

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

IN THE MATTER OF COMPLIANCE)
WITH FEDERAL OBLIGATIONS BY)
THE CITY OF CHICAGO, ILLINOIS)
_____)

FAA Docket No. 16-04-09

RESPONSE TO NOTICE OF INVESTIGATION

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Table of Contents

	<u>Page</u>
I. Introduction.....	2
II. Background.....	3
A. As the FAA Is Fully Aware, the History of Meigs Field is Unique	3
B. The FAA Notice of Investigation Is Without Merit.....	5
C. The City’s Limited Use of Airport Revenues Has Been Carefully Focused on Removal of Airport-Related Improvements and Environmental Remediation, Not Disposition, Redevelopment, or Urban Renewal.....	6
1. The Airport Funds Expended at Northerly Island for Post-Closure Costs Are Limited and Well Documented	8
2. The Airport Funded Expended on Post-Closure Costs Related to Environmental Contamination Are Limited and Well Documented	10
3. Non-Airport Revenue Sources Are Being Used for the Development and Renewal of Northerly Island.....	12
III. Argument	13
A. The Airport Expenditures are Legitimate Capital or Operating Costs of the Chicago Airport System that are Directly and Substantially Related to the Air Transportation of Passengers or Property.....	14

B.	The City May Expend Airport Funds at Meigs Following its Closure as the Timing of the Expenditures of the Funds is Irrelevant	17
C.	FAA Precedent Involving Far Larger and Broader Closure Costs Supports a Compliance Finding Here	19
D.	The City is Legally Obligated to Remove the Airport-related Improvements and to Perform Basic Site Remediation under the Meigs Leases and Under Illinois Law.	26
1.	Obligation to Remove Airport-Related Improvements.....	26
2.	Obligation to Perform Environmental Remediation	34
E.	The Use of Airport Revenues for Post-Closure Removal of Airport-Related Improvements and Environmental Remediation Costs is Consistent with the Legislative History and Public Policy.....	37
IV.	Conclusion	40

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The City of Chicago ("City"), by counsel and pursuant to 14 C.F.R. § 16.17, hereby submits this Response to the Federal Aviation Administration ("FAA") Notice of Investigation ("NOI") dated October 1, 2004 under 14 C.F.R. Part 16 ("Part 16"). In the NOI, the FAA seeks information regarding the use of airport revenues in connection with the City's closure of Merrill C. Meigs Field ("Meigs") on March 31, 2003.

In general, the City denies any allegation that it violated its statutory or grant obligations regarding Meigs and affirmatively states that at all times relevant herein, its Meigs expenditures were fully permissible airport-related expenses. This FAA-initiated investigation should conclude promptly without any finding of noncompliance and without issuance of a compliance order. To the extent the Director re-affirms his view in an adverse Initial Determination, the City respectfully requests an opportunity for a hearing under Subpart F.

I. INTRODUCTION

The City takes compliance with its grant assurances very seriously and is well aware of the statutory and contractual restrictions on the use of airport revenues¹ and the FAA's *Policy and Procedures Concerning the Use of Airport Revenue* ("Revenue Use Policy").² These obligations and the FAA Policy generally restrict the use of revenues generated at the airport to the capital or operating costs of the airport, the local airport system, or any other local facility that is owned or operated by the sponsor that is directly and substantially related to the air transportation of passengers or property.³ Yet, the statutory restriction, grant assurances, and Revenue Use Policy do not address the specific use of airport revenues to cover the costs of closing an airport. Moreover, the regulatory and legislative histories regarding "revenue diversion" are unrelated to the issue of using airport revenues to cover the costs of removing airport improvements and remediating environmental damage in the context of returning land used as an airport to its owner, a park district, upon expiration of its lease.

Yet, on at least two major occasions where the FAA has confronted this issue – the closure of Stapleton Airport in Denver and Robert Mueller Airport in Austin – the FAA has expressly permitted the use of airport revenues for the precise purpose used here: post-closure environmental clean up, and removal of airport-related structures or improvements. In Denver, the FAA and Department of Transportation ("DOT") Office of Inspector General ("OIG") expressly approved the use of airport revenues for environmental remediation, demolition of

¹ 49 U.S.C. § 47107(b) and § 47133.

² 64 Fed. Reg. 7696 (Feb. 16, 1999).

³ See 49 U.S.C. §§ 47107, 47133, AIP Grant Assurance 25, and Revenue Use Policy, 64 Fed. Reg. 7696 (Feb. 16, 1999).

aviation infrastructure, and post-closure operations and maintenance costs at Stapleton.⁴ In Austin, the Associate Administrator for Airports signed a "Memorandum of Agreement" expressly stating that "the City may use airport revenues to pay costs of environmental cleanup of the Mueller property after airport closure," along with \$1.5 million per year to pay for "routine expenses incurred to maintain and preserve the closed facility."⁵

Given this precedent, and no statute, grant assurance, rule, or policy statement to the contrary, the City's use of limited airport revenues to cover the Chicago Airport System's ("CAS") obligations at the end of the lease term for Meigs can only be viewed fairly as consistent with the airport sponsor's obligations. The expenditure of airport revenues for the removal and remediation costs directly related to the City's operation of Meigs for nearly 60 years is directly and substantially related to the air transportation of passengers. But for the longtime operation of an airport at Northerly Island, the removal and remediation costs would not be necessary. Therefore, the Director should conclude this investigation by issuing an Initial Determination finding the City in full compliance with all applicable requirements.

II. BACKGROUND

A. As the FAA Is Fully Aware, the History of Meigs Field is Unique

In 1946, the Chicago Park District ("Park District") leased Northerly Island to the City for the purpose of operating Meigs as an airport ("1946 Lease").⁶ The 1946 Lease expired by its

⁴ See "Report on Audit of Airport Revenue, Denver International Airport," Report No. AV-1999-052 (Jan. 27, 1999).

⁵ See Memorandum of Agreement by and between Representatives of the City of Austin, Texas, the Federal Aviation Administration, and the Airlines that provide commercial passenger service to the Austin Airport, January 22, 1998, attached as Exhibit V.

⁶ 1946 Lease as amended, attached as Exhibit A.

terms on September 17, 1996.⁷ Pursuant to a settlement agreement between the State of Illinois, the Park District, and the City, the Park District agreed to enter into a new lease with the City, which incorporated the 1946 Lease, whereby the City would operate Meigs as an airport for a period of five years (“1997 Lease”), beginning on February 10, 1997.⁸ Prior to the expiration of the 1997 Lease, the City and the Park District entered into the First Amendment to the 1997 Lease, dated March 1, 2002, which extended the term of the 1997 Lease “on a month-to-month basis; *provided, however*, that notwithstanding the date of commencement of such month-to-month tenancy, either party may terminate the Lease effective the first date of any calendar month”⁹ (“First Amendment”) (the 1946 Lease as amended, the 1997 Lease and the First Amendment are collectively referred to as the “Meigs Leases”).

In accordance with the First Amendment, on March 29, 2003, the Park District notified the City by letter that it was exercising its right to terminate the 1997 Lease, effective April 1, 2003.¹⁰ As required by the Termination Letter, on March 30, 2003, the City ceased operations at Meigs and took steps to deactivate the runway by rendering it unusable.¹¹ Prior to its deactivation, the City notified the FAA orally and by letter dated March 31, 2003, of the deactivation of Meigs.¹² A NOTAM was issued that Meigs was closed.

⁷ 1946 Lease, ¶ 1.

⁸ Lease Agreement for Meigs Field Airport (“1997 Lease”), attached as Exhibit B.

⁹ First Amendment, attached as Exhibit C (emphasis added).

¹⁰ March 29, 2003 Letter from Park District to the City (“Termination Letter”), attached as Exhibit D.

¹¹ Declaration of Michael P. Klein, Deputy Commissioner of the Real Estate Division, City of Chicago Department of Aviation (“Klein Dec.”) ¶5 attached as Exhibit E.

¹² March 31, 2003 Letter from Michael A. Forti, Deputy Corporation Counsel to Phillip M. Smithmeyer, Manager, FAA Chicago Airports District Office, attached as Exhibit F.

On April 1, 2003, the City and the Park District entered into a letter agreement governing the City's holdover occupancy of Northerly Island ("2003 Letter Agreement").¹³ The City and the Park District offered to keep the air traffic control tower open through May 1, 2003, to allay any safety concerns related to air-traffic, but the FAA opted to close the tower just three days later, on April 4, 2003. The City was also informed by the Park District that the City was obligated to removed and remediate under the lease.¹⁴ Following the deactivation of Meigs, the City examined carefully its contractual obligations under the Meigs Leases as well as its obligations under federal, state and local law, and concluded that it was obligated to remove airport-related improvements and environmental contamination arising directly from the use of Northerly Island as an airport for nearly six decades.¹⁵ To address any concerns the FAA had with the City using airport funds for this purpose, the FAA and the City engaged in ongoing informal discussions regarding the use of airport revenues at Meigs for removal of airport-related improvements and environmental remediation. This matter was under review for over a year until the FAA issued its NOI and accompanying press release.

