



City of Phoenix
OFFICE OF THE CITY MANAGER

June 23, 2021

Ms. Raquel Girvin, Regional Administrator
Federal Aviation Administration Western-Pacific Region
777 S. Aviation Blvd., Suite 150
El Segundo, CA 90245

Re: FAA Inquiry Regarding Airspace Changes

Dear Ms. Girvin,

I write on behalf of the City of Phoenix, sponsor of Phoenix Sky Harbor International Airport ("PHX"), in response to FAA's recent discussions about "re-opening" airspace decisions made pursuant to the 2017 *Memorandum Regarding Implementation of Court Order* (the "Implementation Agreement"). The City understands those discussions are ongoing and FAA has not yet determined whether to propose any such "re-opening" (hereinafter, "Proposal"). I appreciate that the FAA has also committed to not take any action, including making any announcement, without meeting again with the airport's executive team.

However, to avoid any possible ambiguity in the record – and to provide FAA with the benefit of early feedback – I wish to advise you that *the City of Phoenix would unequivocally oppose the Proposal in the strongest possible terms*. Re-opening any of the decision-making processes set forth in the Implementation Agreement would be both improper and unnecessary.

The Proposal would be directly contrary to the plain language of the Implementation Agreement. It would also contradict the FAA's 2020 representations to the Phoenix community about the Implementation Agreement. More fundamentally, it threatens to undermine our cooperation and return the relationship between the FAA and the City to an adversarial posture. If the FAA proceeds with the Proposal, the City will have no choice but to pursue aggressive legal action to protect its rights and the interests of its residents.

This would not be the first time the City has defended its rights against an ill-conceived FAA airspace proposal. For decades, air traffic to and from PHX followed consistent routes designed to minimize noise impacts. Land-use and development decisions in the City have been based on these routes, and hundreds of millions of dollars have been spent relocating thousands of residents away from flight paths and adding sound-mitigating features to residential, commercial, and public buildings. But in 2014, without public notice or an opportunity for comment, FAA significantly altered these long-settled

PHX flight procedures, routing (in many cases for the first time) low-flying aircraft over residential neighborhoods and other sensitive land uses.

The City and its residents were justifiably concerned – as the D.C. Circuit Court of Appeals later observed, “the planes supplied the sound, the public provided the fury.” FAA initially promised to reconsider the new procedures. But the agency failed to keep that commitment, forcing the City (as well as organizations representing several of the City’s historic neighborhoods) to resort to the courts. In the litigation that ensued, the City prevailed on each and every one of its claims.

After the D.C. Circuit ruled on the merits of the case, the City, the historic neighborhood petitioners, and the FAA entered the Implementation Agreement as a means of memorializing – for themselves, but also for the broader public – their roles and responsibilities in implementing the decision.

The Implementation Agreement is clear, specific, and unique. It mandates that the FAA return departure routes west of PHX to their pre-2014 locations – first through a short-term Letter of Agreement and then, after appropriate environmental review and public engagement, in permanent Performance Based Navigation (“PBN”) procedures. These procedures were finally approved and fully implemented in 2018. They were not timely challenged by any party, and the statute of limitations for filing such a challenge has expired.

Equally clear is the absence of any comparable mandate to make changes to departure paths east of PHX. Although the Implementation Agreement requires FAA to “fully and reasonably” consider stakeholder comments on procedures other than the west-side departure routes referenced above, the agency vigorously negotiated for – and ultimately secured – explicit terms disclaiming any obligation even to *propose* changes to then-existing east-side departure procedures.

Several other sections of the Implementation Agreement also bear noting:

- Section 7 confirms that nothing in the Implementation Agreement relieves FAA of any obligation to comply with applicable laws, orders, and policies (including, without limitation, the National Environmental Policy Act, the National Historic Preservation Act, the FAA’s own orders and policies for PBN procedures, and the FAA’s community involvement manual).
- Sections 9-12 require the City, at its own cost, to provide certain types of assistance with – and support for – FAA flight path changes pursuant to the Agreement.
- Section 15 affirmatively requires the FAA and the City to “vigorously and actively defend [the] Agreement and all terms embodied therein...against any challenge by any individual or entity.” And it further stipulates that neither the FAA nor the City may undermine the Agreement, whether directly or indirectly.

- Section 15 also confirms FAA's commitment to support the City's intervention in support of the Agreement in any action brought by a third party against the FAA.
- Appendix A sets out a detailed listing of the tasks to be completed under the Agreement, with a target completion date for each one.

In 2019, FAA received comments on (among other things) east-side PHX departure procedures, many of which were submitted by Phoenix residents. The agency represented that it fully considered those comments, the vast majority of which opposed conceptual changes to east-side departure procedures. After considering those views, FAA decided not to propose, evaluate, or pursue any changes to east-side PHX departure procedures under the Implementation Agreement. Importantly, the agency also assured the community that any future proposals for airspace changes in and around Phoenix would be treated as new actions that are unrelated to the Implementation Agreement. The resulting closure helped the Phoenix community move past the airspace conflicts of the 2014-2017 time period.

