

**FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

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**DOVER DEVELOPMENT, LLC,**

**Complainant**

**v.**

**ST. LOUIS REGIONAL AIRPORT  
AUTHORITY,**

**Respondent**

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**FAA Docket No. 16-17-09**

**FINAL AGENCY DECISION**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Dover Development, LLC, (Dover or Complainant) of the Director's Determination of November 30, 2017, issued by the Director of the FAA Office of Airport Compliance and Management Analysis, pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in 14 C.F.R. part 16 (Part 16). The Director's Determination dismissed the Complainant's allegations against the St. Louis Regional Airport Authority, (Respondent, or Authority) regarding the Authority's Federal obligations associated with its operation of St. Louis Regional Airport.

Dover argues on appeal that the Director's findings and conclusions erred in concluding that it did not state a claim under Grant Assurance 21, *Compatible Land Use*, and that it did not provide support that it was 'directly and substantially affected' by the alleged non-compliance.

Dover raises three (3) specific issues on appeal:

- 1. Whether Dover Development LLC Has Standing to Bring its Complaint?**
- 2. Whether Dover Development Stated a Claim for the Authority's Violation of Grant Assurance 21?**
- 3. Whether the Director's Reliance on 14 C.F.R. section A150.101(d) was Clearly Erroneous?**

Also, Dover raises an additional issue that the Director erroneously included additional information on 14 Code of Federal Regulations (C.F.R.) Section A150.101(d)<sup>1</sup> not submitted by either party.

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<sup>1</sup> 14 C.F.R. § A150.101(d) states: For the purpose of compliance with this part, all land uses are considered to be compatible with noise levels less than Ldn 65 dB. Local needs or values may dictate further delineation based on local requirements or determinations.

Upon appeal of a Part 16 Director's Determination, the Associate Administrator for Airports must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion is based on applicable law, precedent, and public policy (14 C.F.R. § 16.33(e)). (See *Ricks v. Millington Municipal Airport*, FAA Docket No. 16-98-19, Final Decision and Order p. 21 (Dec. 30, 1999).)

In arriving at a final decision on this Appeal, the Associate Administrator has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Complainant's Appeal, and the Respondent's Reply for consistency with applicable law and policy.

Based on this reexamination, the Associate Administrator affirms the Director's Determination. The Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and the FAA policy.

This decision constitutes the final decision of the Associate Administrator pursuant to 14 C.F.R. part 16.

## II. SUMMARY OF THE ORDER

In its Complaint, Dover's alleged the Authority violated Grant Assurance 21, *Compatible Land Use* by failing to prevent construction of an assisted-living facility at an off airport location adjacent to the airport. Dover stated the facility was incompatible because it was located too close to the airport and was within the 65-70 DNL noise contour. Dover stated it is a user of the airport and would be adversely affected as a user by the construction of the facility.

[ORDER at 2]

Specifically, alleged that it, "flies in and out of the airport" to access its development sites and purchased fuel at the airport. The Complaint does not provide any specifics regarding Dover's actual use of the airport or its purchase of fuel at the airport. Dover is a developer of assisted care facilities including the development of a care and memory treatment facility located about two miles from the airport. [ORDER at 4]

In response, the Authority filed a motion to dismiss which argued the location of the proposed assisted-living facility was outside of the 65 DNL noise contour. According to the Authority, prior to construction of the facility at issue, the Authority worked with the developer to help the developer submit FAA Form 7460, *Notice of Proposed Construction or Alteration* to the FAA. [ORDER at 4-5] FAA conducted an obstruction evaluation/airport airspace analysis.

