UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Pro-Flight Aviation, Inc.,

Complainant

v.

City of Renton Municipal Airport

Respondent

Docket No. 16-15-03

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter before the FAA is based on a formal complaint filed in accordance with Title 14 Code of Federal Regulations, Part 16, *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings* (14 CFR Part 16).

Pro-Flight Aviation, Inc. (PFA or Complainant) filed a formal Complaint under 14 CFR Part 16 against the City of Renton (Airport, City or Airport), which is the owner, sponsor, and operator of the City of Renton Municipal Airport (RNT).

The Boeing Company (Boeing) is not a party to this Complaint; however, the Airport's leasing of Parcels 760 and 770 to Boeing in 2014 is central to this Complaint. Boeing is an aircraft manufacturer with production facilities adjacent to (immediately east of) the Renton Airport with a through-the-fence operation, which permits Boeing access to the airport from this facility. Boeing sought to lease the parcels on the airport to support final production and flight-testing of its 737 MAX aircraft. Its various activities include pre-flight testing, modifications as needed to reflect changes in design, performing maintenance as needed, and initiating test flights (FAA Item 8, page 18).

The Complainant alleges that the Airport violated its federal obligations in the grant assurances required by 49 U.S.C. § 47107. Grant assurances are those commitments airport sponsors make

in return for federal funding of airport projects. The Complainant asserts the Airport violated five grant assurances:

> Grant Assurance 5, *Preserving Rights and Powers*, by allowing a tenant to leave its leasehold idle and vacant, thereby permitting the tenant the discretion to determine when the leasehold of designated general aviation property would be utilized for aviation purposes;
>
> Grant Assurance 22, *Economic Nondiscrimination,* by unfairly discriminating against the Complainant using a different lease application process for Boeing, thereby giving Boeing preferential treatment during negotiations for the leasehold;
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> Grant Assurance 23, *Exclusive Rights,* by leasing the only remaining tie-down spaces to Boeing and by granting Boeing the sole use of the vehicle drive lane adjacent to the Alpha taxiway;
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> Grant Assurance 24, *Fee and Rental Structure,* by not charging an alleged non-aeronautical tenant fair market value for leased aeronautical property; and
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> Grant Assurance 29, *Airport Layout Plan,* by leasing a large tract of airport property designated on the Airport Layout Plan for general aviation, to a non-general aviation tenant without the approval of the Secretary.

The Complainant objects to the Airport's decisions regarding its allocation of the limited space available on the airport. The Complainant alleges that in the Airport's efforts to accommodate Boeing, they misled PFA on the availability of Airport parcels designated for general aviation use. Complainant alleges that this misrepresentation delayed PFA's submission of its application competing with Boeing to lease certain parcels and that the Airport entered into a lease with Boeing for land it does not have an immediate need.

The Complainant requests, in part, the FAA to direct the Airport and Boeing to not evict the Complainant from the current aircraft tie-downs on Parcel 760 that it is currently renting; require the Airport to cause Boeing to divest itself of the Parcels 760, 770 and 820 that it does not utilize; and make those parcels available for lease to the Complainant.

In response, the Airport denies the Complainant's allegations and requests a Summary Judgment finding that the Airport is not in violation of its grant assurances.
The FAA issued an Order denying the motion (FAA Item 20).

After review of the allegations presented in this complaint and the evidence of record, the Director finds the Airport is not in violation of its federal obligations. This decision is based on Federal law and FAA policy, review of the pleadings, and supporting documentation submitted by the parties, which comprises the administrative record outlined in the attached FAA Exhibit 1.

II. THE PARTIES

Airport

The City of Renton Municipal Airport (RNT) is a federally funded, general aviation public-use airport owned by the City of Renton, Washington, and designated as a reliever airport for Sea-Tac International Airport. RNT consists of approximately 170 acres and has one 5,382-foot runway, with 254 based aircraft, and 80,688 operations for the 12-month period ending July 2015 (FAA Item 23). RNT is near capacity with limited unleased tie-down spaces available at any particular time.

The development of the airport was financed, in part, with FAA Airport Improvement Program (AIP) funding, authorized by the Airport and Airway Improvement Act of 1982, as amended at 49 U.S.C. § 47101, *et. seq.*

Complainant

Pro-Flight Aviation (PFA) is a for-profit corporation and has been a tenant at RNT since 1994. PFA provides aeronautical services such as aircraft maintenance, flight instruction, rental aircraft, fueling, and other flight-line services. PFA's facility consists of approximately 30,000 square feet of hangar space and approximately 66,000 square feet of ramp space. About one-third of the ramp is used for helicopter operations, and the remaining area is used for transient aircraft and maintenance aircraft parking. PFA does not lease its space directly from RNT; rather it subleases space on Parcel 750 from Renton Gateway Center that has a long-term lease with RNT. Renton Gateway Center and PFA are affiliated companies with some common ownership (FAA Item 8 page 7). At the time of the Complaint, PFA rented on a provisional basis nine tie-down spaces at the south end of Parcel 760. PFA states that it is the only full-service Fixed Based Operator (FBO) at the airport (FAA Item 1, Paragraphs 14, 15 and 16).

III. BACKGROUND AND PROCEDURAL HISTORY

Background

The Lease Application Process

In late 2011, PFA notified the Airport management that it was interested in additional ramp space should Parcel 760 become available. The Airport responded the next day, indicating that Parcels 770 and 820 were available if PFA were interested. PFA responded that they would look into it, but that they had concerns about the lack of restrooms (FAA Item 1, Exhibit 6a; and Item 8, page 11 and Exhibit JW-1).

In February 2012, Boeing submitted a formal request to the Airport for additional apron space at the airport to accommodate aircraft storage only for the 737 MAX certification period (FAA Item 8, page 12 and Exhibit JW-3). On June 4, 2013, Boeing submitted an application to the Airport for a short-term lease of Parcels 760 and 770.

