

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Boston Executive Helicopters,

Complainant

v.

**Town of Norwood, Massachusetts
And Norwood Airport Commission,**

Respondent



Docket No. 16-15-05

DIRECTOR'S DETERMINATION (revised)

I. INTRODUCTION

The Director, by Order, withdrew the Director's Determination dated October 30, 2018, to correct certain errors.

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

Boston Executive Helicopters ("BEH or Complainant") filed a complaint against the Town of Norwood, Massachusetts ("Town"), the sponsor of Norwood Memorial Airport and the Norwood Airport Commission ("NAC" or "Commission" and jointly "Respondents"), regarding its management of the Norwood Memorial Airport ("Airport").

The Complaint alleges the Town is engaged in economic discrimination and granted a single Fixed Based Operator (FBO)¹ an exclusive right, in violation of Title 49 United States Code (USC) §§47107(a) and 40103(e) and Grant Assurance 23, *Exclusive Rights*. Complainant also alleges the Town is in violation of Grant Assurance 22, *Economic Nondiscrimination*, and Grant Assurance 5, *Preserving Rights and Powers*, by allowing one FBO to operate exclusively on the Airport. BEH has not been issued an FBO permit. BEH alleges that the Town unreasonably delayed and withheld numerous reasonable requests for access to Airport property for commercial tenants, as well as permission to conduct an FBO aviation business at the airport.²

Based on the evidence and record presented in this proceeding, the Director finds the Town and Commission in violation Grant Assurance 22, *Economic Nondiscrimination*, Grant Assurance 23, *Exclusive Rights* and Grant Assurance 29, *Airport Layout Plan*.

¹ A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public.

² Exhibit 1, Item 1, pages 24-25.

The Director's decision in this matter is based on applicable Federal law and FAA policy, as well as the Director's review of the pleadings and supporting documentation submitted by the parties, which comprises the administrative record contained in the attached FAA Exhibit.

II. PARTIES

A. Complainant

The Complainant, BEH, is a Delaware limited liability company based at 209 Access Road, Norwood, Massachusetts 02062. BEH holds a 14 CFR Part 135³ operating certificate and provides helicopter charter services. BEH has been a commercial tenant⁴ of the Norwood Memorial Airport since 2010, and at the time of the complaint leases an area of approximately 3/4 acre⁵ on which the company has finished construction of a new hangar and a new fuel farm.⁶

B. Town/Airport Commission

The Norwood Memorial Airport is a public use general aviation airport designated by the FAA as a reliever airport for Boston Logan International Airport. The Airport has 688 acres, 2 runways, and a contract Air Traffic Control (AYC) tower. The Airport Master Record (FAA Form 5010)⁷ shows 109 fixed-wing aircraft, including 8 jets, and 15 helicopters, are based at the Airport, and it had 58,346 annual operations as of November 2016. Much of the Airport land is wooded and most of the usable flight line facilities are located along the west side of Runway 17-35. A substantial portion of flight line property at the Airport is under long-term lease to Boston Metropolitan Airport, Inc. (BMA), which subleases property to airport tenants that provide aviation services.

Planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 USC § 47101, *et seq.* Since 1982, the Town of Norwood, the Airport owner and sponsor, received 27 grants totaling \$11,577, 569 in Federal financial assistance for airfield improvements. The Airport's taxiways and most of the aprons have been rehabilitated with the assistance of AIP grant funds.⁸

The Town has delegated daily operation of the Airport to the Norwood Airport Commission. The Commission is an agent of the Town, while the Town is the airport sponsor with respect to the applicable federal obligations. As such, the Town is ultimately responsible for ensuring compliance with its federal obligations concerning any and all of the Commission's actions or inaction. References to the Commission's actions and statements in the pleadings and in this decision are understood to be the Town's as well.

³ A Part 135 operator holds an Air Carrier Certificate and provides passenger service as a commuter or on-demand service.

⁴ BEH initially operated its helicopters from hangars 7 and 8, which were leased to MII Aviation Services LLC. (Exhibit 7, Item 1, Exhibit 172).

