

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

**NEIL KUNZ,**

**Appellant,**

**v.**

**SALT LAKE CITY CORPORATION, a Utah  
municipal corporation, and its SALT LAKE  
CITY DEPARTMENT OF AIRPORTS  
including its TOOELE VALLEY AIRPORT,**

**Appellee.**



**FAA Docket No. 16-21-06**

**FINAL AGENCY DECISION**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal by Neil Kunz (Kunz or Complainant) against Salt Lake City Corporation/Salt Lake City Department of Airports, Utah (City or Respondent), owner and sponsor for the Bolinder Field-Tooele Valley Airport (TVY or Airport). Kunz challenges the findings of the Director's Determination (DD) signed March 9, 2022 (FAA Exhibit 2, Item 1).

Kunz's appeal states that the Director's findings and conclusions should be set aside, and alleges that the "decision is not in accordance with law and FAA's precedent and policy" (FAA Exhibit 2, Item 2, p. 2). Kunz argues that the Director is in error that the sponsor is not required to acquire the Kunz easement as part of the Instrument Landing System (ILS) and Runway expansion project, which was Airport Improvement Program (AIP) funded and for which Grant Assurance 35 allegedly applies. Kunz further appeals that an aviation easement is required for the operation of the Airport because an airport overlay zone (AOZ) has not been adopted and no protection exists for the airspace. Finally, Kunz appeals that the City has not fulfilled a condition that a court of competent jurisdiction previously concluded was necessary for the City to obtain funding, i.e., acquisition of the aviation easement (FAA Exhibit 2, Item 2, p. 2).

The City responds that the Director correctly concluded that the City is not in violation of its Federal obligations and the Director's Determination (DD) should be affirmed (FAA Exhibit 2, Item 4, p. 8).

Upon appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence contained in the record; (b) each conclusion is based

on applicable law, precedent, and public policy; (c) the questions on appeal are substantial; and (d) any prejudicial errors occurred. (14 CFR § 16.33(e)).

Based on this reexamination, the FAA Associate Administrator for Airports affirms the Director's Determination. The Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence and is consistent with applicable law, precedent, and FAA policy. The Complainant's Appeal does not put forth persuasive arguments sufficient to reverse any portion of the Director's Determination.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR Part 16.

## **II. SUMMARY OF THE DIRECTOR'S DETERMINATION**

The Complainant alleges that the City violated the Uniform Relocation Assistance and Real Property Acquisition Act (URA), 42 U.S.C § 4601, *et seq.*, and URA-Real Property Acquisition-Certain Litigation Expenses, 49 CFR § 24.107, by abandoning its condemnation action for an avigation easement over the Complainant's property and failing to pay litigation expenses (FAA Exhibit 1, Item 2, pp. 2-3). The Director of Airport Compliance and Management Analysis (Director) concluded in the Director's Determination:

Issue 1 - The City was not in violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, by failing to purchase the Complainant's property or an avigation easement over Complainant's property. The Director determined that Grant Assurance 35 was not implicated in this case. Kunz's property lies outside of the RPZ for Runway 35 (FAA Exhibit 1, Item 6). The FAA has not issued an AIP grant for the acquisition of this property.

Issue 2 - The Respondent was not in violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, by failing to pay litigation expenses related to its failed condemnation action. The Director determined that Grant Assurance 35 and the URA apply only to situations in which the property is acquired with Federal funds, which is not the case here. The Director also stated that it is outside of the FAA's jurisdiction to address the legal fees for the failed condemnation action in this case. The Part 16 process is not intended to address state law legal claims. The grant assurances do not compel the City to acquire property interests from the Complainant nor specify the terms of such acquisition if so pursued.

## **III. PARTIES**

### **A. Appellant**

The Appellant, Kunz, owns Lot 1, Parcel Number 14-11-1, in Kunz Estates, a 21-acre subdivision of Tooele County, Utah. This property was transferred to him by Dick D. Kunz through a quit claim deed on June 5, 2007 (FAA Exhibit 1, Item 3, Exhibit B). Kunz has resided on the property since 2002 (FAA Exhibit 1, Item 4, p. 5).

