EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF TAOS
STATE OF NEW MEXICO

JOHN T. NICHOLS,
DILIA C. MARTINEZ,
PHILLIP H. REYNA,
ERNEST CONCHA,
DANIEL ROMERO,
BONITA (BONNIE) S. KORMAN
EDWARD R. SYLVESTER and JENNIFER P. SYLVESTER
JUDY SUTTON

Plaintiffs,

vs. No. D-820-CV-2014-00325

THE TOWN OF TAOS

and

BOARD OF COUNTY COMMISSIONERS
OF TAOS COUNTY,

Defendants

PLAINTIFFS' REPLY TO TOWN OF TAOS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW Plaintiffs, by and through their counsel of record Graeser & McQueen, LLC and file their reply to Defendant Town of Taos' *Response* as follows.

I. Incorporation of Taos County's Arguments

Plaintiff's incorporate their *Reply to Board of County Commissioners of Taos County's Response to Plaintiffs' Motion for Preliminary Injunction* in reply to Defendant Town of Taos' incorporation of Taos County's motion response.

II. Injunctive Relief is Available to Plaintiffs

The Town disputes several factual issues. The facts it chooses to debate are not essential to the motion, but rather provided by way of background and explanation of the Plaintiffs' concerns. The Town's factual characterizations are incorrect in any event, and it misstates Plaintiffs' argument.

A. The larger runway will permit larger aircraft, and traffic patterns with greater impact.

The Town alludes to Plaintiffs' "argument that larger aircraft will create irreparable harm for Plaintiffs." Response at 2. Plaintiffs' position does not rely on that argument, rather, it relates to the off-site impacts of the new runway alignment, as explained in the Town's own planning documents. Regardless, even this factual assertion is demonstrably false and cannot be left unrebutted.

The Town asserts "the proposed runway is designed to handle the same maximum size and type aircraft as the current runway." Response II.A. This assertion is based on two conclusory, unsupported statements by the non-expert town manager. Affidavit of Rick Bellis ¶5-6. Simply stated, the Town's position is sophistry. The existing runway is 5,803 feet long with a capacity of 24,000 pounds (single wheel). New Mexico Airport System Plan Update 2009, 2-13. **Motion Exhibit 4**. The Town intends to construct an 8,600-foot long runway with a capacity of 60,000 pounds. Final Environmental Impact Statement for Taos Regional Airport, Airport Layout Plan Improvements, June 29, 2012 (EIS), ES-1,

Motion Exhibit 5. The increase in runway length and weight capacity has an obvious purpose: "providing sufficient runway length for the most demanding family of aircraft (high performance turboprop and small cabin class jet aircraft with a Maximum Certificated Take-off Weight (MCTOW) of 60,000 pounds or less) included in the existing *and projected* aircraft fleet." EIS, ES-2. In contrast, Mr. Bellis' affidavit does not even attempt to explain how a 24,000 pound capacity runway is "engineered to carry" a 60,000 pound aircraft. Response at 2.

The Town's response goes on to make entirely unsupported statements regarding impacts on surrounding neighborhoods and traffic patterns. Response at 3. Those unsubstantiated statements directly and wholly contradict the Town's own Off Airport Land Use Plan (developed by its own, presumably qualified, consultant) which renders residential uses on residentially-zoned land near the new runway "clearly unacceptable," stating the "**Specified use [residential] must not be allowed. Potential safety or overflight nuisance impacts are likely in this area**." Off Airport Land Use Plan, "Criteria." If the new runway project is approved, Plaintiffs and others will find their homes are now a "noncompatible land use" as defined by federal regulations. 14 CFR §150.7. In no way can this be considered "no adverse impact." Response at 3.

