UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

McDonough Properties, L.L.C. M&R Holding, L.L.C., Tri-D, L.L.C., And Col. Frank Barnett Complainants/Appellants, v. City of Wetumpka, AL Respondent/Appellee	**Docket No. 16-12-11**

FINAL AGENCY DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by McDonough Properties, L.L.C., M&R Holding, L.L.C., Tri-D, L.L.C., and Col. Frank Barnett (Complainants/Appellants) from the Director's Determination of October 10, 2013, 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 Title 14 Code of Federal Regulations (CFR) Part 16.

The Complainants argue on Appeal to the Associate Administrator for Airports that the Director's Determination should be reversed because the findings and conclusions are not supported by the administrative record, regulations, law, regulations or policy.

The Complainants raise four issues on Appeal:

1. The Director erred when he developed the exception of "legitimate business purpose" to allow a sponsor to suspend its Federal obligations.
2. Did the Director err by finding that the City could violate the self-sustainability provision of Grant Assurance 24 when it required the Complainants to sign a one-year lease?
3. Did the Director err by finding that the City did not discriminate against the Complainants by allowing a nonaeronautical tenant to renew its lease after the City refused to renew the Complainant's leases?
4. Did the Director err by finding that the City gave an exclusive right to a nonaeronautical tenant by renewing its lease after the City refused to renew the Complainant's lease? [FAA Exhibit 1, Item 1, pages 4-5] [1]

The Director's Determination stated, "The Respondent's refusal to grant long term leases for hangars at the Wetumpka Municipal Airport is not a constructive granting of an exclusive right in violation of Grant Assurance 23,

The Complainants also state that they seek to supplement the Administrative Record by including documentary evidence that appear as Appeal Exhibits CA-1 – CA-8. The supplemental information in the Appeal includes communications from the FAA to the County, and visual representations of the conditions at the Airport, as well as a chart identifying "Obstruction Comparison – Public Use Airport. [FAA Exhibit 1, Item 1, exhibits C-1 – C-8]

Upon an 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. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order), p. 21]

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, the Complainant's Appeal, and Respondent's Reply in light of applicable law and policy. Based on this reexamination, the FAA 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 FAA policy. The Complainant's Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(b).

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In the October 10, 2013 Director's Determination, the Director concluded that the Wetumpka Municipal Airport was not currently in violation of its Federal obligations as set forth in its airport grant assurances and existing Federal statutes.

In their initial Complaint, the Complainants (McDonough Properties, L.L.C., M & R Holdings, Tri-D, L.L.C. and Col. Frank Barnett) (Complainants) alleged the Respondent violated Grant Assurance 5, *Preserving Rights and Powers*; Grant Assurance 19, *Operation and Maintenance;* Grant Assurance 22, *Economic Nondiscrimination;* Grant Assurance 23, *Exclusive Rights;* Grant Assurance 24, *Fee and Rental Structure;* and Grant Assurance 38, *Hangar Construction.* The Complainants' claimed that the Respondent engaged in economic discrimination by failing to provide a rental structure which makes the airport self-sustaining and that the Respondent took actions which operated to deprive it of its rights and powers. [FAA Exhibit 1, Item 2, page 1]

> *"The Respondent is contemplating expanding the airport, or in the alternative, possibly relocating the airport. In assessing the best options available for growth, the Respondent commissioned a Feasibility Study to determine if the airport can be expanded in its present location or if the airport should be*

Exclusive Rights, 49 U.S.C., §40103(e) and §47107(a)(4). The record refutes the assertion that other tenants are being treated more favorably thereby creating an exclusive rights. [FAA Exhibit 1, Item 2, page 29]

relocated. To this end, the airport developed a new, standard lease with a one-year term. The purpose of the one-year lease was to put the airport users on notice that making improvements to hangars would not be economically advisable pending the outcome of the feasibility Study. The Respondent anticipates that the one-year term will be in effect for a period of three years."

[FAA Exhibit 1, Item 2, page 17]

"The Respondent's decision to limit the term of the lease was not an unreasonable approach to a possible impending change at the airport. The one-year lease puts the tenants on notice that the airport may be in transition and tenants should plan accordingly. Prior leases had a provision that required the tenants to get the approval of the Respondent prior to making capital improvements to their hangars. The current New Standard Lease has no provision that allows the tenants to make capital improvements on their hangars."

[FAA Exhibit 1, Item 2, page 17]

The Director found that the Respondent was not in violation of Grant Assurance 5, *Rights and Powers* because the Respondent would be required to grant long-term leases at the request of its tenants even when doing so would limit the power of the sponsor to manage the airport.

FAA Exhibit 1, Item 2, page 17]

The Director found that the Respondent was not in violation of Grant Assurance 8, *Consultation with Users,* in failing to allow adequate participation by airport users.

Grant Assurance 8, Consultation with Users, applies to development projects under Title 49, United States Code. The Feasibility Study[2] *was not federally funded and accordingly Grant Assurance 8 is not applicable. Even if Grant Assurance 8 applied, it does not obligate the airport sponsor to necessarily yield to the will of one or more airport tenants, it states the airport sponsor must undertake 'reasonable consultation with affected parties using the airport....'*

[FAA Exhibit 1, Item 2, page 18]

The Director found that the Respondent was not in violation of Grant Assurance 19, *Operation and Maintenance,* because

... [T]he Complainants did not elaborate beyond the allegation that the airport was being operated in an unsafe manner nor did they articulate in what manner the Respondent was in violation of Grant Assurance 19. It is incorrect to apply

[2]The Feasibility Study is a multi-phase study that includes, among other things, evaluating the existing conditions of the Airport, defining requirements for future aeronautical facilities, and determining the ability to use Federal funds to expand the existing site of to relocate the Airport to a new site. [DD page 17]

Grant Assurance 19 to the length of a lease. Rather, this grant assurance requires the airport sponsor to maintain the airport and its facilities in a safe and serviceable condition.

[FAA Exhibit 1, Item 2, page 20]

The Director found that the Respondent was not in violation of Grant Assurance 22, *Economic Nondiscrimination,* because

"... [t]he facts do not support the Complainants' claim of economic discrimination. The record indicates that the Respondent has not offered any tenant a lease with a term longer than one year after it adopted the New Standard Lease in 2011. No Complainant has provided evidence to support an argument that a recent improvement is being impacted by a short term lease. There is no evidence in the record that supports the proposition that the Respondent treated any tenants more favorably than the Complainants."

[FAA Exhibit 1, Item 2, page 24]

The Director found that the Respondent was not in violation of Grant Assurance 23, *Exclusive Rights,* because

"... [t]he FAA will not normally find the airport sponsor in violation of Grant Assurance 23, Exclusive Rights, where the complainant does not show the airport sponsor granted to another entity the exclusive right to conduct a particular aeronautical activity or to provide a particular aeronautical service on the Airport."

[FAA Exhibit 1, Item 2, page 25]

The Director found that the Respondent was not in violation of Grant Assurance 24, *Fee and Rental Structure,* because

"... [w]hile the Complainants may not agree with the Respondent's decision to offer one year leases to all tenants when their current leases expire, the airport owners retain the propriety right to make such decisions. A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the airport's land in a manner consistent with the public's interest."