## **B. Appellee**

The City owns and operates TVY, a public-use general aviation airport with approximately 14 based aircraft and an average of 193 operations per day (FAA Exhibit 2, Item 8).

The Airport's development was financed, in part, with FAA AIP funding, authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* Since 1983, the City has accepted more than \$10,536,564 in Federal grants for airport development and related investments (FAA Exhibit 1, Item 5). As a result of accepting AIP funds, the sponsor is obligated to comply with FAA sponsor assurances and related Federal law, 49 U.S.C. § 47107.

## **IV. PROCEDURAL HISTORY**

1. On March 24, 2021, Kunz filed a 14 CFR Part 16 Complaint against the City (FAA Exhibit 1, Item 2).
2. On May 7, 2021, the City filed a Motion to Dismiss and Motion for Summary Judgment (FAA Exhibit 1, Item 3).
3. On May 21, 2021, Kunz filed an Opposition to the Respondent's Motion to Dismiss and Motion for Summary Judgment (FAA Exhibit 1, Item 4).
4. On March 9, 2022, the FAA Director of Office of Airport Compliance and Management Analysis issued a Director's Determination (FAA Exhibit 2, Item 1).
5. On April 8, 2022, Kunz filed its Notice of Appeal of Director's Initial Determination and Brief (FAA Exhibit 2, Item 2).
6. On April 8, 2022, Kunz filed a Petition for Consideration of New Evidence (FAA Exhibit 2, Item 3).
7. On April 28, 2022, the City filed a Brief of Respondent in Reply to Appeal (FAA Exhibit 2, Item 4).
8. On April 28, 2022, the City filed a Response to Petition for Consideration of New Evidence (FAA Exhibit 2, Item 5).

Refer to the index for other administrative filings.

## **V. BACKGROUND**

The events leading up to the alleged violation of the Airport include the following:

1. In 1999, Dick D. Kunz purchased 21 acres of vacant land adjacent to TVY. The property was subdivided into four parcels and residences were constructed on Lots 1 and 2 in 2001 and 2002, respectively (FAA Exhibit 1, Item 4, p. 6).
2. On June 5, 2007, Dick D. Kunz transferred Lot 1 to Neil Kunz through a quitclaim deed (FAA Exhibit 1, Item 3, Exhibit B).
3. Between 2005 and 2007, in anticipation of receiving an FAA-installed ILS, the City made offers to purchase an avigation easement over the Kunz property. These offers were declined due to disagreement over the fair market value of the easement (FAA Exhibit 1, Item 4, p. 7).
4. In May 2007, the City Council authorized pursuit of an eminent domain proceeding (FAA Exhibit 1, Item 4, p. 7).
5. On July 2, 2007, the City filed a condemnation action in district court for an avigation easement over the Kunz property (FAA Exhibit 1, Item 4, Exhibit A1).
6. In 2008, the FAA installed an ILS (FAA Exhibit 1, Item 4, p. 6).
7. On June 23, 2010, FAA accepted an Airport Layout Plan (ALP) from the City. The Kunz property, identified as Parcel 11 on the Property Map, Exhibit A, lies outside of the Runway Protection Zones for Runway 35 (FAA Exhibit 1, Item 6).
8. On November 19, 2018, the district court granted summary judgment to Kunz and ruled that the City failed to satisfy the Utah Code, requiring that the property owner be given an opportunity to be heard on a proposed taking (FAA Exhibit 1, Item 2, Exhibit G, p. 5).
9. On March 29, 2019, the City Council held a hearing on the condemnation action and gave Kunz an opportunity to be heard. At this meeting, the City Council authorized pursuit of an eminent domain proceeding for an avigation easement and encouraged the airport to negotiate for the purchase of the entire parcel (FAA Exhibit 1, Item 3, p. 7).
10. On April 26, 2019, the district court denied Kunz's motion for attorney fees, costs, and expenses; vacated the City's order of occupancy; and granted Kunz's Motion to Dismiss the City's condemnation claim (FAA Exhibit 1 Item 2, Exhibit H). Both parties appealed to the Utah Court of Appeals.
11. During March 2020, Kunz filed in state court a claim of inverse condemnation, trespass, nuisance and breach of contract as a third-party beneficiary to the City's grant agreements with the FAA, and later sought entry of a preliminary injunction (FAA Exhibit 1, Item 3, p. 8).
12. On July 17, 2020, Barbara Jean Kunz and Neil Norris Kunz submitted an application for Preliminary Injunction (FAA Exhibit 1, Item 2, Exhibit E).
13. On October 16, 2020, the Utah Court of Appeals affirmed the district court's dismissal of the City's condemnation and the denial of attorney fees and costs for the Complainant (FAA Exhibit 1, Item 2, Exhibit I, p. 29).
14. On February 21, 2021, the state court denied Kunz' claims for preliminary injunction and dismissed with prejudice all of the claims except inverse condemnation. (FAA Exhibit 1, Item 3, p. 8).

