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FAA Enforcement of Airport Improvement Program Grant Assurances, 2009

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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 matters.[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 FY 2007 (the most recent year for which complete data is available) alone, more than 2,000 of them received AIP grants totaling more than $3.3 billion.[3]

But AIP funding comes with strings attached. Airports must comply with a list of 39 "grant assurances" as a condition of receiving AIP grants.[4] 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.[5] Thus, the requirements imposed by grant assurances are of considerable relevance to not only airports themselves but also their tenants and other users.

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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 2007 by State," http://www.faa.gov/airports/aip/grant_histories/media/aip_grants_by_state_fy2007.pdf.

4 "Assurances: Airport Sponsors," http://www.faa.gov/airports/alaskan/airports_resources/media/airport_sponsor_assurances.pdf.

5 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.

Some grant assurances are relatively non-controversial, such as requirements that an airport will abide by various federal laws concerning labor, wages, veterans' preferences, civil rights, 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 (e.g., 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); and 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.[6] Since then, hundreds of complaints have been filed, and more than 100 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 the majority of 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 2009, FAA issued initial or final administrative decisions in 11 proceedings (one of which had been initiated by the FAA itself and ten by complaints).

- Gary R. Ernest v. Leitchfield-Grayson County Airport Board, FAA dockets no. 16-09-01 and 2009-0877 (director's determination December 17, 2009). Ernst alleged that the

[6] 14 C.F.R. Part 16.

airport had violated grants assurances #22 and #23 by denying him no-cost through-the-fence (TTF) access to the airport from a neighboring property. FAA held that the airport had not violated the grant assurances, explaining that airports are under no obligation to provide TTF access, and that off-airport users are not protected by the grant assurances. Moreover, FAA noted that if an airport allows TTF access, it should ensure that the terms of such agreements are consistent with grant assurances #5 and #24. Although FAA expressed concerns about Grayson County Airport's "casual" business practices, it concluded that the airport's $500 annual access fee was appropriate under the circumstances.

- William H. Keyes and Dewitt T. Jack Ferrell, Jr. v. McMinn County, Tennessee, FAA dockets nos. 16-08-12, 16-08-13, 2009-1056, and 2009-1065 (director's determination December 12, 2009). Keyes and Ferrell alleged that the airport had not been operated in a safe and serviceable manner; that it had not responded to allegations of discrimination by a fixed based operator (FBO); and that it had transferred power and authority to others, in violation of grant assurances #5, #19 (operation and maintenance), #22, #23, and #34 (policies, operations, and standards). FAA held that the airport had not violated the grant assurances, explaining that McCinn County Airport had taken reasonable steps to address the safety issues and that the Part 16 process is intended to address current and not past violations. Additionally, FAA found that Keyes and Ferrell's allegations that they had been denied access to the airport due to threats and vandalism were unsupported by any evidence and outside the scope of the Part 16 process, and that the airport's management company had not discriminated against them or otherwise violated the grant assurances.

- Asheville Jet, Inc. d/b/a Million Air Asheville v. Asheville Regional Airport, FAA dockets nos. 16-08-02 and 2008-1077 (director's determination October 1, 2009). Asheville Jet alleged that the airport had provided a competing FBO with the exclusive use of an apron, and otherwise discriminated in favor of the other FBO, in violation of grant assurances #5, #22, #23, and #27 (use by government aircraft). FAA held that Asheville Regional Airport had not violated the grant assurances, explaining that aprons in proximity to a FBO can be leased for the FBO's exclusive use. Additionally, FAA found that the other airport actions which were asserted to be discriminatory by Asheville Jet were consistent with the grant assurances; for example, the airport's grant of a temporary waiver to the other FBO allowing it to sell fuel without providing other services during construction, and the airport's lease with the other FBO which included terms and conditions different than those for Asheville Jet. FAA also noted that assurance #27 concerns government aircraft's access to airports, and was not applicable to the complaint at issue.

