

6/11/08

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA

DATE
STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION
by *[Signature]*
Administrative Hearings Clerk

In the Matter of the Noise Variance) OAH Case No. 2004120097
Application of:)
)
SAN DIEGO COUNTY REGIONAL)
AIRPORT AUTHORITY,)
SAN DIEGO INTERNATIONAL AIRPORT (SDIA),) DECISION
)
Respondent.)

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Transportation as its Decision in the above-entitled matter, except for the following technical or minor changes, which do not affect the factual or legal basis for the decision [pursuant to Government Code section 11517(c)(2)(C)]:


- throughout decision:
 - change "Eighth Variance" to "current variance"
 - change "RASP" to "RSAP"
- page 5, paragraph 6:
 - line 1, add "of a 'noise problem' airport" after "airport proprietor"
 - line 3, change "and" to "or"
 - line 6, delete "current"
- page 5, paragraph 7, line 3, add ", unless property meets at least one criterion specified in Section 5014" after "boundary"
- page 5, paragraph 9, line 4, add "at least" after "interest,"
- page 6, paragraph 10, line 4, change "midnight" to "10 p.m."
- page 6, paragraph 11, line 2, change "28th" to "27th"
- page 7, paragraph 12:
 - line 4, add "apply for or" after "fail to"
 - line 8, change "and" to "or"
- page 7, paragraph 13:
 - line 8, change "limitations" to "limitation"
 - line 10, add "CNEL" after "dB"
- page 12, paragraph 23, line 1, delete "...the Ninth Variance sought for this airport. It is..."
- page 12, paragraph 26, line 1, delete "(Eighth Variance)"

- page 15, paragraph 36, line 6, change “the 7th” to “a”
- page 15, paragraph 37, lines 14-15, change “a Ninth Variance” to “another variance”
- page 17, paragraph 4, line 1, change “appropriated” to “appropriate”
- page 17, Order paragraph 1, line 1, add “effective” before “date”
- page 18, Order paragraph 5, line 13, add “discretion” after “legislative”
- page 19, Order paragraph 8, line 1, delete “extension of the”

This decision shall become effective July 11, 2008.

IT IS SO ORDERED this 11th day of June 2008.

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION

By 

GARY CATHEY, Acting Chief
Division of Aeronautics

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

Regarding the Application of:

SAN DIEGO COUNTY REGIONAL
AIRPORT AUTHORITY, SAN DIEGO
INTERNATIONAL AIRPORT (SDIA),

Respondent.

OAH Case No. 2004120097

PROPOSED DECISION

On September 19 and 20, 2007 Stephen E. Hjelt, Administrative Law Judge, conducted an administrative hearing at the Office of Administrative Hearings in San Diego. The following appearances were made at the administrative hearing:

- Michael Gatzke, Esquire and Danielle K. Morone, Esquire of Gatzke, Dillon & Balance, for The San Diego County Regional Airport Authority (SDCRAA or Airport Authority), San Diego International Airport (SDIA) and Breton K. Lobner, General Counsel SDIA;
- Richard Phillips on behalf of the Greater Golden Hill Community Development Corporation (GGHCDC or Greater Golden Hill);
- Raiyn Bain, Attorney, on behalf of the California Department of Transportation; and
- Kirk Hanson, Esq. on behalf of the Airport Coalition.

The parties apprised the court that a settlement had been reached as to intervener the Airport Coalition. However, since the result of the hearing involving the remaining intervener Greater Golden Hill could have a direct and substantial impact on the mutual promises and obligations of the settling parties, any such settlement must be tentative.

This is an airport noise variance hearing. The scope of the hearing was set forth in the Notice of Hearing And Statement of Issues filed by the Department of Transportation pursuant to Public Utilities Code sections 21669 and 21669.6. The Statement of Issues framed the scope of hearing as follows:

“The fundamental issue to be considered by the proceeding is whether the public interest will be served by the granting of a variance to the San Diego County

Regional Airport Authority for authorizing it to operate the San Diego International Airport (SDIA), with a noise impact area exceeding state standards for noise levels in the vicinity of the airport.

In weighing the public interest, the Division Chief for the Department of Transportation, Division of Aeronautics, will include, but not be limited to, consideration of:

- (a) The economic and technological feasibility of complying with the noise standards set by these regulations;
 - (b) The noise impact should the variance be granted;
 - (c) The value to the public of the services for which the variance is sought;
- and
- (d) Whether the airport proprietor is taking good-faith measures to the best of its ability to achieve the airport noise standards."

There was agreement that the only real issue in controversy was (d), whether the airport proprietor is taking good-faith measures to the best of its ability to achieve the airport noise standards. More specifically, the focus of the dispute is on the reasonableness of the "Quieter Home Program" (QHP) instituted by the SDCRAA to sound attenuate residential properties in the "Noise Impact Areas." It is the contention of the intervener Greater Golden Hill that the QHP as conceived and implemented fails to satisfy the standard of "reasonableness" as set forth in the Statement of Issues. The intervener contends, inter alia, that QHP creates social and economic inequities, and that it discriminates impermissibly against ethnic minorities and the poor or those of modest means. In a more global sense, the intervener maintains that the efforts, including the priorities established by the proprietor to reduce the airport "Noise Impact Area" are unreasonable.

