FAA Enforcement of Airport Improvement Program Grant Assurances, 2013 (January 2014)

Aviation is a highly federalized industry. Federal rules and statutes 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 nearly 3400 airports included in the National Plan of Integrated Airport Systems ("NPIAS") have not applied for and received some form of AIP funding.[2] In FY2012 (the most recent year for which complete data is available) alone, more than 1900 airports received AIP grants, totaling almost $3.35 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 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:

The firm's practice encompasses virtually every aspect of aviation law, including advice regarding federal grants programs for airports, and the applicable requirements.

For further information regarding the matters discussed in this article, please contact:

Jol A. Silversmith
(202) 973-7918
jasilversmith@zsrlaw.com

Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W., Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.zsrlaw.com

- 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 2013, FAA released administrative decisions in five grant assurance-based proceedings, one resolved in favor of the complainant and four resolved in favor of the respondent:

- 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. In a Director's Determination dated October 10, 2013, FAA held that the City of Wetumpka was not in violation of the grant assurances. The complainants – airport tenants – had objected to the airport's refusal to grant long-term leases. But FAA concluded that the limited term did not violate the assurances; for example, to the extent that #5 (*preserving rights and powers*) required the airport to be as self-sustaining as possible, the short-term leases were held consistent with that requirement because the airport was planning expansions and/or renovations that would be hampered by longer lease terms. FAA also held that the short-term leases did not violate other grant assurances; e.g., the complainants cited #22 (*economic nondiscrimination*), but failed to show that any similarly-situated entities at the airport had been granted a long-term lease during the relevant time period.

- Northern Air, Inc. and Kem Aviation, LLC as owner of Sparta Aviation, Inc. d/b/a Grand Rapids Air Center and Rapid Air v. Kent County Department of Aeronautics, dockets FAA-2011-1302 and 16-11-10. In a Director's Determination dated March 28, 2013, FAA held that Kent County was not in violation of the grant assurances. The complainants, both FBOs, had alleged that a third party was authorized to develop an FBO on property that the airport previously had refused to lease to the existing FBOs, and that by so doing the airport had violated #22 (*economic*

nondiscrimination) and other grant assurances. FAA responded that there was no violation of #22 because the process had been transparent, and to the extent the applicant had been granted a variance from the airport's minimum standards, there had been no discrimination because the complainants had not themselves requested a similar variance. FAA also disposed of allegations based on other assurances, such as #29 (*airport layout plan*), because the use of the property was consistent with the existing ALP, and #25 (*airport revenue*), because it was permissible for airport revenue to be used to develop aeronautical infrastructure, even if no airport users were currently making use of those facilities.

- Truman Arnold Companies d/b/a TAC Air v. Chattanooga Metropolitan Airport Authority, dockets FAA-2011-1147 and 16-11-08. In a Director's Determination dated October 4, 2013, FAA held that the Chattanooga Metropolitan Airport Authority was not in violation of the grant assurances. TAC Air had argued that the authority had granted preferential terms to an FBO owned by the authority (but operated by a third party). FAA held that the authority was not required by #22 (*economic nondiscrimination*) to manage the budget or pricing structure of its FBO in a manner paralleling that of private operators, as well as that because the two FBOs were not similarly situated, there was no evidence that the airport-owned FBO had been granted preferential terms. FAA also noted that the grant assurances did not prohibit the use of airport funds to construct an FBO – although it noted that in this case the funding for the airport-owned FBO had come from non-aeronautical sources – and further cautioned that because the FBO was managed by a third party, it was not subject to the "proprietary exclusive right" exemption that would allow an airport to make itself the exclusive FBO at the airport.[6]

- Jeff Bodin and Garlic City Skydiving v. County of Santa Clara, California, dockets FAA-2011-0699 and 16-11-06. In a Final Agency Decision dated August 12, 2013, FAA affirmed a prior Director's Determination that Santa Clara was in violation of the grant assurances. Garlic City Skydiving had been denied approval for a drop zone/landing area at South County Airport, even though the local FAA office repeatedly had determined that skydiving operations could be conducted safely. FAA confirmed that skydiving is an aeronautical activity within the scope of the grant assurance #22 (*economic nondiscrimination*); that there was no safety justification for prohibiting skydiving at South County Airport; and that FAA – not the airport – was empowered to determine whether an aeronautical activity can be safely performed. But FAA also noted that Santa Clara had not violated grant assurance #5 (*preserving rights and powers*) simply because it denied Garlic City Skydiving's proposals without taking into account FAA's safety expertise and authority. The assurance requires that an airport sponsor retain authority over an airport and use transparent processes, but it is not violated merely because an airport sponsor does not follow FAA advice.

- Isaac W. Jones, Jr. v. Lawrence County Commission, Alabama, dockets FAA-2011-0753 and 16-11-07. In a Director's Determination dated September 19, 2013, FAA held that Lawrence County was not in violation of the grant assurances. The complainant, on behalf of a hang gliding association, had alleged that he had been denied access to Courtland Airport, in violation of grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). FAA previously had found that ultralight activities could be safely conducted at the airport, but the parties could not agree on a suitable location. FAA concluded that the respondent had made reasonable efforts to accommodate hang gliders – such as proposing the use of a taxiway – and that the complainant was at fault for insisting that it be permitted to utilize active runways, contrary to FAA advice. FAA also noted that the airport had resolved an issue previously identified, namely that a lease with the U.S. Army was inconsistent with assurance #5 (*preserving rights and powers*).

