ZUCKERT SCOUTT & RASENBERGER, L.L.P.
ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309
Telephone [202] 298-8660 Fax [202] 342-0683

FAA Enforcement of Airport Improvement Program Grant Assurances, 2008

By Jol A. Silversmith*

Aviation is a highly federalized industry. Federal statutes and rules typically take priority over – or entirely preempt – state regulation. This is particularly true in the case of airports, which in addition to being closely monitored by the Federal Aviation Administration (FAA) for safety and other purposes are also highly dependent on FAA funding for capital improvements.

The Airport Improvement Program (AIP), which was created by the Airport and Airways Improvement Act of 1982, is one of the most significant sources of FAA funding. If approved by FAA, an AIP grant to an airport can cover up to 95% of the costs of improvements addressing airport safety, capacity, security, or environmental concerns.[1] The allocation scheme for AIP grants is complex – including entitlements for various categories of airports – but very few of the 3,300 airports included in the National Plan of Integrated Airport Systems (NPIAS) have not received some form of AIP funding.[2] In FY2006 alone, more than 2,000 of them received AIP grants totaling more than $3.4 billion.[3]

But AIP funding comes with strings attached. Airports must comply with a list of 39 "grant assurances" as a condition of AIP grants. The grant assurances typically apply not just to the federally-funded improvements but to all of an airport's operations. Likewise, although some of these conditions have a limited term (typically 20 years), others are perpetual.[4] Thus, the requirements imposed by grant assurances are of considerable relevance to not only airports themselves but also their tenants and other users.

Some grant assurances are relatively uncontroversial, such as requirements that an airport will abide by various federal laws concerning labor, wages, veterans' preferences, civil rights,

---

* Jol A. Silversmith is an associate with the firm of Zuckert, Scoutt & Rasenberger, L.L.P., in Washington, D.C. The views expressed in this article are the author's alone, and do not necessarily reflect those of the firm or any other individual or entity.

1 49 U.S.C. § 47101, et seq. See also 14 C.F.R. Part 152; Airport Improvement Program Handbook, FAA Order 5100.38C (June 28, 2005).

2 Additionally, even if an airport has not received AIP funds, it is subject to similar assurances if the airport is comprised in whole or part of property conveyed by the federal government after World War II. 49 U.S.C. § 47151, et seq.

3 "AIP Grants Awarded in FY 2006 by State," http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/media/aip_summary_fy2006.pdf.

4 49 U.S.C. § 47107. See also Airports Compliance Handbook, FAA Order 5190.6A (October 2, 1989); "Assurances: Airport Sponsors," http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

disadvantaged business enterprises, environmental, audit, and other issues. But others are more complex – and significant. Notably:

- Grant assurance #22 generally prohibits "unjust discrimination" at airports. All kinds of aeronautical activities must have access to an airport on reasonable terms; i.e., an airport must treat similarly-situated tenants the same, and cannot ban any activities that it is physically capable of supporting. In practice, however, airport tenants and other users' circumstances are rarely identical, which means that discrimination among them may not be "unjust." For example, an airport might justify different lease terms for two FBOs because one is located in a more desirable location on the airfield, or because one signed a long-term lease during a more favorable economy when rents were higher.

- Grant assurance #23 prohibits airports from granting "exclusive rights." For example, an airport cannot guarantee a FBO that no competitors will be allowed to operate at the airport. But there are certain exceptions – such as that an airport can, if it provides certain services itself, opt not to allow them to be provided by third parties. Nor does this grant assurance require an airport to allow a competitor to an existing tenant or user to start service at the airport, if the airport has legitimate reasons to deny its application (i.e., if no additional space is available at the airport, or if the applicant does not meet reasonable minimum standards set by the airport for its activities).

Other noteworthy grant assurances require airports to retain powers necessary to fulfill their responsibilities under federal law (#5); maintain a self-sustaining fee and rental structure (#24); require that airport revenues be used only for aeronautical purposes (#25).

In 1996, FAA established a special set of procedures to review complaints which allege that airports have not complied with grant assurances, or under which FAA can itself initiate an investigation.[5] Since then, approximately 200 complaints have been filed, about half of which have been resolved through an administrative order by FAA. If an airport is found to have violated a grant assurance, FAA can prohibit the airport from receiving any more AIP funds if it does not bring itself into compliance. However, FAA cannot resolve private claims for damages – and although FAA has asserted authority to impose civil penalties and/or withhold other forms of transportation funding, it has never actually done so. Moreover, in many cases FAA has found that the allegations did not rise to the level of a grant assurance violation – or even if they did, the complaint was moot because the airport already had resolved the underlying problems.

