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FAA Enforcement of Airport Improvement Program Grant Assurances, 2015 (February 2016)

Aviation is a highly federalized industry. Federal rules and statutes typically take priority over – or entirely preempt – state and municipal 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 FY2015, nearly 1,800 airports received AIP grants, totaling more than $3.2 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 most airports accept new AIP grants on a rolling 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 deemed "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, the FAA established a special set of procedures to review complaints that allege that airports have not complied with grant assurances; these procedures also permit the FAA to 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 the FAA. If an airport is found to have violated a grant assurance, the FAA can prohibit the airport from receiving any further AIP funds until it resolves the compliance issue. However, the FAA cannot resolve private claims for damages – and although the 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 the 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 2015, the FAA released administrative decisions in ten grant assurance-based proceedings, eight of which were resolved in favor of the respondent airport sponsors and two of which were resolved in favor of the complainants:

- Jet Center Partners v. County of Montrose, Colorado, dockets no. 16-15-11 and no. FAA-2015-3963, Order of Director (November 19, 2015). In this proceeding, the complainant asserted that a new FBO had been offered more favorable terms, in violation of assurances #5 (preserving rights and powers), #22 (economic nondiscrimination), #23 (exclusive rights), and #24 (fee and rental structure). The FAA dismissed the complaint on the basis that it was not ripe, explaining that the new FBO had not yet begun operations and thus the complainant had not been harmed by the alleged violations, as well as that the new FBO agreement at issue had been terminated, which restored the status quo at the airport and returned it to a state of compliance.

- Skydive Myrtle Beach, Inc. v. Horry County Department of Airports and Robinson Aviation, Inc. d/b/a CRE Aircraft Control Tower, dockets no. 16-14-05 and no. FAA-2014-0538, Director's Determination (October 7, 2015). In this proceeding, the complainant alleged that the airport's efforts to restrict its access to the airport violated assurance #22 (economic nondiscrimination). Based upon a review of the claimed discrimination and the safety of skydiving at the airport, the FAA concluded that the airport was not in violation of the assurances because its actions were not unreasonable, especially given the risks affiliated with skydiving that had been identified – and moreover because of those risks, immediate action – potentially including the outright

prohibition of skydiving – was required to ensure the airport's compliance with #19 (operation and maintenance).

- National Business Aircraft 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, Director's Determination (December 4, 2015). In this proceeding, the complainants alleged that the airport sponsor had generally violated its obligations by asserting that its grant-based commitments expired in 2014 instead of 2023, coupled with its stated intent to restrict operations at or close the airport entirely once its obligations expired. The FAA held that because the sponsors had accepted additional grant funds in 2003, the 20-year clock for its obligations was reset and that the 2023 date was correct.

- SPA Rental, LLC d/b/a MSI Aviation v. Somerset - Pulaski County Airport Board, dockets no. 16-13-02 and no. FAA-2013-0319, Director's Determination (September 1, 2015). In this proceeding the complainant objected to the conditions for Limited Fixed Base Operator (LFBO) leases at the airport, asserting violations of assurances #22 (economic nondiscrimination), #23 (exclusive rights), and #24 (fee and rental structure). The FAA concluded that the airport was in compliance with its obligations, explaining that the airport was entitled to include certain maintenance requirements in its minimum standards for LFBOs, even if those requirements were incompatible with the complainant's existing business model, and also finding no violations connected with a financial incentive program for tenants designed to increase business at the airport.

- Tropical Aviation Ground Services, Inc. and Air Sunshine, Inc. v. Broward County, dockets no. 16-12-15 and no. FAA-2012-1151, Director's Determination (April 27, 2015). In this proceeding, the complainant alleged that it had been denied a long-term lease and been evicted from the airport in violation of various grant assurances, including #22 (economic nondiscrimination) and #23 (exclusive rights). To the extent that the core allegation of the complaint was that other tenants had been allowed to store derelict aircraft but it had not, and also had been allowed long-term leases, the FAA found that there was no evidence in the complaint of such practices and thus no basis for a finding of discrimination or exclusive rights. The FAA also found no basis for any of the other allegations made by the complainant (such as civil rights-based claims) – some of which sought relief that the agency noted were outside the scope of Part 16.

