UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Virginia One Development, INC, Avery Park Partners, LLC d/b/a Avery Park, DSH Diplomat, LLC d/b/a Diplomat Townhomes, Colony Creek, LLC, and Crossings Townhomes, LLC,

Complainants/Appellant

v.

The City of Atlanta, Georgia,

Respondent

FAA Docket 16-12-09

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Virginia One Development, Inc., et al., (Complainant) of the Director's Determination of January 26, 2015, issued by the Director of the FAA Office of Airport Compliance and Management Analysis, pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in 14 CFR part 16 (Part 16). The Director's Determination dismissed the Complainant's allegations against the City of Atlanta, Georgia, as sponsor of the Atlanta Hartsfield Jackson International Airport (Atlanta, Respondent, or sponsor) regarding the sponsor's Federal obligations associated with its operation of ATL.

The Complainants argue on appeal that the Director's findings and conclusions are "contrary to federal law, contrary to the FAA's own regulations and policies, contrary to the intent of Congress" and "its conclusions are wholly unsupported by law and by fact." [FAA Exhibit 2, Item 1, pg. 1-2]

The Complainants raise six (6) specific issues on appeal. Three (3) issues raised are determined by the Associate Administrator to be "substantial" in accordance with 14 CFR 16.33(e), and three (3) issues are separately addressed as preliminary issues. Also, the Complainants raise an additional issue that the Director erroneously omitted information pertinent to the findings under Grant Assurance 16. The Complainants did not directly argue on appeal that the Director erred in finding the Respondent to be in compliance with Grant Assurance 16. However, the Respondent's Reply to the Appeal contained a specific rebuttal to the issue of omitted facts. The Associate Administrator

considers the Complainants' "omission" claim as a fourth preliminary issue. Accordingly, the following issues are addressed:

Preliminary Issues

1. Whether the Director's Determination must be vacated due to the FAA's bias and prejudice against the Complainants.
2. Whether 14 CFR part 16 contains a standard of review applicable to an appeal of the Director's Determination.
3. Whether the findings in the Director's Determination are unconstitutional.
4. Whether the September 27, 2001 Record of Decision is, as alleged, absent from the Director's Determination recitation of facts.

Substantial Issues Evaluated on Appeal

1. Whether compliance with Atlanta's NCP, as approved by the FAA, requires the purchase or noise remediation of Complainants' properties.
2. Whether the Director's Determination finding with respect to Grant Assurance 5 is supported by substantial evidence and in accordance with law.
3. Whether the Director's Determination finding with respect to Grant Assurance 21 is supported by substantial evidence and in accordance with law.

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, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. 14 C.F.R. § 16.33(e) [See e.g., *Ricks v. Millington Municipal Airport*, FAA Docket No. 16-98-19, Final Decision and Order pg. 21 (Dec. 30, 1999)]

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Complainants' Appeal, and the Respondent's Reply for consistency with applicable law and policy. 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 Complainants' Appeal does not have 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

Virginia One Development, LLC, an off-airport entity, and several other entities filed a formal complaint pursuant to Title 14 CFR part 16 against the City of Atlanta, Georgia, sponsor of the Hartsfield-Jackson Atlanta International Airport (ATL). The Complaint alleged that the Respondent has

violated Grant Assurance 5, *Preserving Rights and Powers;* Grant Assurance 16, *Conformity to Plans and Specifications;* Grant Assurance 21, *Compatible Land Use;* and Grant Assurance 35, *Relocation of Real Property Acquisition* because it failed to acquire the Complainants' residential apartment properties, which were identified in the ATL Noise Exposure Map (NEM) as being impacted by aircraft noise.

The Director's Determination found that the Respondent 1) did not give away its rights and powers concerning ATL's NCP and the Consent Order with the City of College Park in violation of Grant Assurance 5; 2) is not in violation of Grant Assurance 16 since this is not a situation where an actual noise mitigation grant has been issued, a project initiated, or the failure of a sponsor to meet the approved plans and specifications for the project; 3) is not in violation of Grant Assurance 21 since there is no indication that the Airport has taken action which has resulted in an incompatible land use, and 4) is not in violation of Grant Assurance 35 since the Airport has not acquired the properties in question.

III. PARTIES TO THE COMPLAINT

A. Respondent/Airport

ATL is a federally funded, public access, FAA-designated, large hub airport owned and operated by the City of Atlanta, Georgia. The Airport, consisting of approximately 4,700 acres and five runways, is classified as a commercial service airport with more than 931,000 annual operations. The Airport serves more than 48 domestic and foreign airlines and ranks first as the busiest commercial airport in the United States used by over 90 million passengers annually (2013). The Airport has 200 gates and its terminals and concourse spaces total over 6.8 million square feet. The Airport is located in Fulton and Clayton counties, and among the local political jurisdictions that abut the Airport is the City of College Park,[1] which extends to the airport's northwest quadrant. [Director's Determination, pg. 2]

The planning and development of the Airport has been financed, in part, with federal funds provided by the FAA to the Respondent under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* Since 1982, over $870 million in federal AIP grants has been conferred to the Airport. Of these, over $326 million (or 37%) were for noise mitigation measures (sound insulation) and land acquisition for noise compatibility purposes. The last two AIP noise grants, issued in 2012 and 2014, totaled $23 million. [Director's Determination, pg. 3]

In addition, significant funds generated by the disposal of noise acquired land (e.g., $13 million between 1992 and 2007) have also been utilized for airport development. The Airport also collects Passenger Facility Charges (PFC) as authorized by the Aviation Safety and Capacity Expansion Act of 1990 and now codified at 49 U.S.C. § 40117. A total of approximately $160 million a year are collected through PFCs. [Director's Determination, pg. 3]

The Airport also includes Federal assistance in the form of surplus property conveyances. In June 1946, with the end of WWII, the airfield closed and the U.S. Government conveyed the airfield and its facilities

[1] The City of College Park, a 9.7 square mile area, is located west of the Airport. Based on year 2000 US Census data, approximately 20,380 persons reside within the City of College Park (with approximately 92 percent of the population residing within the Fulton County portion of the City). [Director's Determination, pg. 2]

to the City of Atlanta as a civil airport. As a result, the Airport 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. § 47151-47153. [Director's Determination, pg. 3-4]

The Instrument of Transfer is the means by which the U.S. Government transferred its interests in the Airport to the Respondent of Atlanta and, in conjunction with the AIP grants, is a controlling Federal interest in several parcels of the airport today. [Director's Determination, pg. 4]

B. The Complainants

The Complainants are five (5) real estate entities who are either current or former owners of multi-family, residential properties, either wholly or partially within, or in close proximity to, the 65 and 70 dBA day-night average sound level (DNL) noise contours of ATL. These properties are all located in two general areas off-airport; approximately 8,000 feet from the western end of the Airport's runways. The Complainants are:

- Virginia One Development, LLC, (Virginia One or VOD) is the owner of Hartsfield Landing, 3001 Roosevelt Highway, College Park, Georgia, 30337.
- Avery Park Partners, LLC, is the owner of Avery Park, 2609 Charlestown Drive, College Park, Georgia, 30337.
- DSH Diplomat, LLC, is the owner of Diplomat Townhomes, 2700 Camp Creek Parkway, College Park, Georgia, 30337.
- Colony Camp Creek, LLC, is the owner of Harrington Park, 2800 Camp Creek Parkway, College Park, Georgia, 30337.
- Crossings Townhomes, LLC, is the owner of Roosevelt Park, 2601 Roosevelt Highway, College Park, Georgia.