The administrative court and the parties engaged in a lengthy prehearing and settlement process. As part of the Pre-Hearing Conference process, the parties were put on notice that they would be expected to comply with Government Code section 11511.5 and Title 1, California Code of Regulations, section 1026 which set forth with specificity what the parties were required to do for a PHC. Section 1026 reads, in relevant part:

"(d) At least 5 business days before a conference, each party shall file with OAH and serve on all other parties a pre-hearing conference statement which shall contain the following information:

- (1) Identification of all operative pleadings by title and date signed.
- (2) The party's current estimate of time necessary to try the case.

(3) The name of each witness the party may call at the Hearing along with a brief statement of the subject matter of the witness's expected testimony.

(4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 11514, if known.

(5) The names and address of each expert witness the party intends to call at the Hearing along with a brief statement of the opinion the expert is expected to give. The party shall also attach a copy of a current resume for each expert witness.

(6) Whether there is need for an interpreter or special accommodation at the Hearing.

(7) A list of the documentary exhibits the party intends to present at the Hearing and a description of any physical or demonstrative evidence.

(8) A concise statement of any legal issues that may affect the presentation of evidence or the disposition of the case.

(e) Exhibits need not be pre-marked or filed with the pre-hearing conference statement unless requested by the ALJ. Exhibits shall be exchanged between the parties at least 5 business days before the pre-hearing conference. On agreement of the parties, exhibits already produced in discovery do not need to be exchanged.

...

(f) After the pre-hearing conference, the ALJ shall issue a pre-hearing conference order that incorporates the matters determined at the conference. This order may be issued orally if an accurate record can be made. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the ALJ. If no matters were determined or dates set at the pre-hearing conference, a pre-hearing conference order is not required."

Pre-Hearing Conference statements were filed by the Department of Transportation, the SDCRAA and Greater Golden Hill. Indeed, but for the exceptional efforts of the parties and their compliance with the directives of this administrative court, the hearing itself would have lasted many weeks, unnecessarily using precious resources of the court, the Department and the parties. The parties were given very wide latitude and much time to pursue resolution of this dispute via stipulation. All prior variance applications since 1988 had been resolved without the necessity of a formal hearing. Unfortunately, despite the best good faith efforts of the parties, a settlement resulting in a stipulation could not be reached between the Airport Authority and Greater Golden Hill.

Furthermore, in order to facilitate the orderly presentation of evidence and minimize the undue consumption of time, the administrative law judge made the following orders as part of the PHC process:

“A. The direct testimony of all witnesses shall be in the form of declarations under penalty of perjury. Following receipt of the declarations, any party may, in writing, request the opportunity to cross-examine the witness at the time of hearing. Additionally, following receipt of the declarations, any party may informally request the opportunity to pose questions to any witness. All parties are expected to cooperate in this process. The court shall establish the time lines for this process with the concurrence of the parties. Both the Airport Authority and Greater Golden Hill fully engaged in this process and presented to the administrative law judge a full record that set forth the support for their respective positions.”

The administrative hearing was set for September 18-28, 2007 in San Diego at the Office of Administrative Hearings. The parties appeared in person on September 20, 2007. Thereafter, numerous submissions of argument and additional exhibits were made. All of these have been added to the record so that each party's fully articulated arguments are part of the record for review by the Department. The final written submission from any party was on November 26, 2007. The record was closed on that date.

FACTUAL FINDINGS

1. The San Diego County Regional Airport Authority (SDCRAA or Airport Authority or Authority) is the proprietor and operator of the San Diego International Airport (SDIA). Ownership and operational responsibilities were transferred to the SDCRAA effective January 1, 2003, from its predecessor in interest, the San Diego Unified Port Authority. This was done as a result of legislation codified in California Public Utilities Code, section 170000 et seq.
2. The Greater Golden Hill Community Development Corporation (GGHCDC or GGH) is a 501 c(3) non-profit development corporation whose purpose is to facilitate and empower residents, property owners and business in the Greater Golden Hill area and to bring about physical improvements in the community while preserving the historical and unique character and foster cultural, educational and economic opportunities that improve the quality of life for the Greater Golden Hill community. It is an intervener in this case because a relatively small portion of the community is exposed to aircraft noise of 65 decibels or more as measured by the Community Noise Equivalent Level (CNEL) scale.
3. California has airport noise standards that in some particulars govern the operation of airports. “In some particulars” describes a somewhat confusing web of laws and regulations, both federal and state that govern the operation of airports such as SDIA and further circumscribe and limit the scope of authority of the California Department of Transportation (DOT). The California Noise Standards are contained in Title 21, California Code of Regulations, section 5000, et seq. The stated purpose of the Title 21 rules is “to

accomplish resolution of existing noise problems in communities surrounding airports and to prevent the development of new noise problems.” (See § 5010.)

4. Title 21 establishes an acceptable threshold level of aircraft-related noise levels for persons living in the vicinity of a California airport. This threshold level is established as 65 decibel (dB) Community Noise Equivalent Level (CNEL) or less.

5. On the basis of the Title 21 requirements, the SDIA (also known as Lindbergh Field) has been designated as an airport with a “noise problem” since July 1972. Anyone who lives or works in downtown San Diego can attest to the airport’s conspicuous presence from the noise of landing or departing aircraft. The city has virtually grown around the airport. It would be inconceivable to think that such a busy airport would not have some significant impact on the lives of those who live and work nearby.

