UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Tropical Aviation Ground Services, Inc., and Air Sunshine, Inc.,
Complainant,
v.
Broward County, Florida
Respondent.

FAA Docket No. 16-12-15

DIRECTOR'S DETERMINATION

I. INTRODUCTION

Tropical Aviation Ground Services, Inc., et al. (Complainant/Tropical) brings this complaint pursuant to 14 CFR Part 16 against Broward County, FL (Respondent/County/Airport), the owner and operator of Fort Lauderdale-Hollywood International Airport (FLL). The complaint alleges violations of Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; Grant Assurance 24, *Fee and Rental Structure*; Grant Assurance 30, *Civil Rights*; Grant Assurance 37, *Disadvantaged Business Enterprises;* and Grant Assurance 39, *Competitive Access.*[1]

The Complaint seeks a "writ of mandamus compelling Broward County to honor its legal obligations pursuant to its Federal Grant Assurances and grant the Tropical a long-term lease" and "any further relief as the court deems just and proper."[2]

In response, the County states "it has complied with the applicable Federal law and Federal Aviation Administration (FAA) Grant Assurances."[3] The County also states that Complainant had derelict aircraft on leased property that were not removed as required by ordinance, and that Complainant failed to vacate the premises within 180 days as required by a settlement agreement entered into by the parties. The County further states that this alleged breach of the settlement agreement relieved it of any duty to provide the consent required for Tropical or its subsidiary to obtain a sublease at FLL. [4]

The Director finds that the Airport is not in violation of its Federal obligations with respect to Grant Assurances 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; Grant Assurance 24 *Fee and Rental Structure*; Grant Assurance 30, *Civil Rights*; Grant Assurance 37 *Disadvantaged Business Enterprises;* and Grant Assurance 39 *Competitive Access*.

[1] FAA Exhibit 1, Item 1, pages 9-25.
[2] FAA Exhibit 1, Item 1, pages 25-29.
[3] FAA Exhibit 3B, p. 13.

II. PARTIES

A. Airport

FLL is a public-use commercial service airport owned and operated by Broward County, Florida. The airport is located approximately 3 miles southwest of Fort Lauderdale and 21 miles north of Miami. The airport encompasses 1,380 acres and has 2 runways.[5]

There were 96,204 operations at the Airport in 2011 and 138 aircraft based on its grounds, according to the 2011 FAA Terminal Area Forecast. FLL serves more than 23 million passengers annually. FLL offers 268 daily flights to the U.S., Canada, Caribbean, and Latin America.[6] The Airport has 4 terminals, one of which is dedicated to commuter airline service (See Figure 1). The development of the Airport was financed, in part, with Airport and Improvement Program (AIP) funding. This funding is authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §47101, et seq. According to the provisions of this Act, the County is obligated to comply with the FAA sponsor grant assurances and related Federal law, 49 U.S.C. §47107.

Since 1982, the Board has accepted $343.3 million in AIP financing for the runway extension and an additional $5.6 million in *American Recovery and Reinvestment Act* (2009) funding. The Airport was also provided Federal assistance in the form of surplus property conveyances. In 1942, it was developed as a U.S. Navy Naval Air Station. The military facilities closed in 1946, and in January of 1948, Broward County assumed control of the facility. In 1953, the County formally took ownership.[7] The United States Government conveyed the airfield and its facilities to Broward County as a civil airport. As a result, the County has incurred obligations in the form of restrictive deed covenants arising from conveyances of land executed under the powers and authority contained in the provisions of the Surplus Property Act (SPA) of 1944, as amended, 49 U.S.C. § 47151-153.[8] The Instrument of Transfer is the means by which the United States Government transferred its interests in the Airport to Broward County and, in conjunction with the AIP grants, imposes certain obligations on the airport sponsor.

B. Complainant

Complainant, Tropical Aviation, is a Florida corporation that leased hangar and ramp space at 3940 SW 12 Terrace, Fort Lauderdale, Florida 33315 at FLL. Complainant, Air Sunshine, a Florida corporation, is an affiliate of Tropical. According to the complaint, the two companies share the same officers and "have a common identity for purposes of ownership."[9] Complainant states that Air Sunshine, as an air carrier,[10] provides air services (passengers and cargo), and sub-leases Tropical's lease space at FLL and uses the leasehold at FLL primarily for maintenance of the aircraft used in its operations.[11] Complainant can be

[5] FLL FAA Form 5010 at http://www.gcr1.com/5010WEB/airport.cfm?Site=FLL&CFID=11926194&CFTOKEN=59432747.
[6] http://www.broward.org/Airport/About/Pages/History.aspx.
[7] http://www.broward.org/Airport/About/Pages/history2.aspx.
[8] Surplus Property Agreement under Public Law 80-289. In addition, the Airport records indicate that a non-surplus conveyance under Section 16 or Section 23 was made as part of the transfer to the County. However, the Director finds that additional details on this conveyance, as it differs from the surplus conveyance under the SPA mentioned above, are not necessary for the present Complaint. See FAA Order 5190.2R List *of Public Airports Affected by Agreements with The Federal Government,* April 30, 1990.
[9] FAA Exhibit 1, Item 1, pages 1-2.
[10] Air Carrier — A person who undertakes directly by lease, or other arrangement, to engage in air transportation. This includes an individual, firm, partnership, corporation, company, association, joint-stock association, governmental entity, and a trustee, receiver, assignee, or similar representative of such entities. See 14 CFR Part 1.1, *General Definitions.*
[11] FAA Exhibit 1, Item 1, page 4.

represented as a single-service provider (Part 135 service provider), and not a full-service fixed-base operator (FBO).[12] Air Sunshine was initially certificated in 1982 by the Miami FSDO.

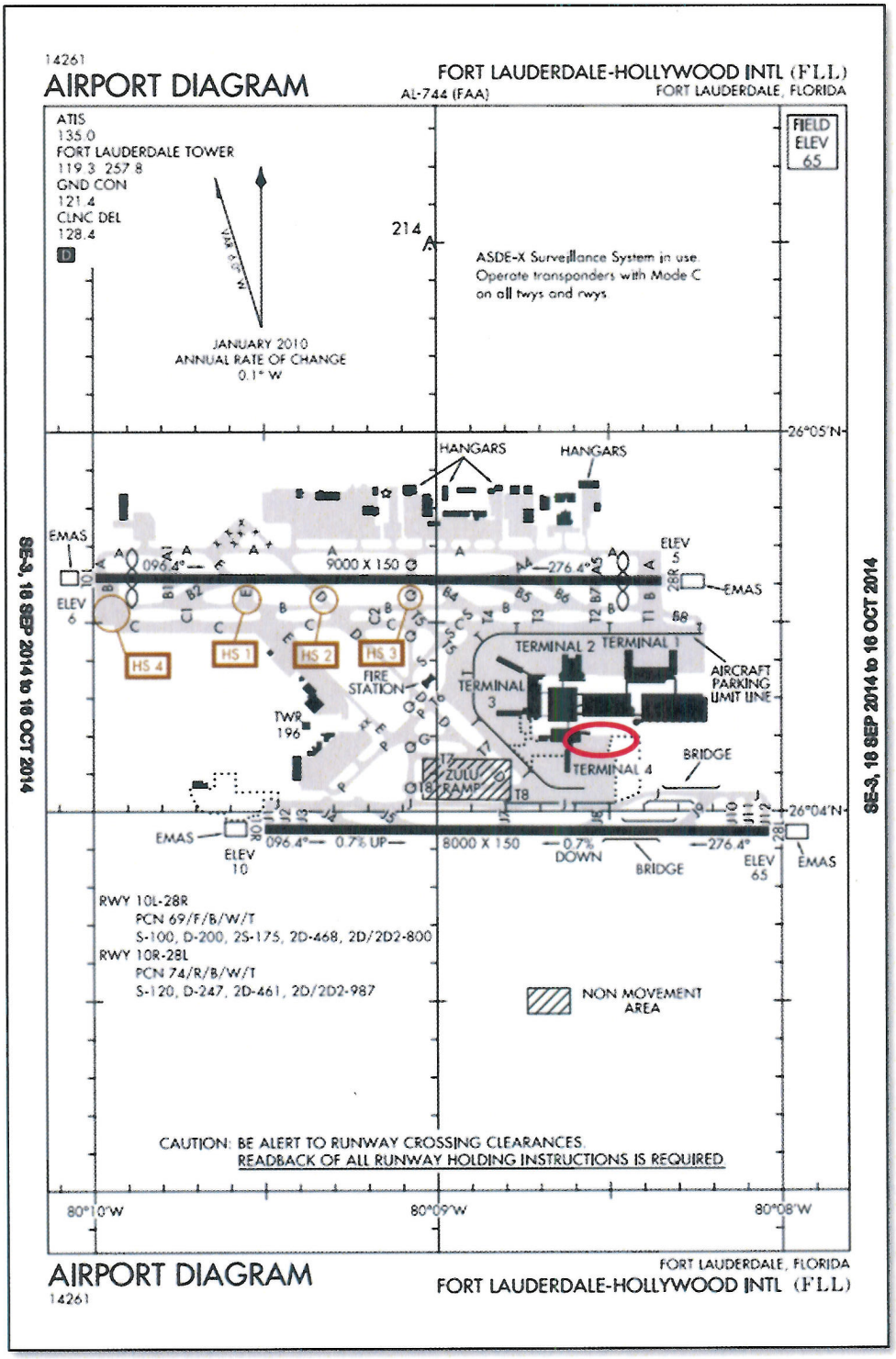

Figure 1 – Fort Lauderdale-Hollywood International Airport diagram dated September 2014. It depicts the general airfield configuration but also the 4 terminals. Terminal 4, encircled in red, is the terminal used by commuter airlines. Source: FAA.