## VI. THE APPEALS PROCESS

A party adversely affected by a DD may, in cases such as this, file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination [14 CFR § 16.33(c)]. The review is limited to an examination of the DD and the administrative record upon which such determination was based. The Associate Administrator does not consider new allegations or issues on appeal unless there is a finding good cause as to why the new issue or evidence was not presented to the Director. [14 CFR § 16.33(f)]. On appeal, the Associate Administrator will consider (1) whether the findings of fact are supported by a preponderance of reliable, probative, and substantial evidence contained in the record; (2) whether the conclusions were made in accordance with law, precedent, and policy; and (3) whether there are questions on appeal that are substantial; and (4) whether any prejudicial errors occurred. [14 CFR § 16.33(e)]

## VII. ISSUES

### PRELIMINARY MATTER

The Complainant submitted a Petition for Consideration of New Evidence on Appeal to the Associate Administrator. Kunz states that there is new evidence that the Director did not consider. Kunz claims that the City is in noncompliance with Grant Assurance 20, *Hazard Removal and Mitigation*, and Assurance 21, *Compatible Land Use*, because there is currently no airspace protection around the Airport, which would be established by the new evidence (FAA Exhibit 2, Item 2, pp. 4-5).

Kunz additionally raises three issues on appeal:

1. The Director erred by not finding the Respondent in violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, by failing to purchase Kunz's property or an avigation easement over the property because it was expressly concluded to be a necessary requirement for the City to obtain funding from the FAA (FAA Exhibit 2, Item 2, p. 2).
2. The Director erred by not determining the Respondent is in violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, by failing to pay litigation expenses related to its failed condemnation action (FAA Exhibit 2, Item 2, p. 4).
3. The Director erred by not determining that the Respondent has not fulfilled a condition that a court of competent jurisdiction previously concluded was necessary for the Respondent to obtain funding, i.e. acquiring an avigation easement (FAA Exhibit 2, Item 2, p. 2). Furthermore, Kunz alleges that the City has effectively engaged in a "taking" without compensation.

## VIII. ANALYSIS

### PRELIMINARY MATTER

Kunz petitions for consideration of new evidence. Kunz submitted new evidence of two Obstacle Identification Studies that were conducted by the FAA. Kunz argues that the Director did not consider that the City is in noncompliance with Grant Assurance 20, *Hazard Removal and*

*Mitigation*, and Grant Assurance 21, *Compatible Land Use*, because there is currently no airspace protection around the Airport, which he alleges would be established by the submitted new evidence (FAA Exhibit 2, Item 2, pp. 4-5).

**Kunz Position:** Kunz argues that the FAA should allow new evidence of two Obstacle Identification Studies that were conducted by the FAA. The FAA sent Kunz one completed study, No. 2021-ANM-6976-OE, on November 8, 2021, and the other completed study, No. 2021-ANM-9818-OE, on February 1, 2022. Kunz alleges that these Obstacle Identification Studies were not available or did not exist at the time the Complaint was made, and that they are a product of the FAA and should be considered on Appeal (FAA Exhibit 2, Item 3, Exhibit C).