6. Title 21 prohibits an airport proprietor from imposing aircraft noise impacts of 65 dB CNEL or greater on persons living in the vicinity of California airports unless the airport operator has applied for and received a variance from the California Department of Transportation. The predecessor operating agency of SDIA, the San Diego Unified Port Authority, applied for and received all prior variances to the California Airport Noise Standards for operation of SDIA including the current Eighth Variance.

7. Title 21 details noise impacted areas and identifies certain land uses as “incompatible land uses.” It identifies four types of land uses deemed incompatible land uses within the noise impact boundary. These are:

- “1. Residences including single-family dwellings, multi-family dwellings, high-rise apartments or condominiums, and mobile homes;
2. Public and private schools;
3. Hospitals and convalescent homes; and
4. Churches, synagogues, temples, and other places of worship.”

8. SDIA’s noise impact boundary area is developed by SDCRAA using noise monitoring equipment and collection processes. From the data obtained from SDCRAA’s noise monitoring equipment, annual CNEL contour maps are generated. These maps are made available by SDCRAA for reporting purposes and are a matter of public record.

9. The entity charged with the responsibility to determine whether an airport that has noise problems should be granted a variance is the California Department of Transportation. The DOT may grant a variance to a noise problem airport if it is in the public interest to do so. To determine the public interest, four factors are considered. These are:

- “(a) The economic and technological feasibility of complying with the noise standards set forth by DOT regulations;

- (b) The noise impact should the variance be granted;
- (c) The value to the public of the services for which the variance is sought;
- (d) Whether the airport proprietor is taking good faith measures to the best of its ability to achieve airport noise standards.”

10. SDCRAA has adopted and implemented regulations restricting the use of SDIA by certain types of aircraft and restricting the use of the airport for departures during certain times of day. Time of day restrictions for Stage 3 aircraft prohibit departures between the hours of 11:30 p.m. to 6:30 a.m. daily and midnight to 7:00 a.m. for non-Stage 3 aircraft. Regularly scheduled Stage 2 aircraft were phased out for use of SDIA since January 1999. There is no noise-related time of day restrictions on arriving aircraft at SDIA.

11. The Eighth Variance was granted pursuant to a Stipulated Decision of the Department of Transportation. It became effective on the 28th day of August 2001. The Order read as follows:

“The application of the District for a variance from the requirements of Section 5012, Chapter 2.5, Subchapter 6, Title 21, of the CALIFORNIA CODE OF REGULATIONS is granted subject to the following terms and conditions:

1. The variance granted shall be for a period of three years beginning on the date of this order.
2. The District shall continue to file the required Quarterly Reports, and shall include in those reports the additional information contemplated by the District's 2001 NIEP.
3. The District's annual report (for each calendar year) shall plot the annual CNEL contours for the 60, 65, 70, 75 and 80 dB CNEL noise contour levels (as currently developed and reported by the District) and shall quantify the area of incompatible land use.
4. The District shall continue to maintain an Airport Noise Management Office at SDIA, which shall, among other things, receive and respond to aircraft noise complaints and gather information on aircraft operations and noise levels at SDIA by use of the aircraft noise monitoring system. The District shall include a status report on this matter with its quarterly reports to the Department. Originals or copies of all public records generated in connection with the operation of the Airport Noise Management Office shall, at a minimum: (i) Be maintained at the Airport Noise Management Office for not less than two (2) years; and (ii) be available for public inspection and designation for copying during normal business hours.

5. During the period of this variance, the District shall continue implementation of the Residential Sound Attenuation Program, as agreed to in the stipulation of the parties (and as summarized in Attachment B to this Stipulation), including its efforts to obtain full federal discretionary AIP funding to match the annual District contribution. The District has no obligation under the RSAP, or under the variance, to commit or support the use of any federal AIP funds allocated to the District in its capacity as the proprietor of SDIA as "entitlement" funds under the AIP program in any year during which the program is in effect.

6. The District shall implement its 2001 Noise Information Enhancement Program as summarized in Attachment C to this stipulation.

7. The District shall submit its request for any further extension of the variance to the Department in accordance with the then current regulations of the Department, but, in any case, not later than sixty (60) days prior to the expiration of the variance. A copy of the application shall be provided to each of the parties to the stipulation."

12. All public use airports in California operate under the authority of permits issued by the California Department of Transportation. Airports having a noise problem are subject to losing their permit authority to operate if they: (1) Fail to bring the size of their noise impact area down to acceptable limits; or (2) fail to obtain a variance from the noise regulations allowing them to operate, subject to reasonable conditions, for a specific period of time. The maximum permissible noise level for areas of defined "incompatible" land uses around a designated noise problem airport is a Community Noise Equivalent Level (CNEL) of 65 decibels (dB), unless the airport proprietor has applied for and received a variance as prescribed by the state noise standards.

13. State law empowers the Department to grant variances if it finds it to be in the public interest to do so. In making such a determination, the Department follows the guidelines prescribed in Title 21, California Code of Regulations, section 5053. The Airport Authority's application requested a variance pursuant to Title 21, California Code of Regulations, section 5012, which states as follows:

"The Standard for the acceptable level of aircraft noise for persons living in the vicinity of airports is hereby established to be a community noise equivalent level of 65 decibels. This standard forms the basis for the following limitations. No airport proprietor of a noise problem airport shall operate an airport with a noise impact area based on the standard of 65 dB unless the operator has applied for or received a variance as prescribed in Article 5 of this subchapter."

