UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Sound Aircraft Services, Inc., Complainant, v. Town of East Hampton, Respondent.	FAA Docket 16-14-07

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Deputy Associate Administrator for Airports on an appeal filed by Sound Aircraft Services, Inc., (Sound) challenging the findings of the Director's Determination issued by the Director of the Office of Airport Compliance and Management Analysis on January 2, 2019. The Determination was issued pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings Title 14 Code of Federal Regulations, Part 16 (14 CFR Part 16) (Rules). The Complaint alleged that the sponsor of the East Hampton Airport (HTO), the Town of East Hamptons (Town), imposed excessive and unreasonable fee increases and spent excessive amounts on an "Outside Professional." The Director concluded that the Town was not in violation of the grant assurances and dismissed Sound's Complaint.

On appeal, Sound argues that the Director erred in that: (1) the conclusions are not supported by the evidence presented; (2) the determinations are contrary to law, precedent, and policy; and (3) there was a 4-year delay before the Director rendered a determination on the important issues presented by the petitioner's complaint. Sound Aircraft request that the Associate Administrator issue a final decision that reverses the Director's Determination. (Exhibit 10, Item 1, p.1)

Sound frames the issues on appeal as being whether: "(1) the [Town's]actions in raising landing fees and fuel flowage fees in 2014 and then raising landing fees again in 2016 were a violation of the [Town's] obligations under Grant Assurance 24, Grant Assurance 25, and FAA Policy Regarding Airport Rates and Charges, resulting in a financial surplus; and (2) the airport sponsor's unchecked and unreasonable spending on an 'Outside Professional' violates Grant Assurance 25 and the FAA Policy and Procedures Concerning the Use of Airport Revenue." *Id.*

Upon appeal of a Part 16 Director's Determination, the Deputy Associate Administrator must determine whether (1) the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record; (2) conclusions made in accordance with the law, precedent, and policy; (3) the questions on appeal substantial; and (4) any prejudicial errors occurred, 14 CFR § 16.33(e) and *see, e.g., Ricks* v. *Millington Municipal Airport,* FAA Docket No. 16-98-19, Final Decision and Order at 21 (December 30, 1999).

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, Sound's Appeal, and the Town's Reply. Based on this reexamination, the Deputy 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 FAA policy. Sound's Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination. The Director's Determination is affirmed.

The Town's Motion to recuse Associate Administrator Kirk Shaffer

The Town's Motion to recuse Associate Administrator Kirk Shaffer, was granted in an order dated May 28, 2020, the analysis and findings for which are contained therein. Accordingly, the Deputy Associate Administrator for Airports issues this Final Agency Decision with delegated authority. All references to actions by the Associate Administrator herein mean actions by the Deputy Associate Administrator.

II. PARTIES TO THE COMPLAINT

A. Town/Respondent

The Town is the owner and sponsor of HTO, a public-use general aviation airport located three miles west of East Hampton, New York. As a condition of receiving Federal funding, the Town must comply with the FAA sponsor grant assurances and related Federal law. The planning and development of HTO have been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, Public Law 97-248, as amended, 49 U.S.C. 47101 *et seq*. Since 1982, the Town has accepted more than $10,000,000 in Federal AIP grants. (Exhibit 5, Item1)

B. Appellant/Complainant

Sound is a full-service Fixed Base Operator[1] (FBO), providing aeronautical services to users at HTO. Sound has operated at HTO since 1990 and has provided FBO services since 1995. (Exhibit 1, Item 2, p.4, and Exhibit 2, Item 2, p.6)

[1] A fixed-base operator (FBO) is a commercial entity providing multiple aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. FAA Order 5190.68, Appendix Z, p. 314.

III. SUMMARY OF DIRECTOR'S DETERMINATIONS

On January 2, 2019, the Director dismissed Sound's Complaint finding that the Town was not in violation of the grant assurances. (Exhibit 9, Item 1) The Director's Determination found that the increased landing fees and fuel flowage fees were not excessive (*Id*., p.12), and revenues generated as a result of the increased fees did not result in an excessive surplus relative to projected expenditures identified in the Town's Airport Capital Improvement Plan and the Airport Maintenance Plan. *Id.* The Director found that while the Town could have provided a more robust notice to the airport community for its planned changes to its fees, the stakeholders ultimately did participate in the process. *Id.*, p. 16. The Director also found that using airport revenue for "Outside Professionals" did not violate Grant Assurance 25 or the FAA *Policy and Procedures Concerning the Use of Airport Revenues* (64 Fed. Reg. 7696, February 16, 1999) (*Revenue Use Policy). Id.*, p.18.

IV. PROCEDURAL HISTORY APPLICABLE TO THE APPEAL

January 2, 2019	The Director issued the Director's Determination. (Exhibit 9, Item 1).
February 1, 2019	Sound filed an Appeal of the Director's Determination. (Exhibit 10, Item 1).
February 21, 2019	The Town filed a Response Brief. (Exhibit 11, Item 1).
February 21, 2019	The Town filed a Petition Pursuant to 14 CFR §16.33(f) to Introduce New Evidence in Support of the Responsive. (Exhibit 12, Item 1).
February 21, 2019	The Town filed a Motion to Recuse Associate Administrator Kirk Shaffer as the deciding official. (Exhibit 13, Item 1).
March 22, 2019	Sound filed Objection to the Town's Motion to Recuse Associate Administrator Kirk Shaffer. (Exhibit 14, Item 1).
March 22, 2019	Sound filed Reply Brief in Further Support of Sound Aircraft Services, Inc.'s Appeal from Director's Determination. (Exhibit 15, Item 1).
April 1, 2019	Town's Motion to Strike the Declaration of Steven W. Tuma in Further Support of Sound Aircraft Services, Inc.'s Appeal from the Director's Determination dated April 1, 2019. (Exhibit 16, Item 1). (Not admitted).
April 1, 2019	The Town filed a Reply to Sound's Response to Town's Motion to Recuse Associate Administrator Kirk Shaffer. (Exhibit 17, Item 1).
April 30, 2019	Sound filed an Objection to the Town's Motion to Strike the Declaration of Steven W. Tuma. (Exhibit 18, Item 1) (Not admitted).

