FAA Enforcement of Airport Improvement Program Grant Assurances, 2011 (January 2012)

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 FY2009 (the most recent year for which complete data is available) alone, 2,885 new and 450 amended AIP grants were awarded, totaling almost $3.51 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; 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.[5] Thus, the requirements imposed by the grant assurances are of considerable relevance to not only airports themselves but also their tenants and other users.

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.,
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.zsrlaw.com

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 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 (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 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.

In 2011, FAA released administrative decisions in eight proceedings:

- Jeff Bodin and Garlic City Skydiving v. County of Santa Clara, California, dockets FAA-2011-0699 and 16-11-06 (Director's Determination, December 19, 2011). Garlic City Skydiving alleged that it 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 that is 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 make a final determination on reasonableness when safety is at issue. FAA also found that Santa Clara had violated grant assurance #5 (*preserving rights and powers*) because it denied Garlic City Skydiving's

proposals without taking into account FAA's safety expertise and authority. The agency found it unnecessary to consider if grant assurance #23 (*exclusive rights*) also had been violated.

- Springfield Flight Academy v. City of Springfield, dockets nos. FAA-2011-1099, 16-10-03 (Director's Determination, August 25, 2011). Springfield Flight Academy alleged that it had been denied the opportunity to sell fuel to third parties at Springfield-Beckley Municipal Airport (SGH), in violation of grant assurances #22 (*economic nondiscrimination*) and #23 (*exclusive rights*). FAA found that there had been no violation of the grant assurances. Springfield Flight Academy had proposed to sell fuel on terms different from those agreed to by other existing vendors at SGH; the airport thus was under no grant assurance-based obligation to agree to that proposal. FAA further found that the subsequent eviction of Springfield Flight Academy was not a grant assurance violation, noting that it had engaged in the sale of fuel to third parties without permission from the airport. FAA also noted that while the grant assurances generally do require a tenant to be provided a reasonable opportunity to self-fuel its own aircraft, that requirement was limited to aircraft owned or operated for its exclusive use.

- Larry Davis v. Jackson Municipal Airport Authority, dockets nos. FAA-2010-1049, 16-10-01 (Director's Determination, January 18, 2011). Davis, an employee of the Jackson Municipal Airport Authority (JMAA), alleged that it had failed to comply with federal requirements for its Disadvantaged Business Enterprise (DBE) program at Jackson-Evers International Airport (JAN), in violation of grant assurances #1 (*general federal requirements*), #30 (*civil rights*), and #37 (*disadvantaged business enterprises*). As an initial matter, FAA found that Davis did have standing to file a complaint, but the agency did not have authority to award damages. FAA further found that there had been no violation of the grant assurances. Based on the record, the JMAA had set compliant goals for – and otherwise properly administered – its DBE program. Additionally, FAA concluded that there was no evidence that the JMAA had engaged in any prohibited retaliation against Davis after he filed the complaint.

- RDM, LLC v. Ted Stevens Anchorage International Airport, dockets nos. FAA-2010-0189, 16-09-14 (Director's Determination, June 7, 2011). RDM, an investor in a planned air cargo facility at Ted Stevens Anchorage International Airport (ANC), alleged that the airport had granted more favorable lease terms to other cargo projects, in violation of grant assurances #22 (*economic nondiscrimination*) and #23 (*exclusive rights*). As an initial matter, FAA found that RDM did have standing to file a complaint, but did further find that there had been no violation of the grant assurances. The other projects were not similarly situated – for example, they had been built by airlines who were signatories to airport use agreements, not a third-party developer, and the leases had been signed at different times – so ANC was under no obligation to offer the same terms to the development in which RDM was an investor. Additionally, FAA noted that its general policy was not to entertain a complaint about the reasonableness of an agreement that already had been signed, as well as that ANC's decision not to grant RDM a right of first refusal to lease additional property was not only was not a violation of, but specifically was required by, the exclusive rights grant assurance.

