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January 20, 2012

VIA FEDERAL EXPRESS

Office of the Chief Counsel
Attn: Docket Clerk
FAA Part 16 Airport Proceedings Docket
AGC 610
Federal Aviation Administration
U.S. Department of Transportation
800 Independence Avenue, S.W.
Washington, D.C. 20591

Re: Docket No. 16-11-06
Jeff Bodin and Garlic City Skydiving v. County of Santa Clara, California

Dear Sir or Madam:

Enclosed please find an original and three copies of the Appeal of the County of Santa Clara pursuant to 14 CFR § 16.33 in the above-captioned matter.

Thank you for your attention to this correspondence.

Very truly yours,

MIGUEL MARQUEZ
County Counsel


ELIZABETH G. PIANCA
Deputy County Counsel

EGP:abe
Encl. (4)

c: Catherine M. Lang, Acting Associate Administrator for Airports
Randall S. Fiertz, Director of Airport Compliance and Management Analysis
Miguel Márquez, County Counsel, Santa Clara County
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COUNTY OF
SANTA CLARA

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

JEFF BODIN and
GARLIC CITY SKYDIVING,

Complainant,

v.

THE COUNTY OF SANTA CLARA,
CALIFORNIA,

Respondent.

FAA Docket No. 16-11-06

**APPEAL BY THE COUNTY OF SANTA CLARA OF THE DIRECTOR'S
DETERMINATION DATED DECEMBER 19, 2011**

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**APPEAL BY THE COUNTY OF SANTA CLARA OF THE DIRECTOR'S
DETERMINATION DATED DECEMBER 19, 2011**

I. INTRODUCTION

Pursuant to 14 CFR § 16.33(b), the County of Santa Clara (the "County" and "Respondent") hereby appeals the Determination made by the Director of the Office of Airport Compliance and Management Analysis (the "Director") on December 19, 2011 in the above-captioned docket (the "Determination").¹ The Director found that the County is in violation of Grant Assurance 5, Rights and Powers, and Grant Assurance 22, Economic Nondiscrimination for unreasonably denying access to Jeff Bodin and Garlic City Skydiving (collectively, the "Complainant") to allow skydivers to land at the South County Airport (the "Airport" or "E16"). The County requests that the Director's conclusions that that the County is in violation of Grant

¹ The appeal is timely filed. The County was served by mail of the December 19, 2011 Director's Determination on December 27, 2011. In accordance with 14 CFR § 16.33(b) the County may file an appeal within 30 days after the date of service.

Assurance 5 and Grant Assurance 22 be reversed because the conclusions are not supported by the administrative record, regulations, law or policy.

II. BACKGROUND

Complainant proposes to drop skydivers through the middle of a congested airway that is the main approach route to the Mineta San José International Airport ("SJC"). Skydivers are expected to land on a very small landing zone located approximately 800 feet from a major north-south interstate U.S. highway and the community of San Martin.² The Airport is a non-controlled airport. The proposal creates a hazard to air traffic and to persons and property on the surface that cannot be mitigated.³

The County's concerns about safety have not been thoroughly analyzed by the Federal Aviation Administration ("FAA"). The FAA has determined that the proposed skydiving operation would be operated in the safest manner if relocated elsewhere, although later concluded that "neither safety nor efficiency would be compromised by the skydiving operations as proposed" at the Airport. Complainant has rejected the County's offer to use the Airport for business operations and for the take-off and landing of jump aircraft, but to locate the landing zone at an off-site location where the hazards to air traffic and to persons and property on the surface would be substantially mitigated.

After rejecting the County's offer to use the Airport for business operations and to locate the landing zone at an off-site location, Complainant filed a Part 16 complaint that the County is not complying with its grant assurances and obligations to the FAA because the County is not permitting a landing zone at the Airport. The County has diligently worked to meet its federal

² The County acknowledges the term "drop zone" and "landing zone" can be used interchangeably. (Determination at p. 19.)

³ County Appeal Exhibit 2 provides a visual description of the ground conditions at the airport. County Appeal Exhibit 3 provides an obstruction comparison with other public use airports.

obligations and its actions support the overall federal policy to provide a system of airports that are safely operated and to protect individuals and property on the ground. Although the County fully respects and defers to the FAA's authority to regulate the nation's airspace, the County believes that such regulations must be based on safety and should not jeopardize the ability of an airport sponsor to serve the civil aviation needs of the public. Unfortunately, enforcing the Director's Determination and compelling the County to submit a corrective action plan will threaten the County's ability to operate the Airport safely and serve the civil aviation needs of the public.

The Complainant has consistently portrayed the County as unwilling to permit his skydiving business to operate at the Airport. (FAA Exhibit 1, Item 1, exhibit 1.) The Director mistakenly interprets the County's actions as wanting to substitute the FAA's judgment with its own. (Determination at p. 29.) Neither portrayal is accurate.

III. FACTS

A. Airport Location

The Airport is a non-controlled towered airport located on approximately 179 acres, owned in fee by the County. The Airport is located adjacent to U.S. Highway 101 and the unincorporated community of San Martin. U.S. Highway 101 is a major north-south interstate thoroughfare. The Annual Average Daily Traffic volume on Highway 101 in the vicinity of the Airport is 115,000 to 120,000 vehicles per day. (FAA Exhibit 1, Item 5, exhibit 37.) The population density of the area surrounding the Airport is approximately 575 persons per square mile. (FAA Exhibit 1, Item 5, exhibit 35.) The Airport is situated below the main approach route to SJC.

