant's proposal to negotiate with Snohomish County tentatively contemplates two to three MD-80 flights a week to Las Vegas. The Allegiant

¹ Letter from Robert Ashcroft, Vice President, Planning, Allegiant Air, to David Waggoner, Airport Director (May 12, 2008).

aircraft have a capacity of about 150 passengers. Allegiant has not formally requested opening of negotiations and has not indicated the date of proposed initiation of service.

Horizon Air Industries has proposed four to six daily flights to Spokane and Portland using Bombardier Q400 turboprops.² These aircraft have an approximate seating capacity of 74 passengers. Horizon has formally requested³ that the County start negotiations during the first week of January so that Horizon can initiate service on April 1, 2009.⁴

II. Snohomish County's Legal Obligations

To understand how the County might respond to the two letters of interest, it is first important to review the County's legal obligations with respect to requests to allow commercial passenger service. These obligations derive principally from regulations and policies of the Federal Aviation Administration ("FAA") and underlying federal law.

General Obligations

Snohomish County has received federal Airport Improvement Program (AIP) grant funds for Paine Field.⁵ As a condition of accepting AIP funds, Snohomish County has entered into the standard statutorily-mandated grant agreement with the FAA.⁶ That agreement includes many written assurances to the federal government, including that the County will "make the 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."⁷

Portions of Paine Field were owned by the federal government during World War II. Title to the airport property was transferred to Snohomish County subject to certain deed restrictions

² Letter from Kenneth P. Stevens, Director, Airport Affairs, Horizon Air, to David Waggoner, Airport Director (Dec. 11, 2008).

³ A formal request from an airline that indicates a present intent to initiate service is legally significant and triggers the County's legal obligations discussed in this memorandum. See Final Decision and Order, *Flamingo Express, Inc. v. City of Cincinnati*, Docket No. 16-06-04 (F.A.A. Aug. 9, 2007) *aff'd*, 536 F.3d 561 (6th Cir. 2008) (FAA final order in Part 16 proceeding regarding Lunken Airport's obligation to accommodate new passenger service). FAA staff informs us that Horizon's December 11 letter satisfies the standard set forth in the *Lunken* case.

⁴ Letter from Dan Russo, Vice President Marketing and Communications, Horizon Air, to Peter B. Camp, Snohomish County (Dec. 17, 2008).

⁵ The FAA has made many discretionary grants to Snohomish County over the course of the last 50 years. The County has received almost \$60 million in federal grants for airport improvements. In addition, under the terms of a proposed federal economic stimulus that is now pending before Congress, the County will become eligible for substantial discretionary grants for immediate projects. FAA staff has informed Airport staff that the stimulus package grants to the County could exceed \$70 million – more than the total of all grants that the County has ever received for Paine Field.

⁶ See Fed. Aviation Admin., Assurances, Airport Sponsors, Part C: Sponsor Certification, available at http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf Grant Assurances are mandated by federal law pursuant to which Snohomish County makes certain commitments in exchange for receipt of federal grant funds. See 49 U.S.C. § 47107.

⁷ Grant Assurance 22 (Economic Non-Discrimination).

mandated by the Surplus Property Act of 1944 which, for the purposes of this memo, impose substantially similar obligations to those set forth in the Grant Assurances.⁸

The County is not eligible to take advantage of a very limited statutory exemption from the Grant Assurances that allows certain airports to ban scheduled passenger service.⁹

Like any other proprietor of a federally-obligated airport, Snohomish County is required to make Paine Field available to all aeronautical users. This principle overlays all federal law and regulation and defines the basic scope of the County's legal obligations. While there are narrow exceptions and limitations to this obligation, federal law prohibits the County from unreasonably denying access to Paine Field to any aeronautical user, including commercial passenger airlines. The County can lawfully deny access to Paine Field only if it has reasonable grounds to do so that are accepted by the FAA,¹⁰ and any such restrictions are neither unjustly discriminatory nor unduly burdensome to interstate commerce.¹¹

With respect to the lease of vacant land for aeronautical use, FAA policy provides that the airport sponsor has the following obligation:

[T]o make available suitable areas or space on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public (i.e., air carrier, air taxi, charter, flight training, crop dusting, etc.) or support services (i.e., fuel, storage, tie down, flight line maintenance, etc.) to aircraft operators. This means that unless it undertakes to provide these services itself, the airport owner has a duty to negotiate in good faith for the lease of

⁸ Surplus Property Act of 1944, Pub. L. 80-289. For a discussion of the deed restrictions applicable to airports built on property transferred from the federal government, see FAA Order 5190.6A, *Airports Compliance Requirements* (1989). The currently required restrictions are found at 49 U.S.C. § 47152.

⁹ 49 USC §§ 47107(q) and (r).

¹⁰ In all cases, the FAA will make the final determination of the reasonableness of the airport sponsor's restrictions, which deny or restrict use of the airport. See FAA Order 5190.6A, § 4-8.