**City Position:** The City objects to Kunz's petition to introduce this new evidence. It claims that these studies were completed on November 8, 2021, and February 1, 2022, well before the Director's Determination was issued on March 8, 2022. The City further states that Kunz offers no explanation for why he failed to move to supplement the record (FAA Exhibit 2, Item 5). The City also provided a new exhibit, which is an affidavit dated April 22, 2022, to specifically respond to the two new Obstacle Identification Studies.

**Associate Administrator's Determination:** Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition supporting a finding of good cause as to why the new issue or evidence was not presented to the Director, which petition must contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed. (*See* 14 CFR § 16.33(f)).

The Record shows that Kunz and City have been contesting this issue for several years in state courts. Both studies were requested by Kunz for a proposed building, a proposed flagpole, and an existing tree in 2021 (FAA Exhibit 2, Item 3, Exhibit A and Exhibit B).

Kunz had ample opportunity to submit obstruction evaluations to the FAA and request that it conduct aeronautical studies to determine proposed construction of a building and flagpole during this contested period, which he did not do. Nor was there any reference in his Part 16 Complaint or state court pleadings that any obstruction studies were being conducted or other evidence to support any proposed construction. In addition, Kunz does not substantiate that he is the property owner of these properties. Furthermore, the proposed structures are proposed and not existing hazards. Finally, the ALP obstruction evaluation chart did not show or state that the existing tree was an obstruction in 2010, and it appears to be located on another person's property (FAA Exhibit 1, Item 6, pp. 8-9). Consequently, Kunz's petition to admit new evidence is denied.

Furthermore, Kunz claims that there is no airspace protection and that the sponsor is in noncompliance with Grant Assurance 20, *Hazard Removal and Mitigation*, and Grant Assurance 21, *Compatible Land Use*, around the airport. His argument that the sponsor is required to protect all of the surfaces because the ILS system cannot function as designed without an aviation easement over the Kunz Property is addressed below (FAA Exhibit 2, Item 2, pp. 11-12).

The FAA Design Guide states:

FAA policy is to protect the public investment in the national airport system. To implement this policy, the FAA studies existing and proposed objects and activities, both off and on public use airports, with respect to their effect upon the safe and efficient use of the airports and safety of persons and property on the ground. These objects need not be obstructions to air navigation, as defined in 14 CFR Part 77. As the result of a study, the FAA may issue an advisory recommendation in opposition to the presence of any off-airport object or activity in the vicinity of a public-use airport that conflicts with an airport planning or design standard or recommendation.

(See FAA Design Guide AC 150/5300-13 Incorporating Changes 1 through 18, para. 212(c)).

Although the Associate Administrator denies the Kunz petition which seeks to admit the two Obstacle Identification Studies into the record on this appeal, the fact that Kunz requested the FAA to conduct these studies simply shows that the airspace around the airport has been evaluated and potential future obstructions identified. Kunz fails to demonstrate how the presence of potential future obstructions – not yet constructed – obviates the Director’s findings regarding Grant Assurance 35 and thus should be considered here. Also, excepting the tree, potential obstructions not yet constructed cannot be deemed a violation of Grant Assurance 20 or 21 based on the premise that they may be built in the future. Furthermore, Kunz does not offer any other evidence in the record to support these new allegations. Consequently, Kunz’s new evidence concerning the Grant Assurances 21 and 22 are not admitted into the record in this Final Agency Decision.

The City also submitted new exhibits to answer Kunz’s Petition to Consider New Evidence (FAA Exhibit 2, Item 5, Exhibit A, and FAA Exhibit 2, Item 5, Exhibit A, Item 1). Because the Complainant’s petition is denied, the City’s new exhibits also are denied.

### **ISSUE ONE**

Whether the Director erred by finding the Respondent is not in violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, by failing to purchase the Complainant’s property or an aviation easement over the property.

**Kunz Position:** The Complainant appeals that the Director did not consider that the City is in noncompliance with Grant Assurance 20, *Hazard Removal and Mitigation*, and Grant Assurance 21, *Compatible Land Use*, because there currently is no airspace protection around the Airport (FAA Exhibit 2, Item 2, pp. 4-5). Kunz argues that the ILS system project, which received AIP funding in AIP Project No. 3-49-0048-13, cannot function as intended without the required aviation easements over the Kunz Property (FAA Exhibit 2, Item 2, p. 3).