[FAA Exhibit 1, Item 2, page 26]

The Director found that the Respondent was not in violation of Grant Assurance 38, *Hangar Construction.* The Complainants argued that Grant Assurance 38 should be interpreted broadly to include any improvements made to a hangar even without the knowledge and consent of the airport sponsor.

"This interpretation of the grant assurance would be a violation of the sponsor's rights and powers. The Respondent retained the right to approve any improvements to hangars

on the airport, in part, based on the long term planning for the airport. To adopt the position of the Complainants would allow the tenant to dictate the management of the Airport by making improvements to a hangar that would then require the Airport to grant a long term lease to the tenant."

[FAA Exhibit 1, Item 2, page 27]

III. PARTIES

A. Airport

The Wetumpka Municipal Airport (08A or Airport) is a public-use, non-towered airport owned and operated by the City of Wetumpka, Alabama. The 312-acre facility is located six nautical miles west of Wetumpka, Alabama. It has 82-based aircraft with 108 average daily aircraft operations and the hangar facilities at the airport include 5 T-hangars consisting of approximately 50 units, 10 enclosed hangars, 8 open hangars, and 9 larger corporate/business hangars. The Airport had 39,400 operations for the 12-month period ending November 2012. It has one fixed-base operator currently operating out of one of the Respondent's airport office buildings. The airport has two runways including a paved runway approximately 3000 feet long and a turf runway approximately 2800 feet long. The development of the Airport has been financed, in part, with discretionary and entitlement funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. Section 47101, *et seq.* As a result the City is obligated to comply with the FAA sponsor assurances and related Federal law, 49 U.S.C. Section 47101. The last grant awarded at the time of the Complaint in 2012, was for $135,523. The City is also bound by a Quitclaim Deed issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. Sections 47151 through 47153. [FAA Exhibit 1, Item 2, page 2]

B. Complainants/Appellants

The Complainants, for the relevant time period, were tenants and are users of the Wetumpka Municipal Airport.

McDonough Properties, L.L.C. (McDonough) owns a large hangar at the airport and is managed by David Ramsey (Ramsey and McDonough may be used interchangeably) and McDonough owns 3 aircraft. McDonough is a hold-over tenant; his lease expired on September 30, 2007.

M & R Holdings, L.L.C. (M & R) is managed by Roger Kemp, who owns a large hangar and has been a hangar tenant at the airport since June, 2003. M & R is under an existing lease that had not expired when this Complaint was filed. M&R owns one aircraft.

Tri-D, L.L.C. (Tri-D) is owned by Theresa Harvey and managed by her husband Richard Chaput. Tri-D has been a hangar tenant at the airport since July 1995. Tri-D is a hold-over tenant; its lease expired December 31, 2011. Tri-D has one aircraft located at its hangar.

Frank Barnett (Barnett) leases a large hangar and has been a tenant at the airport since March 2010. Mr. Barnett is constructing an aircraft located at his hangar. Barnett's lease expired on January 1, 2011. [FAA Exhibit 1, Item 2, pages 2- 3]

IV. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

McDonough Lease

McDonough became the successor in interest to a ground lease beginning in February 1996, with the original lease commencing on October 1, 1992. The hangar was constructed in mid-1970. The term of the original lease stipulated an initial ten-year term followed by five-year renewal periods *"on such terms as the parties hereto shall agree upon."* In 2002, the Respondent renewed McDonough's lease for an additional five years. In 2007, the Respondent rejected the second five-year renewal. Subsequently, the Respondent presented a new lease to McDonough containing a five-year initial term with the option for two, five-year renewals. McDonough objected to certain provisions in the lease including the five-year term of the lease, the forfeiture provision requiring termination of the lease in the event lessee received a felony conviction, and the attorney fee provision. The parties exchanged many letters on these issues but could not resolve the issues of the lease term and the felony conviction provision. [FAA Item 1 pages 14 and 15] McDonough continues to occupy the hangar and became a holdover tenant in 2007.

McDonough filed a Part 13 informal complaint on December 19, 2007, with the FAA Airports District Office (ADO) in Jackson, Mississippi. The Part 13 complaint raised the issues of the forfeiture for felony conviction clause and the lease term. [FAA Item 1, page 15]

On July 22, 2011, the FAA ADO responded to Mr. McDonough's attorney, Wade Ramsey. The ADO stated that the lease term was reasonable based on the facts of this particular lease. The ADO also requested that the Respondent review the lease and ensure that the lease term offered was reasonable and consistent with the other leases on the airfield. The ADO agreed that the forfeiture provision must be modified. [Item 1 page 14 and Exhibit 27]

On August 22, 2011, the Respondent, by email, requested additional time to resolve the McDonough lease due to the Respondent's ongoing effort to develop a New Standard Lease. [FAA Item 1 page 15]

On September 9, 2011, the ADO, by letter, informed the Respondent of its response to Mr. Ramsey and requested that the Respondent continue its efforts to resolve the issues with Mr. McDonough. [FAA Item 1 page 15 and Exhibit 28]

On December 6 and 30, 2011, the Respondent attorney received emails from the City of Wetumpka, Public Works Director, providing information regarding sample hangar rates in the local area. FAA Exhibit 1, Item 7 Exhibit 6]

On December 19, 2011, the Respondent adopted Ordinance No. 2011-15 approving a New Standard Lease, pending the outcome of Feasibility Study to determine growth options for the airport.[3] [FAA Item 7 Exhibit 4]

On December 22, 2011, the Respondent notified the FAA by letter that it had adopted a New Standard Lease for commercial operators, and that the New Standard Lease would temporarily have a one-year term during the pendency of the Feasibility Study. [Item 7 Exhibit 3]

On December 21, 2011, the Respondent informed Mr. Ramsey by letter that the Respondent had adopted a new Airport Minimum Standards Code, Airport Rules and Regulations Code, and New Standard Leases for the Airport. The letter also included a copy of the lease for McDonough to execute and requested that payment be made for the back rent total listed in the letter. [FAA Item 1, Exhibit 29]

On or about December 29, 2011, McDonough hand delivered a check for back rent to the Respondent, but McDonough did not execute the New Standard Lease. [FAA Item 1 page 15]

On January 24, 2012, Ramsey communicated with the Respondent requesting a meeting regarding the one-year term proposed in the New Standard Lease. [FAA Item 1 page 16]

On January 27, 25, and 24, 2012, respectively, the Respondent served Notice of Termination of Tenancy and Notice to Vacate and Remove Personal Property on McDonough, Tri-D, and Barnett. [FAA Item 1 page 16 and Exhibits 34 and 36]

On February 3, 2012, Ramsey requested by letter that the Respondent negotiate with McDonough. [FAA Item 1, exhibit C-37]

On March 2, 2012, the Respondent responded to the request, stating the Respondent did not wish to renegotiate the New Standard Lease. [FAA Item 1, page 17 and Exhibit 18]

On March 2, 2012, Ramsey received a letter from the Respondent stating that the Respondent calculated the back rent inaccurately and included a check for the overpaid amount. [FAA Item 1 page 17 and Exhibit 41]

On March 23, 2012, by letter Ramsey returned to the Respondent the refunded rent check with the explanation that the check was for the amount requested by the Respondent and covered rent through November 30, 2012. [FAA Item 1 Exhibit 42]

On May 12, 2012, Ramsey on behalf of all the Complainants filed a rebuttal to the Respondent's response to the Part 13 Informal Complaint. [FAA Item 1 page 18 and Exhibit 43]

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[3]The forfeiture clause for a felony conviction that Complainant objected to in the lease agreement offered in 2007 was modified in the New Standard Lease to require forfeiture of the lease if the felony conviction affected the ability of the lessee to carry out their obligations under the lease agreement. The Complainant did not object to this provision in the New Standard Lease.

