



City of Long Beach

Working Together to Serve

Memorandum

Date: August 9, 2017

To: Patrick H. West, City Manager *T.M.L.*

From: Jess L. Romo, Director, Long Beach Airport *JLR*

For: Mayor and Members of the City Council

Subject: Curfew Violations at Long Beach Airport - Consideration of Possible Amendments to Long Beach Municipal Code (LBMC) Chapter 16.43 Airport Noise Compatibility (Noise Ordinance) and Resolution No. C-28465

The City of Long Beach (City) restricts flight activity and the time of day that aircraft operations may occur at the Long Beach Airport (Airport or LGB) and prescribes administrative penalties (fines) and alternative enforcement procedures (misdemeanor penalties) for operators who violate the regulations. Taken together, the Long Beach Municipal Code, Chapter 16.43 Airport Noise Compatibility (Noise Ordinance) and Resolution No. C-28465 (implementing provisions for the Noise Ordinance) (collectively Noise Ordinance), are the management tools designed to control and reduce the Airport's noise impact on communities near the Airport. These regulations were developed over the years since the Airport's inception, and ultimately enacted by the City in 1995 arising from a stipulated settlement agreement between the City and the airlines. These regulations are "grandfathered" under the Airport Noise and Capacity Act of 1990 (ANCA). This grandfathered status permits the City to continue to enforce the flight and noise restrictions at the Airport.

The Noise Ordinance has been largely successful in minimizing the number of departure and arrival curfew violations; however, in more recent years, the number of curfew violations has increased significantly and demonstrates a disregard for the noise impact on communities near the Airport. Between 2015 and 2016, the number of curfew violations significantly increased from 89 to 134 (See Table 1). Through the first six months of 2017, curfew violations total 133. This pattern illustrates that the current fine structure does not provide the financial incentive to avoid curfew arrivals and departures at the Airport.

In response to the growing number of curfew violations, and based on an initial analysis and consideration by the City Attorney's Office and outside legal counsel, as well as preliminary discussions with the Federal Aviation Administration (FAA), the Airport is recommending that the City pursue amendments to the Noise Ordinance to increase the fine amounts for curfew violations at the Airport and make other minor amendments to the Noise Ordinance.

As described in more detail below, the Airport's proposed fine structure is intended to target repeat violators by increasing the fine amounts to be more in line with fine amounts at other curfew airports in the region. Further, the Airport believes the proposed increased fine structure for curfew violations (as well as other amendments to the Noise Ordinance) will demonstrate, to the noise-impacted community, the Airport and City's resolve to address the issue of continued disregard of the nightly curfew.

BACKGROUND

In 1981, the City adopted its first noise control ordinance, which limited air carrier flights to 15 per day and required carriers to use quieter aircraft. In December 1983, a Federal District Court determined that there was insufficient basis to support the 15-flight restriction and entered a preliminary injunction prohibiting the City from reducing the number of daily air carrier flights below 18.

Following entry of the preliminary injunction, the City undertook a Part 150 noise study (14 C.F.R. Part 150) and prepared a Noise Compatibility Program (NCP) and implementing ordinance for the Airport and submitted the NCP and ordinance to the FAA for review in July 1986. During this time, and prior to FAA approval of the Part 150 Program, the City adopted an ordinance limiting the number of air carrier flights at the Airport to 32 flights per day. This action was in part a result of numerous noise-related nuisance and inverse condemnation claims filed by residents affected by Airport noise. Additional litigation followed, and in 1989, the District Court invalidated the 1986 ordinance and ordered an increase in the minimum number of allowable daily flights at the Airport to 41.

While the City's appeal to the Ninth Circuit Court of Appeal was pending, Congress enacted ANCA to establish a national program for review of airport noise and access restrictions. ANCA, as implemented by federal regulations, requires airport proprietors proposing to implement airport noise or access restrictions that affect the operation of some "older" aircraft (Stage 2) to comply with specific notice, economic cost benefit analysis, and comment requirements. ANCA further requires that airport proprietors proposing to implement noise or access restrictions on more "modern" aircraft (Stage 3) provide a detailed economic cost benefit analysis, demonstrate satisfaction of six statutory criteria, and obtain FAA approval prior to implementation of any such restrictions, unless agreement is obtained from all affected aircraft operators.