¹¹ An airport sponsor may institute Minimum Standards based on safety concerns. FAA Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities* (August 28, 2006), discusses FAA policy regarding the development and enforcement of airport minimum standards. Grant Assurance 19 requires that an airport proprietor ensure the airport and all facilities necessary to serve aeronautical users are operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable federal, state, and local agencies for maintenance and operation. The airport may impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. See FAA Order 5190.6A, § 3-12. 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 access to a public-use airport. FAA's determination is generally limited to whether the airport sponsor's standards are reasonable, or are unjustly discriminatory, or whether the standards result in an attempt to create an exclusive right. See FAA Order 5190.6A, § 3-17(b).

such premises as may be available for the conduct of aeronautical activities.¹²

The FAA, in a letter dated June 4, 2008, concisely summarized these obligations in the context of Allegiant's preliminary expression of interest in serving Paine Field:

[T]he County [must] "make the 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." . . . [A]n airport sponsor is obligated to make areas available for lease on reasonable terms and to negotiate in good faith for the lease of parcels to conduct aeronautical activities.¹³

In summary, the FAA has opined that, when it receives a proposal to initiate commercial service, an airport sponsor like Snohomish County:

- Must negotiate in good faith for the lease of vacant property for aeronautical use.
- Must make space available to an air carrier on reasonable terms and conditions.
- Cannot accommodate one air carrier in a manner that would effectively foreclose a second air carrier at the airport.
- Is not required to construct facilities to accommodate the carrier if such facilities do not already exist.
- Cannot impose unreasonable, arbitrary or unjustly discriminatory restrictions on operations by the air carrier.

For a more general discussion of Snohomish County's legal authority to restrict access to Paine Field by commercial passenger operators, we refer to our firm's memorandum dated October 12, 2006, entitled "Questions Presented by MRD Panel on Snohomish County's Legal Authority Regarding Snohomish County Airport" which is included as an appendix to the *Report on Mediated Role Determination for Paine Field*.¹⁴

¹² FAA Order 5190.6A, § 4-15.

¹³ Letter from Carol Key, Manager Seattle Airports District Office, FAA, to David Waggoner, Airport Director (June 4, 2008).

¹⁴ Camp, *Report on Mediated Role Determination for Paine Field* (May 16, 2007). Our memorandum was written before the FAA and federal court decisions in the *Lunken* case which clarified an airport sponsor's obligations to negotiate with a prospective air carrier. FAA, Final Decision and Order, *Flamingo Express Inc. v. City of Cincinnati*, Docket No. 16-06-04 (F.A.A. Aug. 9, 2007) *aff'd*. 536 F.3d 561 (6th Cir. 2008) The *Lunken* case is discussed in more detail later in this memorandum.

Airport Operating Certificate

An airport operator must have an Airport Operating Certificate (“AOC”) issued by the FAA before it can lawfully accommodate “any scheduled passenger operation of an air carrier operating aircraft designed for more than 9 passenger seats.”¹⁵ Correspondingly, an air carrier cannot conduct passenger operations at an airport that does not have the requisite certification to accommodate the operations.¹⁶ The County currently holds what is known as a Class IV Airport Operating Certificate. While no airport operator is required by federal law to seek an AOC in the first instance,¹⁷ once an airport operator secures an AOC, it has an obligation to comply with the regulations prescribed by the FAA for commercial service airports.¹⁸ Although certified airports have some flexibility in determining which class of AOC to seek, airports are limited by their “independent obligation . . . to provide reasonable, not unjustly discriminatory access to the airport.”¹⁹

Two characteristics of the Paine Field AOC are critical. First, there are four classes of AOC.²⁰ The Class IV AOC at Paine Field permits only limited types of commercial passenger service operations and does *not* permit the kinds of operations contemplated by either Horizon or Allegiant.²¹ The Paine Field Class IV AOC would need to be changed to a Class I Certificate to accommodate either carrier’s proposed service.²² A change from a Class IV to a Class I would require a change to the Paine Field Airport Certification Manual (which change requires the approval of the FAA’s Regional Airports Division Manager), at least 30 days prior to implementation. It is critical to recognize, however, that, FAA staff has informed us that the existing Paine Field Airport Certification Manual already meets the requirements for a Class I airport.

Second, the FAA takes the position that an airport operator who has *aeronautical* facilities (runways, taxiways, aprons, etc.) sufficient to accommodate a class of commercial passenger service greater than its existing AOC would allow is *obligated* under certain circumstances to amend its Certification Manual and its AOC classification to accommodate such service. The

¹⁵ 49 USC 44706(a); 14 C.F.R. §§ 139.101, 139.201.

¹⁶ 14 C.F.R. § 121.590.

¹⁷ 49 U.S.C. § 44706(f). While federal law did not require the County to seek its AOC for Paine Field in the first instance, the County is obligated, pursuant to a joint use agreement with the Boeing Company, to maintain its facilities in a manner that corresponds closely to FAA requirements under FAR Part 139.

¹⁸ See 14 C.F.R. pt. 139.

¹⁹ *Flamingo Express*, 536 F.3d 561.

²⁰ A Class I AOC authorizes an airport to serve scheduled and unscheduled air carriers regardless of size. A Class II certificate authorizes small scheduled aircraft (10-30 seats) and any size of unscheduled air carrier aircraft. A Class III certificate permits small scheduled aircraft (10-30 seats) but no large scheduled or unscheduled air carrier aircraft. Finally, a Class IV certificate allows any unscheduled air carrier aircraft operations but no scheduled aircraft larger than 9 seats. 14 C.F.R. pt. 139.

²¹ See *supra* notes 1-4 and accompanying text.