On August 7, 2012, McDonough made a preliminary application for a loan to make improvements on his hangar. [FAA Item 1 page 17]

On August 23, 2012, the bank responded to his inquiry stating that the loan maturity date could not exceed the date of the termination of the lease. [Exhibit 65]

TRI-D Lease

On August 7, 2006, Tri-D signed a lease with the Respondent providing for a 5-year lease, term expiring August 7, 2011, with two, five-year renewal periods. [FAA Item 1 page 18 and Exhibit 45]

Tri- D sought to exercise the first, five-year lease renewal option and the Respondent declined to renew the lease, informing Tri-D that the Respondent had adopted a New Standard Lease with a one year term. [FAA Item 1 pages 18 and 19]

On January 25, 2012, the Respondent by letter provided Tri-D with a Notice of Termination of Tenancy and Notice to Vacate and Remove Personal Property. The Respondent has not sought to enforce the eviction notice. [FAA Item 1 page 19 and Exhibit 34]

Tri-D attempted to pay rent due on February 4, 2012. On February 13, 2012, the Respondent informed Tri-D by letter that it received the past due rent check and the Respondent would hold the check pending the receipt of the signed lease and a current copy of Tri-D's insurance. [FAA Item 1 page 19 and Exhibit 38]

On February 24, 2012, the Respondent returned the check to Tri-D based on the failure of Tri-D to sign the lease. Tri-D was given until March 26, 2012, to vacate the premises. The Respondent has not sought to enforce the eviction notice. [FAA Item 1 page 19 and Exhibit 35, 35a]

On May 12, 2012, Tri-D joined the other Complainants in filing a Part 13 Informal Complaint. [FAA Item 1 page 19 and Exhibit 43]

On or about August 9, 2012, Tri-D made an inquiry for a loan from a financial institution. The credit union responded, stating that a loan would have to be paid off prior to the expiration of the lease. [FAA Item 1 page 19]

BARNETT Lease

On March 15, 2010, the Respondent approved the assignment of a lease from Lt. Col. Alexander H. C. Harwick to Barnett commencing April 10, 2007. The lease expired on January 1, 2011. The lease provided that the lease "*must be renewed subject to negotiations of such terms as the CITY may fix.*" [FAA Item 1, page 20 and Exhibit 9]

On October 3, 2010, Barnett informed the Respondent of his intent to renew the lease for his hangar. [FAA Item 1, page 20 and Exhibit 26]

On May 12, 2012, Barnett joined the other Complainants in filing a Part 13 Informal Complaint. [FAA Item 1, page 20 and Exhibit 43]

On August 16, 2012, Barnett informed the Respondent by letter that under the terms of the lease he was invoking the option to renew. [FAA Item 1, page 20]

M & R Lease

On June 16, 2003, the Respondent entered into a lease agreement for a ten-year term with Dr. Roger Kemp, the principal of M & R, for airport property with an existing hangar. The lease expires on or about June 16, 2013, and provided for two renewal periods of five years. [FAA Item 1, page 21 and Exhibit 3]

On May 12, 2012, M & R joined the other Complainants in filing a Part 13 informal complaint. [FAA Item 1, page 21 and Exhibit 43]

In August 2012, M & R made a loan inquiry at its financial institution. The response to the inquiry was that a loan would be denied based on the short term of the lease. [FAA Item 1, page 21]

Airport tenants

The relevant airport tenants consist of nine Commercial Operators. Six of these tenants are operating under valid leases. [FAA Item 1 page 6] There are three hold-over tenants operating under an expired lease.

The tenants operating under valid leases at the time the Complaint was filed are:

- Arrowhead Plastics Engineering, Inc., assumed its lease effective July 6, 1989, and the lease was extended on October 5, 2009 for a period of five years set to expire on August 31, 2014. [FAA Item 7, page 6-7]
- Brett Curenton's (Curenton) lease became effective on June 6, 2003, and will expire on June 15, 2013. [FAA Item 7, page 6 and Item 1, Exhibit 4]
- M & R entered into a lease on June 16, 2003, for a term of ten years, with an expiration date of June 15, 2013. [FAA (DD) Item 1, exhibit C-3,]
- AirEvac's, lease expired on February 28, 2011, and the New Standard Lease for a one-year term was executed for a term beginning January 1, 2012, with an expiration date of December 31, 2012. [FAA Item 7, page 6, fn. 6]
- Mike Albertson's lease expired on December 31, 2011, and the New Standard Lease was executed for a one-year term expiring on December 31, 2012.
- Moffet's lease expired on December 31, 2011, and the New Standard Lease was executed for a one-year term expiring on December 31, 2012.

The tenants that failed to sign the New Standard Lease and do not have valid leases are:

- Tri-D's lease expired December 31, 2011, and it is currently a holdover tenant. [FAA Item 7 page 9-10]
- Frank Barnett's lease expired on January 1, 2011, and he is currently a holdover tenant. [FAA Item 7 page 9]
- McDonough's lease expired on September 30, 2007. McDonough and the Respondent engaged in lease negotiations at that time regarding a dispute over the proposed five-year lease term and other provisions in the lease. They were unable to agree to the term. McDonough has been a holdover tenant since 2007. [FAA Item 7 page 9]

The Respondent approved the New Standard Lease with a one-year lease term in November 2011. The tenants currently under a lease with terms longer than a year are operating under pre-existing leases.

B. Procedural History

On August 28, 2012, Complainants filed their Complaint alleging the Respondent violated 49 U.S.C. §47107(a) and Airport Grant Assurances 5, 19, 22, 23, 24 and 38, includes exhibits 1 - 70.

On August 31, 2013, Complainants filed First Amended Complaint with exhibits 71-79.

On October 1, 2012, Respondent filed Unopposed Motion of the City of Wetumpka for and Extension of Time to File Answer.

On October 22, 1012, Respondent filed Answer to Complaint and Motion to Dismiss with exhibits 1-19.

On October 31, 2012, Complainants filed Motion for Extension of Time to file a Reply and Answer to the Motion to Dismiss.

On November 9, 2012, Complainants filed Reply to the City's Answer and Response to the City's Motion to Dismiss.

On November 20, 2012, the Respondent filed its Rebuttal.

