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FAA Enforcement of Airport Improvement Program Grant Assurances, 2016 (December 2017)

Aviation is a highly "federalized" industry. Federal statutes, rules, and policy 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 subject to the oversight of the Federal Aviation Administration ("FAA") for safety and other purposes – are also typically dependent on FAA funding for capital improvements, and subjects to the "strings" that come attached to those funds.

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 for airports. 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 FY2016, more than 1,700 AIP grants were awarded to airports, totaling almost $3.3 billion.

But AIP funding comes with conditions. Airports must comply with 39 "grant assurances" that accompany AIP grants.[3] The assurances typically apply not just to the federally-funded improvements but to all of an airport's operations. Likewise, although most of these conditions have a limited term (typically 20 years), others are perpetual – and since recipients typically accept new grants on a rolling basis, those airports' 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 the tenants and other users that they benefit.

Most grant assurances are non-controversial, such as requirements that an airport abide by various federal laws and standards – e.g., regarding: wages; veterans' preferences; civil rights; disadvantaged business enterprises; the environment; and audits. But other grant assurances are more complex – and significant:

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- For example, grant assurance #22 generally prohibits "unjust discrimination" at airports. In practice, this means that all types of aeronautical activities must be allowed access to an airport on reasonable terms; i.e., an airport must treat similarly-situated tenants the same, and cannot ban any aeronautical activities that it is capable of safely accommodating. But the interests and circumstances of airport tenants and other users are rarely identical, which means that unless access has been denied outright, different terms among two or more of them may not be deemed to be "unjust" by the FAA. For example, an airport might be able to 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 less-favorable 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 has often been framed as the mirror-image of #22 – i.e., if certain tenants are the victims of unjust discrimination, then the remaining tenants are constructive recipients of an exclusive right. But if an airport opts to provide certain services itself, it does not need to allow them to be provided by third parties. Likewise, an application to provide services may be denied for legitimate reasons apart from competition (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 grant assurances of significance include that airports must retain and not delegate to others the powers necessary to fulfill their responsibilities under federal law (#5); that airports must maintain a self-sustaining fee and rental structure (#24); and 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 300 complaints have been docketed – approximately half of which have been resolved through a public order by the FAA (the others having been dismissed as insufficient; settled; or still pending). If an airport is found to have violated a grant assurance, the remedies available to the FAA include (but are not limited to) a prohibition on the airport receiving further AIP funds until the compliance issue is resolved. However, the FAA cannot resolve private claims for damages – and in many of the decided cases the FAA has concluded that the airport at issue was in compliance with its federal obligations, either because the allegations did not rise to the level of a grant assurance violation – or because the airport had addressed the allegations and restored its compliance.

New Part 16 Decisions

In 2016, the FAA docketed administrative decisions in nine grant assurance-based proceedings, six of which were resolved in favor of the respondent airport sponsors (although sometimes with caveats) and three of which were resolved in favor of the complainants:

- Hicks v. Mount Airy, North Carolina (docket nos. 16-15-07 and FAA-2015-2465), Director's Determination (April 29, 2016). In this proceeding, the complainant alleged that the airport violated various grant assurances in connection with the termination of his hangar lease, his dismissal as a board member, and his removal from the airport hangar waitlist. Specifically, the complainant asserted violations of grant assurance #4 (good title), #5 (preserving rights and powers), #19 (operations and maintenance), #20 (hazard removal and mitigation), #22 (economic nondiscrimination), #23 (exclusive rights), #24 (fee and rental structure) and #25 (airport revenues). However, the FAA concluded that the airport was not in violation of any of its obligations, observing that the complainant's misunderstanding of the facts and issues may have resulted in his incorrect conclusions.

- Messinger v. Pearland Regional Airport (docket nos. 16-15-01 and FAA-2015-0253), Director's Determination (May 26, 2016). In this proceeding, the complainant alleged that the airport banned him from the use of a privately owned fixed-base operator (FBO) facility in retaliation for filing a

safety complaint against the airport, in violation of assurances #22 (economic nondiscrimination) and #30 (civil rights). The FAA held that no civil rights violation had occurred, finding that the complainant failed to present sufficient facts to support his claim. With respect to assurance #22, the FAA acknowledged that assurance obligations apply to all areas of the airport, but found that the airport's justification for restricting complainant was consistent with the assurance. The FAA further noted that it generally will not adjudicate cases hinging on personal relationships or employment matters.