- Orange County Soaring Association, Mary Rust, Larry Touhino, and Chris Mannion v. County of Riverside, dockets nos. FAA-2010-0092, 16-09-13 (Director's Determination, February 2, 2011). The Orange County Soaring Association (OCSA) alleged that since 2009 Hemet-Ryan Airport (HMT) had limited the operation of gliders by both OCSA and its members in violation of grant assurances #22 (*economic nondiscrimination*) and #35 (*relocation and real property acquisition*). FAA found that HMT had violated the economic nondiscrimination grant assurance, as well as a grant assurance not invoked by the complainants, #29 (*airport layout plan*). FAA had reviewed the airport's layout and facilities, and concluded that gliders could safely be operated at HMT; FAA explained that it and not

the airport is empowered to make determinations about safety, as well as that the obligations of the grant assurances applied to the entire airport, not just projects funded by AIP grants. HMT also had failed to notify FAA of the closure of its glider runway, contrary to its obligation to maintain a current airport layout plan. FAA further rejected the airport's argument that grant assurance #24 (*fee and rental structure*) had required it to prohibit glider operations in favor of activities that generated greater revenue. But FAA also noted that the relocation and real property grant assurance cited by the complainants was inapplicable; it concerns only airport tenants displaced due to the acquisition of real property with federal funds.

- Skydive Sacramento v. City of Lincoln, California, dockets nos. FAA-2009-1122, 16-09-09 (Director's Determination, May 4, 2011). Skydive Sacramento alleged that it had been denied access to Lincoln Regional Airport (LHM) for skydiving operations in violation of grant assurances #22 (*economic nondiscrimination*) and #23 (*exclusive rights*). Although certain issues were resolved between the parties after the complaint was filed, FAA found that for an outstanding matter, LHM had violated the economic nondiscrimination grant assurance (since the potential remedies were the same, it did not consider whether the airport also had violated the exclusive rights grant assurance). Notably, even though the airport subsequently had agreed to establish a drop zone, it had set unattainable insurance requirements, which amounted to an unreasonable denial of access. Although FAA usually will not become involved in disputes over contract terms, an airport cannot set a standard with which compliance is impossible. However, FAA noted that LHM could set different insurance requirements for different categories of aeronautical activities, so the airport had not separately violated the grant assurance by setting different standards for Skydive Sacramento and other tenants.

- Valley Aviation Services, LLP v. City of Glendale, Arizona, dockets nos. FAA-2009-1020, 16-09-06 (Director's Determination, May 24, 2011). Valley Aviation Services alleged that it had been subjected to different requirements than other tenants at Glendale Municipal Airport (GEU), as well as that the airport had engaged in practices which deprived it of revenue, in violation of grant assurances #19 (*operation and maintenance*), #22 (*economic discrimination*), #24 (*fee and rental structure*), and #25 (*airport revenues*). FAA found that the airport was in violation of the operation and maintenance and economic nondiscrimination grant assurances as well as a grant assurance not invoked by the complainants, #29 (*airport layout plan*). Notably, the airport had allowed hangars to be used for non-aeronautical storage and activities, in violation of both its own rules and FAA requirements, and had applied its own rules inconsistently to Valley Aviation Services. Additionally, the airport had required Valley Aviation Services to reduce the rent charged to subtenants without proper analysis; FAA noted that whether the airport was allowed to impose this requirement was a matter of contract, but if were it to do so, the airport must have a reasonable basis. At the same time, FAA noted that there was insufficient evidence that the airport was failing to collect fees and taxes from certain tenants – but added that if this allegation was substantiated, it likely would be a further violation of the economic nondiscrimination grant assurance.

- James Vernon Ricks, Jr. v. Greenwood-Leflore Airport/Airport Board, City of Greenwood, Leflore County, Mississippi, dockets nos. FAA-2011-0279, 16-09-04 (Director's Determination, January 24, 2011). Ricks alleged that Greenwood-Leflore Airport (GWO) had not provided any relocation assistance for his salvage business when its lease was terminated to enable another tenant's expansion, in violation of grant assurances #2 *(responsibility and authority of the sponsor*), #5 (*preserving rights and powers*), #19 (*operation and maintenance*), #22 (*economic discrimination*), #23 (*exclusive rights*), and #29 (*airport layout plan*). FAA found that there had been no violation of the grant assurances. Generally, they do not entitle an airport tenant to any particular facilities, and the

airport had made reasonable efforts to provide an alternate leasehold. Additionally, FAA held that numerous other allegations made by Ricks were unsubstantiated, as well as that in many cases there was no evidence that he was directly and substantially affected by them.

FAA also publicly docketed eleven additional complaints pursuant to Part 16 in 2011, some of which were dismissed on procedural grounds, while others remain pending.[7]

- Flightline Ground, Inc. d/b/a Flightline First v. Louisiana Dept. of Transportation and Development and Non-Flood Protection Asset Management Authority, dockets nos. FAA-2011-0529 and 16-11-01. Flightline asserted that it was a victim of unjust discrimination because New Orleans Lakefront Airport had failed to collect rent from another FBO and forgiven other financial requirements imposed upon that FBO, without offering similar concessions to Flightline. The complaint is pending.