On October 20, 2013, the FAA issued a Director's Determination and found the City to be in compliance with its grant assurances.

On December 13, 2013, McDonough Properties, LLC, filed an Appeal of the Director's Determination. This submission included several documents:

- Exhibit CA-1 Emails between Regina Edwards and Wade Ramsey dated October- December 2013.
- Exhibit CA-2 Wetumpka Municipal Airport Feasibility Study dated July 2013.
- Exhibit CA-3 Arrowhead lease with extension letter dated August 15, 2009.

- Exhibit CA-4 New Standard Lease
- Exhibit CA-5 Press release dated March 26, 2013 of study determination
- Exhibit CA-6 News article re December 6, 2010, City Council meeting to study airport relocation.
- Exhibit CA-7 Emails between Regina Edwards and Wade Ramsey, dated 4/15/13.
- Exhibit CA-8 Picture of airport layout.

On December 24, 2013, the City of Wetumpka filed its Reply to the Complainant's Appeal.

On March 21, 2014, the FAA issued an extension of time until June 10, 2014. [FAA Exhibit 1, Item 5]

On July 3, 2014, the FAA issued an extension of time until October 31, 2014.

On December 10, 2014, the FAA issued an extension of time until January 16, 2015.

APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such 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 and 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 fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, and enforcement of Airport Sponsor Assurances.

The Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, (AAIA) as amended. Title 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal Government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *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.[4] FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with Federal obligations of airport sponsors. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

The FAA grant assurances that apply to the circumstances set forth in this Complaint include: (1) Grant Assurance 5, *Preserving Rights and Powers*; (2) Grant Assurance 19, *Operation and Maintenance;* (3) Grant Assurance 22, *Economic Nondiscrimination;* (4) Grant Assurance 23, *Exclusive Rights; (5)* Grant Assurance (24), Fee and Rental Structure; and (6) Grant Assurance 38, *Hangar Construction.*

Grant Assurance 5, Preserving Rights and Powers

Grant Assurance 5, *Preserving Rights and Powers*, (Assurance 5) requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. This assurance implements the provisions of the AAIA, 49 U.S.C. § 47107(a), *et seq*:

Assurance 5 requires, in pertinent part, that the sponsor of a federally obligated airport:

> *...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.* [Assurance 5]

Grant Assurance 19, *Operation and Maintenance*

Grant Assurance 19, *Operation and Maintenance*, implements the provisions of the AAIA, 49 U.S.C., § 47107(a)(7), and requires, in pertinent part, that the sponsor of a federally-obligated airport assure:

> *The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall*

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[4] *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for:
(1) Operating the airport's aeronautical facilities whenever required;
(2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and,
(3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

Additionally, FAA Order 5190.6B provides that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, FAA advises airport sponsors to establish adequate rules covering, *inter alia*, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection. [*See,* FAA Order 5190.6B, Chapter 7 Airport Operation, Section 7.9]

Grant Assurance 22, *Economic Nondiscrimination*

Grant Assurance 22, *Economic Nondiscrimination*, requires the owner of any airport developed with Federal grant assistance to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Grant Assurance 22 deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 implements the provisions of 49 U.S.C. § 47107(a) (1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a)]

...may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)]

...may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i)]

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [*See* FAA Order 5190.6B, ¶14.3]

FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* FAA Order 5190.6B, Chapter 9]

The owner of an airport developed with Federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activities on reasonable terms and without unjust discrimination. [*See* FAA Order 5190.6B, ¶9.1.a]

Grant Assurance 23, *Exclusive Rights*

Grant Assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.

...will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...

In FAA Order 5190.6B, *FAA Airport Compliance Manual*, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application

of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. *[See e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985)]*

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* Order, Sec. 8.9.d *Space Limitation.*]

FAA Order 5190.6B provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* Order, Chapter 8.]

Grant Assurance 24, *Fee and Rental Structure*

Grant assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides.

Section 47107(a)(13) of 49 U.S.C. requires, in pertinent part, that the owner or sponsor of a federally obligated airport "will maintain a fee and rental structure for the facilities and services being provided to airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport." In addition, under § 47107(a), fees levied on aeronautical activities must be reasonable and not unjustly discriminatory.

Grant assurance 24 satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the owner or sponsor of a federally-obligated airport agrees that it will maintain a fee and rental structure consistent with assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights.* The airport owner or sponsor agrees to establish a fee and rental structure that 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. The intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible.

Moreover, FAA Order 5190.6B, *Airport Compliance Requirements*, states that the owner or sponsor's obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair and reasonable fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [*See* Order, 4-14(a).]

Grant Assurance 38, *Hangar Construction*

Section 47107(a) (21) of 49 U.S.C. requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

...and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program. The Order establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable Federal obligation to be grounds for dismissal of such allegations. [*See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01) Wilson Air Center, LLC v FAA, 372 F.3d 807 (6th Cir. 2004)]*

FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended (FAAct), 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 such program, the airport owner or 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 owners or 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. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their Federal grant assurances.

The Complaint Process

Pursuant to 14 CFR Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR Part 16, § 16.23(b) (3, 4)]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR Part 16, § 16.23]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." [5 U.S.C. § 556(d).] [*See also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).*] Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires that the complainant must submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

Title 14 CFR § 16.31(b-d), in pertinent parts, provides that "(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in §16.33." In accordance with 14 CFR § 16.33(b) and (e), upon issuance of a Director's determination, "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;" however, "(i)f

no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable."

Title 14 CFR § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C., § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C., § 47106(d) and 47111(d).

ISSUES ON APPEAL

On Appeal, the Complainants allege that the Director erred in concluding the Respondent is not currently in violation of its grant assurance obligations because those findings and conclusions were not supported by the administrative record, law and regulations or policy. Specifically, the Complainants raise the following four issues on Appeal:

1. **Did the Director err when he held it was not unreasonable under Grant Assurance 22, *Economic Nondiscrimination*, to limit tenants to a one-year lease?**

2. **Did the Director err by finding that the Respondent was "not in violation of Grant Assurance 24, *Fee and Rental Structure*, as a result of the New Standard Lease with a one year term"?**

3. **Did the Director err when he found that the record failed to support the assertion that nonaeronautical users were treated more favorably?**

4. **Did the Director err by not finding that the Respondent gave an exclusive right to a non-aeronautical tenant in violation of Grant Assurance 23, *Exclusive Rights*, 49 U.S.C., § 40103(e), and 49 U.S.C. § 47017(a)(4)"**

VI. ANALYSIS AND DISCUSSION

The Director's Determination found that the City of Wetumpka did not violate Grant Assurance 5, *Preserving Rights and Powers;* Grant Assurance 19, *Operation and Maintenance*; Grant Assurance 22, *Economic Nondiscrimination;* Grant Assurance 23, *Exclusive Rights;* Grant Assurance 24, *Fee and Rental Structure;* and Grant Assurance 38, *Hangar Construction.* The specifics of these findings are detailed in the above Section II, Summary of the Director's Determination.

In the Appeal, the Complainants' take issue with the Director's findings on Grant Assurance 22, 23 and 24.

