FAA Enforcement of Airport Improvement Program Grant Assurances, 2012 (January 2013)

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 applied for and received some form of AIP funding.[2] In FY2011 (the most recent year for which complete data is available) alone, more than 2,000 airports received AIP grants, totaling almost $3.5 billion.

But AIP funding comes with strings attached. Airports must comply with a list of 39 "grant assurances" as a condition of receiving AIP grants.[3] 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; and since many airports accept new AIP grants on a regular basis, their obligations are also effectively perpetual, since each grant extends the compliance obligations further into the future.[4] Thus, the 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:

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- 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 unless one has been denied access outright, different terms 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 different economic conditions.

- Grant assurance #23 prohibits airports from granting "exclusive rights." For example, an airport cannot guarantee an FBO that no competitors will be allowed to operate at the airport. This assurance is often framed as the mirror-image of #22 – i.e., if certain tenants are the victims of unjust discrimination, then the remaining tenants are recipients of an exclusive right. But there are exceptions – such as that an airport can, if it provides certain services itself, opt not to allow them to be provided by third parties. Likewise, an application to provide competing services may be denied for legitimate reasons (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 that allege that airports have not complied with grant assurances, or under which FAA can itself initiate an investigation.[5] Since then, approximately 250 complaints have been filed, about half of which 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 further AIP funds until it resolves the compliance issue. 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.

New Part 16 Decisions

In 2012, FAA released administrative decisions in seven grant assurance-based proceedings. Generally, all were resolved in favor of the respondents:

- James Vernon Ricks, Jr. v. Greenwood-Leflore Airport/Airport Board, City of Greenwood, Leflore County, Mississippi, dockets FAA-2011-0279, 16-09-04 (Order of Remand July 20, 2012). FAA previously had rejected a complaint alleging that multiple grant assurances had been violated by the termination of Ricks' lease in order to enable another tenant's expansion. After an administrative appeal within the agency, the case was remanded on a narrow procedural ground – namely, that the airport and a joint sponsor thereof, Leflore County, had filed an answer to the complaint, but the City of Greenwood had not. However, the complaint subsequently was dismissed due to the death of the complainant.[6]

- Desert Wings Jet Center LLC and Spirit Flight Inc. d/b/a Wings of the Cascades v. City of Redmond, Oregon, dockets FAA-2009-1102, FAA-2011-0328, and 16-09-07 (Final Decision May 25, 2012). 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 such as #22 (economic nondiscrimination) and #23 (exclusive rights). On an administrative appeal within the agency, FAA affirmed the prior findings, including that the terms offered to Desert Wings, although different from those 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.

- Sun Valley Aviation, Inc. v. Valley International Airport and the City of Harlingen, Texas, dockets FAA-2011-0598 and 16-10-02. The complainant alleged that delay in processing its request to establish an FBO at the airport amounted to a constructive denial thereof and a violation of grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). FAA found that the airport previously had improperly sought to protect the incumbent FBO from competition, but further found that the airport subsequently had pursued a plan to fulfill its obligations and achieved compliance with the grant assurances. The agency emphasized that its primary concern is an airport's current compliance. It also noted that to the extent the airport's actions had reduced its profit potential, they did not necessarily violate grant assurance #24 (fee and rental structure) because the airport remained self-sustaining, but cautioned against actions incompatible with an airport's "prime obligation" of operating for the public use and benefit.

- Evergreen International Airlines, Inc. v. Port Authority of New York and New Jersey, dockets FAA-2011-1282 and 16-10-04 (Director's Determination April 2, 2012). The complainant argued that its use of employees of a sister/subsidiary company to perform ground handling services should be considered a form of self-handling, and thus not subject to fees imposed on the use of third-party handlers, pursuant to grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). As a procedural matter, FAA held that the carrier had standing to bring the complaint, because the carrier was substantially affected by the fees, even if they were paid by the handling company. But as to the substance, FAA disagreed, finding that the use of employees of a different – if related – company was distinguishable from the use of a company's own employees and, because airports are not required to accommodate a carrier's business model, nothing prevented the carrier from using its own employees.