[Director's Determination, pg. 4-5]

The Director's Determination referred to "Complainants" as one entity, and they are for the purpose of this review. There are significant differences between the properties owned by Complainants. For example, some of the properties are located in the 65 dBA DNL contour while others in the 70 dBA DNL contour. Not all properties are located within the limits of the City College Park. Some properties may be currently occupied as residences; some may not be occupied and/or are damaged. [Director's Determination, pg. 5]

IV. PROCEDURAL HISTORY

On February 25, 2015, the Complainants filed its Appeal from the Director's Determination. [FAA Exhibit 2, Item 1]

On March 6, 2015, the Respondent submitted a Motion for Extension of Time to File a Reply to the Complainant's Appeal. [FAA Exhibit 2, Item 2]

On March 16, 2015, the FAA granted an extension of time for the Respondent to file its Reply to April 7, 2015. [FAA Exhibit 2, Item 3]

On April 7, 2015, the Respondent filed its Brief in Response to Complainants' Appeal of the Director's Determination. [FAA Exhibit 3, Item 1]

On June 17, 2015, the Associate Administrator issued a Notice of Extension of Time to issue a Final Agency Decision to September 14, 2015. [FAA Exhibit 4]

On September 21, 2015, the Associate Administrator issued a Notice of Extension of Time to issue a Final Agency Decision to November 30, 2015. [FAA Exhibit 5]

On January 7, 2016, the Associate Administrator issued a Notice of Extension of Time to issue a Final Agency Decision to April 16, 2016. [FAA Exhibit 6]

On April 21, 2016, the Associate Administrator issued a Notice of Extension of Time to issue a Final Agency Decision to June 21, 2016. [FAA Exhibit 7]

On August 4, 2016, the Associate Administrator issued a Notice of Extension of Time to issue a Final Agency Decision to September 5, 2016. [FAA Exhibit 8]

V. 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)

Section 47101, *et seq.*, of Title 49 provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, (AAIA) as amended. Section 47107 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, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[2] FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with Federal obligations of airport sponsors. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. The FAA grant assurances raised by Complainants in this appeal include: (1) Grant Assurance *5, Preserving Rights and Powers ;* (2) Grant Assurance 16, *Conformity to Plans and Specifications; and* (3) Grant Assurance 21, *Compatible Land Use* and are discussed below.*;*

(1) Grant Assurance 5 *Preserving Rights and Powers*

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

> a. It will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in this grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.
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> b. It will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in this grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of this grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.
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> d. For noise compatibility program projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary. It will take steps to enforce this agreement against the property owner whenever there is substantial non-compliance with the terms of the agreement.

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

FAA Order 5190.6B elaborates on Grant Assurance 5. It states, in part that:

> A sponsor cannot take any action that may deprive it of its rights and powers to direct and control airport development and comply with the grant assurances. Grant Assurance 5, Preserving Rights and Powers, requires a sponsor not to sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit "A" without the prior written approval of the FAA. Of particular concern to the FAA is granting a property interest to tenants on the airport. These property interests may restrict the sponsor's ability to preserve its rights and powers to operate the airport in compliance with its federal obligations. Providing developers with an option to acquire a fee interest in federally obligated airport property is not acceptable to the FAA under Grant Assurance 5, Preserving Rights and Powers…Grant Assurance 5…prohibits the airport sponsor from entering into an agreement that would deprive it of any of its rights and powers that are necessary to perform all of the conditions in the grant agreement or other federal obligations.[3]

(2) Grant Assurance 16 *Conformity to Plans and Specifications*

Grant Assurance 16, *Conformity to Plans and Specifications,* requires, in pertinent part, that the sponsor of a federally-obligated airport

> …will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval of the Secretary, shall be incorporated into this agreement. Any modification to the approved plans, specifications, and schedules shall also be subject to approval of the Secretary, and incorporated into the grant agreement. [Grant Assurance 16]

(3) Grant Assurance 21 *Compatible Land Use*

Grant Assurance 21, *Compatible Land Use,* requires, in pertinent part, that the sponsor of a federally-obligated airport

> …will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft.
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> …if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended."

FAA Order 5190.6B provides additional details on Grant Assurance 21. It states that:

> …Grant Assurance 21…relates to the obligation of the airport sponsor to take appropriate actions to zone and control existing and planned land uses to make them compatible with

[3] FAA Order 5190.6B, pages 6-2 and 6-4.

aircraft operations at the airport. The FAA recognizes that not all airport sponsors have direct jurisdictional control over uses of property near the airport. However, for the purpose of evaluating airport sponsor compliance with the compatible land use assurance, the FAA does not consider a sponsor's lack of direct authority as a reason for the sponsor to decline to take any action at all to achieve land use compatibility outside the airport boundaries. In all cases, the FAA 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[4] and

...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. Depending upon the sponsor's capabilities and authority, action could include exercising zoning authority as granted under state law or engaging in active representation and defense of the airport's interests before the pertinent zoning authorities. The sponsor may also take action with respect to implementing sound insulation, land acquisition, purchase of easements, and real estate disclosure programs or initiatives to mitigate areas to make them compatible with aircraft operations. Sponsors without zoning authority may also work to change zoning laws to protect airport interests.[5]

C. 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.[6]

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.

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[4] FAA Order 5190.6B, page 20-2. Remedial, or corrective, measures typically include sound insulation or land acquisition. Preventive measures typically involve land use controls that amend or update the local zoning ordinance, comprehensive plan, subdivision regulations, and building code.

[5] FAA Order 5190.6B, pages 20-4 and 20-5.

[6] 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 14 CFR part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings, and monitors airport sponsor compliance with limits on the use of airport revenue.

FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program.[7] 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.[8]

D. 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.

E. The Complaint Process

Pursuant to 14 CFR § 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.[9] If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will

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[7] See http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/.
[8] See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01) Wilson Air Center, LLC v FAA, 372 F.3d 807 (6th Cir. 2004).
[9] 14 CFR § 16.23(b) (3), (4).

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.[10]

Under part 16, the proponent of a motion, request, or order has the burden of proof. [14 CFR §16.229] With respect to this case, Complainants bear the burden of proof of noncompliance with any statute, regulation or grant condition. [14 CFR §16.229(a)] A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This burden of proof standard is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." [5 U.S.C. § 556(d)][11]

Similarly, 14 CFR § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance." Title 14 CFR § 16.31(b(1)) provides that "the Director's Determination shall include findings of fact and conclusions of law, accompanied by explanations and based upon all material issues of fact, credibility of the evidence, law and discretion presented on the record, together with a statement of the reasons therefor."

"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. 43 CFR §1633(c)" 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." Section 16.247(a) defines procedural recourse for judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C. § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C. § 47106(d) and 47111(d).

F. Airport Noise and the 14 CFR Part 150 Program

Congress, in the *Aviation Safety and Noise Abatement Act of 1979* (ASNA), 49 U.S.C. §47501 *et seq*., has provided for a program to address noise impacts from aircraft operations on areas surrounding airports. The statute requires the FAA to establish a single system for determining the exposure of individuals to airport noise and to establish a standardized airport noise compatibility planning program.[12] Specifically, Congress directed the FAA to: (1) establish a single system of noise measurement to be uniformly applied in measuring noise at airports and in surrounding areas for which there is a highly reliable relationship between projected noise and surveyed reactions of people to noise; (2) establish a single system for determining the exposure of individuals to noise from airport operations; and (3) identify land uses that are normally compatible with various exposures of individuals to noise.[13]

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[10] 14 CFR § 16.29.
[11] *See also,* Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (D.C. Cir., 1998).
[12] 49 U.S.C. 47502 – 47504.
[13] FAA Order 5190.6B, page 13-5.

Under 14 CFR part 150,[14] the FAA established as the single system for determining noise exposure the calculation of the yearly day-night average sound level (DNL) expressed in terms of A-weighted decibels [dBA]. For purposes of part 150, the FAA has determined that all land uses are compatible with sound levels that are less than DNL 65 dBA and has designated what land uses are compatible with sound levels higher than DNL 65 dBA.[15]

Airport noise compatibility planning is voluntary, so airport sponsors decide whether to prepare noise exposure maps and then whether to go the next step and prepare noise compatibility programs. For airports that choose to prepare noise exposure maps, the calculation of noise exposure must be made by computer model known as the Integrated Noise Model (INM) or an FAA approved equivalent. The INM incorporates information concerning the number of aircraft operations at the airport, the mix of aircraft, the general flight tracks, and information about the noise characteristics of the aircraft operating at the airport. The INM is used to develop a noise exposure map (NEM) of an airport's surrounding area that depicts noise contours, or lines of equal noise exposure.