- Skydive Myrtle Beach, Inc. v. Horry County Department of Airports (docket nos. 16-14-05 and FAA-2014-0538), Final Agency Decision (August 4, 2016). In this proceeding, the complainant asserted that the airport had engaged in unreasonably restrictive and discriminatory actions regarding its skydiving operations, in violation of grant assurance #19 (operation and management) and #22 (economic nondiscrimination). Initially, the FAA concluded that the airport's actions were reasonable restrictions, consistent with its obligations under assurance #22. However, the FAA further found that while the airport had taken steps to mitigate unsafe skydiving conditions, unsafe operations continued to exist and ordered the airport to take immediate steps to ensure compliance with #19. On appeal, the complainant contended that the FAA had relied on facts and evidence not properly submitted into the part 16 proceeding, including *ex parte* communications. The FAA rejected this contention, holding that the evidence supported the determination and that the FAA investigation did not constitute prohibited *ex parte* communications.

- National Business Aviation Association v. Santa Monica, California (docket nos. 16-14-04 and FAA-2014-0592), Final Agency Decision (August 15, 2016). In this proceeding, the complainants alleged that the airport sponsor had generally violated its obligations by taking the position that its grant-based commitments expired in 2014 instead of 2023, as well as its intention to restrict operations and/or close the airport entirely once its obligations expired. On appeal, the airport sponsor argued that its 2003 amendment to the 1994 grant agreement did not extend the City's grant assurance obligations. The FAA rejected the sponsor's argument, concluding that the airport sponsor remained obligated by the grant assurances until 2023, because the sponsor had received additional grant funds in 2003, the acceptance of which extended the assurance obligation for 20 years.

- R.L.S. Rental Company, Inc. v. Joplin Regional Airport (docket nos. 16-13-06 and FAA-2013-0845), Director's Determination (June 10, 2016). In this proceeding, the complainant asserted that the City failed to consistently enforce the airport's minimum standards for Fixed Based Operators (FBO), and alleged that the City had allowed a competing FBO to operate without meeting minimum standards, in violation of grant assurance #22 (economic nondiscrimination) and #23 (exclusive rights). The FAA held that the City was not in violation of #22; the evidence did not indicate that a competitive advantage had been given to the competing FBO. However, the FAA urged the City to be consistent in enforcing its established minimum standards. With respect to #23, the FAA held that the City was in compliance with its assurance, finding that reasonable steps had been taken to introduce competition at the airport and that the minimum standards were consistent with the airport's federal obligations.

- Chandler Air Service v. Chandler, Arizona (docket nos. 16-13-05 and FAA-2013-0733), Director's Determination (February 9, 2016). In this proceeding, the complainant claimed that the City had mismanaged the Airport in violation of various grant assurances, including #5 (preserving rights and powers), #11 (pavement preventive maintenance), #21 (compatible land use), #22 (economic nondiscrimination), #24 (fee and rental structure), and #25 (airport revenue). The FAA concluded that the City had not violated grant assurance #5, because the City's decision to fund the airport expansion via a voter-approved bond initiative had not yielded any of its rights and powers. The FAA further found that the City's pavement and management program was consistent with its federal obligation under assurance #11. As for the compatible land use claim, the FAA held that the City was not in violation of assurance #21, since the rezoning of land for the retail center did

not adversely affect the airport's current operations. Likewise, the FAA found that assurance #22 was not implicated, because there was no evidence supporting the allegation that the City imposed fuel requirements on complainant that it did not impose on itself or that it used federal money to subsidize its fuel operations. Moreover, the FAA found that the complainant's assertions with respect to grant assurance #24 were misplaced, as the assurance does not require a fee schedule to maximize profits nor does it require an airport to develop to the maximum extent possible. However, the FAA determined that the City could be in violation of assurance #25, based on its collection of levied fuel tax from the airport while waiving the same levied fuel tax for complainant, and also for revenue diversion to the municipal general fund.