B. Garlic City Skydiving Proposal

Complainant first contacted the County in February 2009 about hangar space available for rent. (Determination at p. 2; FAA Exhibit 1, Item 5, exhibits 7, exhibit 8.) Complainant later proposed operating a skydiving business at the Airport, which called for a landing zone on Airport property. (Determination at pp. 2-3; FAA Exhibit 1, Item 5, exhibit 14.) The County was concerned about the proposed skydiving operation, with a landing zone on Airport property and in the middle of a congested airway that is the approach route to SJC. (Determination at p. 3; FAA Exhibit 1, Item 5, exhibit 2, exhibit 20, exhibit 31, exhibit 32.)

C. December 9, 2009 Safety Determination By the San Jose Flight Standards District Office

On December 9, 2009, the FAA's Flight Standards District Office ("FSDO") determined that the proposed drop zone could be supported from a safety standpoint if nine (9) conditions were agreed to by the County, Complainant, and the FAA. (Determination at p. 5; FAA Exhibit 1, Item 5, exhibit 28.) The required nine conditions relating to safety included:

1. All jumps must be conducted in full compliance with 14 CFR Part 105.
2. A NOTAM must be established and published through the appropriate aeronautical entity to advise all airport users of the parachute jump activities.
3. Radio contact between the jump aircraft and NORCAL or Oakland ARTCC must be established and maintained throughout the jump activity.
4. The jump aircraft pilot will communicate with NORCAL or Oakland ARTCC and visually scan the area to ensure aircraft are not entering or maneuvering within the traffic pattern prior to authorizing jumpers to depart the aircraft.
5. Radio transmissions will be conducted by the jump aircraft on the South County Airport of Santa Clara County advisory frequency 122.70 (CTAF/UNICOM) to alert anyone in the area that jump activities are in progress.
6. Jumpers will be briefed to maintain directional control at all times and remain clear of the runway and stay within the designated drop zone area.
7. Airport management will ensure the Airport Facility Directory and San Francisco Sectional charts are updated to indicate (by parachute symbol depiction) that a designated Parachute Drop Zone has been established at the South County Airport of Santa Clara County.
8. Airport management will ensure the advisory information is updated to advise all who utilize South County Airport of Santa Clara County that a Parachute Drop Zone has been established and its location on the airport.

9. Airport management will advise all aircraft operators based at South County Airport of Santa Clara County of the establishment and location of a Parachute Drop Zone at the airport.

The review was not supported by any written study or available analysis justifying the conditions in light of the Airport's location, the commercial and general aviation activity in and around the Airport, or how skydiving can be safely accommodated at the Airport.

D. August 24, 2010 Board of Supervisors Action Disapproving Skydiving Proposal With an On-Airport Landing Zone for Safety Reasons

On August 24, 2010, the Board of Supervisors ("Board") unanimously voted to disapprove the proposal by Complainant to operate skydiving operations with a landing zone on the Airport. (FAA Exhibit 1, Item 5, exhibit 32, exhibit 38.) The Board also directed staff to coordinate with Complainant and the FAA to expeditiously review any revision to the skydiving proposal identifying an off-airport landing zone to determine the impact to Airport operations, if any. (Determination at p. 4; FAA Exhibit 1, Item 5, exhibit 32, exhibit 38.)

The recommendation to the Board to disapprove the Complainant's proposal was based on the safety concerns identified by the County and the County's responsibility to safely operate the Airport. (FAA Exhibit 1, Item 5, exhibit 20.) Nevertheless, the Board has publicly supported Complainant's use of the Airport for take-off and landing of jump aircraft. (FAA Exhibit 1, Item 5, exhibit 32, exhibit 38.) The County's concern has always been and continues to be a concern about safety and not a preference to avoid allowing skydiving activities to operate at the Airport. (Determination at p. 31; FAA Exhibit 1, Item 5, exhibit 2, exhibit 31, exhibit 32; FAA Exhibit 1, Item 19.)

The Determination concludes that if the County understood its commitments it would have "further engaged the FAA's expertise in evaluating the on-airport drop zone before voting to deny Complainant's proposal." (Determination at p. 38.) Rather, County staff was frequently

met with an unwillingness to discuss safety issues associated with Complainant's proposal. (FAA Exhibit 1, Item 5, exhibit 24, exhibit 25.) Following the Board's action on August 24, 2010, the County's position was explained to the FAA and the County welcomed the FAA's critique of the County's technical analysis and also its own technical analysis. (FAA Exhibit 1, Item 5, exhibit 31.) On December 23, 2010, the FAA responded to the County's request for further technical analysis relating to the proposed skydiving operation at the Airport and notified the County that the analysis would be forthcoming. (FAA Exhibit 1, Item 5, exhibit 39.)

E. April 4, 2011 FAA Safety Determination

The FAA's Western-Pacific Region Airports Division Manager issued a letter to the County on April 4, 2011 indicating that while the proposed skydiving operation "*would be operated in the safest manner if relocated to an area several miles away from airspace corridors similar to those existing over*" the Airport, it could be operated at the Airport provided Complainant followed certain conditions to ensure safe operations. (Determination at p. 10 (emphasis added); FAA Exhibit 1, Item 5, exhibit 26.) The letter also recommends that "the County review the training and safety practices required for skydiving and ensure Garlic City Skydiving abides by them." (FAA Exhibit 1, Item 5, exhibit 26.)⁴

The April 4, 2011 letter also includes a memorandum from Flight Standards Division indicating that:

[t]he proposed drop zone's location relative to a significant amount of VFR [Visual Flight Rules] and IFR [Instrument Flight Rules] traffic will require strict compliance by Garlic City Skydiving with 14 CFR § 91.123 and § 105, and close coordination with Air Traffic Control.