In 2008, FAA issued initial or final administrative decisions in nine proceedings (one of which had been initiated by FAA and eight by complaints).

- 41 North 73 West Inc. d/b/a Avitat Westchester v. Westchester County, New York, FAA docket nos. 16-07-13 and 2008-0309 (director's determination, June 12, 2008). Avitat Westchester alleged that the establishment of two classes of FBOs at Westchester County Airport, and the provision of more favorable lease terms to the smaller FBOs, violated grant assurances #22, #23, and #24. FAA held that the airport was not in violation of the

[5] 14 C.F.R. Part 16.

grant assurances, because the two classes of FBOs were not similarly situated. Each type of FBO was subject to restrictions on the aircraft that it could service and the other services that it could offer (i.e., the "Light General Aviation" FBOs, unlike Avitat Westchester, could not offer jet grade fuel), and Avitat Westchester further had knowingly consented to these terms.

- Atlantic Helicopters, Inc/Chesapeake Bay Helicopters v. Monroe County, Florida, FAA dockets no. 16-07-12 and 2008-0250 (director's determination, December 3, 2008). Atlantic Helicopters alleged that restrictions on its ability to establish a base and operate helicopter services from Key West International Airport violated grant assurances #22 and #23. Unusually, FAA issued a "preliminary determination" in which it dismissed the majority of the allegations but held that the airport may have violated the former assurance by not ensuring that Atlantic Helicopters was able to obtain a reasonable lease term from the airport FBO, but provided the airport an opportunity to submit a corrective action plan before FAA issued a determination. Because the airport submitted a plan that was found satisfactory by FAA, its determination held that the airport was not in violation of the grant assurances.

- Airborne Flying Service, Inc. v. City of Hot Springs, Arkansas, FAA docket nos. 16-07-06, 2007-0340, and 2008-0189 (final decision, May 2, 2008). Airborne Flying Service alleged that the prohibitions on self-fueling at Hot Springs Municipal Airport violated grant assurances #22 and #23. FAA held that the airport was not in violation of the grant assurances, because the restrictions – primarily, that fuel be stored at a fuel farm instead of on Airborne Flying Service's leasehold – were reasonable. FAA also noted that Airborne Flying Service had failed to present any evidence to support its claims that the airport's motive in imposing the restrictions was to financially benefit its proprietary fuel concession.

- Flightline Aviation, Inc. v. City of Shreveport through the Shreveport Airport Authority, FAA docket nos. 16-07-05, 2007-0320, and 2008-0321 (director's determination, March 7, 2008). Flightline Aviation alleged that Shreveport Downtown Airport's disparate treatment of its operations and those of another FBO violated grant assurance #22. FAA held that the airport was not in violation of the grant assurances, because the financial requirements imposed by the airport reflected new minimum standards which would apply to all new FBO agreements. Further, even if the other FBO had violated certain airport standards, such as insurance requirements, the airport currently was making efforts to ensure compliance, and the other FBO's lack of compliance did not mean that the standards could not be enforces against Flightline.

- Northwest Airlines, Inc., Delta Airlines, Inc., AirTran Airways, Inc., Continental Airlines, Inc., Southwest Airlines, Inc. v. Indianapolis Airport Authority, Indianapolis International Airport, BAA-Indianapolis, FAA dockets nos. 16-07-04, 2007-28786, 2008-0192, and 2007-319 (director's determination, August 18, 2008). The air carriers alleged that Indianapolis International Airport's financing of a new apron for the exclusive use of Federal Express violated grant assurances #22, #23, #24, and #25. FAA held that the airport was not in violation of the grant assurances. Although the cost methodology for the apron incorporated potential rent credits to FedEx, which could result in costs being

passed on to other carriers, the methodology had not currently raised other carriers' fees or otherwise had an adverse impact on them. FAA also noted that carriers could be granted exclusive rights to use an apron, provided that other carriers were not denied similar opportunities.

- Boston Air Charter v. Norwood Airport Commission, Norwood, Massachusetts, FAA docket nos. 16-07-03 and 2007-28820 (final order, August 14, 2008). Boston Air Charter alleged that Norwood Municipal Airport's failure to enable it to install electric utilities necessary to operate a fueling facility to service its own aircraft violated grant assurances #5, #22, and #23. FAA held that the airport had violated the grant assurances. In order to install the utilities, Boston Air Charter required access to the leasehold of a FBO, which opposed Boston Air Charter's fueling plans and refused to provide access. Generally, airports must retain a right of access and right to grant utility easements across leaseholds. Further, the airport was obligated to provide Boston Air Charter a reasonable opportunity to self fuel its own aircraft. Accordingly, FAA directed the airport to submit a corrective action plan.