Although many airports install noise monitors to measure actual sound levels, it is impractical to develop a noise contour based on such measurements; therefore, the contours represent estimates of noise exposure derived from the INM. The DNL is a weighted day-night average. The noise exposure map must show contours for DNL levels of 65, 70, and 75 dBA. An airport operator wishing to prepare noise exposure maps submits a map showing current conditions and a map showing conditions based on forecasted operations at least five years into the future.[16] The airport operator may also submit proposed program measures and an analysis of their expected effect on reducing noise exposure and land uses designated as non-compatible. The airport operator must provide an adequate opportunity for the public, the affected states and localities, appropriate planning agencies, and the aeronautical users of the airport to submit comments on both the map and the program. The FAA accepts the map and reviews the NCP. FAA and either approves or disapproves the program or portions thereof.[17]

Approval of noise compatibility program measures by the FAA enables the airport sponsor to apply for federal grants to implement measures in the program.[18] Consistent with ASNA, Part 150 provides for airport operators preparing noise compatibility programs to analyze the following alternative measures including acquisition of land in fee, and interests therein, including but not limited to air rights, easements, and development rights, construction of barriers and acoustical shielding, and sound insulation of buildings.[19] FAA approval under Part 150 is only for the purpose of establishing the noise compatibility program. 14 CFR 150.5 *Limitations of this Part* provide details on the scope and limitations of the process including:

> (a) Approval of a noise compatibility program under this part is neither a commitment by the FAA to financially assist in the implementation of the program, nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA.

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[14] See 49 U.S.C. §47504 *Noise Compatibility Programs.*
[15] See 14 CFR part 150, Appendix A and B.
[16] 14 CFR § 150.21(a).
[17] 14 CFR 150.23 and 14 CFR part 150.35.
[18] See 49 U.S.C. § 47504.
[19] FAA Order 5190.6, pages 13-5 and 13-6.

(b) Approval of a noise compatibility program under this part does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action, pursuant to the National Environmental Policy Act (42 U.S.C. 4332 et seq.) and guidelines.

(c) Acceptance of a noise exposure map does not constitute an FAA determination that any specific parcel of land lies within a particular noise contour. Responsibility for interpretation of the effects of noise contours upon subjacent land uses, including the relationship between noise contours and specific properties, rests with the sponsor or with other state or local government.[20]

VI. PRELIMINARY ISSUES:

The parties raise several issues on appeal, including new issues, which are discussed in detail below. As Atlanta points out, Part 16 allows a party to raise new arguments on appeal, but only if accompanied by a petition showing good cause as to why the new issue or evidence was not presented to the Director. 14 CFR § 16.33(f) addresses the raising of new arguments for the first time on an appeal of a Director's Determination. The petitioner must:

(1) Set forth the new matter;

(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) 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."

Complainants made no effort to satisfy the foregoing requirements, and no justification is presented or apparent. Each of the new issues fails on those grounds alone. However, even if the issues did not fail due to non-compliance with 14 CFR § 16.33, the Associate Administrator has independently considered them as discussed below.

1. Complainants' Allegation of the Director's Bias and Prejudice

The Complainants raise the new claim that FAA must now recuse itself from deciding this matter because it cannot be an unbiased and unprejudiced adjudicator. [FAA Exhibit 2, Item 1, pg. 16-19] The Complainants argue the FAA is unable to separate itself from the litigation position it has taken in a matter in the United States Court of Appeals for District of Columbia Circuit.[21]

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[20] 14 CFR 150.5(c). In making its evaluations under NEPA, the FAA applies FAA Order 1050.1F *Environmental Impacts: Policies and Procedures* and FAA Order 5050.4B, *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Projects*. Under these guidelines, the FAA has chosen to use the DNL noise metric for the evaluation of noise impacts around airports. Those procedures also establish a "threshold of significance" for noise impacts. A significant noise impact would occur if analysis shows that the proposed action will cause noise sensitive areas to experience an increase in noise of DNL 1.5 dB or more at or above DNL 65 dB noise exposure when compared to the no action alternative for the same timeframe. See Order 1050.1F, page A-61.

[21] *Avery Park Partners et al. v. Federal Aviation Administration et al.*, Case No. 14-1066

The Complainants contend that the Director assumed certain facts that are "part and parcel of the FAA's litigation position in D.C. Circuit Litigation" and that the Director is "not able to take a position that is contrary to the litigation position that the FAA has taken in the D.C. Circuit Litigation," which has caused the Director to "reach a decision that is unduly biased and prejudiced against the Complainants." [FAA Exhibit 2, Item 1, pg. 17]

The Complainants cite examples of the FAA's alleged bias, including 1) the FAA necessarily decided in the Director's Determination that "the actions approved by the FAA in a NCP are voluntary on the part of the sponsor" in order to defend the same position in the D.C. Circuit court, 2) the effect of the Consent Order is disputed in the D.C. Circuit Litigation, therefore the Director should not be able to rely upon a document that is in dispute and which "allows the City of Atlanta to renege on Atlanta's and the FAA's responsibility to protect the residents and property owners surrounding the airport," and 3) the FAA's "own negligence and dereliction of its duty under the law" for not rendering an initial decision is this matter "within 120 days" as prescribed by 14 CFR § 16.31 has "allowed a deep bias and prejudice against the Complainant to enter into these proceedings." [FAA Exhibit 2, Item 1, pg. 17-19]

Upon review, the Associate Administrator is not persuaded by these arguments. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their Federal grant assurances, which is administered through the FAA's Airport Compliance Program and the Part 16 process. The presence of litigation does not nullify or otherwise supersede the FAA's duty to carry out its statutory and regulatory mandates. The Complainants initiated the FAA's involvement in this matter by filing a formal Complaint against the Respondent. The Complaint against the Respondent necessarily required that the allegations be formally investigated by the FAA under 14 CFR part 16. Each of the issues and allegations presented by the Complainants were objectively evaluated as part of the FAA's investigation and review of the evidence, and are outlined in detail in the Director's Determination and included as part of the publicly-available administrative record. Complainants identify no evidence supporting the allegation that bias and prejudice have in any way influenced the Director's findings. Consequently, the assertion that the FAA is inherently biased in its consideration of the Complaint simply because a separate court action exists is baseless and without merit.

Also, under §16.23(j), the Director has wide discretion to consider whatever information is available in determining whether a sponsor is in non-compliance with its federal obligations. In certain circumstances, it may be necessary for the Director to extend the date for which a Determination will be rendered in order to make sound findings of fact and conclusions of law based upon the credibility of the evidence presented and information sought by the FAA from available sources. (§16.11(a)). The Associate Administrator confirms that the mere act of extending the time to render a Director's Determination is not evidence of bias or prejudice in the proceedings. Also, State or Federal court litigation is a separate action that may involve matters of law over which the Director may have no jurisdiction. As such, the FAA's conclusion in a Director's Determination is not dependent or otherwise predicated on the outcome of a certain court action. Similarly, FAA precedent holds that state or federal court litigation does not provide a basis for staying a Part 16 process. [*See Rick Aviation, Inc. v. Peninsula Airport Commission*, FAA Docket No. 16-05-18, (November 6, 2007) (Final Decision and Order), page 22.]

Two Federal cases likewise provide relevant precedent. In *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001), and *American Airlines v. City of Dallas*, 202 F.3d 788 (5th Cir. 2000)(American Airlines), the airport sponsor argued that the United States Department of Transportation (DOT) or FAA was barred from carrying out its duties to administer the Federal aviation laws because of pending state court cases or an earlier state court decision finding that the airport's conduct was lawful. In both cases, the Courts of Appeal held that the pending or prior state court litigation did not bar the Federal agency from conducting its own proceeding and determining whether an airport was complying with its obligations under Federal law. In *American Airlines*, the Fifth Circuit held "because of the important Federal interests here, we decline to hold that common law preclusion doctrines apply in this case. Instead, DOT properly declined to give preclusive effect to the state court judgment." 202 F.3d at 801; *See* also *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 171 (1st Cir. 1989).

Lastly, the Complainants' allegation of improper bias or prejudice in the Director's Determination is without merit because the Complaint filed herein was docketed in August 2012, and this substantially pre-dates the Complainants' pending court litigation (*Avery Park Partners, LLC, et al v. DOT, et al.*, DC Circuit Court of Appeals, Docket No. 14-1066) by 20 months (April 2014). Consequently, the Associate Administrator rejects the Complainants argument that the FAA must recuse itself from further adjudicating the Complaint due to inherent bias and prejudice.

