

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

**Lawrence J. Minch and
Janice Kay Thompson,
Complainants**

v.

**Cottonwood Municipal Airport
City of Cottonwood, Arizona
Cottonwood**

FAA Docket No. 16-17-05

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter before the FAA is based on a complaint filed under Title 14 of the Code of Federal Regulations, Part 16 (14 C.F.R. Part 16)¹ by Lawrence J. Minch and Janice Kay Thompson (Complainants) against the City of Cottonwood, Arizona (Cottonwood). Cottonwood is the owner and sponsor of the Cottonwood Municipal Airport (P52 or Airport). The Complaint alleges that Cottonwood violated Grant Assurance 22, *Economic Nondiscrimination* in the terms of the Complainants' leases of airport property (with hangar improvements), which the Complainants allege are unfair and discriminatory when compared to the lease terms of other similarly situated leaseholders. The Complainants also allege these lease terms violate Grant Assurance 23, *Exclusive Rights*, Grant Assurance 38, *Hangar Construction*, and Grant Assurance 1, *General Federal Requirements*.

In its Answer and subsequent pleadings², Cottonwood argues that it has not discriminated against the Complainants. Cottonwood denies violating Grant Assurance 22, Grant Assurance 23, Grant Assurance 38, and Grant Assurance 1. (FAA Exhibit 5, Item 1; FAA Exhibit 2, Item 1)

With respect to the above-referenced matter, and based on the specific evidence provided in the case, the Director finds the City of Cottonwood, Arizona is not violation of its Federal obligations with respect to this complaint. The reasons for the finding of compliance are set forth below.

¹ Enforcement procedures regarding airport compliance matters may be found in *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 C.F.R. Part 16), published in the Federal Register (61 FR 53998, October 16, 1996) effective on December 16, 1996, and as amended, effective November 12, 2013.

² On June 2, 2017, Cottonwood filed a Motion to Dismiss, arguing that the Complainants failed to state a claim demonstrating violations of Grant Assurances 1, 22, 23, or 38, as alleged. (FAA Exhibit 5, Item 1) On October 16, 2017, the Director rejected the Motion to Dismiss and directed the parties to proceed with the procedural requirements in 14 C.F.R. §16.23, *Pleadings*. (FAA Exhibit 5, Item 3)

II. PARTIES

A. Complainants

The Complainants, Lawrence J. Minch and Janice Kay Thompson, are individual hangar tenants at P52. Mr. Minch serves as a trustee to “The 2004 L. And P. Minch Family Trust” and is signatory to the lease of land on which “Hangar C” sits. Ms. Thompson serves as the trustee to the “Cortez Diversified, LLC” and is the current signatory/assignee to the lease of land on which “Hangar D” sits. Both Complainants have paid rents and fees to the Airport as part of their tenant leases. Given this business relationship with the Airport, the Complainants are directly and substantially affected by the alleged noncompliances and thereby have standing in accordance with 14 C.F.R., § 16.23(a).

B. Cottonwood

Cottonwood Municipal Airport is a General Aviation airport owned and operated by the City of Cottonwood, Arizona. The airport has 13 based aircraft and accommodates over 18,000 operations annually (FAA Exhibit 8, Item 1). The Airport’s development has been financed, in part, with funds provided to the sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C., §47101, *et seq.* Since 1985, Cottonwood has accepted more than \$6,000,000 in federal grants for airport development and related investments (FAA Exhibit 9, Item 1). As a result of accepting AIP funds, the sponsor is obligated to comply with FAA sponsor assurances and related Federal law, 49 U.S.C. §47107.

III. BACKGROUND AND PROCEDURAL HISTORY

A. Background

Cottonwood began leasing vacant airport property in 1995, which allowed tenants to construct hangars or other improvements on land that had no previous facilities (FAA Exhibit 5, Item 1, p. 2). In November 1995, Cottonwood executed a lease for land (on which “Hangar G” now sits) with “Larry Green Chevrolet, Oldsmobile, Geo, Inc.” (Green) for a term of 25 years plus an additional 15-year extension option. Green later assigned the lease to “Dakota Territory Tours, A.C.C.” in 2003.³ (FAA Exhibit 6, Item 3)

On January 28, 2002, Cottonwood executed a lease with Cortez Diversified, LLC, signed by Donald C. Thompson, decedent Husband of Complainant Janice Kay Thompson, for land (on which Hangar D now sits) for a term of 25 years. Upon the passing of Donald C. Thompson, Complainant Thompson became the designated assignee of the lease. (FAA Exhibit 6, Item 5)

On May 20, 2004, Cottonwood executed a lease for land (on which Hangar C now sits) with “LAK, L.L.C.” for a term of 25 years (FAA Exhibit 6, Item 6). LAK was subsequently unable to continue maintenance of the property and requested the City approve assignment of the lease to Minch. On July 5, 2005, the lease was voluntarily reassigned to Minch. The lease explicitly

³ Referred to in this Determination as the “Green” lease (instead of “Dakota” or similar) in order to be consistent with the references in the Complaint.

stated that “the term of this lease is through May 20, 2029.” The May 20, 2029 lease expiration represented 25 years from the original date of execution by LAK in 2004, giving Minch a 23 year, 10 month lease term. All other terms of the lease carried over from the LAK lease to Minch. (FAA Exhibit 6, Item 2.)