- Nishio v. Saipan International Airport (docket nos. 16-13-03 and FAA-2013-0408), Director's Determination (April 29, 2016). In this proceeding, the complainant alleged that the airport's general liability insurance requirement for aircraft operators was unreasonable and a violation of assurance #22 (economic nondiscrimination). The complainant argued that it was unreasonable to impose the same insurance requirements on flight training as on commercial operations, and asserted that the required insurance was neither available on the market nor economically feasible. Upon review, the FAA found it unreasonable to impose a $10 million requirement on non-commercial aircraft users, and thus that the airport was in violation of its federal obligations with respect to assurance #22. In reaching its determination, however, the FAA did not weigh in on the reasonableness of any specific dollar amount of liability insurance coverage.

- SPA Rental, LLC v. Somerset - Pulaski County Airport Board (docket nos. 16-13-02 and FAA-2013-0319), Final Agency Decision (August 8, 2016). In this proceeding, the complainant objected to the conditions imposed on Limited Fixed Base Operator (LFBO) leases at the airport, alleging violations of grant assurances #22 (economic nondiscrimination), #23 (exclusive rights), and #24 (fee and rental structure). But the FAA concluded that the minimum standards established by the airport were necessary and consistent with its federal obligations. The FAA explained that lease terms may change over time due to differing circumstances, including economic realities. The FAA further held that the minimum standards were not indiscriminately applied, because it is not discriminatory for the airport to apply minimum standards incentives differently to dissimilar tenants.

- Virginia One Development, Inc. v. City of Atlanta, Georgia (docket nos. 16-12-09 and FAA-2012-1021), Final Agency Decision (December 13, 2016). In this proceeding, the complainants alleged that the airport had violated assurances #5 (preserving rights and powers), #16 (conformity to the plans and specifications), #21 (compatible land use), and #35 (relocation of real property acquisition), because it failed to acquire the complainants' residential apartment properties, which were identified in the airport's 14 C.F.R. Part 150 plan as being affected by aircraft noise. At the outset, the FAA addressed a number of preliminary issues raised by complainants for the first time on appeal, including allegations of Director bias and prejudice; allegations of a lack of standard of review; allegations that the Director's findings are unconstitutional; and, allegations of omission of facts from the Director's determination. While the FAA dismissed the new allegations as procedurally improper, it also considered the substance and found them to be without merit. With respect to the substantive issues on appeal, the FAA held that complainants failed to establish that the Part 150 plan or federal aviation law required the City to purchase (or noise remediate) complainants' properties, noting that the Part 150 process is voluntary in nature. The FAA further held that assurance #5 does not require an airport sponsor to adopt property specific noise mitigation strategies and practices. Finally, the FAA concluded that assurance #21 did not impose an obligation to acquire properties.

New Part 16 Complaints

The FAA also publicly docketed eighteen new Part 16 complaints in 2016. Four of them were dismissed on procedural grounds, and two voluntarily dismissed, while twelve remained pending as of the end of 2016.

- Island Airlines, LLC v. Virgin Islands Port Authority (docket nos. 16-16-19 and FAA-2017-0425). The complainant alleged that the airport had allowed an FBO to monopolize fuel sales at the airport, in violation of grant assurance #23.

- McGuire v. City of Liberty, Texas (docket nos. 16-16-18 and FAA-2017-0421). The complainant alleged that the City was in violation of grant assurance #19, based on its failure to maintain the taxiways located at the airport.

- AVE, LLC v. Miami-Dade County (docket nos. 16-16-17 and FAA-2016-9486). The complainant asserted that the airport had violated grant assurances #22, #23, #25 and #29, by granting other airport tenants more favorable terms, diverting airport revenues, and operating with an outdated airport layout plan.

- Evergreen Flying Services, Inc. v. Town of Rayville (docket nos. 16-16-16 and FAA-2016-9485). The complainant alleged that it had been denied a lease for the construction of an aircraft maintenance and repair facility in violation of grant assurance #22.

- Boggs v. City of Cleveland (docket nos. 16-16-15 and FAA-2016-9337). The complainant alleged that his home's proximity to the airport runway had rendered the property worthless and asserted various violations of the grant assurances because the City had refused to purchase the home.

- American Flyers, Inc. v. City of Santa Monica (docket nos. 16-16-14 and FAA-2016-9331). The complainant asserted that the City had denied access to the airport, refused to negotiate in good faith, and demanded an illegal short-term lease with extortive rent, in violation of the City's federal obligations, including grant assurances #22 and #23.