- Flightline Ground, Inc. d/b/a Flightline First v. Louisiana Dept. of Transportation and Development and Non-Flood Protection Asset Management Authority, dockets FAA-2011-0529 and 16-11-01 (October 24, 2012). The complainant, an FBO, asserted that New Orleans Lakefront Airport had allowed another FBO to default on lease, insurance, and other payments, which put Flightline at a disadvantage, in violation of the grant assurances. FAA found that to the extent the airport had settled a lawsuit with the other FBO, the agency would not substitute its judgment for that of the court. The agency also found no merit in other claims, such as that the airport's failure to meet a self-imposed deadline for making hangar repairs violated grant assurance #19 (operation and maintenance) or that the airport should not have allowed the other FBO to sublease certain property (although FAA noted that the airport is responsible for ensuring that subleases are themselves compatible with the grant assurances).

- Kenneth Paskar and Friends of LaGuardia Airport, Inc. v. The City of New York and the Port Authority of New York and New Jersey, dockets FAA-2011-0612 and 16-11-04 (September 27, 2012). The complainants asserted that the construction of a trash transfer facility near LaGuardia Airport would attract wildlife and pose a danger to aviation, and thus amounted to a violation of various grant assurances, including hazard removal (#20) and compatible land use (#21). After an initial decision found that the City was not a proper respondent,[7] the agency concluded that the Port Authority had not violated the grant assurances for reasons including: the transfer station was not directly within the Port Authority's jurisdiction; the Port Authority had voiced opposition to its construction; and the Port Authority was entitled to rely on FAA findings that the transfer station posed no hazard. FAA also dismissed claims that were outside the scope of Part 16, such as the adequacy of the FAA's analysis of the safety of the transfer station.

- Isaac V. Jones, Jr. v. Lawrence County Commission, Alabama, dockets FAA-2011-0753 and 16-11-07 (July 16, 2012). The complainant, on behalf of a hang gliding association, alleged that he had been denied access to Courtland Airport, in violation of grant assurances such as #22 (economic nondiscrimination) and #23 (exclusive rights). FAA issued an unusual "preliminary determination" to give the parties an opportunity to address the evidence that the agency had

gathered. FAA noted that safety was the exclusive responsibility of the agency, not the airport, and that based on a risk assessment it had concluded that hang gliding operations could be safely conducted at the airport, subject to certain procedures. Additionally, FAA noted that an agreement between the airport and the U.S. Army to provide rent-free facilities and the exclusive use of a runway were incompatible with the grant assurances.

New Part 16 Complaints

FAA also publicly docketed fourteen additional complaints pursuant to Part 16 in 2012, some of which were dismissed on procedural grounds, while others remain pending.[8]

- Epic Aviation Services LLC v. Arapahoe County Public Airport Authority, dockets FAA-2012-0059 and 16-12-01. Epic alleged that the airport's revocation of its authority was pretextual, and actually reflected gender discrimination against its principal. The case remains pending.

- Aircraft Management Services, Inc. v. Milton Aviation Partners LLC, dockets FAA-2012-0118 and 16-12-02. The complainant alleged that a new FBO had been granted a "sweetheart" deal that economically discriminated against it, the existing FBO. The case remains pending.

- Edward Kling, Jim Auman, DeKalb Aviation, LLC, Midwest Hangar Corporation, and M & E, LLC v. City of DeKalb, dockets FAA-2012-0253 and 16-12-03. The complainants alleged favorable treatment of another FBO. The complaint was dismissed due to a lack of good faith efforts at resolution before it was submitted to FAA.

- Frank Hinshaw, Skydiving School, Inc., d/b/a Skydive Hawaii and Island Skydiving, LLC v. State of Hawaii, dockets FAA-2012-0258 and 16-12-04. The complainants alleged that the airport's failure to act on their applications to establish a skydiving operation amounted to an effective – and unjustly discriminatory – denial thereof. The case remains pending.

- Edward Kling, Jim Auman, DeKalb Aviation, LLC, Midwest Hangar Corporation, and M & E, lLC v. City of DeKalb, dockets FAA-2012-0537 and 16-12-05. The complainants resubmitted their allegations, now with evidence of efforts at resolution. The complaint remains pending.

