



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

**SUBJECT: CURFEW COMPLIANCE
PROVISIONS IN PROPOSED
AIRLINE LEASE AND
OPERATING AGREEMENTS**

DATE: March 9, 2007

SUPPLEMENTAL MEMO

Background

Council is scheduled to consider a recommendation to authorize the City Manager to negotiate and execute proposed new Airline Lease and Operating Agreements with all passenger and cargo airlines currently operating at the Airport, at its March 13, 2007 meeting. Questions have arisen regarding the provisions in the proposed Agreements addressing the City's Curfew Ordinance and specifically as to a comparison of the Curfew provisions in the proposed new Agreements with the provisions of the current form Airline Lease and Operating Agreements.

The purpose of this memorandum is to compare the provisions in the current and proposed new Agreements and to affirm that the City will continue to have the ability to enforce the terms of the Curfew Ordinance under the proposed new Agreements. This memorandum will also review the limitations imposed by Federal law on the City's ability to expressly require that a violation of the Curfew Ordinance be an event of default under the terms of the Agreements, without the agreement of the airlines

Discussion

A. Current Airline Lease and Operating Agreements

The Airline Lease and Operating Agreement form that is currently in effect with most of the airlines at the Airport does not include any specific reference to the airlines' obligation to comply City's Airport Curfew Ordinance. Rather, the current Agreements include general provisions that the airlines will comply with all lawful statutes and ordinances of the City, state and federal governments. The current Agreements include a general provision that the City may terminate the Agreements for default. However, the current Agreements do not expressly provide for termination and eviction of an airline for violations of the curfew ordinance. The City has negotiated specific provisions regarding compliance with the Curfew Ordinance in agreements with UPS and Hawaiian Airlines. However, those agreements also do not expressly provide for

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termination and eviction of the airlines for violation of the Curfew Ordinance. In fact, the City has never attempted to default or terminate an airline for violation of the curfew or the Curfew Ordinance.

B. Proposed New Airline Operating Agreements

The proposed new Agreements provide that the airlines will agree: (a) to abide by the City's Curfew Ordinance and all other noise control restrictions that may be adopted by the City in accordance with applicable law; (b) not to schedule or conduct takeoffs or landings between the Curfew Hours of 11:30 p.m. and 6:30 a.m. (local time), unless such takeoff or landing is allowed under the terms of the Curfew Ordinance; (c) to restrict static jet engine testing between the hours of 11:30 p.m. and 6:30 a.m. (local time); and (d) to inform its staff of the Curfew Ordinance requirements and to work cooperatively with Airport staff for timely submission of flight schedule changes and Curfew reporting documents. Violations of the Curfew Ordinance will continue to be subject to enforcement by the City under the terms of the Curfew Ordinance. However, the airlines agreed to include these specific provisions regarding the Curfew Ordinance only if the agreement also expressly provided that violations of the Curfew Ordinance would not constitute an event of default under the new Agreements.

In addition, the Agreements provide that the airlines will voluntarily agree to schedule and conduct all takeoffs and landings at the Airport between 6:30 a.m. and 11:30 p.m. (local time), regardless of whether the takeoff or landing would otherwise be permitted under the provisions of the Curfew Ordinance. In recognition that this last provision is a voluntary commitment by the airlines above and beyond the mandatory provisions of the Curfew Ordinance, the Agreements provide that an Airline's failure to schedule its otherwise permitted operations outside the Curfew Hours shall not constitute either an event of default or a violation of the Curfew Ordinance.

C. Federal Limitations on the City's Ability to Adopt New Curfew Enforcement Remedies

Prior to imposing any new curfew restrictions on aircraft that currently operate at the Airport, Federal Law and FAA Regulations require that the City (and any other Airport operator): (a) conduct a detailed cost benefit analysis; (b) comply with certain federal statutory requirements; and (c) obtain FAA approval, *unless agreement is obtained from all affected aircraft operators.*

While the airlines have agreed to incorporate the above-described curfew provisions into the proposed new Agreements, they agreed to do so only on the condition that violation of the curfew provisions would not be an event of default under the Airline Lease. Because an express default provision, including a remedy of eviction for a violation of the Curfew Ordinance, would be a new curfew restriction, the City cannot unilaterally impose such a default provision without first either: (a) obtaining the unanimous agreement of all of the airlines; or (b) conducting the required cost benefit analysis and obtaining FAA approval. The cost benefit analysis and the other stringent

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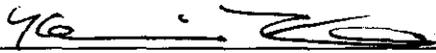
federal requirements to obtain FAA approval of new curfew restrictions effectively preclude the City from requiring such a default provision as a condition to the approval of the proposed new Airline Lease.

The City received FAA approval in October 2003 to revise the curfew from a weight-based to a noise-based curfew as provided in the current Curfew Ordinance. Because the FAA determined in that instance that the new noise-based curfew did not impose any new restrictions as compared to the old weight-based curfew, the FAA did not require that the City meet all of the requirements under ANCA and applicable FAA Regulations for new curfew restrictions. Although the City can impose the \$2,500 fine under the Curfew Ordinance and seek injunctive relief for repeat violations of the ordinance as an Unfair Business Practice, a new provision in the airline Agreements providing for default and eviction of an airline for violation of the Curfew would constitute a new curfew restriction that would require a full cost benefit analysis under ANCA, compliance with all other applicable federal statutory requirements and FAA approval. Because the statutory criteria are subjective and also because the FAA has previously stated its opposition to any new local curfew restrictions, the likelihood of FAA approval of any new curfew restrictions such as a provision in the airline Agreements providing for default and eviction of airlines for curfew violations is low.

Conclusion

Without the concurrence of the airlines, Federal law and regulations effectively preclude the City from requiring that a violation of the Curfew Ordinance would result in a default and eviction under the proposed new Airline Agreements. Regardless of whether the Curfew Provisions in the Airline Agreements include a default provision, the City's remedies for violation of the Curfew Ordinance, which are the \$2,500 fine and injunctive relief for repeat violations, remain in full force and effect.

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By 
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