14. The Federal Aviation Administration (FAA) also takes steps within its jurisdiction to reduce the effects of jet noise upon homeowners, while obeying its congressional mandate to ensure air safety. The FAA is authorized with the preemptive right to manage airspace. Thus, States are federally preempted from taking direct regulatory action involving aircraft in flight by using their police powers. (*See City of Burbank v. Lockheed Air Terminal, Inc.*, (1973) 411 U.S. 624; *San Diego Unified Port District v.*

Gianturco, (1981) 651 F. 2d 1306.) Noise regulations by airports, if acting in their capacity as landlord and property owner, generally withstand judicial scrutiny. However, these local airport regulations must be non-discriminatory and may not result in an undue burden on interstate commerce. In addition, noise and/or access restrictions must adhere to the Airport Noise and Capacity Act. As to any regulation of a Stage 3 aircraft, FAA approval is required.

Ultimately, the end result to be achieved should be a program that will:

“... reduce the noise impact area of the airport to an acceptable degree in an orderly manner over a reasonable period of time.” (Cal. Code Regs., tit. 21, § 5050.)

In reviewing variance applications, the Department must be guided by the underlying policy that the proprietor of each existing airport having a noise impact area is required to develop and implement programs to reduce the noise impact area of the airport to an acceptable degree in an orderly manner over a reasonable period of time. (Cal. Code Regs., tit. 21, § 5050.)

15. In considering a variance application to the requirements in the noise Standards that the noise impact area be zero, the Department is bound by numerous federal laws, state laws and regulations. It must recognize and follow the dictates of the following non-exclusive list of statutes and regulations:

United States Code, Title 49, section 40103:

“(a) Sovereignty and Public Right of Transit

- (1) The United States Government has exclusive sovereignty of airspace of the United States.
- (2) A citizen of the United States has a public right of transit through the navigable airspace.”

United States Code, Title 49, section 40102:

“(a) General Definitions—In this part-

(30) ‘navigable airspace’ means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.”

United States Code, Title 49, section 40103:

“(b) Use of Airspace

- (1) The administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by

regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

- (2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for:
 - A. navigating, protecting, and identify aircraft;
 - B. protecting individuals and property on the ground
 - C. using the navigable airspace efficiently; and
 - D. preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.”

United States Code, title 49, section 40117, Passenger facility fees:

“(b) General Authority

(2) A State, political subdivision of a State, or authority of a State or political subdivision that is not the eligible agency may not regulate or prohibit the imposition or collection of a passenger facility fee or the use of the passenger facility revenue.”

United States Code, title 49, section 41713, Prices, routes, and service:

“(b) Preemption

(1) Except as provided in this subsection, a State, Political subdivision of a State, or political authority of at least 2 states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”

California Public Utilities Code section 21669:

“The department shall adopt noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit issued by the department to an extent not prohibited by federal law.”

California Public Utilities Code section 21669.2, subdivision (a):

Guidelines for Writing Noise Standards

“... and the maximum amount of local control and enforcement shall be permitted.”

California Public Utilities Code section 21669.4, subdivision (b):

Violation of Standards; Enforcement; Penalties

“It shall be the function of the county wherein an airport is situated to enforce the noise regulations established by the department.”

Title 21, California Code of Regulations, section 5010:

Purpose of Noise Standards

“The purpose of these regulations is to provide a positive basis to accomplish resolution of existing noise problems in communities surrounding airports and to prevent the development of new noise problems. To accomplish this purpose, these regulations establish a quantitative framework within which the various interested parties (i.e., airport proprietors, aircraft operators, local communities, counties and the state) can work together cooperatively to reduce and prevent airport noise problems.”

Title 21, California Code of Regulations, section 5050:

Variances

“In granting variances, the department shall be guided by the underlying policy that the proprietor of each existing airport having a noise impact area be required to develop and implement programs to reduce the noise impact area of the airport to an acceptable degree in an orderly manner over a reasonable period of time.”

Title 21, California Code of Regulations, section 5053:

Conditions of Variance

“The department may grant a variance if to do so would be in the public interest. In weighing the public interest, the department’s considerations include but are not limited to the following:

- (a) The economic and technological feasibility of complying with the noise standards set by these regulations;
 - (b) The noise impact should the variance be granted;
 - (c) The value to the public of the services for which the variance is sought;
- and
- (d) Whether the airport proprietor is taking good faith measures to the best of its ability to achieve the airport noise standard.”

16. The Airport Authority has a number of options (although they are not unlimited) to reduce or eliminate the size of the noise impact area, including those listed in Title 21, California Code of Regulations, section 5037. For instance, it may encourage the use of less noisy aircraft or departure flight paths and procedures to minimize noise in residential areas. It may also convert incompatible land uses to compatible ones through rezoning, acquisition of aviation easements for noise, application of acoustical insulation, or acquisition of property.

17. Although the parties may disagree about many things regarding the airport and its noise impact on the community, the basic issue in dispute relates to the priorities established by the Airport Authority in determining which residential properties to retrofit. The intervener raises numerous questions and concerns that deal with the relative impacts of the current system on residents of the Greater Golden Hill community. These are not silly or frivolous. They go to core issues of concern in our democracy about equal and fair treatment of citizens by government irrespective of wealth or ethnicity. The essence of the argument is this. GGH is predominantly minority in composition and relatively poor by per capita income figures. A portion of that community falls within the noise contour. None of the money from the QHP has gone to a residence in GGH. Virtually all of the money has gone to retrofit homes in relatively more affluent areas in the east and west side of the airport.