B. The FAA Notice of Investigation Is Without Merit.

On October 1, 2004, the FAA issued a NOI pursuant to Part 16, concerning a possible violation of the City's federal obligations regarding the use of airport revenues at Meigs. The NOI identified the City's use of approximately \$1.5 million from the Chicago O'Hare International Airport ("O'Hare") Development Fund ("ADF") for use to remove the runway and

¹³ April 1, 2003 Letter Agreement between Park District and the City, attached as Exhibit G.

¹⁴ Declaration of Christopher M. Gent, Deputy Director for Department of Planning and Development, Chicago Park District ("Gent Dec.") ¶5 attached as Exhibit H; Declaration of Maria G. Garcia, General Counsel, Chicago Park District ("Garcia Dec.") ¶8 attached as Exhibit I; Klein Dec. ¶6.

¹⁵ Klein Dec. ¶¶ 6-12.

“prepare for its conversion to a city park” as a potential violation of the City’s statutory requirements.

The NOI lists three specific issues for investigation/resolution: (i) whether the City used airport funds to dig trenches in the runway at Meigs and take other actions to render the airport unusable in contravention of the City’s grant assurances and statutory obligations; (ii) whether the City used airport funds to remove abandoned facilities from Meigs and for site remediation at Meigs in violation of its grant assurances and statutory obligations; and (iii) whether the City reimbursed the O’Hare ADF for costs expended from the ADF for removal of abandoned facilities and site remediation in violation of its grant assurances and statutory obligations.

The answer to each of these inquiries is that the City at all times complied with its grant assurances and statutory obligations. No O’Hare or Chicago Midway International Airport (“Midway”) ADF monies (or other airport monies) have been used by any City Department or the Park District for any park-related improvements. Airport revenues were used strictly for work related to closure, such as removal of runways, taxiways, and other airport improvements, and remediation of airport-related environmental contamination. The Park District, on the other hand, along with various City departments and other sources, has paid for work relating to future park development, such as landscaping, tree planting, pavement of pedestrian pathways, and remediation of non-airport-related environmental contamination. At no time has any park-development-related work been paid for by airport revenues.

C. The City’s Limited Use of Airport Revenues Has Been Carefully Focused on Removal of Airport-Related Improvements and Environmental Remediation, Not Disposition, Redevelopment, or Urban Renewal

Unlike prior examples of alleged revenue diversion in the context of airport closures, the City has not sought to use airport revenues on sale or lease disposition, redevelopment of the

property, or urban renewal. Nor has the City attempted to fund such closure costs out of the pockets of the airlines.

The City's expenditures of airport revenues at Northerly Island to remove airport-improvements and conduct airport-related environmental remediation have been funded by the O'Hare and Midway ADFs. These funds are governed by the terms of the Chicago O'Hare International Airport Amended and Restated Airport Use Agreement and Terminal Facilities Lease ("O'Hare Use Agreement") and the Chicago Midway Airport Amended and Restated Airport Use Agreement and Facilities Lease ("Midway Use Agreement"), respectively.¹⁶

The O'Hare ADF fund is funded by a portion of the surplus revenues generated in the Land Support Cost Revenues Center. The majority of these surplus revenues generated are derived from rent payments from cargo facilities, hangar facilities, ramps, services, and from certain concessions. Since 1996, none of the revenues that has funded the O'Hare ADF has come from airline rates and charges.¹⁷

Likewise, the Midway ADF is funded by airport revenues pursuant to the terms of the Midway Use Agreement. In simplest terms, the Midway ADF is funded if and when in any given year Midway's operational and maintenance costs are less than the target amount, or when its non-airline revenue is greater than the target amount. In such cases, two-thirds of the excess is deposited in the Midway ADF fund.¹⁸

¹⁶ Declaration of Daryl McNabb, Deputy Commissioner of Capital Finance, City of Chicago Department of Aviation, ("McNabb Dec.") ¶¶ 6-9, attached as Exhibit J; O'Hare Use Agreement § 10.04(a), attached as Exhibit K; Midway Use Agreement § 7.04(g), attached as Exhibit L.

¹⁷ McNabb Dec. ¶ 7; O'Hare Use Agreement § 10.01-10.05 and 13.01-13.06.

¹⁸ McNabb Dec. ¶ 8, Midway Use Agreement § 8.08.

1. The Airport Funds Expended at Northerly Island for Post-Closure Costs Are Limited and Well Documented

To date, the City's Department of Aviation ("DOA") has spent airport revenues for (i) closure of the airport, (ii) removal of airport-related improvements, and (iii) environmental remediation of contamination directly related to the use of the property as an airport.¹⁹ All expenses are fully documented in the attachment and affidavit exhibits. The DOA made expenditures in the following manner: \$2,742,986 has been spent from the O'Hare ADF, and \$144,447 has been spent from the Midway ADF, for a total of \$2,887,462.²⁰ This figure represents payments to three general sources: (1) \$2,373,199 paid to the Park District for airport-related work;²¹ (2) \$492,699 paid directly to City contractors for airport-related work; and (3) \$21,564 paid in compensation to owners of aircraft located at Meigs that needed to be relocated in order to close the facility.²²

The airport-related work conducted at Northerly Island and its associated costs are summarized below:²³

Removal of runways and other infrastructure (work done by the Park District)	\$1,499,000
Seeding, removal and disposal of underground aircraft fuel tank, aircraft maintenance area, and airport fence (work done by Park District)	\$465,000
Installation of geotextile fabric and soil removal (work done by Park District)	\$409,199

¹⁹ McNabb Dec. ¶¶ 10-13.

²⁰ McNabb Dec. ¶ 10; Declaration of Forrest Artz, Assistant Comptroller for the Enterprise Funds, City of Chicago Department of Finance ("Artz Dec."), ¶ 6, attached as Exhibit M.

²¹ Declaration of Mark Thomas, Director of Office of Budget and Management, Chicago Park District ("Thomas Dec."), ¶¶ 7-11, attached as Exhibit N.

²² McNabb Dec. ¶ 10; Artz Dec. ¶¶ 6.

²³ Artz Dec. ¶ 6; Declaration of John Piazza, Director of Facilities, Chicago Park District ("Piazza Dec."), ¶¶ 7-12, attached as Exhibit O.

Equipment rental for runway removal at Meigs (T24825-29)	\$105,341
Infrastructure removal (C8005T1)	\$106,330
Infrastructure removal (C8005TE)	\$84,463
Architectural/Engineering services for additional survey revisions to the Meigs infrastructure removal (1936-1)	\$18,204
Asbestos building survey (T26388-39)	\$11,760
Soil sampling for potential presence of asbestos and thorium (T26388-28)	\$2,083
Tank tightness testing (T26388-44)	\$3,465
Supplementary soil investigation (T26388-46)	\$78,569
Aboveground storage tank removal (T26388-47)	\$6,140
Additional soil investigation (T26388-55)	\$34,878
Removal, cleanup, and disposal of the exterior asbestos containing material ("ACM") black tar material (T26003-42)	\$12,560
Removal, cleanup, patch/repair/encapsulation and disposal of the ACM duct insulation from the basement, first, and second floor of the Terminal and Ground Maintenance Buildings (T26003-43)	\$4,380
Removal, cleanup, patch/repair/encapsulation and disposal of the ACM duct insulation from the basement, first and second floor of the Terminal and Ground Maintenance buildings (T26003-49)	\$6,190
Removal, cleanup, and disposal of the exterior ACM transit panel barrier fencing on north end (T26003-50)	\$11,870

Painting of white, yellow and black markings at Meigs indicating runway closure in accordance with AC 150/5340-1H (T25829-9)	\$6,466 ²⁴
Reimbursements to aircraft owners for cost associated with closure	\$21,564
TOTAL PAYMENTS	\$ 2,887,462

The expenditures are itemized in the “Funding for Closure of Meigs Field” spreadsheet.²⁵ The removal of airport-related improvements involved the removal of structures and equipment that were (1) located entirely on airport property, and (2) designed and intended exclusively for the use of airport passengers.²⁶

2. *The Airport Funds Expenditures on Post-Closure Costs Related to Environmental Contamination Are Limited and Well Documented*

Upon closure of the airport, the City engaged an environmental consultant, Carnow, Conibear & Associates (“CCA”), to evaluate the status of the property. The Park District engaged its own environmental consultant, Levine Fricke (“LFR”), to evaluate the site.²⁷ While the preliminary evaluations are not in full agreement as to the sources of all contamination at the site,²⁸ both preliminary studies reveal significant contamination directly arising from the site’s use as an airport. The Park District and the City agree that the use of airport funds to remediate