[12] See 1996 Lease Agreement and Background section below. Single service providers are common and are permitted by FAA policies. See Advisory Circular AC 150/5190-7 *Minimum Standards for Commercial Aeronautical Activities*, August 28, 2006, pages 4 and 6.

As of October 1, 2014, a review of the FAA's records on 14 CFR Part 135 operators lists Air Sunshine, Inc., with the certificate designator RSHA311A (Licensed to fly US,MX,SA,CB,PR) and three Cessna 402 aircraft, N347AB, N441TT, N477RS, and N603AB (See Figure 2).[13] Its IATA[14] code is YI while its ICAO[15] code is RSI.[16]

Currently, the airline's Web site identifies the following destinations: San Juan (Puerto Rico), St. Thomas, St. Maarten, Tortola, St. Kitts, Nevis, Dominica, and Antigua, all in the Caribbean.[17] The airline also publishes schedules and rates for both passenger and cargo services.[18] The airline employs approximately 45 people (2011).[19]

III. PROCEDURAL HISTORY

According to the Complaint, on January 26, 2012, Complainant and the County met to resolve outstanding issues through an informal process, but were unable to find resolutions to the issues.[20]

On September 28, 2012, Complainant filed a formal Part 16 Complaint.

On October 22, 2012, the FAA issued the *Notice of Docketing.*[21] On November 8, 2012, *a Notice of Parties' Election to File Remaining Pleadings Electronically*, was filed with the FAA.[22]
On November 14, 2012, the County filled a set of three pleadings:

(1) *Respondent Broward County's Motion to Dismiss Complainant's Complaint with Prejudice for Failure to State a Claim upon Relief May be Granted Pursuant to 14 CFR § 16.19 and F.R.C.P. 12(b)(6);*[23]

(2) R*espondent Broward County's Answer and Affirmative Defenses;*[24] and

(3) *Respondent Broward County's Memorandum of Points and Authorities in Support of its Motion to Dismiss Complainant's Complaint with Prejudice for Failure to State a Claim upon Relief May be Granted Pursuant to 14 CFR § 16.19 and F.R.C.P. 12(b)(6).*[25]

On April 15, 2013, the FAA issued a *Notice of Extension of Time.* This extension was followed by several additional extensions dated June 11, 2013; August 15, 2013; October 16, 2013; February 11, 2014; October 17, 2014; and January 29, 2015.[26]

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[13] Title 14 CFR Part 135 Operators and Aircraft, FAA, October 1, 2014 at https://www.faa.gov/search/?omni=MainSearch&q=Part+135+operators. Title 14 CFR Part 135 Operators and Aircraft [MS EXCEL]. According to FAA Registry data, other aircraft may have been on Air Sunshine certificate in the past including: 122TA, 123HY, 206RH, 220RS, 251RS, 314AB, 318AB, 327AB, 347AB, 351AB, 36915, 744BA, 792BA, 793BA, 900MX, and 403RM. Some of these aircraft were EMB-110, Beech 1900C, and Saab 340 aircraft, not Cessna 402C aircraft, which compose the airline's fleet today.
[14] International Air Transport Association.
[15] International Civil Aviation Organization.
[16] http://www.airlines-inform.com/world_airlines/Air_Sunshine.html.
[17] http://www.airsunshine.com/Flight-Schedule.htm. Date: December 17, 2014.
[18] http://www.airsunshine.com/STX-VQS.htm and http://www.airsunshine.com/Air-Freight.htm.
[19] http://www.aviationsupport.com/misc/AirOperators/AirOperaview.asp?ID=2339.
[20] FAA Exhibit 1, Item 1, page 30.
[21] FAA Exhibit 1, Item 2.
[22] FAA Exhibit 1, Item 5.
[23] FAA Exhibit 1, Item 3A.
[24] FAA Exhibit 1, Item 3B.
[25] FAA Exhibit 1, Item 4.
[26] FAA Exhibit 1, Items 6-12.

IV. BACKGROUND

On January 2, 1996, Tropical and the County entered into a month-to-month lease agreement. The lease stated that "it is understood and agreed that if by December 31, 1996, [Complainant] has not entered into a long-term lease agreement for the area depicted on the attached Exhibit C,[27] or such area at the airport agreed to by both parties, which includes a full development plan for the site and a financial plan describing the funding strategy for the development of the site, then this lease Agreement shall terminate on December 31, 1996, and the [Complainant] shall vacate the premises leased under this Lease Agreement no later than December 31, 1996."[28]

According to the 1996, lease, Complainant's services were limited to "the maintenance, storage and operation of Lessee's affiliate Air Sunshine, Inc., regularly scheduled Federal Aviation Regulations (FAR) Part 135 commuter operation." The same lease stated that Complainant was not entitled to provide several services including terminal facilities for passenger operations, other than those covered by FAR Part 135, sale of nonaviation products, retail sale of aviation fuel and aviation lubricating oils," "engaging in the public offering of aircraft or structural maintenance, or the public sale of aircraft tie-down, storage, or fueling of any private or corporate aircraft, or any other aspect of service which normally consists of the rights and privileges of a fixed-base operator, and such uses are not permitted of the Premises."[29]

In addition, under the lease, Complainant could not store derelict aircraft.[30] It also stated that "Lessee [Complainant] shall not be entitled to provide any aviation-related services pursuant to this subparagraph… unless it has first received the written consent of the Aviation Department."[31]

On the issue of derelict aircraft, the lease stated "Lessee [Complainant] and all sub-lessees shall not permit the temporary or permanent storage and shall not allow the arrival at the premises or the presence at the premises at any time of any derelict aircraft." The lease defines "derelict aircraft" as one of the following:

> (1) an aircraft that does not hold a current and valid airworthiness certificate issued by the FAA, together with necessary aircraft registration and maintenance records with a current endorsement by an appropriately rated certificate holder that the aircraft is in an airworthy condition; (2) an aircraft which has been issued a condition notice by the FAA that specifies that the aircraft has one or more conditions which render it un-airworthy, and (3) an aircraft which has had major components, accessories, flight controls, portions of the airframe or engines removed so as to render the aircraft un-flyable.[32]

On January 30, 1996, Complainant sent a letter to the County raising several problems and issues with its lease, including negotiations to secure a long-term lease, signing the lease agreement under duress, and difficulty in correcting code violations and other issues by the previous tenant.[33] Complainant also stated that its expansion plans have been dealt a serious blow because of these lengthy negotiations, but it could

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[27] Site diagram attached to the lease. The reproduction provided to the FAA is very poor in terms of quality and not very helpful in visualizing the leased premises.
[28] FAA Exhibit 1, Item 1, Exhibit A, Lease Agreement section 4.1.
[29] See FAA Exhibit 1, Item 1, Exhibit A (Scope of Lease), pages 1.3 – 1.4.
[30] See FAA Exhibit 1, Item 1, Exhibit A (Scope of Lease), pages 1.3 – 1.4.
[31] See FAA Exhibit 1, Item 1, Exhibit A (Scope of Lease), page 1.2.
[32] See FAA Exhibit 1, Item 1, Exhibit A (Scope of Lease), page 1.4.
[33] FAA Exhibit 1, Item 1, Exhibit B.

not wait any longer. Complainant expresses the need to enter a long-term lease as soon as possible, and asked for a lease similar to what the County offered to other tenants.[34]

On December 10, 1996, Complainant and the County signed an *Amendment No. 1 to Short Term Lease Agreement*. The agreement extended, on a month-to-month basis, beginning January 1, 1997, the Complainant's leasehold at the Airport.[35] Among its provisions, the Amendment stated that "this Agreement shall terminate upon thirty (30) days written notice, with or without cause, by either party."[36]

In November 1999, the County enacted Ordinance §2-30(f) *Removal of Derelict Aircraft or Derelict Motor Vehicles*. This ordinance defines a derelict aircraft and requires such aircraft to be removed within 90 days following notice by the County Aviation Department.[37]

According to the Complaint, on March 8, 2010, the County notified Tropical that it was in violation of Ordinance §2-30(f), and that the county would move forward to terminate Tropical's lease at the March 23, 2010 meeting of the County Commission.[38]

On March 23, 2010, the County sought the Commission's permission to evict Tropical in ninety days [90] based on the presence of derelict aircraft.[39] The Commission approved the request.