In January 2008, Cottonwood executed a lease for land (on which Hangar F now sits) with GRL, Inc. for a term of 25 years plus an additional 15-year extension option (FAA Exhibit 6, Item 4). GRL appears to be an entity associated in some capacity with Green, which would make the GRL lease the second such lease of land for hangar construction by Green/GRL associates at the airport. Both the Green and GRL leases contained the same language granting a term of 25 years with an additional 15-year extension option.

In August 2007, Minch petitioned Cottonwood to amend his July 5, 2005, lease to include the same 15-year renewal option that was offered and executed in the leases to Green and GRL. In November, 2007, Cottonwood voted to grant the same 15-year renewal option to Minch’s lease (FAA Exhibit 7, Item 1), which was formally amended and executed with Minch’s signature on January 17, 2008. (FAA Exhibit 6, Item 1)

In June 2015, Complainant Thompson requested to extend her lease by 15 years. Cottonwood required Ms. Thompson to obtain an appraisal of fair market value to ascertain an appropriate lease rate. It was later determined the appraisal requirement was made in error; Thompson was simply requesting the same 15-year extension option as Minch and others. Upon clarification, Cottonwood reimbursed the cost of the appraisal of the hangar and offered to amend Thompson’s lease to include the same 15-year extension option. At the time of this proceeding, Thompson has not accepted Cottonwood’s offer and the original 25-year lease term remains in place. (FAA Exhibit 2, Item 1, p. 9; FAA Exhibit 5, Item 1, p 5.)

On June 23, 2016, the FAA Western Pacific Region Airports Office issued an informal determination to an informal complaint filed by Minch under 14 C.F.R. Part 13, *Investigative and Enforcement Procedures*. The FAA Western Pacific Region Airports Office, Regional Airport Compliance Program Manager concluded that the differences in lease terms were “miniscule” and “essentially the same,” and that it appears “that Mr. Minch already has reasonable access, on reasonable terms, without unjust discrimination, and without the grant of an exclusive right under the current lease agreement” (FAA Exhibit 10, Items 1 and 2). Minch argued that the finding is in error, and filed a formal complaint, which is the subject of this proceeding.

B. Procedural History

April 29, 2017	FAA received the Complaint (FAA Exhibit 1, Item 1).
May 8, 2017	FAA issued a Notice of Docketing (FAA Exhibit 1, Item 2).
June 2, 2017	Cottonwood filed a Motion to Dismiss (FAA Exhibit 5, Item 1).
June 13, 2017	Complainant filed its Opposition to the Cottonwood’s Motion Dismiss (FAA Exhibit 5, Item 2).

October 16, 2017 FAA issued an FAA Response to the Motion to Dismiss (FAA Exhibit 5, Item 3).

November 3, 2017 Cottonwood filed its Answer to the Complaint (FAA Exhibit 2, Item 1).

November 13, 2017 Complainant filed its Reply (FAA Exhibit 3, Item 1).

November 21, 2017 Cottonwood filed its Rebuttal in Support of its Answer (FAA Exhibit 4, Item 1).

IV. APPLICABLE FEDERAL LAW AND FAA POLICY

This section discusses (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 regulating 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 legislative actions that authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In these programs, the airport sponsor assumes certain obligations, either by contract or by covenants in property deeds and conveyances, 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. 49 U.S.C. § 47122 mandates the FAA to ensure airport owners comply with their grant assurances.

B. FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal 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 conveyances protect the public's interest in civil aviation and require compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure 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 administration of valuable rights, which airport sponsors pledge to the people of the United States they will protect in exchange for monetary grants and donations of federal property.

FAA Order 5190.6B, *FAA Airport Compliance Manual*, September 30, 2009, sets the policies and procedures for the FAA Airport Compliance Program. The order is not regulatory and does

not control airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to carry 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. 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. In addressing allegations of noncompliance, the FAA will determine whether an airport sponsor currently complies with its 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, (August 30, 2001) (Final Decision and Order).

C. Statutes, Sponsor Assurances, and Relevant Policies

The *Airport and Airway Improvement Act of 1982* (AAIA), as set forth in 49 U.S.C. § 47101, *et seq.*, establishes 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.

Four (4) grant assurance violations apply to the specific allegations and circumstances of this Complaint: Grant Assurance 1, *General Federal Requirements*; Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; and Grant Assurance 38, *Hangar Construction*.