²⁴ This amount has been allocated and work has been completed, but actual payment to the contractor is pending.
²⁵ “Funding for the Closure of Meigs Field” Spreadsheet, attached as Exhibit P.
²⁶ Declaration of Rob Rejman, Director of Lakefront Construction, Chicago Park District (“Rejman Dec.”) ¶¶ 5-12, attached as Exhibit Q; McNabb Dec. ¶¶ 6, 9.
²⁷ Declaration of LeeAnn Tomas, Environmental Engineer, Chicago Park District (“Tomas Dec.”), ¶¶ 6-10 attached as Exhibit R.
²⁸ The City and the Park District are considering hiring an independent consultant to review the preliminary drafts by CCA and Levine Fricke and make a final determination as to the source of PNA contamination of the soil in certain areas of the former airport, some of which has been removed and some of which remains in place. Discussions between the parties are ongoing.

the site has been limited to remediation of environmental contamination resulting from the property's use as an airport.²⁹

The City's preliminary environmental site investigation conducted by CCA (the "Site Investigation") at Meigs revealed the presence of several harmful toxic substances at dangerous levels due in part to Meigs' operation as a commercial airport for nearly 60 years.³⁰ Specifically, the Site Investigation detected:³¹

- leaking underground storage tanks;
- polynuclear aromatic hydrocarbon compounds ("PNAs") benzo(*a*)anthracene, benzo(*b*)fluoranthene, benzo(*k*)fluoranthene, benzo(*a*)pyrene, dibenzo(*a,h*)anthracene, and indeno(1,2,3,-*c,d*)pyrene levels at concentrations that exceeded the Illinois Environmental Protection Agency (IEPA) Tier 1 soil ingestion exposure route Soil Remediation Objectives (SROs) for residential properties;
- inorganic constituents, "heavy metals," arsenic, and lead at concentrations that exceeded the IEPA Tier 1 soil ingestion exposure route Soil Remediation Objectives (SROs) for residential properties;
- benzo(*a*)pyrene and lead at concentrations exceeding the IEPA Tier soil ingestion exposure route SROs for the construction worker.
- naphthalene above the construction worker soil inhalation exposure route SRO;
- PNAs benzo(*a*)anthracene, benzo(*b*)fluoranthene, benzo(*a*)pyrene, dibenzo(*a,h*)anthracene, and heavy metal lead at concentrations exceeding the SROs for the soil component of the Class I groundwater ingestion exposure route; and
- PCBs in the vicinity of a small liquid spill below a transformer in the Maintenance/FAA building.

²⁹ Tomas Dec. ¶¶ 6-9.

³⁰ Memorandum from David Bremer, Carnow, Conibear & Associates, Ltd., to John Plezbert, Managing Deputy Commissioner – Development, City of Chicago Department of Aviation (March 15, 2004) attached as Exhibit S.

³¹ Draft Preliminary Site Investigation conducted on: Former Meigs Field Airport Northerly Island, 1521 South Lynn White Drive, Chicago, Illinois. Carnow, Conibear & Assoc., Ltd. (July 22, 2003): Klein Dec. ¶ 12.

Remediation of the foregoing has included and may in the future include the following: removing the toxic soil, installing a fence to isolate contaminated hotspots pending remediation, covering the remaining soil with a geotextile fabric, and replacing the contaminated top soil.³² The Park District also intends to remove the underground aviation fuel tank, which likely contains PNAs. The City is considering proposing to the Park District that an independent third party consultant be engaged to assist in reconciliation of any discrepancies between the CCA report and the LFR report. The Park District has indicated that it will likely seek reimbursement for the costs associated with remediation of contamination related to the use of the site as an airport, including costs associated with PNA removal and excavation, soil monitoring and documentation during runway demolition, architectural and engineering expenses associated with planning for the removal of airport-improvements and airport-related environmental remediation.³³

3. *Non-Airport Revenue Sources Are Being Used for the Development and Renewal of Northerly Island*

The post-closure costs incurred to date³⁴ by CAS were the minimum required for the City to meet its legal obligations under the lease. The Park District is in the process of developing the property into a park pursuant to a planned process that is itself in its early stages.³⁵ To this end, other work at the site is ongoing and has been funded by the Park District and other City

³² McNabb Dec. ¶ 11, Rejman Dec. ¶ 11. Some of these actions were required as part of infrastructure removal.

³³ Northerly Island Restoration & Construction Funds, Park District Sources and Uses (Dec. 1, 2004) attached as Exhibit T.

³⁴ On October 20, 2004, the City requested a 90-day extension of time within which to respond to the NOI. On October 22, 2004, the Director issued an Order denying the City's request, granting only a 30 day extension until December 3, 2004. While the information contained in this Response and accompanying declarations and exhibits is accurate to the best of the City's belief, the City reserves the right to amend or supplement this Response based on its ongoing review.

³⁵ Declaration of Shirl McMayon, Director of Natural Resources, Chicago Park District ("McMayon Dec.") ¶¶ 6-11, attached as Exhibit U.

departments. To date, over \$1.0 million has been spent towards preliminary work in anticipation of park development.³⁶ Of that additional money, \$450,000 was provided by the City's Department of Planning and Development ("DPD"), and \$513,440 came from Park District funds. Additionally, the City's Department of Transportation ("CDOT") resurfaced the road and repaired, repainted and resurfaced parking lots at a cost of \$166,242.³⁷ The McCormick West Expansion Project relocated existing trees from the that project to Northerly Island and donated additional trees at a value of \$63,271.³⁸ The Park District is in the early stages of a process to devise a plan for the future park development.³⁹

III. ARGUMENT

Based on a thorough review of the relevant federal law, legislative and regulatory history, Illinois law, FAA, and OIG precedent, the City respectfully submits that its expenditure of airport funds at Northerly Island following the closure of Meigs Field was lawful and wholly consistent with the City's statutory and regulatory obligations. As fully discussed below, airport revenues spent to deactivate Meigs were used solely for capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator, and directly and substantially related to the air transportation of passengers or property.

In particular, the City's use of airport revenues for the removal of airport-related improvements and for airport-related environmental remediation is permissible for at least five reasons. First, the costs associated with the removal of airport-related improvements and environmental remediation at Meigs are permissible capital or operating costs of the CAS that

³⁶ Northerly Island Restoration & Construction Funds, Park District Sources and Uses (Dec. 1, 2004).

³⁷ Rejman Dec. ¶14.

³⁸ Northerly Island Restoration & Construction Funds, Park District Sources and Uses (Dec. 1, 2004); Thomas Dec. ¶12; Rejman Dec. ¶13.

³⁹ Rejman Dec. ¶8.

were directly and substantially related to the operation of Meigs and thus, to the air transportation of passengers or property. Second, the City may expend airport funds at Meigs following its closure, as the timing of the payments from airport funds is irrelevant. Third, the City's limited and narrow use of airport revenues for closure costs is consistent with FAA and OIG precedent and, in fact, is far smaller and narrower than amounts previously deemed permissible uses of airport revenues. Fourth, the City was obligated under the Meigs Leases and Illinois law to remove the airport-related improvements and perform basic site remediation.⁴⁰ Finally, the City's use of airport revenues for these purposes is consistent with underlying legislative and federal policy, and is supported by any balancing of equities.

A. The Airport Expenditures are Legitimate Capital or Operating Costs of the Chicago Airport System that are Directly and Substantially Related to the Air Transportation of Passengers or Property.

As an initial matter, the CAS owns and operates O'Hare and Midway, and, until recently, operated Meigs. The City's use of airport revenues now for costs directly related to the operation of Meigs as an airport, although Meigs is now closed, remain capital or operating costs of the CAS, which is consistent with the Generally Accepted Accounting Principles ("GAAP"). The Revenue Use Policy provides that "[o]perating costs for an airport may be both direct and indirect and may include all of the expenses and costs that are recognized under the generally accepted accounting principles and practices that apply to the airport enterprise funds of state and local government entities."⁴¹

All of the costs for which the City has used airport revenues are costs related directly to the City's use of Meigs as an airport. The City has not used, and does not propose or intend to

⁴⁰ Garcia Dec. ¶¶ 5-8; Klein Dec. ¶¶ 9-12; Gent Dec. ¶¶ 5-8.