- Susan Boggs, Fouad Rachid, Nicole Rachid, and Fouad, Inc. v. City of Cleveland, dockets FAA-2012-0743 and 16-12-06. The complainants alleged that their property had been devalued due to runway construction. The complaint was dismissed due to a lack of good faith efforts at resolution before it was submitted to FAA; the agency also noted that many of the claims were outside the scope of Part 16.

- Airport Owners, Pilots and Tenants of the St. Clair Regional Airport v. City of St. Clair, Missouri, dockets FAA-2012-0744 and 16-12-07. The complainants alleged that the airport had refused to extend their leases, because it hoped to obtain FAA permission to close the airport, even though assurances were effective until the year 2026. The complaint remains pending.

- Joseph Gamez, John Ewing, Mitchell Dunn, Thomas Trotter, Todd Mattern, and Gilberto Garzo v. Yuma County Airport Authority (YCAA), Yuma County Airport Authority Board of Directors, Yuma County Board of Supervisors, and Yuma County, dockets FAA-2012-1011 and 16-12-08. The complainants alleged favorable treatment of another set of airport users. The complaint remains pending.

- Avery Park Partners, LLC d/b/a Avery Park, DSH Diplomat, LLC, d/b/a Diplomat Townhomes, Colony Creek, LLC, and Crossings Townhomes, LLC v. City of Atlanta, Georgia, dockets FAA-2012-1021 and 16-12-09. The complainants alleged that the city had failed to follow an airport noise mitigation plan by acquiring properties identified therein. The complaint remains pending.

- Scott Meter v. City of Cincinnati, dockets FAA-2012-1147 and 16-12-10. The complainant alleged that revenue from the sale of airport property had been diverted to non-airport purposes. The complaint was dismissed due to a lack of good faith efforts at resolution before it was submitted to FAA.

- McDonough Properties, LLC, M&R Holdings LLC, Tri-D LLC, and Col. Frank Barnett v. City of Wetumpka, dockets FAA-2012-1012 and 16-12-11. The complainants alleged that the airport had improperly refused to negotiate long-term leases with tenants. The complaint remains pending.

- Alphonso Agusto Waldron, Jr. v. Gary Dempsey, Jet Aviation U.S. Aircraft Services, Jet Aviation Holdings USA, Inc. and President and Chief Operating Officer General Dynamics Corporation, dockets FAA-2012-1013 and 16-12-12. The complainant alleged that his employer – which was not an airport – had discriminated against him in violation of federal and state laws. The complaint remains pending, but appears ripe for dismissal, because its claims are outside the scope of Part 16.

- Pensacola Aviation Center LLC v. Pensacola International Airport, a Division of the City of Pensacola, dockets FAA-2012-1053 and 16-12-13. Pensacola Aviation Center alleged that the airport had manipulated its minimum standards for FBOs to enable a favored tenant to sell fuel without making the investments normally required. The complaint remains pending.

- Tropical Aviation Ground Services, Inc. and Air Sunshine, Inc. v. Broward County, dockets FAA-2012-1151 and 16-12-15. The complainants alleged that the airport had evicted them based on violations of an otherwise unenforced ordinance and refused to entertain requests for a new lease. The complaint remains pending.

Part 16-Related Court Decisions

In 2012, two federal courts issued decisions on appeals of FAA decisions that had denied grant assurance-based claims:

- BMI Salvage Corp. v. FAA, 2012 WL 2924025 (11th Cir. July 19, 2012). FAA previously had concluded that the appellant was not within the scope of the grant assurances because aircraft salvage and demolition was not an "aeronautical activity," and on that basis rejected a claim that other tenants at Opa-Locka Airport had received more favorable lease terms. The appeals court deferred to the FAA's interpretation. Additionally, to the extent that a second appellant – an FBO – was within the scope of the grant assurances, the appeals court agreed that it had not been discriminated against because the tenants alleged to have received more favorable lease terms were not similarly situated, and thus no comparison between the lease terms was warranted.

- Paskar v. FAA, 478 Fed.Appx. 707 (2d Cir. June 12, 2012). FAA previously had dismissed a complaint brought against the City of New York on the basis that the airport was operated by the Port Authority of New York and New Jersey, and thus the city was not a proper respondent. The court agreed with FAA that even though the city owned the land under LaGuardia Airport, it was not a sponsor under the terms of the underlying grant agreements, which provided financial assistance only to the Port Authority.