Most strikingly, the Town argues that "there is no evidence of increased traffic created by the new runway…" Response at 4. This argument, based on the Bellis Affidavit, ¶10, directly contradicts the current data determined by the State

Aviation Division and the comprehensive, decades-long, expert analysis contained in the Environmental Impact Statement. The Airport had 11,450 total operations (takeoffs and landings) for 2012. **Motion Exhibit 4.** The Airport is expected to have 15,258 total operations per year for the year 2020 without the Airport Project. **Motion Exhibit 6.** With the Airport Project total operations in 2020 are expected to be 19,148, an increase of approximately 25% from the no-build scenario. **Motion Exhibit 6.**

More to the point, air traffic will use the new runway. This will be all the more the case because the existing runway is slated to be shortened. If there was no projected material use of the new runway, the Town's consultant would not say it was incompatible with residential uses. Nor would it make sense to spend many millions of dollars to build a runway that will not get used. Not only will air traffic necessarily follow flight paths directly over affected residential areas, based solely on the geometry of the proposed runway, but the Town has no control over what flight paths the pilots choose to use and cannot make any representations as to where those aircraft will fly:

> The Federal Aviation Act of 1958, as amended grants the FAA exclusive control over aircraft takeoffs, landings, and air navigation. Acting through the FAA, the federal government also provides construction grants... Section 1718(a)(1) requires that airports so subsidized must be available for public use on fair and reasonable terms and without unjust discrimination. *Greater Westchester Homeowners Association v. City of Los Angeles*, 603 P.2d 1329, 26 Cal.3d 86, 94 (1979) (parentheticals and quotations removed).

Saying that only 5% of traffic will use the new runway has no support in the

factual record. Although the Town *wants* there to be no impact, its position that there would be none is counterfactual. Actual impacts aside, Plaintiffs' complaint is founded on the Town Consultant's own recommendation regarding necessary restrictions. Whether or not more, larger, louder aircraft will use the larger runway, the restrictions remain.

B. The New Runway is not a Legal Nonconforming Use

The Town's response relies on the "grandfathering" concept of legal nonconforming use to avoid any land use review or regulation of the new runway (*not* the existing airport). "The Town can also show that the *new* runway is a 'legal nonconforming use.'" Response at 5 (emphasis supplied). Illogical on its face, the Town's argument offers no authority to support its position.

A legal nonconforming use is one that was "lawfully established prior to the inception date of [the LUR], has been in continuous occupancy and uninterrupted use for the applicable purpose(s)." LUR Section 2.1.2. That cannot be true of the as-yet unbuilt crosswind runway, rejecting the Town's argument under the LUR. Moreover, the Town does not offer a letter of determination of legal non-conforming use under LUR Section 3.3.2(A)(1).

New Mexico caselaw is similarly unhelpful to the Town. In *City of Las Cruces v. Huerta*, 1984-NMCA-120, 102 N.M. 182, our Court of Appeals fully addressed the Town's argument that purchasing land and engaging in planning of contemplated uses "established" the new runway as an existing use:

The general rule is that actual use as distinguished from merely

> contemplated use when a zoning restriction opposed to it becomes effective is essential to its protection as a lawful nonconforming use. It is not the present intention to put property to a future use but the present use of the property which must be the criterion Mere intentions or plans at the time a zoning ordinance becomes effective to use particular land or dwellings for a certain use does not entitle one to that use in contravention of the ordinance.
>
> A purchase of property with an intention to use it for a particular purpose does not in itself give a right to use it for that purpose as against a subsequent zoning ordinance or restriction. 1984-NMCA-120 ¶12, quoting 8A E. McQuillin, Municipal Corporations § 25.188 at 34 (3d. ed.1976) (internal formatting omitted).

The Town's argument that it falls within a grandfather exception does not withstand scrutiny under New Mexico law regarding such exceptions.

> Generally, in resolving statutory ambiguities, courts will favor a general provision over an exception. This is especially true when a statute promotes the public welfare. Because of this judicial predilection, strict or narrow construction is usually applied to exceptions to the general operation of a law. For this reason, a grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause. When the scope of a grandfather clause is ambiguous, the court will construe it strictly against the party who seeks to come within its exception. *Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 1998-NMSC-020 ¶27, 125 N.M. 401.

The Town had a funding obligation to make a commitment to the federal government, and it did so, stating it "recognizes and willingly accepts the requirement … to coordinate with local jurisdictions to ensure that appropriate action, including the adoption of zoning laws, has or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal Airport operations…" Motion Exhibit 22. The Town now seeks an abbreviated, rubber-stamp process that

entirely avoids the commitment it made to secure funding.

I certify that this pleading was served on all counsel of record through the Tylerhost e-fling system.

Respectfully submitted,

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