1. Grant Assurance 1, General Federal Requirements

Grant Assurance 1 states, that the airport sponsor will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for a federally funded airport project including, but not limited to:

- a. Title 49, U.S.C, subtitle VII (Aviation Programs), as amended.

Title 49 is the principle set of statutes pertaining to transportation law, including 49 U.S.C. § 47107, *Project grant application approval conditioned on assurances about airport operations*, which establishes the authorities and requirements promulgated by the 39 federal grant assurances. The sponsor of a federally obligated airport must provide written assurance to the Secretary of Transportation that, as a condition of receiving federal funding for airport development, it will comply with all applicable laws, regulations, policies, etc. in accordance with Grant Assurance 1.

2. Grant Assurance 22, *Economic Nondiscrimination*

Grant Assurance 22, *Economic Nondiscrimination* 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 – except in certain prescribed circumstances – 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.

3. Grant Assurance 23, *Exclusive Rights*

Grant Assurance 23, *Exclusive Rights*, 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 not either directly or indirectly, grant or permit any person, firm or corporation, the exclusive right at the airport to conduct any aeronautical activities. Such activities include but are not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, and sale of aircraft parts. The statute similarly applies to any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity. The airport sponsor further agrees that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.

4. Grant Assurance 38, *Hangar Construction*

Grant Assurance 38, *Hangar Construction*, implements 49 U.S.C. § 47107(a)(21), and requires airport sponsors to allow long-term hangar leases for aircraft owners who have constructed hangars at their own expense.

Grant Assurance 38 states:

If the airport owner or operator 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.

V. ISSUES AND ANALYSIS

Preliminary Issue

The Complaint was filed jointly by Lawrence J. Minch and Janice Kay Thompson. The central allegation at issue is that the Complainants' leases both contain a "hard end date" lease term that allegedly violates Cottonwood's federal obligations. However, the record shows the Thompson lease includes a direct 25-year term, not a hard end date as alleged, and is without an additional 15-year renewal option. (FAA Exhibit 6, Item 5) In comparison, the Minch lease consists of a 25-year lease

term (23 years, 10 months remaining upon signing) with a specific expiration date of May 29, 2029, and has an additional 15-year renewal option. These differences are substantial. The Minch and Thompson leases do not share lease term similarities. The absence of the 15-year renewal option in Thompson's lease is due to her unexplained failure to accept Cottonwood's good faith offer to amend her lease with the 15-year extension (FAA Exhibit 2, Item 1, p. 16). Thompson's refusal to accept the 15-year option appears to be personal or financial in nature and remains a personal/business decision. There is no evidence her refusal to sign is due to Cottonwood's conduct or its alleged violation of Grant Assurance 22, *Economic Nondiscrimination* or Grant Assurance 23, *Exclusive Rights* or any other Grant Assurances. Therefore, the Director dismisses Thompson's claims based upon the lack of evidence supporting her claims or an explanation of how her refusal to sign the 15-year renewal option is the result of a violation of the Grant Assurances. However, the Minch claims require further analysis and discussion.

The Director has determined the following issues will be analyzed to determine Cottonwood's compliance with applicable federal law and policy with respect to Minch's claims.

ISSUE 1: Whether the lease term language in the Complainant's lease is unjustly discriminatory in violation of Grant Assurance 22, *Economic Nondiscrimination*.

1. Complaint and Reply

The core of the Minch Complaint is a dispute over lease language pertaining to the length of the term of the Minch lease compared to other leaseholders who have also leased land and constructed hangars on airport property. Minch alleges that Cottonwood has violated Grant Assurance 22 by allowing "only a 25 year lease term before taking over ownership of their improvements (hangars) while the City allowed a total term of 40 years for three other similarly situated hangars owners before taking over ownership of those hangars thus creating a discrimination"⁴ (FAA Exhibit 1, Item 1, p. 32). Minch argues that other similarly situated tenants are allowed to "keep their hangars for 15 years longer before City confiscation." Minch argues that he "should be allowed to have the exact same wording" as other similarly situated land/hangar lessees, which were offered a 25-year lease term with a 15-year renewal extension option (FAA Exhibit 1, Item 1, p. 32).