(FAA Exhibit 1, Item 5, exhibit 29.)

⁴ The Determination correctly acknowledges that the County is under no obligation to ensure Complainant's training and safety practices are followed in accordance with FAA requirements. (Determination at p. 35.)

A memorandum prepared by the FAA's Director of the Western Service Center, which was also included in the April 4, 2011 letter, explains that:

[t]o ensure and enhance the safety of air traffic flying above E16 the preferable option would be for the proponent to offset their landing zone several miles away from the airspace corridor over the airport. The airspace is an active air traffic corridor with a mix of IFR and VFR aircraft transiting to and from both San Jose International Airport and Reid-Hillview Airport.

(FAA Exhibit 1, Item 5, exhibit 30.)

The April 4, 2011 letter includes an *Airspace Analysis* conducted by the WSC Operations Support Group. (FAA Exhibit 1, Item 5, exhibit 27.) The *Airspace Analysis* shows many of the concerns previously illustrated by the County such as the airspace above the Airport being subject to high volumes of aircraft activity along the low-altitude route approach SJC. (FAA Exhibit 1, Item 5, exhibit 27, exhibit 32, Attachment "D".)

F. May 2, 2011 County Response to April 4, 2011 FAA Safety Determination

The April 4, 2011 letter from the FAA left many unanswered questions and concerns for the County including: the FAA's conclusion that a skydiving operation at the Airport would be operated in the safest manner if relocated to an area several miles away; the lack of any FAA analyses regarding the safety aspects of locating the landing zone on Airport property; the expectation that the County provide oversight and enforcement of safety procedures for the skydiving operation at the Airport; and, the potential weakening of the County's immunity under California law if it is required to permit skydiving on the Airport. The County addressed these concerns in a letter to Mark McClardy of the FAA on May 2, 2011. (Determination at p. 10; FAA Exhibit 1, Item 5, exhibit 2.) On June 14, 2011, before the FAA was able to respond to these concerns, the FAA received Complainant's Part 16 Complaint. (Determination at p. 11; FAA Exhibit 1, Item 1.)

G. August 12, 2011 FAA Letter

The FAA responded to the May 2, 2011 letter on August 12, 2011 describing the County's safety concerns as a preference "*that skydiving operators conduct their activities further away from E16 or below 15,000 feet MSL.*" (FAA Exhibit 1, Item 16 (emphasis added).)

The August 12, 2011 letter provides a safety determination that differs from its earlier determination stated in the April 4, 2011 letter "that the proposed skydiving operation would be operated in the safest manner if relocated to an area several miles away from airspace corridors similar to those existing over E16" (FAA Exhibit 1, Item 5, exhibit 26) by concluding that:

neither safety nor efficiency would be compromised by the skydiving operations as proposed at E16.

(FAA Exhibit 1, Item 16 (emphasis added).)

The August 12, 2011, takes a different position from its April 4, 2011 letter that skydiving operations could be conducted at E16 at some level of safety the FAA deems sufficient, even though such a level, by previous determination of the FAA, would be below the safest level. To date, the FAA offers no evidence to support this revised safety analysis. (FAA Exhibit 1, Item 19.)

The August 12, 2011 letter from the FAA also concludes that an on-Airport landing zone would be safe and relies on prior safety assessments that are part of the FAA's April 4, 2011 letter to the County to support this determination by explaining that:

the characteristics associated with this parcel were considered as part of the FAA's safety assessment, and the FAA's Western Pacific Region believes that the airport can safely accommodate skydiving operations, including an on-airport LZ.

(FAA Exhibit 1, Item 16 (emphasis added).)

The FAA safety assessments, however, do not evaluate the safety of an on-Airport landing zone and its proximity to the E16 runway and the surrounding community. (FAA Exhibit 1, Item 5, exhibit 26, exhibit 27, exhibit 28, exhibit 29, exhibit 30.)

H. October 19, 2011 County Letter

On October 19, 2011, the County sought clarification and evidentiary support of the conclusions reached in the FAA's August 12, 2011. (FAA Exhibit 1, Item 19.) On November 28, 2011, the FAA informed the County that given the Part 16 investigation it would be inappropriate for the FAA to comment on the County's concerns addressed in the October 19, 2011 letter. (County Appeal Exhibit 1, Letter from Brian Armstrong to Michael Murdter.)

I. Outstanding Safety Questions

The Determination does not respond to the County's questions raised in the October 19, 2011 letter. (Determination at p. 36.) The County, thus, continues to ask the question of how the FAA has reached the conclusion that an on-Airport landing zone is safe since the FAA has not provided any evidence to support this conclusion. Instead, the Determination expects the County to rely on the FAA's authority as the final arbiter of airport safety absent evidence to support the FAA's position. (Determination at pp. 23-32.) The County recognizes and respects the important duty vested in the FAA to ensure safe airport operations and airspace navigation. The County, however, is concerned that the FAA has not thoroughly analyzed the complex safety issues involved with the Complainant's skydiving proposal, which could jeopardize the public health, safety, and welfare of persons in the County and the County's ability to sustain the operation of the Airport. Although the FAA may be the final arbiter, before making the decision the FAA "will carefully analyze supporting data and documentation." (FAA Order 5190.6B,

¶14.3.) The FAA has not demonstrated that a careful analyze supported by data and documentation has been conducted.