The Complainant became aware that Parcel 760 was available and that Boeing had submitted a lease application. On June 6, 2013, the Complainant submitted a lease application to the Airport for Parcel 760 (FAA Item 1, Paragraph 26). On June 17, 2013, as required, the Complainant submitted an Independent Accountant's Report to support its lease application to the Airport for Parcel 760 (FAA Item 1, Paragraph 26).

On July 24, 2013, by letter, the Airport Manager informed PFA that the City Administration had received PFA's completed application for the lease of Parcels 760 and 770. The letter stated that the City had determined that a competing application furthered the City's goals (FAA Item 1, Paragraph 27, and Exhibit 10). The letter did not specify who submitted the competing application or how it furthered the City's goals.

On July 25, 2013, the Transportation/Aviation Committee of the City Council considered Boeing's and PFA's lease applications and the Airport's recommendation to award the lease to Boeing and voted to recommend approval of the Boeing lease to the full City Council (FAA Item 8, page 13).

On August 5, 2013, the Transportation/Aviation Committee of the City approved the lease between RNT and Boeing for Parcels 760 and 770 (FAA Item 8, page 2; Declaration of Doug Jacobson, page 2).

The Boeing lease is for a five-year term, with two consecutive one-year options (FAA Item 8, pages 13 and 14). Boeing's production schedule requires leasing the parcel in anticipation of its future need. The Airport required Boeing to continue to lease the space on the parcels for aircraft tie-downs until June 30, 2015, the date that Boeing anticipates the need to start use of the parcel.

On July 28 and August 20, 2014, a City Administrator for the City of Renton met with the Complainants to explore leasing alternative tie-down space. (FAA Item 8, Declaration of Doug Jacobson, page 3; and Item 1, Exhibit 6d).

On September 29, 2014, City officials held a follow-up meeting with the Complainant. The City provided the Complainant a draft layout that would accommodate up to 11 single-engine aircraft on the old restaurant site (FAA Item 8, Declaration of Doug Jacobson, page 4 and Item 1, Exhibit 6e). This site is not contiguous to PFA's current subleased property.

On October 1, 2014, the Complainant emailed the Public Works Administrator stating that a long-term lease for Parcel 760 would be the minimum acceptable option (FAA Item 8, Declaration of Doug Jacobson page 4, and Item 1, Exhibit 6f).

On March 17, 2015, by email, the City suggested the Complainant consider Parcel 820 that would accommodate all of the aircraft currently on Parcel 760. The Complainant informed the City that Parcel 820 would be useless because it is 250 yards away from their office (FAA Item 8, Exhibit DJ-3 to Declaration of Doug Jacobson).

The Complainant's Account

The Complainant argues that the lease application process was discriminatory and conducted in a manner to exclude the Complainant from competing for Parcel 760 and prevent the Complainant from leasing additional tie-down space at the airport. The Complainant also asserts that Boeing is a non-aeronautical tenant, is not charged a non-aeronautical rate for the lease, and was afforded preferential treatment over an aeronautical tenant. The Complainant further alleges that the lease grants Boeing exclusive rights by allowing Boeing to leave the tie-downs idle until needed and that the Airport fails to comply with the designation of general aviation on its Airport Layout Plan.

The Airport's Account

In its answer, the Airport acknowledges the Complainant submitted an application, and the Transportation/Aviation Committee considered that. The Airport states that selecting Boeing for the short-term lease over a long-term lease to the Complainant was a logical and reasonable decision under the circumstances and not a violation of the grant assurances (Memorandum in Support of the Motion for Summary Judgement, pages 3 and 12). The Airport asserts that based on the definition of aeronautical; Boeing's use of the tie-down area is an aeronautical activity. The Airport offered the Complainant tie-down space on a different parcel; however, the Complainant refused, declaring that the only parcel it would consider was Parcel 760.

Procedural History

January 28, 2015:	Part 16 Complaint filed alleging that the Airport violated 49 U.S.C. § 47107, § 47103(e) and Grant Assurances 5, 22, 23, 24 and 29 (FAA Item 1)
February 6, 2015:	Notice of Docketing (FAA Item 2)
February 12, 2015:	Letter from the City Attorney for the City of Renton objecting to service because the Complainant did not serve the Complaint on an authorized Party for the City (FAA Item 3)
February 18, 2015:	Letter from Pro-Flight responding to the objection of service (FAA Item 5)
February 17, 2015:	Letter from the City Attorney for the City of Renton requesting 12 weeks additional time to file the City's Answer (FAA Item 4)
February 23, 2015:	Letter from Pro-Flight objecting to the City's request for a 12-week filing extension but agreeing to a 30-day extension (FAA Item 6)
March 11, 2015:	FAA Order Granting a 45-day Extension of Time for the Airport to file its Answer (FAA Item 7)
April 17, 2015:	Airport's Motion for Summary Judgment, Memorandum in Support thereof, Statement of Material Facts (FAA Item 8)

April 23, 2015:	Complainant's Unopposed Motion of Pro-Flight Aviation for an Extension of Time to file its response to the Airport's Motion for Summary Judgment (FAA Item 9)
May 1, 2015:	FAA Order Granting a 30-day Extension of Time for the Complainant to File its Answer to the Airport's Motion for Summary Judgment (FAA Item 10)
June 4, 2015:	Complainant's Answer to the Airport's Motion for Summary Judgment (FAA Item 11)
June 12, 2015:	Airport's Motion for Leave to File a Reply to Pro-Flight Aviation, Inc.'s Answer to Airport's Motion for Summary Judgment and Proposed Reply (FAA Item 12)
June 24, 2015:	Complainant's Answer in Opposition to Airport's Motion for Leave to File a Reply (FAA Item 13)
July 17, 2015:	Motion from Pro-Flight Aviation for a Preliminary Injunction (FAA Item 14)
July 22, 2015:	Airport's Unopposed Motion for an Extension of Time to File its Answer and its Response to Motion of Pro-Flight Aviation for Preliminary Injunction (FAA Item 15)
July 23, 2015:	FAA Order granting an extension to August 7, 2015, for the Airport to Submit an Answer to Complainant's Motion for a Preliminary Injunction (FAA Item 16)
August 7, 2015:	Answer of the City of Renton Municipal Airport (Airport) to the Complaint of Pro-Flight Aviation, Inc. (FAA Item 17)
August 12, 2015:	Joint Motion for an Extension of Time to file Complainant's Reply and to file Airport's Rebuttal (FAA Item 18)
August 13, 2015:	FAA Order Granting Joint Motion for Extension of Time requested on August 12, 2015 (FAA Item 30)
August 26, 2015:	Letter from Complainant regarding its Motion for Preliminary Injunction, (FAA Item 19)
September 1, 2015:	FAA Order Denying Complainant's Motion for Preliminary Injunction (FAA Item 20)
September 3, 2015:	Pro-Flight Aviation, Inc.'s Reply to Airport's Answer, dated September 3, 2015 (FAA Item 21)