- McDonough Properties, LLC, M&R Holdings LLC, Tri-D LLC, and Col. Frank Barnett v. City of Wetumpka, dockets no. 16-12-11 and no. FAA-2012-1012, Final Agency Decision (January 15, 2015). In this proceeding, the complainants – airport tenants – had objected to the airport's refusal to grant them long-term leases. But the FAA concluded that the airport had not violated the assurances; for example, to the extent that they cited #22 (economic nondiscrimination), short-term leases were found to be allowable because the airport was planning certain renovations that would be hampered by longer lease terms and the complainants were not similarly-situated to tenants that had been granted longer leases. Likewise, assurance #24 (fee and rental structure) was found not to be implicated by the airport's financial decisions, because it must be read with a long-term perspective and does not require the maximization of short-term revenues.

- Virginia One Development, Inc., 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 no. 16-12-09 and no. FAA-2012-1021, Director's Determination (January 26, 2015). In this proceeding, the complainants alleged that the city had violated various grant assurances, including #5 (preserving rights and powers) and #21 (compatible land use), by identifying their property as being affected by airport noise in the city's mitigation plan but failing to acquire their properties. The FAA concluded that the city was not in violation of its obligations, because it was not required to take a specific course of action based on its mitigation plan. Generally, an airport sponsor has discretion to decide whether to acquire or to provide sound insulation to eligible properties.

- Aircraft Management Services, Inc. v. Santa Rosa County, Florida, dockets no. 16-12-02 and no. FAA-2012-0118, Director's Determination (March 27, 2015). In this proceeding, the complainant – an existing FBO at Peter Prince Field – alleged that the airport had violated assurance #22 (economic nondiscrimination) by offering more favorable terms to a new FBO. The FAA concluded that the airport had violated its obligations. As an initial matter, the FAA concluded that the FBOs were similarly situated based on the aeronautical services that they offered to the public, even though there were acknowledged differences between their lease terms. Further, the FAA found that some of those differing terms were inequitable – notably, that only the incumbent but not the existing FBO was charged a flowage fee for fuel sales. However, the FAA also dismissed other allegations as being outside the scope of Part 16, such as claims that the county had improper motives for issuing an RFP to allow a second FBO at the airport.

- 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 no. 16-11-04 and no. FAA-2011-0612, Final Agency Decision (June 17, 2015). In this proceeding, 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 #19 (operation and maintenance), #20 (hazard removal) and #21 (compatible land use). The FAA concluded that the Port Authority had not violated the grant assurances for reasons including that: the transfer station was not within the airport's runway protection zone – and even if it were, its construction would not amount to a violation because it was located off-airport; the transfer station had not been shown in the record to pose a risk as a wildlife attractant; and the Port Authority reasonably had relied on FAA findings that the transfer station would not pose a hazard.

- Flightline Ground, Inc. d/b/a Flightline First v. Louisiana Dept. of Transportation and Development and Non-Flood Protection Asset Management Authority, dockets no. 16-11-01 and no. FAA-2011-0529, Final Agency Decision (January 15, 2015). In this proceeding, 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 competitive disadvantage, in violation of the grant assurances. The FAA found that to the extent the airport had reached a court-approved settlement with the other FBO, the agency generally would not substitute its judgment for that of the court as to whether the terms were permissible, as well as that the terms of the settlement were subordinate to the grant assurances if any violations were identified. The FAA also found no actual breaches of the assurances; for example, that various delays in repairing the airport after Hurricane Katrina did not violate #19 (operation and maintenance) and that the rent credits and other concessions in the other FBO's settlement agreement were not excessive.