V. Background

Starting on February 6, 2014, the Town began the process of a financial analysis regarding "whether the airport could generate sufficient cash flow to fund necessary and reasonable capital maintenance expenditures without resorting to FAA Funding." (Exhibit 1, Item 1, p. 3; *see also*

Exhibit 2, Item 4, p. 2.) The process contemplated increasing the fuel flowage fee. On March 27, 2014, the Town's Budget and Financial Advisory Committee held a meeting with Sound and other airport stakeholders to discuss the airport "fuel and the fuel farm." (Exhibit 2, Item 4, p. 7, ¶28) On April 11, 2014, the Advisory Committee held a teleconference with Sound and with the airport fuel supplier regarding airport fueling. *Id.*, ¶29.

On June 5, 2014, the Town held a town meeting. The agenda included Resolution 2014-673 to increase the fuel flowage fee from 15 cents per gallon to 30 cents, and Resolution 2014-672 to increase the landing fee by 10%. Sound spoke at the meeting. (FAA Exhibit 1, Item 1, p. 7) The Town Board voted to increase the landing fee by l0% but ultimately voted to table the fuel flowage fee increase for additional discussion. (*Id.*, p.8)

On June 19, 2014, the Town meeting agenda included the fuel flowage fee and Sound, among others, opposed the fee increase. The Town adopted Resolution 2014-673, increasing the fuel flowage fee 100 percent to 30 cents per gallon. In 2016, by Town ordinance, the Town raised landing fees using a weight-based landing fee structure, producing an average fee increase of about 58 percent relative to the 2013 fee schedule. (Exhibit 1, Item 1, p. 9)

On October 1, 2014, Sound filed a Complaint, under Part 16 alleging that the Town was in violation of Grant Assurance 24 by raising landing fees and fuel flowage fees without notice to Airport users, by failing to consider FAA *Rates and Charges Policy*, and by not using a reasonable, consistent, and transparent method of calculation. Sound also raised a claim based on Grant Assurance 25. That claim alleged that the increased fees would create an inappropriate revenue surplus, the Town failed to follow the FAA *Revenue Use Policy*, and the Town lacked records to support expenditures it incurred for "Outside Professionals." (Exhibit 1, Item 1) The Director issued a Determination on January 2, 2019, finding that the Town was not in violation of its grant assurances. (Exhibit 9, Item 1) Sound appealed that determination on February 1, 2019. (Exhibit 10, Item 1)

VI. APPEALING THE DIRECTOR'S DETERMINATION

Pursuant to 14 CFR § 16.33(c), a party adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination.

Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. The Associate Administrator does not consider new allegations or issues on appeal unless it is warranted by a good cause. *See* 14 CFR §16.33 (f) (1). Failure to raise issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable on appeal. *See, Town of Fairview, Texas* v. *City of McKinney, Texas*, FAA Docket No. 16-04-07, Final Decision and Order, November 30, 2005, p.14. *Also see Aerodynamics of Reading, Inc.* v. *Reading Reg'l Airport Auth.*, FAA Docket No. 16-00-03, Final Decision and Order, p.10 (July 23, 2001) (Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal).

Upon appeal, the Associate Administrator determines whether to issue a judgment or dismissal using the following analysis:

1. Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
2. Are conclusions made in accordance with the law, precedent, and policy?
3. Are the questions on appeal substantial?
4. Have any prejudicial errors occurred?

14 CFR § 16.33(e), *see also, e.g., Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19, December 30, 1999, Final Decision and Order, at 21.

VII. APPLICABLE FEDERAL LAW AND FAA POLICY

The Town's last Airport Improvement Program grant was in 2001, making it an obligated airport. As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. 47101, *et seq*., the Secretary of Transportation and, by extension, the FAA, must receive certain assurances from the airport sponsor. Title 49 U.S.C. 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6B, *Airport Compliance Manual*, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated function of assuring that sponsors comply with the assurances.

The following discussion pertains to (A) the FAA's enforcement responsibilities; (B) the FAA compliance program; (C) statutes, sponsor assurances, and relevant policies; and (D) the complaint process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, *et seq*., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities.

In each program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. The FAA has a statutory mandate to ensure that airport owners comply with their grant assurances. *See, e.g.*, the Federal Aviation Act of 1958, as amended and re-codified, Title 49 U.S.C. §§ 40101, 40113,

40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of l982, as amended and re-codified. Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(1), 47111(d), 47122.

C. FAA Airport Compliance Program

The FAA enforces airport sponsor obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of Federal property for airport purposes. These obligations in grant agreements and instruments of conveyance protect the public's interest in civil aviation and require compliance with Federal laws.

The Airport Compliance Program ensures the national system of public-use airports is safe, properly maintained, and that airport sponsors operate consistent with their Federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the actions of airport sponsors to assure that the rights of the public are protected.

FAA Order 5190.6B, *Airport Compliance Manual*, sets forth the policies and procedures for the FAA Airport Compliance Program. The order establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. Among other things, the order analyzes the airport sponsor's obligations and assurances, addresses the application of the assurances in the operation of public-use airports, and helps FAA personnel interpret the assurances and determine whether the sponsor has complied with them.

The FAA compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and operators of public-use airports that have been developed with FAA assistance. Therefore, in addressing allegations of noncompliance, the FAA will determine whether an airport sponsor currently complies with the applicable Federal obligations. The FAA will also consider the successful action by the airport to cure an alleged or potential past violation of applicable Federal obligation as grounds for dismissal of the allegations. *See e.g., Wilson Air Center* v. *Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, Final Decision and Order (August 30, 2001).

C. Statutes, Sponsor Assurances, and Relevant Policies

The Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, *et seq*., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition before receiving the assistance. These sponsorship requirements are included in every AIP grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal Government.

Sound alleges violations of Grant Assurance 24, *Fee and Rental Structure*, and Grant Assurance 25, *Airport Revenues*.

1. Grant Assurance 24, *Fee and Rental Structure*

Grant Assurance 24, *Fee and Rental Structure,* states:

> [The airport] will maintain a fee and rental structure for the facilities and services at the airport, which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

2. Grant Assurance 25, *Airport Revenues*

Grant Assurance 25, *Airport Revenues,* states:

a. All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport. Provided, however, that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in governing statutes controlling the owner or operator' s financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.

b. As part of the annual audit required under the Single Audit Act of 1984, the sponsor will direct that the audit will review, and the resulting audit report will provide an opinion concerning, the use of airport revenue and taxes in paragraph (a), and indicating whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, United States Code and any other applicable provision of law, including any regulation promulgated by the Secretary or Deputy Administrator.

c. Any civil penalties or other sanctions will be imposed for violation of this assurance in accordance with the provisions of Section 47107 of Title 49, United States Code.