October 16, 2015: Complainant's Motion for Leave to File Surrebuttal to Airport's Rebuttal (FAA Item 22)

October 21, 2015: Airport's Opposition to Complainant's Motion for Leave to File Surrebuttal (FAA Item 23)

Renton Municipal Airport 5010 (FAA Item 24)

Renton Municipal Airport Grant History (FAA Item 25)

May 10, 2016: Notice of Extension of Time to issue the Director's Determination to August 25, 2016 (FAA Item 26)

August 30, 2016: Notice of Extension of Time to issue the Director's Determination to October 11, 2016 (FAA Item 27)

October 13, 2016: Notice of Extension of Time to issue the Director's Determination to January 11, 2017 (FAA Item 28)

January 18, 2017: Notice of Extension of Time to issue the Director's Determination to March 13, 2017 (FAA Item 29)

March 31, 2017: Notice of Extension of Time to issue the Director's Determination to May 16, 2017 (FAA Item 30)

IV. ISSUES

Issue 1 - Did the Airport violate Grant Assurance 5, Preserving Rights and Powers, by allowing a tenant to leave its leasehold idle and vacant, thereby permitting the tenant the discretion to determine when the leasehold of designated general aviation property would be utilized for aviation purposes?

Issue 2 - Did the Airport violate Grant Assurance 22, Economic Nondiscrimination, by unfairly discriminating against the Complainant by using a different lease application process for Boeing, thereby giving Boeing preferential treatment during negotiations for the leasehold?

Issue 3 - Did the Airport violate Grant Assurance 23, Exclusive Rights, by leasing the only remaining tie-down spaces to Boeing and by granting Boeing the sole use of the vehicle drive lane adjacent to the Alpha taxiway?

Issue 4 - Did the Airport violate Grant Assurance 24, Fee and Rental Structure, by not charging an alleged non-aeronautical tenant fair market value for leased aeronautical property?

Issue 5 - Did the Airport violate Grant Assurance 29, Airport Layout Plan, by leasing a large tract of airport property, designated on the Airport Layout Plan for general aviation, to a non-general aviation tenant without the approval of the Secretary?

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The following discussion pertains to (a) the FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint process.

A. FAA Enforcement Responsibilities

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

In each program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. Under 49 U.S.C. § 47122, the FAA has a statutory mandate that airport owners comply with their grant assurances.

B. FAA 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 instruments of conveyance 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 consistently 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 forth the policies and procedures for the FAA Airport Compliance Program. The order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the continuing commitments airport owners make to the United States as a condition for the grant of federal funds or the conveyance of federal property for airport purposes. Among other things, the order analyzes the airport sponsor's obligations and assurances, addresses the application of the

assurances in the operation of public-use airports, and helps FAA personnel interpret the assurances and determine the sponsor has complied with them.

The FAA compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and operators of public-use airports that have been developed with FAA assistance. Therefore, in addressing allegations of noncompliance, the FAA will determine whether an airport sponsor currently complies with the applicable federal obligations. The FAA will also consider the successful action by the airport to cure an alleged or potential past violation of applicable federal obligation as grounds for dismissal of the allegations. *See 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, codified at Title 49 U.S.C. § 47101, *et seq.*, sets forth assurances to which an airport sponsor receiving federal financial assistance must agree as a condition before receiving the assistance. These sponsorship requirements are included in every AIP grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal Government. Five grant assurances apply to the specific circumstances of this complaint.

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 this 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)
>
> It will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in this grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of this grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement. (Assurance 5)

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) that requires sponsors to make the airport available as an airport for public use without discrimination. These provisions permit the owner or 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 making all airport facilities and services available on reasonable terms without unjust discrimination. *See* FAA Order 5190.6B, Chapter 9.

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).* An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce on airport property equipment, personnel, or practices that would be unsafe, unsightly, detrimental to the public welfare, or affect the efficient use of airport facilities (Order 5190.6B, Sec.11.2).

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise is 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 5190.6B, Sec. 8.9.d, *Space Limitation).*

Grant Assurance 24, *Fee and Rental Structure*

[The Sponsor] will maintain a fee and rental structure for the facilities and services at the airport 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. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.

Grant Assurance 29, *Airport Layout Plan*

a. It will keep up to date at all times an airport layout plan of the airport showing:

1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto;
2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities;
3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon; and
4) all proposed and existing access points used to taxi aircraft across the airport's property boundary. Such airport layout plans and each amendment, revision, or

modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility or efficiency of the airport.

b. If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the airport layout plan as approved by the Secretary, the owner or operator will, if requested, by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities except in the case of a relocation or replacement of an existing airport facility due to a change in the Secretary's design standards beyond the control of the airport sponsor.

D. The Complaint Process

Under 14 CFR § 16.23, persons directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. Complainants shall provide a concise but complete statement of the facts relied upon to substantiate each allegation and describe how they were directly and substantially affected by the things done or omitted by the Airports (14 CFR§ 16.23(b)(3)(4).

If these statements provide 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§ 16.29).