2. Complainants' Allegation of a Lack of Standard of Review

The Complainants argue that 1) 14 CFR part 16 does not contain a standard of review applicable to an appeal of a Director's Determination, 2) the Director's Determination improperly referenced *Ricks v Millington Municipal Airport*[22] in citing the Director's standard of review, and 3) the lack of a standard of review should compel the Associate Administrator to perform a *de novo* review of the appealed Director's Determination. [FAA Exhibit 2, Item 1, pg. 19-21] In its reply, Atlanta claims that the appropriate review is established in 14 CFR § 16.33(e) and (f). [FAA Exhibit 3, Item 1, pg. 12-15]

Upon consideration, the Associate Administrator confirms that 14 C.F.R. §16.33 plainly provides a standard of review applicable to Complainants' appeal of the Director's Determination and this standard has been consistently applied numerous times. Section 16.33(e) specifically provides that:

> "On appeal, the Associate Administrator will consider the issues addressed in any order on a motion to dismiss or motion for summary judgment and any issues accepted in the Director's Determination using the following analysis:
>
> (1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?

[22] [FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order)]

(2) Are conclusions made in accordance with law, precedent and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?"

Consequently, the Complainants' claim that 14 CFR part 16 does not include a standard of review for an appeal to the Director's Determination is rejected.

The Complainants also claim that the Director erred in referencing *Ricks v Millington Municipal Airport* in citing standard of review precedent. Specifically, the Complainant claims that *Ricks* "does not cite any statutory or regulatory support for its use of that standard of review," and therefore insists that a *de novo* review of the Director's Determination under 5 U.S.C. 557(b) of the Administrative Procedures Act (APA) is necessary in the absence of a standard of review under 14 CFR part 16. [FAA Exhibit 2, Item 1, pg. 19]

The Associate Administrator is not persuaded. 49 U.S.C. § 47122(a) provides that "The Secretary of Transportation may take action the Secretary considers necessary to carry out this subchapter, including conducting investigations and public hearings, prescribing regulations and procedures, and issuing orders." Also, 49 U.S.C. § 106(f)(2)(iii) provides that the FAA Administrator shall provide for the "...promulgation of regulations, rules, orders, circulars, bulletins, and other official publications of the Administration." This matter is before the FAA in accordance with Title 14 Code of Federal Regulations (CFR) part 16, *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings*. Therefore, the statutory powers delegated by the Secretary to the FAA to investigate a complaint under 14 CFR part 16, to issue an initial decision (Director's Determination), and to review an appeal of that decision prevail here. The Complainant's claim that 5 U.S.C. § 557(b) of the APA controls the adjudication of the Complainant's appeal in this proceeding is without merit and is dismissed accordingly.

3. Complainants' Allegation that the Director's Findings are Unconstitutional.

The Complainants argue that the Director's Determination violates either the Equal Protection clause of the Fourteenth Amendment or the Due Process clause of the Fifth Amendment of the United States Constitution. [FAA Exhibit 2, Item 1, pg. 34]. The Complainants further argue that the Director's Determination violates the dormant Commerce Clause of the United States Constitution. [FAA Exhibit 2, Item 1, pg. 34] In its Response, Atlanta states that such a claim was waived because the Complainants' claim was not raised in the briefing submitted to the Director and therefore must be rejected. As previously noted, 14 CFR § 16.33(f) states that "[a]ny new issues . . . presented in an appeal . . . will not be considered unless accompanied by a petition and good cause found as to why the issue . . . was not presented to the Director."

The Associate Administrator agrees that the Equal Protection and Due Process claims were waived because they were not raised in the Complainants' briefing to the Director and, in raising them now on appeal, the Complainants did not provide a good cause argument as to why the issue was not presented to the Director, as required by 14 CFR § 16.33(f). The Associate Administrator also confirms that the FAA does not have jurisdiction over allegations of violations of the Constitution of the United States under 14 CFR part 16, or otherwise. The Complainants have pursued the same or similar claims of unconstitutionality in the appropriate

court setting. (*Avery Park Partners, LLC, et al v. DOT*, et al., DC Circuit Court of Appeals, Docket No. 14-1066). Consequently, the Complainants' constitutional arguments are not considered here.

4. Complainants' Allegation of Omission of Facts from the Director's Determination

The Complainants raise the new argument that the Director's Determination omitted pertinent information in its recitation of facts. The Complainants allege that "noticeably absent" from the Director's Determination is "any mention of the FAA mandated noise mitigation measures contained in the FAA's September 27, 2001, Record of Decision." (2001 ROD) [FAA Exhibit 2, Item 1, pg. 4] The Complainants further claim that the "absence of a discussion of the requirements of the 2001 ROD negates the Director's argument concerning Grant Assurance 16." [FAA Exhibit 2, Item 1, pg. 4] The Complainants argue that the 2001 ROD requires both noise mitigation and revision of the airport's NCP, and therefore by signing the grant agreement to construct the Fifth Runway, the Respondent was required to carry out the proposed noise mitigations (e.g. acquisition and/or sound insulation.) [FAA Exhibit 2, Item 1, pg. 4] The Complainants assert that the 2001 ROD in effect made the noise mitigations mandatory instead of voluntary.

In its Reply, Atlanta claims that the 2001 ROD merely memorialized Atlanta's plans to conduct the new Part 150 study. Atlanta further states that it "followed through on those plans" with the updated NEMs and NCP approved by the FAA in 2008. [FAA Exhibit 3, Item 1, pg. 24] Lastly, Atlanta claims that "[n]othing in the 2001 ROD requires Atlanta to purchase Complainants' properties." [FAA Exhibit 3, Item 1, pg. 24] With respect to noise mitigation, Atlanta cites evidence that Complainants' properties were either ineligible for sound insulation because they were "uninhabitable" and stripped "to the studs" or, in the case of Avery Park, Harrington Park and Crossings Townhomes, sound insulation evaluations were offered by the sponsor, but such offers were put "on hold" by their owners. [FAA Exhibit 3, Item 1, pg. 9-12]

Upon review, the FAA confirms that the 2001 ROD was not raised by the parties in any of the pleadings prior to the issuance of the Director's Determination and that Complainants' previously raised no claims or arguments based upon the 2001 ROD. Therefore, the Associate Administrator finds that these claims have been waived because, in belatedly raising them for the first time on appeal, the Complainants did not provide a good cause argument as to why they were not first presented to the Director, as required by 14 CFR § 16.33(f).

The Associate Administrator further affirms that the claims based upon the 2001 ROD are without merit. The 2001 ROD was noted in the *Section IV Background* as part of the Director's recitation of facts pertaining to the sponsor's years-long effort to construct the Fifth Runway and in the performance of associated regulatory and documentary requirements (e.g. EIS, NCP, NEM, etc.) [Director's Determination, pg. 6]

The FAA reviewed the 2001 ROD in its entirety. The 2001 ROD required noise mitigation measures and a commitment to further evaluate such measures as part of a Part 150 study. The specific mitigation commitments included acoustical treatment of residences and community facilities within the 65-74 DNL dB contour and relocation of willing sellers of residences within

the 75+ DNL dB contour. The Complainants have not proffered any evidence that the Respondents did not meet the mitigation commitments in the 2001 ROD; rather the evidence is to the contrary. Specifically, as a result of the 2001 ROD commitment to conduct a Part 150 study, the Respondent commenced updating its NCP in 2003, which was ultimately approved by the FAA in 2008. The 2008 NCP included a number of mitigation measures, including property acquisition and noise mitigation of eligible properties. The evidence shows that, in compliance with the 2001 ROD mitigation measures, the sponsor offered to evaluate noise mitigation acoustical treatment for the Complainants' properties located within the 65-74 DNL dB contour and the owners put all such efforts on hold. [FAA Ex. 1, Item 16, Exhibit "A", pg. 46-48]. The evidence in the administrative record demonstrates that the City fulfilled its commitments to offer noise mitigation in accordance with the 2001 ROD.

5. Other Preliminary Issues

Respondent Atlanta argues in its Reply to the appeal that the Director "overlooked....undisputed evidence regarding when Complainants acquired the properties...and...sworn testimony" and thus erred by simply evaluating the "allegations" of financial loss made by the Complainants instead of the "evidence" presented by Atlanta in its Motion to Dismiss. Atlanta argues that the Director "...should have dismissed the Complaint for lack of standing" [FAA Exhibit 3, Item 1, pg. 15-17]

Upon review, the Associate Administrator confirms that the threshold for filing a Complaint under 14 CFR § 16.23 is that the person must be "directly and substantially effected by any alleged noncompliance." However, in reviewing whether the Complainants have standing in this proceeding, the Respondent is incorrect that the Director limited his initial focus to the "alleged substantial impact due to supposed financial implications." [FAA Exhibit 3, Item 1, pg. 15] The record shows that the Director also considered "...the location of the properties within the 65-70 DNL contours, which constitute "impacted" areas within the provisions of the 14 CFR part 150 process." [Director's Determination, pg. 22] The Associate Administrator agrees that the potential for an off-airport, non-aeronautical entity (such as the Complainants) to suffer financial losses due to airport noise impacts does not in itself constitute "standing" for the purposes of Part 16. However, the location of the properties within the 65-70 dBA DNL contours for the Fifth Runway is itself a reasonable basis for the Director to investigate an allegation pertaining to noise mitigation and the implementation of the Respondent's FAA-approved NCP. The Associate Administrator affirms the Director's decision that the Complainants had standing under Part 16 and to investigate the allegations further.