Furthermore, Kunz claims that “the ALP contains an error according to the version of FAA Design Guide AC 150/5300-13 in force June 23, 2010. A portion of the Kunz property lies inside the Runway Protection Zones for Runway 35” and that “the Runway 35 are visual and Runway

35 is a non-precision runway requiring larger RPZ dimensions which would cross into the Kunz property” (FAA Exhibit 2, Item 2, p. 8).

The Complainant also argues that FAA *Central Regional Airports Division, AIP Sponsor Guide 500 - Planning, 562 – Zoning around Airports* states that zoning will not be sufficient to prevent the construction of incompatible land uses (FAA Exhibit 2, Item 2, p. 21).

**City Position:** The City responds that Kunz agrees that his property is outside the RPZ as depicted on the ALP. The City states that the ILS system was installed by the FAA in 2008 and has been operating ever since. The City contends that the Kunz’s argument appears to rest on the mistaken view that the City argued to the court that “the aviation easement was required” for the 2008 ILS installation, which is not the case (FAA Exhibit 2, Item 4, p. 6). Because the City lacks direct jurisdictional control, it has pursued an AOZ in Tooele County and will pursue an AOZ in the newly-formed Erda City. These zoning efforts will protect the surrounding land use and approach surfaces in a more comprehensive fashion than a single aviation easement over the Complainant’s property.

**Associate Administrator’s Determination:** The ILS was installed in 2008. The FAA conditionally approved the ALP on June 23, 2010. The Property Map, Exhibit A, Land Parcel Data on Sheet 9 was reviewed. It shows the number of specific parcels adjacent to the Airport that had to be acquired for approach protection, missed approach, aeronautical, and future development. It showed what FAA AIP project agreements were used for the purchases including FAA grant and non-AIP funds.

Going further, the Property Map identified Tract 11 as the Kunz property. A footnote states that the Tract 4A is now incorporated into Tract 11. It specifically denotes the parcel as a “possible aviation easement.” It does not state that Kunz property must be purchased for airport purposes as part of any existing or proposed project unlike the others. Nor is the Kunz property assigned to a specific AIP project number like the other properties acquired with AIP funds (FAA Exhibit 1, Item 6, p. 9).

Kunz also contends that “the ALP contains an error according to the version of FAA Design Guide AC 150/5300-13 in force June 23, 2010.” He argues that a portion of the Kunz property lies inside the Runway Protection Zones for Runway 35 (FAA Exhibit 2, Item 2, p. 8). Kunz specifically claims that the Runway 35 RPZ approach is not a visual runway with visibility minimum lower than 1 mile. Rather, Kunz claims that Runway 35 is a non-precision runway requiring approach visibility minimums of not lower than  $\frac{3}{4}$  mile, which requires larger RPZ dimensions that would result in his property being inside of the RPZ (FAA Exhibit 2, Item 2, p. 8). Kunz points to the “attached Table 2-4 and revised ALP with revised dimensions showing RPZ on Kunz property” (FAA Exhibit 2, Item 2, p. 8).

Although Kunz did not provide any clear citations to documents in the record to support his claim, the ALP sheets submitted by Kunz and the City were reviewed (FAA Exhibit 1, Item 6). Kunz is correct that the ALP information for Runway 35 RPZ is for a visual approach. However, Kunz is incorrect that the Runway 35 is a non-precision runway requiring use of lower approach visibility minimum of  $\frac{3}{4}$  mile and RPZ dimensions that are larger than required for a visual



runway. ALP Sheet 2 Runway Data Chart shows that the existing Runway 35 approach visibility minimums is one mile and its future approach visibility minimum remains 1 mile (FAA Exhibit 1, Item 6, p. 2).