Issue 1 - Did the Director err when he held it was not unreasonable under Grant Assurance 22, *Economic Nondiscrimination*, to limit tenants to a one-year lease?

The Director held in his Determination that "the [City's] decision to limit the term of the lease was not an unreasonable approach to a possible impending change at the airport. The one-year lease puts the tenants on notice that the airport may be in transition and tenants should plan accordingly." [FAA Exhibit 1, Item 2, page 17]

The Director also stated,

> "In Pompano, the lease was the standard lease with a two year term. The Airport in Pompano did not articulate a business purpose for the limited lease term. In Pompano, the FAA found that the airport sponsor was in violation of its grant assurance for failure to grant long term leases. The facts in Pompano can be distinguished from the present set of facts because the Respondent in this complaint has articulated a legitimate business purpose to support its decision to limit lease terms to one-year and no tenants were offered longer term leases than the Complainants."

[FAA Exhibit 1, Item 2, page 21]

The Complainant argues on Appeal that,

> *"The Director cites in his Determination a 'policy' that allows a sponsor to violate its grant assurances if there exists a 'legitimate business purpose' to do so.' [citation omitted] Such a 'policy' flies in the face of logic and reason. To allow an airport to circumvent its federal obligations under the guise of having a 'legitimate business purpose' would give airports carte blanche authority to violate the grant assurances whenever the airport finds it convenient to do so.*
>
> *.... The 'legitimate business purpose' exception to airport obligations is a dangerous precedent created by the Director here that must be reversed."*

[FAA Exhibit 1, Item 1, page 5]

The Complainant adds;

> *"Further, the City remains in violation of its federal obligations because while the "legitimate business purpose" has gone away (the feasibility study ended March 26, 2013),[footnote omitted] by correctly concluding that the City does not need to move the airport, it has not negotiated with nor offered the Complainants anything other than a one-year non-renewable lease. [footnote omitted][citation omitted] The City knows that it is currently in violation of its grant assurances because it has communicated to Complainants' Counsel that it is in the process of developing a standard lease that will extend the leases to a 10 year term with 5 year renewals."[citation omitted] [5]*

[5]The Complainants have not provided further information regarding current (post – Director's Determination) lease negotiations other than to state that the City has communicated to Complainant's counsel that it is in the process of developing a longer term lease.

[FAA Exhibit 1, Item 1, pages 5-6]

In its Reply to the Appeal, the City states,

> *"Complainants' first allegation of error, that the Director incorrectly developed a "new policy" that 'allows a sponsor to violate its grant assurances if there exists a 'legitimate business purpose' to do so' (Appeal at 5, citing Director's Determination at 22) mischaracterizes the Director's findings. The Director neither held that a 'legitimate business purpose' could ever excuse an airport sponsor from its Federal obligations, nor developed a policy that would allow an airport sponsor to violate its Federal obligations. Rather the Director found that the City was in compliance with its Federal obligations. See*, e.g. Director's Determination at 23, 24, 27, and 29."

[FAA Exhibit 1, Item 3, page 4]

Additionally, the City states,

> *"Complainants do not provide any credible arguments or point to any evidence in the administrative record contradicting the fact that the City was actively exploring alternatives to realize the future growth of the Airport when it temporarily implemented the standard one-year lease, or that it was (and is) within a City's proprietary powers to take actions that are in the short- and long-term best interest of the Airport. Rather, Complainants argue that: (1) the Director erred because he misinterpreted United States Construction Corp. v. City of Pompano Beach, FAA Docket No. 16-00-14, Final Agency Decision (July 10, 2002) ("Pompano") (Appeal at 7-8); (2) even if the City did have a "legitimate business purpose" for considering the future of the Airport, the City "did not undertake the feasibility study until after it had denied Complainants' requests to exercise their renewal options but restricted the Complainants to a new lease" (Appeal at 5); and (3) the City is currently in violation because the feasibility study has been completed and now the City is in the process of developing a new standard hangar lease (Appeal at 6). None of these arguments withstand the most cursory scrutiny."*

[FAA Exhibit 1, Item 3, page 5]

The City also argues,

> *"...Complainants allege that the City's legitimate business purpose is not valid because it arose after the City 'denied Complainants' request to exercise their renewal options. Complainants are conflating the facts. The lease negotiations that occurred between the City and Complainant McDonough in 2007 were related to a different lease than the one at issue before the Director. The lease at issue in the Complainants' complaint was the City's temporary standard one-year lease. The Director correctly found that the City's*

adoption of a one-year took place in 2011, after the City commissioned a feasibility study for the future of the Airport. Thereafter, the City did not offer, or enter into, a longer-term lease with any other Airport tenant. Contrary to the Complainants' assertions, the validity of the City's business purpose for adopting a one-year lease does not hinge on prior events." [FAA Exhibit 1, Item 3, pages 6-7]

In a footnote to the Reply, the City also stated, *"It should be noted that in Pompano, the complainant was being denied access to the airport. Here, Complainants have not been denied access. On the contrary, all of the Complainants have had access to the Airport and continue to do business from each of their respective Airport leaseholds."*

[FAA Exhibit 1, Item 3, page 6, fn 5]

In this case, the Complainants and Arrowhead are not similarly situated (as discussed in more detail in Issue 3-4). In Pompano, the entities were considered to be similarly situated. Additionally, as the Director points out, the City engaged in a thorough review via a feasibility study to determine whether it was more advantageous to relocate the airport or have it remain in its current location. [FAA Exhibit 1, Item 2, page 17] This action justified the City's use of a temporary lease pending the outcome of the study. The Director did not articulate a 'new policy' of a legitimate business purpose but rather found that that the City had an identified goal and was proceeding in a prudent fashion. To grant longer term leases when it was unclear if the airport was going to remain in its present location would have been irresponsible and potentially harmful to the existing tenants.

In their Appeal, the Complainants provided additional information and exhibits. One exhibit contained an email from Regina B. Edwards, counsel for the Respondent, dated December 3, 2013, to Wade Ramsey, counsel for the Complainant, and stated in part, *"As I told you before, we are proposing a standard lease with an initial 10 year term with two 5-year renewal options. In the event of new construction we would consider adjusting the term to allow for depreciation of the improvements. The rental rates would be based on fair rental value of the leased property and then adjusted by the Consumer Price Index as we discussed. I believe we are very close on finalizing a lease that will be acceptable to all parties. Although the City would love to have this process completed and the new leases in place by January 1, 2014, we are prevented from doing so since we will not have all the necessary information to finalize the lease by then, so it appears that it will be mid-January or so before this will be done."* [FAA Exhibit 1, Item 1, exhibit CA-1, page 5 of 6]

This information supports the City's contention that it is now offering longer term leases as sought by the Complainants. The gravamen of the Complaint was that the City was not offering lease terms longer than one year. The evidence that the City is moving to 10-year leases for tenants essentially moots the Complainant's argument that they have been denied longer term leases.