As the proponent of a motion, request, or order, the Complainant has the burden of proof. As the party who has asserted an affirmative defense, the Airport has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act and Federal case law. The Administrative Procedure Act 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 U.S. 267, 272 (1994) and *Air Canada, et al.* v. *Department of Transportation*, 148 F.3d 1142, 1155 (DC Cir. 1998). Also, Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires that complainants submit all documents then available to support their complaints. 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."

FAA's Responsibility with Regard to an Appeal

Under 14 CFR § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after an investigation.

In such cases, "it is the Associate Administrator's responsibility to 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 *Ricks v. Millington Municipal Airport,* FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 9. *See also* 14 CFR §16.227.

VI. ANALYSIS AND DISCUSSION

Issue 1

Did the Airport violate Grant Assurance 5, Preserving Rights and Powers, by allowing a tenant to leave its leasehold idle and vacant, thereby permitting the tenant the discretion to determine when the leasehold would be utilized for aviation purposes?

Complainant's Allegations

The Complainant alleges that the Airport violated Grant Assurance 5, *Preserving Rights and Powers,* by allowing Boeing full discretion for when or if to use Parcels 760 and 770, permitting Boeing to leave its leaseholds at the Airport idle and vacant as well as to bank space based on future contingent needs (FAA Item I, Paragraphs 73, 74, and 75 and Item 11, page 4).

In 2010, the Airport and Boeing executed a lease agreement, and Section 8b of the lease covers the conditions for *continuous use*:

> Continuous Use: Tenant covenants that the Premises shall be continuously used for those purposes set forth above during the Term, shall not be allowed to stand vacant or idle unless Tenant determines in its sole discretion that allowing the Premises to stand vacant or idle is necessary given the business conditions affecting aircraft delivery and/or manufacturing at the time of such determination, and subject to reasonable, temporary interruptions for maintenance, construction, or other purposes (FAA Item 1, Exhibit 9, page 10).

In 2013, the Airport and Boeing executed Lease Amendment 4 to include Parcels 760 and 770.

The Complainant alleges that Section 8b of the 2010 Boeing Lease with the Airport extends to the 2013 Amendment 4, which includes Parcels 760 and 770, and therefore gives Boeing "sole discretion" to leave the leaseholds vacant "if business conditions affecting aircraft delivery and/or manufacturing at the time of such determination" warrants. The Complainant asserts that Amendment 4 to the lease does not modify Section 8b of the 2010 Lease and once Boeing takes occupancy of Parcels 760 and 770, at its sole discretion, it may leave the parcels empty for the duration of the lease (FAA Item 11, page 32).

The Complainant's point is that giving Boeing "sole discretion" violates Grant Assurance 5 because the Airport has given away its rights and powers; and relinquished its right to "to perform any or all of the terms, conditions, and assurances in the grant agreement." The sponsor "will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property . . .," See Assurance 5 (b).

The Complainant also states that even if Boeing's on-airport needs materialize, the facts do not support the Airport's position that Boeing has a demonstrated need for all of the leased space (FAA Item 11, page 32). The Complainant further asserts that by giving Boeing the contractual authority in the lease to leave space designated for general aviation fallow for up to 7 years if its manufacturing conditions warrant, the Airport has abdicated its power to ensure the Airport is utilized in a manner that benefits the flying public (FAA Item 11, page 33), which violates Grant Assurance 5.

Lastly, the Complainant offers an email from the City as additional evidence that the Airport relinquished its powers. In it, the City requests that Boeing negotiate with PFA and the City for the use of the parcels 760 and 770, which Boeing refused (FAA Item 11, page 33).

Airport's Defense

The Airport counters that an important error in the Complainant's argument is that the basis for this claim relies on provisions in the original 2010 Boeing Lease Section 8b that do not include Parcels 760 and 770. In 2013, Boeing and the Airport executed Lease Amendment 4 that amended the lease to add Parcels 760 and 770. Comparable language to Section 8b of the 2010 lease is not included in the Amendment. The Airport states that the Amendment specifically "contains contrary language... that makes [sic] clear that Boeing cannot let the property stand vacant or idle" (FAA Item 8, page 21).

The Airport also states that it requires Boeing to lease the existing space to airport tenants until it is needed (FAA Item 8, page 14). Amendment No. 4 to the 2010 Lease, executed in July 2013, for Parcels 760 and 770 requires the continued leasing of the 760 and 770 parcels, stating:

> Landlord shall continue leasing the 760 Parcel and the 770 Parcel to the Current Tenants (who shall be treated as tenants of Landlord and not subtenants of Tenant for purposes of the Lease, and who shall pay their rents directly to Landlord) until the earlier of (a) March 31, 2015; or (b) such time as Tenant provides written notice to Landlord that Tenant requires use of said parcels, which notice shall be provided to Landlord no later than 120 days prior to the date of Tenant's required use (the "Current Tenant Lease Period") (FAA Item 1, Exhibit 9).

The Airport clarified that even in the 2010 Lease, the provision allowing the leasehold to remain idle qualified this point by acknowledging the nature of Boeing's operations, and the conditions of the lease did not grant Boeing unlimited discretion to bank leased space (FAA Item 8, page 22).

The Airport also asserts, and the Complainant admits, that it (PFA) continued to use some of the tie-down space on Parcel 760 before Boeing's actual use of the parcels (FAA Item 1, Paragraph 30, Item 8, page 22, and Item 17, page 2).

Director's Analysis

Under Assurance 5, *Preserving Rights and Powers*, an airport sponsor may not take any action that may deprive it of its rights and powers to direct and control airport development and comply with the applicable federal obligations. A violation of Assurance 5 may occur when an airport sponsor enters into an agreement with terms that may place the sponsor in noncompliance with its federal obligations.