- Kenneth D. Paskar and Friends of LaGuardia Airport, Inc. v. City of New York and the Port Authority of New York and New Jersey, dockets nos. FAA-2011-0612 and 16-11-02. The complainants alleged that the construction of a waste transfer station near New York LaGuardia Airport posed a safety hazard which the airport had an obligation to prevent. FAA dismissed the complaint without prejudice, because the City was not a proper respondent; the Friends of LaGuardia Airport had not been shown to be a proper complainant; and the complaint sought various forms of relief that were outside the scope of Part 16. (A new complaint subsequently was filed, as discussed below.)

- James Vernon Ricks, Jr. v. Greenwood-Leflore Airport and Greenwood-Leflore Airport Board, dockets nos. FAA-2011-0613 and 16-11-03. Ricks asserted that unsafe conditions existed at the airport, based on both a lack of secure gates and aircraft demolition activities conducted by another tenant. FAA dismissed the complaint because Ricks had not demonstrated that he previously had made good faith efforts to resolve the issues, as well as that to the extent cognizable under Part 16, the issues were duplicative of allegations that he had made in another docket (which is discussed above).

- 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. FAA-2011-0612 and 16-11-04. The complainants again alleged that the construction of a waste transfer station near New York LaGuardia Airport posed a safety hazard which the airport had an obligation to prevent pursuant to the grant assurances. FAA again held that the City was not a proper respondent, but allowed the claims to proceed against the Port Authority. The complaint is pending.

- Fletcher Flying Service, Inc. v. Collier County Airport Authority, dockets nos. FAA-2011-0633 and 16-11-05. Fletcher, an agricultural dusting operator, claimed that Immokalee Airport was charging excessive fuel flowage fees, which far exceeded those at comparable airports and primarily impacted it as the major airport tenant. FAA dismissed the complaint without prejudice because Fletcher had not demonstrated that it previously had made good faith efforts to resolve the issue.

- Isaac V. Jones, Jr. and Alabama Hang Gliding Association v. Lawrence County Commission, Alabama, dockets nos. FAA-2011-0753 and 16-11-07. The complainants stated that Lawrence County Airport had engaged in unjust discrimination by refusing to allow ultralight operations at the airport, despite a finding by the local FAA office that such operations could be conducted safely. The complaint is pending.

- Truman Arnold Companies d/b/a Tac Air v. Chattanooga Metropolitan Airport Authority, FAA dockets nos. FAA-2011-1147 and 16-11-08. Tac Air argued that a competing FBO – which was owned by the airport sponsor, but privately-managed – had been favored by the airport, including by the adoption of modifications to the airport minimum standards tailored to its interests, and thus that Tac Air was a victim of unjust discrimination. The complaint is pending.

- Anoka Air Charter, Inc. and Crossroads Aviation, Inc. v. Metropolitan Airports Commission, docket nos. FAA-2011-1157 and 16-11-09. Anoka asserted that it had been denied the opportunity to self-fuel its aircraft, that its application to establish a new FBO at Blaine Airport had been pretextually denied, and that property had been leased to other tenants without the agreements being made subordinate to the requirements of the grant assurances. The complaint is pending.[8]

- 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, docket nos. FAA-2011-1302 and 16-11-10. The complainants, both FBOs, asserted that another entity had been authorized to develop an FBO on property which the airport previously had stated could not be used for an FBO and refused to lease to the existing FBOs, which amounted to unjust discrimination, as well as a violation of other grant assurances. The complaint is pending.

- Epic Aviation Services, LLC v. Arapahoe County Public Airport Authority, docket nos. FAA-2011-1335 and 16-11-11. Epic, an aircraft maintenance and repair shop, asserted that its license do business at the airport had been revoked for pre-textual reasons, and actually had been based on the gender of its owner, and thus that Epic was a victim of unjust discrimination. FAA dismissed the complaint without prejudice because Epic had not demonstrated that it previously had made good faith efforts to resolve the issue, and because no documentation had been submitted in support of the complaint.

- Urban Moore and Eugene Skydivers, L.L.C v. City of Creswell, Oregon, dockets FAA-2012-0058and 16-11-13. Eugene Skydivers alleged that it had been denied approval for a drop zone/landing area at Hobby Field, even though the local FAA office repeatedly had determined that skydiving operations could be conducted safely at the airport. The complaint is pending.