The Complainants have not met the burden of proving that the Director erred in his analysis with Pompano. The fact that the Complainants were not satisfied with the process of the feasibility study does not mean that the airport sponsor was not within its proprietary rights to engage in the

study. As noted earlier, the fact that the City has concluded this study and determined that longer term (10 year) leases are appropriate and efforts have been made to communicate this information to the Complainants essentially renders this argument in the Appeal with little practical value.

The Complainants' argument that the Director erred when he identified the process the City was undertaking with its feasibility study as having a legitimate business purpose has no merit.

Issue 2 - Did the Director err by finding that the Respondent was "not in violation of Grant Assurance 24, *Fee and Rental Structure*, as a result of the New Standard Lease with a one year term"?

In the Director's Determination, the Director stated,

"The administrative record does not contain any evidence that the Respondent's business decision is impacting the airports ability to be self-sustaining. While Complainants may disagree with the financial business decisions of the Respondent regarding the development of the Airport, the Respondent has the proprietary right to make such decisions. It may be appropriate for the Respondent to decline to enter into a long term lease with a tenant for an area slated for redevelopment. The Respondent offered a business decision as support for the lease term."

[FAA Exhibit 1, Item 2, page 27]

Additionally, the Director's Determination stated,

"In this case, the Complainants' concern appear [sic] to have less to do with the self-sustainability of the airport and more to do with their desire for long term leases and maintaining the current status of the Airport. The Complainants have not provided any information to support its contention that the Respondent's New Standard Lease has impaired the Airports ability to be self-sustaining. To the contrary, it appears from the record that all tenants at the Airport with leases due for renewal, except for the Complainants, have signed the new one year lease." [citation omitted]

[FAA Exhibit 1, Item 2, page 25]

The Complainants argue on Appeal,

> *"The Director erred by finding that the City could [not] violate the self-sustainability provision of Grant Assurance 24 when it required the Complainants to sign a one-year lease. One-year leases are, on their face, contrary to an airport's self-sustainability. Airports cannot attract tenants to invest in infrastructure and equipment necessary to operate an airport with one-year leases."*

[FAA Exhibit 1, Item 1, page 14]

To support this argument, the Complainants state,

> *"The Director makes the point that the Complainants had not made applications for hangar improvement loans – just that they had written letters inquiring about such loans – and that the Complainants had not approached the Airport for approval of hangar improvements....To the contrary, it is intuitively obvious that a business person does not go to the expense of submitting a loan application if the loan application will be denied....Likewise, it is intuitively obvious that a prudent business person would not approach a lessor seeking permission to make improvement or expansions if it were impossible to fund those improvements or expansions. In this instance there is sufficient evidence in the record to support a finding that loans cannot be obtained for improvements to leaseholds with one-year terms which thereby results in a conclusion that the Airport is not self-sustainable because of its policies."*

[FAA Exhibit 1, Item 1, page 13]

In its Reply to the Appeal, the City states,

> *The Director correctly determined that the City justified the one-year lease terms based on, among other things, 'its business decision to explore the expansion of the airport or its relocation by conducting a Feasibility Study' and 'on a business decision designed to streamline its tenants' leases to allow it to further develop the airport.*

Further, the City argues,

> *Besides Complainants own speculations about how a' prudent business person' would act, the Appeal again fails to provide any evidence or analysis in support of their claim. Instead, Complainants offer a laundry list of lease provisions that could have made the lease more palatable to them...Federal obligations should not require the City to unconditionally bend to the Complainants' demands.*

[FAA Exhibit 1, Item 3, pages 8-9]

The Director's Determination did not state that "*the City could violate the self-sustainability provision of Grant Assurance 24 when it required the Complainants to sign a one-year lease.*" [*See* FAA Exhibit 1, Item 1, page 14] Rather, the Determination stated, "[t]he administrative record does not contain any evidence that the Respondent's business decision is impacting the airports ability to be self-sustaining." [FAA Exhibit 1, Item 2, page 27]

In the Appeal, the Complainants disagree with the Director and state, *"In this instance there is sufficient evidence in the record to support a finding that the loans cannot be obtained for improvements to leaseholds with one-year terms which thereby results in a conclusion that the Airport is not self-sustainable because of its policies."* [FAA Exhibit 1, Item 1, page 14]

Grant Assurance 24, *Fee and Rental Structure*, has more flexibility than other Assurances in that compliance is generally determined over the *longer term*. An airport sponsor could not reasonably be found in violation of this assurance by judging its financial performance over just one year. In this case, the airport sponsor was taking a proactive approach in determining the future location of the airport. Section 17 of FAA Order 5190.6B (Airport Compliance Handbook) states:

> "If market conditions or demand for air service do not permit the airport to be financially self-sustaining, the sponsor should establish long-term goals and targets to make the airport as financially self-sustaining as possible." [FAA Order 5190.6B, Section 17.7]

Grant Assurance 24 does not necessarily prohibit agreements that in the short term may not maximize revenues. Airports must maintain a fee and rental structure that makes the airport as financially self-sustaining as possible under the particular circumstances at that airport. The requirement recognizes that individual airports will differ in their ability to be fully self-sustaining, given differences in conditions at each airport. The purpose of the self-sustaining rule is to maintain the utility of the Federal investment in the airport. [FAA Order 5190.6B, Section 17.5]

The Complainant's argument is not persuasive. The City was well within its proprietary rights to examine whether the airport should remain in its current location or move to a new location. It was a prudent business decision to require short-term leases while the feasibility study was ongoing. The fact that the Complainants were not in agreement with this decision does not make it a violation of the grant agreements. The grant agreements are in place to protect the Federal investment made in airports, not to provide protection to tenants who demand specific lease terms for their own interest. The Complainants have not explained why they think the Director erred in the findings and conclusions or why those findings are not supported by the administrative record, regulations, law, or policy. Rather, the Complainants continue to argue that they should have had the right to a lease term of their choosing, notwithstanding the City's determination to evaluate the future of the airport and its location.

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. Grant assurance 24, *Fee and Rental Structure*, does not require airport sponsors to establish fees that will general the greatest possible income. [*See* 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, (June 21, 2007) (Director's Determination).]

The Director's finding that the City was not in violation of Grant Assurance 24, *Fee and Rental Structure,* is upheld.

Issue 3 - Did the Director err when he found that the record failed to support the assertion that nonaeronautical users were treated more favorably?

In the Director's Determination, the Director stated,

"The Complainants alleged that the Respondent engaged in disparate treatment between airport users, resulting in economic discrimination. They claimed that the Respondent leased airport property to nonaeronautical users, specifically Arrowhead Plastics Engineering (Arrowhead) and The Pilot Center, Inc. operated by Brett Curenton (Curenton) with terms more favorable than those given to the Complainants. [FAA Exhibit 1, Item 1 pages 32, 33] To support this allegation the Complainant compared the renewal negotiations for McDonough to the renewal of the Arrowhead lease."