IV. THE DIRECTOR'S DETERMINATION

The relevant issues in the Director's Determination for this appeal are:

- A. Has the County violated Grant Assurance 22, Economic Nondiscrimination, by refusing Complainant's request to establish a drop zone at the South County Airport?
- B. Was the August 24, 2010 action by the County's Board of Supervisors to refuse to allow an on-airport drop zone at South County Airport a violation of Grant Assurance 5, Preserving Rights and Powers?

V. RESPONSE TO THE DIRECTOR

In an appeal of a Director's Determination, pursuant to 14 CFR § 16.33, it is the FAA "Associate Administrator's responsibility to determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy." (United States Construction Corporation v. City of Pompano Beach, FAA Docket No. 16-00-14, at 18 (July 10, 2002) (Final Agency Decision).) In considering the administrative appeal, new evidence may be submitted if it was not previously available and it could not have been previously discovered or proffered by the parties. (Roadhouse Aviations, LLC v. City of Tulsa, FAA Docket No. 16-05-08, at 13 (June 26, 2007) (Final Agency Decision).) The County seeks to supplement the Administrative Record by including supplemental documentary evidence that appear as County Appeal Exhibit 1 through County Appeal Exhibit 3.⁵ The appeal

⁵ County Appeal Exhibit 3 measures the distance to significant monuments from the center line of the landing zone. These measurements differ from measurements previously referenced by

exhibits include communications from the FAA to the County and visual representations of the conditions at the Airport. The issues will be separated here as they were in the Determination.

A. Grant Assurance 22—Economic Nondiscrimination

1. Summary of the Director's Determination

The Determination concludes that the County's decision to not allow Respondent to conduct a skydiving operation with an on-Airport landing zone due to the safety hazards identified by the County is a violation of Grant Assurance 22, *Economic Nondiscrimination*, because "this restriction is unreasonable because the FAA's safety evaluations found Complainant's proposal to conduct parachute activities, including the establishment of a drop zone on the Airport, to be safe." (Determination at p. 36.) The conclusion is made notwithstanding the County's open request to the FAA to provide evidence to support its conclusion that "neither safety nor efficiency would be compromised by the skydiving operations as proposed at E16" and that "the airport can safely accommodate skydiving operations, including an on-airport LZ." (FAA Exhibit 1, Item 16, Item 19.)

2. County Response to Director's Determination

(a) The Director's Determination Does Not Show that the County Failed to Act Reasonably by Prohibiting an On-Airport Landing Zone.

Grant Assurance 22(i) provides that:

[t]he sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

Grant Assurance 22(i) recognizes the County's authority to exercise control of the Airport sufficient to preclude unsafe and inefficient conditions, which interferes with the safe use

the County because the measurements for County Appeal Exhibit 3 were taken at a different location.

of the Airport. The County has taken the position, consistent with Grant Assurance 22(i), that skydiving with a landing zone on Airport property unacceptably interferes with the safe use and operation of the Airport, the civil aviation needs of the public, and the safety of persons and property on the surface. (FAA Exhibit 1, Item 5, exhibit 2, 31, 32; FAA Exhibit 1, Item 19.) Therefore, the County's denial of Complainant's request to operate a landing zone on Airport property is grounded in its obligation to ensure the safe operation of the Airport and to serve the civil aviation needs of the public.

Although the Director recognizes the County's authority to prohibit or limit any given type, kind or class of aeronautical use at the airport if such action is necessary on the grounds of safety or efficiency under Grant Assurance 22(i), the Director explains that the FAA "is the final arbiter regarding aviation safety and will make the determination regarding reasonableness of the sponsor's proposed measures that restrict, limit, or deny access to the airport." (Determination at p. 24 (citing FAA Order 5190.6B, ¶14.3).) The problem is the FAA's safety determination that "neither safety nor efficiency would be compromised by the skydiving operations as proposed at E16" and that "the airport can safely accommodate skydiving operations, including an on-airport LZ" is not supported by evidence to justify an on-Airport landing zone. (FAA Exhibit 1, Item 16; FAA Exhibit 1, Item 19.)

The Determination relies on the FAA's safety evaluations that are included in the FAA's April 4, 2011 letter to the County to support the safety conclusion. (Determination at pp. 23-32; *see also* FAA Exhibit 1, Item 5, exhibit 26, exhibit 27, exhibit 28, exhibit 29, exhibit 30.) The County continues to express concerns that reliance on these prior evaluations is a serious error because the evaluations do not demonstrate that skydiving can be conducted safely at E16. (FAA Exhibit 1, Item 5, exhibit 2; Item 16, Item 19.) The FAA has not shown that the County

has unreasonably denied access to the Airport because the record does not support a conclusion that skydiving with an on-Airport landing zone can be safely accommodated.

(b) The Director's Determination that the County Is In Violation of Grant Assurance 22 Is Not Made In Accordance with National Policy.

The County accepts its responsibility under the Airport Improvement Act to operate and maintain the Airport with the highest degree of safety and efficiency in exchange for receiving financial assistance from the FAA for airport development. (49 U.S.C. §§ 47107 *et seq.*) The County also recognizes its duty to operate the Airport in a safe and serviceable manner and to not take any action that would in any way jeopardize the civil aviation needs of the public. (*Id.* § 47107(a).) The County's decision to not allow skydiving with an on-Airport landing zone is consistent with these duties. To do anything otherwise would be inconsistent with the directive of the Airport Improvement Act and grant assurances since it would create the untenable position of operating the Airport in a manner that is not safe. The Determination that skydiving must be permitted at the Airport is incompatible with the FAA's important objective of creating a system of self-sufficient airports to serve the aviation needs of the public.