Clauses in airport agreements that subordinate the terms of the agreement to the applicable federal obligations can preserve the airport sponsor's rights and powers. A subordination clause enables the airport sponsor to amend terms that are inconsistent with the sponsor's federal obligations to conform to and therefore preserve the sponsor's rights and powers under Assurance 5. *See Platinum Aviation and Platinum Jet Center BMI v. Bloomington-Normal Airport Authority,* FAA Docket No. 16-06-09 (June 4, 2007) Director's Determination, page 14, and *SeaSands Air Transport, Inc. v. Huntsville-Madison County Airport Authority,* FAA Docket No. 16-05-17 (August 28, 2006) Director's Determination, page 27.

The 2010 lease agreement between the Airport and Boeing confirms that the agreement contains the required language subordinating the lease to federal grants and conveyances. The subordination clause specifically states that if the lease terms or any provisions of the lease are or become in conflict with the Airport's federal obligations, those obligations shall control, and if necessary, modify or supersede any provisions of the Lease with liability against the Airport (FAA Item 1, Exhibit 9, pages 2 and 3 or page 170). The Complainant, in its pleadings, contradicted its allegation that the Boeing parcels would remain unused; admitting that PFA continued to rent tie-down spaces on Parcel 760 until Boeing needed them (FAA Item 1, Paragraph 63).

It is incumbent upon complainants to provide the evidence to support allegations of an airport sponsor's failure to comply with its federal obligations. The Complainant has provided no evidence that the Airport violated Grant Assurance 5 in its lease agreement with Boeing. Given the lack of substantive evidence and that the language in Lease Agreement and the Amendment refute the Complainant's allegations, the Director has determined that the Airport is not in violation of Grant Assurance 5.

Issue 2

Did the Airport violate Grant Assurance 22, Economic Nondiscrimination, by unfairly discriminating against the Complainant by using a different lease application process for Boeing, thereby giving Boeing preferential treatment during negotiations for the leasehold?

Complainant's Allegations

The Complainant alleges that the Airport violated Grant Assurance 22, *Economic-Nondiscrimination* when it afforded Boeing "favored status" and ignored its obligation to make the airport available to the public for aeronautical use. PFA further asserts that PFA "will be

economically disadvantaged" by not acquiring the lease for Parcel 760 because it will be forced to discontinue flight training and rental operations (FAA Item 1, Paragraphs 45, 46, and 47; and Item 11, page 23).

The Complainant alleges that the Airport did not follow its leasing policy, violating assurance 22, by failing to ensure equal treatment of all current and future tenants and users to make the Airport available on reasonable terms:

> Specifically, PFA alleges that Airport intentionally concealed from PFA that the 760 Parcel was available for lease in order to ensure that Boeing was awarded the lease, even though the City was aware of PFA's longstanding interest in the 760 Parcel, and its desire to use 760 for its flight training aircraft and transient aircraft parking (FAA Item 17, page 1).

The Complainant further asserts that "it is readily apparent that Boeing has been implicitly granted a de facto right of first refusal regarding leases for available space at RNT" (FAA Item 1, Paragraph 61) and to not find a violation of Grant Assurance 22 when the Airport merely allowed the Complainant to apply for the parcels after it discovered on its own that Boeing had submitted an application would render this assurance "toothless" (FAA Item 11, page 9).

The Complainant does not assert that it is similarly situated to Boeing, but rather the Airport violated Grant Assurance 22 because it considers the leasing process related to Parcel 760 inconsistent with the Airport's leasing policies, specifically to provide preferential treatment for Boeing (FAA Item 1, Paragraph 2). The totality of the allegation of unjust discrimination is that the conduct toward the Complainant proves that the Airport never considered the Complainant's application for the lease of Parcels 760 and 770 (FAA Item 11, page 10).

The Complainant specifically alleges that the Airport refused to negotiate in good faith, misleading the Complainant about the availability of Parcels 760 and 770 and discouraging the submission of a lease application for the parcels (FAA Item 1, Paragraph 24). The Complainant also notes that the Airport notified the Complainant that Boeing had been awarded the lease before the City formally voted on the matter (FAA Item 1, Paragraphs 27 and 28; FAA Item 11, page 26).

The Complainant contends that the approval of the lease for Boeing "was a foregone conclusion before it even submitted its application, and it was provided preferential treatment in the application process, as evidenced by Airports effort to keep PFA from submitting a competing application as long as it could" (FAA Item 11, page 9). The Complainant further contends that "additional evidence of Airport's unjustly discriminatory treatment of PFA can be found in the Airport's violation of its own, self-imposed leasing policies...." The Complainant cites as support Section 6.13 of the Airport Leasing Policies, which states that "[o]versubscribed facilities will be managed using a process that is fair, transparent, and uniformly applied" (FAA Item 11, pages 9 and 10).

Airport's Defense

The Airport asserts that the relevant facts regarding the allegations of unjust discrimination would be pertinent were PFA and Boeing engaged in similar aeronautical activities, and the sponsor did not have the discretion to manage the airport efficiently to serve the interest of the public (FAA

Item 8, page 29). The Airport notes that the parties are not similarly situated and the differences between the operations of Boeing and the Complainant "could not be more obvious and make it abundantly clear that the two are not similarly situated" (FAA Item 8, page 28).

The Airport states that the Transportation/Aviation Committee of the City Council considered both lease applications at a Transportation Committee meeting held on July 25, 2013 (FAA Item 8, page 12; and Item 1, Paragraph 28). Boeing and the Complainant attended the meeting, presented their applications, and answered questions from committee members. The Airport concludes that "while PFA was not ultimately offered the 760/770 Parcels lease, it was by no means shut out of the application process as it now contends" (FAA Item 8, page 13).

The Airport noted that it had several discussions with the Complainant regarding its interest in Parcel 760 between 2011 and 2013 and that the Complainant has rejected any alternatives not immediately adjacent to its current sublease (FAA Item 8, page 4).

The Airport admitted that the Complainant informed the airport that it was interested in additional space and submitted an application. "However, the application indicated that there had been no feasibility study of the proposed use of the space beyond the small portion of Parcel 760 already in use for tie-downs" (FAA Item 8, page 12). The Airport asserts that the Complainant did not take steps to demonstrate its ability to make use of both parcels under an expanded lease, and at that time Boeing had also expressed an interest in Parcel 760 and 770 and submitted its lease application. The Airport also states, "Boeing had a legitimate space concern based on its planned production schedule for the 737 MAX during the certification period" (FAA Item 8, page 12).