3. DOT/FAA Policy Concerning Airport Rates and Charges

Most of the principles contained in the *Policy Concerning Airport Rates and Charges* (*Rates and Charges Policy*) 78 Fed. Reg. 55330 (September 10, 2013), including the prohibition on unjust economic discrimination and the requirement to be financially self-sustaining, are based on the

statutory grant assurances found at 49 U.S.C. 47107, *et seq.* In addition to the unjust discrimination prohibition, (78 Fed. Reg. 55335; *see also* 49 U.S.C. 47107(a)(1)) and the self-sustainability requirement, (*see also* 49 U.S.C. 47107(a)(13)(A)) rates, fees, rentals, landing fees, and other service charges (fees) imposed on aeronautical users for aeronautical use of airport facilities must be reasonable. *See also* 49 U.S.C. 47107(a) (1). In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes. 78 Fed. Reg. 55330-55335 (September 10, 2013).

Under the terms of grant agreements, all aeronautical users are entitled to airport access on fair and reasonable terms without unjust discrimination. Therefore, the principles and guidance in the *Rates and Charges Policy* apply to all aeronautical uses of the airport. The FAA recognizes, however, that airport proprietors may use different mechanisms and methodologies to establish fees for different facilities. The FAA considers these differences when called upon to resolve a dispute over aeronautical fees or otherwise consider whether an airport sponsor is in compliance with its obligation to provide access on reasonable terms without unjust discrimination. *Id*.

A Federally obligated airport owner's obligation to make the airport available for public use does not preclude them from recovering the cost of providing facilities and services at the airport through imposing reasonable fees, rents, and other user charges designed to make the airport as self-sustaining as possible. *See* FAA Order 5190.6B, *Airport Compliance Manual*, September 30, 2009, Chapter 17, p. 17-1. Neither Federal law nor FAA policy requires a single approach to airport rate setting. Airport fees, rents, and other charges may be set according to a methodology, *e.g.*, historical cost valuation, direct negotiation with aeronautical users, objective determinations of fair market value, residual or compensatory, or a combination thereof, at the discretion of the airport sponsor, as long as the methodology and cost-allocation formula selected is transparent, reasonable, and not unjustly discriminatory. *See* 49 U.S.C. 47129(a) (2); paragraph 3.4 of the DOT/FAA *Rates and Charges Policy*, 78 Fed. Reg. 55330, 55335, (Sept. 10, 2013); and FAA Order 5190.6B, *Airport Compliance Manual*, September 30, 2009, p.18-5, ¶18.8.c.

Airport proprietors must employ a reasonable, consistent, and transparent (*i.e.*, clearly and fully justified) method of establishing and adjusting the rate base on a timely and predictable schedule. 78 Fed. Reg. 55330, 5533 (September 10, 2013); *Aircraft Management Services, Inc.,* v. *Santa Rosa County*, FAA Docket No. 16-12-02, Director's Determination, (January 1, 2016), p. 30. Airport proprietors are advised to establish fees with regard to economy and efficiency (*See* Grant Assurance 25 discussion, above). The airport proprietor must apply a consistent methodology in establishing fees for similarly situated aeronautical users of the airport. The prohibition on unjust discrimination does not prevent an airport proprietor from making reasonable distinctions among aeronautical users (*e.g.*, signatory and non-signatory carriers, tenants and non-tenants, commercial and non-commercial users) and assessing higher fees on certain categories of aeronautical users based on those distinctions (*e.g.*, higher fees for non-signatory carriers, as compared to signatory carriers).

Further, the FAA will not ordinarily investigate the reasonableness of a general aviation airport's fees absent evidence of a progressive accumulation of surplus aeronautical revenues. "[T]he progressive accumulation of substantial amounts of surplus aeronautical revenue may warrant an FAA inquiry into whether aeronautical fees are consistent with the airport proprietor's

obligations to make the airport available on fair and reasonable terms." FAA/DOT Policy on Rates and Charges, *See* 78 Fed. Reg. 55330, 55335 (September 10, 2013), ¶4.2.1; and *Wadsworth Airport Association, Inc.* v. *City of Wadsworth and Wadsworth City Council*, FAA Docket No. 16-06-14, Director's Determination, (August 8, 2007) pp.13-14; *also see*, *Bombardier Aerospace Corp., and Dassault Falcon Jet Corp.,* v. *City of Santa Monica*, FAA Docket No. 16-03-11, Director's Determination, (January 03, 2005), (*Bombardier)* p.24.

4. Revenue Use Policies

The FAA *Policy and Procedures Concerning the Use of Airport Revenues,* 64 Fed. Reg. 7696, (Feb. 16, 1999) (*Revenue Use Policy*) states, "all fees, charges, rents, or other payments received by or accruing to the sponsor for any one of the following reasons are considered to be airport revenue." Airport revenue generally includes all revenue a sponsor receives for activities it conducts as airport owner and operator.

The *Revenue Use Policy* provides for the policies and procedures on the generation and use of airport revenue to ensure that an airport owner or operator receiving Federal financial assistance will use airport revenues only for purposes related to the airport. It also discusses the self-sustaining assurance. 64 Fed. Reg. 7696, 7720-7721 (Feb. 16, 1999)

Additionally, the FAA *Revenue Use Policy* cites two instances of permitted uses relevant to this case as follows:

> The capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property . . . Operating costs for an airport may be both direct and indirect and may include all of the expenses and costs that are recognized under the generally accepted accounting principles and practices that apply to the airport enterprise funds of state and local government entities.…
>
> Lobbying fees and attorney fees to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement.

Revenue Use Policy, 64 Fed. Reg. 7696, 7718 (February 16, 1999). *Also, see,* FAA Order 5190.6B, *Airport Compliance Manual*, September 30, 2009, Appendix E, p. 70.

VIII. ISSUES ON APPEAL

Issue 1 Did the Director err by finding that the Town's increased landing fees and fuel flowage fees resulting in an accumulation of surplus were not unreasonable and did not violate Grant Assurance 24, *Fee and Rental Structure*; Grant Assurance 25, *Airport Revenues*; and FAA *Rate and Charges Policy*?

Issue 2 Did the Director err by finding that the Town's spending on "Outside Professional" did not violate Grant Assurance 25 and the FAA *Revenue Use Policy*?

Preliminary Issue: New Evidence Presented in the Appeal by Sound.

As part of its Appeal, Sound Aircraft Services includes additional information for the Deputy Associate Administrator to consider for the Final Agency Decision. Specifically, Sound presents new evidence in its Notice of Appeal and Brief in:

1. Attachment 1 - 2017 Town of East Hampton Adopted Budget;
2. Attachment 2 - 2019 Town of East Hampton Adopted Budget;
3. Attachment 3 - Airport Management Advisory Committee - Meeting Minutes from September 20, 2018.