⁴¹ 64 Fed. Reg. 7696, 7718 (Feb. 16, 1999).

use, airport revenues to convert the property into parkland or other uses not related to the CAS.⁴² The City's restoration and environmental remediation is strictly limited to Meigs-related expenses to fulfill the City's regulatory, statutory and contractual obligations.⁴³

The City, as airport operator, is a separate entity from the Park District. The land belongs to the Park District, and, to be clear, the City's intent, as lessee of the property, is to meet its legal obligations arising directly out of the closure using airport revenues. Under no circumstances will airport revenues be used for purposes unrelated to the City's obligations arising out of its use of Northerly Island to operate Meigs.⁴⁴

Although the phrase "capital or operating cost" is not defined in either the statutes or the FAA Policy, the plain meaning of the terms requires that the costs be related to the operations or capital requirements of the airport system. The U.S. Department of Justice Office of Legal Counsel ("OLC") has addressed the meaning of "capital or operating costs," noting that:

The phrase "capital or operating costs" in section 511(a)(12) is not defined. The Supreme Court has stated, however, that "it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). "Capital costs" and "operating costs" are generally understood as referring, collectively, to all of the costs incurred in a business. See, e.g., E.L. Kohler, *A Dictionary for Accountants*, at 82, 333 (5th Ed. 1975). Consistent with this common meaning, Section 511(g) of the AAlA, which permits the use of certain airport-generated revenues in the State of Hawaii for highway construction projects, broadly defines the phrase "airport capital and operating costs" as "cost incurred . . . for operation of all airports . . .".⁴⁵

⁴² McNabb Dec. ¶¶ 6, 9; Rejman Dec. ¶¶ 8, 9.

⁴³ From a public safety standpoint, the City was required to mark the runway unusable in accordance with FAA AC 150/5340-1H. Costs incurred with rendering the runway unusable were directly related to preventing a perception of availability in an aircraft operational emergency situation affording an alternate emergency use landing strip.

⁴⁴ *Id.*

⁴⁵ Memorandum for C. Dean McGrath, Jr., Department of Justice Office of Legal Counsel, "Application of Airport and Airway Improvement Act to the Proposed Lease of the Albany County Airport" (Feb. 12, 1991).

Additionally, the FAA in at least one other regulatory context has recognized the use of airport revenues for future environmental remediation as a justifiable cost. The FAA's *Policy Regarding Rates and Charges*⁴⁶ states:

2.4.2 Airport proprietors may include reasonable environmental costs in the rate base to the extent that the airport proprietor incurs a corresponding actual expense. All revenues received based on the inclusion of these costs in the rate base are subject to Federal requirements on the use of airport revenue. Reasonable environmental costs include, but are not necessarily limited to, the following:

(a) the costs of investigating and remediating environmental contamination caused by airfield operations at the airport at least to the extent that such investigation or remediation is required by or *consistent with* local, state or federal environmental law, and to the extent such requirements are applied to other similarly situated enterprises.⁴⁷

The preamble to the policy provides additional support:

If the use of the airfield today generates predictable environmental remediation expenses in the future, the principle of cost causation would allow, if not encourage, the airport proprietor to charge today's users for those expenses.⁴⁸

In other contexts as well, the FAA has recognized costs associated with environmental remediation as eligible for Passenger Facility Charge ("PFC") and Airport Improvement Program ("AIP") funding. For example, the FAA recently approved an application for impose and use authority of PFCs for environmental remediation related to runways and landfills.⁴⁹

⁴⁶ 61 Fed. Reg. 31994-32022 (June 21, 1996).

⁴⁷ *Id.* at 32019 (emphasis added).

⁴⁸ *Id.* at 32003.

⁴⁹ City of Tallahassee, Florida. Application No. 02-04-C-00-TLH, 67 Fed. Reg. 62513, 62515 (Oct. 7, 2002). (PFCs approved for, among other things, "Former landfill remediation."); Monroe County Board of County Commissioners, Key West, Florida. Application No. 01-05-C-00-EYW, 66 Fed. Reg. 46055, (Aug. 31, 2001). (PFCs approved for, among other things, "Environmental mitigation runway 9."); Monroe County, Key West, Florida. Application No. 99-04-C-00-EYW, 64 Fed. Reg. 58895, 58896. November 1, 1999 (PFCs approved for, among other things, "Environmental mitigation.")

Similarly, eligible AIP costs include certain environmental planning and remediation projects, and in some cases, the sponsor's cost of extinguishing a lease and removing improvements.⁵⁰

The FAA apparently would not quarrel with the use of airport revenues to cover the costs of remediating environmental contamination caused by the airport's operations while Meigs was still operating as an airport. Yet, the Revenue Policy only requires that environmental costs be "consistent with" environmental requirements to be included in the rate base. Here, the costs of remediating Meigs not only were "consistent with" requirements, but were also required under the lease and by state law. It is counterintuitive to conclude now that such costs become any less operating or capital costs of an airport system, simply because Meigs is now closed.

B. The City May Expend Airport Funds at Meigs Following its Closure as the Timing of the Expenditures of the Funds is Irrelevant

The Revenue Use Policy permits the use of airport revenues for the "capital or operating costs of the . . . local airport system . . . directly and substantially related to the air transportation of passengers or property."⁵¹ The timing of the expenditures of the funds is irrelevant because the timing of the payments (or incurred costs) has no effect on the legitimacy of the use of funds for airport purposes. The DOT interpretation makes clear that reimbursement of operating expenses does not have strict temporal limitations.

The City's position regarding the timing of the costs and expenditures is supported by precedent. First, as the Denver OIG Audit discussed, the disposition costs were incurred and paid from airport revenues post-closure. Second, in an OLC memorandum dated February 12, 1991, the DOJ provided an opinion regarding a proposed lease arrangement for privatization of Albany County Airport, concluding that:

⁵⁰ See AIP Handbook ¶¶ 405(i); 580; 593(c).

⁵¹ 64 Fed. Reg. 7696, 7718 (Feb. 16, 1999).

{S}ection 511(a)(12) of the AAIA permits an airport owner or operator like Albany County to recoup its unreimbursed capital and operating expenses from airport revenues, regardless of when the expenses were incurred. The statute requires only that airport revenue be used “for the capital or operating costs” of the airport. The use of airport revenues to reimburse past capital or operating expenses may fairly be characterized as an expenditure “for the capital or operating costs” of the airport within the meaning of the statute.⁵²

The OLC memorandum went on to find that the statute “does not by its terms impose a temporal limitation on the recovery of airport capital or operating costs through airport revenue, nor is there any evidence that Congress intended to impose such a limitation.”⁵³ Although Congress has since imposed a statute of limitation of six years after the date on which the expense is incurred for repayment for past capital and operating costs from airport revenues,⁵⁴ the OLC’s conclusion – that the time of the expenditure (provided it is within six years) is not relevant to whether airport revenue was lawfully used – remains valid. Similarly, here, it is irrelevant when the post-closure costs were incurred, so long as they were operating and capital expenses of CAS directly and substantially related to the transportation of passengers and property.

Any attempt to distinguish pre-closure costs from post-closure costs based on when a particular settlement agreement was executed would be flawed because the relevant issue is whether the cost are legitimate operating or capital costs, not the execution date of a settlement agreement. Here, as long as the costs are substantially and directly related to the capital or operating costs of an airport or airport system, when the funds are expended is irrelevant. Also, because the closure obligations arose under the lease and by law, any settlement agreement with

⁵² OLC Memorandum dated February 12, 1991 regarding a lease agreement for privatization of Albany County Airport, at 11.

⁵³ *Id.*

⁵⁴ 49 U.S.C. § 47107(n)(7).

regard to costs relate to pre-closure obligations and would be consistent with the FAA's restriction on the use of airport revenues.

Accordingly, the CAS is legally responsible for the payment of costs set forth in the July 28, 2003 Letter Agreement, which was executed post-closure, and the use of revenues for this purpose is lawful. Specifically, the Letter Agreement resolves outstanding legal obligations of the parties related to the City's lease of the property from the Park District, all of which arose *prior* to closure. Again, for these purposes, the timing of the execution of the Letter Agreement does not affect the legality of the use of airport funds for this purpose.

C. FAA Precedent Involving Far Larger and Broader Closure Costs Supports a Compliance Finding Here

The City's removal and remediation costs relating to Meigs' closure remain capital or operating costs of the CAS and, more importantly, the expenditures need not be associated with the City's continued operation of Meigs and correspond to the CAS meeting its obligations which arise out of its operation of Meigs. To suggest that the City may not expend airport revenues to meet obligations arising out of its operation of Meigs because Meigs is now closed is an unsupported and unsupportable interpretation of the statute and regulation.