Additionally, according to the Authority, its input in the project also resulted in the adjustment of the building elevations and the flagpole. A water feature was changed, at the airport's insistence, to avoid the attraction of wildlife [FAA Exhibit 1, Item 2, 42]. Based on these actions, among other reasons, the airport asserts it complied with Grant Assurance 21. [ORDER at 4]



Under the FAA standards all land uses are considered to be compatible with a DNL less than 65 dB [14 C.F.R. § A 150.101(d)]. The Authority notes that the noise contour maps accepted by the FAA on May 16, 2008 as part of an Environmental Assessment, show that the location of the facility is, in fact, outside the 65 DNL contour. The Director found its examination of these maps supported the assertion of the Authority. The Director noted no party has introduced into evidence any other document that was accepted by the FAA or is more recent than the studies conducted for the 2008 Environmental Assessment that demonstrates otherwise. [ORDER at 6]

The Director further found Dover lacked standing. Dover asserts the Authority's violations of the Grant Assurances could lead to a loss of grant funding, which could, in turn, lead to a diminishment of the airport. This assertion is simply too speculative to show Dover is directly and substantially affected by an alleged noncompliance. Standing based on a potential closure or diminishment of the airport, as alleged by Dover, is speculative. The Director further noted the record was unclear as to whether Dover operated an aircraft or conducted an aeronautical activity at the airport. [ORDER at 8]

On November 30, 2017, the Director issued an ORDER granting the Authority's motion to dismiss and dismissing the Complaint.

### **III. PARTIES TO THE COMPLAINT**

#### **A. Respondent/Airport**

The St. Louis Regional Airport (ALN) is a public airport averaging approximately 38,000 operations a year, with 110-based aircraft. The airport property comprises 2,250 total acres and has two runways. ALN is funded, in part, through Airport Improvement Program funds. As a condition of receiving Federal funding, the airport agreed to comply with the FAA's sponsor Grant Assurances. [ORDER at 3-4] As of 1989, the airport has accepted \$ 8,783,072.00 in grants.

#### **B. Complainant**

Dover states that it is an aeronautical user of the airport. Specifically, Dover states that it flies in and out of the airport to access its development sites, and that it has purchased fuel at the airport. Dover does not appear to own or operate its own aircraft at the airport, is not an airport tenant, and does not own or operate an aeronautical business.

Dover is a developer of assisted care facilities based in Clayton, Missouri. One of these ongoing developments is an assisted-care and memory treatment facility in Bethalto, Illinois, that is located about two miles from ALN. [ORDER at 4]

### **IV. PROCEDURAL HISTORY**

On December 29, 2017, the Complainant filed its appeal from the Director's Determination together with a supporting brief. [FAA Exhibit Items 17, 18]

On January 22, 2018, Respondent filed its Response to Complainant's appeal as a Motion to Dismiss. [FAA Exhibit 2, Item 19]

## V. APPLICABLE FEDERAL LAW AND THE FAA POLICY

Grant Assurance 21, *Compatible Land Use*, requires, in pertinent part, that the sponsor of a federally obligated airport...

...will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft.

... if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended."

FAA Order 5190.6B provides additional details on Grant Assurance 21. It states that:

... Grant Assurance 21 ... relates to the obligation of the airport sponsor to take appropriate actions to zone and control existing and planned land uses to make them compatible with aircraft operations at the airport. The FAA recognizes that not all airport sponsors have direct jurisdictional control over uses of property near the airport. However, for the purpose of evaluating airport sponsor compliance with the compatible land use assurance, the FAA does not consider a sponsor's lack of direct authority as a reason for the sponsor to decline to take any action at all to achieve land use compatibility outside the airport boundaries. In all cases, the FAA expects a sponsor to take appropriate actions to the extent reasonably possible to minimize incompatible land. Quite often, airport sponsors have a voice in the affairs of the community where an incompatible development is located or proposed. The sponsor should make an effort to ensure proper zoning or other land use controls are in place and,

... in cases where the airport sponsor does not have the authority to enact zoning ordinances, it should demonstrate a reasonable attempt to inform surrounding municipalities on the need for land use compatibility zoning. The sponsor can accomplish this through the dissemination of information, education, or ongoing communication with surrounding municipalities.