18. Airport Noise Variance proceedings and the intensity of the feelings they generate are the product of the oftentimes very legitimate concern on the part of local communities about the impact of the age of commercial turbojet powered aircraft. Virtually any major airport in the United States brings blessings and curses to the communities surrounding it. These impacts are economic, social, cultural, health and welfare. They can be wrapped up within a broad and extremely ambiguous term called "quality of life."

19. Despite much public sentiment that they have little say in how airports are allowed to impact communities, there is actually a broad regulatory scheme that places limits on the conduct of airport operators. This regulatory scheme, however, is not seamless. It is complicated by the interstate nature of travel and specifically the Supremacy Clause of the United States Constitution. (Art. VI, cl. 2.)

20. Federal aviation law establishes a preemptive effect and limits the permissible scope of these variance proceedings under the California Noise Standards, Title 21, California Code of Regulations, section 5000 et seq. This is, by now, legally beyond dispute. It has come as the result of almost 50 years of litigation and action by Congress.

21. The effect of the preemption doctrine on the present proceeding is to significantly limit the scope of the proceeding. Essentially, the scope of federal preemption precludes any use of the variance process to regulate or restrict the type of aircraft which can use SDIA (based upon their noise or any other characteristic), the time of day when such aircraft can operate (i.e., a "curfew"), or the flight or operational procedures such aircraft must or may use when departing or arriving at the airport.

22. At the same time, State law and regulation is clear and unambiguous about the need to secure a variance from the strict requirements of the California Noise Standards for the airport proprietor to continue to operate within the law. Litigation over the last almost 50 years demonstrates clearly the tension between Federal and State law.

23. This variance proceeding is the Ninth Variance sought for this airport. It is required by law and the Airport Authority has the burden of proof to establish its continued entitlement to a variance. The Statement of Issues filed by the DOT to initiate this proceeding framed the scope of the hearing as follows:

“The fundamental issue to be considered by the proceeding is whether the public interest will be served by the granting of a variance to the San Diego County Regional Airport Authority for authorizing it to operate the San Diego International Airport (SDIA), with a noise impact area exceeding state standards for noise levels in the vicinity of the airport. In weighing the public interest, the Division Chief for the Department of Transportation, Division of Aeronautics, will include, but not be limited to, consideration of:

- (a) The economic and technological feasibility of complying with the noise standards set by these regulations;
- (b) The noise impact should the variance be granted;
- (c) The value to the public of the services for which the variance is sought;
- (d) Whether the airport proprietor is taking good-faith measures to the best of its ability to achieve the airport noise standards.”

24. Two interveners established standing and took part in an extensive and exhaustive pre-hearing series of meetings and negotiations both with this administrative court’s assistance and on their own. One intervener, the Airport Coalition, reached an agreement with the Airport Authority. The other, The Greater Golden Hill Development Corporation, did not. This was not for lack of effort. Nor was it due to bad faith. It was due, ultimately, to a fundamental disagreement over the term “reasonable” and to the application of concepts such as social equity and environmental justice.

25. Ultimately, the recommendation made to the Department of Transportation in this Proposed Decision rests on the proper limit of the discretion to be vested in the hands of one administrative law judge to second guess and impose his own notions of fairness and equity on the parties to this dispute and ultimately on the San Diego community.

26. Under the terms of the currently existing variance for SDIA (Eighth Variance), the Airport Authority agreed by stipulation, and was required by Condition 5 of the Order Granting Variance to “. . . continue implementation of the Residential Sound Attenuation Program (RASP), as agreed to in the stipulation of the parties, including its best efforts to obtain full federal discretionary AIP funding to match the annual [Authority] contribution.”

RASP committed the Authority to use its best efforts to combine Authority funding and federal Airport Improvement Program (AIP) grants administered by the Federal Aviation Administration (FAA) to fund what is now referred to by the Authority as the "Quiet Home Program" (QHP) with \$10 million per fiscal year. The Authority has continued to implement the QHP and continues to be successful in obtaining the necessary federal AIP funding to maintain or exceed the total average funding goal for the program of \$10 million per year.

27. By mid August 2007, the Authority had completed sound attenuation on 382 single-family residences and 301 multi-family units under the QHP. In addition, 112 single-family residences and 77 multi-family units were in the selection, design or construction phase. In addition, the Authority had approved extension of the then currently approved eligibility areas in order to begin selection and construction process in newly eligible areas on the east and west sides of SDIA.

28. Under the terms of the current variance and the RASP, the Authority is prioritizing residences eligible for sound attenuation treatment under the program by starting with the homes exposed to the greatest noise levels and working towards the residences with the lowest (65 dB CNEL) eligible noise levels. Eligible properties on both the east and west sides of SDIA are equally eligible for participation in the QHP based upon their noise level exposure.

29. In response to the court's order regarding direct testimony by declaration, the Authority submitted the declaration of Dan Frazee, the Director of the Airport Noise Mitigation Department for DSCRAA. He has been employed in that capacity since July 2002. He is responsible for all the activities and functions of the Airport Noise Mitigation Department. This includes compliance with the terms and conditions of the Authority's current variance under the California Noise Standards.