[FAA Exhibit 1, Item 2, page 19-20]

"The record confirmed that the current Arrowhead lease was renewed prior to the adoption of a new standard lease; accordingly, Arrowhead was not treated more favorably than the Complainants." [FAA Exhibit 1, Item 2, page 21]

On Appeal, the Complainants argue that,

> *"Again, the Director has failed to understand the facts in this case. Curenton IS an aeronautical user that DOES HAVE access to the runway. [Emphasis in the original] As can be seen on Complainant's exhibits C-2 and CA-8, Curenton owns a hangar adjacent to the airport runway. He operates a flight school that is an aeronautical function. To say that Curenton is not similarly situated to the Complainants is completely wrong. And it is in error to find that Arrowhead was not treated more favorably than McDonough or Barnett when Arrowhead's lease was renewed on October 9, 2009, and McDonough and Barnett's leases were not renewed on July 30, 2007, and October 3, 2010, respectively. The record amply supports this fact."*

[FAA Exhibit 1, Item 1, page 12]

In its Reply to the Appeal, the City states,

> *Complainants argue that the Director erred by finding that Curenton is not similarly situated to them. While Complainants may be correct in stating that Curenton is an aeronautical tenant the Director's finding otherwise is a harmless error. The Director's conclusion that Curenton is not similarly situated is valid because Curenton's lease was not set to expire until June 15, 2013, whereas the Complainants' leases had already expired or were set to expire soon after the Complaint was filed. [See Director's Determination at 7, 22 (citing R. Item 7, at 9-10, 34); see also Item 1, Ex. 51 at Ex. B). Moreover, Complainants do not assert that the Director's misstatement about Curenton was prejudicial. Rather, all of Complainants' allegations of prejudicial errors are related to Arrowhead's lease.*

[FAA Exhibit 1, Item 3, page 10, fn 9]

The City additionally argues,

> *In finding that the City was not in violation of Grant Assurance 22, the Director compared Complainant McDonough's lease with Arrowhead's lease and found that because Arrowhead is a nonaeronautical tenant, does not have airfield access, and would not be impacted in the same was as aeronautical tenants if the Airport were relocated, it is not similarly situated to the Complainants.*

[FAA Exhibit 1, Item 2, page 9]

The Director's apparent misidentification of the Curenton lease as nonaeronautical does not materially change the outcome of the Director's Determination, nor does the Complainant allege that the misidentification was in any way prejudicial. A review of Complainant's exhibit C-8 identifies The Pilot Center operated by Brett Curenton as an aeronautical use with airfield access. [FAA Exhibit 1, Item 1, exhibit CA-8]. However, the Complainants' have not alleged or provided evidence that Curenton received a longer or more favorable lease term upon expiration of its lease in June 2013. Rather, the issue on Appeal is whether the City unjustly discriminated against the Complainants by allowing Arrowhead, a nonaeronautical tenant, to renew its lease after the City refused to renew the Complainant's aeronautical lease.

The Director provided a thorough analysis in the Determination of why Arrowhead and the Complainants were not similarly situated for the purposes of Grant Assurance 22. The evidence shows that Arrowhead is not an aeronautical tenant and the Complainants, by virtue of their lease agreements to hangar aircraft on the airport, are aeronautical tenants. Aeronautical tenants and nonaeronautical tenants are not similarly situated and may be treated differently. [FAA Exhibit 1, Item 2, page 22-22]

As identified in the Director's Determination, Arrowhead Plastics Engineering, Inc., assumed its lease effective July 6, 1989, and the lease was extended on October 5, 2009 for a period of five years set to expire on August 31, 2014. [FAA Exhibit 1, Item 2, page 21] There was no dispute in the Director's Determination that the Arrowhead lease was for a nonaeronautical user that was not permitted to engage in aeronautical activities on the airport, and where that nonaeronautical leasehold was separated from the airfield by a state highway resulting in no airfield access. FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner **those users making the same or similar use of the airport** [emphasis ours] and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* FAA Order 5190.6B, Chapter 9, Section 9.6]

In Vincent DeSciose, Jr., and Omaha Airplane Supply, Inc., d/b/a Aero Realty Company v. City of Long Beach, CA, FAA Docket No. 16-99-12 (December 13, 2001) (Final Decision and Order), the issue of whether two entities, Westland, identified as a developer and DeSciose identified as a fixed-base operator, was a critical element in the review. The FAA wrote, "[i]f Westland is characterized as a developer and DeSciose as a fixed-base operator, the two could

not be considered similarly situated and the Complainant could not prevail on a claim of unjust economic discrimination…The FAA could review this complaint and evaluate allegations of unjust discrimination under the grant assurances only if both enterprises were characterized as aeronautical and were similarly situated."

The decision further states, "If both Westland and DeSciose are characterized as developers, they might be similarly situated, but would not fall under the grant assurances designed to protect aeronautical users. In that case, an issue would have been raised relevant to DeSciose's standing and whether he would have been permitted to bring this Part 16 complaint forward. The FAA could review this complaint and evaluate allegations of unjust discrimination under the grant assurances only if both enterprises were characterized as aeronautical and were similarly situated. The Complainant characterized Westland in the appeal as an aeronautical provider and characterized its own enterprise as a fixed-base operator, which is also an aeronautical provider." (Vincent DeSciose, Jr., and Omaha Airplane Supply, Inc., d/b/a Aero Realty Company v. City of Long Beach, CA, FAA Docket No. 16-99-12 (December 13, 2001) (Final Decision and Order) Page 27)

Grant assurance 22, *Economic Nondiscrimination*, prohibits only *unjust* economic discrimination, not *all* economic discrimination. The principle of unjust economic discrimination requires a party who has been allegedly discriminated against to be "similarly situated" to an alleged preferred party in order to establish unjust economic discrimination under assurance 22. [*See* R/T-182, LLC v. Portage County Regional Airport Authority, FAA Docket No. 16-05-14, (March 29, 2007) (Final Agency Decision), page 12.]

The FAA has acknowledged that several factors can distinguish parties that a sponsor can justly treat differently without violating its Federal obligations. Such factors may include: period of lease, business plan proposed, location of facilities, level of service and amenities, scope of services, investment, market conditions, and reasonable actions by the sponsor to promote and protect its ability to continue to serve the interests of the public in civil aviation, including the enlistment of prudent business practices that may change over time. [*See* Richard M. Grayson and Gate 9 Hangar, LLC v. DeKalb County, GA, FAA Docket No. 16-05-13, (February 1, 2006) (Director's Determination).]

The Complainants have failed to demonstrate by a preponderance of evidence that they are similarly situated to Arrowhead and were therefore unjustly discriminated against by the terms the lease.

The arguments presented by the Complainants do not support the proposition that the Director erred in his finding that Arrowhead and the Complainants were not similarly situated. The Director's Determination finding that the City is not in violation of Grant Assurance 22 is upheld.

Issue 4 - Did the Director err by finding that the Respondent did not grant an exclusive right to a non-aeronautical tenant in violation of Grant Assurance 23, *Exclusive Rights*, 49 U.S.C., § 40103(e), and 49 U.S.C. § 47017(a)(4)"

In the Director's Determination, the City acknowledged that Arrowhead was a nonaeronautical user but denied that they were treated more favorably. The City stated that Arrowhead was not similarly situated to the Complainants and the Director's analysis found this to be evident. Arrowhead is a nonaeronautical user not permitted to engage in aeronautical activities at the airport. Additionally, Arrowhead operates its facilities from leasehold that is separated from the airfield by a state highway and it has no airfield access.