- Delbert Johnson d/b/a Two Dogs Aviation v. Goldsboro-Wayne Airport Authority, FAA dockets no. 16-08-11 and 2009-0774 (director's determination October 9, 2009). Two Dogs Aviation alleged that the airport had denied its request to sell fuel in competition with an existing FBO, in violation of grant assurances #5, #22, #23, #24, and #25. FAA held that Goldsboro-Wayne Airport had not violated the grant assurances, explaining that the airport's requirements for sale of fuel – i.e., that the sale of fuel be bundled with the provision of other aeronautical services – were reasonable, and that there was no

evidence of other grant assurance violations. FAA did express concern that the FBO previously had been granted numerous waivers from the airport's minimum standards, and about certain other airport practices, but also noted that the FBO's contract had been revoked, and that there were no current compliance issues at the airport. Additionally, FAA noted that Two Dogs Aviation had failed to take steps necessary to pursue its fueling business proposal. FAA also noted that some of the allegations – such as that the airport had conflicts-of-interest that violated state law and had violated state public records law – were outside the scope of a Part 16 proceeding.

- Northwest Airlines, Inc., Delta Airlines, Inc., AirTran Airways, Inc., and Continental Airlines, Inc. v. Indianapolis Airport Authority, Indianapolis International Airport, BAA-Indianapolis LLC, FAA dockets nos. 16-07-04, 2007-28786, 2008-0192, and 2007-319 (final decision and order October 27, 2009). The air carriers alleged that the airport's financing of a new apron for the exclusive use of Federal Express violated grant assurances #22, #23, #24, and #25. In a prior administrative decision, FAA held that Indianapolis International Airport had not violated 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, and thus the dispute was not ripe for consideration. Unusually, the airport appealed because even though it agreed with the outcome, it asserted that certain language in the opinion was dicta and should be stricken. FAA held that, with one exception, the prior opinion had been supported by the record before the agency and thus FAA largely declined to modify the language at issue.

- 41 North 73 West Inc. d/b/a Avitat Westchester v. The County of Westchester, a Political Subdivision of the State of New York, FAA dockets nos. 16-07-13 and 2008-0309 (final decision and order September 18, 2009). Avitat Westchester alleged that the airport's establishment of two classes of FBOs, and the provision of more favorable lease terms to the smaller FBOs, violated grant assurances #22, #23, and #24. FAA, affirming a prior administrative decision, held that Westchester County Airport had not violated the 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.

- In the Matter of the City of Santa Monica, FAA dockets nos. 16-02-08 and 2003-15807 (final decision and order July 8, 2009). In 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. FAA had initiated an investigation of a similar proposal by Santa Monica in 2002; after the City adopted the ordinance, FAA revived the investigation, enjoined enforcement of the ordinance, and subsequently determined that it violated grant assurances #22 and #23. The City then requested a hearing, and the hearing officer held that assurance #22 but not #23 had been violated. The City appealed within FAA again, and the agency's final order affirmed that the agency had exclusive authority to regulate safety, that no actual safety risks at the airport

had been shown to exist, and that the ordinance violated assurance #22 – although not #23 since no effects on competition had been shown to exist. The City now has appealed to the U.S. Court of Appeals for the District of Columbia Circuit (docket no. 09-1233).

- Jetaway Aviation, L.L.C. v Montrose County, Colorado, and the Montrose County Building Authority, FAA dockets nos. 16-08-01 and 2008-0190 (director's determination July 2, 2009). Jetaway Aviation, an aeronautical service provider which accessed Montrose County Airport on a through-the-fence (TTF) basis, alleged that the airport had discriminated against its plans to develop an on-airport FBO in favor of an existing FBO, in violation of grant assurances #5, #22, #23, #24, and #29 (airport layout plan). The FAA noted that Jetaway Aviation and the airport had been parties to a prior Part 16 proceeding, and also were parties to actions in state court. To the extent that the complaint was cognizable in a Part 16 proceeding, FAA held that the grant assurances had not been violated. Notably, FAA found that the airport had engaged in good faith negotiations with Jetaway Aviation, and that Jetaway Aviation was not entitled to any particular site on the airport property for its FBO; the airport's refusal to lease to Jetaway Aviation its preferred site was not a violation of the grant assurances. FAA also noted that to the extent the complaint concerned Jetaway Aviation's off-airport property, TTF users are not protected by the grant assurances.