New Part 16 Complaints

The FAA also publicly docketed eleven additional complaints pursuant to Part 16 in 2015. Three of them were later dismissed on procedural grounds, while eight remain pending.

- Safer Medical of Montana and George Ackerson v. City of Fort Benton, Montana, Chouteau County, Montana and Chouteau County Joint Airport Board, dockets no. 16-15-12 and no. FAA-2015-7682. The complainants objected that the airport had taken actions against them and their leases based on grant assurances, including to ensure compatible land use and prohibit non-aeronautical uses, which they asserted were unjustified.

- Federal Aviation Administration v. City of Dallas, Texas, dockets no. 16-15-10 and no. FAA-2015-3561. In a case initiated by the FAA, a notice of investigation suggested that the City of Dallas might have violated its federal obligations by failing to arrange for continuing accommodations for Delta Air Lines at Love Field, after the gate it used at DAL was subleased to another air carrier.[6]

- Philip J. Higgins v. Burlington, Massachusetts Airports, dockets no. 16-15-09 and no. FAA-2015-3584. The complainant asserted that he was being harassed by aircraft serving airports in his

vicinity. The FAA dismissed the complaint because its allegations were not within the scope of Part 16, and also was procedurally deficient in multiple respects.

- National Business Aviation Association, Inc., Shoreline Aviation, Inc. (Connecticut); PlaneSense, Inc.; Fly the Whale, Inc.; Eastern Air Express, Inc.; FL Aviation Corporation; Tuckaire, Inc.; Autonomic Controls, Inc.; Shoreline Aviation, Inc. (Massachusetts); Wes Rac Contracting Corporation; Eagle Air, Inc.; and JETAS, Inc. v. Town of East Hampton, New York, dockets no. 16-15-08 and no. FAA-2015-2467. The complainants asserted that a curfew and other operational restrictions at East Hampton Airport violated the prohibition on exclusive rights in grant assurance #23, as well as that the town had engaged in revenue diversion in violation of grant assurance #25.

- William Alfred Hicks, Jr., a/k/a Billy Hicks v. City of Mount Airy, North Carolina; and the County of Surry, North Carolina; through the Mount Airy/Surry County Airport , dockets no. 16-15-07 and no. FAA-2015-2465. The complainant asserted that various violations of the grant assurances (including #4, #5, #19, #20, #22, #23, #24, and #25) had occurred because the FBO at the airport also acted as its manager, and had engaged in various conduct that created a conflict of interest or otherwise was non-compliant, and which had not been adequately monitored by the city.

- Cathy Kloess d/b/a The Jumping Place v. St. Mary's Airport Authority, dockets no. 16-15-06 and no. FAA-2015-1996. The complainant asserted that it had been denied access to St. Mary's Airport for skydiving operations on a perpetual basis, namely the security of a neighboring military base. The FAA dismissed the complaint because its allegations were unclear and unsupported by documentation, and also was procedurally deficient in other respects.

- Boston Executive Helicopters v. Town of Norwood, Massachusetts and Norwood Airport Commission, dockets no. 16-15-05 and no. FAA-2015-0885. The complainant alleged that it had been denied the opportunity to provide FBO services at the airport in favor of the existing FBO, in violation of grant assurance #22.

- Daniel Rogers v. Macon County Airport Authority, dockets no. 16-15-04 and FAA-2015-0370. The complainant asserted that inoperative systems at Macon County Airport posed safety issues. The FAA dismissed the complaint because its allegations were unclear and unsupported by documentation, and also was procedurally deficient in other respects.

- Pro-Flight Aviation v. City of Renton Municipal Airport, dockets no. 16-15-03 and no. FAA-2015-0361. The complainant asserted that the airport had violated grant assurances #5, #22, #23, and #29 by leasing facilities to an aircraft manufacturer that it needed as the only FBO at the airport, and requested that the FAA grant interim relief to prevent its eviction. In an interim order, the FAA denied the request for interim relief – holding that the FBO had failed to demonstrate irreparable harm – but did not rule on the merits of the complaint.

