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FAA Enforcement of Airport Improvement Program Grant Assurances, 2010

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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 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 FY2008 (the most recent year for which complete data is available) alone, nearly 2,400 of them received AIP grants totaling more than $3.47 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; moreover, since many airports accept new AIP grants on a regular basis, their obligations are also effectively perpetual, since each grant extends the compliance obligations.[5] Thus, the

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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 surplus property conveyed by the federal government after World War II. 49 U.S.C. § 47151, et seq.

3 "Airport Improvement Program FY2008 Report to Congress," http://www.faa.gov/airports/aip/grant_histories/media/aip_annual_report_fy2008.pdf; "AIP Grants Awarded in FY2008 by State," http://www.faa.gov/airports/aip/grant_histories/media/aip_grants_by_state_fy2008.pdf.

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

5 49 U.S.C. § 47107. See also Airports Compliance Handbook, FAA Order 5190.6B (http://www.faa.gov/documentLibrary/media/Order/5190_6b.pdf.

requirements imposed by the grant assurances are of considerable relevance to not only airports themselves but also their tenants and other users.

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; the environment; audits; 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 fixed-base operators ("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); 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, more than 200 complaints have been filed, and more than half have been resolved through a public 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 2010, FAA released initial or final administrative decisions in ten proceedings:

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

- Aero Ways, Inc. v. Delaware River & Bay Authority, FAA dockets no. 16-09-12 and 2010-0079 (Director's Determination, August 30, 2010). Aero Ways, an aircraft management company, alleged that it had been denied the right to self-fuel its own aircraft, in violation of grant assurance #22 (economic nondiscrimination). FAA held that no violation had occurred, because Aero Ways did not own or have a long-term lease for the aircraft at issue. To the extent that Aero Ways alleged that other entities at the airport had been allowed to self-fuel, they were differently situated (*i.e.*, air carriers or FBOs). FAA also rejected Aero Ways' claim that it had been unjustly denied access to the airport. For example, FAA noted that a gate restriction had been put in place due to damage caused by an Aero Ways employee, and that requests to post a sign and lease additional land had been denied because Aero Ways had an outstanding rent balance of more than $100,000.

- Desert Wings Jet Center LLC and Spirit Flight Inc. d/b/a Wings of the Cascades v. City of Redmond, Oregon, FAA dockets no. 16-09-07 and 2009-1102 (Director's Determination, November 10, 2010). Desert Wings alleged that the airport had set unreasonable standards that effectively prohibited it from becoming a fixed-based operator, in violation of grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). FAA held that the terms offered to Desert Wings, although different than for existing FBOs at the airport, did not violate the grant assurances; lease rates and terms may change over time, and Desert Wings had not shown any of these conditions – such as duration limits for new leases and height restrictions for new construction – to be unreasonable. Additionally, FAA noted that grant assurance #19 (operation and maintenance) did not require the airport to remedy a storm runoff problem on Desert Wings' leasehold; the obligation generally applies only to aircraft movement areas.

- Venice Jet Center v. City of Venice, Florida, FAA dockets no. 16-09-05 and 2009-1119 (Director's Determination, September 1, 2010). Venice Jet Center, while in receivership, alleged that the airport had failed to act on its proposal to build new hangars on its leasehold; the receiver alleged that the airport had violated grant assurances including #22 (economic nondiscrimination) and #23 (exclusive rights). FAA ruled that although the receiver previously had standing to file a Part 16 complaint, the subsequent sale of the FBO's assets to a new owner meant that neither the receiver nor the shell of Venice Jet Center retained standing. Further, the record lacked evidence that the new owner had actively pursued the hangar project and thus could assume the complaint. However, FAA noted that the new owner could file a new complaint with respect to events that had occurred since it acquired the FBO's assets, and warned the airport that a failure to timely process a request to build hangars could result in a finding of a grant assurance violation.

- Sterling Aviation LLC v. Milwaukee County, Wisconsin, FAA dockets no. 16-09-03 and 2009-0892 (Director's Determination, April 13, 2010). Sterling Aviation alleged that it was not allowed to fuel aircraft other than those being operated for its public charter programs, even though a similarly situated aeronautical service provider was allowed to fuel unaffiliated aircraft, in violation of grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). FAA held that no violation had occurred, because Sterling Aviation and the other aeronautical service provider at issue were not similarly situated. FAA noted that Sterling Aviation was primarily intended to be a

charter and air taxi service provider while the other provider was primarily intended to be a repair station and aircraft sales business. FAA noted that airports may assign different rights, restrictions, and responsibilities to different classes of aeronautical users.

- Drake Aerial Enterprises, LLC d/b/a Air America Aerial Ads and James Miller v. City of Cleveland Department of Port Control, FAA dockets no. 16-09-02 and 2009-0879 (Director's Determination, February 22, 2010). Drake Aerial Enterprises, which tows aerial banners, alleged that it had been denied access to Burke Lakefront Airport in violation of grant assurances #22 (economic nondiscrimination) and #24 (fee and rental structure). FAA held that no violation had occurred, because the airport had proposed to allow Drake to use the airport, and the terms – although not to Drake's liking – were not so unreasonable as to amount to a denial of access; likewise, the proposed fee schedule was not unreasonable. FAA noted that Cleveland's proposal had been made after the complaint had been filed, but that the purpose of Part 16 is to cure any past or current violation, and that punitive measures will not be taken if an airport has corrected any errors.

- 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 (Final Agency Decision and Order, July 26, 2010). Keyes and Ferrell alleged that the airport had not been operated in a safe and serviceable manner, in violation of grant assurances #19 (operation and maintenance) and #34 (policies, operations, and standards). On an appeal from a Director's Determination, FAA affirmed that the airport had not violated the grant assurances, explaining that although issues had arisen with its runway and other facilities, McCinn County Airport subsequently had taken reasonable steps to address the safety issues and that the Part 16 process is intended to address current and not past violations.