- J&B Enterprises, Inc., d/b/a Rhythm Shine v. Metropolitan Nashville Airport Authority, FAA dockets nos. 16-08-07 and 2009-0139 (director's determination May 5, 2009). Rhythm Shine, a disadvantaged business enterprise (DBE) at Nashville International Airport, alleged that the terms of a new concessions contract discriminated against it on the basis of race, in violation of grant assurances #30 (civil rights) and #37 (disadvantaged business enterprises), and regulations cross-referenced by those assurances.[7] FAA held that Rhythm Shine had failed to show evidence of disparate impact; i.e., there was no evidence that the airport's facially-neutral policies had impacted anyone but Rhythm Shine. Moreover, FAA found that even if such evidence had been shown, the airport had responded with evidence of substantial justification for the new contract terms; the new master agreement complied with federal targets for DBE participation and was intended to address customer service preferences. However, the FAA did note certain problematic practices at the airport that since had been corrected, including a solicitation which had improperly stated a preference for local vendors. FAA also noted that some of Rhythm Shine's requests – such as that FAA award damages and resolve landlord/tenant disputes – were outside the scope of a Part 16 proceeding.

- Goodrich Pilot Training Center, LLC and Aviation Management Group, LLC v. Village of Endicott, New York, FAA dockets nos. 16-08-03 and 2008-1024 (director's determination April 3, 2009). Goodrich and Aviation Management alleged that the airport had discriminated against them by terminating their leases and terminating the former entity's airport management agreement, in violation of grant assurances #5, #22, and #23. FAA noted that whether the eviction was legal under state law was not within

[7] 49 C.F.R. Parts 23 and 26.

the scope of a Part 16 proceeding, but that the companies' conduct adequately justified Tri-Cities Airport's decision to get rid of Goodrich and Airport Management and to refuse to engage in further business with them. The companies had failed to make the payments required by its management agreement; failed to cooperate with an audit; engaged in self-dealing; and been highly litigious. Indeed, FAA indicated that the airport's actions were not only justified but required; allowing them to remain at the airport while flouting rules that applied to all other airport tenants was itself a violation of the grant assurances, and the airport's response to their misconduct had been tardy.

- Gina Michelle Moore, individually and d/b/a Warbird Sky Ventures v. Sumner County Regional Airport Authority, FAA dockets no. 16-07-16 and FAA-2008-0289 (director's determination February 27, 2009). Warbird Sky Ventures alleged the airport had denied its application to operate an aircraft maintenance business and applied its minimum standards inconsistently, in violation of grant assurances #5, #22, and #23. FAA held that Sumner County Regional Airport had not imposed conditions on Warbird Sky Ventures' business plan that were unjustified or inconsistent with requirements imposed on other tenants. FAA also noted that the airport was justifiably concerned by Moore's past misconduct at the airport, including parking of a motor home on the ramp. However, FAA held that as a general matter the airport's procedures for reviewing applications lacked transparency and thus violated assurance #5; accordingly, FAA directed that the airport submit a corrective action plan. Additionally, FAA noted that Warbird Sky Ventures had made allegations that were outside the scope of a Part 16 proceeding, including that the airport had violated her constitutional rights and state laws, as well as that Warbird Sky Ventures had asserted violations of various other assurances without submitting any supporting evidence or explanation of the claims.

In addition, in 2009 FAA publicly docketed ten new complaints pursuant to Part 16; the complaints remain pending, and FAA has not determined if they have merit. The key assertions of the new complaints are as follows:

- Orange County Soaring Association, Mary Rust, Larry Touhino, and Chris Mannion v. County of Riverside, FAA dockets nos. 16-09-13 and 2010-0092. A glider flying club asserted that an airport had prohibited glider operations (despite a local FAA finding that they could be operated safely at the airport) in violation of grant assurance #22.