The Airport asserts that with respect to the denial of access the Complainant has never been denied access to the Airport for aeronautical use. The Complainant has continuously conducted FBO operations at the Airport since 1994. Additionally, the Airport states that the lease to Boeing will not stop PFA from continuing to serve the public (FAA Item 8, page 24).

Director's Analysis

For the complaint to support an allegation of unjust economic discrimination, the allegation should contain a description of the alleged preferential treatment of another party, how the other party is similarly situated, and that the complainant requested similar treatment and was denied. *See BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida,* FAA Docket No. 16-05-16, (July 25, 2006) Director's Determination, page 12.

Grant Assurance 22 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 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.

Even when aeronautical tenants propose the same or similar use of the airport, if the levels of investment and business aspects are dissimilar, the FAA may find the aeronautical users are not similarly situated. *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, (October 1, 2009) Director's Determination, page 31. Management issues such as economy of collections and efficient use of the airport's limited facilities can be justifications for differing treatment of users of the airport. The Airport has the latitude to determine the course of the airport.

The Parties agree that the airport is near capacity and that demand may exceed availability. The record provides that the Complainant made the Airport aware in 2011 that it was interested in additional tie down space. The Airport offered the Complainant Parcels 770 or 820 in 2011 (FAA Item 8, page 25) and Parcel 820 again in 2013 and all were rejected by the Complainant (FAA Item 11, pages 23 and 24).

In *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 (December 17, 2007) (Final Agency Decision), the FAA held that grant assurances and federal obligations do not require an airport sponsor to recognize past occupancy as a preference for future occupancy. Nor do the federal obligations require sponsors to adhere to the location preferences of current tenants when planning for future development.

The Complainant is not alleging the parties are similarly situated or that the Airport unfairly offered different pricing, terms, or imposed unfair requirements.

The Complaint contends that the Boeing leasehold is inconsistent with the Airport Master Plan and Airport Layout Plan because Boeing provides no aeronautical service at the Airport. Complainant characterizes Boeing's use of the airport as not related to aviation activities at the airport, but rather to aircraft manufacturing that occurs off airport (FAA Item 11, page 33).

The Airport Master Plan, among other things, provides a means to promote land use compatibility around the airport (FAA Airport Compliance Manual- Order 5190.6B, page 20-3). The Airport Master Plan is a planning document that does not require FAA approval. The ALP requires the sponsor to depict the airport's boundaries, including all facilities, and to identify plans for future development of the Airport Layout Plan (FAA Airport Compliance Manual- Order 5190.6B, page 7-17). To support a violation of the grant assurances related to the ALP requires an allegation that the Airport erected any structure or altered the airport in conflict with the approved ALP. The Boeing lease did not alter the use of the leasehold. The facts do not support an allegation of noncompliance with the requirements of the Master Plan or the ALP.

The lease of Parcels 760 and 770 to Boeing is to conduct flight tests of aircraft that hold experimental airworthiness certificates. As Boeing's Senior Manager stated in, "Boeing will use the 760 and 770 Parcels for temporary airplane storage and for completion of re-engineering and maintenance or other modifications that may be needed due to required airplane design changes based on flight test results" (FAA Item 8, Declaration of Clifford E. Johnson).

The fact that Boeing does not provide aeronautical services to the public does not support a violation of Grant Assurance 22. The grant assurances do not define aeronautical use as limited to providing services to the public. Rather, 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. Moreover, Boeing intends to conduct test flights. The leasehold granted to Boeing falls within that definition. *See* Grant Assurance 22 (i)

The facts do not support a claim of unjust discrimination based on the Airport's decision to grant the leasehold to Boeing rather than to the Complainant. The Airport offered other tie-down space on the airport that the Complainant declined. It is also clear that Boeing's activities are aeronautical. Accordingly, the Director finds that facts do not support the allegation of a violation of Grant Assurance 22.

Issue 3

Did the Airport violate Grant Assurance 23, Exclusive Rights, by leasing the only remaining tie down spaces to Boeing and by granting the sole use of the vehicle drive lane adjacent to the Alpha taxiway to Boeing?

Grant Assurance 23, *Exclusive Rights*, states in part that an airport sponsor "will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Complainant's Allegations

Tie-Downs

For support of its allegations, the Complainant cites Advisory Circular 150/5190-6, which prohibits sponsors from leasing to a tenant that does not make timely, productive use of the leased facilities:

> An exclusive rights violation can occur through the use of leases where, for example, all the available airport land and/or facilities suitable for aeronautical activities are leased to a single aeronautical service provider who cannot put it into productive use within a reasonable period of time, thereby denying other qualified parties the opportunity to compete to be an aeronautical service provider at the airport.

The Complainant asserts that the "Airport's action of leasing the only remaining space on the airport suitable for tie-downs to Boeing is a violation of Grant Assurance 23." The Complainant states that "it is readily apparent that Boeing has been implicitly granted a de facto right of first refusal for available space at the RNT" (FAA Item 1, Paragraphs 61 and 62).

The Complainant states that Boeing and the Airport acknowledged that Boeing had no immediate need for space (FAA Item 1, Paragraph 62).

The Complaint contends that allowing Boeing to bank the tie-down space until needed is also a violation of the grant assurance, citing *Boca Raton Jet Center, Inc. v. Boca Raton Airport Authority*, FAA Docket No. 16-97-06, Director's Determination at 16 (December 29, 1997). The ruling, in this case, was that "a single aeronautical enterprise, although meeting all reasonable standards and qualifications should be limited, to the lease of such space as is demonstrably

needed. The advance grant of options or preferences on all future sites to the incumbent enterprise must be viewed as an exclusive right...."