The Director's Determination, Section II. B. Respondent, provides an airnav link dated December 1, 2021. Airnav obtains the published aeronautical and airport information from the FAA. Airnav identifies that there is only a visual approach to Runway 35 (FAA Exhibit 2, Item 1). The Record does not show that the official FAA Form 5010 for TVY is in the Public Docket. However, the Associate Administrator considers this a harmless error since the information in airnav is similar to that published in FAA Form 5010. This omission has been corrected and the official FAA Form 5010 for TVY is docketed (FAA Exhibit 2, Item 8). Accordingly, a review of FAA Form 5010 shows that Runway 35 is similarly categorized as B(V), which is code for "Other than utility runway with a visual approach" (FAA Exhibit 2, Item 9, p. 26). The FAR 77 Category for Runway 35 approach for the Primary Surface Width is 500 feet and its Approach Surface Slope is 20:1 (FAA Exhibit 2, Item 9, pp. 25-26). Consequently, the FAA conditionally-approved ALP is correct.

Kunz also claims that AIP Sponsor Guides 500 and 560 support his appeal. The AIP Sponsor Guides are prepared by the FAA Central Region Airports Division (FAA ACE), which does not include Utah. On the FAA ACE webpage for the AIP Sponsor Guides, it clearly states that "the supplemental guidance and best practices provided within this guide is not intended to create additional participation requirements over and above that established by statute, regulation or official FAA policy. In the event this guidance conflicts with current AIP policy, the AIP policy has precedence" (FAA Exhibit 2, Item 7). Specifically FAA policy states:

FAA policy expects a sponsor to take appropriate actions to the extent reasonably possible to minimize incompatible land. Quite often, airport sponsors have a voice in the affairs of the community where an incompatible development is located or proposed. The sponsor should make an effort to ensure proper zoning or other land use controls are in place (*See* FAA Order 5190.6B Change 1, p. 20-2).

It also states:

In cases where the airport sponsor does not have the authority to enact zoning ordinances, it should demonstrate a reasonable attempt to inform surrounding municipalities on the need for land use compatibility zoning. The sponsor can accomplish this through the dissemination of information, education, or ongoing communication with surrounding municipalities. (*See* FAA Order 5190.6B Change 1, p. 20-4).

The Complainant does not substantiate any claims related to this issue on Appeal. The record shows that the sponsor is taking reasonable actions to minimize incompatible land use; pursue AOZs; and protect the Airport's airspace. The FAA does not dictate what the sponsor needs to do to promote compatible land use, such as purchasing property or air aviation easements. Consequently, the Associate Administrator upholds the Director's Determination.

## ISSUE TWO

Whether the Director erred by finding that the Respondent is not in violation of Grant Assurance 35, *Relocation and Real Property Acquisition*, by failing to pay litigation expenses related to its failed condemnation action.

**Kunz Position:** Kunz claims that “an avigation easement is required over the Kunz property . . . as established by the previous condemnation proceedings, the Respondent’s occupancy of the Kunz family’s property, and applicable law and regulations” (FAA Exhibit 2, Item 2, p. 10). Kunz further states that the state district court’s ruling in the previous condemnation proceedings identified that “the Runway Extension and ILS Project, AIP Project No. 3-49-0048-1 (Project) required the avigation easement to protect the 34:1 approach surface” (FAA Exhibit 2, Item 2, pp. 11-12). Since the dismissal of the prior condemnation proceedings, the City has not re-initiated any condemnation proceedings and has abandoned such efforts. The Complainant alleges that, based on the facts alleged, the City is obligated to pay litigation costs and expenses (FAA Exhibit 2, Item 2, p. 22).

**City Position:** The City responds that the Director correctly concluded that the City is not obligated to pay attorney’s fees and expenses due to its failure to re-start a new eminent domain action (FAA Exhibit 2, Item 4, p. 8).

**Associate Administrator Determination:** The ALP provides that the Kunz parcel does not have to be purchased for airport purposes as part of any proposed project unlike certain other property parcels (FAA Exhibit 2, Item 1, Item 6, p. 9).

Consequently, the Associate Administrator affirms that the Director is correct that it is outside of the FAA’s jurisdiction address the legal fees for the condemnation action in this case. The Part 16 process is not intended to address state law legal claims or provide compensation to aggrieved parties. The grant assurances do not compel the City to acquire property interests from the Complainant nor specify the terms of such acquisition if so pursued.

Consequently, the Associate Administrator upholds the Director’s Determination.