Minch acknowledges signing a lease amendment in 2008 that "does have a 15 year option to renew" but claims the "[t]erm will have already ended on May 20, 2029" giving Cottonwood the ability to "takeover" the hangar by the May 20, 2029 date (FAA Exhibit 1, Item 1, p. 8). Minch further alleges that the presence of the "hard end" date lease term is discriminatory because other similarly situated land/hangar lessees do not have a specific lease expiration date (FAA Exhibit 1, Item 1, p. 5). Minch believes the terms of the lease "allows a 15 year extension at rates that include leasing [the] building back from the City in addition to the ground pad" (FAA Exhibit 1, Item 1, p. 5). Minch argues that Cottonwood should be compelled to "make the wording (one sentence) in [the] leases to be written identical (verbatim) to that one sentence of others who" Minch believes "allows the improvements to

⁴ Language in the Complainants' lease requires construction of non-commercial aircraft storage/maintenance hangar with incidental office, lounge, and restroom areas (FAA Exhibit 6, Item 2, p. 4). Other tenant leases (e.g., Green, GRL) contain the same requirement (FAA Exhibit 6, Item 3, pp. 3; FAA Exhibit 6, Item 4, p. 4). None of the leases prescribe minimum hangar size or investment requirements. Therefore, for the purposes of evaluating lease terms, the Complainants and Green/GRL (who are not party to the proceeding) are considered to be similarly-situated.

remain in possession of the hangar owner until the end of the [40 year] term of the lease” (FAA Exhibit 1, Item 1, p. 45).

2. Cottonwood’s Answer and Rebuttal

Cottonwood denies unjust discrimination against the Complainants. Rather, Cottonwood argues that the Complainants “misrepresent or misunderstand the lease terms” (FAA Exhibit 2, Item 1, p. 2). Cottonwood states that on May 20, 2004, a 25-year lease was executed with LAK, L.L.C. Approximately a year into the lease, LAK, L.L.C. cited hardship and formally requested Cottonwood approve assignment of the lease to Minch, who had demonstrated interest. In July 2005, the lease was reassigned and executed by Minch and Cottonwood (FAA Exhibit 2, Item 1, p. 2; FAA Exhibit 5, Item 1, pp. 4-5). Cottonwood confirms that in 2007, Minch “petitioned the City to adjust the term of his lease to be the same as the GRL lease.”⁵ Cottonwood alleges that “the City subsequently approved the lease amendments for Minch, as well [as] another hangar owner, which added exactly the same fifteen year renewal option as present in the GRL lease” (FAA Exhibit 2, Item 1, pp. 3).

Cottonwood further states that the “Minch Lease does not allow the City to ‘confiscate’ any improvements on the property until the expiration of the term, which may be 40 years from the effective date of the lease if Minch chooses to exercise the 15 year renewal option and the parties can agree on a fair rental rate for the renewal term” (FAA Exhibit 5, Item 1, p. 8). Cottonwood also disputes “that the six hangars identified by the Complainants are similarly situated...because of proximity,” arguing that the hangars are “significantly” different in size (FAA Exhibit 2, Item 1, p. 5). Lastly, Cottonwood argues that “all of the leases with renewal options provided that the exercise of the option was contingent upon the parties negotiating in good faith the rate of lease at renewal” (FAA Exhibit 2, Item 1, p. 3). Cottonwood’s argument is centered on its belief that the “City had granted Minch reasonable airport access without unjust discrimination and had not granted any exclusive right” (FAA Exhibit 2, Item 1, p. 4).

3. Director’s Review and Analysis

Minch contends the terms of his lease provide for “confiscation” of the hangar upon initial lease expiration on May 20, 2029. A secondary issue is the allegation that Minch will be deprived of 15-years of ownership, and thus 15 fewer years of additional return on its hangar investment. The Director’s analysis of the allegations under *Issue 1* is based on a review of the specific language contained in Minch’s lease and other similarly situated tenants.

Section III, Term, of the original LAK, L.L.C. lease, dated May 20, 2004, which was carried over and assigned to Minch on July 5, 2005, specifies, “The term of this lease is through May 20, 2029. The term begins when the agreement becomes effective” (FAA Exhibit 6, Item 2, p. 2). This language was revised in the Amended Lease Agreement, dated January 17, 2008, to include a 15-year renewal option, stating, “the term of this lease is through May 20, 2029, with a fifteen (15) year renewal option.” Additionally, *Section IV, Lease Rate*, of the amended lease was

⁵ The Complaint repeatedly references GRL, whose lease was executed within the same month as Minch’s amended lease, but contains a directly-stated lease term in number of years instead of a “hard end date,” as in the Complainant’s lease. The alleged effect of the difference in terms is at the heart of Minch’s allegations of unjust discrimination.

revised to reference the renewal option, which states, “the Lease Rate for the premises is as follows for the initial term of the agreement, the lease rate is subject to renegotiation upon exercise of the renewal option [sic]” (FAA Exhibit 6, Item 1, p. 1). All other provisions of the original May 2004/amended July 2005 Minch lease agreement remained unchanged.