²² The AOC for Paine Field, Class IV, which permits unscheduled passenger service in 31-seat aircraft and larger but not scheduled passenger service. To accommodate large aircraft in scheduled passenger service, Paine Field would need a Class I AOC (scheduled large air carrier aircraft with 30 or more seats).

obligation ripens once an expression of interest matures to the point that a prospective carrier has expressed a definite plan to initiate service at the airport and the service reasonably can be expected to occur.²³ As the FAA has explained, “Airports ... cannot decline to meet the requirements for a certain AOC in order to prevent an air carrier from continuing or beginning such service.”²⁴

The FAA generally treats planned service the same as existing service if the air carrier (1) is able actually to begin service, *i.e.* it has the use of necessary facilities and equipment, and has the necessary Department of Transportation and FAA authority to operate scheduled air transportation, and (2) has filed formal notice with the airport of its intent to begin service within a reasonable time, e.g. 2-6 months.²⁵

In response to the inquiry from Allegiant to initiate service at Paine Field, the FAA opined as follows:

A Class I AOC would be necessary to accommodate an air carrier such as Allegiant Air planning to conduct scheduled service in large aircraft. However, the categorization of an airport among the four classes of an AOC principally is an administrative determination by the FAA. In the likely event that the County has sufficient facilities or available land to accommodate Allegiant Air, and that Allegiant Air demonstrates that it is reasonably expected to operate at Paine Field, the *FAA would expect Paine Field to take appropriate action to change the AOC to Class I.* (emphasis added)²⁶

In summary, with regard to the Paine Field AOC:

- A Class I AOC would be necessary to accommodate Allegiant or Horizon.
- Paine Field has a Class IV Airport Operating Certificate but its facilities would qualify for a Class I AOC.
- Horizon (but not yet Allegiant) has taken steps to demonstrate that its service is “sufficiently realistic to be considered ‘planned’ for the purpose of determining reasonable access.”²⁷

²³ See Final Decision and Order, *Flamingo Express Inc. v. City of Cincinnati*, Docket No. 16-06-04 (F.A.A. Aug. 9, 2007), *aff’d.*, 536 F.3d 561 (6th Cir. 2008).

²⁴ FAA Airport Safety & Operations Div., *Program Policy and Guidance, Policy No. 75: Designation of Class of Certificate Under the Revised 14 C.F.R. Part 139* (June 10, 2004) (“FAA Policy 75”).

²⁵ *Id.*, quoted with approval in *Flamingo Express*, 536 F.3d at 564.

²⁶ Letter from Carol Key, Manager Seattle Airports District Office, Federal Aviation Administration to David Waggoner, Airport Director (June 4, 2008).

²⁷ *Flamingo Express*, 536 F.3d at 568.

- If Snohomish County and one or both carriers are able to reach an agreement on reasonable terms and conditions to allow service at Paine Field, the FAA will administratively change the Paine Field Operating Certificate to a Class I.
- Upon the administrative change to Class I, Snohomish County would need to ensure that the Airport Certification Manual complies with the requirements for Class I airports.

Obligation to Negotiate

As explained above, the County has an affirmative obligation to negotiate in good faith to provide facilities to aeronautical users.²⁸ While the FAA has not defined the parameters of what is meant by “good faith” negotiations, past experience and FAA precedent suggest that Snohomish County could not lawfully impose conditions that would implicitly be designed to make negotiations fail. For example, under federal law, the County cannot:

- Impose operating lease conditions on a prospective carrier (e.g., size of aircraft, times of operations, noise restrictions, etc.) that would otherwise violate federal law if such conditions were imposed by regulation.
- Demand lease payments which are unreasonable, as defined in the FAA’s established policies on airport rates and charges and the considerable case law under those policies.²⁹
- Require lease terms (e.g., length of term, lease rate, location of available property, insurance requirements) that are unreasonable or do not comport with industry practice.
- Extend negotiations indefinitely in a manner that becomes tantamount to denying access to Paine Field.³⁰

While federal law and FAA regulations do not require that negotiations with a prospective carrier be successful, the legal burden on the County is a heavy one: if an airport sponsor has available property (as exist at Paine Field), if the carrier is demonstrably able to pay reasonable lease rates (i.e., if it is financially responsible), and if the carrier does not itself act unreasonably in its lease negotiations, the FAA will expect that lease negotiations will be successful. As discussed in section III of this memorandum, administrative and judicial remedies are available if a prospective carrier believes that the airport proprietor has not negotiated in good faith.³¹

²⁸ Letter from Carol Key, Manager Seattle Airports District Office, Federal Aviation Administration to David Waggoner, Airport Director (June 4, 2008).

²⁹ See DOT/FAA, *Policy Regarding Airport Rates and Charges*, 61 Fed. Reg. 31,994 (1996) *vacated in part* Air Transport Ass’n of America v. DOT, 119 F.3d 38 *as amended by* 129 F.3d 625 (D.C. Cir. 1997); DOT/FAA, *Notice of Amendment to Policy Statement, Policy Regarding Airport Rates and Charges*, 73 Fed. Reg. 40,430 (2008).

³⁰ See *City of Pompano Beach v. FAA*, 774 F.2d 1529, 1538 (11th Cir. 1985).

³¹ See 14 C.F.R. Pts. 16 and 302.

Security

In 2001, the federal government, through the Transportation Security Administration (“TSA”), assumed responsibility for the screening of passengers and property on commercial aircraft.³² By regulation, the operator of an airport that accommodates a scheduled passenger or public charter passenger operation with an aircraft with 61 or more passenger seats must develop, obtain TSA approval for, and implement what is known as a “complete airport security program.”³³ Paine Field does not have a complete security program and, because there has not been commercial passenger service since 2001, the County has never prepared such a program. The County has prepared a draft program that has yet to be accepted by the TSA.