Depending upon the sponsor's capabilities and authority, action could include exercising zoning authority as granted under state law or engaging in active representation and defense of the airport's interests before the pertinent zoning authorities. The sponsor may also take action with respect to implementing sound insulation, land acquisition, purchase of easements, and real estate disclosure programs or initiatives to mitigate areas to make them compatible with aircraft operations. Sponsors without zoning authority may also work to change zoning laws to protect airport interests.



## VI. ISSUES ON APPEAL

### 1. Whether Dover Has Standing to Bring its Complaint?

On appeal, Dover contends it has standing to bring its Complaint because of “its status as an aeronautical user of the airport” based upon a declaration it submitted with its Complaint [Appeal,

Item 2, page 14]. Dover contends the Director refused to credit the declaration and offered no justification for ignoring a prior FAA decision regarding standing, *Paskar*<sup>2</sup> [Appeal, Item 2, page 14]. Dover contends it has standing because the alleged Grant Assurance violations at issue could lead to the eventual closure of the airport.

In its Complaint, Dover alleged it was an ‘aeronautical user of the airport’ and had ‘purchased fuel at the airport.’ In response, the Authority stated Dover did not lease space at the airport or run its operations out of the facility. The Authority noted Dover did not identify a pilot in its employ and Dover ‘does not fly its own aircraft.’ The Authority stated its records contained no evidence of Dover’s use of the airport. [ORDER at 7].

The Director found Dover lacked standing. The Director explained that, even assuming the location of the assisted-living facility was incompatible, Dover still failed to show a sufficient nexus to the airport or explain how it could be harmed and, therefore denied standing. [ORDER at 8].

Under 14 C.F.R. Part 16, standing requires a showing that “a person must be directly and substantially affected by any alleged noncompliance.” 14 C.F.R. § 16.23(a) states: “A person directly and substantially affected by any alleged noncompliance or a person qualified under 49 C.F.R. § 26.105(c) may file a complaint under this part. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C. § 47107(b).”

On appeal, Dover contends it has standing based upon the FAA’s prior decision in *Paskar and Friends of LaGuardia Airport, Inc. v. The Port Authority of New York and New Jersey*. Dover claims the Director ignored the findings in *Paskar* on standing and that the same rational should apply in this case. [Item 18, p. 13-14]. *Paskar* involved the construction of a waste transfer station adjacent to LaGuardia Airport. Paskar was a licensed pilot who used the airport. He alleged the waste transfer station would present hazards to aircraft operations by attracting birds. The Director found that the Complainant did have standing, stating, “Kenneth Paskar, as a pilot and an aeronautical user of LaGuardia Airport has established standing for this Part 16 proceeding.

The situation presented here is readily distinguishable from *Paskar*. It is apparent a pilot could be directly affected by birds being attracted to a waste transfer station next to a runway. However, it is not apparent how an aeronautical user, such as Dover, could be directly affected by the mere presence of an assisted-living facility located next to an airport. The situations are not analogous and Dover fails to explain otherwise.

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<sup>2</sup> Referring to FAA Docket No. 16-11-04, *Kenneth D. Paskar and Friends of LaGuardia Airport, Inc. v. The Port Authority of New York and New Jersey*.



Dover also argues it possesses standing because the “Airport Authority’s noncompliance could result in the airport’s loss of federal grant support and the airport’s ultimate closure. If that happens, Dover will no longer be able to fly into the airport and its access to its development in Bethalto, and other current and future development sites in Southwestern Illinois, will be diminished. This is a direct and substantial effect under any reasonable definition of the phrase.” [FAA Exhibit 1, Item 3, page 1]

The airport replies in its Response that “Dover alleges it is an aeronautical user of the airport. Dover, however, provides no substantiating evidence about their connection to the SLRAA in a manner sufficient to have standing for a Part 16 complaint of this nature. Ultimately, Dover was unable to articulate the actual harm it has or would experience as a result of the construction of Holly Brook<sup>3</sup>.” [FAA Exhibit 2, Item 2]

The Associate Administrator is not persuaded Dover satisfies the requirements for standing based on its occasional casual use of the airport and its speculative concerns regarding a potential future loss of airport access. Dover presented insufficient evidence of its use of the airport or how that use would be directly and substantially affected by the existence of the assisted-living facility. It appears Dover primarily seeks an opportunity to voice its objections to a competing assisted-living facility located within 2 miles of its own facility. However, this is insufficient to meet the requirements of 49 C.F.R. § 16.23.