In accordance with 14 CFR § 16.33(f), "[a]ny new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director." Sound does not petition for this information to be considered in accordance with the requirements of 14 CFR § 16.33 (f); rather, in a footnote, Sound represents that there is good cause to consider the new information. Sound argues that the information was not available at the time of the initial briefing. Sound adds that the information further demonstrates that the Town's action in raising the fee "was excessive, unreasonable, and contrary to the FAA *Rates and Charges Policy.*" (Exhibit 10, Item 1, p.3, fn2)

Sound does not explain why this evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed, January 2, 2019, or why it could not have made this challenge before January 2, 2019. The vast quantity of information and data was made available to Sound on July 25, 2014, in a New York State Freedom of Information Law (FOIL) response to Sound. (Exhibit 3, Item 6) Again, Sound does not explain why it considers this information, capable of being addressed between July 25, 2014, and January 2, 2019, to now be "new information" raised for the first time in its appeal.

The Town argues the rules prevent Sound from supplementing the record in this manner and filed a "Petition Pursuant to 14 CFR § 16.33 (f) to Introduce New Evidence in Support of the Responsive Brief for the Town of East Hampton, New York, on Appeal from the Director's Determination," opposing Sound's introduction of the new evidence but also asking the Associate Administrator to allow the Town to introduce new evidence. (Exhibit 12, Item 1) This Petition puts forth an extensive argument that Sound's submission of the new information does not comply with 14 CFR § 16.33 (f). The Petition states that Sound's new evidence should ordinarily be excluded because Sound has not met the minimum requirements for presenting new information on appeal. However, the Town also rebuts Sound's new evidence on appeal because the new evidence is substantially identical to that properly on appeal and "it is practical to simply address these issues now to avoid protracted debate and to save the agency, and it resources from yet another Part 16 matter involving the Town." (Exhibit 12, Item 1, p.5)

The FAA's process for accepting new evidence presented in appeal or reply to appeal is stated in 14 CFR § 16.33 (f) (1-3):

> (f) Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director. Such a petition must:

(1) Set forth the new matter;
(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
(3) Contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

In this case, Sound admits that the evidence contained in the Attachments was publicly available at the Town's web site before the Director's Determination was issued (Exhibit 10, Item 1, p.3, fn2); however Sound failed to meet the procedural requirements of 14 CFR §16.33(f). Sound did not submit a Petition to Supplement the Record, nor did it submit a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

Furthermore, in an internal agency appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr., Administrative Law and Practice, Vol. 1, § 6.76, (1997) The new evidence will not be considered if the party could reasonably have known of its availability. *Id*. The dates of Sound's "new" evidence precede the Director's Determination, and Sound fails to provide an explanation on appeal why any of this new evidence was not available and could not have been discovered or presented prior to the issuance of the Director's Determination on January 2, 2019. A party may not correct a mistake in its original selection of evidence by compelling the agency to consider it on appeal. *Id.*

The Town filed a Petition to offer new evidence to rebut the new evidence from Sound. The Town proffers the new evidence in the event Sound's new evidence is accepted. Sound did not meet the procedural requirements under § 16.33(f) and does not provide good cause for the Deputy Associate Administrator to consider the new information on appeal. Because the Deputy Associate Administrator denies Sound's request to supplement the record with new evidence, the Town's Petition is unnecessary and is denied.

Sound argues that good cause exists for considering its "new evidence" because (1) the materials are being offered to show the fallacy of the Town's assertion that the surplus is not unreasonable because it is needed to pay for deferred maintenance; and (2) the materials only became available recently (Exhibit 15, Item 1, pp.2-3). The Director finds that Sound's first reason for good cause fails because it is not a permitted exception listed in §16.33(f) allowing supplementation to the record (it simply is providing further argument), and its second reason for good cause fails because notwithstanding that Sound claims the "materials only became available recently" (*Id.*, p.4) they were available prior to the issuance of the Director's Determination on January 2, 2019.

Sound's "Reply Brief in Further Support of Appeal from Director's Determination" (Exhibit 15, Item 1) and the attached declaration of Steven W. Tuma (Exhibit 15, Item 2) are dated March 22, 2019 – after the issuance of the Director's Determination. Moreover, the Declaration speaks to the Town Board meeting on February 5, 2019 – again, after the Director's Determination was issued. Submission of evidence occurring after the determination is issued is not permitted. If the parties could supplement the Director's Determination after it is issued, the administrative

process would be endless and contrary to the expedited procedures provided under Part 16. *Roadhouse Aviation, LLC,* v. *City of Tulsa & The Tulsa Airports Improvement Trust,* FAA Docket No. 16-05-08, Final Decision and Order, June 26, 2007, p.11.

For these reasons, the three attachments to Sound's Appeal (Exhibit 10, Items 2, 3, and 4), the associated arguments in its Appeal (Exhibit 10, Item 1), and Sound's Reply Brief (Exhibit 15, Item 1) with the Declaration of Steven W. Tuma (Exhibit 15, Item 2) will not be considered on appeal. Accordingly, the Town's new information as a rebuttal (Exhibit 12, Item 1) will not be considered in this Final Agency Decision.

IX. ANALYSIS AND DISCUSSION

Issue 1

Did the Director err by finding that the Town's increased landing fees and fuel flowage fees that resulted in an accumulation of surplus were not unreasonable and did not violate Grant Assurance 24, *Fee and Rental Structure*; Grant Assurance 25, *Airport Revenues;* and FAA *Rate and Charges Policy*.

In the Determination, the Director stated a claim under Grant Assurance 24, *Fee and Rental Structure,* is usually based on an alleged airport fee undercharge where the sponsor fails to exploit its assets to "make the airport as self-sustaining as possible." *Citing,* FAA Order 5190.6B, *Airport Compliance Manual*, September 20, 2009, ¶ 17.5; and*, Jim De Vries* v. *City of St. Clair,* FAA Docket No. 16-12-07, Director's Determination at 33 fn157, and 36 (May 20, 2014) (*De Vries*) (where complainant argued allowing hangars to remain empty results in a revenue loss that violates Grant Assurance 24). The Director found that Sound did not argue that the Town was undercharging in its rates to support such a claim (Exhibit 9, Item 1, p.11). In that regard, the Director found no violation of Grant Assurance 24, *Fee and Rental Structure*. *Id.*

The Director went on to address Sound's arguments. Sound argued that the airport's lack of a current surplus should not defeat its claim that the fees are unreasonable. (Exhibit 3, Item 1, p.6) The Director cited *Bombardier* explaining that it involved a case where all of the airport's landing fees were charged to certain large aircraft operators who made up only 7.5 percent of airport operations. *Bombardier* found that allocating all costs to a small percentage of users was unreasonable and unjustly discriminatory regardless of whether it yielded a surplus. (Exhibit 9, Item 1, p.12) The Director here found no evidence of such discrimination in this case. *Id.* p.12.