The airport operator’s chief responsibilities under a complete security program are to maintain secured areas (an air operations area and a security identification display area).³⁴ The airport operator must submit the proposed security program for TSA approval at least 90 days before an air carrier is expected to begin operations.³⁵ Neither the draft nor the final security program is available for public inspection.³⁶

While the relevant statutes and regulations do establish a clear division between TSA (which is responsible for screening passengers and baggage) and the airport operator (which is responsible for establishing and maintaining the integrity of secured areas), there are multiple areas of overlap, particularly related to the airport operator’s accommodation of TSA’s needs for passenger and baggage screening. A few aspects of this overlap have been defined. In 2003, Congress authorized the award of grants to airport sponsors for airport security capital improvement projects, mostly related to redevelopment within existing facilities to address federal security mandates.³⁷ Airport operators must make screening facilities available to TSA rent-free, although TSA and airport operators may enter into checkpoint agreements by which TSA will reimburse the airport operator for utilities and janitorial services. Further, TSA has developed guidelines for the design of airport security facilities, including screening areas, and encourages close coordination between airport planners and TSA in the design of new facilities.³⁸

³² 49 U.S.C. § 44901(a) (“The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation.”).

³³ 49 C.F.R. § 1542.103(a). Note that the TSA thresholds for various types of airport security programs are not intended and do not correspond to the FAA’s Airport Operating Certificate classes.

³⁴ 49 C.F.R. §§ 1542.103, 1542.201, 1542.203 and 1542.205.

³⁵ 49 C.F.R. § 1542.105(a).

³⁶ Under 49 C.F.R. Pt. 1542, an airport’s security program is considered Sensitive Security Information and exempt from public disclosure for security reasons.

³⁷ 49 U.S.C. § 44923(a).

³⁸ See TSA, *Recommended Security Guidelines for Airport Planning, Design and Construction* (June 15, 2006).

Beyond these defined areas, there is considerable uncertainty, particularly as to the relative levels of control by TSA and the airport operator, over passenger and baggage screening in an environment such as Paine Field. While TSA clearly has some statutory authority over airport operators,³⁹ TSA's principal regulatory authority over airport operators concerns the airport security program. Equally important, because of the highly sensitive nature of aviation security, TSA typically acts through Security Directives and other case-by-case decisions which are themselves protected from disclosure, rather than by issuing broadly-applicable rules. The precise obligations of each airport are generally negotiated between TSA officials and local airport and law enforcement officials and are incorporated into the airport security program or airport-specific agreements.⁴⁰ Finally, TSA has considerable influence by virtue of the fact that it alone is responsible for passenger and baggage screening and can, for example, control the number of TSA screeners at an airport.

Federal security requirements do not themselves dictate whether the County legally is obligated to accommodate commercial passenger service. Nevertheless, because the County does have such an obligation under federal law, the County will have to satisfy significant security-related obligations before the airlines could begin service at Paine Field.

The County's security obligations do not end with TSA approval of its security program. Because of its responsibility to provide passenger and baggage screening, TSA will have considerable influence over the design of passenger and baggage processing functions and other details of how a terminal will be designed and how airlines would operate at Paine Field. This TSA influence is important because it means that the County does not have unfettered discretion over how it designs terminal facilities to accommodate any particular carrier. In particular, as discussed further below, it is likely that TSA will require that the security program call for construction of only one central passenger checkpoint for all scheduled passenger operations given the small number of flights that Allegiant and Horizon propose for Paine Field.

III. Consequences of Violating Obligations

A detailed discussion of the legal mechanisms for enforcement of the County's obligations under federal law is beyond the scope of this memorandum. Several points are noteworthy, however, and should enter into the County's consideration.

First, the FAA has a long record of enforcing airports' Grant Assurance obligations and Surplus Property Act deed restrictions in the face of perceived threats to the national air transportation system. The agency has authority to initiate enforcement action unilaterally,⁴¹ and is not timid about pursuing whatever administrative or judicial remedies are available to ensure that airport sponsors are properly allowing access to airports. Second, airport users and industry groups have proven equally aggressive in attacking airport sponsors whom they believe to be improperly or

³⁹ See e.g., 49 U.S.C. § 114(f)(11) (the Under Secretary shall "oversee the implementation, and ensure the adequacy, of security measures at airports").

⁴⁰ See 49 U.S.C. § 114(m).

⁴¹ See 14 C.F.R. § 16.101.

unreasonably limiting access to their airport or otherwise not complying with federal obligations.⁴²

Several legal challenges and remedies are available to the FAA (or other interested parties in some instances) if the agency believes that the County has violated its federal obligations:

- The FAA has the authority to initiate an administrative proceeding⁴³ to enforce an airport's legal obligations under the Grant Assurances and Surplus Property Act deed restrictions. In this proceeding, the FAA exercises considerable discretion. If the FAA finds that the airport sponsor is violating its obligations, the agency can (a) withhold payment under existing grants; (b) suspend or terminate eligibility to receive further grants; and (c) seek injunctive relief in court.⁴⁴
- Both the FAA and aggrieved parties can seek an injunction from federal district court to prevent violation of an airport's obligations. A court can impose the same remedies as can the FAA in its administrative proceedings and can issue an injunction that requires compliance with federal legal obligations.⁴⁵
- In civil litigation, an aggrieved party could seek not only an injunction but also damages.

