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FAA Enforcement of Airport Improvement Program Grant Assurances, 2014 (March 2015)

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. An AIP grant 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 more than 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 FY2014, approximately 1,800 airports received AIP grants, totaling almost $3.3 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 grant-based 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 capable of safely accommodating. 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 business model).

Other noteworthy grant assurances require airports to retain and not delegate to others the powers necessary to fulfill their responsibilities under federal law (#5); maintain a self-sustaining fee and rental structure (#24); and dictate that airport-derived 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, more than 270 complaints have been filed, approximately 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, in practice it has not done so. Moreover, in many decided 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 2014, FAA released administrative decisions in three grant assurance-based proceedings, two resolved in favor of the respondent and one in favor of the complainant:[6]

- Scott Meyer v. City of Cincinnati, Ohio, dockets no. 16-12-14 and no. FAA-2013-0235, Director's Determination (September 12, 2014). The complaint alleged that revenue diversion, in violation of grant assurance #25, based upon the city's closure and aborted sale of Blue Ash Airport. The FAA found that even though Cincinnati had received $6 million from the city of Blue Ash, Ohio in connection with the planned sale of the airport to Blue Ash, the transaction subsequently was rescinded and the money returned to Blue Ash. The FAA concluded that there had been no "leakage" of the funds while in Cincinnati's possession and thus no revenue diversion. Among other conclusions, the FAA noted that it did not dictate that specific accounting methods be used by airports; that there is no requirement that airport funds be kept in interest-bearing accounts; and there is no prohibition on the commingling of funds. The FAA also noted that assurance #25 is applicable so long as an airport is operated as an airport – but once an airport has been closed (assuming that there is no FAA prohibition of its closure), assurance #25 is no longer effective.

- De Vries, et al. v. City of St. Clair, Missouri, dockets no. 16-12-07, no. FAA-2012-0744, and no. FAA-2014-0539, Director's Determination (May 20, 2014). The complaint alleged that the airport had refused to negotiate long-term leases to tenants, even though its grant-based obligations required it to continue operating as an airport through 2026. The FAA concluded that the city was not currently out of compliance with any of the assurances cited by the complainants – but at the same time, the FAA cautioned that St. Clair's interest in closing the airport at an earlier date (for

which it had a pending petition at the FAA) did not excuse it from negotiating with any tenant that requested a long-term lease. Notably, the FAA explained that assurance #5 – which prohibits the delegation of powers necessary to fulfill federal commitments – was not violated by the city's agenda of seeking permission to close the airport; that for the purposes of assurances #22 and #23, a medical helicopter operator was not similarly situated to the complainants and thus the terms of its lease could not be the basis for a discrimination/exclusive rights claim; and that assurance #24, to the extent that it requires airports to be self-sustaining, does not require them to generate the greatest possible income and allows airports to exercise judgment in making business decisions.

- Frank Hinshaw, Skydiving School, Inc., d/b/a Skydive Hawaii and Island Skydiving, L.L.C. v. State of Hawaii, dockets no. 16-12-04, no. FAA-2012-0258, and no. FAA-2014-0217, Director's Preliminary Determination (August 18, 2014). The complaint alleged that the airport had refused to allow skydiving, despite an FAA finding that skydiving activities could be safely conducted at the airport, and that the airport's failure to act on the pending application amounted to a constructive denial of access to the airport. The FAA generally agreed with the complainants, ruling that the airport was out of compliance with assurances #22 and #23; the FAA has the final word on matters of safety, and seven years had elapsed since the original application was filed. However, the FAA concluded that the airport's failure to act, standing alone, did not comprise a violation of assurance #5, which prohibits the delegation of powers necessary to fulfill federal commitments. Moreover, the FAA issued a "preliminary" determination out of an acknowledgement that that the airport might have been confused by a draft Advisory Circular, which proposed stricter standards for skydiving. But the FAA emphasized that the circular was a non-binding draft, and that it would proceed to issue a more formal finding if the airport did not take prompt corrective action.

New Part 16 Complaints

FAA also publicly docketed thirteen new complaints pursuant to Part 16 in 2014.[7] Six of them were later dismissed on procedural grounds, while seven remain pending.

- United Airlines, Inc. v. Port Authority of New York and New Jersey, dockets no. 16-14-13 and no. FAA-2015-0026. The complaint alleged that the Port Authority had imposed excessive fees on air carriers at Newark Liberty International Airport, which are siphoned off to its non-aeronautical operations. The complaint remains pending.