30. Frazee was responsible for participating in and overseeing the preparation of the Authority's application for a variance that is the subject of this administrative hearing. Frazee's testimony established that in order to comply with the requirements of the Noise Standards, the Authority maintains a state-of-the-art aircraft noise monitoring system for SDIA. The SDIA noise monitoring system continues to be updated with new remote monitoring station equipment that are stationed throughout the communities west and east of SDIA's runway. Data lines to a central computer maintained in his office by a full-time staff connect those remote-monitoring stations. Specialized software has been installed on the computer that receives the raw noise data from the remote monitoring stations, as well as radar and aircraft transponder identification information from the Federal Aviation Administration (FAA). The information and data is processed regularly in accordance with the requirements of the state's regulations (California Noise Standards) to produce single event noise exposure levels (SENEL), hourly noise levels (HNL) and community noise equivalent levels (CNEL) for noise generated by aircraft operations at SDIA. The data is reported in "Quarterly Noise Reports" prepared by his office in accordance with the regulatory requirements of the California Noise Standards and in accordance with the additional information requirements that the Authority agreed to in prior variance negotiations and incorporated as conditions of prior variances.

31. Data derived from the system was collected and a comparison made between the 2001 and 2006 noise contours of the incompatible area as defined by the California Noise Standards. These show that, generally, that the CNEL contours and the incompatible land use areas around SDIA have been reduced between calendar year 2001 to 2006. Further, the number of homes or multi-family units treated under the QHP from 2001 through August 2007 has grown substantially and program modifications and funding have been enhanced in a manner which would indicate ultimate completion of the project far in advance of past estimates.

32. The overwhelming weight of the evidence indicates that the Airport Authority has substantially complied with the terms of the Order granting the Eighth Variance. The Eighth Variance was signed as a result of negotiation with community representatives on August 14, 2001. The stipulation was adopted without change by the California Department of Transportation, Division of Aeronautics by order dated August 27, 2001. This Eighth Variance is the variance from the California Noise Standards under which SDIA is currently operated. The Department's order granting the Eighth Variance specifically states that it was based upon the Department's consideration of the stipulation of the parties and upon the Department's determination regarding the "value to the public" resulting from the continued operation of SDIA as the only scheduled commercial air carrier airport in the San Diego region and the fact that the Authority "... is taking good faith measures to the best of its ability to achieve the California Noise Standards ..."

33. There are some who may view this case, and the outcome, as merely David versus Goliath with the Goliath Airport Authority prevailing due to its immense advantage in terms of resources. After all, the intervener GGH was represented by a volunteer who is not even an attorney. In point of fact, Mr. Phillips' stellar advocacy for his community and the principles of social equity and environmental justice produced clarity of focus on the actions of the Airport Authority and may well result in a change in direction within the Airport Authority in terms of eliminating the restriction on the size of a multi-family residence (the so called six or less criterion). Such a David versus Goliath view completely ignores the law and the evidence that cannot be avoided simply because it may be inconvenient to someone's preconceived idea of what is right or just. The standard established is that of reasonableness – does the evidence establish that the QHP is unreasonable? Or, viewed from a slightly different legal calculus, does the evidence presented by the intervener establish that the program is arbitrary and capricious? Barring a finding of bad faith, the agency here, the Airport Authority, is entitled to some deference in terms of how they have balanced the competing factors. As long as they have done the balancing within the boundary of "reasonableness," it is not for one administrative law judge sitting on behalf of the Department of Transportation, to determine that a clearly better plan exists.

34. The QHP plan, as implemented, is clearly not outside the scope of reasonableness to be called arbitrary and capricious. Sound mitigation has long been recognized as an appropriate method to deal with the unwelcome noise from landing and departing jet aircraft. Even the intervener tacitly acknowledges that. The objection is that the current system of choosing eligible properties for sound attenuation favors those with

wealth and disfavors minorities. These are huge and important questions. They are not foolish rantings. But whether these questions are susceptible to easy answers in the context of this variance proceeding is another thing.

35. SDIA has been identified as a noise problem airport for over 35 years. It already has in place use restrictions in terms of the type of jets that can use its runways. It is, in fact, the first airport of comparable size to have a curfew. And, due to changes in federal law, if today it wanted to impose a curfew, it could not.

36. The Noise Regulations set forth a number of different strategies that can be used to address airport noise problems. One is to purchase the residential properties to convert them to airport compatible properties. This is certainly a non-optimum solution. A more sensible approach has been the sound attenuation program begun by the Airport Authority's predecessor in interest. A pilot program was begun in or about 1994. In 1997, as a result of the grant of the 7th variance, a full-scale sound attenuation program was put in place. Over the intervening years far more money was committed per year to this program. Since 2002, over 60 million dollars have been expended on this program. The original priority sequence, i.e., who qualifies and in what order, was established in the 1997 variance. It established that those exposed to the greatest level of noise per CNEL would be the first to receive the grant money. It also established criteria that gave priority to single family residences and multi-family residences of six or fewer units where one of the units was owner occupied. Notices were given and applications processed on the basis of the criteria established and a waiting list was created. Indeed, one of the least appealing aspects of the plan, as originally implemented, was the long time that it would take before all eligible properties were treated.