Finally, greater than the threat of litigation over compliance with its obligations, is the potential loss of *discretionary* grants from the FAA. Snohomish County has received about \$60 million in FAA funding over the past 50 years. Because of current capital needs, the County will need more than that amount in the next five to seven years. Most FAA grants are discretionary; the County risks loss of these discretionary grants if the agency does not believe that the County is appropriately accommodating passenger service. Past experience demonstrates that the FAA will not await the outcome of litigation to exercise its discretion to discontinue grants if it is unsatisfied with the County's approach. FAA staff has explained that, if the County is unwilling

⁴² Three well-known cases illustrate this point. When the City of Naples Airport Authority attempted to ban noisy jet aircraft from the Naples Municipal Airport in 1999, the FAA, airport industry groups and individual airport users filed multiple lawsuits – in state court, in federal court and in administrative forums – to stop the airport's actions. *See e.g., City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005); *National Business Aviation Ass'n v. City of Naples Airport Auth.*, 162 F.Supp.2d 1343 (M.D. Fla. 2001). While the Airport Authority ultimately was successful in all of the litigation, the cost (in excess of \$5 million) and the effort were considerable. The Arapahoe County Public Airport Authority's decision to ban all scheduled passenger service at the Centennial Airport in Colorado also was met with fervent opposition, which ultimately required federal legislation to overcome. *See Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001); *see also* 49 U.S.C. § 47107(q) (legislative resolution to dispute). Finally, the City of Santa Monica, California recently attempted to limit the size of aircraft that can use the Santa Monica Airport on safety grounds. The FAA and industry groups have opposed that effort and the FAA has initiated enforcement action in administrative and judicial forums to stop the City's actions. *See Director's Determination, In the Matter of Compliance with Federal Obligations by the City of Santa Monica*, Docket No. 16-02-08 (F.A.A. May 27, 2008). (Our firm has represented all three airport proprietors.)

⁴³ *See* 14 C.F.R. § 16.101.

⁴⁴ *See* 49 U.S.C. §§ 47111(d), 47106(d) and 47111(f).

⁴⁵ *See Mineta v. County of Delaware*, No. 05-CV-0297, 2006 WL 2711559, at *7 (N.D. Okla. Sept. 19, 2006) (“The FAA has been given legislative authority to protect federal grant funds and property interests, which provides a basis for the FAA to seek equitable relief in this case. The FAA could ask the Court for monetary damages, but federal legislation provides the FAA a variety of remedies to choose from when monitoring the use of federal funding.”).

to make the minimal investment to build a terminal for these carriers, FAA will reconsider its historical level of funding for Paine Field. More seriously, as explained above in footnote 3, the County could jeopardize over \$70 million in *discretionary* funding under the proposed federal economic stimulus package. The FAA is watching the actions of the County closely; the agency has a long track record of using discretionary grants to convince an airport proprietor to act in a manner consistent with the FAA's policies.

The County's two agreements with Boeing⁴⁶ both require the County to solicit FAA funds for airport projects. If the FAA were to withhold discretionary grants, the County would risk losing funding for projects that directly support Boeing's operations and provide an incentive for Boeing to remain at Paine Field.⁴⁷

This brief discussion is intended only to illustrate the range of legal and policy remedies available. It is important to recognize that the courts and the FAA take an airport's Grant Assurance obligations seriously and that the consequences to the County for failure to comply with those obligations could be not only financial (e.g., loss of existing and future grants) but also injunctive, in that the FAA or a court could order the County to comply with its obligations and grant access for passenger service.

IV. Airport Facility Constraints

While the County has an affirmative obligation to accommodate commercial passenger service, there are physical constraints on the facilities at Paine Field that fundamentally affect the County's options for accommodating the air carriers.

Aviation Facilities

Paine Field is designated as a general aviation reliever airport in the FAA's *National Plan of Integrated Airport Systems*. A reliever airport is a general aviation airport that is located in a metropolitan area and is intended to reduce congestion at a large commercial service airport by providing general aviation pilots with alternative landing areas. In addition, Paine Field is a designated alternate landing site to Seattle-Tacoma International Airport for commercial service when weather conditions dictate.

⁴⁶ The 1967 Boeing agreement for use of Paine Field for the 747 plus amendments and the Project Olympus agreement for the 787 Dreamliner among Boeing, the State and the County.

⁴⁷ The proposed economic stimulus funding includes \$48 million for rehabilitation of the main runway and parallel taxiway. We understand from Airport staff that the pavement on Taxiway Alpha and in the touchdown area on Runway 16R is at the end of its life and needs to be replaced and upgraded to meet FAA standards. Loss of funding for this project could jeopardize the County's relationship with Boeing and the valuable production facilities at Paine Field.

Paine Field currently supports daily transport category operations for:

- Boeing, including 737, 767, 777, 747, 747 Large Cargo Freighter and An-124 Heavylift air cargo aircraft;
- ATS (formerly Goodrich), including Southwest 737, Alaska 737, Delta 757 and 767, UPS 757, 767 and 747, Hawaiian 767, and military C-9 aircraft; and
- US Government C-5, C-17, charter 737 and MD-80 aircraft

Paine Field consists of approximately 1,280 acres, with three runways, an extensive system of taxiways, aircraft parking aprons, hangars, a small terminal building, and various other airport facilities. Under federal law, the County is obligated to make any of the vacant property available to a qualified aeronautical user on reasonable terms and conditions. While most of the airport property has been leased or is already dedicated to aeronautical uses, there is adequate space in the terminal area to accommodate a passenger terminal.