Significantly, no statute, grant assurance, or regulation requires that costs relate to the continuing operations of an airport.⁵⁵ Indeed, the statutory language requires only that airport

⁵⁵ The only place discussing the use of airport revenues in the context of airport closure is the FAA *Policy Regarding Rates and Charges*, 61 Fed. Reg. 31994-32022 (June 21, 1996). There, the FAA affirmatively stated that in the context of an airport closure with an airport opening, the sponsor may include in the rate base the costs of disposition, meaning costs of preparing the closed airport's property for sale or lease. 61 Fed. Reg. at 32020, § 2.5.4(c). See also "Use of Airport Revenue Denver International Airport," Report No. AV-199-052 (Jan. 27, 1999) at 9 ("FAA policy permits the use of Airport revenues for the reasonable costs of disposition."). In the instant case, of course, the City is not seeking to recover the costs of either the disposition or the redevelopment of Northerly Island. Indeed, the City has no continuing property interest in the land, which is owned by the Chicago Park District, a distinct legal entity. The City is only using limited airport revenues for the purpose of remediation and removal or airport infrastructure at the site, recognizing its obligations under Illinois law, all of

revenues be expended for the capital or operating costs of the airport system. That such expenses are “directly and substantially related to the air transportation of passengers and property” cannot be gainsaid. The removal of airport improvements and remediation of airport-related contamination would not be necessary absent the 60-year operation of the airport.

In at least one other situation, the FAA has allowed airport revenues to be used to cover the costs of disposition of a closed airport. When the City of Denver closed Stapleton International Airport (“Stapleton”) in 1995, it used revenues from its new airport, the Denver International Airport, to cover the post-closure costs related to the *closed* airport. Denver included in its list of costs reasonably necessary to dispose of the airport the following: “nonattributable environmental remediation” and “demolition of obsolete aviation infrastructure.”⁵⁶ As the OIG Audit noted, “FAA policy permits the use of Airport revenues for the reasonable costs of disposition.”⁵⁷ Although the OIG Audit found that Denver’s use of airport revenues for what was essentially an urban renewal project exceeded those required for disposition, the OIG found that much of its post-closure expenditure of airport revenues for Stapleton (including basic site remediation and removal of airport-related improvements) was permissible.⁵⁸

For its part, the FAA consciously chose to ignore both the OIG and airline allegations of unlawful revenue diversion at Denver in the context of closing Stapleton and using airport revenues from the new Denver International Airport (“DIA”). On December 4, 1995, the airlines filed a Part 13 formal complaint against Denver alleging, *inter alia*, unlawful revenue diversion.

which are directly and substantially related to the operation of Meigs as an airport. In addition, as discussed in section II, C, *infra*, the airport revenues at issue here, unlike other airport closures, generally will have no effect on the airlines’ rate base.

⁵⁶ “Use of Airport Revenue Denver International Airport,” Report No. AV-199-052 (Jan. 27, 1999) at 9.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.*

Thereafter, as reflected in a position paper from then-Administrator Garvey to the OIG, the FAA not only did not bring any enforcement action, it became actively involved in dispute resolution between the airlines and airport. Recently released documents⁵⁹ show active monitoring, knowledge, and participation between the Director and the parties to facilitate a settlement that actually provided for enormous sums of DIA airport revenues to be used for environmental remediation and airport infrastructure removal at the Stapleton site.

The FAA was fully aware of⁶⁰ and chose not to challenge in any manner a Stipulation Agreement between the parties that authorized Denver to spend \$120 million of airport revenues in connection with the removal of airport-related improvements (i.e., "Removal of concrete and other paved surfaces, including certain underground improvements, fixtures and equipment, pipelines and hydrants on the Stapleton property, and removal, backfill and grading of the underlying soils on the Stapleton property"), environmental remediation, and *disposition expenditures*.⁶¹ In exchange, the airlines dropped their revenue diversion complaint against the

⁵⁹ On October 22, 2004, the City submitted a Freedom of Information Act ("FOIA") request seeking information about prior airport closures and civil aviation security threats to allow the City to fully defend its position in this matter. On November 4, the City's counsel and the FAA conducted a conference call in which the FAA sought to limit the scope of the FOIA request. During the November 4 conference call, the FAA informed the City's counsel that the City would likely not receive a full response until after the date that the City's Response to the NOI was due, on December 3, 2004. Accordingly, the City sought an extension to file its Response beyond the December 3, 2004 due date until it had received a complete FOIA response from the FAA. On November 10, 2004, the City made a formal request to the FAA for an extension, which the FAA denied. However, the FAA stressed that the City was free to amend its Response following receipt of a complete FOIA. On December 1, 2004, the City received a partial FOIA response from the FAA. The partial response consisted of over 500 pages, and the City has not had a sufficient opportunity to thoroughly review all the documents and incorporate them into its Response. Accordingly, the City explicitly reserves the right to amend its response to reflect any information contained in the partial FOIA response and any subsequent responses.

⁶⁰ The Denver OIG report indicates that after the airlines filed their Part 13 complaint, the FAA met with the sponsor on March 6, 1998, where "the sponsor briefed FAA on a proposed settlement to the airlines' complaint and revised its cost estimate . . . call[ing] for using Airport revenues totaling \$100 million for demolition, remediation, and operation and maintenance over an unspecified period of time." *Id.* at 8. The report indicates the FAA met again with the sponsor's counsel on September 15, 1998, to learn about "approximately \$100 million of airport revenue [that] will be needed" to dispose of the Stapleton property.

⁶¹ Stipulated Agreement Relating to the Disposition of Stapleton International Airport. March 29, 2000 (emphasis added), attached as Exhibit W.

City. The Agreement expressly stated that none of the terms “conflict with or violates federal aviation law,” including the City’s grant assurances, and “FAA policies and regulations and federal statutes.” The Stipulated Agreement was shared with the FAA, no contrary view was taken, and the Part 13 complaint was dismissed.

Indeed, in their sheer magnitude, Denver’s expenditures at Stapleton stand in stark contrast to the City’s expenditures at Meigs.⁶² As the OIG stated: “It is clear that the redevelopment activities at Stapleton, being funded with Airport revenue, amount to more than just preparing the property for sale. In fact, it appears that the Redevelopment Plan is, in effect, an urban renewal project.”⁶³ Denver estimated that the closure costs would be as much as \$100 million, despite the fact that fair market value of the property was only \$58 million. Moreover, of the \$100 million estimate, the OIG determined that Denver appropriately spent other-airport revenue on airport closure (as opposed to development), questioning only \$1.2 million for various ineligible and unsupported costs.

Unlike the Denver case, all of the Meigs’ expenditures of airport revenues are exclusively related to the removal of airport-related improvements and airport-related environmental remediation. And very much unlike the Denver case, where airlines directly paid \$15 million for environmental remediation, and allowed another \$85 million in closure costs to come out of the DIA rate base, here, the airlines’ rate base will be virtually unaffected by the Meigs closure. As described above, and in the accompanying declaration of the City’s Department of Aviation

⁶² The amount in question in the instant proceeding is likewise a small fraction of amounts that are apparently diverted by a number of major airports each year under the Act’s so-called “grandfathering” provisions. For example, the Port Authority of New York/New Jersey recently announced a lump-sum payment of \$750 million and \$90 million annual rent to the city of New York for its lease extension, see “City extends Port Authority’s airport contracts,” Nov. 29, 2004, New York Newsday, available at <http://www.nynewsday.com/news/local/newyork/politics/nyc-air1130,0,1378865.story>. See also, OIG Audit Report, Monitoring of Airport Revenues at Baltimore/Washington International Airport, FAA Eastern Region, Report Number: R9-FA-04-014 (Sept. 22, 1994).

⁶³ “Report on Audit of Use of Airport Revenue, Denver International Airport,” Rep. No. AV-199-052 at 5.

Deputy Commissioner of Capital Finance, Daryl McNabb, over ninety-five percent (95%) (\$2,742,985.57) of all airport revenues spent to date for Meigs came out of the O'Hare ADF, which does not affect the airlines' rate base. As stated by Deputy Commissioner McNabb: "Since 1996, none of the revenue that has funded the O'Hare ADF is generated by airline rates and charges."⁶⁴ As noted previously, the O'Hare ADF is funded by a portion of the surplus revenues generated in the Land Support Cost Revenue Center, like payments from cargo facilities, hangar facilities, ramps, services, and certain concessions. The less than five percent (5%), or \$144,477.08 of Meigs closure costs that came from the Midway ADF "will have a highly attenuated and at most a negligible effect on Midway rates and charges."⁶⁵

Also, just as Denver's post-closure expenditures ultimately benefited the new airport, here, the City's closure of Meigs will produce a net benefit to the CAS by relieving the CAS of the costs associated with keeping Meigs open.

In another airport-closure case, the FAA, City of Austin ("Austin") and commercial airlines entered into a Memorandum of Agreement ("MOA") regarding the closure of Robert Mueller Municipal Airport ("RMMA").⁶⁶ In the MOA, the parties agreed that up to \$8 million of airport revenue could be used for post-closure costs, including the use of airport revenue for environmental cleanup of the property after closure, and operating and maintenance costs of the

⁶⁴ McNabb Dec. ¶7. The Midway ADF is funded if and when in any given year Midway's operation and maintenance costs are less than the target amount, or when its non-airline revenue is greater than the target amount. McNabb Dec. ¶ 8.

⁶⁵ *Id.* at ¶¶ 8, 10.