37. In 2001, the DOT made a finding that the QHP was a reasonable method to deal with the chronic airport noise problem and that the Airport Authority was in compliance. Since that time, the evidence established that the AA has continued with vigor to implement the program. Since 2001, the AA has discussed the issue whether to expand the program to include all residences not just those with six or fewer units. It is evidence that some within the Airport Authority have questioned the eligibility criteria and have argued to expand it to all residences without qualification. This is the proper venue for that decision-making. The difficulty is in imposing a different priority eligibility qualification in an administrative hearing such as this is. The current system is one that was negotiated with the community in 1997 and the Department of Transportation, by approving it, has acknowledged that it is a significant and reasonable effort by the airport operator to address the problem. To the extent that it matters, it would be the recommendation of this administrative law judge that the so-called six or fewer restrictions be eliminated. This would be a "reasonable" step. At the same time, from the standpoint of a qualification for a Ninth Variance, the Airport Authority has established that its current priority system is "reasonable." The word "reasonable" in the last two sentences has two distinct meanings. In terms of the ALJ's recommendation "reasonable" means rational or sensible. The second use of "reasonable" is as a legal term of art. It implies legally sufficient. The Airport Authority's current priority system is legally sufficient. Perhaps it could be improved upon.

Neither statute, regulation, nor case law empowers this administrative law judge, or the DOT to impose a standard on an airport proprietor of "perhaps it could be improved upon."

38. In order for such a program as the QHP to be found "unreasonable" there needs to be a clear and unambiguous showing that the plan is irrational. Both the Airport Authority and the intervener have put forth a view of the facts and ask the administrative law judge to reach a particular conclusion in his recommendation to the DOT. The difficulty is that there is nothing inherently problematic with either of their conclusions. The intervener's argument that the criteria be changed to benefit the residents of the GGH using as guideposts the notions of social fairness and environmental justice has a great deal of basic appeal. At the same time, there is nothing unreasonable about the criteria established and implemented by the AA. The problem at hand is noise . . . those who are subject to the loudest insults seem to deserve to get relief soonest. That logic is simple and inexorable. It raises the question: On what basis is it reasonable to devote money to GGH, whose residents are far less impacted in terms of noise than the residents who are now on a waiting list to get sound attenuation work done on their homes?

39. With funding that is not limitless, the AA has made a judgment to give priority to those with the greatest sound exposure. In point of fact, the highest priority was given to schools and then to residences.

40. Pleas made in the name of environmental justice and social equity are quite powerful. However, in practice, applying these important social values to the demographics of urban San Diego creates a quagmire. In point of fact, the demographics of the city are fluid and changing. The economic and ethnic character of neighborhoods is not static. And it seems beyond the reach of Solomon to attempt to devise a system that tries to value on a relative scale economic status and ethnicity and balance that against the amount of exposure to jet aircraft noise in decibels in an effort to arrive at a formula for qualifying for sound attenuation treatment.

LEGAL CONCLUSIONS

1. As set forth in Title 21, California Code of Regulations, section 5053, the Department may grant a variance if to do so would be in the public interest. In making this determination, the Department must consider the following: (a) The economic and technological feasibility of complying with the noise standards set by the regulations; (b) the noise impact should the variance be granted; (c) the value to the public of the services for which the variance is sought; and (d) whether the airport proprietor is taking good faith measures to the best of its ability to achieve the airport noise standards. (Cal. Code Regs., tit. 21, § 5053.)

2. The actions that an airport proprietor may undertake, and to a greater extent those that a state or local regulatory agency may mandate, are circumscribed by federal law and policy. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2nd Cir. 1998); *Burbank-Glendale-*

Pasadena Airport Authority v. Los Angeles, 979 F.2d 1338 (9th Cir. 1992); *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981); *Air Transport Association of America v. Crotti* 389 F.Supp. 58 (N.D. Cal. 1975).

3. The Department may not impose conditions that directly affect aircraft or flight operations. *San Diego Unified Port District v. Gianturco*, *supra*, at 1314; *Air Transport Association of America v. Crotti*, *supra* at 65; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, 72 Cal.App.4th 366, 379 (1999). On the other hand, the courts have upheld governmental land use restrictions and other mitigation measures without direct impact. See, *San Diego Unified Port District v. Gianturco*, *supra* at 1314 (“local governments may adopt abatement plans that do not impinge on aircraft operations”); *Air Transport Association v. Crotti*, *supra* (Cal. Code Regs., tit. 4, § 5037’s predecessor not invalid on its face); *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, *supra* (state requirement for city approval of airport expansion plans not preempted by federal law).

4. The determination of whether a noise variance is appropriated, and if so whether conditions are necessary requires the balancing of the factors set forth in Title 21, California Code of Regulations, section 5053, while keeping in mind the limitations placed by federal law. It is indisputable that it is not technologically feasible during the period of the next variance to reduce the Airport’s noise impact area to zero. It is further indisputable that the Airport is extremely valuable to the San Diego region. But, regrettably, the noise impact is significant and the noise impact area is not likely to be eliminated absent continued efforts by the Airport Authority.

5. Based upon Factual Findings 1-40 granting a properly conditioned variance is in the public interest.

ORDER

The application of the Airport Authority for a variance from the requirements of Section 5012, Chapter 2.5, Subchapter 6, Title 21, of the CALIFORNIA CODE OF REGULATIONS is granted subject to the following terms and conditions:

1. The variance shall be granted for a period of three years beginning on the date of this order.
2. The Airport Authority shall continue to file the required Quarterly Reports, and shall include in those reports the additional information contemplated by the Authority’s 2001 NIEP.
3. The Airport Authority’s annual report (for each calendar year) shall plot the annual CNEL contours for the 60, 65, 70, 75 and 90 dB CNEL noise contour levels (as currently developed and reported by the Authority) and shall quantify the area of incompatible land use.