Other Guidance

Early in the year, Congress adopted the FAA Modernization and Reform Act of 2012.[9] Among other provisions, the statute modified five of the grant assurances, which in turn caused FAA to issue new guidance regarding those requirements:[10]

- Through-the-Fence Arrangements. FAA previously questioned whether an airport could enter into a through-the-fence arrangement with a neighboring residential airpark without violating the grant assurances. Congress required FAA to allow such arrangements subject to certain conditions, and FAA made corresponding changes to grant assurance #5.[11]

- Use of Airport Revenues. Congress provided that, under limited circumstances, revenue from the sale of an airport and revenue derived from mineral extraction at an airport could be used for non-airport purposes, and FAA made corresponding changes to grant assurance #25.[12]

- Veterans' Preference. Congress provided that the existing preference for veterans in contracting should be expanded to include Persian Gulf and Afghanistan-Iraq veterans, as well as small businesses owned and controlled by disabled veterans, and FAA made corresponding changes to grant assurance #15.

- Costs of Relocating or Replacing Sponsor-Owned Property. Congress provided that under certain circumstances, an airport does not bear all costs of relocating or replacing property to meet safety standards (i.e., if the relocation or replacement was necessitated by a change in FAA standards), and FAA made corresponding changes to grant assurance #29.

- Disposal of Land. Congress changed certain requirements for the disposal or leasing of land required as a noise buffer, such as to specify the purposes to which such revenue should be devoted, and FAA made corresponding changes to grant assurance #31.

FAA also issued other guidance and notice regarding the grant assurances and Part 16:

- FAA proposed to expand the "operation and maintenance" obligations of grant assurance #19 so as to require airports that do not have a Part 139 certificate, but are federally-obligated, to conduct wildlife hazard assessments. Airports with a Part 139 certificate already are required to address wildlife risks, but some commercial operations (in addition to general aviation) are permitted at uncertificated airports. The proposal is intended to enhance safety, and remains pending.[13]

- FAA proposed to clarify its policies for parachute landing activities at federally-obligated airports – by adopting specific standards and risk assessment procedures – and by modifying grant assurance #22 to incorporate the new standards and procedures. The proposal remains pending.[14]

- FAA proposed procedural revisions to Part 16: notably, it would provide for a new "summary judgment" procedure that would allow requests to dismiss a complaint to be submitted before an answer is required, as well as allow pleadings to be filed electronically. The proposal remains pending.[15]

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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/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; whether Part 16 is the appropriate legal mechanism 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.

[1] 49 U.S.C. § 47101, et seq. See also Airport Improvement Program Handbook, FAA Order 5100.38C (June 28, 2005) (http://www.faa.gov/airports/resources/publications/orders/media/aip_5100_38c.pdf); 14 C.F.R. Part 152.

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

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

[4] 49 U.S.C. § 47107. See also Airports Compliance Handbook, FAA Order 5190.6B (http://www.faa.gov/documentLibrary/media/Order/5190_6b.pdf).

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

[6] FAA also belatedly docketed the remand decision, dated December 20, 2011. Ricks also attempted, unsuccessfully, to assert his own claims against the city and airport pursuant to the grant assurances. See Ricks v. City of Winoa, 858 F.Supp.2d 682 (N.D.Miss. 2012).

[7] See the discussion, supra, of Paskar v. FAA.

[8] FAA also belatedly docketed a complaint that had been filed in 2010 – Mercury Air Center-Corpus Christi, Inc. d/b/a Atlantic Aviation v. City of Corpus Christi, dockets FAA-2012-0072 and 16-10-05, which alleged that Mercury Air Center had been discriminated against because less restrictive operational requirements were imposed upon a city-owned FBO. The complaint remains pending.

[9] Public Law 112-95 (February 14, 2012).

[10] 77 Fed. Reg. 22376 (April 13, 2012).

[11] See also 77 Fed. Reg. 44515 (July 30, 2012).

[12] See also Compliance Guidance Letter 2012-01: Use of Mineral Revenue at Certain Airports (May 16, 2012).

[13] 77 Fed. Reg. 73511 (December 10, 2012).

[14] 77 Fed. Reg. 39446 (July 3, 2012).

[15] 77 Fed. Reg. 13027 (March 5, 2012).

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