- Aero Ways, Inc. v. Delaware River & Bay Authority, FAA dockets nos. 16-09-12 and 2010-0079. An aircraft management company asserted that an airport had denied it the right to self-fuel aircraft, and had applied inconsistent standards to other airport tenants which allowed them to self-fuel, in violation of grant assurance #22.

- Heliops, LLC v. Norwood Memorial Airport and Norwood Airport Commission, FAA dockets nos. 16-09-10 and 2010-0078. A helicopter charter company asserted that an airport had refused to allow it to conduct commercial operations without maintaining a physical office at the airport, in violation of grant assurance #22.

- Skydive Sacramento v. City of Lincoln, California, FAA dockets nos. 16-09-09 and 2009-1122. A skydiving company asserted that an airport had refused to allow it to

establish a drop zone on reasonable terms and conditions, in violation of grant assurance #22.

- Mac Dan Aviation v. Essex County Airport, FAA dockets nos. 16-09-08 and 2009-1207. A fixed base operator asserted that an airport had imposed stricter and discriminatory lease conditions on it than on another FBO, in violation of grant assurance #22.

- Desert Wings Jet Center LLC and Spirit Flight Inc. d/b/a Wings of the Cascades v. City of Redmond, Oregon, FAA dockets nos. 16-09-07 and 2009-1102. A fixed based operator and flight school asserted that an airport was attempting to breach their leases and redevelop their leasehold, in violation of grant assurance #22 and other assurances.

- Valley Aviation Services, LLP v. City of Glendale, Arizona, FAA dockets nos. 16-09-06 and 2009-1020. An airport tenant in the business of leasing hangars asserted that an airport had imposed discriminatory conditions on its sub-tenants, and had allowed other hangars to be used for non-aeronautical purposes, in violation of grant assurance #22.

- Venice Jet Center v. City of Venice, Florida, FAA dockets nos. 16-09-05 and 2009-1119. A fixed base operator asserted that an airport had refused to allow it to construct new hangars at the airport, in violation of grant assurance #22; the airport responded that the dispute involved unusual circumstances, since the FBO's managing partner had been charged with serious financial crimes.

- Sterling Aviation, LLC v. Milwaukee County, Wisconsin, FAA dockets nos. 16-09-03 and 2009-0892. An airport repair station/charter operator asserted that an airport had refused to allow it to fuel aircraft of customers and guests, even though other service providers at the airport were permitted to do so, in violation of grant assurance #22.

- Drake Aerial Enterprises, LLC d/b/a Air America Aerial Ads and James Miller v. City of Cleveland Department of Port Control, FAA dockets nos. 16-09-02 and 2009-0879. A banner towing company asserted that an airport had refused to allow it to operate at the airport, even though such operations could be performed safely, in violation of grant assurance #22.

Finally, in 2009 FAA issued a revised version of its Airport Compliance Manual.[8] Although the guidance provided in the manual is not binding as a matter of law, the cover letter to the order indicates that the manual states FAA's positions on "the obligations set forth in legislatively mandated airport sponsor assurances, addresses the nature of the assurances and the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel." Because the manual had not been revised for two decades, the new edition included guidance that did not appear in its predecessor. Some of the additions reflect the rulings in Part 16 proceedings, and thus are not strictly new but merely compiled for the first time. But some of the new language has proven to be controversial; most notably,

[8] Order 5190.6B (September 30, 2009), http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/.

FAA's new guidance regarding through-the-fence access at federally-obligated airports. FAA previously had taken the position that agreements enabling aircraft to access airports from neighboring private property were disfavored (but not strictly prohibited). But advocacy groups for private pilots have objected to FAA's statement that residential airparks should never be allowed at airports subject to AIP grant assurances. Notably, both the Aircraft Owners and Pilots Association (AOPA) and the Experimental Aircraft Association (EAA) have filed comments asserting that FAA's position is both unprecedented as a matter of history and unsound as a matter of policy.[9]

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, grant assurances, and the filing procedures of Part 16, who may be able to advise if a similar situation previously has been addressed by FAA; if Part 16 is the correct forum for their concerns; and 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.

[9] Docket FAA-2009-0924. FAA requested that comments on the manual be submitted by March 31, 2010.