By comparison, *Section III, Term*, of both the Green (1995) and GRL (2008) leases executed at different times for different airport properties states that, “(t)he term of this lease is twenty-five (25) years, with a fifteen (15) year renewal option. The term begins when this agreement becomes effective” (FAA Exhibit 6, Item 3, p. 2; FAA Exhibit 6, Item 4, p. 2). Minch contends this language is unjustly discriminatory in its effect because of the different terms compared to his lease. Additionally, *Section IV, Lease Rate*, of the GRL lease provides that: “The Lease Rate for the premises is as follows for the initial term of the agreement, the lease rate is subject to renegotiation upon exercise of the renewal option. [sic]” (FAA Exhibit 6, Item 4, p. 2). *Section IV, Lease Rate, Term* (paragraph F), of the Green lease provides that, “The Lease Rate shall be fixed for the initial term of the lease and subject to renegotiation upon exercise of the renewal option.” (FAA Exhibit 6, Item 3, p. 2).

Minch argues that the language in *Section III* of his lease allows Cottonwood to “confiscate” his hangar (Hangar C) at the “hard end date” of May 20, 2029, and then rent the hangar facility and the land back to him. Minch further argues that the hard end date does not allow the hangar and improvements to remain in his possession for more than its term of 23 years, 10 months⁶, even with the inclusion of 15-year extension renewal option (FAA Exhibit 1, Item 1, p. 32).

Conversely, Minch claims the language of *Section III* of the Green/GRL leases allow for possession and reversion back to Cottonwood after 40 years, effectively denying him the same additional 15 years of possession and amortization of his hangar. Minch also alleges “significant monetary penalties in the reduced resale value of their hangars affecting their ability to attract buyers” (FAA Exhibit 1, Item 1, p. 52). In that regard, Minch alleges that, as written, the lease will cost an additional \$176,400 over 15 years for simply “leasing back [its] own buildings along with the land from the City” (FAA Exhibit 1, Item 1, p. 56).

Minch argues the Green and GRL lease terms are evidence of Cottonwood treating similarly situated aeronautical users dissimilarly. However, the Director finds the Green lease – negotiated 10 years prior to Minch’s lease – has no relevant bearing on Minch’s lease term. The Director has consistently concluded that Grant Assurance 22, *Economic Nondiscrimination*, does not require a sponsor to offer lease rates and terms that are identical to other leases negotiated at different points in time. (See *Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority*, FAA Docket No. 16-00-03 (July 23, 2001) (Final Agency Decision) (*Reading*).)

Likewise, the FAA has consistently acknowledged several factors can distinguish parties that a sponsor can justly treat differently without violating its federal obligations. Such factors 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*,

⁶ Calculated from the original 25-year LAK lease. 23 years and 10 months of which were remaining when Minch assumed the lease.

LLC v. DeKalb County, GA, FAA Docket No. 16-05-13, (February 1, 2006) (Director's Determination).)

The Director confirms that Cottonwood in this case was under no obligation to renegotiate the lease terms willfully assumed and executed by Minch in July 2005 to be commensurate with a lease negotiated 10 years earlier. Lease negotiation is inherently a local airport business practice and FAA policy and precedent has consistently allowed for reasonable variances in leases executed for different facilities at different points in time.

The Complaint also makes substantial references to the GRL lease, which was executed in January 2008, and also contains a directly-stated initial term of 25 years (versus a hard end date) plus an additional 15-year extension option (FAA Exhibit 6, Item 4). GRL executed its lease 2 weeks prior to Minch executing his amended lease granting a 15-year extension option. Minch alleges the GRL lease term is a more recent example of ongoing unjust discrimination against him.⁷

The Director does not agree. Absent from Minch's argument is any reference to *Section IV, Lease Rate*, of the amended lease, which provides that the renewal lease rate is subject to renegotiation upon Minch's exercise of the renewal option. (FAA Exhibit 6, Item 1, p. 1). The Complaint also did not reference *Section II, Property* or *Section X, Ownership of Improvements* which are relevant to this issue. *Section II, Property*, paragraph A, states that "onsite improvements to be constructed or placed on the Premises are not part of the Premises and title to the improvements will remain in the TENANT for the term of the lease." Likewise, *Section X, Ownership of Improvements*, paragraphs A and B, clearly dictate the ownership of improvements during the lease and after its expiration:

A) During Term of Lease: All improvements constructed on the Premises by the TENANT as permitted by this Lease shall be owned by the TENANT until expiration of the term or sooner termination of this Lease, unless earlier dedicated to LANDLORD.

B) Expiration of Lease: All improvements on the Premises at the final expiration of the term shall, without compensation to TENANT, become LANDLORD'S property free and clear of all claims to or against them by TENANT or third person. At the final expiration of the term and any extension or holdover, the Premises shall be free and clear of all mortgages and liens. (FAA Exhibit 6, Item 1)

The Director finds the language in Section II, Section III, Section IV, and Section X to be unambiguous. Taken together, the language clearly indicates that:

1. Minch has the ability to exercise the 15-year extension option, if he so chooses, at a rate negotiated by the parties (Sections III and IV);
2. Minch's hangar remains in his possession throughout the term of the lease (Section X, paragraph A);

⁷ In a related argument, Minch alleges that, three months after amending its lease, Cottonwood amended the "Cottonwood Hangar Association" lease to add a 15-year extension (40-year total term) using the same language as the Green and GRL lease while allegedly denying him the same 40-year term. Minch argues the terms are more evidence of unjust discrimination. The Director considers the allegation to be redundant, and therefore does not specifically adjudicate the effect or the terms of the Association lease (FAA Exhibit 1, Item 1, p. 61).