Paine Field has several apron areas for aircraft parking and storage. These include the Terminal Ramp, which has three components: the Outer Terminal Ramp, on the northwest; the Inner Terminal Ramp, located directly adjacent to the terminal building; and the Back Terminal Ramp, on the south.⁴⁸

Commercial Airline Facilities

Paine Field currently has a facility that is designed as a passenger terminal. The terminal building, which contains airport management offices, along with aviation related business offices, is located adjacent to the Inner Terminal Ramp, between the parallel runways, north of Runway 11/29. Public automobile parking is located on the east side of the terminal building.⁴⁹ The existing terminal is approximately 2,450 square feet. The terminal is not large enough to serve either Horizon or Allegiant. It does not contain either sufficient space or actual facilities that are commonly or legally required for commercial airline terminals, including baggage and passenger security screening facilities, sterile areas, baggage claim, or ticket counters. In large part because of TSA requirements, the building is not large enough to accommodate even the most rudimentary facilities needed today for scheduled passenger service in aircraft capable of seating more than 30 passengers.

Airport staff has investigated the needs of the airlines, had preliminary discussions with the TSA, engaged an architect to review the facility needs, and conferred with other airports with service considered comparable to the potential operations at Paine Field. To accommodate the needs of both Allegiant and Horizon, Airport staff has determined that a passenger terminal of approximately 16,000 square feet would be needed. This space would include ticket counter space, minimum necessary office space for the airlines and TSA, security processing facilities

⁴⁸ *Airport Master Plan*, at A.12.

⁴⁹ *Airport Master Plan*, at A.13.

for passengers and baggage, and sterile hold rooms for passengers after clearing through TSA's security screening.

If the site of the existing terminal were not used to accommodate commercial service, there are limited other locations where a terminal could be accommodated. While a small passenger terminal might be located on a few other sites, a viable commercial passenger operation would also need other facilities including appropriate apron parking space (with space for potential remain-overnight storage of aircraft), appropriate access by the public (from public streets and other non-secure areas), and vehicle parking facilities. Equally significant, the passenger terminal would have to be built in a location that would not interfere with the operations of other critical airport users and tenants such as Boeing. The Paine Field Master Plan has designated the Inner/Outer Terminal Ramp area as the location for a passenger terminal sized for the County-approved "regional low aircraft operations forecast."

Airport staff has concluded that the optimal location to accommodate commercial passenger service would be either adjacent or connected to the existing minimal passenger terminal. This location would minimize disruption of other critical airport functions, would satisfy the minimum needs of air carriers (as described above) and would be consistent with long-range planning for Paine Field. This location would not, moreover, provide meaningful expansion opportunity for further scheduled passenger operations.

V. Negotiation Options

Because this memorandum is not intended to be confidential, it is not appropriate to set forth the sensitive strategy for negotiations. Without divulging any privileged information, it is clear that Snohomish County has three basic paths it can follow in negotiations with prospective carriers. We would be pleased to discuss these considerations in more detail in an appropriate confidential setting.

We discuss briefly below the legal and practical benefits and costs of each option. The assumption is that, under any scenario, the air carriers would need, at the least, (a) a passenger terminal sufficiently large to accommodate its passengers, (b) security facilities large enough to satisfy TSA passenger and baggage screening needs, (c) enough secure aircraft apron and parking for the anticipated aircraft; and (d) vehicle access and automobile parking for the public. Other facilities, such as passenger amenities, are optional. The three options vary principally in terms of who provides these facilities.

Option 1 - Ground Lease

One option would be for the County to offer a prospective airline a ground lease of property at Paine Field. Under this scenario, the airline would be responsible for constructing any facilities it needs, including a terminal, parking, and ancillary facilities. The County would lease to the airline sufficient real estate upon which to construct its desired facilities and would either have a separate agreement to allow use of aircraft apron space or would allow the airline to build its own private apron. The lease term would necessarily be long (e.g., 20+ years) so that the airline

could amortize its capital construction costs. The County's revenue would realistically be limited to the airlines' lease payments; the airlines would likely demand that on-site revenue (e.g., concessions, parking, rental car fees, etc.) be retained and dedicated to the airlines' capital and operating costs of the facilities.

It is highly unusual for an airline to directly build and operate its own terminal because airline economic models generally do not call for making capital investments in terminals. Therefore, it is unlikely that either Allegiant or Horizon would be willing to make a substantial investment to construct a terminal at Paine Field. It is far more likely that, if offered a ground lease, the airlines would then enter into a contract with a third party to construct and/or operate a terminal. The County is not likely to have much control over the selection of that third party, beyond setting minimum qualifications to ensure financial responsibility.

Of the three options, the ground lease option would afford the County the least control over the future of passenger service at Paine Field, the size of facilities that are built, how the terminal is operated, and what actions the users take to encourage use of the facilities. Since the airline (or a third party contractor) would have a strong profit incentive to optimize the value of the facilities, it would be in the airline's interest to maximize use, and potentially sublease, of the terminal.

This option would require the smallest County investment. The investment risk and reward would be carried by the airline(s).

