U.S. Department
of Transportation
**Federal Aviation
Administration**

Airport Compliance and Management Analysis

800 Independence Ave., SW.
Washington, DC 20591

March 12, 2014

Orry P. Korb, County Counsel
Elizabeth G. Pianca, Deputy County Counsel
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San Jose, CA 95110-1770

Dear Mr. Korb and Ms. Pianca:

RE: Compliance with FAA's December 19, 2011 Director's Determination, as affirmed by the Agency's August 12, 2013 Final Agency Decision; FAA Docket No. 16-11-06

On August 12, 2013, the Federal Aviation Administration (FAA) issued a Final Agency Decision (FAD), in the case of *Jeff Bodin and Garlic City Skydiving v. County of Santa Clara, California,* FAA Docket 16-11-06. The FAA affirmed the December 19, 2011 Director's Determination (DD), which found the County of Santa Clara (County) to be in violation of Federal law and Grant Assurance No. 22, Economic Nondiscrimination. This letter is to communicate to the County that the FAA continues to view the County to be in noncompliance with the Agency's 2011 DD and Order, as affirmed by the FAD. This letter is also to provide the County with the opportunity to explain its new insurance requirement in writing, and provide the FAA with a reasonable explanation of the requirement and specific facts in support of that requirement.

The December 19, 2011 Director's Determination ordered the County to take immediate steps to (1) permit the establishment of an on-airport parachute drop zone; (2) to negotiate in good faith with those entities desiring to provide parachute related commercial aeronautical services; (3) adopt the stipulations required by the FAA to conduct parachute operations at the airport safely; and (4) provide any required 'pen and ink' changes to the airport's Airport Layout Plan. The FAA directed the County to take these actions within thirty days.

Over 200 days has elapsed since the FAD in this case was issued, and the County appears to be no closer to complying with the Director's 2011 Order. The FAA is very concerned that a further delay in reaching a resolution, combined with the level of third party liability

insurance coverage the County seeks to require, may subject the County to further allegations from the complainant involving unjust discrimination and unreasonable denial of access.

To assess the status of negotiations to bring the County into compliance, in the last few months I requested FAA staff from our Regional Office and Airports District Office to meet with both parties. Since the beginning of this year, the FAA has participated in two meetings with both the County and Mr. Bodin, and has reviewed and considered the many communications between the County and Mr. Bodin and his counsel regarding the County's new requirement for $1 million in third-party liability insurance coverage with the County as an additional named insured. These meetings have so far failed to result in a solution that the FAA considers an acceptable corrective action plan consistent with the Director's 2011 Order.

The County stated in a February 20, 2014 e-mail from Elizabeth Pianca, County of Santa Clara Deputy County Counsel, to Brian Armstrong of the FAA that it requires Mr. Bodin to obtain an insurance policy covering:

> Bodily injury and property damage to third parties caused by the acts of skydiving, but not including such injuries or damages to skydivers themselves, which provides total limits of not less than one million ($1,000,000) combined single limit per occurrence. The County would be an additional insured [...]

In this e-mail the County stated that this coverage could be included in one policy along with aircraft liability coverage, or it could be a separate policy.

As we have discussed in our meetings with the County, FAA policy requires that insurance requirements and insurance costs be *reasonable*. See Order 5190.6B, *FAA Airport Compliance Manual* (September 30, 2009, para. 14.4). The FAA has defined reasonable as "fair, equal and not unjustly discriminatory." See Skydive Sacramento v. City of Lincoln, California, FAA Docket 16-09-09, (May 4, 2011), p. 20. Insurance requirements must be "relevant to the proposed activity, reasonably attainable, and uniformly applied." Skydive Sacramento, p. 20; see also pp. 22-25. The FAA has previously found insurance requirements reasonable where the type of insurance required is "common" and "not unusual." Brown Transport Co. v. City of Holland, Michigan, FAA Docket No. 16-05-09, (March 1, 2006), p. 4.