In March 2020, the City of Scottsdale filed suit challenging FAA's decision – made pursuant to the Implementation Agreement – to refrain from changing east-side departure procedures.

Until recently the City had no reason to suspect the Scottsdale litigation might lead the FAA to violate the Implementation Agreement. On May 25, 2021, however, you orally informed Chad Makovsky, the City's Director of Aviation Services, that FAA was considering "reopening" the Implementation Agreement in order to make changes to east-side PHX departure procedures. Although Mr. Makovsky was not provided with detailed information about the changes under consideration, he was left with the impression that FAA planned to reverse its Implementation Agreement decision-making in order to avoid defending the Scottsdale litigation. That impression was separately confirmed in subsequent conversations on May 27, June 8, June 9, and June 10, involving PHX General Counsel Brad Holm, Assistant City Attorney Carolina Potts, and various FAA personnel.

This procedural approach to airspace changes would be directly contrary to the plain language of both the Implementation Agreement and representations made by the FAA to Phoenix residents pursuant to the Agreement:

First, the Implementation Agreement does not create an open-ended invitation for FAA to continually revise the airspace in and around Phoenix. Instead, it sets forth a discrete set of tasks to be conducted in a specific sequence according to a clear timeline. Those tasks were completed in 2020. "Re-opening" the process – more than a year and a half after its completion – is not authorized anywhere in the Implementation Agreement and was never contemplated by any of the Agreement's signatories.

Second, in 2020, FAA explicitly assured the Phoenix community that the decision-making process set forth in the Implementation Agreement was complete and that any further changes to the airspace in and around Phoenix would be new actions, unrelated to the Implementation Agreement. The FAA purported to base that decision *on comments received from the Phoenix community*. The City is not aware of any basis to conclude those commenters have changed their views.

Third, the Implementation Agreement requires FAA to “vigorously and actively” defend the Agreement and any challenges to decisions taken to implement the Agreement – including the Scottsdale litigation. The Proposal violates this clear obligation by “re-opening” the Agreement so that FAA can walk away from – rather than defend against – Scottsdale’s claims.

Fourth, for all of the reasons set forth above, the Proposal would set off a firestorm of controversy on both the east and west sides of the airport. Moreover, the Proposal would, whether deliberately or inadvertently, direct that controversy toward the City.

To be clear, the City cannot – and would not – stand aside if FAA were to attempt an administrative end run around compliance with the Implementation Agreement. The FAA must follow through on its obligation to vigorously defend both the Agreement and the agency’s performance under the Agreement, including in the Scottsdale litigation. Consistent with the FAA’s representations to the Phoenix community and the terms of the Implementation Agreement itself, all airspace changes in and around Phoenix must be addressed as a new action rather than decisions taken under the Implementation Agreement. And, more fundamentally, such action must be transparent, subjected to citizen scrutiny and input, and openly, meaningfully, and robustly debated by all interested stakeholders. FAA must comply with applicable federal laws and agency regulations governing stakeholder input, transparency, and environmental review.

As FAA considers whether to formally proceed with the Proposal, please bear in mind that the Phoenix community remains apprehensive and openly skeptical of further airspace changes. Some directly oppose specific changes. Others fear a “domino effect” in which new or modified east-side departure procedures affect other aspects of the airspace. But all residents – and the City itself – have a compelling interest in ensuring the FAA follows through on its commitments, honors its representations to the community, and conducts open and robust decision-making processes in which all options are thoroughly vetted.

If the FAA follows through on its commitments to (a) vigorously and actively defend challenges to the Implementation Agreement decision-making and (b) treat further airspace changes as a new action, the City will fulfill its obligations to assist FAA with recommendations for outreach, environmental analysis, mapping, and related community issues.

On the other hand, if the FAA decides to pursue the Proposal – in violation of the Implementation Agreement and the agency's prior public assurances – the City will exercise its legal rights and take action to protect its interests and those of our residents.

Finally, the City wishes to highlight its interest in continuing to build a more collaborative and constructive relationship with FAA. In that spirit, I hope we can quickly reach an understanding on the right approach to the agency's consideration of potential airspace changes (if any). I look forward to your reply.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ed Zuercher', with a long horizontal flourish extending to the right.

Ed Zuercher
City Manager
City of Phoenix

cc: Mayor and City Council
Historic Neighborhoods
Jim Thompson, Scottsdale City Manager
Cris Meyer, City Attorney
Mario Paniagua, Deputy City Manager
Chad Makovsky, Aviation Services Director
Brad Holm, Assistant Aviation Director / General Counsel
Jordan Feld, Deputy Aviation Director – Planning & Environmental