The ground lease arrangement is the most difficult option to structure in a legally valid manner for two reasons. First, federal law prohibits the County from granting what is known as an "exclusive right."⁵⁰ The County cannot allow one airline to control all passenger service facilities at the airport. If one airline controlled the passenger terminal, it would, naturally, have a strong incentive to discourage competitors. If an airline acted in a manner that discouraged competition, however, the County could be held liable under federal law for having allowed an exclusive right. The result might be that the County would have to allow each carrier to construct its own facilities or operate at different locations on the airfield. This scenario, though not likely, illustrates the complexity in having one airline control the passenger terminal.⁵¹

The second consideration in an airline-controlled terminal is how to provide TSA security. TSA is extremely unlikely to provide more than one security screening facility at an airport the size of Paine Field. The agency is likely to demand that any lease arrangement reserve enough authority

⁵⁰ See 49 U.S.C. §§ 47101(d), 47107; FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally-Obligated Airports* (Jan. 4, 2007). For a thorough discussion of the airport operator's obligation to provide access to airports by new entrant air carriers, see FAA/OST Task Force Study, *Airport Business Practices and Their Impact on Airline Competition* (Oct. 1999).

⁵¹ The FAA has advised the County that the agency would carefully scrutinize any lease that allows an airline-controlled terminal. The agency believes that the potential for an anti-competitive environment is enormous under this scenario. While the agency does not flatly prohibit such arrangements, it does discourage any lease that turns over control over major facilities like a terminal to a single user. The situation at Paine Field is unusual because there are no existing passenger processing facilities and if one airline builds a terminal, it is likely to have considerable control over passenger operations, including those of a competitor.

to the County so that the County will be able both to meet its security obligations to TSA and to enable TSA to perform its security screening functions in a manner acceptable to TSA.

Since the existing terminal building is not large enough to accommodate even TSA functions, under this scenario the County would face only two options: to build a separate security facility for baggage and passenger screening, or to sublease back from the airline the space needed for security. While TSA pays for some of its facility and equipment needs, it does not pay for most security costs and would not pay for building a security facility; those costs would have to be borne by the County. Because the County's ability to generate revenue under this scenario would be limited, the County could face the burden of security costs without a clear source of funding.

Option 2 - Third Party Owned and Operated Terminal

The County could entertain proposals from a third party to build, own and operate a passenger terminal under contract to the County. There are private operators that perform this function at a few commercial service airports in the U.S. While similar in some respects to the ground lease option, this option contemplates that the County would retain some limited control over the terminal and ancillary facilities and would enter into a separate terminal use-and-lease agreement with whatever airline chooses to use the facilities. The County could have a contractual relationship with just the terminal owner/operator or could have a separate arrangement with the individual airlines.

In terms of County control, this option would be the middle of the three. The County would be able to stipulate the type and size of the facility but would be limited in its ability to impose constraints on how it is used. Since a third party would want to optimize the return on its capital investment, it would have a strong incentive to encourage growth of revenue and hence passenger operations. Unlike the ground lease scenario, in which the airline would have to balance competing considerations of limiting competition and maximizing revenue, a third party operator of a terminal would have only one incentive: to maximize use of the terminal. Unless the County wanted to guarantee revenue to the terminal operator (which would defeat the purpose of a third party terminal operator), the County would need to allow the operator the flexibility to generate as much revenue as it could.

As with the ground lease option, the County's investment would be minimal. The complexity of providing security functions would be lessened because this scenario envisions a single common-use terminal where space could be reserved for all security needs for all airlines.

Interested bidders for a terminal could be sought through a formal request-for-proposals or any other process that is lawful for making County franchises available to the private sector.

Option 3 - County-Owned and Operated Terminal

The County could build and operate a single terminal facility to accommodate projected passenger needs. In most respects this option would optimize the County's control over future commercial passenger service and limit its financial exposure.

The County could dictate the size, character and location of the terminal but would also face the greatest investment because airport funds would be used to construct the facility. The County could design a terminal just large enough to accommodate reasonably expected passenger service from Allegiant and Horizon.

This option would maximize the County's operational and financial control over passenger operations. The County could maintain financial control by charging the airlines lease payments as necessary to compensate the County for the airline-use portion of the capital investment in the facility and the cost of airport operations. Airport staff estimates that lease payments and related revenue could pay off any capital costs within about five years. The leases could be structured so that the County would receive compensation in the event that an airline discontinued service. Operationally, the County would be able to allocate space both among carriers and among terminal functions (*e.g.*, ticketing, passenger screening, offices, concessions) in a manner that accommodates the carrier needs but, just as importantly, satisfies other County's policy objectives.

Of the three options, this scenario also gives the County the most control over revenue from ancillary facilities. In order to make either of the other options viable (and therefore available for use on "reasonable terms and conditions" under FAA standards), the County likely would be required to allow the tenant (airline or third-party terminal owner) to earn revenue from the most lucrative functions of a terminal: vehicle parking, rental car concessions, and passenger services (restaurant, etc.) If the County controlled the terminal, these revenues would be used by the County to offset the County's capital investment in the terminal, and the County could determine the pricing of these facilities to achieve its revenue objectives.

While there are undoubtedly policy considerations in the selection of the optimal alternative, we believe that a County-owned and County-controlled terminal would give the County the greatest long-term control over the future of Paine Field. The capital investment – which would come from airport funds, not County general funds – could be amortized over five years. This option also presents the fewest legal risks to the County in terms of its security obligations, its obligation to prevent the creation of an "exclusive right" in one airline, and its obligation to provide reasonable facilities to prospective airlines.