The sole insurance carrier (apparently based in Utah) identified by the County offers a product that, although marginally available, does not appear to be reasonably attainable in a competitive insurance marketplace. Based on the information the FAA has reviewed, the level of third-party liability insurance coverage the County wishes to require of Mr. Bodin may not be reasonable. In its negotiations, the County has identified only one insurance broker that is actually willing to write an insurance policy with the County's $1 million required level of coverage. However, this company, by its own admission, has written fewer than three (3) policies of a nature similar to the one requested by the County. This draws into question this insurance broker's actual ability to underwrite and successfully carry out an insurance policy for Mr. Bodin that is acceptable to the County.

Even if the sole insurance broker identified by the County is indeed willing and able to underwrite such an insurance policy, because there appears to be only one underwriter actually willing to write a policy that meets the County's standards, there is no competition in the insurance market for such a policy. Mr. Bodin would therefore be unable to negotiate or comparison shop with regard to either the policy's terms or price, both of which the insurance broker could set at any level it wished.

In contrast to the insurance coverage in Brown v. Holland, the cost of insurance coverage required by the County and provided by the proposed insurance broker appears to greatly exceed industry standards. The insurance broker estimates this policy would cost Mr. Bodin at least $15,000 to $20,000 per year, though the actual cost would be $30 to $40 per jumper, which could increase the total cost beyond the $20,000 estimate. In contrast, the United States Parachute Association (USPA) provides $50,000 of third-party liability coverage as a membership benefit, the cost of which is included in USPA's $65 per year membership fee. Mr. Bodin is a USPA member and already has this $50,000 of insurance coverage. USPA individual member third-party insurance is the industry standard for skydiving operations at airports. As we understand it, USPA's policy covers third parties for bodily injury and property damage caused by USPA members during skydiving. According to USPA, the policy applies whether the skydiver lands on an airport or off an airport.

To date, the County has not been able to provide any evidence to support the need for this level of insurance. Without more, the County cannot reasonably require Mr. Bodin to provide insurance against 100 percent of the risks of his skydiving operation. As the FAA stated in its FAD:

> [w]hile the FAA acknowledges and is sensitive to the County's concerns of liability, no airport operations are without some potential risks, and the County may not use general liability concerns to prohibit a legitimate aeronautical activity on the airport, especially where specific safety measures have been identified which would allow the activity to take place with an acceptable level of safety on the airport.

Jeff Bodin and Garlic City Skydiving v. County of Santa Clara, California, FAA Docket 16-11-06, (August 12, 2013) (FAD), p. 37.

This is a request for the County to provide the FAA with documentation or other evidence or support showing that the new insurance requirement is reasonable and not unjustly discriminatory. As the record in the Agency's Part 16 adjudication shows, Mr. Bodin has been attempting to establish an on-airport drop zone at South County Airport since early 2009 – for almost five years. Multiple alternative options for insurance coverage arrangements have been presented by Mr. Bodin to the County, none of which the County has been willing to consider. The insurance the County wishes to require is not available on the competitive insurance market. The County's requirement has the appearance of intending to further obstruct Mr. Bodin in establishing his business at the airport.

During the February 12, 2014, meeting between FAA, the County, and Garlic City Skydiving, we believe Mr. Orry Korb, Santa Clara County Counsel, stated that if the insurance coverage the County was requiring of Mr. Bodin was found to be unavailable or not reasonably attainable, then the County would change its requirements. We invite the County to do so, and to amend its operating agreement with Mr. Bodin to bring the insurance coverage required of Mr. Bodin in line with coverage that is standard in the industry and readily available in a competitive marketplace.

The FAA requests the County to respond to this letter within 10 days of receipt with a copy of the operating agreement including the revised insurance requirements.

If the County is not able to provide a satisfactory explanation of the new insurance requirement as it relates to achieving compliance with the FAA's 2011 Order, the Agency is prepared to initiate an adjudication under 14 CFR, Part 16 by issuing a Notice of Investigation (NOI) to determine whether the County's new requirement is in violation of Federal law and the County's grant assurances. As it did in the last Part 16 adjudication, the County would have the opportunity to respond to FAA's NOI. In the context of the NOI, the FAA will consider whether it has additional grounds to continue to suspend the processing of all current and future grant applications for Airport Improvement Program grants under 49 U.S.C., § 47115 and general aviation airport grants under 49 U.S.C., § 47114(d) requested by the County of Santa Clara.

Sincerely,

Kevin C. Willis
Manager of Airport Compliance