⁶⁶ Memorandum of Agreement by and between Representatives of the City of Austin, Texas, the Federal Aviation Administration, and the Airlines that provide commercial passenger service to the Austin Airport, January 22, 1998.

property “considered to be the routine expenses incurred to maintain and preserve the closed facilities.”⁶⁷

Simply put, the costs of removing airport-related improvements from the leased property and conducting basic site remediation are capital or operating costs of the CAS – airport funds will not be used for urban renewal or park development.⁶⁸ Indeed, the CAS should bear the cost associated with the closure of Meigs because aviation operations damaged the lessor’s parkland; the costs legal and logical obligations related to the operation of the airport system, not to the City.⁶⁹

In its informal discussions with the City, the FAA questioned the City’s position that Illinois law required reimbursement of such costs to the landlord, the Park District. It also indicated that to the extent the City had such obligations, they should have been paid from corporate, not ADF monies. However, such arguments miss the point. Whether the City was under such an obligation is irrelevant to whether the City was entitled to use airport revenue because these costs were legitimate capital and operating costs directly related to air transportation. As such, the City is entitled to reimburse the Park District from airport funds. Based on the plain meaning of “capital or operating” and existing FAA policy, both removal and remediation costs related to the City’s operation of Meigs as an airport should properly be considered justifiable costs of doing airport business. The obligations arise solely from the

⁶⁷ *Id.* at § III.D. Although not contained in any statute, grant assurance, rule, or policy statement, the FAA apparently took the position in Austin that costs to remove and re-grade pavement areas were not appropriate uses of airport revenue. While the City submits that view is without basis in law or fact, in the Austin case – unlike the instant case – the underlying property was owned by the City, and the FAA took the position that the additional work to remove runways would “significantly enhance the value of the property,” which would benefit the sponsor on resale. Letter from Naomi L. Saunders, Manger, Airports Division and Jesus Garcia, City Manager, dated February 10, 1999. Here, the City does not own the property and is fulfilling its closure obligations to the Park District. The work has not been done to increase the value of the property – only to remove airport-related improvements and remediate airport-related contamination.

⁶⁸ McNabb Dec. ¶ 14.

⁶⁹ Klein Dec. ¶¶ 6-12; Garcia Dec. ¶¶ 5-8; Gent Dec. ¶¶ 5-8.

City's use of the property as an airport, and are squarely within the meaning of operational and capital costs of the CAS.

The costs of removal of airport-related improvements and environmental remediation also are directly and substantially related to the air transportation of passengers or property. First, the Revenue Use Policy clearly provides "expenditures that are directly and substantially related to the operation of the airport qualify inherently as operating costs of the airport."⁷⁰ For nearly 60 years, the City operated Meigs as an airport on the Northerly Island site. The costs incurred in its closure "have a connection with" its use as an airport, and are therefore "directly and substantially related to the air transportation of persons and property." The U.S. Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), defined "relating to" under 49 U.S.C. § 1305(a)(1) to mean "having a connection with or reference to airline 'rates, routes, or services.'"⁷¹ Second, the costs also are related to air transportation of passengers or property because the expenditure of the funds will allow O'Hare and Midway to stop subsidizing Meigs' operating costs, and instead use those funds directly for the air transportation of passengers or property at O'Hare and Midway airports.

Therefore, the City's removal of airport-related improvements and environmental remediation costs associated with the termination of the Park District Lease were directly related to the operation of Meigs as an airport and are rightly classified as operating costs of the CAS.

⁷⁰ 64 Fed. Reg. 7696, 7704 (Feb. 16, 1999).

⁷¹ *Id.* at 384.

D. The City is Legally Obligated to Remove the Airport-related Improvements and to Perform Basic Site Remediation under the Meigs Leases and Under Illinois Law.

The City is legally obligated to remove the airport-related improvements and to perform basic site remediation because it was contemplated specifically in the Meigs Leases and it is required under Illinois law.

1. *Obligation to Remove Airport-Related Improvements*

The bases for the CAS's legal obligations related to the closure of Meigs and site remediation arise from the terms of the lease and the City's statutory and common law obligations.⁷² Pursuant to Section 2 of the 1946 Lease, which was incorporated into the 1997 Lease, all improvements constructed by the City for use of Meigs as an airport are owned by the City.⁷³ At the end of the lease term, the City may demolish or remove any of the improvements, unless the Park District elects to take possession of the improvements.⁷⁴ When read in the

⁷² Klein Dec. ¶ 8; Gent Dec. ¶¶ 5-6; Garcia Dec. ¶¶ 5-8.

⁷³ Section 2 of the 1946 Lease states:

The Lessee [the City] shall have the right at its sole cost and expense during the term of this lease to construct, reconstruct, operate and maintain a public airport and to erect an administration building, a control tower building, and buildings, structures and facilities for emergency repairs and service to aircraft, and none others, and attach fixtures and install underground facilities and utilities in or upon the demised premises. All buildings and structures shall be in harmony with the general park development in the area. *Those buildings, structures, fixtures, facilities and utilities so placed in, upon or attached to the demised premises by the Lessee shall remain the property of the Lessee except as is otherwise hereinafter provided.* At the expiration of the term hereof, whether by lapse of time or otherwise, the Lessee shall surrender possession of the demised premises and shall, within a reasonable time after the termination of this lease, have the right to remove all buildings, structures, fixtures, facilities and utilities, whether the same be attached on or below the surface of the demised premises, unless at the expiration of the term of this lease the Lessor at its option, to be exercised by notice in writing to be given within thirty (30) days after the termination date, takes possession, control and ownership, without cost to the Lessor, of any and all of said buildings, structures, fixtures, facilities and utilities, and thereupon possession, control and ownership and the right of the Lessee or any other person to remove or otherwise dispose of said buildings, structures, fixtures, facilities and utilities shall cease and determine and said buildings, structures, fixtures, facilities and utilities shall become the sole and absolute property of the Lessor. (Emphasis added.)

⁷⁴ Garcia Dec. ¶ 5; Klein Dec. ¶¶ 8-10.

context of Illinois Law, Section 2 requires the City to remove improvements, unless the Park District elects to take possession of them, which it has declined to do, with one or two exceptions.⁷⁵

Under Illinois law, whether the City is required to remove the improvements depends on whether the airport-related improvements, such as the runways, terminal buildings, control tower, and other improvements, are “trade fixtures,” which are the responsibility of the tenant, or “fixtures,” which are the responsibility of the landlord.⁷⁶ Courts will infer the intent of the parties based on the provisions of the Lease and the state of the common law regarding improvements at the time the 1946 Lease was drafted.

Illinois law on this point has generally remained unchanged since the time the 1946 Lease was executed: the intent of the parties is paramount to determining how the improvements should be characterized. The “rule as to trade fixtures between landlord and tenant, arising from the presumption that their annexation was accessory to the trade or calling of the tenant, and not the land, is another illustration of the rule that the intention with which the annexation is made will control as to whether the article attached has become a permanent fixture or not.” *Hopwood v. Green*, 30 N.E.2d 656 (Ill. 1940), *transferred to* 34 N.E.2d 559, 563 (3d Dist. 1941) (holding that scale house, bins to hold crushed rock, buildings for lunchroom and office, and other equipment used to operate a quarry were intended to be trade fixtures). *See also Griffiths v. Office of the State Fire Marshall*, 704 N.E.2d 934, 936 (Ill. App. 2d Dist. 1998) (“the unifying feature of all of these cases is that the courts look to the parties’ intent to determine whether the underground equipment is a trade fixture.”)

⁷⁵ *Id.*

⁷⁶ *Id.*

Based on the language of the lease and the status of common law at the time it was drafted, the parties intended for the improvements to be characterized as trade fixtures that remain the City's property.⁷⁷ Section 2 states that the improvements remain the property of the City, and may be removed by the City at the end of the Lease term, subject to the Park District's right to claim them. The lease drafters saw the need to provide a right for the Park District to claim the improvements, establishing that the improvements and facilities were not to be treated as part of the realty, but as trade fixtures, belonging to the tenant. Here, the Park District informed the City that it was obligated under the Meigs Leases to remove the trade fixtures and improvements to which the Park District did not wish to assume title.