- Richard Corbett d/b/a Modesto Flight Center, Inc. v. City of Modesto, California, FAA dockets no. 16-08-10 and 2009-0775 (Director's Determination, April 5, 2010). Modesto Flight Center, an aeronautical service provider, alleged that it was not allowed to sell fuel at Modesto City-County Airport, in violation of grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). FAA held that no violation had occurred, because there was no evidence that delays in processing its application – including the determination that additional environmental review was required – were for anything but innocent reasons; in particular, there was no evidence that the airport was attempting to protect the incumbent FBO. FAA added that even if there was ill will between Modesto Flight Center and the airport, that would not in itself amount to a violation of the grant assurances. However, FAA did recommend that the airport adopt minimum standards for fuel sales and other commercial activities, in order to avoid future complaints.

- J&B Enterprises, Inc. d/b/a Rhythm Shine v. Metropolitan Nashville Airport Authority, FAA dockets no. 16-08-07 and 2009-0239 (Final Agency Decision and Order, March 3, 2010). 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 separate DBE regulations cross-referenced by those assurances.[7] On an appeal from a Director's Determination, FAA affirmed 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.

- ALCA, Inc., Cylinder Shop, Inc., Suncoast Aviation, Aircraft Parts, and National Aviation v. Miami-Dade County, Florida, FAA dockets no. 16-08-05 and 2009-0343 (Director's Determination, August 31, 2010). The complainants, aeronautical service providers at Opa-Locka Executive Airport, alleged that they had been denied long-term leases after the airport entered into a development lease with a third party developer, in violation of grant assurances #22 (economic nondiscrimination). FAA held that no violation had occurred. The development lease was distinct from a facility lease, and thus it was not unjustly discriminatory for it to incorporate different terms than the complainants' leases; there was no evidence that they had sought and been denied a similar development lease. Moreover, FAA found that there was no evidence that the complainants were required to negotiate only with the third-party developer – other property was available at the airport – and the complainants had failed to submit basic information to the developer which was a predicate for negotiations. Other providers that had obtained leases from the developer had submitted proper documentation, and also were investing to develop new facilities rather than seeking to remain in old facilities.

- 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 (Final Agency Decision and Order, July 13, 2010). 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 #22 (economic nondiscrimination) and #23 (exclusive rights). On an appeal from a Director's Determination, FAA affirmed that Sumner County Regional Airport had not imposed conditions – such as for insurance and ramp space – on Warbird Sky Ventures' business plan that were unjustified or inconsistent with requirements imposed on other tenants. FAA also held that there was no evidence that the complainant's civil rights had been violated, a claim that improperly was asserted for the first time on appeal.

FAA also publicly docketed one new complaint pursuant to Part 16 in 2010 – Larry Davis v. Jackson Municipal Airport, FAA dockets no. 16-10-01 and 2010-1049.[8] An employee of the airport asserted that the airport had failed to comply with federal requirements for

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

[8] In a presentation dated September 26, 2010, the Manager of FAA's Airport Compliance Division noted that in 2010 there had been a dramatic decline in new Part 16 complaints and in decisions issued on pending complaints. "Airport Compliance: An Overview of Current Issues," http://www.aci-na.org/static/entransit/kwillis.pdf.

Disadvantaged Business Enterprises (DBEs) and had retaliated against him for voicing concerns. The complaint requests remedies that on their face are not available from FAA, such as lost wages and emotional distress damages. But the complaint remains pending (as do various complaints filed in prior years), and FAA has not determined if it has any kind of merit.

In addition, in 2010 a federal appeals court affirmed a Part 16 decision that FAA had issued the previous year. In 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 no. 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 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. In an unpublished decision, the U.S. Court of Appeals for the Second Circuit found no error in FAA's reasoning. 2010 U.S. App. LEXIS 22830 (docket no. 09-4810, November 2, 2010).[9]

Finally, in 2009 FAA also issued a revised version of its Airport Compliance Manual.[10] Although the guidance provided in the manual is not legally binding, it represents 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." FAA's revised guidance regarding through-the-fence access at federally-obligated airports proved to be controversial. Organizations such as the Aircraft Owners and Pilots Association (AOPA) and the Experimental Aircraft Association (EAA) have objected to FAA's position that residential airparks should never be allowed through-the-fence access airports subject to AIP grant assurances. In response, FAA issued a notice in 2010 that sought to clarify its position and solicited public comment; in particular, FAA stated that while it continued to oppose the establishment of new residential airparks with access to grant-obligated airports, existing airparks usually would not comprise grant violations.[11] FAA has not yet responded to the comments.

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[9] Further, in 2009, FAA issued a Part 16 decision that prohibited the City of Santa Monica from enforcing an ordinance which purported to prohibit the operation of Category C and D aircraft at Santa Monica Municipal Airport (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)). The City's ban nominally was 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 resumed consideration of and adopted the ordinance in 2008, FAA revived the investigation, enjoined enforcement of the ordinance, and determined that it violated grant assurances #22. The City subsequently appealed to the U.S. Court of Appeals for the District of Columbia Circuit, where the matter remains pending (docket no. 09-1233).

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

[11] "Airport Improvement Program (AIP): Policy Regarding Access to Airports from Residential Property," 75 Fed. Reg. 54946 (September 9, 2010) and 75 Fed. Reg. 57829 (September 22, 2010).

Airport tenants and users who are concerned that an airport may be violating its grant assurances can consult FAA's general web page on grant assurances, http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/, as well as 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.