On or around July 2010, by letter to Complainant, the County announced the termination of the short-term lease on August 5, 2010.[40]

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[34] See FAA Exhibit 1, Item 1, Exhibit B.
[35] FAA Exhibit 1, Item 1, Exhibit C.
[36] FAA Exhibit 1, Item 1, Exhibit C, Section 2.
[37] According to the Complaint, the Ordinance states, in relevant part:

(1) Derelict aircraft is defined as an aircraft stored, in the open, to which one or more of the following applies:

a. An aircraft that does not hold a current and valid airworthiness certificate issued by the Federal Aviation Administration, or other appropriate aircraft certificating authority, together with necessary aircraft registration and maintenance records with a current endorsement by an appropriately rated certificate holder that the aircraft is in an airworthy condition; or

b. An aircraft which has been issued a condition notice by the Federal Aviation Administration that specifies that the aircraft has one or more conditions which causes it to be not airworthy; or

c. An aircraft which has had major components, accessories, flight controls, portions of the airframe, or engines removed so as to render the aircraft not airworthy, or

d. An un-hangared aircraft located on the Airport, whether on a tenant leasehold or public area, which has been continuously parked or stored on the AOA, and has not landed or taken off from the Airport for a period of sixty (60) days or more, unless the owner of such aircraft has obtained the prior written consent of the Aviation Department.

(2) Any derelict aircraft shall be removed from the Airport within a period of ninety (90) calendar days after written notice from the Department. Notwithstanding the foregoing, the Department may make written request to the owner to demonstrate that an open work order is being actively pursued. If the owner fails to provide the Department with satisfactory evidence that such an open work order is being actively pursued within three (3) calendar days of the date requested, then such derelict aircraft shall be removed from the Airport within ninety (90) calendar days from the date the Department makes its written request to the owner for proof that an open work order is being actively pursued."

FAA Exhibit 1, Item 1, pages 5-6.

[38] FAA Exhibit 1, Item 1, pages 6-7.
[39] FAA Exhibit 1, Item 1, page 7.
[40] FAA Exhibit 1, Item 1, pages 6-7.

On August 6, 2010, the County filed an eviction complaint against Tropical in state court. In response, Tropical filed a counterclaim alleging the County had discriminated against Tropical in attempting to evict Tropical and not entering into a long term lease with Tropical for the leased premises.[41]

On December 22, 2010, the County filed a second complaint against Tropical for "eviction, breach of lease, and double rent."[42] The County's eviction and double rent claims were set for jury trial on March 22, 2011.[43] However, on March 22, 2011, the parties engaged in discussions in an effort to resolve the County's eviction and double rent claims. The parties agreed to a *Settlement Agreement*.[44] As part of that agreement, the parties agreed, in part, to the following:

- Tropical Aviation will vacate the Leased Premises within 180 calendar days from the date the County's Board of County Commissioners approves this Settlement (the 180 Days' and in vacating the Leased Premises, Tropical Aviation will remove all items not affixed to the Leased Premises and not owned by the County, including but not limited to aircraft, equipment, and vehicles, including without limitation, all operable and inoperable aircraft, equipment and vehicles located at the Leased Premises…

- If Tropical Aviation is prevented by reason of hurricane or other casualty caused by nature from vacating the Leased Premises, the County agrees to extend the 180 Days by the amount of time Tropical Aviation is prevented from continuing its efforts to vacate the Leased Premises…

- To the extent not prohibited or prevented by the Fire Marshal, the County will allow Tropical Aviation to locate moving container(s) on the Leased Premises to allow for the removal of the aforesaid items, and Tropical Aviation will immediately remove all containers from the Leased Premises and from Airport property when the containers are full. No containers shall remain on the Leased Premises or on Airport property after the last day of the 180 Days…

- The County will not object to Air Sunshine, Inc. entering into a sublease with a prime tenant of the County at the Airport, provided that any such sublease by Air Sunshine, Inc., with certain conditions…

- The Parties will enter into an agreed order to be filed with the Court dismissing County's eviction and double rent claims and Tropical Aviation's and its affiliate Air Sunshine, Inc.'s claim for temporary injunctive relief and abuse of process and ordering that if Tropical Aviation fails to vacate the premises within the 180 Days, the Court, on County's motion, shall enter its order requiring the issuance of the writ of possession to the Broward County Sheriff's Office or appropriate law enforcement agency for Broward County to take immediate possession of the Leased Premises.

- Tropical Aviation will continue to pay monthly rent during the 180 Days.[45]

[41] FAA Exhibit 1, Item 3B, Exhibit 1, Exhibit A, page 1.
[42] FAA Exhibit 1, Item 3B, Exhibit 1, Exhibit A, page 2.
[43] FAA Exhibit 1, Item 3B, Exhibit 1, Exhibit A, page 2.
[44] FAA Exhibit 1, Item 3B, Exhibit 1, Exhibit A.
[45] FAA Exhibit 1, Item 3B, Exhibit A, pages 2-3.

On May 10, 2011, the Broward County Board of County Commissioners approved the settlement agreement negotiated between Tropical and the County.[46] This effective date for the writ of possession, if Tropical failed to vacate, was ordered to be by November 6, 2011.[47]

On November 18, 2011, the court issued a writ of possession against Tropical.[48]

According to the Complaint, on December 23, 2011, the County "refused to give consent to the sublease between AIR and FLL-AIR [a prime tenant at the Airport]."[49] According to the County, it had no obligation to consent to a sublease because Complainant had breached the settlement agreement.[50]

According to the Complaint, on January 26, 2012, Complainant and the County met to resolve outstanding issues through an informal process. The parties were unable to find resolutions to the issues between them.[51] On September 28, 2012, Complainant filed a formal Part 16 Complaint with the FAA's Office of Airports Compliance Division.[52]

V. ISSUES

The complaint raises the following six issues:

Issue 1 - Whether the County is in violation of Grant Assurance 22 *Economic Nondiscrimination*, by (1) not entering into a long-term lease with Complainant, (2) by enacting the derelict aircraft ordinance and then applying it with respect to Complainant in a manner different from how applied to others.

Issue 2 - Whether the County is in violation of Grant Assurance 23 *Exclusive Rights* by denying Complainant a long-term lease while granting other similarly situated tenants such leases.

Issue 3 - Whether the County is in violation of Grant Assurance 24 *Fee and Rental Structure* by failing to maintain a uniform fee and rental structure for the facilities and services at the airport, and by failing to provide Complainant a long-term lease or other lease options available to similarly situated tenants at the airport.

Issue 4 - Whether the County's denial of either of the Complainant's requests for a long-term lease request or to improve their leased property, while other similarly situated tenants were offered such conditions, violated Grant Assurance 30, *Civil Rights.*

Issue 5 - Whether the County's denial of the Complainant's long-term lease request, while granting other tenants such leases, violated Grant Assurance 37, *Disadvantaged Business Enterprises*.

Issue 6 - Whether the County's denial of the Complainant's long-term lease request, while granting other tenants such leases, violated Grant Assurance 39, *Competitive Access.*

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[46] FAA Exhibit 1, Item 3B, Exhibit A, pages 2-3.
[47] FAA Exhibit 1, Item 3B, Exhibit A, Exhibit 2, page 5.
[48] FAA Exhibit 1, Item 3B. Exhibit A, Exhibit 2, page 5.
[49] FAA Exhibit 1, Item 1, page 9.
[50] FAA Exhibit, Item 3B, page 5.
[51] FAA Exhibit 1, Item 1, page 30.
[52] FAA Exhibit 1, Item 1, pages 9-17, 17-19, 19-20, 20-22, 22-23, and 23-25.

VI. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

A. The Airport Improvement Program (AIP)

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

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under AIP, 49 U.S.C., § 47107, *et seq.,* the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C., § 47107(a) sets forth the sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[53] FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with Federal obligations of airport sponsors. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to restrictions on aeronautical activities. The FAA grant assurances that apply to the circumstances set forth in this Complaint are as follows: Grant Assurances 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; Grant Assurance 24 *Fee and Rental Structure*; Grant Assurance 30, *Civil Rights*; Grant Assurance 37 *Disadvantaged Business Enterprises*; and Grant Assurance 39 *Competitive Access*.

1. Grant Assurance 22, *Economic Nondiscrimination*

Grant Assurance 22 of the prescribed sponsor assurances implement requires, in pertinent part, that the sponsor of a federally obligated airport assure:

> "a. It will make the 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.

[53] *See, e.g.,* the *Federal Aviation Act of 1958*, as amended and re-codified, Title 49 USC, §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and re-codified, Title 49 USC, §§ 47105(d), 47106(d), 47107(k), 47107(1), 47111(d), 47122.

b. In any agreement, contract, lease or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to:

1. …furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and

2. …charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchases.

c. Each FBO at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other FBOs making the same or similar uses of such airport and utilizing the same or similar facilities…

e. Each air carrier using such airport (whether as a tenant, non-tenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non-signatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status…

h. The sponsor may establish such reasonable, 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...

i. The sponsor may prohibit or 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."

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public. The owner of an airport developed with Federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.[54]

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. 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 appear to deny or limit access to, or use of, the airport.[55]

[54] FAA Order 5190.6B, Section 9.1(a).
[55] FAA Order 5190.6B, Section 14.3.

FAA Order 5190.6B describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination.[56]

2. Grant Assurance 23, Exclusive *Rights*

Title 49 U.S.C. §40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." Title 49 U.S.C. §47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Grant Assurance 23, *Exclusive Rights,* of the prescribed sponsor assurances implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport

> "It will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:
>
> a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and
>
> b. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport. It further agrees that it 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, including, but 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, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and 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."

An exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right.[57] Compliance with Grant Assurance 23 and 49 U.S.C. §47107(a)(4) must be balanced with other considerations. For example, an airport sponsor is also bound by its obligation to operate the airport in a safe and efficient manner [Grant Assurance 22(h), *Economic Nondiscrimination*]. Clearly, the sponsor may be compelled to make a fiduciary or business decision to restrict certain rights to promote more fundamental user rights. When a tenant's activity or rights interfere

[56] FAA Order 5190.6B at Chapter 9.
[57] See FAA Advisory Circular 5190-6 *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities,* January 4, 2007.

with an airport's ability to operate safely or disrupts aeronautical activities on the airport, it is incumbent on the sponsor to ensure the best interests of the airport, the user community, and the airport system.

Therefore, it is FAA's policy that the sponsor of a federally obligated airport will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public and 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. The Order clarifies the applicability, extent, and duration of the prohibition against exclusive rights under 49 U.S.C. § 40103(e) with regard to airports developed with FAA-administered grant assistance and Federal property conveyances. The exclusive rights prohibition remains in effect as long as the airport is operated as an airport. FAA takes the position that the grant of an exclusive right for the conduct of any aeronautical activity on such airports is regarded as contrary to the requirements of the applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means. FAA Order 5190.6B provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports.[58]

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

Grant Assurance 24 *Fee and Rental Structure*, implements the provisions of the AAIA, 49 U.S.C. § 47107(a)(13), and requires, in pertinent part, that the sponsor of a federally obligated airport assure:

> "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."

Grant Assurance 24 *Fee and Rental Structure* addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides and satisfies the requirements of § 47107(a)(13) by addressing self-sustainability. The intent of this assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible while maintaining a fee and rental structure consistent with the sponsor's other Federal obligations. In addition, FAA Order 5190.6B states that "to aid in establishing uniform rates and charges applied to aeronautical activities on the airport, the sponsor should establish minimum standards to be met as a condition for the right to conduct an aeronautical activity on the airport."[59]

4. Grant Assurance 30, *Civil Rights*

The Secretary of Transportation, through the FAA, must ensure open participation in activities carried out with Federal funding covered under 49 U.S.C. §47123, regardless of physical characteristics, heritage, or beliefs. This subchapter is supported by and is similar to the regulations provided under Title VI of the Civil Rights Act of 1962. Grant Assurance 30, *Civil Rights* states, in part that the airport sponsor:

> "…will promptly take any measures necessary to ensure that no person in the United States shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination in any activity conducted with, or benefiting from, funds received from this grant.

[58] FAA Order 5190.6B, Chapter 8.
[59] FAA Order 5190.6B at Section 9.6(e).

a. Using the definitions of activity, facility and program as found and defined in §§ 21.23(b) and 21.23 (e) of 49 CFR § 21, the sponsor will facilitate all programs, operate all facilities, or conduct all programs in compliance with all non-discrimination requirements imposed by, or pursuant to these assurances.[60] [Grant Assurance 30].

The Director coordinates closely with the Office of Civil Rights, ACR, and relies on their expertise when evaluating Grant Assurance 30 allegations.[61]

5. Grant Assurance 37 *Disadvantaged Business Enterprises*

Grant Assurance 37 states that:

> The sponsor shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract covered by 49 CFR Part 26, or in the award and performance of any concession activity contract covered by 49 CFR Part 23.
>
> In addition, the sponsor shall not discriminate on the basis of race, color, national origin or sex in the administration of its DBE and ACDBE programs or the requirements of 49 CFR Parts 23 and 26.[62] The sponsor shall take all necessary and reasonable steps under 49 CFR Parts 23 and 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts, and/or concession contracts.
>
> The sponsor's DBE and ACDBE programs, as required by 49 CFR Parts 26 and 23, and as approved by DOT, are incorporated by reference in this agreement. Implementation of these programs is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement.
>
> Upon notification to the sponsor of its failure to carry out its approved program, the Department may impose sanctions as provided for under Parts 26 and 23 and may, in appropriate cases, refer

[60] 49 CFR, Subpart 21.3(b) states, in pertinent part:

> *In any program receiving Federal financial assistance in the form, or for the acquisition, of real property or an interest in real property, to the extent that rights to space on, over, or under any such property are included as part of the program receiving that assistance, the nondiscrimination requirement of this part shall extend to any facility located wholly or in part in that space.*
>
> *The Regional Airports Offices, Airports District Offices, and the FAA's Office of Civil Rights are responsible for enforcing Grant Assurance 30, Civil Rights. More information is available at 49 Code of Federal Regulations (CFR) Part 21 Nondiscrimination in Federally Assisted Programs of the Department of Transportation, and 150/5100-15, Civil Rights Requirements for the Airport Improvement Program.*

[61] FAA Airport Compliance Manual, Order 5190.6b, Section 9.9. The Office of Civil Rights (ACR) advises, represents, and assists the FAA Administrator on civil rights, diversity, and equal opportunity matters that ensure the elimination of unlawful discrimination on the basis of race, color, national origin, sex, age, religion, creed, and individuals with disabilities in federally operated and federally assisted transportation programs.

[62] 49 CFR Part 26.13 provides, in relevant part:

> *The recipient [sic] shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The Recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801).*

the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1936 (31 U.S.C. 3801). [Grant Assurance 37]

The FAA Office of Civil Rights (ACR) handles alleged violations of laws relating to disadvantaged business enterprises (DBE), persons with disabilities at airports, Access and civil rights.[63] The Director coordinates closely with ACR and relies on their expertise when evaluating Grant Assurance 37 allegations. The criteria for qualification as a DBE is outlined in 49 USC §47107(e) and §47113

6. Grant Assurance 39, *Competitive Access*

Grant Assurance 39, *Competitive Access,* requires operators of large and medium hub airports to report to the Secretary any denial of a request by an air carrier for access to the airport. A report is due on February 1 or August 1 if there has been any denial of access in the preceding six-month period.[64]

Grant Assurance 39, *Competitive Access* states that:

a. If the airport owner or operator of a medium or large hub airport (as defined in section 47102 of title 49, U.S.C.) has been unable to accommodate one or more requests by an air carrier for access to gates or other facilities at that airport in order to allow the air carrier to provide service to the airport or to expand service at the airport, the airport owner or operator shall transmit a report to the Secretary that-

    1) Describes the requests;

    2) Provides an explanation as to why the requests could not be accommodated; and

    3) Provides a time frame within which, if any, the airport will be able to accommodate the requests.

b. Such report shall be due on either February 1 or August 1 of each year if the airport has been unable to accommodate the request(s) in the six month period prior to the applicable due date.

C. Surplus Property Obligations

Surplus property instruments of disposal are issued under the *Surplus Property Act of 1944* (SPA). The Act authorizes conveyance of property surplus to the needs of the Federal Government.[65] Public Law 80-289, approved July 30, 1947, amended Section 13 of the Surplus Property Act of 1944. These conveyances are subject to the terms, conditions, reservations and restrictions prescribed therein. Surplus property instruments of transfer are one of the means by which the Federal Government provides airport development assistance to public airport sponsors.

The conveyance of surplus Federal land to public agencies for airport purposes is administered by the FAA pursuant to 49 U.S.C. § 47151, 47152, and, 47153. Public Law 81-311 specifically imposes upon the FAA the sole responsibility for determining and enforcing compliance with the terms and conditions of all

[63] FAA Airport Compliance Manual, Order 5190.6b, Section 5.3(a).
[64] FAA Airport Compliance Manual, Order 5190.6b, section 9.8(b). Also see http://www.gpo.gov/fdsys/pkg/FR-2005-03-29/html/05-6072.htm.
[65] FAA Order 5190.6B.

instruments of transfer by which surplus airport property is or has been conveyed to non-Federal public agencies pursuant to the SPA. In this case, under the provisions of the *Surplus Property Act of 1944*, the Airport assumed certain obligations, reservations, and conditions. Upon acceptance of surplus property conveyance by the City, the obligations in the instrument of disposal became a binding obligation between the City and the Federal Government. Commitments assumed by the City in property conveyance 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.[66]

D. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.[67]

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program.[68] The Order establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes.

FAA Order 5190.6B analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel. The FAA Compliance Program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance.

Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable Federal obligation to be grounds for dismissal of such allegations.

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[66] Complainant has not pled a Surplus Property Act issue. The overview of the SPA is provided here in order to establish a complete record of the applicable Federal obligations affecting the Airport.

[67] The Airport Compliance Program is administered by FAA's ACO-100 Airport Compliance and Management Analysis. The Airport Compliance Division oversees the Airport Compliance Program. The division holds primary responsibility for interpreting, recommending, and developing policies and resolving matters that involve the Federal obligations of airport sponsors. It also adjudicates formal complaints and FAA-initiated investigations under Title 14 Code of Federal Regulations Part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings, and monitors airport sponsor compliance with limits on the use of airport revenue.

[68] See http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/.

E. 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 such program, the airport owner or sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

Commitments assumed by airport owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C., § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their Federal grant assurances.

F. The Complaint Process

Pursuant to 14 CFR Part 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents.[69]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance.[70]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. The complainant must submit all documents then available to support his or her complaint. 14 CFR §§ 16.23, 16.29. Title 14 CFR, § 16.31(b-d) provides, in part, that "the Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in §16.33."