(i) Safety Concerns of the County

The County's safety concerns can be summarized as (1) the potential conflict between a skydiver and an aircraft and (2) the potential for a skydiver to miss the landing zone. The airspace directly above and adjacent to the south county Airport is a very busy corridor for commercial aircraft flying into Mineta San José International Airport ("SJC"). Commercial jets on approach to SJC fly at an altitude of 4,000 to 8,000 feet above mean sea level (MSL) in the vicinity. The skydivers, however, will jump from an altitude of 12,000 to 15,000 MSL, which means that they will descend through the very airspace used by the large commercial jets on approach to SJC. In addition, the landing zone is small and in close proximity to the Airport

runway, Highway 101, and the adjacent San Martin community. Thus, landing on it will require a level of accuracy that does not afford for any miscalculation. If the skydiver misses the landing zone then they will land on the Airport runway, the highway, or adjacent private property. (FAA Exhibit 1, Item 5, exhibit 20; County Appeal Exhibit 2; County Appeal Exhibit 3.)

(ii) Liability Issues Associated with an On-Airport Landing Zone

As the County has previously explained, in response to Complainant's incorrect assumption that the County is exempt from liability for a skydiving accident under California law, if the County were to approve skydiving at the Airport, it would be exposed to potential liability arising out of injuries and persons or damage to property. (FAA Exhibit 1, Item 1, pg. 13, fn 7; Item 5, p. 22; Item 8, pp. 8-11; Item 10, pp. 15-16.) California Government Code Section 831.7 is a governmental immunity that applies to skydivers, those who assist skydivers and spectators of skydivers, it does not apply to an individual who may be injured as a result of the skydiving activity, such as an airline passenger who is injured if a collision occurred, an adjacent property owner who experiences property damage caused by a skydiver landing on his or her property, or a driver or vehicle passenger on Highway 101. If the County fails to warn of a known dangerous condition that was not assumed by the participants as inherently part of the activity (for example, failing to disclose the drop zone conditions), the immunity may similarly not apply. The County further explained that a substantial burden could be placed on the County's revenues if a skydiver, airline passenger, freeway user, or adjacent property owner is injured and this will, in turn, impose an impediment on the County's ability to safely operate the Airport. (FAA Exhibit 1, Item 8, pp. 10-11.)

The Determination dismisses the application of Section 831.7 and concludes that the County may not "use the potential of increased liability exposure under state law as a means to

justify excluding an aeronautical user from a federally-obligated airport” and that this is “unreasonable.” (Determination at pp. 32-33.) However, the question is not limited to the potential of increased liability exposure, but whether the County is expected to knowingly permit an aeronautical use at the Airport where an accident could result in the County not being able to satisfy its obligation under the Grant Assurances, and the FAA’s objective, to create a system of self-sufficient airports to serve the aviation needs of the public.

The Determination does not consider the public policy ramifications of placing the County in a position of losing its governmental immunity. The Determination characterizes the County’s discussion about Section 831.7 as a basis to ban other aeronautical activities because they present greater risk of liability

[u]nder this approach, one could argue that other aeronautical activities, such as student flight training, or touch and go landings, expose the Respondent to greater liability than ‘normal’ flight operations conducted by pilots with greater flight experience.

(Determination at p. 32.)

The County did not cite Section 831.7 as a reason to preclude skydiving, or any other aeronautical activity that presents greater risks, but rather as a response to Complainant’s argument that the County should allow it because the County would have immunity for any injuries that resulted. (FAA Exhibit 1, Item 1, Complaint, p. 13, FN. 7; Item 5, Answer, p. 22, ¶ F7; Item 8, pp. 9-11.)

The Determination explains that the County’s potential liability concerns can be eliminated because the County “can pass the costs associated with insuring skydiving on an airport on to the entities offering skydiving activities.” (Determination at p. 33.) However, the Determination goes on to explain that if the airport sponsor demands insurance that does not exist then the requirement that the entities offering skydiving activities pay the insurance costs

will be deemed unreasonable. (Determination at p.33, fn. 18.) The very fact that insurance might not be available demonstrates the concern from insurers of covering such a dangerous activity.

The Determination's conclusion that the skydiving entities should not be required to pay insurance costs does not address the question of who is expected to pay for damages resulting from a skydiving accident when there is no insurance available to cover the activity and Section 831.7 is deemed inapplicable. This burden would likely fall on the County as the airport sponsor. Consequently, a situation could be created where the airport sponsor is unable to make the airport available for civil aviation because its financial resources will be used to pay for damages arising from a skydiving accident instead of for the maintenance and operation of the airport.⁶

In the unfortunate event that a skydiving accident does occur the potential will become reality, the damage will be done, and the County will be endangering its ability to make the Airport available for civil aviation needs. This outcome will weaken the Federal government's goal to create a national system of self-sufficient airports that do not burden general revenues of a local government. The safety and liability issues should be addressed now, before an accident occurs.