Sound argued weight-based landing fees are unreasonable because the fees are to "deter the use of the Airport and/or in an effort to generate inappropriate revenue surplus" and that "either motive is demonstrative of unlawful revenue diversion." (Exhibit 1, Item 4, p.1) The Director found that Sound failed to demonstrate that a surplus even exists, and such absence casts serious doubt on its claim. Notwithstanding the absence of a surplus, the Director found that while relatively substantial, the fees increase was not in itself evidence of unreasonableness, a circumstance leading to revenue diversion, or an inappropriate revenue surplus. (Exhibit 9, Item 1, p. 12)

The Director also found that the Town's projected increase in the budget is not evidence of an unreasonable fee, nor is it evidence of an inappropriate revenue surplus and that Sound failed to provide any evidence to support that such landing fee and fuel flowage fee revenues — if achieved — create a surplus beyond what is reasonably required to finance airport operations, administration, capital projects, contingencies, and adequate reserves, as is permitted by the *Rates and Charges Policy. Id.*

Regarding Sound's argument of "unlawful revenue diversion," the Director found that it was not substantiated by the record. There was no evidence whatsoever that the Town does or will use revenues generated from landing fees or fuel flowage fees for an impermissible purpose. (Exhibit 9, Item 1, p.17)

The Director concluded that airfield costs may be allocated to all users, but that capital expenditure should be capitalized and depreciated over time and that the Town's chosen methodology is to increase fees — by Town ordinance — based on the findings of its debt capacity analysis of projected airport revenues, expenses, maintenance obligations, and contingency requirements over the near- and long-term. *Id.* p.13. The record contained no evidence that the weight-based landing fee schedule or fuel flow charges will lead to an inappropriate revenue surplus. The Director found that the steps taken by the Town to evaluate its finances in order to adequately maintain and operate the Airport without federal funding are the same type of airport management principles embodied in and encouraged by Grant Assurance 24, *Fee and Rental Structure*, so long as the resulting fees are not unreasonable and do not result in inappropriate surpluses. *Id.* p.14.

The Director stated that at a general aviation airport, where fees are increased in an otherwise nondiscriminatory matter, the existence or absence of a surplus will, in fact, play an important role in determining if such a fee is reasonable. The Director went on to find that Sound failed to demonstrate that the Town's weight-based landing fee schedule and fuel flowage fees were unreasonable or unjustly discriminatory to the Complainant or has resulted in an inappropriate revenue surplus in violation of Grant Assurance 24, *Fee and Rental Structure,* and the *Rates and Charges Policy. Id.*

The Deputy Associate Administrator agrees with the Director's analysis. The Town contended that 1) the fees are not discriminatory because they apply to all airfield users, and 2) the fee structure was adopted through a public process of evaluating and comparing future financial needs to existing and future revenues. (Exhibit 2, Item 2, p. 30) The Town's method of setting fees, by, for example, weight classification, is practiced throughout the industry. (Exhibit 12, p. 13)

Further, the Director found it amply shown in the record, that the Town's method of establishing its fees by analyzing its debt capacity, forecast of revenues, expenses, maintenance obligations, and contingency requirements was sound, reasonable, and acceptable. As applied, this method resulted in fees that were reasonable and not unjustly discriminatory. The Town's application of this process did not and would not be expected to result in an inappropriate revenue surplus; this was the Town's attempt to make the airport as self-sustaining as possible under the circumstances existing at HTO. *See*, *De Vries* at 14. Grant Assurance 24, *Fee and Rental Structure*, "does not require airport sponsors to establish fees that will generate the greatest

possible income. The airport sponsor is expected to make appropriate business decisions that will make the airport as self-sustaining as circumstances will permit while maintaining a fair and reasonable pricing structure for aeronautical users." *De Vries* at 37, *citing, Thermco Aviation, Inc., and A-26 Company* v. *City of Los Angeles, Los Angeles Board of Airport Commissioners, and Los Angeles World Airports*, FAA Docket No. 16-06-07, Final Agency Decision (December 17, 2007).

The Deputy Associate Administrator finds that the Town's method of setting its landing and fuel flowage fees, as described herein, resulted in fees that were reasonable and not unjustly discriminatory, and did not result in an inappropriate revenue surplus. Accordingly, the Deputy Associate Administrator affirms the Director's findings regarding the Town's alleged violation of Grant Assurance 24, *Fee and Rental Structure*, in setting its landing and fuel flowage fees.

Sound did not support its claim that the fees are unreasonable in the lower proceeding, and it still does not show that the fees led to the accumulation of an unreasonable surplus. It does not quantify what an unreasonable surplus is, nor does Sound cite case guidance to prove that these amounts are unreasonable – it simply seizes upon the Director's comment that increase was "substantial." (Exhibit 9, Item 1, p.12; Exhibit 10, Item 1, pp. 2, 6) The FAA will not ordinarily undertake an investigation of the reasonableness of a general aviation airport's fees absent evidence of a progressive accumulation of aeronautical revenues. FAA Order 5190.6B, ¶¶17.9, 17.10; *Also see Rates and Charges Policy*, 78 Fed. Reg. 55330, 55332. Sound has provided no valid reason to depart from that practice here. Further, a complainant must show that an increase in fees it charges to airport users will unreasonably deny airport access to those users. *See Thermco Aviation* v. *City of Los Angeles*, FAA Docket No. 16-06-07, Final Agency Decision, December 17, 2007, p. 27, *citing Roadhouse Aviation* v. *City of Tulsa*, FAA Docket No. 16-05-08, Final Decision and Order, June 26, 2007, p.15.