In accordance with 14 CFR, § 16.33(b) and (e), upon issuance of a Director's determination, "a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;" however, "if no appeal is filed within the time period specified in paragraph (b) of this section, the Director's Determination becomes the final decision and order of the FAA without further action."

A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. Title 14 CFR, § 16.247(a) provides for judicial review of the Associate Administrator's final

[69] 14 CFR, Part 16, § 16.23(b) (3, 4).
[70] 14 CFR, Part 16, § 16.29.

decision and order, as provided in 49 U.S.C., § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 USC, § 47106(d) and 47111(d).

VII. ANALYSIS

A. Preliminary Issues

1. Motion to Dismiss

The County's *Motion to Dismiss* asserts a 6-year statute of limitations that it claims has run.[71] We agree that if the 1996 lease is looked at in isolation, this case may very well have warranted dismissal. However, we decline to dismiss the complaint because it raises issues that fall within the limitations period. For instance, the complaint raises issues associated with an eviction that took place within 2010 to 2011. The motion to dismiss is denied.

2. Writ of Mandamus and Other Prayers for Relief

The Complainant seeks a "writ of mandamus compelling Broward County to honor its legal obligations pursuant to its Federal Grant Assurances and grant the Tropical a long-term lease" and "any further relief as the court [FAA] deems just and proper."[72] Complainant also asks the FAA to:

a. Issue a permanent injunction, pursuant to Fla. R. Civ. P. 1.610, preventing Broward County from continuing to violate Federal Grant Assurance 22;
b. Issue a writ of mandamus, pursuant to Fla. R. Civ. P. 1.1630, compelling Broward County to fulfill its legal duties pursuant to Federal Grant Assurance 22;
c. Award Tropical damages caused by Broward County's violation of Federal Grant Assurance 22, in the maximum amount allowable by law; and
d. Grant Tropical all other relief the Court[73] deems just and proper.[74]

The County responds that "of a writ of mandamus and for money damages" are "not within the jurisdiction of the FAA's Part 16 administrative proceedings."[75] The Director concurs with the County. The types of order that FAA issues under Part 16 are found at 14 CFR § 16.109, and do not include writs and injunctions pursuant to Florida Rules of Procedure.

2. Burden of Proof

The Complainant carries the burden-of-proof to establish the facts of its allegations. *See Rick Aviation, Inc. v. Peninsula Airport Commission* (FAA Docket No. 16-05-18). The complainant must include all documents then available to support the complaint.[76] "Each party shall file documents that it considers

[71] FAA Exhibit 1, Item 3A. Also, the County cites: Guy Heide, et al. v. Molnau, 2006 WL 2029134, *43, FAA Docket No. 16-04-11 (July 7, 2006), review dismissed 199 Fed. Appx. 582 (81Cir. 2006); *Hill Air Co., Inc. v. Broward County Board of County Commissioners*, 2006 WL 325373, *25- *26, FAA Docket No. 13-93-7 (Jan 31, 2006).
[72] FAA Exhibit 1, Item 1, pages 25-29.
[73] The Director notes that many times throughout the Complaint, Complainant keeps referring to FAA as the "Court." The Director assumed that this was an un-intentional transposition, possibly due to the fact that some of the language used may have been used in a previous legal action
[74] FAA Exhibit 1, Item 1, pages 14-17.
[75] FAA Exhibit 1, Item 3B, page 6. Also see FAA Exhibit 1, Item 3A. In support of its motion, the County cites Larry L. Davis v. Jackson Municipal Airport Authority, 2011 WL273404, *17, FAA Docket No. 16-10-01 (January 18, 2011); Long Island Jet Center East, Inc. v. County of Suffolk, 2005 WL 42889, *10, FAA Docket No. 16-04-05 (January 21, 2005).
[76] 14 CFR §16.23.

sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."[77]

B. Issue 1 - Whether the County is in violation of Grant Assurance 22 *Economic Nondiscrimination*, by (1) not entering into a long-term lease with Complainant, (2) by enacting the derelict aircraft ordinance and then enforcing it on Complainant in a manner which differed from that applied to other similarly situated tenants.

Grant Assurance 22, *Economic Nondiscrimination* states in part that the Airport is to

> …make the 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.

Grant Assurance 22(e) deals with an airport's obligation to manage tenants through

> …substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications…

Complainant states that in 1994, it first applied for a long-term lease at the Airport."[78] Following the execution of a short-term lease in 1996, Complainant raised concerns because it sought a long-term lease similar to that granted to other tenants" but that the "County refused it but did approve "long-term leases for other similarly situated tenants."[79] The Complaint alleges 3 counts of violation of Grant Assurance 22.

First, it alleges that Tropical has been harmed by the County's failure to provide access and allow Tropical to "expand, grow, change or adapt."[80] Complainant also argues that the County "refused to give consent to the sublease between AIR and FLL-AIR [prime tenant] on December 23, 2011."[81] This alleged violation, from what the Director can discern, is not clearly tied to a particular occurrence or incident. Nevertheless, giving Complainant the benefit of the doubt, the Director interprets this count as related to the County's failure to consent to the sublease.

Second, the Complaint alleges that the County's ordinance violates Grant Assurance 22.[82] The Complainant argues that the ordinance is vague, violates the U.S. Constitution and discriminates against users such as it. Among other things, this count also cites – with no specificity -- to "unduly restrictive lease covenants."

Third, the Complaint alleges that the County's application of the ordinance against Tropical was discriminatory.[83] Complainant adds that the County:

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[77] 14 CFR § 16.29.
[78] FAA Exhibit 1, Item 1, pages 2, 3, 9, 15, 16, and 24.
[79] FAA Exhibit 1, Item 1, page 3.
[80] FAA Exhibit 1, Item 1, pages 11-12 (¶ 62).
[81] FAA Exhibit 1, Item 1, Page 9.
[82] FAA Exhibit 1, Item 1, pages 12-15 (¶¶ 63-72).
[83] FAA Exhibit 1, Item 1, pages 14-17 (¶¶ 73-86).

> "has failed to apply and enforce nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non-signatory carriers."[84]

These counts are addressed in turn.

1. Grant Assurance 22 and Access: Count 1

Although Count 1 is vague, the Director construes this to be a complaint regarding access. In particular we construe this to be a complaint that the County did not consent to the sublease. The County has provided an executed settlement that provides that the County will not object to a sublease.[85] But, the County has pled that Tropical breached this agreement and therefore it had no obligation to consent.[86]

Tropical has the burden of proof to show a violation of Grant Assurance 22. Without more, we conclude that it is not unreasonable for the County to withhold its consent to a sublease where Tropical has breached a settlement agreement with the County – particularly when the very settlement agreement breached provided for the consent at issue.[87]

2. Grant Assurance 22 and the Ordinance: Count 2

In arguing a violation of Grant Assurance 22, Complainant adds that the County "has created a discriminatory condition in the enactment of the derelict aircraft ordinance, § 2-30(f)" and that the:

> "ordinance restricts FLL'S availability for public use and discriminates against any aircraft owner or business such as Tropical by placing a restriction on access to the airport with a preset condition that he must complete any or all maintenance, repairs, teardowns or restoration of the aircraft within a 60 day period or submit justification and seek a written waiver authorization which is unduly burdensome, restrictive and discriminately favors those individuals and or entities that have greater financial resources or access."[88]

We note that the1996 lease, and subsequent leases, prohibited the storage of derelict aircraft.[89] The lease was executed in early 1996, (and extended since) and the ordinance was passed in late 1999. We find it relevant, albeit not dispositive, that prior to the ordinance, the Complainant had agreed to a provision similar to the one to which it now objects.

The FAA supports a local government's right to make and enforce their own laws, regulations, policies, and ordinances; provided these are applied in a reasonable manner and consistent with Federal law. The Director does not find the ordinance at issue here to be unduly burdensome or improperly vague.

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[84] FAA Exhibit 1, Item 1, page 11.
[85] FAA Exhibit 1, Item 3B, Exhibit A, paragraph 2(D)
[86] FAA Exhibit 1, Item 3B, page 5 (¶ 50).
[87] FAA Exhibit 1, Item 3B, Exhibit 1, section 2(d); paragraph 49.
[88] FAA Exhibit 1, Item 1, page 12.
[89] e.g., FAA Exhibit 1, Item 1, Exhibit A, 1996 Lease, Section 1.4, page 4.