- Federal Aviation Administration v. City of Santa Monica (docket nos. 16-16-13 and FAA-2016-9330). The FAA initiated an investigation into a series of actions being carried out by the City, which, the FAA argued, resulted in a *de facto* closure of the airport. The FAA dismissed this investigation pursuant to a settlement agreement, which has been challenged in the U.S. Court of Appeals for the District of Columbia by interested parties (docket no. 17-1054).

- Atlantic Aviation FBO, Inc. v. City of Santa Monica, California (docket nos. 16-16-12 and FAA-2016-9283). The complainant asserted that the City was in violation of a number of its federal obligations, including grant assurance #22, based on the City's refusal to negotiate with complainant in good faith and to offer a lease on reasonable terms.

- Hogan v. Butler County Regional Airport-Hogan Field (docket nos. 16-16-11 and FAA-2016-9127). The complainant alleged that the County was in violation of various grant assurances with respect to its management of and lack of public involvement with the airport, including assurances #5, #8, #11, #13, #16, #17, #18, #19, #22, #25, #26, #29, #32, and #34.

- Comav, LLC v. Southern California Logistics Airport Authority (docket nos. 16-16-10 and FAA-2016-8500). The complainant alleged that the airport had refused to extend the term of complainant's lease, demanded an unreasonable lease rate, and engaged in revenue diversion, in violation of assurances #22, #23, and #25.

- Pelzer v. State of Michigan (docket nos. 16-16-05 and FAA-2016-4973). The complainant asserted that Michigan had violated grant assurances #5, #22, and #23 by establishing unreasonable barriers and denying access in connection with parachuting at Romeo State Airport.

- Air Transport Association of America, Inc. v. Port of Portland, Oregon (docket nos. 16-16-04 and FAA-2016-4972). The complainant alleged that the Port was improperly diverting airport revenues by collecting and remitting to the City fees for offsite storm water management and superfund remediation, in violation of grant assurance #25.

- Smith v. City of Santa Monica, California (docket nos. 16-16-02 and FAA-2016-3830). The complainant asserted that the City had diverted airport revenues by charging the airport questionable and improperly documented loans, imposed excessive landing fees, and charged sub-market rents for non-aeronautical activity in violation of grant assurances #22 and #25.

- Kurtz v. City of Casa Grande, Arizona (docket nos. 16-16-01 and FAA-2016-3829). The complainant asserted that it had been denied access to the airport for skydiving operations in violation of assurances #22 and #23.

- McGuire v. City of Liberty, Texas (docket nos. 16-16-08 and FAA-2016-9129). The complainant alleged that the City had failed and refused to maintain the airport in violation of grant assurance #19.

- Justice Aviation, Inc. v. City of Santa Monica, California (docket nos. 16-16-07 and FAA-2016-5421). The complainant alleged that it had been evicted without cause and otherwise denied access, in violation of grant assurances #22 and #23. The complaint was withdrawn based on a settlement agreement.

- Above It All, Inc. v. Hawaii Department of Transportation (docket nos. 16-16-06 and FAA-2016-9126). The complainant alleged that the airport refused to lease hangars, increased its rent, and failed to effectively communicate with complainant concerning a construction project at the airport, in violation of its federal obligations, including grant assurances #19 and #22. The FAA dismissed the complaint because it was procedurally deficient.

- Boutique Air v. McCarran International Airport (docket nos. 16-16-03 and FAA-2016-3831). The complainant alleged that the airport's pricing schedule was economically discriminatory for a small-sized, community airline because it did not offer a flexible pricing schedule. The FAA dismissed the complaint because it failed to certify prior to filing that a substantial and good faith effort was made to resolve the dispute informally.

Grant Assurance-Related Court Decisions

- Air Transport Association of America v. Jordan, 2016 WL9000276 (D.Or. May 30, 2016). In this case, the plaintiff sought to enjoin the City of Portland from imposing certain fees associated with storm water and sewer management against the airport owner, the Port of Portland. Specifically, the plaintiff contended that the fees violated federal law, which limits how airport revenues are spent. In response, the City argued that the plaintiff lacked standing because the economic injuries alleged were not caused by the City, but rather the independent decision of the Port to pass those fees to airlines as an operating cost of the airport. The court held that the plaintiff did not have standing to bring the claim, finding that plaintiff was unable to show that its alleged harms were fairly traceable to the challenged action of the City.