Additionally, and perhaps most significantly, the Respondent's original Motion to Dismiss, filed in its initial response to the Complaint, was evaluated by the Director and denied. [Director's Determination, pg. 23] Subsequently, the Director's decision finding that the Complainants had standing resulted in a lengthy and thorough investigation into the allegations and the record of evidence, and ultimately resulted in a finding of compliance in favor of the Respondent. The Associate Administrator concludes that since the Respondent was not adversely affected by the Director's findings, it cannot logically raise another (or new) claim in its Reply to the appeal regarding the Complainants' standing in this proceeding. This is particularly true since the Complainants, who were adversely affected by the Determination, are not afforded an

opportunity under 14 CFR § 16.31(c) to argue against a new claim made in a Reply to an appeal. In consideration of the foregoing, the Associate Administrator rejects the Respondent's argument.

VII. ISSUES ON APPEAL

Upon consideration of the Complaint, subsequent pleadings, and the record, the Director of the Office of Airport Compliance and Management Analysis previously determined that the Authority is not currently in violation of Federal obligations under Grant Assurance 5, *Preserving Rights and Powers;* Grant Assurance 16, *Conformity to Plans and Specifications;* and Grant Assurance 21, *Compatible Land Use.*

The Complainants have raised and the Associate Administrator has identified the following three (3) substantial issues on Appeal:

ISSUE 1: Whether compliance with Atlanta's NCP, as approved by the FAA, is voluntary or requires the purchase or noise remediation of Complainants' properties.

The primary argument put forth by the Complainants appears to be that Atlanta's NCP is an "enforceable federal standard" pursuant to which their respective properties should have either been purchased or noise remediated by Atlanta. They claim that the Director's Determination "impermissibly relieves the FAA of its statutory obligations under federal law." [FAA Exhibit 2, Item 1, pg. 23] The Complainants cite a number of statutes and statements of Congressional intent to support its claim, including 42 U.S.C. § 4903(a) which states that Congress authorizes and directs that Federal agencies shall, to the fullest extent consistent with their authority under Federal laws administered by them, carry out the programs within their control in such manner as to further the policy declared in Section 4901(b)."[23]

The Complainants also cite 42 U.S.C. § 4911(f) and 49 U.S.C. § 44715 as the statutory authority that conveyed an "enforceable federal standard" on the Respondent's FAA-approved NCP.[24] [FAA Exhibit 2, Item 1, pg. 23] The Complainants claim that 42 U.S.C. § 4911 and 49 U.S.C. § 44715 institutes a required "national uniformity of treatment" and therefore sets an enforceable standard for the Respondent to carry out its NCP. [FAA Exhibit 2, Item 1, pg. 23].

The Complainants further argue that through the promulgation of 14 CFR part 150, the FAA established standards for which the airport sponsor must adhere and therefore "as a matter of law" became "an enforceable legal standard." The Complainants argue that "[b]y approving the NCP, the FAA has instituted the required "national uniformity of treatment," and set an enforceable standard for the state and local government to carry out its program…" to protect the public from aircraft noise. The Complainants contend that the FAA's interpretation of the Part

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[23]Paragraph (b) of 42 U.S.C. § 4901, *Congressional Findings and Statement of Policy* outlines Congressional interest in mitigating harmful effects of noise in order to promote the health and welfare of the American people.

[24] 42 U.S.C. § 4911(f) authorizes a citizen to commence legal action in a civil suit against any person or the United States Government, who is alleged to be in violation of any noise control requirement. Paragraph (f) of 42 U.S.C. § 4911 defines "noise control requirement" as a standard, rule, or regulation issued under 49 U.S.C. § 44715, which further prescribes the authority of the FAA to regulate aircraft noise and sonic boom. Section 44715 also prescribes interagency regulatory coordination requirements.

150 program is "far too narrow" and that the FAA's "duty under the law is much, much broader." [FAA Exhibit 2, Item 1, pg. 27]

It is important to note that the Complainants' specific argument that an FAA-approved NCP is a "legally enforceable standard" is markedly different than the specific arguments put forth in the Complaint and subsequent pleadings of this case. While the Complainants' original allegations under Grant Assurances 5, 16, 21, and 35 imply or infer "legal enforceability" of the Respondent's NCP, the Complainants only now in its Appeal makes a direct argument in this regard. The Director's Determination did not explicitly make a finding with regard to the Complainants' specific argument here, because it was not squarely raised. Accordingly, the Associate Administrator has weighed the Complainants' position against the requirement under 14 CFR 16.33(e)(3) that the questions raised on appeal be "substantial" and has determined that additional analysis is necessary, as is expounded on below.[25]

In its Reply, Atlanta argues that nothing in the NCP, applicable law, or in applicable Grant Assurances required it to purchase Complainants' properties. [FAA Exhibit 3, Item 1, pg. 18-19] Atlanta contends that an airport sponsor must necessarily make choices in giving one project priority over others and in dealing with other jurisdictions in implementing noise reduction projects. [FAA Exhibit 3, Item 1, pg. 20-22]

Upon review, the Associate Administrator confirms that the Complainants' argument that Atlanta's NCP, grant assurances, and the aviation statutes require the FAA to make Atlanta purchase or noise remediate their properties is without merit. The Director properly found that nothing in the NCP or the Part 150 program requires the FAA to mandate the acquisition of specific properties or the institution of sound remediation of others. [Director's Determination, pg. 28-30)

The Airport Noise Compatibility Planning Program (14 CFR part 150), established under the Aviation Safety and Noise Abatement Act of 1979 (49 U.S.C. 47501 through 47509) (ASNA), provides the "basis in law and in fact" for which noise mitigation programs are carried out in the United States.[26] The criteria for FAA approval or disapproval of noise mitigation measures submitted in a Part 150 program are clearly set forth in ASNA and are further elaborated on in the Part 150 regulation itself. Specifically, ASNA directs the Federal approval of an NCP (except for measures relating to flight procedures) (1) if the program measures do not create an undue burden on interstate or foreign commerce; (2) if the program measures are reasonably consistent with the goal of reducing existing incompatible land uses and preventing the introduction of additional incompatible land uses; and (3) if the program provides for its revision if necessitated by the submission of a revised NEM.

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[25] The Complainant also raises a broad new issue under Appeal pertaining to Grant Assurance 31, *Disposal of Land.* [FAA Exhibit 2, Item 1, pg. 28-29] The Associate Administrator rejects the Complainant's argument pursuant to 14 CFR 16.33(f).

[26] The Aviation Safety and Noise Abatement Act (1979) (Public Law 96-193) gives the FAA authority to issue regulations on "air noise compatibility planning" and to make funds available for airport projects contained in an approved noise compatibility program. These regulations have been published by the FAA in 14 CFR part 150. The Act also required the Secretary of Transportation to establish federal standards for measuring and assessing noise impacts on residences near airports. (49 U.S.C. 47501-47510.)
See also Aircraft Noise Abatement Act (1968) (49 U.S.C. 44715); Airport and Airway Improvement Act (1982) (49 U.S.C. 47101-47131); Airport Noise and Capacity Act (1990) (49 U.S.C. 47521-47533); National Environmental Policy Act (1969) (42 U.S.C. 4321-4345).

To that end, both ASNA and Part 150 embody strong concepts of local initiative, flexibility, and control. The decision whether to develop and submit an NCP and NEM under Part 150 is left to the discretion of local airport operators (i.e. not an FAA requirement), and the types of mitigating measures that airport operators may include in an NCP are not limited by ASNA or Part 150, thereby allowing airport operators substantial latitude to submit a broad array of noise mitigation measures that respond to local needs and circumstances. The Part 150 program allows airport operators to submit NEMs and NCPs to the FAA demonstrating the actions the airport operator has taken, or has proposed, for the reduction of existing incompatible land uses and the prevention of additional incompatible land uses within the area covered by NEMs. Such proposals may, but are not required to, include sound insulation and/or property acquisition of affected properties. Similarly, such proposed mitigation measures may, but are not required to, be funded by the FAA Airport Improvement Program and/or PFC funds, if requested by the airport sponsor and approved by the FAA. At this time, there is no evidence that the Airport has received, set aside, or earmarked AIP or PFC funds for sound insulation or property acquisitions projects involving the Complainants' properties, and Complainants have identified none.