As discussed throughout the Director's Determination and this Final Decision, Sound has failed to show that the Town is acting unreasonably in its plan for change at the Airport. The Town's explanation of its method of calculating landing and fuel flowage fees do not appear, nor does Sound argue there are any critical technical shortcomings. Therefore, the FAA may accept the Town's methodology and justification for the new landing and fuel flowage fees schedule. The impact of the landing and fuel flowage fees on users does not appear, nor does Sound argue them to be significant. The landing and fuel flowage fees imposed by the Town are not inherently high when compared to similar airports. (Exhibit 11, Item 1, p.10) There is a relationship between landing and fuel flowage fee revenues and the expenditures for which the Town planned in its budget (Exhibit 2, Item 2, pp. 27-29) The rate-setting methodology the Town uses appears to be applied consistently to similarly situated aeronautical users and conforms with the requirements of the policies set forth in Grant Assurance 24, *Fee and Rental Structure;* and the FAA *Rates and Charges Policy* (78 Fed. Reg. 55330) (Exhibit 9, Item 1, p.13; and *Rates and Charges Policy* § 2.1, 78 Fed. Reg. 55330, 55333.) Neither the absolute nor the relative amount of the user fees appears to deny access. Nor does it appear that those user fees are applied in an unjustly discriminatory manner.

FAA will not ordinarily investigate the reasonableness of a general aviation airport's fees absent evidence of a progressive accumulation of surplus aeronautical revenues, not present in this case. In such a context, the Deputy Associate Administrator finds no grounds to hold the fees

unreasonable. Accordingly, the Deputy Associate Administrator finds the landing and fuel flowage fees to be reasonable and compliant with the City's Federal obligations.

Regarding notice to the airport users of the planned increase in landing and fuel flowage fees, the Director noted that the Town's process for notifying and involving airport users of pending airport fee increases is somewhat lacking. (Exhibit 9, Item 1, p.15) However, the Director found that no violation occurred because the stakeholders ultimately did participate in the process. (*Id.* p. 16) The Deputy Associate Administrator agrees with the Director – the *Rates and Charges Policy* does not impose mandatory requirements on general aviation airports to provide notice of rate changes to its users – the Policy encourages direct consultation with airport users in setting new rates and charges. (Exhibit 9, Item 1, p.8; and *Rates and Charges Policy*, 78 Fed. Reg. 55330 (September 10, 2013))

Here the Town met with airport users, specifically Ms. Cindy Herbst of Sound Aviation, who frequently participated in the Town's Budget and Financial Advisory Committee's meetings (Exhibit 2, Item 4, ¶5 (a) and Exhibit 18) The Deputy Associate Administrator finds that HTO users including Sound were provided adequate notice of the Town's new rates and charges as intended by Grant Assurance 24, *Rates and Charges*, and the FAA *Rates and Charges Policy*.

Issue 2

Did the Director err by finding that the Town's spending on "Outside Professional" did not violate Grant Assurance 25 and the FAA *Revenue Use Policy*?

In its Complaint, Sound states it is concerned that airport resources are being expended on the use of the services of "Outside Professionals" contrary to expenditures permitted under the FAA Revenue Use Policy. On July 2, 2014, Sound requested "all bills, invoices, statements, and payments for the amounts expended for the Airport's 'Outside Professional' costs for 2011 to present." (Exhibit 1, Item 1, p. 20) Sound alleges the Town's response lacked any reference to any bills, invoices, statements or records of payments made for "Outside Professionals." Sound argues that the lack of information available to demonstrate the purpose of those expenditures causes concern that the Town is using those funds in a manner inconsistent with the FAA Revenue Use Policy. (*Id.* pp. 20-21)

Sound argues in its Reply that the Town failed to provide records relating to $228,000 worth of expenditures for outside professionals when requested (Exhibit 3, Item 1, p. 17). Sound argues in its Appeal that:

> when presented with evidence demonstrating a lack of transparency as to the use of funds, the Director erroneously declined to investigate. Instead, he summarily concluded, "the Director finds no credible evidence that using airport revenue for 'Outside Professionals — presumed in this case to be airport-related legal services – violated Grant Assurance 25 or the FAA Revenue Use Policy." Sound concludes that the Director's "presumption" is erroneous and contrary to law, precedent and policy and even if the Town's assertion that the $3.7 million in outside professional fees was used for Airport-related legal services, the FAA's inquiry should not have stopped there. Sound states that not all legal services incurred are acceptable capital and operating costs of an

> airport. Sound asserts that the FAA was obligated to evaluate whether the $3.7 million in legal services charged to the Airport were used for a legitimate Airport purpose consistent with the mandates 49 U.S.C §47107 (b). (Exhibit 10, Item 1, p. 8)

In the Determination, the Director recited the applicable legal standard: airport sponsors may use airport revenues for the capital or operating costs of the airport (Exhibit 9, Item 1, p.17) *Citing* FAA Order 5190.6B, *Airport Compliance Manual*, September 30, 2009. The Director recited long-established agency policy that airport revenue may be used for attorney's fees "to the extent these fees are for services in support of . . . operating costs that are otherwise allowable." *Id.*

Further, the Director found that nothing exists in FAA policy to restrict a sponsor from using airport revenue to pay for airport-related legal obligations, activities, and costs. Moreover, the Director found that airport sponsors must use airport revenues for the capital and operating cost of the airport, the local airport system, or other local facilities, which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property. *Revenue Use Policy*, Section V, para A. Moreover, the Director notes that an airport may incur legal costs by enacting management or operational actions that relate to airport operations, even if those operations are ultimately found to be contrary to the sponsor's federal obligations. (Id. pp.17-18)

Sound asks in its appeal that the Deputy Associate Administrator find that the airport sponsor spending on "Outside Professional" violates Grant Assurance 25 and the FAA *Policy and Procedures Concerning the Use of Airport Revenue.* (Exhibit 10, Item 1, p.1) In its appeal, Sound asserted that the Town's spending on "Outside Professional," combined with the Town's failure to provide documentation in support of same, was a violation of Grant Assurance 25 and the FAA *Revenue Use Policy*. Sound claims that it presented the FAA with evidence demonstrating a lack of transparency relating to expenditures for "Outside Professional."