- City of Pensacola v. Emerald Coast Utilities Authority, docket N.D. Fla. No. 16-0203. In this case, the City, as owner and operator of the Pensacola International Airport, filed a complaint for declaratory relief against the Emerald Coast Utilities Authority (ECUA) and the FAA, seeking, among other things, to quiet title to two potable water wells located on airport property. Specifically, the City alleged that a 1981 transfer agreement between the City and ECUA for the entirety of the City's water infrastructure did not include the airport wells and that, absent FAA approval, the City could not have transferred the wells. The FAA moved to dismiss, arguing lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Following a hearing on the motion to dismiss, the court took the matter under advisement and granted the parties a 30-day stay to engage in settlement discussions. The parties reached a settlement and, on November 16, 2016, the court entered an order of dismissal.

- Friends of the East Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133 (2d Cir. 2016). In this case, the plaintiffs sought a preliminary injunction, precluding enforcement of the Town's

laws restricting airport operations, purportedly to address noise problems. Specifically, the plaintiffs contended that the challenged ordinances did not fall within a "proprietor exception" because the Town failed to comply with the procedural requirements of the Airport Noise and Capacity Act ("ANCA"), in enacting them. The court agreed, holding that the plaintiffs could invoke equity jurisdiction to enjoin enforcement of the challenged laws; and that plaintiffs were likely to succeed on their preemption claim because ANCA applied to the airport, despite its intent not to accept further federal funding, and it was undisputed that the Town enacted the ordinances without complying with ANCA's procedural requirements.

Other Grant Assurance-Related Developments

- Petition of the Aircraft Owner and Pilots Association (AOPA) to Amend FAA Policy Concerning Flying Club Operations at Federally Obligated Airports, Final Policy, 81 Fed. Reg. 13719 (March 15, 2016). The FAA clarified its policy regarding the operation of flying clubs at federally-obligated airports. Specifically, the FAA amended its guidance in Order 5190.6B to permit clubs to provide reasonable compensation to instructors and mechanics who are club members for services rendered to the club, which previously would have required airports (based on the grant assurances) to treat the club's operations as commercial. In reaching its determination, the FAA emphasized three points: "(1) Flying clubs should at no time hold themselves out as fixed based operators, flight schools, or as business offering services to the general public; and (2) CFIs and mechanics should be permitted to receive either monetary compensation or discounted/waived regular club member dues but not both; (3) flying clubs must not indicate, in any form of marketing and/or communications, that they are a flight school and flying clubs must not indicate in any form of marketing and/or communications that they are a business where people can learn to fly."

- Policy on the Non-Aeronautical Use of Airport Hangars, Notice of Final Policy, 81 Fed. Reg. 38906 (June 15, 2016). The FAA clarified its policy for the storage of non-aeronautical items in airport facilities designated for aeronautical use, a matter which previously had generated considerable controversy. The FAA expanded its definition of aeronautical use to include the construction of amateur-built aircraft and provided further guidance on permissible non-aeronautical uses of a hangar.

- Notice of Policy on Evaluating Disputed Changes of Sponsorship at Federally Obligated Airports, Notice of Policy, 81 Fed. Reg. 36144 (June 6, 2016). The FAA clarified its legal authority and its policy for addressing disputed changes of sponsorship at federally-obligated, publicly-owned airports. Specifically, the FAA explained its policy for monitoring and approving requests to change the sponsorship of, and/or operational responsibility for, an airport from one public agency to another public agency when there is a dispute surrounding the proposed change. The document further addresses the requirements for coordination between the FAA and state or local governments contemplating actions that may impact an airport's ownership, sponsorship, governance, or operations, to ensure compliance with federal law.

- Guidance on the Extraction of Oil and Gas at Federally Obligated Airports, Advisory Circular 150/5100-20 (March 23, 2016). In this Advisory Circular ("AC"), the FAA provided guidance for oil and gas development on federally obligated airport land, including any drilling that penetrates the subsurface of airport owned land. Notably, FAA identified grant assurances that apply to on-airport oil and gas development and provided a recommended process an airport sponsor can follow when drafting and negotiating an acceptable lease/agreement for oil and gas development.

- 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,[6] the FAA generally requires such revenues to be used only for airport-related purposes. In 2016, FAA issued a template for state and local governments to use when submitting their action plans to FAA.[7]

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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 the 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 the 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 49 U.S.C. § 47133.

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

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