When ANCA was passed in 1990, it permitted airports to implement Stage 2 restrictions that were proposed and Stage 3 restrictions that were in effect before its effective date. ANCA, and its implementing regulations, also expressly gave a statutory exception to certain noise restrictions already in existence. These exceptions are collectively referred to as the "grandfathering" provisions of ANCA. ANCA permits amendments to the grandfathered restrictions so long as the amendments do not constrain capacity or operations below the levels permitted under the original, "grandfathered" agreement or impact safety.

Beginning in 1992, and to avoid further litigation, the City and the involved air carriers and general aviation groups negotiated a Stipulated Final Judgment, which the Federal District Court adopted on May 18, 1995. The stipulation provided that: (1) the City could enforce its newly adopted noise regulations (LBMC Chapter 16.43); (2) until at least January 1, 2001, the City could not amend its noise regulations to make them more restrictive with respect to aircraft noise or air carrier operations; and, (3) on or after January 1, 2001, the City was free to "amend or replace....its ordinances...including the adoption of regulations more restrictive on aircraft noise and operations than those embodied in the version of Chapter 16.43."

The Noise Ordinance reflects consensus, derived through this extensive litigation history, between the City, the FAA, communities, and various aviation stakeholders on the nature and extent of aircraft operations and noise generated by aircraft operations at the Airport. For over 20 years, the Noise Ordinance has balanced the development of facilities and the growth of operational capacity at the Airport with the legitimate environmental concerns of the surrounding communities.

The three major components of the Noise Ordinance are:

1. Single event noise exposure limits (SENEL) for aircraft operating at the Airport.
2. Curfew requiring all commercial flights to be scheduled between 7:00 a.m. and 10:00 p.m. Violations are subject to monetary administrative "civil" penalties as well as "alternative" criminal enforcement.
3. Community Noise Equivalent Level (CNEL) "noise budget" for all five Airport user groups (commercial air carriers, commuter, general aviation, industrial, charter) based on their respective CNEL limits in the baseline year of 1989-1990. The Noise Ordinance allows a minimum of 41 air carrier flights per day. The number of flights may be increased if all flights in the category operate at, or below, the 1989-1990 baseline CNEL noise contour.

The FAA has previously acknowledged that the fundamental provisions of the City's Noise Ordinance, including those provisions related to the limitation of "late night" flights, is grandfathered under the provisions of ANCA; therefore, the notice, review, and approval requirements set forth in ANCA and Part 161 do not apply to a subsequent amendment to the Noise Ordinance so long as it "...does not reduce or limit aircraft operations or aircraft safety." See, 49 USC 47524(d)(4), as implemented by 14 CFR 161.3(b) and 161.7(b)(4).

The Noise Ordinance approved by the Court remains in effect today, and it has not been amended or modified by the Long Beach City Council since its enactment. Given the special status and critical nature of the Noise Ordinance, the City is very careful to ensure that it is protected. It is the City's goal that the Noise Ordinance and the protections provided to the communities, aviation interests, and other stakeholders remain in effect. For this reason, the City strictly adheres to the provisions of the Noise Ordinance and has, to date, deferred any modification to the Noise Ordinance.

CURFEW VIOLATIONS AT THE AIRPORT

After the 1995 settlement, the anticipated increase in the number of flights at the Airport did not materialize and there were few neighborhood or resident complaints concerning aircraft noise. This situation, however, has changed in recent years, for many reasons, including that all 41 permanent flight slots have been allocated and 9 supplemental flight slots have been allocated to air carriers. Not only have neighborhoods experienced a significant increase in aircraft activity, the carriers have engaged in (and continue to engage in) a considerable number of aircraft operations in violation of the City's curfew regulations.

From January 1, 2017 through June 30, 2017, there have been 119 violations during the sensitive nighttime hours between 11:00 p.m. and 7:00 a.m., with an additional 14 violations occurring during 10:00 p.m. to 11:00 p.m. The number of late night curfew violations has made it difficult for the City to balance the air carrier opportunities at the Airport against the legitimate complaints of residents and neighbors who have an interest in ensuring compliance with the Noise Ordinance.