Sound further argues that the Director erred in finding that there was no credible evidence that the airport revenue for "Outside Professional" violated Grant Assurance 25 or the FAA *Revenue Use Policy* and the finding is not supported by a preponderance of reliable, probative, and substantial evidence contained in the record. (*Id.*, p.4.) Sound claims the Director disregarded the evidence presented demonstrating the Town's lack of transparency regarding its spending on "Outside Professional" (Exhibit 10, Item 1, p.8) Sound states that notwithstanding evidence demonstrating the lack of transparency relating to those expenditures, the Director's Determination "presumed" that the expenditures were for "airport-related legal services" without any consideration as to whether the expenses were for the capital or operating costs of the Airport as is required by 49 U.S.C. 47107(b), as opposed to the unlawful use of such funds to restrict public access to the Airport while generating a surplus for the Town (*Id.,* p.5). Sound further argues the Director's conclusion in that regard is unsupported by the evidence and is inconsistent with the FAA's obligation to audit compliance and, in instances of non-compliance, to recover illegally diverted funds as mandated by 49 U.S.C. 47107(l)-(m). (*Id.*) Sound argues – again – that the Director did not rely on any credible evidence supporting his conclusion that expenditures for "Outside Professional" were proper and is, therefore, contrary to law, precedent, and policy. (*Id.*) Sound goes on to state the principle that airport revenue must be applied only to the capital and operating costs of the airport. (*Id.*, p.7, *citing In the Matter of Revenue Diversion by the City of Los Angeles at Los Angeles International, Ontario, Van Nuys*

and Palmdale Airports, FAA Docket No. 16-01-96, Record of Determination at p. 18 (March 17, 1997)) Sound concludes by questioning whether "Outside Professional" expenditures by the Town are acceptable capital and operating costs of the airport (*Id*.). Sound alleges that the Town is spending on "Outside Professional" with "reckless abandon", (*Id.,* p. 8) but does not explain or provide evidence regarding the claim of the Town's reckless spending on "Outside Professionals."

The record fails to show what evidence Sound bases this argument – it simply wants the Director, and now the Deputy Associate Administrator, to investigate the Town's spending. (Exhibit 10, Item 1, pp.7-8)

The Town, however, provides persuasive evidence that its expenditures are reasonable and airport-related. The Declaration of Charlene G. Kagel attached to the Town's Answer to the Complaint contains 226 pages of invoices, billing records, spreadsheets, budget estimates, and records (Exhibit 2, Item 8) Exhibit 04 to Kagel's Declaration contains 216 pages of "Outside Professional Invoices." (Exhibit 2, Item 12) The expenses detailed in these invoices are all airport-related. Many of them are legal bills associated with challenges to operational decisions made by the Town in relation to Part 16 actions, noise, or environment. The summary at Exhibit 05 lists the Summary of Services Provided; again, all are airport-related. (Exhibit 2, Item 13)

Further, the Town states in its Reply to the appeal that it provided "hundreds of pages of invoices showing that all of these expenses – including the legal fees – were for airport-related matters." (Exhibit 11, Item 1, p.2) "[T]he Town provided 214 pages of detailed documentation regarding each specific expenditure for "Outside Professionals" in between 2011 and 2013" (the years identified in Sound's Complaint). (Exhibit 2, Item 2, p.40) These documents demonstrate that the Town paid outside consultants to perform airport services, including: preparation of FAA Form 7460s (Notice of Proposed Construction or Alteration); environmental professional services; Airport Layout Plan updates; on-call consulting services related to airport noise; and airport litigation. *Id*. The Director correctly concluded that these expenses were permissible uses of Airport revenue. (Exhibit 9, Item 1, pp.17-18)

Sponsors may use their airport revenue for the capital or operating costs of the airport. (*Northwest Airlines* v. *Indianapolis Airport Authority*, FAA Docket No. 16-07-04, Director's Determination, (August 19, 2008), p. 3) A sponsor may use airport revenue to pay lobbying and attorney fees to the extent those fees are for services in support of airport capital or operating costs that are otherwise allowable. (*Boca Aviation* v. *Boca Raton Airport*, FAA Docket No. 16-00-10, Final Decision and Order, (March 20, 2003), (*Boca*), p. 39) The Deputy Associate Administrator reviewed the billing statements, invoices, and receipts found in Exhibit 04 attached to the Declaration of Charlene G. Kagel (Exhibit 2, Item 12) in detail and, like the Director, concludes that the expenses described by Sound as being attributed to "Outside Professional" are permitted airport expenses under Grant Assurance 25, *Airport Revenues*, as explained in the FAA *Revenue Use Policy.* The Deputy Associate Administrator concludes that had Sound considered the itemized operating expenses listed in the Town's Answer and attached declarations it too would conclude that none of the expenditures can be labeled as "unchecked

and unreasonable spending" or were made with "reckless abandon."[2] The Deputy Associate Administrator finds that these "Outside Professional" expenses were all airport operating costs made in accordance with Grant Assurance 25, *Airport Revenues*, as explained the FAA *Revenue Use Policy.*

Grant Assurance 25, *Airport Revenues,* and related policies establish two principles relevant to this case. First, airport sponsors may use airport revenue for the capital or operating costs of the airport. Second, FAA Order 5190.6B provides that airport revenue may be used for attorney fees "to the extent these fees are for services in support of ... operating costs that are otherwise allowable." (FAA Order 5190.6B, p. 15-5; *Boca*, p. 39)

The issue, then, is whether using airport revenue to pay for legal fees - when such fees are related to airport-related legal issues - is an element of the "operating costs of an airport." The Director found that such an expenditure qualified as such. Airport operations include management and administrative tasks: equipment costs, administrative/ management costs, personnel costs, and legal costs. Legal costs may further airport-related purposes, covering anything from general liability issues, airport master planning and environmental costs, to legal representation during legal challenges or administrative proceedings, such as a Part 16 complaint. Legal costs are valid and common cost-centers in businesses, units of government, and airports. Many such entities have legal departments, and legal fees and costs can include in-house expenses, outside counsel fees and costs, special studies, related travel, court costs, and so on.

Sound references the FAA *Revenue Use Policy*, stating that legal costs need to be "beneficial to the taxpaying citizens of the sponsoring government." The Director clarified that the statement in the policy was written within the context of using airport revenues for community use, not, as Sound asserts, as a rule that bars legal costs unless they "implicate a purpose that benefits an airport and its users." Nothing in FAA's policy restricts the use of airport revenue in support of an airport sponsor's legal obligations, activities, or costs. Moreover, nothing in relevant authorities subjects the expenditure of legal fees to a test deemed to "benefit an airport or its users."

Generally, fees related to airport legal issues may be paid with airport revenue. The Deputy Associate Administrator is not prepared to say that efforts to address airport noise, even those that ultimately run afoul of the law, fail to advance an airport purpose for purposes of analyzing a violation of Grant Assurance 25, *Airport Revenues*. As noted in our Final Agency Decision in *NBAA v. Town of East Hampton,* there are cases where legal fees could be incurred in a way that is so "frivolous" or contrary to established legal and regulatory norms – such as, for example, ignoring a clear judicial directive – that they could be excluded from the definition of "operating costs." *See NBAA v. Town of East Hampton*, FAA Docket No. 16-15-08, p. 11 (July 23, 2020). While the full delineation of that principle may await another day, there is nothing in this case that suggests a departure so remarkable that the legal fees should be disallowed.