- The Flight Shop, Inc. d/b/a Professional Air, and Aero Facilities, LLC v. City of Bend, Oregon Municipal Airport, dockets no. 16-14-12 and no. FAA-2015-0241. The complaint alleged that the airport had interfered and refused to honor the terms of its development agreement with the complainant, as part of an effort to void its terms. The complaint remains pending.

- Hairoun Aviation Services, Inc. d/b/a Executive Flight Services v. Virgin Island Port Authority, dockets no. 16-14-11 and no. FAA-2015-0240. The complaint alleged that the FBO's applications for a new lease were denied without explanation and that it was subject to restrictions not applicable to the two other FBOs at the St. Thomas airport. The complaint was dismissed on the basis that good faith pre-complaint efforts to resolve the dispute had not been documented, as well as a failure to include with the complaint all of the documents relied upon by the complaint.

- Ultimate Concrete, LLC v. City of El Paso, docket no 16-14-10. The complaint alleged that the bid solicitation process for a project at the airport did not comply with federal competitive bidding requirements. The complaint was dismissed on the basis that it alleged a violation of 49 C.F.R. Part 18 – the general DOT rules for grants to state and local governments – and should be reviewed by a different FAA office.

- Star Marianas Air, Inc. v. A.B. Won Pat International Airport Authority, Guam, dockets no. 16-14-09 and no. FAA-2015-0027. The complaint alleged that the airport had denied the carrier access

to the terminal, even while allowing another carrier to use terminal space for non-aeronautical offices. The complaint was dismissed on the basis that an informal investigation under 14 C.F.R. Part13 was in progress and presumptively provided a reasonable prospect for resolution.

- Better Airports, LLC v. Wahoo Airport Authority, dockets no. 16-14-08 and no. FAA-2015-0031. The complaint alleged that the airport had unjustly discriminated against crop spraying operations by prohibiting itinerant operations, adopted unreasonable minimum standards and, and engaged in other violations of the grant assurances. The complaint remains pending.

- Sound Aviation Services, Inc. v. Town of East Hampton and East Hampton Airport, dockets no. 16-14-07 and no. FAA-2015-0030. The complaint alleged that the landing fees and fuel flowage fees assessed by the airport are inconsistent with assurances #24 and #25, for reasons including that there was inadequate notification to tenants and inadequate methodological justification, and also violate #25 through poor documentation. The complaint remains pending.

- Mansfield Heliflight, Inc. v. City of Burlington, Vermont, dockets no. 16-14-06 and no. FAA-2015-0033. The complaint alleged that the City had denied access to property at the airport and manipulated its minimum standards, with the intent of effectuating an exclusive right to the existing FBO, in violation of grant assurances #22 and #23. The complaint remains pending.

- Skydive Myrtle Beach, Inc. v Horry County Department of Airports and Robinson Aviation, Inc. d/b/a CRE Aircraft Control Tower, dockets no. 16-04-05 and no. FAA-2014-0538. The complaint alleged that the airport had imposed unique conditions for skydiving that do not apply to other airports users and are unnecessary for safety. The complaint remains pending.

- National Business Aviation Association, Krueger Aviation, Inc., Harrison Ford, Justice Aviation, Kim Davidson Aviation, Inc., Aero Film, Youri Bujko, James Ross, Paramount Citrus LLC and Aircraft Owners and Pilots Association v. City of Santa Monica, California, dockets no. 16-14-04 and no. FAA-2014-0592. The complaint alleged that the city's grant obligations endure until 2023, contrary to the 2014 expiration date asserted by the city, and that the city has taken actions premised on the 2014 expiration date that already have harmed the complainants. The complaint remains pending.

- Tenants of the St. Clair Regional Airport v. City of St. Clair, Missouri, dockets no. 16-14-03 and no. FAA-2014-0539. The complaint – filed shortly after the prior complaint regarding St. Clair Regional Airport was decided – alleged that airport revenues had been misused because the city has not been able to accurately account for the costs of insurance charged to the airport. The complaint was voluntarily dismissed.[8]

- Star Marianas Air, Inc. v. Commonwealth Port Authority of the Commonwealth of the Northern Mariana Islands, dockets no. 16-14-02 and no. FAA-2014-0265. The complaint alleged that the airport had selectively failed to collect Passenger Facility Charges and other airport fees from favored operators. The complaint was dismissed on the basis that good faith pre-complaint efforts to resolve the dispute had not been documented.