3. Minch's continued possession of his hangar beyond May 20, 2029, is wholly contingent on successfully exercising the 15-year renewal option (Sections II and IV);
4. Hangar possession and other improvements revert to Cottonwood's ownership upon expiration of the lease, including any extension (Section X, paragraph B) unless such improvements are removed, which the Complainant has the contractual right to do.⁸

In consideration of the foregoing, the Director concludes that the May 20, 2029, "hard end date" in Minch's lease is not materially different than the directly-stated "25-year" lease term in the GRL lease. Regarding hangar ownership, the "final expiration of the term" referred to in Section X, paragraph B is either 1) the term of the initial lease (23 years and 10 months), or 2) the initial term plus the 15-year extension. Minch has the ability – through May 20, 2029 – to exercise the renewal option, which would then trigger lease rate negotiations.⁹ If the parties were to successfully negotiate lease terms for the extension, Minch would keep possession of his hangar for the totality of 38 years and 10 months (unless sooner terminated). The record shows Minch's lease and the GRL lease contain functionally similar language pertaining to the initial term, 15-year extension, rates and negotiation, and ownership of improvements (FAA Exhibit 6, Item 3; FAA Exhibit 6, Item 4).

A highly relevant example of lease parity is that both Minch's and GRL's lease contain specific rental rates, calculated per quarter, and escalated on a schedule of approximately every 5 years. The final escalation for both leases is from 2027 to the end of the initial term, where Minch is obligated to pay \$795.00 per quarter and GRL \$2368.00 per quarter. Minch agreed via *Section IV* that the 15-year renewal option was contingent on lease rate negotiations, as did GRL in its Lease. Cottonwood may, but is not contractually bound to, offer the same rates and charges beyond the end of the initial term (May 20, 2029). The same facts apply to the GRL lease as well, where lease rates expire 25 years from the date of execution (January 2, 2008). The Director finds that any differences that may exist between the two leases are minimal and none of these differences have an unjustly discriminatory impact on Minch. Further, the Director cannot find evidence in the lease that gives Cottonwood the authority to "confiscate" Minch's hangar on May 20, 2029, and then rent the hangar and land back to him, as alleged. In fact, Minch has the contractual right to remove the hangar upon expiration of the lease, if he so chooses.

Lastly, Minch makes broad and unsubstantiated claims regarding the financial penalty he will suffer as a result of the allegedly discriminatory lease terms. Specifically, Minch alleges he will be subjected to a penalty of \$176,400 due to Cottonwood allegedly taking ownership of the hangar after the initial term of 23 years, 10 months. As the Director concluded above, there is no evidence in the lease dictating that ownership of the hangar will automatically revert to Cottonwood upon expiration of the initial term (May 20, 2029). Minch relies on rates currently charged by Cottonwood for the rental of a City-owned hangar, and projects that those same or similar rates will be charged upon exercise of the extension option. Minch did not provide evidence to substantiate the claim. The basis for this claim is unknown, as *Section IV, Lease Term* of the Complainant's amended lease, provides only that "...the lease rate is subject to renegotiation upon exercise of the renewal option" (FAA Exhibit 6, Item 1, p. 1). The Director finds no merit to Minch's claim of a financial penalty based on rates that have not yet been renegotiated.

⁸ Minch's July 5, 2005 Lease, *Section VII, Construction and Improvements*, paragraph (3) *Removal*.

⁹ The Director notes that lease *Section XX, Holding Over* does not entitle the Complainant to holdover tenancy for any reason, including during lease negotiations.

4. Grant Assurance 22, Findings and Conclusions

The Director has consistently concluded that Grant Assurance 22 does not require a sponsor to offer lease rates and terms that are identical to other leases negotiated at different points in time. Likewise, while FAA policy in Order 5190.6B, *Airport Compliance Manual*, Chapter 12, states that while 30-35 year lease terms may be appropriate to amortize a tenant's investment in hangar improvements, lease terms and amortization requirements are highly dependent on the circumstances of each prospective tenant and each individual airport. The 30-35 year term outlined in Order 5190.6B is a best practice recommendation left to the discretion of the airport sponsor, not an FAA requirement. Here, Cottonwood offered up to 40 years to amortize tenant hangar investments. The FAA does not normally intervene in the business decisions of the airport sponsors where grant assurance violations are not at issue. (*See Jet 1 Center Inc. v. Naples Airport Authority*, FAA Docket No. 16-04-03 (January 4, 2005) (Director's Determination) p. 25.)