3. Grant Assurance 22 and the County's Application of the Ordinance: Count 3

Complainant argues that the County "refrain[ed] from enforcing the Ordinance against the various tenants who have aircraft that remain un-hangared and un-flown for over 60 days, while selectively enforcing the Ordinance against Tropical." Complainant alleges unjust discrimination because "at the time the Ordinance was enacted, Tropical's neighbor had various types of aircraft on its property" and that "after the Ordinance went into effect, the neighbor's aircraft stayed on non-hangared space on the neighbor's leasehold property for at least two years without taking off or landing, which is a violation of § 2-30(f)…"[90]

Complainant summarizes the issue by stating that the County, "has established unreasonable, and unjustly discriminatory, conditions"[91] related to the operation of the airport "through its application of the Ordinance has violated Federal Grant Assurance 22 (e) when it arbitrarily subjected Tropical to discriminatory and distinct rules from those applied to other similarly situated tenants, including unduly restrictive lease covenants" and that the County "further violated Federal Grant Assurance 22(h) when it arbitrarily enforced safety and efficiency regulations [§ 2-30(f)] solely against Tropical, despite visible violations committed by other similarly situated tenants."[92]

To these allegations, the County simply "denies" all allegations, with very little detail and supporting documentation. The County does note that "Tropical entered into a legally-binding lease"[93] and asserts that "there were no other noncommercial carrier tenants that operated at FLL. The other general aviation aircraft operators have been subtenants, of whom some have had derelict aircraft and they either came into compliance or their subleases expired. The County admits it has not been compelled to evict other tenants for derelict aircraft, but denies there are "many tenants who house aircraft that are not hangared and that have not flown for over 60 days."[94]

The Director notes that the County's identification of Tropical as the only "non-commercial carrier," indicates that the County considered the Complainant dissimilar from other airport tenants engaged in commercial air transportation, e.g., 14 CFR Part 135. It further distinguishes Tropical as a "general aviation aircraft operator."

The record contains no evidence showing that other entities at the Airport were permitted to store derelict aircraft past 60 days. It is relevant, as part of any review of alleged unjust discrimination to analyze the alleged treatment of the Complainant, namely by comparing them to the treatment received by other similarly situated tenants. The Complainant's service category is especially important in the scope of the entire complaint analysis. The Complainant claims other similarly situated tenants were treated more favorably. The Complainant relies on, throughout its complaint, comparison with "other tenants" or "similarly situated tenants" to establish discriminatory treatment or a granting of exclusive rights. Consistent within all these allegations, the Complainant never identifies a specific tenant in order to make a detailed and reasonable comparison, beyond one reference to a "neighbor."[95]

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[90] FAA Exhibit 1, Item 1, page 6.
[91] FAA Exhibit 1, Item 1, pages 16-17.
[92] FAA Exhibit 1, Item 1, pages 16-17. Enforcement of such laws and standards, against only one tenant or business, provides no basis for a Federal law or, in this case, a grant assurance violation unto itself. However, under certain circumstances, such treatment may indicate a violation.
[93] FAA Exhibit 1, Item 3B, page 2.
[94] FAA Exhibit 1, Item 3B, page 5.
[95] Had Complainant identified other tenants, the Director could have researched or attempted to acquire related leases or other documentation as part of this investigation.

While neither the Complainant nor the County discusses how the Complainant's tenancy was defined, the County's *Minimum Standards Policy for General Aviation at Broward County Airports* (Minimum Standards) does describe various types of tenants, within its airport system. The lease outlines the services the Complainant was permitted to perform and some services from which they were prohibited to undertake. Complainant is an "air agency" (or air carrier) providing passenger and cargo transportation for hire. This holds true even when we take into account that Tropical was effectively supporting Air Sunshine's operations from the Airport. Thus, under one corporate entity for all intended purposes, Complainant can be considered a *Non-Scheduled and Air Charter Passengers, Cargo, and Mail Services* service (a SASO or *Specialized Aviation Service Operation*).

As described within the minimum standards, a SASO offering nonscheduled and charter passenger, cargo, and/or mail services shall: (1) Conduct all aircraft charter and air taxi operations in accordance with and certificated under FAR Part 135 and amendments thereto and all other applicable rules and regulations, (2) Provide services and equipment for servicing passengers and for handling freight, luggage, and ticketing. Make available transportation for transient passengers and pilots, i.e. calling a taxi or shuttle service."

Thus in this case, a similarly situated user is one providing similar transportation for hire, not a full service FBO. A more relevant comparison would be with another commuter airline or Part 135 service provider. Specifically, one which was permitted to store nonflying aircraft or large components (e.g., fuselages) for several months at the Airport. But even these obvious distinctions cannot be made with any certainly in this case because of the lack of details or information provided in the record.

Storage of derelict aircraft has been addressed by the FAA before. See Valley Aviation Services, LLP v. City of Glendale, AZ, FAA Docket No. 16-09-06. In Valley Aviation, the FAA stated that "enforcing the Airport Rules and Regulations against the Complainant for storing disabled aircraft while not enforcing these same Rules and Regulations against other users (without a reasonable explanation) is a violation of Grant Assurance 22, *Economic Nondiscrimination*." In this case, the Director found the airport sponsor was "in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to apply its Airport Rules and Regulations consistently among similarly situated tenants. The policy regarding storing…disabled aircraft on the Airport has not been equitably applied to all tenants."[96]

There are crucial distinctions between Valley Aviation and the present case. In Valley Aviation, the record contained evidence of inconsistent practices. In the present case, Tropical, the party with the burden of proof, did not submit information indicating whether or not other leases contained a derelict aircraft provision. For example, there is no record of related enforcement or complaints by others, or any photos that show derelict aircraft in any leasehold at the airport.[97] Part 16 requires a complainant to "provide a concise but complete statement of the facts relied upon to substantiate each allegation." 14 CFR 16.23(b)(3). The complaint at issue is ambiguous and lacks sufficient information, thus falling short of this requirement. The Director therefore finds no violation of Grant Assurance 22.

Issue 2 - Whether the County is in violation of Grant Assurance 23 *Exclusive Rights* by denying Complainant a long-term lease while granting other similarly situated tenants such leases.

Grant Assurance 23 states in part, 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." Similarly, Title 49

[96] Valley Aviation Services, LLP v. City of Glendale, AZ, FAA Docket No. 16-09-06, page 47.
[97] On this the Director points to FAA Exhibit 2, Item 1 and 2, which show derelict aircraft at the Airport, but it is not indicative that discrimination took place or that those aircraft were there past any lease limitation.

U.S.C. § 47107(a)(4) provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."[98]

The Complainant asserts the County's "failure to provide Tropical a long term lease or other lease options available to similarly situated tenants at the airport while continuing to grant additional land to a select number of tenants forcing other tenants such as Tropical to become a sub-lessee of these select tenants is a violation Federal Grant Assurance 23."[99] Furthermore, Complainant states that the County "violated Federal Grant Assurance 23 when it granted a limited number of companies' long-term leases, and continued to award these tenants increasingly larger leaseholds, while continually refusing to provide Tropical with a long-term lease." Complaint concludes that the County's "actions effectively [granted] other tenants with long-term leases and less restrictive clauses an exclusive right in their operations and prevent Tropical from being competitive in its industry, is a violation of Federal Grant Assurance 23."[100] In response, the County "denies" this allegation, and merely states that "Federal Grant Assurance 23 speaks for itself."[101]

For all intended purposes, Complainant's arguments are very similar to those made under Grant Assurance 22 above. This similarity also exists with regards to the evidence submitted. As with the issue above, Complainant fails to identify specific "similarly situated tenants," making difficult any comparison on which to establish an exclusive right. Even if the Complainant described another similarly situated tenant, any difference between two leases is insufficient to establish a violation of Grant Assurance 23 on its own.[102] This is because in some cases, lease terms may change over time to accommodate evolving economic, operational, or other airport conditions or needs of the airport. The fact is that the Complainant has provided no evidence or documentation to substantiate the allegation other similarly situated tenants at the airport were provided leases.

Complainant has failed to identify a particular rejection or inaction on the part of the County with respect to a request for a long term lease that falls within the limitations period. To consider such a claim, FAA must examine the particular transaction or negotiation between Tropical and the County. General allegations regarding trouble obtaining a desired lease are insufficient. FAA cannot determine when Tropical last requested a long term lease. It appears that the last time the County rejected Tropical's request for a long-term lease was some time before February 1, 1997.[103]

The County very well may have denied a request for a long term lease at a time falling within the limitations period, but Complainant has provided no specifics regarding such an event. Complainant failed to provide any details such as what other companies, what parcels of property were leased, or what other entities at the airport have sub-leases and/or short-term leases. Without this type of information to support the allegation that the County granted additional land to "a select" number of similarly situated tenants forcing other

[98] Federal statutory law prohibits sponsors from granting an exclusive right. Consequently, regardless of how the sponsor granted the exclusive right – e.g. express agreement, unreasonable minimum standards, action of a former sponsor, or other means. See Advisory Circular 150/5190-6d.
[99] FAA Exhibit 1, Item 1, pages 18-19.
[100] FAA Exhibit 1, Item 1, pages 18-19.
[101] FAA Exhibit 1, Item 3B, page 8. The Director believes the County's level of response to the allegations, reflect poor communication with tenants and the FAA.
[102] Both minimum standards and lease terms may change over time. The FAA recognizes leases are legal documents, which may evolve from year to year. These agreements are rarely identical between users because of differing circumstances of the leases, sites, users, negotiations, business plans, economic circumstances, and market conditions, etc. Additionally, the FAA cannot enforce lease provisions through the compliance program, but may interpret the application of the lease terms as discriminatory or a conveyance of an exclusive right.
[103] FAA Exhibit 1, Item 1, at 12-13.

tenants such as Tropical to become sub-lessees, is unsupported. Simply, the claim lacks sufficient evidence for the Director to make his own comparison.