New Part 16 Complaints

FAA also publicly docketed six additional complaints pursuant to Part 16 in 2013.[7] Two of them were dismissed on procedural grounds, while four remain pending.

- SPA Rental, LLC, d/b/a MSI Aviation v. Somerset-Pulaski County Airport Board, dockets FAA-2013-0246 and 16-13-01. SPA alleged that another tenant at Lake Cumberland Regional Airport in Kentucky had been granted more favorable lease terms, in violation of the economic nondiscrimination grant assurance. FAA dismissed the complaint based on both a lack of service and a lack of good faith efforts to resolve the dispute prior to filing.

- SPA Rental, LLC d/b/a MSI Aviation v. Somerset-Pulaski County Airport Board, dockets FAA-2013-0319 and 16-13-02. SPA re-filed its complaint, including information about the efforts it had made to resolve the dispute prior to filing. The case remains pending.

- Hiroaki Nishio v. Saipan Airport, dockets FAA-2013-0408 and 16-13-03. Nishio alleged that the airport had required that he maintain economically infeasible liability insurance ($10 million) for general aviation flight training activities. The case remains pending.

- Scott Tidd v. Angola Indiana Airport, dockets FAA-2013-0378 and 16-13-04. Tidd alleged that various airport officials without justification had sought to evict him from his hangar. FAA dismissed the complaint based on both a lack of service and a lack of good faith efforts to resolve the dispute prior to filing. FAA also noted other procedural defects, including that individuals and not the airport sponsor had been named as respondents.

- Chandler Air Service v. Chandler, Arizona, dockets FAA-2013-0733 and 16-13-05. Chandler Air Service alleged that the City had violated the grant assurances by limiting the length of the runway at Chandler Municipal Airport, as well as by engaging in revenue diversion and by subsidizing city-run fueling services. The case remains pending.

- R.L.S. Rental Company, Inc. d/b/a Mizzou Aviation v. Joplin Regional Airport, City of Joplin, Missouri, dockets FAA-2013-0845 and 16-13-06. Mizzou alleged that another company had been allowed to operate as an FBO at the airport without meeting the same minimum standards that applied to Mizzou – in particular, by allowing it to sell fuel without offering any other services. The case remains pending.

Part 16-Related Court Decisions

In 2013, a federal court issued a decision in a case that was not a direct appeal of an FAA Part 16 decision but did incidentally involve the grant assurances. In Washburn v. Lawrence County Board of Commissioners, 720 F.3d 347 (6th Cir. May 29, 2013), the appellant had been injured by a hangar door blown off during a storm. In a decision affirming that neither the airport owner nor the FBO that leased the hangar were liable, the court noted that the appellant in part relied on the grant assurances, which she alleged obligated the county "to maintain sufficient control" over the hangar. The court concluded that the hangar had not been shown to be within the scope of the airport's obligations, based on the language of the assurance and other FAA guidance, such as to make the county liable for the plaintiff's injuries.

Other Guidance

Additionally, in 2013 FAA issued two notices regarding the requirements imposed by the grant assurances:

- FAA extended the comment period for a proposed clarification to its wildlife management requirements pursuant to the "operation and maintenance" obligations of assurance #19. FAA had proposed to require airports that do not have a Part 139 certificate, but are federally-obligated, to conduct wildlife hazard assessments. (Airports that have a Part 139 certificate already are required to address wildlife risks, but some commercial operations are permitted at uncertificated airports.) The proposal remains pending.[8]

- FAA issued a revised policy statement for through-the-fence agreements between airports and residential airparks. Congress previously required FAA to allow such arrangements subject to conditions. The policy conditions such agreements on airports: (1) retaining control of access points and boundaries; (2) ensuring that users comply with its rules and standards; (3) collecting fees comparable to those for on-airport tenants; (4) ensuring that operations at the airport are not affected by neighboring residences or hangars; and (5) generally ensuring compatible land uses around the airport.[9]

* * * *

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] See 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). In 2013, FAA solicited comments on revisions to the handbook, which remain pending. See 78 Fed. Reg. 7476 (February 1, 2013).

[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. See 49 U.S.C. § 47151, et seq.

[3] See "Assurances: Airport Sponsors," http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances_2012.pdf.

[4] See 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. In 2013, the FAA amended Part 16, with the primary goal of simplifying the filing procedures. See Rules of Federal Practice for Federally-Assisted Airport Enforcement Proceedings (Retrospective Regulatory Review), 78 Fed. Reg. 56135 (September 12, 2013).

[6] At the same time, the FAA did caution that the airport should not provide employees to assist FBOs during busy period, which would be a misuse of airport revenue, and also stated that the right of first refusal in Tac Air's lease was itself a violation of the grant assurance prohibition on exclusive rights.

[7] Additionally, a complaint filed in 2012 – 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 – was voluntarily dismissed in 2013, based on a settlement among the parties. A further complaint filed in 2012 – Scott Meyer v. City of Cincinnati, Ohio, dockets FAA-2013-0235 and 16-12-14 – was not docketed until 2013; the case, which alleges the diversion of revenue from the sale of airport property, remains pending.

[8] National Plan of Integrated Airport Systems: Clarification of Wildlife Hazard Management Requirements for Non-Certificated Federally Obligated Airports, 78 Fed Reg. 5861 (January 28, 2013).

[9] Airport Improvement Program (AIP): Policy Regarding Access to Airports From Residential Property, 78 Fed. Reg. 42419 (July 16, 2013).

Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.zsrlaw.com