Regarding ownership of the hangar facilities at lease expiration, the Director finds that the lease language in this case is unambiguous. Minch's amended lease contains a 15-year extension option, for a total potential lease term of 38 years and 10 months. The Director found no evidence in the original or amended leases dictating the "confiscation" of Minch's hangar on May 20, 2029, and then leasing the land and hangar and land back to him, as alleged. Additionally, a "hard end date" versus a directly-stated term in number of years is immaterial to the actual expiration of an executed lease. The outcome is effectively the same, a 23 year, 10 month (effective) initial term versus a 25-year initial term (such as GRL's), each with a 15-year extension option. Minch was not treated dissimilarly to other similarly situated tenants.

Moreover, the record included partial reference to an appraisal prepared in conformance with Uniform Standards of Professional Appraisal Practice (USPAP) indicating that a "Class S Maintenance Hangar" (metal frame and walls like the Minch hangar) has a useful life expectancy of 40 years (Exhibit 1, Item 1, p. 25.) The appraisal further indicated that a leasehold of less than 40 years would create a negative leasehold interest for the owner. Cottonwood granted an amended lease that reflects Minch's ability to recoup his original investment for the useful life of his hangar, subject to the terms of the renegotiation.¹⁰

The Director notes that it is entirely conceivable that the ownership of Minch's hangar could revert to Cottonwood's ownership after May 20, 2029, if the parties cannot successfully negotiate terms of the 15-year extension, and Minch does not remove the hangar. The language of the executed lease allows for that contingency. The same holds true for GRL at the expiration of its initial lease term. The Director concludes that Minch fails to substantiate that he will be deprived of 15 additional years of hangar ownership when in fact the lease itself makes the 15-year extension a contractual right contingent on additional negotiation. Indeed, Minch agreed to those terms by his signature on January 17, 2008 (FAA Exhibit 6, Item 1, p. 2).

¹⁰ The amended lease does not require Minch to make additional capital improvements to the leasehold over the term of the lease, therefore no further costs are expected to be amortized by Minch. Airport sponsors are strongly encouraged to incorporate capital improvement requirements into ground/hangar leases in order to ensure the ongoing serviceability and maintenance of the facilities, particularly where reversion clauses are in place.

In consideration of the totality of the record, the Director finds Cottonwood has met its grant assurance obligations as an airport sponsor by, in part, voluntarily agreeing to amend Minch's lease to add the 15-year extension option. Such actions are demonstrative of an airport sponsor taking care to avoid unjust discrimination, not that of a sponsor seeking to unjustly discriminate against airport tenants. The Director concludes that Cottonwood is not in violation of the requirements Grant Assurance 22, *Economic Nondiscrimination* to provide reasonable and not unjustly discriminatory access to the airport.

ISSUE 2: Whether the lease term language in the Complainant's lease results in a prohibited exclusive right in violation of Grant Assurance 23, *Exclusive Rights*.

1. Director's Analysis

Grant Assurance 23, *Exclusive Rights* requires the owner or sponsor of a federally obligated airport not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities.

Minch alleges that a prohibited exclusive right exists via the alleged unjustly discriminatory terms in his lease. Specifically, Minch alleges that similarly situated airport tenants were granted access to the airport for a 40-year term that was otherwise denied to him. As determined in *Issue 1*, the terms in the various leases are functionally identical. Minch failed to substantiate that he will be deprived of 15 additional years of hangar ownership when in fact the lease itself makes the 15-year extension a contractual right contingent on additional negotiation. If Minch successfully negotiates lease terms for a 15-year extension, then he would keep possession of his hangar on the airport for the totality of 38 years and 10 months (unless sooner terminated). The terms for the additional 15-year renewal are the same as provided for in the GRL lease. Therefore, Minch cannot credibly argue that Cottonwood granted an exclusive right to lease airport property to others on favorable terms otherwise denied to him.

2. Grant Assurance 23, Findings and Conclusions

For the reasons provided above, the Director finds that in the absence of evidence of granting a prohibited exclusive right to similarly situated airport tenants, Cottonwood is not in violation in Grant Assurance 23, *Exclusive Rights*.

ISSUE 3: Whether the Complainant's lease term results in a violation of Grant Assurance 38, *Hangar Construction*.

1. Complaint

Grant Assurance 38, *Hangar Construction*, which is codified in 49 U.S.C. § 47107(a)(21), requires the airport sponsor to grant "a long term lease" to a person who owns an aircraft and seeks to build a hangar (at the aircraft owner's expense) on the airport, subject to the terms and conditions imposed by the airport operator. Minch argues that Cottonwood violated Grant Assurance 38 by "not granting such a lease when Complainant's hangars were constructed, namely a minimum of 30 to 35 years as directed" by FAA Order 5190.6B, *Airport Compliance Manual* (FAA Exhibit 1, Item 1, pp. 53).