Air carrier operations outside the scheduled hours (7:00 a.m. - 10:00 p.m.) have comprised approximately 1.5 percent of all air carrier operations at the Airport. However, activity during the first six months of 2017 indicate that approximately 2.7 percent of all air carrier operations were conducted outside of the hours of 7:00 a.m. and 10:00 p.m., which represents nearly a doubling of late-night flight activity compared to previous periods. Not only have neighborhoods experienced a significant increase in aircraft activity, the carriers have engaged in (and continue to engage in) a considerable number of aircraft operations in violation of the City's noise regulations.

Table 1 illustrates the number of air carrier curfew violations between 2013 and 2017. Although the highest number of violations occurred in 2016, it is very clear there will be a greater number of violations at the end of 2017.

Table 1. Air Carrier Curfew Violations 2013 - 2017

| Year | Number of Violations |
|-------------------|-----------------------------|
| 2013 | 120 |
| 2014 | 97 |
| 2015 | 89 |
| 2016 | 134 |
| 2017 ¹ | 133 |

¹ Data for 2017 includes activity from January 1 through June 30.

AIRPORT NOISE AND ACCESS CONTROLS IN THE REGION

There are two airports in the region that have curfew provisions and a fine structure similar to the Long Beach Airport: John Wayne Airport (JWA) and San Diego International Airport (SDIA).

JWA operates under an ANCA grandfathered settlement agreement with the City of Newport Beach and a few community groups surrounding JWA. The Phase 2 Commercial Airline Access Plan and Regulation (Access Plan) is the principal regulatory mechanism by which the JWA settlement agreement restrictions are administered. The Access Plan provides specific SENEL and commercial and cargo operations hours (curfew) and related restrictions and provisions for operations at JWA.

Any person who violates the curfew at JWA is subject to the following administrative penalties: (a) For each of the first five violations occurring during the term of the Access Plan, \$2,500 per violation; (b) For each of the next five violations occurring during the term of the Access Plan, not less than \$3,500 or more than \$5,000 per violation; and (c) For each violation after ten violations during the term of the Access Plan, an administrative penalty of not less than \$5,000 or more than \$10,000 per violation. Total cumulative violations beyond 10 violations may be a material event of default under a carrier's lease or operating agreement and may subject the carrier to disqualification and termination of its operating privileges at JWA.

In 2002, and again more recently, JWA went through a lengthy public outreach, review and comment process to amend the settlement agreement and Access Plan. These amendments included amendments to the allocation and related provisions of the Access Plan. The main purpose of the settlement amendment was to continue the County's historical protection of the environmental interests and concerns of persons residing near JWA in a manner that provided increased capacity at JWA, and to provide the ability to amend the Access Plan in a manner that allows the allocation of operating rights at JWA. Importantly, throughout both these amendment processes, JWA coordinated closely with FAA and received written assurances and an opinion from the Chief Counsel of FAA concurring with JWA that a subsequent amendment of an airport noise or access agreement or restriction that is grandfathered under ANCA, and that does not reduce or limit aircraft operations or affect aircraft safety, can be approved and implemented without jeopardizing the airport noise and access agreement's grandfathered status under ANCA.

SDIA also operates under an ANCA grandfathered nighttime departure curfew (there are no time restrictions for arriving flights) that was established in 1989. Airlines that take off between 11:30 p.m. and 6:30 a.m. face fines of between \$2,000 and \$10,000 (and sometimes more depending on how frequently they have broken curfew within a particular time frame). A panel of airport officials (the Airport Noise Advisory Committee - ANAC) reviews curfew violations before deciding how much to fine an airline.

In 1999, in response to growing numbers of departure curfew violations by airlines, the ANAC requested SDIA staff to confer with the FAA and determine the legality of increasing the fine amounts for curfew violations. The FAA, after lengthy correspondence and review, rendered an

opinion (at that time) that the airport operator could, within the specific fine structure proposed by the airport, increase the fine amounts without jeopardizing the curfew's grandfathered status under ANCA (among other assurances). The national events of 2001, and the impending transfer of the airport to the new San Diego Regional Airport Authority (SDCRAA), then delayed decisions on increasing fines. In mid-2002, the airport decided to refer the matter to the new SDCRAA Board for consideration. Although the airport and Board ultimately decided not to increase the fine structure for curfew violations, the decision was based on assurances from the airlines regarding future compliance and a decrease in curfew violations during the period leading up to consideration of an increase in the fine structure. We understand that SDIA is, once again, experiencing an increase in late night curfew violations and may soon initiate a process to re-consider an increase in the penalties for curfew violations. The proposed new fine structure in 2002 targeted repeat violators by extending the term of the compliance period within which violations are cumulated and with the use of a "multiplier" in calculating fine amounts.