The runway and airport-related improvements at Meigs are trade fixtures, as they were installed solely so that the City could operate an airport. Illinois courts recognize that "an article may generally be regarded as a trade fixture if it is annexed for the purpose of aiding in the conduct by the tenant of a calling exercised on the leased premises for the purpose of pecuniary profit." *Empire Building Corp. v. Orput & Associates, Inc.*, 336 N.E.2d 82 (Ill. App. 2d Dist. 1975). Despite being embedded in the ground, the runway is characterized as a trade fixture under Illinois law. Indeed, Illinois courts have held that a wide variety of improvements can qualify as trade fixtures, including underground storage tanks and well casing embedded and cemented in the ground. *See Griffiths v. Office of the State Fire Marshall*, 704 N.E.2d 934 (Ill. App. 2d Dist. 1998); *Jones v. Jos. Greenspon's Son Pipe Corp.*, 46 N.E.2d 67 (Ill. 1943). Based on the provisions of the lease and common law principles, the airport-related improvements at Northerly Island are trade fixtures, and as such, remain the responsibility of the City at the end of the lease term. Moreover, if the condition of the premises is not the same at the end of a tenancy

⁷⁷ Klein Dec. ¶ 7; Garcia Dec. ¶¶ 5-6.

as at the beginning, the landlord may hold the tenant liable for the costs to return the premises to a condition acceptable for rental. *Pyramid Enterprises, Inc. v. Amadeo*, 294 N.E.2d 713 (Ill. App. 3d Dist. 1973); *Northwest Commerce Bank v. Continental Data Forms, Inc.*, 598 N.E.2d 446, 448-449 (Ill. App. 3d, 1992). Also, the owner of damaged property has the discretion to decide how to fix it. *United States v. Peavey Barge Line*, 590 F.Supp. 319, 323 (C.D. Ill. 1984).

If the City refuses to remove the improvements, or abandons them in place, the Park District has legal and equitable claims against the City, including claims for trespass and property damage.⁷⁸ It is well established under Illinois law that an owner of property has an action for trespass where another causes a thing to be on the property without permission, or if the thing unlawfully remains on the property of another, even if it entered with permission. See *Millers Mutual Insurance Association of Illinois v. Graham Oil Co.*, 668 N.E.2d 223, 230 (Ill. App. 2d Dist. 1996), *appeal denied*, 671 N.E.2d 734 (Ill. 1996) (“In Illinois, one may be liable in trespass for causing a thing or a third person to enter the land of another either through a negligent act or an intentional act”) (citing *Dial v. City of O’Fallon*, 411 N.E.2d 217, 221-223 (Ill. 1980)); *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998) (holding that under Illinois law, landowner was entitled to damages for trespass based on adjacent landowner’s construction of a fence intruding onto landowner’s property); *Miller v. Simon*, 241 N.E.2d 697, 700 (Ill. App. 1st Dist. 1968) (placing parking sign on another’s property justified award of damages for trespass); *McMillin v. Economics Laboratory, Inc.*, 468 N.E.2d 982, 988-89, 991 (Ill. App. 3d Dist. 1984) (plaintiff property owners were held entitled to a mandatory injunction requiring defendant to cease using a railroad spur track built across plaintiffs’ land, to remove the track, and to restore the land “to the status and condition that was

⁷⁸ Klein Dec. ¶ 10; Garcia Dec. ¶ 6.

in existence” before the trespass); *People v. Goduto*, 174 N.E.2d 385, 387 (Ill. 1961) (“Any unauthorized entry on the land of another or unlawfully remaining on the premises of another is a trespass for which the law provides a civil remedy.”)

Additional support for the City’s conclusion is found in the RESTATEMENT (SECOND) OF PROPERTY § 12.2(3) (1977):

Duty of tenant to restore in case of permissible changes -- Except to the extent the parties to a lease validly agree otherwise, there is a breach of the tenant’s obligation if he makes permissible changes in the leased property and does not, when requested by the landlord, restore, where restoration is possible, the leased property to its former condition within the time provided in § 12.3 or within a reasonable time after the request to restore, whichever is later, unless such changes result from reasonable wear and tear, or unless it would be unreasonable to require the restoration in the light of the probable future use of the leased property; and for this breach, the landlord may:

- (a) recover damages; and
- (b) in an appropriate case, obtain equitable relief.

Had the City not removed the airport-related improvements as required, the City would have been exposed to potential monetary and equitable claims for failure to remove such improvements.

Additionally, the indemnification provision of the lease clarifies the parties’ intent that the airport-related improvements would not remain on the property. The lease requires the City to indemnify the Park District for any costs or expenses that may arise from the City’s use of Northerly Island as an airport. Section 12 of the 1946 Lease, which was incorporated into the 1997 Lease, states:

The Lessee agrees to indemnify, save and keep harmless the Lessor, its officers, agents and employee, [sic] of and from all liability, lien, judgment, cost, damage and expense of whatsoever kind and nature which may in any way be suffered by the Lessor or its officers, agents or employes, [sic] or which may accrue against

or be charged to or recovered from the Lessor or its officers, agents or employes [sic] by reason of or in consequence of the operation of the airport by the Lessee or for or on account of any act or thing done or suffered or omitted to be done under the authority of the lease by Lessee.

In addition to common law obligations, because the runway and related fixtures are directly related to the City's operation of Meigs as an airport, Section also 12 requires the City to bear the costs associated with removal of the runway and other airport-related improvements.

In the process of removing airport improvements, certain environmental requirements relating to controlling erosion were brought into play. The pile of material resulting from demolition and the soil left bare by the removal of airport-related improvements necessitated various erosion control measures.⁷⁹ Both State and local law require erosion control measures at Northerly Island. *See* 415 Ill. Comp. Stat. 5/12(a) (prohibiting the discharge of any contaminants⁸⁰ "into the environment in any State so as to cause or tend to cause water pollution⁸¹ in Illinois"); Chi. Mun. Code § 11-4-1410 (prohibiting the illegal discharge or contaminants into Lake Michigan or other waters within three miles of the City).⁸² To comply with these requirements, the City has provided funds to implement erosion control measures, which included seeding and other soil stabilization measures, to prevent soil and possible contaminants from entering Lake Michigan waters or the ground water. The Chicago Municipal

⁷⁹ Rejman Dec. ¶¶ 11-12; McMayon Dec. ¶ 2.

⁸⁰ Defined as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source," 415 Ill. Comp. Stat. 5/3.165.

⁸¹ Under section 3.55 of the Act, 415 Ill. Comp. Stat. 5/3.545, "water pollution" is defined broadly to include an "alteration of the physical, thermal, chemical, biological, or radioactive properties of any waters of the State, or such discharge of any contaminants into any waters of the State, as will or is likely to create a nuisance"

⁸² Chi. Mun. Code § 11-4-1410 (disposal in waters prohibited) states: "No person shall throw, discharge, dump, dispose or deposit, or cause, suffer, allow or procure to be thrown, discharged, disposed, dumped or deposited, in Lake Michigan within three miles of the corporate limits or in any other waters within the corporate limits any waste or material of any kind unless such person has obtained (a) permits pursuant to the Clean Water Act from all applicable federal or state agencies and (b) all other necessary approvals and permits from federal, state and local regulator bodies or special districts."

Code also contains several provisions which prohibit conditions that would lead to dust emissions and run-off. *See* Chi. Mun. Code § 11-4-770 (requiring reasonable precautions or measures so as to minimize atmospheric pollution when handling waste); Chi. Mun. Code § 11-4-780 (requiring reasonable precautions or measures so as to minimize atmospheric pollution related to the operation or maintenance of buildings, demolition or other enterprises involving material likely to be scattered by the wind). Compliance with these provisions requires measures in place to prevent erosion into Lake Michigan or the emission of dust into the air, and seeding is a common soil stabilization measure.

Further, had the City sought to abandon the unwanted improvements, it would not have the equities of the transaction on its side. An equitable inquiry would look into whether the Park District received a benefit to balance against its agreement to undertake the potentially burdensome commitment inherent in an obligation to clean up after the City. Since the Park District received no rent whatsoever from the City throughout nearly 60 years that Northerly Island was used as an airport, the Park District has received no real benefit whatsoever at any time from the Meigs Leases or the City's tenancy on Northerly Island. Since the Park District received no benefit under the Meigs Leases to offset against an obligation to clean up at the end of the lease term, there is no basis for a finding that the Park District should be burdened with the expense of removing unwanted improvements and clearing the premises of the airport facilities. Therefore, the proposition that the Park District should be protected against having to bear the burden of cleaning up after the City, and should be returned to a position that is at least broadly similar to that which existed at the commencement of the lease, is one that is well supported in the particulars of this landlord/tenant transaction, not only by the lease itself, but also by the equities.

Moreover, this is not a debate over whether the lease gives the City the *right*, but not the *obligation*, to remove the airport-related improvements at the end of the lease term. This is because, as discussed above, the lease is clear that when the Park District does not exercise its option to retain improvements, they remain the property of the City as lessee.⁸³ Simply put, at the end of the lease, the Park District is given the choice to retain any or all of the City's additions. Since the Park District decided not to retain certain airport-related improvements, the City remains their owner. Here, the Park District informed the City that it did not wish to take title to certain improvements and that the City was responsible for removing the unwanted improvements and remediating airport-related contamination.⁸⁴ Any emphasis on the City's "right" to remove these additions, therefore, is misplaced. Reading the lease as it must be read under Illinois law, coupled with the intent of the parties – and giving effect to its plain and unambiguous terms – results in the City maintaining ownership of the airport-related improvements. The 1946 Lease is unambiguous on this point – otherwise, the portion of Section 2 quoted above would be rendered meaningless.