4. The Airport Authority shall continue to maintain an Airport Noise Management Office at SDIA, which shall, among other things, receive and respond to aircraft noise complaints and gather information on aircraft operations and noise levels at SDIA by use of the aircraft noise monitoring system. The Authority shall include a status report on this matter with its quarterly reports to the Department. Originals or copies of all public records generated in connection with the operation of the Airport Noise Management Office shall, at a minimum: (i) Be maintained at the Airport Noise Management Office for not less than two (2) years; and (ii) be available for public inspection and designation for copying during normal business hours.

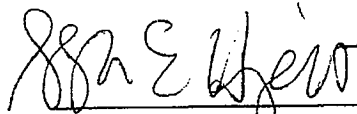
5. During the period of this variance, the Airport Authority shall continue implementation of the Residential Sound Attenuation Program (Quieter Home Program), as agreed to in the 1997 and 2001 stipulations of the parties, including its efforts to obtain full federal discretionary AIP funding to match the annual Authority contribution. The Authority has no obligation under the RSAP, or under this variance, to commit or support other use of any federal AIP funds allocated to the Authority in its capacity as the proprietor of SDIA as "entitlement" funds under the AIP program in any year during which the Quieter Home Program is in effect. In addition, the Authority shall continue to retain its legislative discretion to review and revise elements (other than the funding level commitments, obligations of its stipulations, and the conditions of this variance decision) of the RSAP including, but not limited to, revisions to the eligibility and funding priority provisions of the QHP; and that, after the term of this variance, retains the right and legislative to terminate the QHP. However, any such decision to terminate the QHP must be demonstrably reasonable and shall not be arbitrary and capricious.

6. The Airport Authority shall continue to implement its 2001 Noise Information Enhancement program, except that the meeting frequency of the Airport Noise Advisory Committee (ANAC) specified in paragraph 1(c), page two, of Attachment C to the 2001 variance stipulation, is revised to require that the ANAC meet not less frequently than quarterly.

7. During the term of this variance, the Airport Authority shall conduct a study modeling the potential noise effects which would result in areas surrounding SDIA if the commercial airlines using SDIA were to employ "Noise Abatement Department procedures," as permitted by FAA Advisory Circular 91-53A, during departure from SDIA. The purpose of this study is to determine what net noise benefits, if any, might result from the employment of such procedures. This condition does not imply that the Authority has any direct, lawful, regulatory authority to require commercial airlines to employ any such procedures. But if the study demonstrates significant net noise benefits to the entire affected community, the authority will pursue efforts to encourage the use of such procedures at SDIA on a voluntary basis, in coordination with the individual airline operators and the FAA. In performing the study, the Authority will provide appropriate opportunities for public input, and the final results of the study will be presented to and considered by the Authority's governing board.

8. The Airport Authority shall submit its request for any further extension of the variance to the Department in accordance with the then current regulations of the Department, but, in any case, not later than sixty (60) days prior to the expiration of the variance. A copy of the application shall be provided to each of the parties to the stipulation.

DATED: 4-15-08



STEPHEN E. HELT
Administrative Law Judge
Office of Administrative Hearings

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, the undersigned, say: I am, and was at all times herein mentioned, a citizen of the United States, over the age of 18 years, employed in the County of Sacramento, State of California, and not a party to the within action or proceeding; that my business address is 1120 N Street, Sacramento, California 95814. On the date below, I served the following document(s): **DECISION** in a separate envelope for each of the persons named below, addresses as set forth immediately below the respective names, as follows:

Michael Scott Gatzke, Esq.
GATZKE DILLON & BALANCE LLP
1525 Faraday Avenue, Ste. 150
Carlsbad, CA 92008

Professor Richard Wharton
LAUREN BYERTS & SETH FUNK
ENVIRONMENT LAW CLINIC
UNIVERISTY OF SAN DIEGO SCHOOL OF LAW
5998 Alacala Park
San Diego, CA 92110

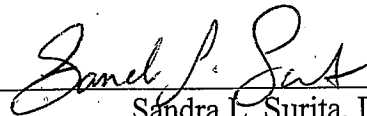
Richard Philips, Esq.
GREATER GOLDEN HILL COMMUNITY
DEVELOPMENT CORPORTATION
1712 Granada Avenue
San Diego, CA 92101

Kirk Hanson
THE AIRPORT COALITION
2672 Poinsetta Drive
San Diego, CA 92106

The following is the procedure by which the service of this document was effected:

- BY MAIL. I caused such envelope with postage thereon fully prepaid as first class mail to be placed in the United States mail at Sacramento, California.
- BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the office of the person(s) listed above.
- BY GOLDEN STATE OVERNIGHT SERVICE NEXT DAY AIR. I caused such document(s) to be delivered by Golden State Overnight Service to the office of the person(s) listed above.
- BY FACSIMILE TRANSMISSION. I caused such document(s) to be delivered by facsimile transmission to the facsimile number(s) of the person(s) set forth above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
June 11, 2008, at Sacramento, California.



Sandra L. Surita, Declarant