Based on these examples, it appears that reasonable increases in the fine structure for curfew violations would be consistent with the intent of Congress in adopting ANCA and permitting exempt amendments to "grandfathered" regulations.

CONSIDERATION OF POSSIBLE AMENDMENTS TO THE NOISE ORDINANCE AND ALLOCATION RESOLUTION

Based upon the request from the Airport, the City Attorney's Office, with the assistance of outside legal counsel, has evaluated potential amendments to the Noise Ordinance that may enhance compliance with the original intent of the Ordinance, address increasing concerns expressed by the communities surrounding the Airport regarding the failure of airlines to comply with the curfew requirements, and provide continued opportunities for the growth of air transportation services to the public. A few potential amendments were evaluated. The key amendments deemed to be reasonable and legally viable, without possibly endangering the ANCA grandfathered status of the existing Noise Ordinance, are outlined below:

FINES FOR CURFEW VIOLATIONS

Existing Fines

Penalties for Noise Ordinance violations (including noise level and curfew violations) are currently \$100 for the first through third violation and \$300 thereafter. These amounts have not been increased since the Noise Ordinance was adopted in 1995 and are not currently sufficient to encourage compliance or, in some cases, deter illegal late-night operations.

Recommended Modifications to Fine Structure

The Airport is recommending an increase in the fines for curfew and noise violations to \$2,500 for the first through fifth violation during any 24-month period; \$3,000 to \$5,000 for the sixth through tenth violation during any 24-month period; and, \$5,000 to \$10,000 thereafter during any 24-month period, with disqualification and forfeiture of slots possible for 20 or more violations

during any 24-month period. Under this proposal, the fine structure would automatically reset every 24-month period.

Table 2 compares the present fine schedule with the proposed fine schedule.

Table 2. Fine Schedule

| Present Noise Curfew Fine Schedule | Airport Proposed Curfew Fine Schedule |
|---|--|
| \$100 for the 1 st violation and \$300 for each occurrence thereafter occurring during any 12-month period | \$2,500 for the 1 st -5 th curfew violation |
| \$100 if no violation during the previous 12 months; \$300 for any additional violations of curfew within any 12-month period | \$3,500-\$5,000 for the 6 th -10 th curfew violation, depending on the circumstances and number of previous violations |
| Same as above | \$5,000-\$10,000 for the 11 th and any additional curfew violation |
| Same as above | For any additional violations of the curfew beyond 20, the operating privileges of an operator may be terminated or limited by the Airport |

As indicated in Table 2, the proposed curfew fine schedule would involve increasing the fine amounts for initial and subsequent curfew violations for repeat violators and provide the Airport Director with the ability to reduce, limit, or terminate the operating privileges of an air carrier that is a serial and serious repeat violator.

UNDER UTILIZATION OF OPERATIONS CAPACITY - MINIMUM SLOT UTILIZATION REQUIREMENTS

In addition to the increasing concern regarding curfew violations, there also is a concern that air carriers are not adequately utilizing the flight slots allocated at the Airport; thereby, minimizing the opportunities for other incumbent and new entrant air carriers to increase or initiate service at the Airport. This is particularly problematic with the recent increase in demand for flight slots at the Airport and the increase in curfew violations by incumbent air carriers failing to fully utilized their slot allocations.

Existing Flight Utilization Requirements

Slot utilization requirements are contained in City Council Resolution C-28465. As stated in the Resolution, "Operations' means averaging at least four flights per Slot per week over any 180-day period (57 percent); provided however, failure to conduct at least 30 Flights per Slot in any 60-day period (50 percent) shall constitute failure to Continuously Operate such slot." These

requirements enable a carrier to maintain a slot with a minimum of 57 percent utilization. This level of utilization arguably provides for the potential to engage in anti-competitive behavior by maintaining flight slots that are underutilized and, thereby, restricts opportunities for new entrants or other incumbent air carriers that might otherwise be able to operate the slots.