- Self Serve Pumps, Inc. v. Chicago Executive Airport, FAA docket nos. 16-07-02 and 2007-28782 (director's determination, March 17, 2008). Self Serve Pumps alleged that Chicago Executive Airport's policy of allowing only full-service FBOs to sell fuel violated grant assurances #22 and #23. FAA held that the airport was not in violation of the grant assurances, because its minimum standards which tied the sale of aviation fuel to other aeronautical services were reasonable. FAA noted that bundling aeronautical services with the sale of aviation fuel was in fact a common industry practice, and that Self Serve Pumps had not alleged that any particular term was unreasonable. Instead, Self Serve Pumps was seeking to tilt the playing field to its advantage, because its fuel-only proposal would require less investment and fewer operating facilities than full-service FBOs.

- Sun's, Inc. v. Port of Seattle, FAA docket nos. 16-06-13, 2007-27228, and 2008-0191 (director's determination, November 14, 2008). Sun's, Inc. alleged that Seattle-Tacoma International Airport had engaged in race discrimination by offering preferential terms to Disadvantaged Business Enterprises (DBE) in the new central terminal, and not selecting Sun's to be a vendor in the new terminal, in violation of grant assurance #37 and FAA's separate DBE regulations. FAA held that the airport was not in violation of the grant assurances, because its leasing policies were facially neutral and did not have a disparate impact on any protected group. Although the owner of Sun's was Asian-American, Sun's had not submitted any racial data for other DBE concessionaires. Further, the airport had demonstrated a legitimate justification for its leasing policies, namely to obtain a blend of businesses in the central terminal, including DBE concessionaries.

- In the Matter of Compliance with Federal Obligations by the City of Santa Monica, California, FAA docket nos. 16-02-08 and 2003-15807 (director's determination, May 27, 2008). Santa Monica enacted an ordinance prohibiting the operation of Category C and D aircraft at Santa Monica Municipal Airport. The ban was nominally based on safety concerns, but Santa Monica long had sought means to restrict operations at the airport generally. FAA had initiated an investigation of a similar proposal by Santa

Monica in 2002, which had been dormant; after Santa Monica adopted the ordinance, FAA revived the investigation, issued an interim cease and desist order enjoining enforcement of the ordinance and subsequently determined that the ordinance violated grant assurances #22 and #23. FAA explained that the agency alone had the power to regulate aircraft operations based on safety, and that in any case Santa Monica had not demonstrated that a safety problem existed. FAA also addressed and rejected various procedural defenses asserted by Santa Monica. Subsequently, Santa Monica filed an administrative appeal of the determination, and also challenged the interim cease and desist order in court. The latter challenge was rejected by the U.S. District Court for the Central District of California (no. 08-2695); a further appeal by Santa Monica is pending in the U.S. Court of Appeals for the Ninth Circuit (nos. 08-55869 and 08-72192).

Federal courts also issued rulings in three appeals from FAA administrative decisions.

- Flamingo Express, Inc. v. FAA, 536 F.3d 561 (6th Cir. 2008), on appeal from FAA docket nos. 16-06-04 and 2006-25196. Flamingo Express initially alleged that by delaying review of its application to provide commercial service; imposing excessive insurance requirements; and limiting its operations to aircraft seating nine or fewer passengers, Cincinnati Municipal Airport-Lunken Field violated grant assurance #22. FAA held that the airport was not in violation of the grant assurances because there was no evidence that it had unreasonably delayed its review of the application; the insurance requirements were reasonable, in light of Flamingo Express's proposal; and the airport's decision to "downgrade" its operating certificate such that operations with larger aircraft were prohibited was made prior to the submission of any concrete proposal by Flamingo Express. The U.S. Court of Appeals for the Sixth Circuit affirmed FAA's findings.

- R/T 182, LLC v. FAA, 519 F.3d 307 (6th Cir. 2008), on appeal from FAA dockets no. 16-05-14, 2005-22378, and 2005-25076. R/T-182 initially alleged that Portage County Airport's assessment of user fees on aircraft based at the airport but not on transient aircraft violated grant assurances #22 and #24. FAA held that the airport had not violated the grant assurance because users of aircraft based at the airport and transient users were not similarly situated. FAA held that it was reasonable for the airport to collect user fees only for aircraft based at the airport while recovering costs from transient aircraft through other means, such as fuel flowage fees. Further, it was reasonable for the airport to conclude that the cost of tracing and billing transient aircraft was likely to be greater than any user fees generated. The U.S. Court of Appeals for the Sixth Circuit affirmed FAA's findings.