2. Director's Analysis

As discussed in *Issue 1*, above, Order 5190.6B, states that 30-35 year lease terms may be appropriate to amortize a tenant's investment in hangar improvements. However, lease terms and amortization requirements are highly dependent on the circumstances of each prospective tenant and each individual airport. The 30-35 year term outlined in Order 5190.6B is a best practice recommendation left to the discretion of the airport sponsor, not a minimum FAA requirement as asserted by Minch. The FAA established this lease term guidance to give airport sponsors wide latitude to attract long-term tenants to the airport while also retaining required rights and powers over airport property. Lease terms less than 30-35 years are not a violation of Grant Assurance 38 or FAA policy.

Conversely, the FAA considers lease terms exceeding 50 years to be, effectively, a prohibited disposal of airport property and a violation of the sponsor's federal obligations (FAA Order 5190.6B, *Airport Compliance Manual*, p. 12-3). Lease terms with option renewals of up to 40 years, similar to the terms provided to Minch, are not a violation of the grant assurances so long as the sponsor incorporates appropriate subordination and rental escalation clauses within the lease and the sponsor exercises rent escalators to account for the economic dynamics of the airport. In this case, Cottonwood satisfactorily addresses the future rent escalation issue by making the 15-year renewal option contingent on rate negotiation.

Minch willfully entered into a 23 year, 10 month ground lease arrangement with Cottonwood on terms agreed to by both parties. Later, upon request, Cottonwood amended Minch's lease to add a 15-year renewal extension, contingent on rate negotiation, for a total of 38 years, 10 months.

3. Grant Assurance 38, Findings and Conclusions

Minch cannot credibly argue that he was not granted a "long term lease" in which to build a hangar when he enjoys a privately financed hangar on the airport, and has the option to keep possession of the hangar for up to 38 years, 10 months (unless sooner terminated). The Director concludes that Cottonwood is not in violation of Grant Assurance 38, *Hangar Construction*.

ISSUE 4: Whether the Complainant's lease term results in a violation of Grant Assurance 1, General Federal Requirements.

1. Grant Assurance 1, Findings and Conclusions

Minch's alleged Grant Assurance 1, *General Federal Requirements*, violation is premised on the assumption that Cottonwood violated "applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements" pertaining to Grant Assurance 22, *Economic Nondiscrimination*, Grant Assurance 23, *Exclusive Rights*, and Grant Assurance 38, *Hangar Construction*. As evaluated and discussed previously, the Director concludes that Cottonwood is not in violation of the aforementioned grant assurances; therefore, Minch's allegations of a Grant Assurance 1 violation is likewise without merit and dismissed accordingly.

VI. FINDINGS AND CONCLUSIONS

The Director finds Cottonwood has adequately addressed its lease parity issues by voluntarily agreeing to amend Minch's lease to add the 15-year extension option. Further, the Director finds no evidence in the original or amended leases dictating the "confiscation" of Minch's hangar on May 20, 2029. For these reasons, and those listed in the Issues and Analysis section above, the Director concludes that Cottonwood is not in violation of Grant Assurance 22, *Economic Nondiscrimination*.

The Director finds the terms in Minch's lease to be functionally identical to those with other tenants at the Airport. Minch failed to substantiate that he would be deprived of 15 additional years of hangar ownership. For these reasons, and those provided in the Issues and Analysis section above, the Director concludes that Cottonwood is not in violation in Grant Assurance 23, *Exclusive Rights*.

The Director finds that Minch cannot credibly argue that the Complainant was not granted a "long term lease" in which to build a hangar. For this reason and those stated in the Issues and Analysis section above, the Director concludes that Cottonwood is not in violation of Grant Assurance 38, *Hangar Construction*.

The Director finds that Cottonwood is not in violation with Grant Assurance 22, Grant Assurance 23, or Grant Assurance 38. For this reason, the Director concludes that Cottonwood is not in violation of Grant Assurance 1.

VII. ORDER

Accordingly, it is ordered that:

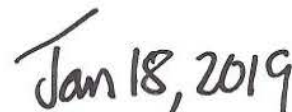
1. The Complaint is dismissed; and
2. All motions not expressly granted in this Determination are denied.

VIII. RIGHT OF APPEAL

The Director's Determination is an initial agency determination and does not constitute a final agency action subject to judicial review under 49 U.S.C. §46110. Any party to this proceeding adversely affected by the Director's Determination may appeal this initial determination to the FAA Associate Administrator for Airports pursuant to 14 C.F.R. §16.33(c) within 30 days after service of the Director's Determination.



Kevin C. Willis
Director, Office of Airport Compliance
and Management Analysis



Date