Title 14 CFR § 150.5 provides in pertinent part that: 1) approval of an NCP is not a determination concerning the acceptability of land uses under Federal, state, or local law; 2) approval of the NCP does not by itself constitute an FAA implementing action; 3) a request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action, and 4) approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant funding. The plain language of 14 CFR § 150.5 makes it clear that FAA approval of an NCP is not a determination on acceptable land use or an "FAA implementing action," and therefore cannot logically be considered to be "legally enforceable" by virtue of regulatory order from the FAA, contrary to the Complainants' argument.

Further, in establishing the airport noise compatibility planning program, ASNA did not change or otherwise challenge the legal authority of state and local governments to control land uses within their jurisdictions. In this case, the designation of permitted uses of land falls under the laws of the State of Georgia, and by extension, the cities of Atlanta and College Park and Fulton County. The FAA gives deference to State and municipal laws concerning land use and the implementation of noise mitigation programs outside of airport property and/or in surrounding jurisdictions for which the program may be implemented. The FAA does not have direct legal authority to require airport sponsors to acquire non-sponsor owned or controlled property to prevent, eliminate, or otherwise mitigate incompatible land uses.

Although the FAA might approve proposed noise compatibility measures in accordance with ASNA and Part 150, no such approval provides legal authority for the airport sponsor to circumvent State and local laws to implement noise mitigation through land acquisition in another jurisdiction under the premise that the FAA approval is a de facto or official mandate to do so. The aforementioned limitations, by definition, contradict the Complainant's argument that "[b]y approving the NCP, the FAA has instituted the required "national uniformity of treatment," and set an enforceable standard for the state and local government to carry out its

program…" to protect the public from aircraft noise." Rather, the "national uniformity of treatment" is accomplished by the FAA's approval of an NCP that is deemed consistent with the requirements of ASNA and Part 150.

Similarly, under Georgia State law, the Respondent may (or may not) be empowered under relevant authorizing state and local legislation to implement the components of its NCP, including property acquisition. However, such a circumstance is beyond FAA control and does not somehow make the FAA responsible for enforcing implementation of the NCP. Rather, the responsibility for implementation of an NCP rests entirely on the airport sponsor, consistent with applicable governing state laws and enabling legislation, and in accordance with the sponsor's own priorities.

Lastly, the FAA's intent in allowing for substantial local flexibility in 14 CFR part 150 is best demonstrated in an important footnote in Appendix A, Table 1, *Land Use Compatibility,* to Part 150, recognizing the ability of local governments to establish their own land use compatibility standards and regulations. The footnote states, in pertinent part, that *"FAA determinations under Part 150 are not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses."* In effect, the plain language of the footnote demonstrates the FAA's clearly stated intent that the promulgation of noise mitigation measures on incompatible land uses, including residential properties owned by the Complainants, remains exclusively a local decision, not one in which the FAA has a statutory or regulatory mandate to compel or otherwise legally enforce, contrary to the Complainants' argument.

While the Complainants are correct that it is Congress' declared policy to promote an environment for all Americans free of aircraft noise that can jeopardize the people's health and welfare, the Complainants are incorrect that the FAA's approval role under ASNA and Part 150 provides a "legally enforceable" element to an overtly voluntary noise compatibility program. Rather, the FAA's role in Part 150 noise compatibility planning approval under ASNA is comparatively narrow and is designed only to ensure "national uniformity of treatment" in that federal approval be granted when commerce is not burdened, reasonable actions are taken to reduce or eliminate incompatible land uses, and necessary revisions to the NCP are provided for in the program. This narrowly defined, statutorily-required approval process, in conjunction with the conditions and limitations provided for in 14 CFR § 150.5, is designed specifically around the core tenets of ASNA to provide substantial local discretion, latitude, and flexibility to enact a broad array of noise mitigation measures that respond to local needs and circumstances.

To that end, the record indicates that some of the Complainant's properties may be to some degree noise-impacted by the Respondent's expanded airport operation, as identified by the Respondent's multiple NCP's and NEMs. Part 150 is intended to carry out Congressional and FAA intent to mitigate the effects of aircraft noise on demonstrably affected populations. While Part 150 necessarily provides substantial flexibility and deference to airport sponsors to mitigate noise in a manner consistent with the circumstances existing at the airport and surrounding jurisdictions, such flexibility by the airport sponsor should be accompanied by thoughtful discretion to ensure that the spirit and intent of the NCP to mitigate noise impacts is reasonably executed. Nonetheless, the FAA's role in the Part 150 process is not to mandate specific

implementation, but to approve of the sponsor's proposed actions as consistent with the intent of Part 150 and, if applicable, monitor the sponsor's compliance with its federal grant obligations for those noise mitigation projects that are funded under AIP.

For the foregoing reasons, the Associate Administrator confirms that Complainants have failed to establish that compliance with the 2008 NCP, Part 150, and Federal aviation laws requires Atlanta to purchase (or noise remediate) Complainants' properties at issue here. The Associate Administrator upholds the Director's findings concerning the voluntary nature of the Part 150 process. The Director's findings are supported by reliable, probative, and substantial evidence and are made in accordance with applicable law, precedent, and policy. [FAA Exhibit 2 Item 1, pg. 21-27]

ISSUE 2: Whether the Director's Determination finding with respect to Grant Assurance 5 is supported by substantial evidence and in accordance with law.

The Director held in his Determination that "[t]here is no evidence that the Airport gave away its rights and powers concerning AIP-funded and acquired property for noise mitigation purposes, which would be a violation of Grant Assurance 5." [Director's Determination, pg. 31]

The Complainants' core argument on Appeal is that the Director's Determination "allows" the Respondent to violate Grant Assurance 5:

> Whether the Consent Order bars Atlanta itself from purchasing property within College Park, Atlanta is still responsible for carrying out its NCP as approved by the FAA. That is what is required by the statute and that is what the FAA requires non-airport sponsors to do. The Consent Order, as read by Atlanta, restricts Atlanta's ability to carry out the NCP as approved by the FAA by discriminating between residents and landowners based on where they live or own property. Because of the inherent discrimination involved, Atlanta is in violation of Grant Assurance 5, among other grant assurances.

The Complainants further argue that it"...is the function of the federal government to ensure the program it oversees, including the Noise Compatibility Programs, are implemented without discrimination." The Complainants' contend that the Director's finding that the Consent Order prevents Complainant's property from being purchased pursuant to the FAA-approved NCP "is nothing but a restraint on Atlanta's ability to carry out its NCP in a non-discriminatory fashion." [FAA Exhibit 2, Item 1, pg. 35] Similarly, the Complainants' argue that the "...NCP is an offer that has been relied upon by residents and landowners and Atlanta has failed to deliver on its promises and therefore it is in violation of its grant assurances." [FAA Exhibit 2, Item 1, pg. 36] The Complainants' arguments on Appeal are essentially unchanged from the arguments considered in the Director's Determination.