- Friends of East Hampton Airport, Inc., Analar Corporation, Associated Aircraft Group, Inc., Helicopter Association International, Inc., Helifilites Shares LLC, and Shoreline Aviation, Inc. v. East Hampton Airport, a division of the Town of East Hampton, dockets no. 16-15-02 and no. FAA-2015-0363. The complainants alleged that the town had failed to maintain various airport facilities (in violation of grant assurances #11, #19, #20, and #29) and had charged unreasonable fees to airport users (in violation of grant assurances #24 and #25).

- Wayne R. Messinger v. Pearland Regional Airport, dockets no. 16-15-01 and no. FAA-2015-0253. The complainant asserted that he had been denied access to facilities at Pearland Regional Airport in retaliation for reporting safety issues at the airport to state authorities.

Grant Assurance-Related Court Decisions

In Bodin v. County of Santa Clara, 2015 WL 5440822 (N.D.Cal. Sept. 15, 2015), the U.S. District Court for the Northern District of California held that a skydiving business did not have a claim against the county, based on the conditions included in its operating permit, under 42 U.S.C. § 1983. Although the litigation was not specifically premised upon grant assurances, the backdrop to the case was that the city long had resisted allowing skydiving at the airport, and did so only after it had been found to be non-compliant in a Part 16 proceeding. The court noted that the FAA's holding was not the same as an order requiring the county to allow the plaintiff to conduct skydiving activities.

In Diaz Aviation Corp. v. Puerto Rico Airports Authority, 2015 WL 6554547 (D.P.R. October 29, 2015), the court noted that there was no private right of action for alleged violations of the grant assurances. The court in Friends of the East Hampton Airport, Inc. v. Town of East Hampton, 2015 WL 3936346 (E.D.N.Y. June 26, 2015) reached a similar conclusion regarding the equitable enforcement of the grant assurances, but left open the question – raised in a separately case pending before it – of whether the FAA could enter into a settlement agreement that waived the enforcement of certain of the assurances.

Additionally, three lawsuits were filed which seek to resolve whether the grant assurances require the City of Dallas to arrange for continuing accommodations for Delta Air Lines at Love Field, after the gate it used at DAL was subleased to another air carrier. See Southwest Airlines Co. v. DOT, D.C. Cir. nos. 15-1036 and 15-1276, and City of Dallas v. Delta Air Lines, Inc., et al., N.D.Tex. No. 15-2069.[7]

Other Grant Assurance-Related Developments

In 2014, the FAA issued policy guidance on how the proceeds from aviation fuel taxes could be used; based upon the grant assurances and an additional federal statute,[8] the FAA generally requires such revenues to be used only for airport-related purposes. In 2015, the FAA docketed additional questions that it had received from the State of Georgia and the National Association of State Aviation Officials, and docketed answers that it had provided to the Georgia questions as well as questions previously received from California and Michigan.[9]

Additionally, the FAA solicited public comment on a petition filed by the Aircraft Owners and Pilots Association, which would lower the grant assurance-based barriers for new flying clubs by allowing flight instructors and mechanics who are members of such clubs to receive monetary compensation for service provided.[10]

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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/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] See 14 C.F.R. Part 16.

[6] See also the text associated with endnote 7.

[7] See also the text associated with endnote 6. In January 2016, the U.S. District Court for the Northern District of Texas issued an interim order, requiring that Delta continue to be accommodated at DAL.

[8] See 49 U.S.C. § 47133.

[9] See docket no. FAA-2013-0988.

[10] See Petition of the Aircraft Owners and Pilots Association (AOPA) to Amend FAA Policy Concerning Flying Club Operations at Federally-Obligated Airports, 80 Fed. Reg. 41447 (July 15, 2015).

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