Because there is no evidence demonstrating what terms and conditions were offered to other similarly situated tenants, the FAA cannot determine whether the County's "actions effectively [granted] other tenants with long-term leases and less restrictive clauses an exclusive right, as Complainant asserts. This is made more difficult by the fact the record also fails to provide much detail on the Complainant's own plans. Also, the Complainant does not identify any precise need(s) for expansion of their leasehold or conversion of their short-term lease to a long-term agreement. Even basic information concerning the level of financial investment Complainant was willing to make, in terms of "full development plan for the site and a financial plan describing the funding strategy for the development" as the County mentioned in its lease,[104] is not provided.

Therefore, any insights about the Complainant's initial intent for growing its business or other plans for a larger leasehold space are absent, specifically any goals to repair inoperable or derelict aircraft. Since these aircraft and the length of their storage are the primary reason for the eviction, any plans related to repair or remove them are potentially pertinent to this case. Without evidence to establish the requests as reasonable, an assumption the County denied these requests in a discriminatory manner is problematic. For example, in its January 30, 1996, letter to the County, Complainant state that it "need[s] to enter a long-term lease as soon as possible, a lease similar to what you offer to your other tenants. A lease without any restrictive clauses designed to protect other operators…"[105] Yet, the record does not include any information of what "those other leases" have been or are likely to be.[106]

The Complainant also states that "on or about 1997, Tropical began to request permission from Broward County to build a larger hangar in which to house the aircraft on which it continued to work, in order to minimize exposure of the aircraft to the South Florida elements."[107] The Complainant claims they, at some point, requested a larger hangar and permission to expand their overall leasehold. However, they fail to explain the specific need for this expansion or provide adequate evidence to demonstrate such a need. Any information demonstrating the manner in which additional space would facilitate the repair and removal of the aircraft the County deemed derelict would be especially illustrative.

As the Director found in the previous issue, the Complainant's failure to identify a specific "other" or "similarly situated" tenant for comparison weakens the allegations within this issue. Complainant also fails to introduce any evidence showing differences between the Complainant and other tenants. For example, another tenant's lease or list of services would be illustrative for purposes of this discussion.

Absent evidence to prove otherwise, and given these considerations and a lack of sufficient evidence, the Director finds the County has not violated Grant Assurance 23 *Exclusive Rights.*

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[104] FAA Exhibit 1, Item 1, Exhibit A, Section 4.1.
[105] FAA Exhibit 1, Item 1, Exhibit B.
[106] The 1996 lease agreement describes the property leased to the Complainant states that "the proposal of lessee for the lease from Broward County of 1.433 acres of land, including 6,400 square feet of hangar space, and 42,182 square feet of paved aircraft ramp and 9,025 square feet of non-airside asphalt space as depicted on the attached, Exhibit A located at the Fort Lauderdale-Hollywood international Airport has been accepted by County." FAA Exhibit 1, item 1, Exhibit A. The Complainant also states that "on or about 1997, Tropical began to request permission from Broward County to build a larger hangar in which to house the aircraft on which it continued to work, in order to minimize exposure of the aircraft to the South Florida elements." FAA Exhibit 1, Item 1, page 3. The Complainant claims they, at some point, requested a larger hangar and permission to expand their overall leasehold. However, they fail to explain the specific need for this expansion or provide adequate evidence to demonstrate such a need. Any information demonstrating the manner in which additional space would facilitate the repair and removal of the aircraft the County deemed derelict would be especially illustrative.
[107] FAA Exhibit 1, Item 1, page 3.

Issue 3 - Whether the County is in violation of Grant Assurance 24 *Fee and Rental Structure* by failing to maintain a uniform fee and rental structure for the facilities and services at the airport, and by failing to provide Complainant a long-term lease or other lease options available to similarly situated tenants at the airport.

Grant Assurance 24 *Fee and Rental* requires, in part, that the sponsor

> …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.

Complaint states that the County violated this assurance by failing to maintain a uniform fee and rental structure and by failing to provide Tropical a long-term lease.[108] The exhibits filed during the proceedings provide no firm evidence to support this allegation. For example, other tenant lease rates, a general fee schedule applicable to similarly situated tenants, or other evidence of discriminatory fee setting practices may have helped give a better foundation for this allegation. The record contains no information concerning either overall rates in affect at the time, or any data concerning any other operator at the airport. Nothing in the record questions that County's ability to maintain "a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible." Nothing in the record points towards an action on the County's part that it purposely failed to collect revenues or has changed lower rates than it should change.[109] In fact, the argument can be made that by attempting to recover unpaid rents, as it did in court against Complainant, the County is in fact complying with this grant assurance.

Therefore, against this background, and given these considerations and a lack of sufficient evidence and supporting documentation, the Director finds the County has not violated Grant Assurance 24 *Fee and Rental Structure.*

Issue 4 - Whether the Country's denial of either of the Complainant's requests for a long-term lease request or to improve their leased property, while other similarly situated tenants were offered such conditions, violated Grant Assurance 30, *Civil Rights.*

Grant Assurance 30, *Civil Rights states,* in part, that the Airport

> It will promptly take any measures necessary to ensure that no person in the United States shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination in any activity conducted with, or benefiting from, funds received from this grant.

The Complainant argues that the County is obligated to comply with federal law and related FAA Sponsor Assurances (49 U.S.C. § 47107), including Federal Grant Assurance 30.[110] [The] "County breached

[108] FAA Exhibit 1, Item1, page 20.
[109] In Valley Aviation Services, LLP v. City of Glendale, AZ, FAA Docket No. 16-09-06, the Director found that "the Respondent is not currently in violation of Grant Assurance 24, Fee and Rental Structure…by failing to collect taxes and fees for commercial aeronautical and non-aeronautical businesses operating on the Airport. Even though the Respondent may or may not be administering its lease agreements in accordance with its own Airport Rules and Regulations, the administrative record contains no evidence that the Respondent did not establish a reasonable fee and rental structure." DD at 60.
[110] FAA Exhibit 1, Item 1, page 20.

Federal Grant Assurance 30 when it prevented Tropical from obtaining a long-term lease and making improvements to the property based on Tropical's Middle Eastern race, Muslim creed, and/or Iranian origin."[111]

Complainant also argues that the County "failed to comply with the Sponsor Assurance 30 in several material respects including...." (1) selective and unjustly enforced § 2-30, (2) failure to treat Tropical as other similar situated tenants at the airport, (3) intentionally mistreated Tropical and its owners based on their national origins and religious beliefs, and have denied them opportunities and options that it has afforded other similarly situated tenants at the airport."[112] As with other issues above, the County denies this allegation, without further detail.[113]

Complainant makes a general allegation in the complaint documents alleging it was discriminated against because at least one if its principals is of "Middle Eastern race, Muslim creed, and/or Iranian origin."[114] The Civil Rights Grant Assurance requires sponsors to comply with rules promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age or handicap be excluded from participating in any activity conducted with or benefiting from funds received from Federal grants.

To prove a claim of intentional discrimination, one must show that a challenged action was motivated by an intent to discriminate.[115] It does not require evidence of "bad faith, ill will or any evil motive on the part of the [recipient]."[116] Intentional discrimination claims may be analyzed using the Title VII burden shifting analytic framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).[117]

Alternatively, under a disparate impact theory of discrimination, an allegation would be made that an airport sponsor uses criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race or sex. The theory would support an allegation that an airport sponsor, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. [118]

In Henrihetta and Lindsay Tulloch v. City of Harlingen, Texas, FAA Docket 16-05-07, the Director found that to prove a claim of intentional discrimination, one must show that "a challenged action was motivated by an intent to discriminate."[119] In Docket 16-05-07, the FAA also determined that the Complainant had failed to meet the burden to properly proffer allegations of the Civil Rights Grant Assurance under both an intentional discrimination claim and a disparate impact claim. The allegations raised by the Complainant were vague and unclear. The Complainant in that case was unable to show the airport sponsor or one of its agents discriminated against Complainant because [Complainant] was of the female gender.[120]

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[111] FAA Exhibit 1, Item 1, page 28.
[112] FAA Exhibit 1, Item 1, page 21. Although Complainant makes the same references to "selective and unjustly enforced § 2-30" and "failure to treat Tropical as other similar situated tenants at the airport," these issue are addressed in the discussions concerning the allegations of violation of Grant Assurance 22 and Grant Assurance 23, not Grant Assurance 30.
[113] FAA Exhibit 1, Item 3B, page 13.
[114] FAA Exhibit 1, Item 1, pages 21 and 28.
[115] Elston v. Talladega Board of Education, 997 F2d 1394, 1406 (11 Cir., 1993).
[116] Elston, 997 F.2d, 1406 (quoting Williams v. City of Dothan, 745 F.2d 1406, 1414 (11 Cir., 1984).
[117] Henrihetta and Lindsay Tulloch v. City of Harlingen, Texas, FAA Docket 16-05-07 at 22-23. Docket No. 16-00-10 (April 26, 2001) and reference to Morris Waller and M & M Transportation v. Wichita Airport Authority, FAA Docket No. 16-98-13 (March 12, 1999).
[118] Henrihetta and Lindsay Tulloch v. City of Harlingen, Texas, FAA Docket 16-05-07 at 23.
[119] See DD at 22 and Elston v. Talladega Board of Education, 997 F2d 1394, 1406 (11 Cir., 1993) as a reference.
[120] DD at 23.