The Director also stated, "[t]he Complainants argue that the Respondent is in violation of Grant Assurance 23, Exclusive Rights, in 'conferring exclusive rights on Arrowhead and Curenton by allowing them to retain a long term lease but denying that right to the Complainants."

> "The Complainants' contention that Arrowhead and Curenton were offered longer leases than the Complainants has been fully analyzed .... As explained in the analysis of Grant Assurance 22, this assertion by the Complainants is not supported by the facts in the record, specifically no other tenants, aeronautical or non-aeronautical, were offered longer term leases than the Complainants."

[FAA Exhibit 1, Item 2 (DD), page 25]

In their Appeal, the Complainants admit that they are not similarly situated to Arrowhead, stating;

> *"The City discriminated against the Complainants by signing a longer term lease with Arrowhead when Arrowhead, while not similarly situated, should not receive more favorable treatment then Complainants because Arrowhead is a non-aeronautical user and the Complainants are aeronautical users."*

[FAA Exhibit 1, Item 1, page 12]

The Complainants' add;

> *"In addition to the effect of allowing Arrowhead to renew its lease but denying Complainants the right to renew their leases is providing an exclusive use to Arrowhead.* The Complainants go on to state, *"The City conferred a right upon Arrowhead to renew its lease on October 5, 2009...The City should not be allowed to refuse to renew the Complainants' leases on either side of the Arrowhead lease when it renewed the Arrowhead lease. By doing so, the City gave Arrowhead an exclusive right in violation of Grant Assurance 23."*
> [FAA Exhibit 1, Item 1, page 9]

In its Reply to the Appeal, the City states,

> *"Complainants only argument in support for their claim that the Director's Grant Assurance 23 findings are in error is that the City 'refuse[d] to renew the [Complainant McDonough and Barnett's] leases on either side of the Arrowhead lease when it renewed the Arrowhead lease...Complainants neither*

dispute the Director's factual findings nor do they provide any support to contradict the legal precedent on which the Director relied. In fact, they concede that Arrowhead is not an aeronautical tenant, and that the City instituted the temporary one-year lease after Arrowhead renewed its lease."

[FAA Exhibit 1, Item 3, page12]

In order to make a finding of a violation of Grant Assurance 23, *Exclusive Rights,* the FAA must determine that the City established such inequity in its **aeronautical leases** (emphasis ours) as to create a significant burden on one competitor that is not placed on another provider of a particular aeronautical service or activity on the airport. As discussed above, Arrowhead is a nonaeronautical tenant and therefore was not granted any right to provide a particular aeronautical service that was not provided to the Complainants. In particular, the sponsor may not grant a special privilege or a monopoly to anyone providing aeronautical services on the airport or engaging in an aeronautical use. The intent of this restriction is to promote aeronautical activity and protect fair competition at federally obligated airports.

An aeronautical activity is defined as any activity that involves, makes possible, or is required for the operation of aircraft or that contributes to or is required for the safety of such operations. Arrowhead, as a nonaeronautical business does not fall under this definition and the Complainants and Arrowhead are not in competition with each other.

The FAA will not normally find the airport sponsor in violation of Grant Assurance 23, *Exclusive Rights*, where the complainant does not show the airport sponsor granted to another entity the exclusive right to conduct a particular aeronautical activity or to provide a particular aeronautical service on the Airport. [*See* Asheville Jet, Inc. d/b/a Million Air Asheville v Asheville Regional Airport Authority; City of Asheville, North Carolina; and Buncombe County, FAA Docket No. 16-08-02, (Director's Determination, page 20)]

In order to make a finding of a violation of Grant Assurance 23, *Exclusive Rights,* the FAA would have to determine that the City established such inequity in its aeronautical leases as to create a significant burden on one competitor that is not placed on another provider of a particular aeronautical service or activity on the airport. As discussed above, Arrowhead is a nonaeronautical user and therefore, was not granted any right to provide a particular aeronautical service that was not provided to the Complainants. Again, the record shows that Arrowhead assumed its lease in 1989 and renewed it in 2009 for five years. This renewal occurred prior to the Respondent's adoption of a new standard lease. Arrowhead was not treated more favorably than the Complainants – it had an existing lease when the Respondent initiated its new leasing policy.

Complainants do not present any evidence or argument of circumstances beyond which is discussed above to establish an exclusive right. The Associate Administrator affirms the finding in the Director's Determination that the City is not in violation of Grant Assurance 23, *Exclusive Rights*.

Submission of new documents

The Complainants seek to supplement the Administrative Record by including additional documentary evidence. In considering the administrative appeal, new evidence may be submitted if it was not previously available and could not have been previously discovered or proffered by the parties [14 CFR 16.33(3)]

In this case, the information submitted to the Record consists of eight (8) exhibits. Four (4) of the documents are substantially similar to documents already part of the administrative record. Three (3) related to the feasibility study and one (1) is communications between complainants and attorney regarding payments by M&R Holdings. Additionally, there several emails included between counsels Regina Edwards and Wade Ramsey. These emails include information supporting the City's intent and efforts to develop longer term leases for on-airport tenants. [FAA Exhibit 1, Item 1, exhibit C-1, email dated 12/3/2013 from Regina Edwards regarding 10- year lease with 5-year renewal provisions.]

The supplemental evidence is accepted.

VII. CONCLUSION

The FAA'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. As noted above, the Complainants allege error by the Director in his findings on Grant Assurance 22, *Economic Non Discrimination;* Grant Assurance 23, *Exclusive Rights;* and Grant Assurance 24, *Fee and Rental Structure*, but have failed to back their allegations with supporting fact and evidence. The Complainants may not have agreed with the City and its efforts to determine whether the airport should remain in its current location or be relocated but as noted above, it is the right of an airport sponsor to plan for the future and examine possible relocation options. Although temporarily inconvenient for some tenants, as part of its ongoing planning process, airport sponsors may appropriately reevaluate any number of factors at the airport, including location. Such planning is well within their role as the airport proprietor. Additionally, it appears from information provided in the Appeal pleadings that the City has made the decision to remain in its current location and has reached out to Complainant's counsel to negotiate longer term leases as sought by the Complainants.

Upon an 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. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order), p. 21]

In arriving at a final agency decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Appeal and Reply submitted by the parties, and applicable law and policy. Based on this reexamination, the Administrator concludes that the analysis contained in the Director's Determination with regard to Grant Assurance 22, 23 and 24 is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed with regards to the sponsor's compliance with Grant Assurance 22, Economic Non Discrimination; Grant Assurance 23, Exclusive Rights; and Grant Assurance 24, Fee and Rental Structure. The Appeal is dismissed, pursuant to 14 CFR § 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 not later than 60 days after a Final Agency Decision and Order has been served on the party. [14 CFR § 16.247(a)]

Eduardo A. Angeles
Associate Administrator
for Airports

January 15, 2015
Date