⁶ With respect to the County, the current airport liability insurance policy includes third party liability coverage for damages arising from skydiving activities. This insurance, however, does not cover injuries or damages sustained by skydivers themselves that occur as a result of County negligence. The airport liability insurance company has been very specific in that they are not interested in including skydivers in the County's coverage. Therefore, should the County be required to permit skydiving at the County airport, the County currently would have no insurance to protect itself for liability of injuries or damages incurred by skydivers. In order to do so, the County would have to seek additional insurance or attempt to replace its entire airport liability coverage with insurance that includes skydivers. The ability for the County to do either is very uncertain at this point – since the County has no indications of insurance markets interested in insuring this risk. If the coverage can be obtained, it will very likely represent an increase in the airport insurance costs. If the coverage cannot be obtained, the skydiving operation would represent a risk the County would have no insurance protection, and the County would have to use its own assets to respond to any claims or lawsuits.

3. Conclusion

In sum, the evidence does not show that the County has unreasonably denied access to the Airport because the conclusion that the County violated Grant Assurance 22 is not supported by the record. Furthermore, if the County is compelled to permit skydiving at the Airport it will contravene the FAA's policy to create a system of self-sufficient airports to serve the aviation needs of the public because it will jeopardize the County's ability to make the Airport available for the civil aviation needs of the public.

B. Grant Assurance 5—Preserving Rights and Powers

1. Summary of the Director's Determination

With respect to whether the County violated Grant Assurance 5, the Determination correctly recognizes that Complainant did not explain how the County violated this assurance. (Determination at p. 37.) The FAA concludes, however, that through its Part 16 investigation that the Board violated Grant Assurance 5 when it voted on August 24, 2010 to reject the Complainant's proposal to conduct a skydiving operation with a drop zone on the Airport. (Determination at pp. 37-38.) The Director's Determination misreads the facts and the law as it applies to this matter and reaches a finding that is not substantiated by the administrative record and the applicable law and policy.

2. County Response to Director's Determination

(a) The Director's Determination Erred in Concluding that the August 24, 2010 Board Action Violated Grant Assurance 5 Because the Record Does Not Support this Determination.

Grant Assurance 5 can be summarized as requiring the County to refrain from taking or permitting actions which would operate to deprive the County of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without written approval of the Secretary. Asserting the August 24, 2010 Board of Supervisors'

action to reject Complainant's proposal to conduct a skydiving operation with a drop zone on the Airport as grounds for violating Grant Assurance 5, as well as a violation of Grant Assurance 22, is an incorrect conclusion. The FAA has not shown that the County has unreasonably denied access to the Airport and, thus, is not able to demonstrate that the County has taken action to deprive the County of any rights or powers necessary to perform the terms and conditions of the grant assurances.

The Determination explains that if the County had fully understood its commitments under the grant assurance then "it would have further engaged the FAA's expertise in evaluating the on-airport drop zone before voting to deny the Complainant's proposal." (Determination at p. 38.) The County acknowledges that prior to August 24, 2010 the County and the FAA were not able to effectively communicate on the County's concerns regarding safety of permitting an on-Airport landing zone and the FAA's interests in making the Airport available to all aeronautical users. (FAA Exhibit 1, Item 1, exhibit 8, exhibit 31; Exhibit 1, Item 5, exhibit 22, exhibit 24.) However, following the August 24, 2010 Board action both the FAA and the County were able to more effectively communicate their respective interests, as highlighted in the correspondence dated September 22, 2010, December 23, 2010, April 4, 2011, May 2, 2011, August 12, 2011, and October 12, 2011. (FAA Exhibit 1, Item 5, exhibit 2, exhibit 26, exhibit 31, exhibit 39; Exhibit 1, Item 15; FAA Exhibit 1, Item 19; County Appeal Exhibit 1.) Unfortunately, this dialogue was abruptly ended pending the outcome of the Part 16 proceedings. (County Appeal Exhibit 1.)

3. Conclusion

Since the administrative record does not support the Director's Determination that the Board of Supervisors violated Grant Assurance 5 on August 24, 2010 when it voted to reject Complainant's proposal to operate skydiving with an on-Airport landing zone, the Director's

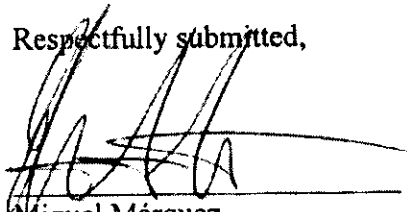
Determination has incorrectly characterized this action as the basis for the County's violation of Grant Assurance 5. Furthermore, the record demonstrates the County's willingness to engage in a dialogue with the FAA regarding the safety of an on-Airport landing zone. For these reasons, the August 24, 2010 action by the Board of Supervisors is not a violation of Grant Assurance 5.

VI. CONCLUSION

The County has raised safety concerns about having skydivers drop through the middle of a congested airway that is the main approach to SJC and then land on a very small landing zone approximately 800 feet from a major north-south interstate highway and the community of San Martin. The County respects the FAA's authority to regulate the nation's airspace; however, the proposal to operate a landing zone on the Airport presents serious safety concerns that threaten public health, safety, and welfare and will ultimately threaten the County's ability to make the Airport available for civil aviation needs. For the reasons set forth in this Appeal, the County respectfully requests that the Associate Administrator reverse the December 19, 2011 Director's Determination.