Recommended Modifications to Flight Slot Utilization Requirements

The Airport is recommending a modification in the minimum utilization provisions to require flight slot utilizations of 60 percent per month, 70 percent per quarter, and 85 percent per year (October 1 through September 30). These minimum utilization provisions are less than those provided at other airports in the region, including nearby JWA.

In addition to these modifications, the Airport is recommending that the Allocation Resolution be amended to include an administrative penalty provision for failure to comply with the minimum utilization requirements that would subject air carriers to penalties including reduction in the number of flight slots consistent with utilization and disqualification from receiving additional permanent or supplemental flight slots.

ADDITIONAL RECOMMENDED MODIFICATIONS AND AMENDMENTS

In addition to these recommended amendments, the Airport is recommending the City consider other administrative amendments, including clarifications regarding "scheduled" and "operated" requirements and modifications to some definitions in the Noise Ordinance, as well as providing an air carrier with the ability to sponsor a code share airline's entry into the Airport. A "code share" is an air carrier marketing agreement which is approved by the Federal Department of Transportation in which an air carrier places its designator code on a flight operated by another airline, and sells tickets for that flight. The arrangement offers carriers an opportunity to provide service to destinations not typically in their route structure.

Each of these proposed modifications and amendments will be more fully discussed and analyzed in the context of the next steps process as outlined below.

NEXT STEPS

In response to the increase in curfew violations at the Airport, staff will be initiating a process for the City Council to consider amendments to the Noise Ordinance that would modify the fine structure for curfew violations and for related Noise Ordinance amendments. Amendments are being considered because of the Airport's interest in enforcing the current nighttime curfew and the importance of protecting the surrounding community consistent with existing regulations at the Airport. Because of the importance of this issue to the Airport, the community, and the aviation industry, the Airport intends to address this matter by initiating a process that will ensure all interested parties have a full opportunity to provide input to the Airport as it considers any possible amendments to the Noise Ordinance.

Initially, the Airport will send a letter to the air carriers and other interested parties for review and comment. The letter will discuss the issues and make the preliminary recommendations discussed in this memo. The Airport will also reach out to the greater community to discuss the proposed amendments through public input meetings. Once the Airport has received initial comments from the air carriers, community, and other interested parties, the Airport will prepare a report to the City Council that includes any comments received, responses and related information, and recommendations regarding any proposed amendments. The staff report and attachments will then be presented to the City Council for consideration.

At appropriate points during the process, the Airport, in close coordination with the City Attorney's Office and outside counsel, will continue to coordinate on this matter with the FAA to ensure the City recognizes any federal interests or concerns that might be related to the consideration of these important issues.

Prior to presenting the Airport's final recommendations to the City Council, the Airport will request a formal written opinion from the Chief Counsel of FAA concurring in the following points: (i) within the meaning of, and for all purposes related to Section 9304 of ANCA, the proposed amendments do not reduce or limit aircraft operations or effect aircraft safety in violation of ANCA do not jeopardize the Noise Ordinance's grandfathered status under ANCA; (ii) the proposed amendments are not inconsistent with any of the Airport's "sponsor assurances" or other covenants or obligations under any Airport grant agreement entered into by the City and FAA pursuant to any Federal law or regulation; (iii) the proposed amendments will not adversely affect any application for Federal grant funds submitted in the future by the City for eligible projects at LGB; (iv) the proposed amendments will not adversely affect any application submitted in the future by the City to impose or use passenger facility charges with respect to eligible projects at the Airport; and, (v) the proposed amendments are consistent with and do not violate any provision of existing federal law for which FAA has statutory or delegated enforcement or implementation responsibilities.

Although the Airport cannot set specific dates for this process until the initial comments are received, staff intends to proceed as promptly as possible to address and resolve these issues, and anticipate bringing this matter to conclusion prior to the first quarter of 2018.

If you have any questions or require additional information, please contact me at (562) 570-2605.

JR: RRM

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