VI. Additional Questions Raised by County Council

The County Council has requested answers to several specific questions to guide its deliberations on the subject of commercial service at Paine Field. This memorandum has discussed some of the issues raised by Council and many of the questions were addressed in detail our firm's 2006 memorandum prepared during the MRD process. The following brief answers to specific

questions are provided to assist Council debate. We can provide far more detailed answers to these questions but many of these questions require extensive discussion of federal law that is beyond the scope of this memorandum.

Council Question #1: How far can we push the envelope in terms of having airlines pay?

As explained in detail earlier in this memorandum, the County can only charge reasonable rates and charges to airlines. While this standard is subject to considerable flexibility, federal law allows the County to base airline charges upon one of two general approaches: an approach that requires airlines to compensate the County for the costs incurred by the County accommodate the airlines (known as the compensatory model), and an approach that requires airlines to pay whatever costs the County incurs for operating Paine Field that are not already paid by other users (known as the residual model).

Council Question #2: Can we charge for the costs of law enforcement and fire service?

Yes, the County can include the cost of law enforcement and fire services in the calculation of its lease rates. The County already charges Boeing for about 60-70 percent of the cost of aircraft rescue and fire-fighting (ARFF) functions. Some portion of the cost of ARFF services can be allocated to the airlines.

Council Question #3: Are we required to allow a third party to provide a terminal if we won't?

Yes. As discussed in detail earlier in this memorandum, because Paine Field has available land, the County must accommodate commercial passenger carriers. If the County does not have, or is unwilling to provide, facilities for the airlines, and the airlines are willing to build a terminal (either themselves or through a third party), the County must allow them to do so. As discussed above, the County would have little control over the location, size, and facilities that an airline built under this scenario.

Council Question #4: How much discretion do we have on landing fees? What costs can be included?

Like other charges, landing fees must be reasonable and must be equitably applied to all airport users. The basic principle is that the total costs imposed on all users at the airport cannot exceed the County's actual costs of operating the airport. The County has considerable discretion over how and where to charge for use of the airport. A landing fee is just one of several possible fees that the County could impose on users. All airport costs can be included in fees that are levied to users.

Council Question #5: Can we require a SEPA review and dictate its elements?

Yes, the lease and construction of a terminal would be subject to SEPA and the County's SEPA procedures. Federal environmental requirements under the National Environmental Policy Act

(NEPA) also may apply. In particular, the FAA will have to conduct environmental review for the airlines' initiation of service and for the change in the airport's AOC.

Council Question #6: Can the County decide the "right" amount of security to be provided and charge the airlines?

While the County has considerable discretion over how much security to require for general aviation (non-commercial) airport operations, security for commercial airlines is preempted by TSA regulation. The County can, in certain circumstances, demand *more* security than required by TSA, but the agency directly provides passenger and baggage screening, regulates the security functions performed by airports and airlines, and regulates virtually all aspects of commercial airline security. The County's precise security plans and requirements are set forth in a TSA-approved airport security program.

Council Question #7: Who has to pay for noise mitigation?

Snohomish County can use airport funds for noise mitigation. In addition, federal grant funds are often available for noise mitigation efforts, but the FAA generally limits noise mitigation funding to areas that lie within the 65 dB DNL contour. The cost of mitigation is considered to be an airport operating cost that can be shared among airport users according to the County's rates and charges. The FAA often contributes to the cost of noise mitigation but any FAA contribution is discretionary and subject to a number of complex procedural hurdles.

Council Question #8: Can we determine the size of the pad the building would sit on?

Maybe, within the standard of reasonableness discussed in this memorandum. If the County elects to pursue the ground lease option discussed above, the County must make available property that is large enough to accommodate the air carrier's needs (i.e., large enough for the carrier to build its desired terminal). Under this option, the County cannot tell the carrier how large a parcel it is willing to lease and therefore it has little control over how large a terminal would be built. If, however, the County pursues either of the other two options, the County can decide how large a building site is made available, where a terminal is built, and the size of the terminal.

Council Question #9: Can the County regulate hours of operation as well as number of flights?

Generally, no. If there are facility constraints (i.e., limited apron or passenger holdroom space), the County could implement a space allocation system for use of the constrained facility but unless there are physical constraints, the County cannot as a policy matter limit the number of operations. The County cannot generally regulate the hours of operation, either of the airport generally or the terminal specifically. The issue of airport access restrictions is complex and addressed in more detail in our firm's October 2006 memorandum.

Council Question #10: Do we have any additional power to regulate hours of operation, number of flights, noise, size of plane, type of plane, etc if we pay for and build a terminal than if we don't?

In general, the County's legal authority to impose restrictions on the *use* of Paine Field is the same regardless of how a terminal is constructed, funded and operated. The County does have somewhat more influence over the nature and level of future activity within a County-built and County-operated terminal. This is a very sensitive topic and therefore the ways in which the County might control future service are best discussed in a confidential setting. With that caveat, it is clear that, so long as the terminal facility is a reasonable size and facilities are reasonable to meet the needs of the two carriers who have formally expressed an interest in serving Paine Field, the County has no obligation to build facilities that accommodate future growth beyond the existing proposals. The County's actions might have the consequence of making future growth inconvenient or costly but the County has no legal obligation to anticipate growth of passenger operations unless it has received a definite proposal for such service. Since the County has only two proposals for passenger service, the County can build a terminal that is just the right size to accommodate Allegiant and Horizon in terms of number of passengers, size of aircraft, number of operations, and other facility needs.