For its part, the Respondent's Reply argues that Grant Assurance 5 does not contain language that speaks to the concept of "non-discrimination" when selecting properties for sound insulation or acquisition for noise mitigation purposes. [FAA Exhibit 3, Item 1, pg. 20] The Respondent also emphasizes the need to reach mutually-acceptable land use accommodations when prioritizing which projects to mitigate noise issues. [FAA Exhibit 3, Item 1, pg. 20] The

Respondent argues that the Consent Order with the City of College Park was a form of project prioritization, and that the Complainants' contention that entering into the Consent Order is a violation of Grant Assurance 5 is "entirely unsupported." [FAA Exhibit 3, Item 1, pg. 20] Lastly, the Respondent argues that the Complainants' are mistaken in their belief that the Respondent must find alternative ways to protect the Complainants from aircraft noise or otherwise facilitate the purchase of the Complainants' properties by the City of College Park. The Respondent argues that the FAA is not in a position to dictate how the Respondent carries out its NCP at the local level. [FAA Exhibit 3, Item 1, pg. 20]

The Director's Determination found that the Complainants misunderstand the requirements of Grant Assurance 5 and the scope of the Part 150 process. [Director's Determination, pg. 29] The Director in a number of instances reiterates that Grant Assurance 5 pertains to actions or inactions taken by the sponsor that would deprive it of the rights and powers necessary to control and operate airport property "within or outside airport boundaries" that it already owns (e.g. land used for "noise mitigation" or "off-site parking") and which is identified on the sponsor's Exhibit 'A' property map. [Director's Determination, pg. 28] By way of further information, the Associate Administrator notes that the Exhibit 'A' is a snapshot of the inventory of parcels that make up dedicated airport property. The Exhibit 'A' indicates how the land was acquired, the funding source for the land and if the land was conveyed as Federal surplus land. Other detached parcels owned by the airport sponsor that are dedicated to airport purposes must also be shown on the Exhibit 'A'. The Exhibit 'A' must show all dedicated airport property regardless of the type of funds (AIP, state, local, etc.) used to acquire that property. All land described in a project application and shown on an Exhibit 'A' constitutes the airport property federally obligated for compliance under the terms and covenants of a grant agreement.

The record here shows that the Complainants' properties (1) "are not airport properties;" (2) are "not located within airport boundaries;" and (3) "the Airport has no control over them." [Director's Determination, pg. 28] In fact, the Respondent has no affiliation whatsoever to the Complainant's properties. As noted above, Grant Assurance 5 does not bestow a right or responsibility to assert power over property the airport sponsor does not own. Accordingly, the Associate Administrator confirms that the Director did not err in his interpretation that Grant Assurance 5 "does not extend to any and all actions on the part of the Airport concerning a property it does not own but might be interested in for noise mitigation purposes (in the NCP), as it is the case here." [Director's Determination, pg. 28]

Regarding the Complainants' understanding of the FAA's Part 150 program, the Director clarified that 1) the Part 150 process is a voluntary program proposed and administered by the airport sponsor, and 2) land acquisition for noise compatibility is eligible for federal participation if it is an element of a Noise Compatibility Program prepared by the airport owner and approved by the FAA in accordance with Part 150. [Director's Determination, pg. 29] The Director further clarified that the FAA's role is to assure that federal funds spent under the program are consistent with the NCP, as approved, and responsive, on the part of the Airport, to local conditions and concerns or surrounding municipalities. Significantly, the Director concluded that it "is not the FAA's role, nor is it a requirement, to mandate that specific properties be acquired or others sound insulated." [Director's Determination, pg. 29] The Director also found that Grant Assurance 5 is not a mandate for the Respondent to enter into an agreement with the

Complainants regardless of other related matters and consequences (such as concerns outlined by College Park). [Director's Determination, pg. 30] Lastly, the Director concluded that property owner's discretion is limited to deciding whether to accept sound insulation or acquisition, if offered by the airport, and that Grant Assurance 5 does not require that a particular offer must actually be made or that the lack of an offer is inconsistent with the sponsor's federal obligations. [Director's Determination, pg. 30]

Upon review, the Associate Administrator confirms that the only mandate provided by Grant Assurance 5 regarding noise mitigation projects on private property is paragraph (d), which requires that a sponsor must enter "into an agreement with the owner of that property" for noise mitigation purposes, and that the agreement must include "provisions" specified by the FAA, which are "designed to protect the Airport's rights and powers and federal obligations interests." [Director's Determination, pg. 29] The plain language of paragraph (d) of Grant Assurance 5 cannot be read to compel the Respondent to enter into an agreement with the Complainant concerning the subject properties, but rather that any such agreement, if entered, must protect the airport sponsor's rights and powers. If the Respondent and the Complainants were to enter into an agreement for noise mitigation purposes, then such an agreement would subordinate the Complainants to the Respondent's rights and powers requirement under Grant Assurance 5. However, it is undisputed that no such agreement between the Respondent and the Complainants exists. Given the fact that 1) Grant Assurance 5 extends to those properties owned or controlled by the airport sponsor, and 2) participation in 14 CFR part 150 is voluntary on the part of an airport operator, it is unreasonable to argue that the Director erred in his finding that the Respondent is not in violation of Grant Assurance 5 for not implementing proposed noise mitigations on property for which the Respondent does not own, control and/or has not entered into an agreement with the property owners.

Lastly, the Complainants argue that even if "the Consent Order bars Atlanta itself from purchasing property within College Park, Atlanta is still responsible for carrying out its NCP as approved by the FAA" and that "by signing the Consent Order with College Park, Atlanta committed itself to finding a way to ensure that the residents and landowners in College Park are protected from the severe impact of aircraft noise the same way other residents and landowners in other cities are." [FAA Exhibit 2, Item 1, pg. 35] The Complainants further claim that the "issue here is not land use...but the airport sponsor's and the FAA's obligation to protect the residents and landowners from aircraft noise." [FAA Exhibit 2 Item 1, pg. 36] Finally, the Complainant's argue that "the NCP is an offer that has been relied upon by residents and landowners and Atlanta has failed to deliver on its promises and therefore is in violation of its grant assurances."

Upon review of the Complainants' claim, the Associate Administrator confirms that Grant Assurance 5 does not require an airport sponsor to adopt property specific noise mitigation strategies and practices. Therefore, the Respondent is not required by FAA statute, regulation, policy, or precedent to purchase Complainant's property as part of an NCP. Furthermore, while the Respondent may be restricted from purchasing the Respondent's property by the Consent Order, that is just one of a myriad of local concerns and conditions which may affect local noise mitigation plans, options, and decisions. The Associate Administrator affirms the Director's conclusion that "...FAA's approval of an NCP measure is not a mandate for implementation, and

the Part 150 process itself provides for updates, amendments, and changes, including those designed to accommodate local concerns." [Director's Determination, pg. 30] Here, the "local concerns" presumably include any legal constraints imposed by the Consent Order restricting the Respondent from purchasing any apartment complexes in the City of College Park (other than Clubhouse Apartments). [Director's Determination, pg. 9] The Associate Administrator upholds the Director's findings.

Finally, the Complainants argue that "...discrimination [against the Complainant] is only alleviated if the Consent Order is read as merely eliminating Atlanta as a potential purchaser of the airport properties identified for acquisition in College Park" and that if the Consent Order is read "along with Atlanta's continuing responsibility to carry out the NCP as approved by the FAA, then Grant Assurance 5 disappears." [FAA Exhibit 2, Item 1, pg. 35] The Complainants cite 49 U.S.C. 47504(c) as providing the Respondent options beyond acquiring and/or sound insulating the Complainants' properties.

The Complainant is correct that 49 U.S.C. 47504(c) provides a number of options available to the FAA to issue grants for soundproofing and/or acquisition of noise affected properties, including grants to a public agency representing an affected jurisdiction surrounding the airport. The Director makes clear that "the FAA has taken the public position that if College Park demonstrates that it is capable of carrying out the projects [noise programs] within its jurisdiction, then it may be eligible to receive grants to implement those projects" as provided by 49 U.S.C. 47504(c)(1), (c)(3). [Director's Determination, pg. 30] Consequently, the Complainants' reference to 49 U.S.C. 47504(c) to challenge the Director's finding under Grant Assurance 5 is without merit.

In consideration of the foregoing, the Associate Administrator upholds the Director's findings concerning the Respondent's compliance with Grant Assurance 5, *Preserving Rights and Powers.* The Director's findings are supported by reliable, probative, and substantial evidence and are made in accordance with applicable law, precedent, and policy.

ISSUE 3: Whether the Director's Determination's findings with respect to Grant Assurance 21 are supported by substantial evidence and in accordance with law.