- BMI Salvage Corporation and Blueside Services, Inc. v. FAA, 272 Fed. Appx. 842 (11th Cir. 2008), on appeal from FAA dockets no. 16-05-16 and 2005-22380. BMI Salvage initially alleged that requirements imposed by Opa-Locka Airport, including that advance notice be provided of large aircraft arrivals and notice be provided of derelict aircraft stored at the airport, violated grant assurances #22 and #24. FAA held that the airport was not in violation of the grant assurance because the requirements were reasonable. FAA also held that allegations of personal motives, political corruption, ill will, and racial discrimination on the part of the airport were beyond its jurisdiction. The U.S. Court of Appeals for the Eleventh Circuit remanded the case to FAA for consideration of

an additional issue, namely whether BMI Salvage's aircraft demolition business was similarly-situated to other businesses at the airport and thus whether it was entitled to a lease on the same terms as other businesses at the airport.

In addition, in 2008 FAA publicly docketed four other complaints which remain pending, and also commenced an investigation on its own initiative.

- In the Matter of Compliance with Federal Obligations by the Port Authority of New York and New Jersey, FAA docket no. 16-08-09. Subsequent to FAA's announcement of its intent to auction slots for air carrier operations at LaGuardia Airport (LGA), John F. Kennedy International Airport (JFK), and Newark Liberty International Airport (EWR), the Port Authority of New York and New Jersey announced its intent to prohibit any operations conducted in conjunction with a slot. FAA asserted that such action would amount to unjust discrimination, in violation of grant assurance #22. The investigation remains open.[6]

- Flight School of Barrow County, Inc. v. Barrow County Airport Authority, FAA docket nos. 16-08-08 and 2008-1023. The flight school asserted that the rental fees for its facilities at Northeast Georgia Regional Airport in Winder, Georgia were higher than those for comparable facilities leased to other airport tenants, as well as above their fair market value. The complaint remains pending.

- Goodrich Pilot Training Center, LLC and Aviation Management Group, LLC v. Village of Endicott, New York, FAA docket nos. 16-08-03 and 2008-1024. The pilot training center asserted that its lease at Tri-Cities Airport, which had been entered into while a sister company managed the airport, was terminated without justification once the village assumed direct management of the airport, in violation of grant assurance #22 and grant assurance #23. The complaint remains pending.

- Asheville Jet, Inc. d/b/a Million Air Asheville v. City of Asheville, North Carolina, and Asheville Regional Airport, FAA docket nos. 16-08-02 and 2008-1077. Asheville Jet asserted that another FBO at the airport had been granted exclusive rights, including the preferential use of an apron, a waiver of the airport's minimum standards, and preferential lease terms, in violation of grant assurance #22 and grant assurance #23. The complaint remains pending.

- JetAway Aviation, L.L.C. v. Board of County Commissioners of Montrose County, Colorado, and the Montrose County Building Authority, FAA docket nos. 16-08-01 and 2008-0190. JetAway asserted that the county had unreasonably delayed consideration of or denied its proposal to become a FBO and sell jet fuel at the airport, in violation of grant assurance #22 and grant assurance #23. FAA previously had denied a complaint by

[6] However, in a separate proceeding, the U.S. Court of Appeals for the District of Columbia Circuit has enjoined FAA from conducting slot auctions (docket no. 08-1332). The court explained that the Port Authority and other parties had satisfied the requirement for a stay pending the court's review, including a substantial likelihood that they ultimately would prevail on their argument that FAA lacked authority to conduct slot auctions.

JetAway (FAA dockets no. 16-06-01 and 2006-25185), but had stated that its decision only considered issues that occurred before it was filed. The complaint remains pending.

Airport tenants and users who are concerned that an airport may be violating its grant assurances can consult the FAA's general web page on grant assurances, http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/, as well as the FAA's website for Part 16 proceedings, http://part16.airports.faa.gov, for guidance. But it is also advisable that they contact an attorney or consultant familiar with the AIP program and grant assurances, who may be able to advise if a similar situation previously has been addressed by FAA, or how best to frame a complaint about a novel issue. For additional advice or information, please contact Jol A. Silversmith at (202) 973-7918 or via e-mail at jasilversmith@zsrlaw.com.