[2] Sound was also provided with 154 pages of these invoices and billing statements for "Outside Professional" in a FOIL response dated July 25, 2014 (Exhibit 3, Item 6). Apparently Sound also failed to examine these records in claiming a "lack of transparency" (Exhibit 10, Item 1, p. 3), "undocumented spending" *(Id.)*, and "expenditures for 'Outside Professional' not supported by the evidence" (*Id.*, p. 5).

Sound states that the Director's "presumption" is erroneous and contrary to law, precedent, and policy (Exhibit 10, Item 1, p.8). Sound asserts that even if we assume that the $3.7 million in outside professional fees was used for Airport-related legal services, the FAA's inquiry should not have stopped there. Specifically, Sound argues that significant precedent exists holding that not all legal services incurred are acceptable capital and operating costs of an airport. *(Id.).*

The Deputy Associate Administrator believes that this case is easily distinguishable from *Meigs Field* and *Boca*. The Town's expenditures for "Outside Professional" are not costs associated with closing an airport as it was in the case of Meigs Field. Further, it is abundantly clear that here, unlike in *Boca,* the sponsor obtained and paid for services for an airport purpose.

The Deputy Associate Administrator finds that the Director did not err in finding that the Town's spending on "Outside Professional" did not violate Grant Assurance 25 and the FAA *Revenue Use Policy*.

Sound's Claim of Prejudicial Error - Delay for four years in issuing the Director's Determination

Sound asserts that the Director's delay in rendering a decision for four years was a prejudicial error (Exhibit 10, Item 1, p.8). Sound goes on to say that the Director's unexcused delay in addressing these important issues precluded it from further challenging the use of revenue and the accumulation of surplus. Sound claims the delay allowed the Town to (1) continue charging the unreasonable fees; (2) spend approximately $3.4 million on "Outside Professional"; and (3) accumulate surplus funds projected to be $7,749,753 in 2018.[3]

Extensions are sometimes necessary to ensure a fair and complete review of the pleadings. 14 CFR §16.11(a) The Deputy Associate Administrator finds the extensions issued in this matter were appropriate. The Deputy Associate Administrator is not persuaded that the Director's timeliness in this matter violated Sound's due process rights. As the record reflects, Sound did not object to these extensions in its Appeal. Moreover, Sound filed a joint request for extension of time and was given extra time to file its Reply to the Town's Answer. (Exhibit 3, Item 7) The FAA has significant discretion in its chosen course of action when investigating complaints under Part 16. *Wilson Air Ctr., LLC* v. *FAA,* 372 F.3d 807, 817 (6th Cir. 2004) This discretion specifically includes the ability to extend "*any* time period prescribed" under the Part 16 regulations "where necessary or appropriate for a fair and complete consideration of matters before the agency." 14 CFR § 16.11(a) (emphasis added).

It was "necessary or appropriate for a fair and complete consideration" to extend the time for the issuance of the Director's Determination in this matter, in part, due to the complexity and multitude of legal cases relating to challenges to the Town's actions or inactions regarding HTO. During the pendency of this case, three other cases involving the Town of East Hampton were on the FAA Part 16 Docket and being processed by the FAA Airports and Chief Counsel's Office.[4]

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[3] As discussed *infra* the portion of Sound's Appeal concerning the period after February 27, 2015, (the date of the last pleading – the Town's Rebuttal) will not be admitted.

[4] *Friends of East Hampton Airport Inc., et al, v. Town of East Hampton*, 841 F.3d 133 (2d Cir. 2016), *cert denied 137 S.Ct. 2295 (Jun 26, 2017); Friends of East Hampton Airpor, Inc., et al, v. Town of East Hampton*, FAA Docket 16-15-

These cases interacted with each other and had overlapping issues to be considered. The Deputy Associate Administrator finds that the complexity of these matters justified the extension of the time for the issuance of a Director's Determination. The Deputy Associate Administrator finds that the Director did not abuse his discretion in granting these extensions.

X. CONCLUSION

In arriving at a final decision on this appeal, the FAA reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the appeal submitted by Sound, the Response submitted by the Town, and applicable law and policy. Based on this reexamination, the Deputy Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and the conclusions are consistent with applicable law, precedent, and public policy.

The Deputy Associate Administrator finds that the Director did not err by finding that the Town's increased landing fees and fuel flowage fees were not unreasonable and did not violate Grant Assurance 24, *Fee and Rental Structure*; Grant Assurance 25, *Airport Revenues;* and the FAA *Rates and Charges Policy*.

The Deputy Associate Administrator also finds that the Director did not err by finding that the Town's spending on "Outside Professional" did not violate Grant Assurance 25, *Airport Revenues,* and the FAA *Revenue Use Policy*.

The Deputy Associate Administrator finds that it was necessary and appropriate to extend the time for the issuance of a Director's Determination. The Deputy Associate Administrator finds that the Director did not abuse his discretion in granting these extensions and that the Director's delay in rendering a decision for four years and two months after Sound filed its complaint was not prejudicial error.

The Deputy Associate Administrator finds that the Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

The Deputy Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Deputy Associate Administrator for Airports pursuant to 14 CFR § 16.33(b).

XI. ORDER

ACCORDINGLY, it is ORDERED that (1) the Director's Determination is affirmed, (2) the Appeal is dismissed pursuant to 14 CFR § 16.33, (3) Sound's request to admit Attachments 1, 2, and 3 to its Appeal is denied, (4) Sound's request to submit its "Reply Brief In Further Support of Sound Aircraft Services, Inc.'s Appeal From Director's Determination" and its attached declaration of Steven W. Tuma is denied, (5) The Town's Motion to Introduce New Evidence in

02, Director's Determination With Regard To Uncontested Claims issued January 31, 2017, Director's Determination With Regard to Contested Claims not yet issued; and *NBAA v Town of East Hampton*, FAA Docket 16-15-08, March 26, 2018, NBAA Appeal dated April 25, 2018, pending.

Support of the Responsive Brief for the Town of East Hampton, New York, on Appeal from the Director's Determination is denied, (6) The Town's Motion to Strike The Declaration of Steven W. Tuma in Further Support of Sound Aircraft Services, Inc.'s Appeal is granted, and (7) all other motions not decided herein are denied.

XII. 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 CFR §16.247(a))

Date 01/04/2021

Winsome A. Lenfert
Deputy Associate Administrator for Airports