Additionally, in 2011 a federal appeals court issued a decision that primarily relied on a city's grant assurance commitments. In 2008, the City of Santa Monica adopted an ordinance that prohibited certain heavier categories of aircraft from operating at Santa Monica Municipal Airport (SMO), premised on the risk to neighbors should an aircraft overran the runway. FAA took the position that the ban was contrary to grant assurance #22, and prohibited Santa Monica from implementing it. After various proceedings before FAA and federal courts, the U.S. Court of Appeals for the District of Columbia Circuit concurred, finding that the ban was unjustly discriminatory. The court explained that the ban was facially discriminatory, and further that it was unjust because there was no safety-based justification for prohibiting operations by heavier aircraft. Notably, the record before FAA established that such aircraft generally could operate safely at SMO; that the risk of an overrun by other, lighter, categories of aircraft was actually greater; and that the risk of a heavier aircraft overrunning the runway was extremely small.[9]

In a case decided at the end of 2010 but not reported until 2011, a California appeals court affirmed that a city which had cancelled an airport development project based on grant assurance-related concerns nevertheless could be held liable for breach of contract by the developer, because the contract had not explicitly been made subordinate to the grant assurances. The town had entered into an agreement for a hotel/condominium project at Mammoth-Yosemite Airport (MMH), but FAA subsequently

took the position that the project would inappropriately deprive the airport of property necessary to meet the growing demand for aeronautical facilities. Although the contract required the parties to "comply with all applicable rules and regulations of the FAA," the grant assurances were not explicitly mentioned, and the court held that the parties had not intended for the "rules" language to include the grant assurances and thus declined to give it an expansive reading. As a result, although the town asserted that it was obligated by the grant assurances to terminate the development agreement, it nevertheless was held liable to the developer for $30 million in damages, plus attorney fees.[10]

FAA's Inspector General in 2011 released two public reports which found that airports had not complied with grant assurances commitments. First, the IG found that in sales of property that comprised Stapleton International Airport (which has been closed and replaced by a new airport), Denver had failed to obtain fair market value for the property. The IG estimated the loss to be $71 million; blamed FAA for a lack of oversight, and recommended that the agency improve its oversight for sales of the remaining parcels at Stapleton as well as for future airport closures, and that FAA seek recovery of the lost revenue from Denver. But FAA disagreed with the IG's criticisms, stating that its procedures had been adequate; that fair market value had been obtained; and that no revenue diversion had occurred.[11] The IG also similarly criticized FAA for allowing below-value property sales and leases, as well as other forms of revenue diversion at Venice Municipal Airport; the FAA again did not concur with the IG's conclusions, conceding that certain changes in its procedures and in practices at the airport were appropriate, but disagreeing that the leases at issue had not been structured to obtain adequate revenue.[12]

Finally, in 2009 FAA issued a revised version of its Airport Compliance Manual.[13] 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) objected to FAA's position that residential airparks should never be allowed through-the-fence access to 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.[14] In 2011, FAA issued an interim policy, which largely repeated its 2010 guidance, and indicated that in 2014 FAA would initiate a new proceeding which would consider whether new residential airparks should be allowed at grant-obligated airports.[15]

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; 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.

[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] "Airport Improvement Program FY2009 26th Annual Report of Accomplishments to Congress," http://www.faa.gov/airports/aip/grant_histories/media/26th_AIP_Annual_Report_of_Accomplishments.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).

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

[7] FAA also belatedly docketed two complaints that had been filed in 2010, but not yet resolved. See Sun Valley Aviation, Inc. v. Valley International Airport and the City of Harlingen, Texas, dockets nos. FAA-2011-0598 and 16-10-02 (which asserted excessive delays in the review of its FBO application) and Evergreen International Airlines, Inc. v. Port Authority of New York and New Jersey, dockets no. FAA-2011-1282 and 16-10-04 (which asserted that the use of employees of a subsidiary should be considered a form of self-handling for grant assurance purposes).

[8] A nearly identical complaint was docketed in docket nos. FAA-2011-1368 and 16-11-12.

[9] City of Santa Monica v. FAA, 631 F.3d 550 (D.C.Cir. 2011).

[10] Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 120 Cal.Rptr.3d 797 (Calif. Ct. App. 2010).

[11] "FAA Did Not Ensure Revenue Was Maximized at Denver International Airport," Report No. AV-022-057 (February 28, 2011).

[12] "More Rigorous Oversight Is Needed to Ensure Venice Municipal Airport Land Sales and Leases Are Used Appropriately," Report No. AV-2011-180 (September 29, 2011).

[13] FAA Order 5190.6B.

[14] "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).

[15] "Airport Improvement Program (AIP): Interim Policy Regarding Access to Airports from Residential Property," 76 Fed. Reg. 15028 (March 11, 2011).

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