## ISSUE THREE

Whether the Director erred by finding that City did not fail to fulfill a condition that a court of competent jurisdiction previously concluded was necessary for the Respondent to obtain funding, i.e., obtaining an avigation easement, and whether this failure constitutes a “taking” without compensation (FAA Exhibit 1 Item 2, p. 2).

**Kunz Position:** Kunz argues that his property is required to be acquired under Federally Funded Project AIP Project No. 3-49-0048-13 (FAA Exhibit 2, Item 2, p. 13). Kunz contends that the state court made a determination that “the avigation easement was necessary” (FAA Exhibit 2, Item 2, p. 13). Kunz also argues that by failing to acquire property, the City “has taken” his property without compensation based on two United States Supreme Court decisions (FAA Exhibit 2, Item 2, pp. 3-4).

**City Position:** The City’s motion referenced by Kunz states that “as a condition to the FAA’s funding the Project, FAA regulations require the Airport to assure the protection of a 34:1 approach surface on Runway 35 to prevent the creation of future airport hazards and restrict the future use of land in the vicinity of the runways to activities and purposes compatible with normal airport operations” (FAA Exhibit 2, Item 4, Exhibit B, p. 7). The City also argues that the avigation easement was not necessary for any present development, but rather the condemnation was being sought for future planning (FAA Exhibit 2, Item 4, Exhibit B, pp. 8-9). Finally, the City argues that it is hypocritical for Kunz to claim the City has an obligation to acquire an avigation easement given that Kunz had challenged the City’s authority to condemn the avigation easement at all (FAA Exhibit 2, Item 4, Exhibit B, p. 7).

**Associate Administrator’s Determination:** Having examined the arguments of the City and Kunz, the Associate Administrator affirms the finding in the Director’s Determination. The grant assurances do not compel the City to acquire property interests from Kunz nor specify the terms of such acquisition if so pursued. The Director also did not err concerning the jurisdiction of the court actions. State court action may involve matters of contract law over which the FAA has no jurisdiction. Nor is the FAA’s conclusion dependent on the outcome of such state court action. (*See Rick Aviation, Inc. v. Peninsula Airport Commission*, FAA Docket No. 16-05-18, Final Decision and Order, p. 22 (Nov. 6, 2007)).

Furthermore, Part 16 is not the appropriate forum for alleged violations of constitutional law. Under 14 CFR § 16.1, the FAA’s jurisdiction is specifically limited to proceedings involving complaints against federally assisted airports arising under legal authority outlined in the Part 16 regulations, including portions of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, *et seq.*; the Airport and Airway Improvement Act (AAIA) of 1982, as amended and recodified at 49 U.S.C. § 47107, *et seq.*; the Surplus Property Act, as amended, 49 U.S.C. § 47151, *et seq.*; predecessors to those Acts; and regulations, grant agreements, and documents of conveyance, pursuant to those Acts. (*See Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority*, FAA Docket No. 16-07-16, Director’s Determination, p. 18 (Feb. 27, 2009)).

Consequently, the Associate Administrator upholds the Director’s Determination.

## **IX. CONCLUSIONS AND FINDINGS**

The FAA’s role in this Appeal is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director’s Determination. The Associate Administrator finds no error by the Director in his Determination.

In arriving at a final decision in this Appeal, the FAA has reexamined the record, including the Director’s Determination, the administrative record supporting the Director’s Determination, the Appeal, the City’s Reply, and applicable law and policy. Based on this reexamination, this decision concludes that the Director’s Determination is supported by a preponderance of reliable, probative, and substantial evidence and is consistent with applicable law, precedent, and FAA policy. The Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director’s Determination.

The Director's Determination is affirmed. This decision constitutes a final decision of the Associate Administrator pursuant to 14 CFR § 16.33.

### **ORDER**

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the Appeal is dismissed, pursuant to 14 CFR § 16.33.

### **RIGHT OF APPEAL**

The parties are offered the opportunity to appeal the agency's final decision in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business.

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. (14 CFR § 16.247(a)).

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Shannetta R. Griffin  
Associate Administrator for Airports  
Federal Aviation Administration

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Date