- Skydive Myrtle Beach, Inc. v. Horry County Department of Airports, dockets no. 16-14-01 and no. FAA-2014-0264. The complaint alleged that an airport had denied access to skydivers. The complaint was dismissed on the basis that good faith pre-complaint efforts to resolve the dispute had not been documented.

Part 16-Related Court Decisions

In 2014, a federal district court issued an unpublished decision in Gary Jet Center, Inc. v. Gary/Chicago International Airport Authority, 2014 WL 1329412 (N.D.Indiana no. 13-CV-00453, April 2, 2014), which turned in part on the airport's grant-based obligations. The plaintiff, a FBO, complained that a competing FBO had been granted an exemption which allowed it to sell fuel without complying with other generally-

applicable requirements for FBOs at the airport. The court allowed the complaint to proceed; in so doing, it noted that the FBO did not have a private right of action to enforce FAA granted-based assurances, but concluded that its claim was separately based on contractual terms between the FBO and the airport. Moreover, the court recognized that an FBO could file a Part 16 complaint, but declined to defer primary jurisdiction to the FAA, noting that Part 16 was intended only to determine an airport's current compliance and thus would not necessarily resolve the allegations made by the plaintiff.

Other Part 16-Related Developments

- In July 2014, the FAA solicited comments on proposed clarifications to its assurance-based policy on the circumstances under which hangars at grant-obligated airports could be used for non-aeronautical purposes, and the obligations of airports to scrutinize tenant conduct.[9] Hundreds of comments were filed in response to the notice.[10] The FAA has yet to issue a final policy.

- In September 2014, the FAA released a revised edition of its Airport Improvement Program Handbook, Order 5100.38D.[11] The handbook primarily concerns the procedures for applying for and implementing grants; although there is some limited discussion of the assurances, the FAA's primary source of guidance concerning the assurance is instead Order 5190.6B.[12]

- In September 2014, Dallas, Texas informed Delta Air Lines that there would no longer be space available for it to operate at Love Field airport. A letter from Delta to Dallas subsequently was made public, which among other issues argued that the city's actions were inconsistent with the grant assurances.[13] Dallas subsequently backed down, and allowed Delta to continue operations at Love Field; a subsequent letter from the FAA advised that Dallas, having accommodated Delta at Love Field, was obligated to continue doing so by the grant assurances.[14]

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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.

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1 See 49 U.S.C. § 47101, et seq.

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-aip.pdf).

4 See 49 U.S.C. § 47107. See also Airports Compliance Handbook, FAA Order 5190.6B (http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b.pdf.

5 14 C.F.R. Part 16.

6 Additionally, an FAA Part 16 decision that had been appealed within the agency – Truman Arnold Companies d/b/a Tac Air v. Chattanooga Metropolitan Airport Authority, dockets no. 16-11-08 and no. FAA-2011-1147 –was reported to have been settled, as was a complaint that had not yet been decided, Epic Aviation Services LLC v. Arapahoe County Public Airport Authority, dockets no. 16-12-01 and no. FAA-2012-0059.

7 Additionally, a complaint filed in 2013 – Greg Black and Mountain Wings, Inc. v. Town of Wawarsing, dockets no. 16-13-07 and FAA-2014-0218 – was not publicly docketed until 2014. The complaint alleged that gliders and ultralight aircraft had been denied access to an airport; but it was dismissed on the basis that good faith pre-complaint

efforts to resolve the dispute had not been documented, as well as that the complaint had not been properly served. Moreover, a complaint – alleging that an airport had denied access to skydivers – which had been pending since 2011 was voluntarily dismissed after the complainant informed the FAA that the matter had been settled. See Urban Moore and Eugene Skydivers, L.L.C. v. City of Creswell, Oregon, dockets no. 16-11-13 and FAA-2012-0058.

[8] The reason for the dismissal was that at the end of 2014, President Obama signed a bill which eliminated the airport's grant-based obligations. See Pub. L. 113-285.

[9] See "Policy on the Non-aeronautical Use of Airport Hangars," 79 Fed. Reg. 42483 (July 22, 2014).

[10] See docket FAA-2014-0463 (http://www.regulations.gov/#!docketDetail;D=FAA-2014-0463).

[11] See http://www.faa.gov/airports/aip/aip_handbook/media/AIP-Handbook-Order-5100-38D.pdf.

[12] See supra footnote 4.

[13] See http://www.scribd.com/doc/241824574/Letter-From-Delta-to-Dallas-City-Hall.

[14] In 2015, Southwest challenged the FAA's position in court, and attached a copy of the letter to its complaint. See Southwest Airlines Co. v. DOT, D.C.Cir. docket no. 15-1036..

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