Dated: January 20, 2012

Respectfully submitted,



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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify in accordance with 14 CFR § 16.15(a) that today I served the foregoing Respondent's Answer, Statement of Facts, and Affirmative Defenses on the following persons at the following address by Federal Express:

Office of the Chief Counsel
Attn: Docket Clerk
FAA Part 16 Airport Proceedings Docket
AGC ~~500~~ 610
Federal Aviation Administration
U.S. Department of Transportation
800 Independence Avenue, S.W.
Washington, D.C. 20591

Associate Administrator for Airports
Attn: Catherine M. Lang
ARP-1
Federal Aviation Administration
U.S. Department of Transportation
800 Independence Avenue, S.W.
Washington, D.C. 20591

Randall S. Fiertz, Director
Office of Airport Compliance and
Management Analysis
Federal Aviation Administration
U.S. Department of Transportation
800 Independence Avenue, S.W.
Washington, D.C. 20591

Richard J. Durden
Attorney at Law
27987 Richmond Hill Road
Conifer, CO 80433

Date: this 20th day of January 2012


Elizabeth G. Pianca
for the Respondent



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

**ROADS & AIRPORTS
DEPARTMENT
RECEIVED**
Western-Pacific Region
Airports Division
P.O. Box 92007
Los Angeles, CA 90009

**County Appeal
Exhibit 1**

2011 NOV 28 A 11:11

**COUNTY OF
SANTA CLARA**

Mr. Michael Murdter
Santa Clara County
101 Skyport Drive
San Jose, CA 95110

Dear Mr. Murdter:

Mr. Mark McClardy asked me to respond to your October 19 letter regarding the proposal by Garlic City Skydiving to conduct skydiving at the South County Airport.

On June 14, Garlic City Skydiving filed a formal complaint against the county of Santa Clara in accordance with the procedures outlined in Title 14, Code of Federal Regulations, Part 16. We are investigating the complaint and your letter has been forwarded to our Office of Airport Compliance for inclusion in the administrative record. We hope to complete our investigation by mid-December.

Given the continuing nature of the investigation, it would be inappropriate for me to provide further comment at this time. You will receive the Director's Determination as soon as it is available.

I trust this information is helpful.