The Complainant's core arguments on Appeal in issue 3 are that the Director's "application of the Keathly test to this matter was unsubstantiated by law and fact" and that the Respondent failed to take all "appropriate actions" to comply with Grant Assurance 21.[27] [FAA Exhibit 2, Item 1, pg. 29-31] The Complainants argue that:

> The Director's Determination failed to comprehend that the approach in this matter is reversed [from Keathly]. Instead of an off-site land use being constructed that is incompatible with airport operations, by constructing the Fifth Runway, Atlanta created new incompatible land uses. Thus, Keathly still applies and it requires the airport sponsor to take all reasonable actions to ensure that the land uses that it made incompatible are addressed and made compatible. In this case, that means offering

[27] *See* Mr. Donald Keathly vs. City of McKinney, Texas; Collin County Regional Airport [Docket No. 16-03-14, Directors Determination (October 13, 2004) (Keathly)

> acquisition to the owners of the property in the 70 DNL contour or straddling the 70 DNL contour. [FAA Exhibit 2, Item 1, pg. 30]

The Complainants cite the text of 49 U.S.C. § 47107(a)(10), FAA Order 5190.6B, and Grant Assurance 21 to support its contention under *Keathly* that the Respondent failed to restrict the use of land adjacent to the airport to uses compatible with airport operations. [FAA Exhibit 2, Item 1, pg. 29-32] With regard to compatible land use issues, the Complainants' cite *Keathly* to show that the FAA typically addresses two questions in order to determine if a sponsor has violated its obligations: (1) whether the facility's operations are compatible with local airport operations and (2) if not, could the sponsor have prevented the facility from operating near the airport. The Complainants also argue that the Respondent has not taken "appropriate action" to comply with Grant Assurance 21 because it used the Consent Order to "weasel out of its FAA-approved commitment to acquire property within the 70 DNL" instead of taking "other actions" available to it. [FAA Exhibit 2, Item 1, pg. 32] The Complainants' arguments on appeal are essentially unchanged from the arguments considered in the Director's Determination.

For its part, the Respondent argues in its Reply that the facts in *Keathly* are "easily distinguishable" from this case because the land use in question in *Keathly* fell within the jurisdiction of the airport sponsor. Here, the Respondent argues, as airport sponsor, it does not control the jurisdiction where the Complainants' properties are located and thus could not have violated Grant Assurance 21. [FAA Exhibit 3, Item 1, pg. 26] Similarly, the Respondent argues that the construction of the Fifth Runway "is not in any way relevant to the question of compliance with Grant Assurance 21" since the two of the properties potentially eligible for acquisition absent the Consent Order are well north of the Fifth Runway and located in College Park outside of relevant noise contours. [FAA Exhibit 3, Item 1, pg. 27]

The record shows that, in *Keathly*, the airport sponsor allegedly failed to prevent an incompatible land use by allowing an enclosed recycling facility to locate adjacent to the airport. The Complainants argue that the "reverse" occurred at Atlanta in that the construction of the Fifth Runway in fact introduced incompatible land uses and that the Respondent must "take all reasonable actions to ensure the land uses that it made incompatible are addressed and made compatible" in compliance with Grant Assurance 21. [FAA Exhibit 2, Item 1, pg. 30] The Complainants' cite *M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board* [Docket No. 16-06-06, Directors Determination (January 19, 2007)] (Carey Davenport) as evidence that the FAA has previously determined that "the FAA does not per se accept an owner or sponsor declining any action on the simple grounds that it does not possess zoning authority outside the airport boundaries." [FAA Exhibit 2, Item 1, pg. 31] The Complainants further cite *Carey Davenport* as recommending various actions the airport sponsor could take including zoning regulations, sound insulation, land acquisition, etc. in order to be in compliance with Grant Assurance 21. [FAA Exhibit 2, Item 1, pg. 31]

Upon FAA review of the record and *Keathly*, the Associate Administrator confirms that the Complainants are correct that the Director did not provide a detailed analysis of the applicability (or inapplicability) of their reference to *Keathly*. [Director's Determination, pg. 36-37] However, upon review, the Associate Administrator's confirms the inapplicability of *Keathly* to this case. As previously mentioned, *Keathly* involved a facility that was built adjacent to the

airport in a jurisdiction under the sponsor's control. At issue was the alleged wildlife hazard implications related to the facility's indoor recycling operations. The Director found that the sponsor in that case was not in violation of Grant Assurance 21 for failing to prevent the facility from being located adjacent to the airport because the facility was not deemed an incompatible land use by FAA guidance or otherwise.

In this case, the Complainants assert that residential facilities built long before the Fifth Runway was constructed were made incompatible due to the location of the new runway. The Complainants argue that the Respondent under Grant Assurance 21 is required to mitigate these incompatible uses through acquisition or sound insulation, regardless of the Consent Order with the City of College Park. The Director was not persuaded by the Complainants' argument. The Associate Administrator is similarly unpersuaded.

The Complainants are correct that Grant Assurance 21 compels the sponsor to "take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft." The Complainants accurately cite that, for the purpose of evaluating airport sponsor compliance with Grant Assurance 21, the FAA does not consider a sponsor's lack of direct authority as a reason for the sponsor to decline to take any action at all to achieve land use compatibility outside the airport boundaries. [FAA Exhibit 2, Item 1, pg. 31] FAA Order 5190.6B §20.2(d) states that "...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 dissemination of information, education, or ongoing communication with surrounding municipalities." Conversely, where the sponsor does have authority to control land use adjacent to the airport, the FAA expects the sponsor under Grant Assurance 21 to zone and/or use other measures to restrict the use of land in the vicinity of the airport to activities and purposes compatible with normal aircraft operations, including appropriate action to avoid or mitigate noise incompatible land uses.[28]

In this case, the Respondent lacks authority to institute or compel new zoning laws or other land use restrictions in the City of College Park, leaving the Respondent with few options to restrict or otherwise mitigate incompatible land uses adjacent to the airport in that jurisdiction. The Respondent's 2008 NCP proposed a combination of preferred noise abatement and land use management measures, including property acquisition and sound insulation, and a plan for public outreach and implementation of the proposed measures. The FAA, in its approval of the 2008 NCP, exercised its responsibility in evaluating and determining that the Respondent's proposals were consistent with ANSA and Part 150. As such, the Associate Administrator affirms that the Director's finding that the Respondent is not in violation of Grant Assurance 21 is supported by reliable and substantial evidence because the Respondent has recognized the potential need to mitigate incompatible land uses in its NCP. Under the facts presented, the Respondent's lack of jurisdictional control over properties within the City of College Park cannot be construed as sufficient grounds for sustaining a violation of Grant Assurance 21. The Director's findings are

[28] FAA Order 5190.6B, § 20.2.

consistent with FAA policy in FAA Order 5190.6B and past precedent and Complainants have failed to show otherwise.

Likewise, the record sufficiently demonstrates that the Respondent has engaged in comprehensive public outreach in connection with its Part 150 noise mitigation programs and, as the Director notes, "...the Airport has been consistently engaged in noise mitigation for several decades, expending large amounts of funds in both property acquisition and sound insulation. The Airport has also had in place a very comprehensive noise land reuse plan, which includes restricted covenants for any disposal to prevent the re-introduction of noise sensitive developments." [Director's Determination, pg. 39] The Respondent has expended significant financial resources for acquisition or sound insulation of eligible properties, and other noise reduction measures, which included public outreach and coordination over a number of years. As such, to the extent that the Respondent can take reasonable actions to prevent and/or mitigate incompatible land uses within and outside its jurisdictional control (and the Consent Order), the Associate Administrator concurs with the Director that the Respondent has been successful in accomplishing its Grant Assurance 21 obligations to the extent reasonably possible.

Lastly, Grant Assurance 21 also states that "...if the project is for noise compatibility program implementation, it [airport sponsor] will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended." In this case, the subject properties are not and never have been owned or under jurisdictional control of the Respondent, nor have there been Federal funds expended on the subject properties for noise compatibility purposes. As such, this provision of Grant Assurance 21 simply does not apply.

In consideration of the foregoing, the Associate Administrator for Airports confirms that the Director did not err in his determination concerning the applicability of Grant Assurance 21 to the Respondent's proposed mitigation of noise affecting the Complainants' properties. The Director was correct in his finding that "The record contains no information indicating that the Airport has taken action, which has resulted in an incompatible land use." [Director's Determination, pg. 39] The Associate Administrator confirms that the Director's findings are supported by reliable, probative, and substantial evidence and are made in accordance with applicable law, precedent, and policy.

VIII. CONCLUSION

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

Specifically, 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, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [14 CFR § 16.33(e)] [See e.g., *Ricks v. Millington Municipal Airport*, FAA Docket No. 16-98-19, Final Decision and Order pg. 21 (Dec. 30, 1999)] 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, and Reply submitted by the parties, 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

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 Unite 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 part 16 § 16-247(a)]

Eduardo A. Angeles
Associate Administrator for Airports

December 13, 2016
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 12-15-2016, I caused to be placed in the United States mail (first class mail, postage paid) a true copy of the Final Agency Decision, addressed to:

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