Thus, under both an express provision of the lease and well-established Illinois trade fixture law, the City is the owner of the airport-related improvements at Northerly Island. Of course, with rights come responsibilities. The City has not only the benefits of ownership of the improvements, but also the burdens. One of the clear burdens of property ownership under Illinois law is that one may not trespass with his or her property upon the land of another.⁸⁵

⁸³ Klein Dec. ¶ 9; Garcia Dec. ¶ 6.

⁸⁴ Garcia Dec. ¶¶ 5-7; Gent Dec. ¶¶ 5-8.

⁸⁵ Another burden is a matter of public safety: historically, airports closed but left in place with the required markings showing closure have been considered by the general aviation community as only available as a last resort for emergency landing. To eliminate this potential use and hazard, the City removed the runway in its entirety.

Several federal, state and local laws require the City to remediate the site on which Meigs was operated. Below is a brief summary of some of the basic requirements. First, the City must clean up subsurface contamination such as that related to leaking underground storage tanks. 415 Ill. Comp. Stat. 5/57, *et seq.* The Chicago Municipal Code incorporates the leaking underground storage tank provisions of the state act. With respect to soil contamination other than that caused by leaking underground storage tanks, the IEPA or the Illinois Attorney General's Office may bring an enforcement action against the City to force a clean-up and obtain penalties, if it believes that the existing soil contamination presents a threat to human health or the environment. The State can also potentially file a common law public nuisance action to compel a clean-up of the contaminated soil, if it believes that the elements of such an action exist. Additionally, such actions may be based on alleged violations of various provisions of the Illinois Environmental Protection Act, 415 Ill. Comp. Stat. 5/21 (Open Dumping, Unpermitted Waste Storage and Disposal, Causing or Allowing Litter), and 415 Ill. Comp. Stat. 5/12 (Water Pollution). If the City failed to clean up Meigs, the City may also be liable for common law waste on the property. Under Illinois law, waste is defined as "anything that causes lasting damage or permanent loss of the fee, or that destroys or lessens the fee's value."⁸⁸ The City would be liable because the contamination caused lasting damage or lessen the value of the property.

Second, material that has been excavated or demolished on Northerly Island, but which still remains in waste piles on-site must be properly disposed of under both state statute and local ordinances. *See* 415 Ill. Comp. Stat. 5/21, Chi. Mun. Code § 11-4-1500 (requiring proper

⁸⁸ 16 Ill. Juris., Property § 24:45 (2004).

disposal of waste); Chi. Mun. Code § 7-28-450(b) (requiring removal of waste or debris); Chi. Mun. Code § 7-28-440 (prohibiting dumping of waste except at permitted waste facilities).

As the environmental studies of the property reveal, the City's expenditure of airport revenues to comply with environmental laws is necessary because of the real and present environmental contamination related to the operation of Meigs or the process of removing airport-related improvements.⁸⁹ To be clear, the costs covered by the Letter Agreement are documented actual costs related to the City's closure obligations, including compliance with environmental laws. All environmental remediation costs arose from the City's use of the property as an airport, and as such are legally binding obligations of the CAS.⁹⁰ Similarly, any future expenditures for environmental remediation also would be related to the City's operation of Meigs as an airport.

Finally, as discussed herein, to argue that the City's obligations should be paid for out of corporate funds, rather than airport funds, is contrary to the intent of the revenue requirements and public policy. The only use of the site under the Meigs Lease was for an airport, and to require, in effect, the CAS to walk away from its closure related obligations would result in a windfall to the airport and a significant burden on the general taxpayers of the City. Such a result would be contrary to the intent of Congress, which was to prevent cities from gouging airlines and using AIP grants and PFC for the benefit of the City. Instead, such a finding would instead result in the gouging of general taxpayers for the benefit of the airlines and the AIP and PFC programs.

⁸⁹ Rejman Dec. ¶ 11-12; McNabb Dec. ¶ 11, 12.

⁹⁰ Klein Dec. ¶ 12; Garcia Dec. ¶ 7; Gent Dec. ¶ 7.

E. The Use of Airport Revenues for Post-Closure Removal of Airport-Related Improvements and Environmental Remediation Costs is Consistent with the Legislative History and Public Policy.

The use of airport revenues for post-closure costs is consistent with the legislative history of the revenue retention requirements and public policy in that it is fair for aviation users to pay for a cleanup cost arising out of airport-related uses. The legislative history indicates that the prohibition is “designed to prevent airports from using their monopoly power to gouge airlines and other airport users in order to build huge surpluses that could then be diverted to other local programs that have nothing to do with aviation.”⁹¹ The use of airport revenues to remediate Meigs could hardly be characterized as the airport using its power to gouge airlines. Meigs was part of the CAS, and the CAS bears the responsibility for meeting its lease and common law obligations to remediate the site. Indeed, aviation users benefited from the use of Meigs as an airfield; it is only fair that they help pay for its restoration to the status quo.

The instant case stands in marked contrast to those cases involving alleged diversion of airport revenues beyond grandfathered terms or purposes well beyond air transportation. For example:

- The City of San Francisco allegedly diverted airport revenues to the City averaging over \$22 million/year and \$12.5 million in impermissible indirect and unsupported costs.⁹²
- Miami-Dade International Airport allegedly spent \$37.8 million in excess, ineligible and unsupported costs, and over \$1.6 million for design work on State roads and promotional materials for a conference and Orange Bowl parade.⁹³

⁹¹ H.R. Conf. Rep. No. 104-714, at 37 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3674.

⁹² “Report on Revenue Diversions at San Francisco International Airport.” OIG Report No. SC-2004-038, Mar. 31, 2004.

⁹³ “Report on Oversight of Airport Revenue, OIG Report No. SC-2003-030. Mar. 20, 2003.

- Accounting and posting errors by the City of Cleveland and airport staff resulted in overpayments to the sponsor of \$53,900 and duplicate payments to the City's Division of Water totaling \$11,900.⁹⁴
- The City of San Antonio inappropriately allocated \$166,000 to the airport for the indirect costs that should have been allocated to the other city services, including \$60,000 for an Assistant City Manager's salary that was directly billed to the airport.⁹⁵
- The Augusta-Richmond County Commission inappropriately used airport revenue for: (1) \$2.0 million for a non-interest bearing loan to the sponsor's general fund, (2) \$175,000 for acquisition of land that could not be used for airport purposes, (3) \$94,281 for indirect administrative costs of the government, and (4) \$4,592 for special auditing services related to airport revenue diversion.⁹⁶
- The City of Big Spring, Texas, allegedly diverted at least \$1.8 million for non-aeronautical purposes. Specifically, the amounts diverted included: (1) \$1,285,554 for non-aeronautical construction, (2) \$529,730 for paying fire fighters costs related to city fire protection, and (3) \$26,539 for wages of employees that worked off airport property.⁹⁷

Unlike the above examples of revenue diversion, in both magnitude and purposes, the funds at issue here are demonstrably limited and narrow.

In addition, the FAA for years has encouraged airport owners and operators to be "good neighbors" and remain sensitive environmental consequences of aviation operations. It would be sadly ironic and inconsistent with this sound guidance for the FAA now to say – via a Compliance Order – that an airport can take over prime lakefront real estate, trash the environs with toxic waste, fuel run-off, and other pollutants for 60 years, and then turn it back over to the landlord Park District without any restoration from aviation funds, leaving general taxpayers footing the bill. At bottom, such an indifferent and callous approach to meeting aviation's

⁹⁴ *Id.*

⁹⁵ *Id.*

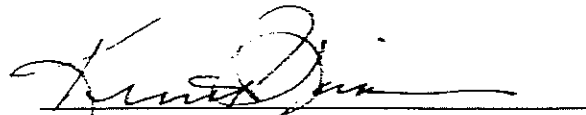
⁹⁶ "Diversion of Airport Revenue Augusta-Richmond County Commission," OIG Report No. AV-1998-093, Mar. 12, 1998.

⁹⁷ "Airport Revenues McMahon-Wrinkle Airpark, Big Springs, Texas." OIG Report No. AV-1998-026, Nov. 21, 1997.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Director render an initial determination of compliance that the City's use of airport revenues for removal of airport-related improvements and environmental remediation at Meigs was permissible and in accordance with applicable law, and that no compliance order is necessary or shall be issued.

Respectfully submitted,



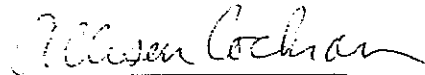
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served this Response to Notice of Investigation on the following addressee by way of personal delivery:

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Dated: December 3, 2004.



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