The Director’s finding that Dover does not have standing in this case is affirmed.

## **2. Whether Dover Stated a Claim for the Airport Authority’s Violation of Grant Assurance 21?**

On appeal, Dover argues that the Director’s finding that the Complaint failed to state a claim is contrary to law, precedent and policy and is arbitrary and capricious and an abuse of discretion. [FAA Exhibit 1, Item 1]

Specifically, Dover argues “to affirm the Director’s Determination, the Associate Administrator must find that the undisputed facts demonstrated that the Airport Authority complied with Grant Assurance 21 with respect to the facility<sup>4</sup>. [Item 18, p. 15]. The Airport Authority did not make this showing, and, in ruling to the contrary, the Director clearly erred.” Dover also adds: “...the FAA does not per se accept an owner or sponsor declining any action on the simple grounds that it does not possess zoning authority outside the airport boundaries.” [FAA Exhibit 2, Item 1, pages 15-16] Dover further contends the facility is located within the 65-70 DNL noise contour band based upon a noise contour map contained in Bethalto’s 2000 Comprehensive Plan (the 2000 map). Dover acknowledges the Authority’s evidence is contrary but claims the Director erred in summarily resolving the factual dispute presented. [FAA Exhibit 2, Item 1, pages 15-16].

In its Response, the airport states “there is no evidence that SLRAA violated Grant Assurance 21 by allowing an incompatible land use because of noise-related issues...SLRAA provided evidence that the Holly Brook development was outside of the 65 dB contour, and therefore not incompatible with Grant Assurance 21 based on noise.” [FAA Exhibit 2, Item 2, page 5]

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<sup>3</sup> Holly Brook is the name of the assisted-living facility that was built adjacent to the Airport.

<sup>4</sup> The ‘Facility’ means Holly Brook assisted-living facility



The FAA expects appropriate actions on the part of an airport sponsor to the extent reasonable to minimize any adverse impacts on the airport. In this case, the airport provided evidence it worked with developers to submit the developer's FAA form 7460, *Notice of Proposed Construction or Alteration* for the facility. The airport also provided input that resulted in adjustments to the facility's elevation and ensured that a proposed water feature was changed to avoid attracting wildlife. The FAA also conducted an obstruction evaluation and airspace analysis with no

negative findings. On May 26, 2017, the FAA conducted an inspection at the airport and no operational issues were reported. [FAA Exhibit 2, Item 2, page 2].

With respect to the noise issue, the Director analyzed the 2000 map submitted by Dover and the noise contour map included with a 2008 Environmental Assessment submitted by the Authority. [ORDER at 6-7.] The Director found the 2008 Environmental Assessment noise contour map was reliable because it was more recent, was previously accepted by the FAA and specifically showed the facility to be outside the 65 DNL noise contour. [ORDER at 6-7]. The 2008 map was prepared using the FAA noise model and approved by the FAA. [Item 2 Ex. C, #11.] The Director did not use the older 2000 map submitted by Dover which was part of Bethalto's 2000 Comprehensive Plan. There was no evidence, much less comparable evidence, supporting the reliability of the 2000 map.

On appeal, Dover argues the Director erred by failing to use its 2000 map to show the noise contour levels at the facility. [Item 18, p. 21-23]. However, Dover still fails to identify evidence supporting the reliability or admissibility of the older, superseded 2000 map. There is no evidence showing when or how the map was prepared. There is no indication whether the map was prepared in accordance with the FAA noise model or with some other noise model or standards. The map is partly illegible. The date cannot be discerned, although it appears to be in 1990s. There is insufficient indicia of the map's accuracy or reliability. Further, the precise location of the facility in relation to the DNL noise contour levels is not depicted on the map. [Item 1, Ex. G] Under these circumstances, the Associate Administrator cannot find the Director erred in not considering the 2000 map or in relying upon the 2008 Environmental Assessment noise contour map that showed the facility to be outside the 65 DNL noise contour.