The Complainant maintains that the loss of approximately four to five aircraft tie-downs will greatly diminish the services PFA and other providers can offer, and the Airport is obligated to lease the available property to those willing and qualified to offer aeronautical services to the public (FAA Item 1, Paragraph 52 and 51).

Finally, the Complainant states that the Airport offered it Parcel 820 that is approximately 250 yards away from their offices. Use of Parcel 820 would require a walk by passengers and pilots that will not be safe or efficient, rendering the parcel useless (FAA Item 8, Exhibit DJ-2). The Complainant rejected the offered parcel stating that the minimum acceptable option would be a long-term lease for Parcel 760 (FAA Item 8, Exhibit DJ-2).

Vehicle Lane Use

The Complainant asserts that the Airport bars "all airport tenants, except Boeing, from using the vehicle drive lane adjacent to the Alpha Taxiway" (FAA Item 1, Paragraph 65). The Complainant states that the Airport allowed barricades to be placed in front of Boeing's Apron B. This restriction caused rerouting of fuel shipments to the Complainant and had there been an emergency, first responders would have had to divert to an active taxiway (FAA Item 1, Paragraph 65).

Airport's Defense

Tie-Downs

The Airport denies that it leased the only remaining parcels suitable for general aviation to Boeing, stating that the airport is currently negotiating with another tenant for a general aviation long-term lease and the airport is currently developing the Old Restaurant Site to accommodate general aviation aircraft (FAA Item 17, page 14). Additionally, the Airport counters that it has provisions to accommodate most of the airworthy aircraft displaced by the Boeing Lease, including transient aircraft (FAA Item 8, page 16).

The Airport states that it has not granted Boeing a *de facto* right of first refusal, noting the Lease Amendment 4 specifically prevents Boeing from allowing Parcels 760 and 770 to stand idle. Boeing is required to allow the Airport to lease the tie-downs to other tenants "until its physical occupancy is anticipated" (FAA Item 11, Paragraph 61). The Complainant admitted that after Boeing had leased the parcel, Complainant continued to use the tie-downs (FAA Item 1, Paragraph 63).

The Airport notes that while Boeing's need may not have been immediate, it did have a definite need for additional space in connection with the production of the 737 MAX aircraft, and fluctuation in its manufacturing schedule makes it necessary to secure space before the actual need (FAA Item 8, Declaration of Jonathan Wilson, Paragraph 21).

The Airport offered available tie-down space to the Complainant on Parcel 820. The Airport also offered other options for additional tie-down spaces, all of which the Complainant declined (FAA Item 8, Paragraph 11-13).

The Airport states that it has never denied the Complainant access to the airport for aeronautical use. The Airport points to the Complainant's continuous FBO operations, its long-term sublease for Parcel 750, and its Operating Permit issued by the Airport that allows it to provide a full range of FBO service (FAA Item 8, page 24).

Vehicle Lane Use

The Airport allowed Boeing to place temporary barricades on the vehicle drive lane adjacent to Apron B, for security reasons and to keep private aircraft from getting too close to Boeing parked aircraft. However, to avoid disputes, the Airport required that the barricades be removed, which Boeing has done, and promised they would not be replaced (FAA Item 8, page 16; and Item 8, Declaration of Clifford E. Johnson).

Based on the record, the allegation of restricted access to the vehicle drive lane adjacent to Alpha Taxiway in front of Apron B is resolved because the barricades were removed and access to the vehicle drive land adjacent to Apron B is not restricted. The allegation requires no further discussion.

Director's Analysis

The FAA will not typically find the airport sponsor in violation of Grant Assurance 23, Exclusive Rights when 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 et al.*, FAA Docket No. 16-08-02, October 1, 2009, Director's Determination, p. 20.

FAA policy identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. Although public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, the position of the FAA is that any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right when a significant burden has been placed on one competitor that is not placed on another. *See Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985)).

The record shows that the Airport identified and offered the Complainant additional tie-down space on the airport. The Complainant declined to accept the tie-downs offered, stating they would only accept Parcel 760. The Director recognizes that the offered spaces did not meet the stated desires of the Complainant; however, that does not mean that the Airport has violated the prohibition of granting an exclusive right. The Airport made a business decision regarding the best use of the available space on the airport. The Airport made additional space available to the Complainant; not accepting the space was the Complainant's business decision.

The Director notes the precedent established in FAA Docket No 16-08-12, *Keyes and Ferrell v. McMinn County,* wherein the Director stated that "[w]hen evaluating if a sponsor is in compliance with its grant assurances, the Director considers the reasonableness of a sponsor's actions and its obligation to exercise due diligence in assessing its compliance status and posture. See *William H. Keyes and Dewitt T (Jack) Ferrell, Jr. v. McMinn County, Tennessee,* December 12, 2009, Director's Determination, p. 31.

Another precedent upholds the premise that the FAA will not interject its opinion about an airport sponsor's business decisions when such decisions are consistent with its Federal obligations. See *Jet 1 Center, Inc. v. Naples Airport Authority,* FAA Docket No. 16-04-03 (January 4, 2005) Director's Determination.

The Complainant did not establish that the Airport leased the only remaining tie-down spaces at the Airport to Boeing and failed to provide Complainant with additional tie-down spaces at the airport. The Airport offered and the Complainant rejected additional space to accommodate aircraft tie-downs.

Vehicle Lane Use

The Director finds that the issue regarding access to the vehicle drive lane adjacent to Apron B was resolved when the barriers were removed, giving all airport users, including the Complainant, access to the ramp. The facts do not support the allegation of exclusive rights related to the vehicle lane use.

Tie-Downs

Boeing subleased the tie-downs to the Complainant until they were needed. The parcels were not banked and idle as alleged and so did not create an exclusive right for Boeing. The Airport did not lease the only remaining tie-down space on the airport to Boeing as it offered the Complainant additional space at the airport. Accordingly, the Director finds that the Airport did not violate Grant Assurance 23.

Issue 4

Did the Airport violate Grant Assurance 24, Fee and Rental Structure, by not charging an alleged non-aeronautical tenant fair market value for leased aeronautical property?