Sincerely,

Brian Armstrong
Manager, Airport Safety,
Standards & Compliance Branch

SOUTH COUNTY AIRPORT PROPOSED PARACHUTE DROP ZONE

County Appeal
Exhibit 2



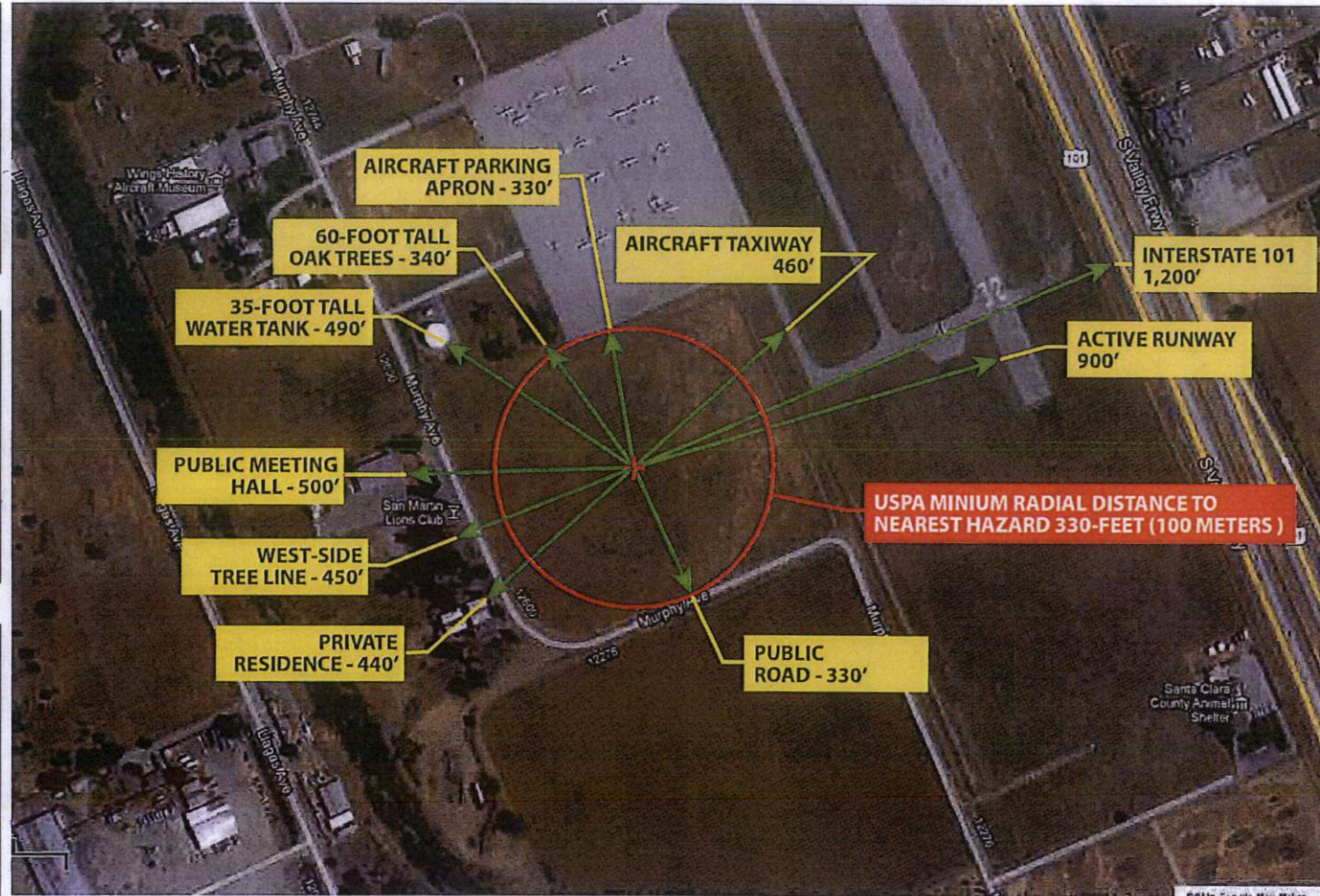
WATER TANK & OAK TREES



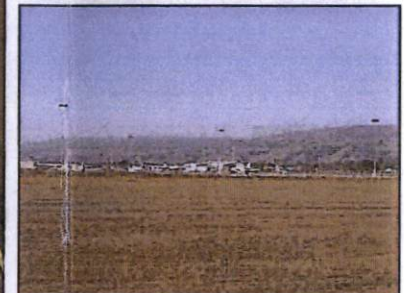
WEST-SIDE TREE LINE



PUBLIC MEETING HALL



STATE HIGHWAY 101 & RUNWAY



PARKING APRON & 40' LIGHT POLES



PRIVATE RESIDENCE & TREES

REV 18JAN12

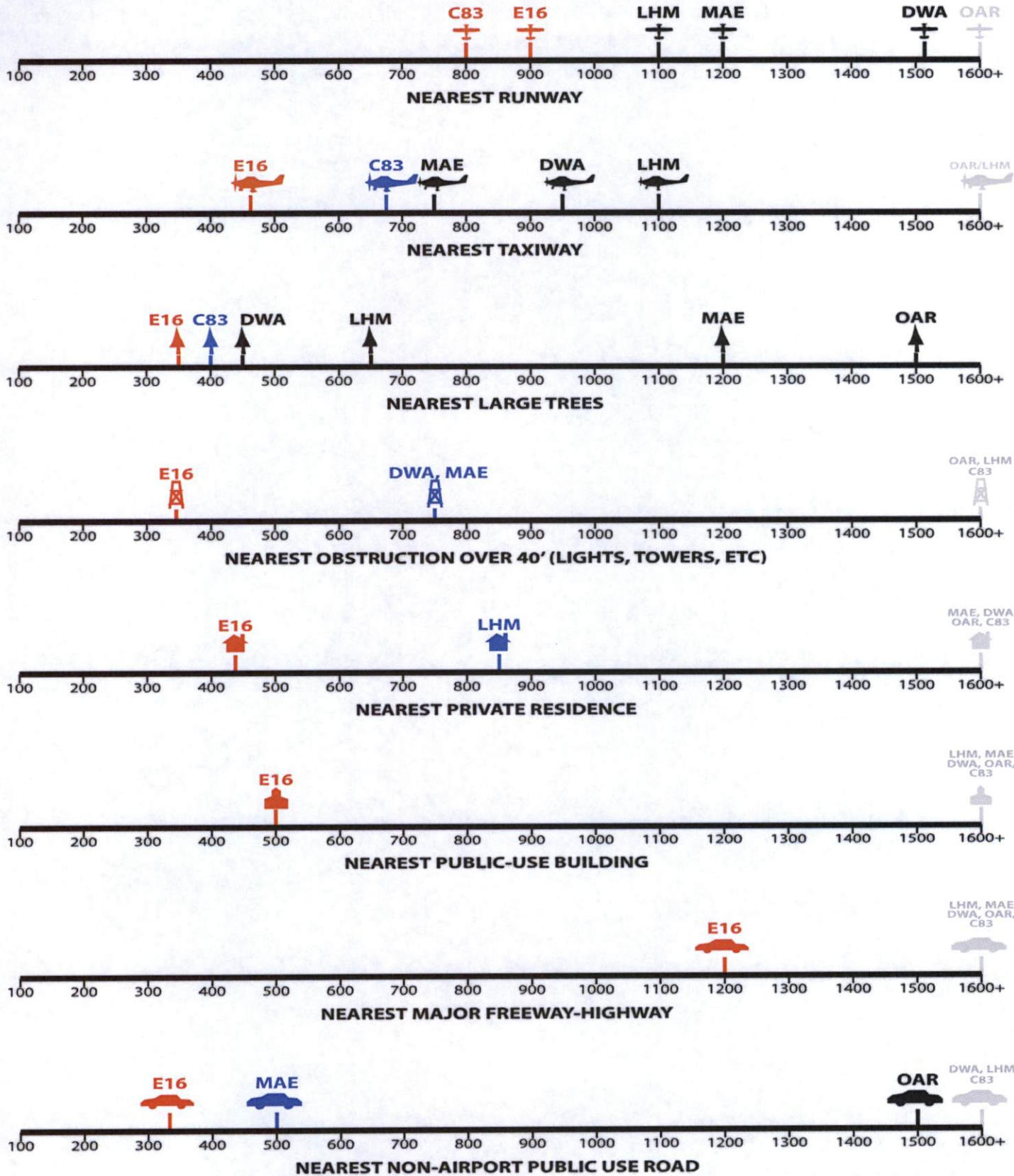
**SOUTH COUNTY AIRPORT
PROPOSED PARACHUTE DROP ZONE**



E16 SKYDIVING PROPOSAL OBSTRUCTION COMPARISON - PUBLIC-USE AIRPORTS

(DISTANCE FROM CENTER OF DROP ZONE IN FEET)

County Appeal
Exhibit 3



E16 = SOUTH COUNTY AIRPORT OAR = MARINA AIRPORT DWA = YOLO COUNTY AIRPORT
 MAE = MADERA AIRPORT LHM = LINCOLN AIRPORT C83 = BYRON AIRPORT