In the present case, Tropical has failed to meet the burden to properly proffer allegations of the Civil Rights Grant Assurance under both an intentional discrimination claim and a disparate impact claim. The allegations raised by Complainant are vague and unclear. No showing has been made that the County or one of its agents discriminated against Complainant based on the fact that one of Tropical's principals is of Middle Eastern race, of Muslim creed, and/or of Iranian origin.

The fact remains that as with other allegations made by the Complainant; this allegation is unsubstantiated by reasonable evidence. The Complaint fails to describe similarly situated tenants and provide any comparison with the owners or operators of these businesses. This allegation alleges discrimination based on race, creed, and national origin. The preponderance of evidence suggests the Complainant was never denied an opportunity to participate in any airport activity due to race, creed, or national origin. The FAA's Office of Civil Rights also reviewed this complaint and affirmed this conclusion.

Therefore, the Director finds the County is compliant with their obligation as outlined under Grant Assurance 30. FAA finds no basis for the Complainant's allegations and finds that the City actions are consistent with its Federal obligations.

Issue 5 - Whether the County's denial of the Complainant's long-term lease request, while granting other tenants such leases, is in of Grant Assurance Grant Assurance 37, *Disadvantaged Business Enterprises*.

Grant Assurance 37 *Disadvantaged Business Enterprises* states that:

> The sponsor shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract covered by 49 CFR Part 26, or in the award and performance of any concession activity contract covered by 49 CFR Part 23. In addition, the sponsor shall not discriminate on the basis of race, color, national origin or sex in the administration of its DBE and ACDBE programs or the requirements of 49 CFR Parts 23 and 26.[121]
>
> The sponsor shall take all necessary and reasonable steps under 49 CFR Parts 23 and 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts, and/or concession contracts.
>
> The sponsor's DBE and ACDBE programs, as required by 49 CFR Parts 26 and 23, and as approved by DOT, are incorporated by reference in this agreement. Implementation of these programs is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement.
>
> Upon notification to the sponsor of its failure to carry out its approved program, the Department may impose sanctions as provided for under Parts 26 and 23 and may, in appropriate cases, refer

[121] 49 CFR Part 26.13 provides, in relevant part: "*The recipient [sic] shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The Recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801).*"

> the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1936 (31 U.S.C. 3801).

The Complainant alleges the County violated Grant Assurance 37, *Disadvantaged Business Enterprises (DBEs)*. Specifically, Complainant argues that the County "is obligated to comply with federal law and related FAA Sponsor Assurances (49 U.S.C. § 47107), including Federal Grant Assurance 37, which provides that the recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract," (2) that "Grant Assurance 37 further provides that the recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts" (emphasis added)," and (3) that "49 CFR Part 26 likewise requires…that the recipient must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract ...on the basis of race, color, sex, or national origin."[122] In response, the County states that "Grant Assurance 37 speaks for itself," and denies the allegations.[123]

Grant Assurance 37 has criteria for and definition of DBE contracts. 49 U.S.C. § 26, which governs this section, protects DBEs from discrimination during the award and enforcement of "DOT-assisted contracts." There is no evidence showing the Complainant is now or has ever participated in such a contract. Its tenancy on a federally funded airport is outside of the definition of a DOT-assisted contract. Moreover, the Complainant also failed to demonstrate recognition or even qualification as a DBE, under the statutory guidance provided in section 26, Appendix E. 49 USC §47107(e)(7).[124]

Consequently, the Director finds the County has not violated Grant Assurance 37, *Disadvantaged Business Enterprises.*

Issue 6 - Whether the County's denial of the Complainant's long-term lease request, while granting other tenants such leases, violated Grant Assurance 39, *Competitive Access.*

Grant Assurance 39, *Competitive Access,* requires operators of large and medium hub airports to report to the Secretary any denial of a request by an air carrier for access to the airport. Grant Assurance 39, *Competitive Access* states that:

> "If the airport owner or operator of a medium or large hub airport (as defined in section 47102 of title 49, U.S.C.) has been unable to accommodate one or more requests by an air carrier for access to gates or other facilities at that airport in order to allow the air carrier to provide service to the airport or to expand service at the airport, the airport owner or operator shall transmit a report to the Secretary that-
>
> 1) Describes the requests;

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[122] FAA Exhibit 1, Item 1, page 22.
[123] FAA Exhibit 1, Item3B, page 10.
[124] In Henrihetta and Lindsay Tulloch v. City of Harlingen, Texas [FAA Docket 16-05-07], the Director discussed a Grant Assurance 37 allegation outside of a federal contract: "The Complainant also references a violation of 49 CFR Part 26. Again in this allegation, the Complainant failed to proffer a sufficient claim. In terms of a violation the DBE requirements, the first threshold is that an airport sponsor shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The lease agreement between the Complainant and the County was not a federally-assisted contract and is not subject to the County's DBE program requirements. Nor was the Complainants' prior lease with the County's former tenant, Harlingen Jet Center. Moreover, the Complainant has not provided any evidence to substantiate a claim that the County or its agents acted in a discriminatory manner in the administration of its DBE program." DD at 23.

2) Provides an explanation as to why the requests could not be accommodated; and

3) Provides a time frame within which, if any, the airport will be able to accommodate the requests."

Complainant argues that the County is "obligated to comply with federal law and related FAA Sponsor Assurances (49 U.S.C. § 47107), including Federal Grant Assurance 39, which provides that [i]f the airport owner or operator has been unable to accommodate one or more requests by an air carrier for access to gates or other facilities in order to allow the air carrier ... to expand service at the airport, the airport owner or operator shall transmit a report to the Secretary that (a) describes the requests; (b) provides an explanation as to why the request could not be accommodated; and (c) provides a time-frame within which, if any, the airport will be able to accommodate the requests."[125]

The Complainant claims that "on or about 1997, Tropical began to request permission from [the County] to build a larger hangar in which to house the aircraft on which it continued to work, in order to minimize exposure of the aircraft to the South Florida elements," and that over many years, has "repeatedly expressed to [the County] its desire for a long-term lease and larger leasehold at FLL and for permission to further develop its leasehold, including building a hangar suitable to house its aircraft.'[126]

The Complainant summarizes the alleged violation by stating that "although the record is replete with Tropical's requests for a long term lease, [the County] has failed to give Tropical a response as to why its request could not be accommodated in violation of Federal Grant Assurance 39." Complainant also states that the County is in Violation of Grant Assurance 39 because "it failed to provide the [required] report to the Secretary."[127] The County denies the allegation but states that "FLL is a Large Hub because FLL accounts for more than 1% of the annual national boardings (enplanements)."[128]

The issue is whether the County had to notify the FAA that an air carrier operator had essentially been denied access "to gates or other facilities" at the Airport. The Director notes that this grant assurance was intended to ensure accommodation of carrier operations directly related to the movement and care of passengers, focusing on gate access and, to a lesser extent, other terminal and baggage processing areas.

As discussed above, the record establishes is that the County terminated the complainant's lease for cause, and evicted it from its leasehold. The record contains no evidence that the County has taken steps to prevent Air Sunshine from accessing the Airport's terminal and gates, specifically the commuter gate area in Terminal 4. The Director cannot affirm that a lease termination concerning airport hangars and ramp space, is by itself grounds for a finding of violation of Grant Assurance 39. This is especially true if the Airport has not prevented the operator from accessing its terminal areas or otherwise provide for aircraft and baggage access to those terminal areas and gates. Certainly, an air carrier does not need to have a land lease for hangar and ramp space in order to serve the Airport. In addition, Grant Assurance 39 is not intended to require an airport sponsor to file a report every time lease negotiations fail to meet all of the expectations of a tenant or prospective tenant.

Therefore, the Director finds that the County is not in violation of Grant Assurance 39 *Competitive Access* because the County did not submit the report to the FAA.

[125] FAA Exhibit 1, Item 3B, pages 23-25.
[126] FAA Exhibit 1, Item 1, Pages 3, 26.
[127] FAA Exhibit 1, Item 3B, pages 23-25.
[128] FAA Exhibit 1, Item 3B, pages 10-11.

VII. FINDINGS AND CONCLUSION

Upon consideration of the submissions of the parties, and the entire record herein, and the applicable law and policy and for the reasons stated above, the Director finds and concludes:

Issue 1 - The County is not in violation of Grant Assurance 22 *Economic Nondiscrimination.*

Issue 2 – The County is not in violation of Grant Assurance 23 *Exclusive Rights*.

Issue 3 – The County is not in violation of Grant Assurance 24 *Fee and Rental Structur*e.

Issue 4 – The County is not in violation of Grant Assurance 30, Civil Rights.

Issue 5 – The County is not in violation of Grant Assurance Grant Assurance 37, *Disadvantaged Business Enterprises*.

Issue 6 – The County is not in violation of Grant Assurance 39, *Competitive Access* because it did not file the required report with the FAA.

ORDER

All Motions not expressly granted in this Determination are denied.

RIGHT TO APPEAL

This Director's Determination, FAA Docket No. 16-12-15, is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. [14 CFR § 16.247(b)(2)]. A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination pursuant to 14 CFR § 16.33(c) within thirty (30) days after service of the Director's Determination.

Randall S. Fiertz
Director, Office of Airport Compliance
and Management Analysis

4-22-2015
Date