Grant Assurance 24, *Fee and Rental Structure*, describes the requirements and factors for sponsors to consider for setting its fees so they are fair market value:

> It will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway

Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.

Complainant's Allegations

The Complainant asserts that the Airport is in violation of Grant Assurance 24 because Airport is not charging Boeing the fair market value of the parcels based on its belief that Boeing is a non-aeronautical user of the airport (FAA Item 1, Paragraph 67 and 68). The Complainant contends that Boeing's use of Parcels 760 and 770 is not an aeronautical use and therefore a violation of the grant assurances.

Fuel Tanks

The Complainant raises an issue and allegation unrelated to the lease or Boeing, stating that the Airport allows a former FBO tenant that went out of business over three years ago to continue to store two aboveground fuel storage tanks without receiving rent for the storage tanks. The Complainant states that the fuel would be considered unstable and unusable, and the Airport is not aware of the amount of the fuel in the tanks (FAA Item 1, Paragraph 71 and 72).

Airport's Defense

The Airport notes that the FAA's Hangar Use Policy states that final active assembly of an aircraft in the manufacturing process resulting in a completed operational aircraft is an aeronautical activity.

As discussed under Issue 2, even though Boeing does not provide aeronautical services to the public, this is not a violation of Grant Assurance 24. The FAA defines an aeronautical activity 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. Because the leasehold granted to Boeing falls within that definition, the lease terms and rate as an aeronautical tenant are appropriate.

Fuel Tanks

The Airport addressed the issue of the fuel tanks stating, as noted by the Complainant, a prior tenant defaulted on its lease, vacated the parcel, and abandoned the fuel tanks. The Airport states that the Complainant's assertions are factually incorrect related to the failure to receive rent for the fuel tanks. The Airport states that the fuel tanks are located on a Parcel "currently leased by Rainier, and the Airport is collecting rent from Rainier for the entire 800 Parcel, including the area occupied by the fuel tanks" (FAA Item 8, page 17). The Airport states that the relevant fact is there is no loss of revenue related to the fuel tanks to create a violation of Grant Assurance 24 (FAA Item 8, page 4 and 44).

Director's Analysis

The verification of Boeing's status as an aeronautical user is fully discussed in Issue 2. The Director finds that Boeing's activities on the airport fall within the definition of an aeronautical

activity. Boeing is an aeronautical tenant, and an aeronautical rate is appropriate. The fuel tanks are on leased parcels for which the airport is collecting rent.

Accordingly, the Director finds that the facts related to Boeing as an aeronautical tenant and the fuel tanks do not support finding a violation of Grant Assurance 24. We also find that the complaint does not state a valid claim or provide sufficient evidence to find a violation related to the tanks, an issue that, if a violation at all, occurred in the past.

Issue 5

Did the Airport violate Grant Assurance 29, Airport Layout Plan, by leasing a large tract of airport property, designated on the Airport Layout Plan for general aviation, to a non-general aviation tenant without the approval of the Secretary of Transportation?

Grant Assurance 29 obligates an airport sponsor "to keep up to date at all times a layout plan of the airport," and also to receive FAA approval of any ALP amendment, revision, or modification. The ALP is a planning document only, and FAA approval will be required at the time the land is to be used for the non-aeronautical purpose (FAA Order 5190.6B, Page 21-9).

Complainant's Allegations

The Complainant contends that the Airport violated Grant Assurance 29 by leasing large areas of the airport that is designated as general aviation to Boeing, whereas other areas of the airport leased to Boeing are designated aircraft manufacturing (FAA Item 1, Paragraph 55). The Complainant asserts the Airport's leasing general aviation space violates Grant Assurance 29 on the premise that Boeing's activity is non-aeronautical (FAA Item 1, Paragraph 56).

The Complainant contends that the Airport violated Grant Assurance 29 when it leased Parcels 760 and 770 Parcels to Boeing, stating that, "The ALP for RNT clearly designates the 760/770 Parcels for General Aviation ("GA")." The Complainant further states that the Airport failed to follow its leasing policy when it leased parcels designated as general aviation on the Airport Master and Layout Plans, to Boeing (FAA Item 1, Paragraph 48; and FAA Item 19, page 4).

The Complainant states that Boeing intends to use the 760 and 770/780 Parcels as a holding area for incomplete aircraft that, by definition, do not require the use of an airfield (FAA Item 1, Paragraph 57).

Airport's Defense

The Airport notes that Grant Assurance 29 has been interpreted to require that "[a]ny construction, modification, or improvement that is inconsistent with the plan [ALP] requires additional FAA approval" (FAA Order 5190.6B, § 7.18).

The Airport states that the activity conducted by Boeing falls within the definition of an aeronautical activity and it is not meaningfully different from the Complainant's intended use of the property for aircraft tie-down spots, asserting both are aeronautical uses, equally compatible with general aviation (FAA Item 8, page 27).

Director's Analysis

The Complainant's claim that the Airport violated its leasing policy is not a matter to be adjudicated by the Director. Nonetheless, the record does not support the allegation that the Airport committed a material deviation from its leasing policy.

In support of its claim, the Complainant cites Grant Assurance 29, asserting that because the activities are not aeronautical, an update to the ALP would be required. The Director previously stated under Issue 2 that the Boeing's activities fall within the definition of an aeronautical activity. Boeing's use of the tie-downs for flight-testing does not adversely affect the safety, utility, or efficiency of the airport – nor does it change the use from aeronautical to non-aeronautical. Based on the facts and context of this case, we decline to find that the alleged failure to update the ALP rises to the level of a grant assurance violation. Accordingly, the Director finds that the Airport is not in violation of Grant Assurance 29.

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. Under 14 CFR §16.33(c), any party to this proceeding adversely affected by the Director's Determination may appeal this initial determination to the FAA Associate Administrator for Airports within 30 days after service of the Director' s Determination.

Kevin C. Willis — June 12, 2017

Kevin C Willis
Director, Office of Airport Compliance
And Management Analysis

Date