Dover alternatively argues Assurance 21 has been violated, even assuming the facility is located outside the 65 DNL noise contour. Dover contends FAA guidance provides any residential use near an airport is incompatible, citing the FAA's Airport Compliance Manual, Chap. 20.3.b [Item 18, p. 21-23]. Dover is mistaken. All land uses are considered to be compatible with noise levels less than Ldn 65 dB, including residential land uses. *See* 14 C.F.R. § A150.101(d). While local needs or values may dictate further delineation based on local requirements or determinations, Assurance 21 does not dictate that all residential use near an airport are incompatible. [Id.]

In consideration of the foregoing, the Associate Administrator concludes the Director's findings are supported by reliable, probative and substantial evidence. The Associate Administrator upholds the Director's finding under Grant Assurance 21, *Compatible Land Use*.



### 3 Whether the Director's Reliance on 14 C.F.R. § A150.101(d) was Clearly Erroneous?

Dover raises an additional issue that the Director erroneously included additional information on 14 C.F.R. Section A150.101(d)<sup>5</sup> not submitted by either party.

Dover argues the Director erred in *sua sponte* raising and relying on 14 C.F.R. Section A150.101(d) in the Director's Determination. [FAA Exhibit 2, Item 1, page 17] Dover states in its appeal that, "On review, therefore, the Associate Administrator should assume that the facility sits in the 65-70 ldn [sic] noise contour." [FAA Exhibit 2, Item 1, page 19]

Under the authority of 49 U.S.C. §§ 40113 and 47121, the Director may conduct investigations, issue orders, and take such other actions as are necessary to fulfill the purposes of this part. The Director appropriately applied A150.101(d) because of its pertinence to the issue of whether the facility was located on land within the 65 dB noise contour and the consequences thereof.

A large element of the Complaint filed by Dover concerned the issue of whether the land for Holly Brook was within the 65 dB noise contour. The Director may properly use applicable law, regulations, policy and expertise to explain and determine this issue. Doing so was well within the Director's purview.

This argument is rejected and the Associate Administrator upholds the Director's use of and reliance on 14 C.F.R. Appendix A to Part 150, Noise Exposure Maps.

## VIII. CONCLUSION

The Associate Administrator's role in this appeal is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination. The Associate Administrator finds no error by the Director in the Director's Determination.

Specifically, upon appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [14 C.F.R. § 16.33(e)] [See e.g., *Ricks v. Millington Municipal Airport*, FAA Docket No. 16-98-19, Final Decision and Order pg. 21 (Dec. 30, 1999)] In arriving at a final decision in this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the appeal, and papers submitted by the parties, and applicable law and policy. Based on this reexamination, this decision concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and the FAA policy. The appeal does not advance persuasive arguments sufficient to reverse any portion of the Director's Determination.

The Director's Determination is affirmed. This decision constitutes a final decision of the Associate Administrator pursuant to 14 C.F.R. § 16.33.

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<sup>5</sup> 14 C.F.R. § A150.101(d) states: For the purpose of compliance with this part, all land uses are considered to be compatible with noise levels less than Ldn 65 dB. Local needs or values may dictate further delineation based on local requirements or determinations.



**ORDER**

**ACCORDINGLY**, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the appeal is dismissed pursuant to 14 C.F.R. § 16.33.

**RIGHT OF APPEAL**

A party to this decision disclosing a substantial interest in the Final Decision and Order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the Court of Appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed no later than 60 days after a Final Decision and Order has been served on the party. [14 C.F.R. part 16 § 16-247(a)]



Winsome A. Lenfert  
Acting Associate Administrator  
for Airports

5-23-18  
Date