⁵ BEH subleases Lot F from BMA (Exhibit 1, Item 1, page 2).

⁶ Exhibit 1, Item 1.

⁷ Exhibit 9, Item 1, FAA Form 5010.

⁸ Exhibit 1, Item 1, Exhibit 84 & Exhibit 9, Item 4

III. PROCEDURAL HISTORY AND BACKGROUND

A. Procedural History

March 11, 2015	Formal complaint filed under 14 CFR Part 16. ⁹
March 31, 2015	FAA docketed the Complaint. ¹⁰
April 14, 2015	FAA received Respondents Motion to Extend the Time to Respond to the part 16 Complaint filed by the Complainant, dated April 13, 2015.
May 12, 2015	FAA received <i>Respondent's Answer</i> to part 16 Complaint filed by the Complainant, dated May 8, 2015, includes exhibits 1-105.
May 14, 2015	Letter from Russ Maguire, Manager, Norwood Memorial Airport, of the airport, received by the FAA.
May 15, 2015	Complainant's Motion to Extend the Time to Respond to the Answer of the Town of Norwood and the Norwood Airport Commission.
May 19, 2015	Letter from Brandon Moss including a DVD to replace Exhibit 12 associated with May 8, 2015 Complaint.
June 10, 2015	FAA received Complainant's Response to the Answer of the Town of Norwood and the Norwood Airport Commission, dated June 8, 2015, includes exhibits 158-176.
July 9, 2015	Respondent's Rebuttal to Complainant's Reply, including exhibits 106-141.
June 13, 2016	Respondent's Motion for Leave to File a Supplemental Rebuttal. ¹¹
June 17, 2016	Respondent's Motion for Leave to File a Second Supplemental Rebuttal.
September 2, 2016	Respondent's Motion for Leave to File a Third Supplemental Rebuttal.
November 15, 2016	Respondent's Motion for Leave to File a Fourth Supplemental Rebuttal.
November 29, 2016	Complainant's Opposition to the motion filed by the Respondent for Leave to File a Fourth Supplemental Rebuttal.
December 15, 2016	Complainant's correspondence between the Parties.
January 3, 2016	Respondent's Response to Complainant's Pleadings and Motion to Strike November 29, 2016 Filing.
February 7, 2017	Correspondence update with copy of February 1, 2017 letter responding December 12, 2016 letter.

B. Background

a. Previous 14 CFR Part 16 Formal Complaint

As an initial matter, in its Complaint, BEH refers to a previous Part 16 case, *Boston Air Charter v. Norwood Airport Commission, Norwood Massachusetts*, Docket Number 16-07-03.¹² The

⁹ Exhibit 1, Item 1.

¹⁰ Exhibit 2, Item 1.

¹¹ The last filing date is December 15, 2016. The Director did not reject these items; however, given the delay of more than a year filing the documents only the information therein related to the allegations in the initial pleadings are considered in the decision. New allegations are not addressed.

¹² *Boston Air Charter v. Norwood Airport Commission, Norwood Massachusetts*, FAA Director's Determination, Docket No, 16-17-03, (April 11, 2008) page 4 and FAA Final Agency Decision, Docket No. 16-17-03, (August 14, 2008), page 4.

case is relevant to provide background regarding the Town's prior violations of the grant assurances in granting long-term leases and exclusive rights. The prior Complaint, adjudicated in 2008, alleged the Town engaged in economic discrimination by granting a fixed based operator an exclusive right in violation of 49 USC 47101(a) and 40103 (e) and the respective Grant Assurances 22 and Grant Assurance 23.

In FAA Docket No. 16-07-03, the Town permitted Eastern Air Center to oppose Boston Air Charter's (BAC) request to self-fuel and refused to grant consent for an underground conduit to access Boston Air Charter's leasehold. Eastern was the only FBO and was concerned a second FBO providing fuel would result in competition and threaten its investment at the Airport.

After considering the parties positions, the FAA found the Town to be in violation of Grant Assurances 5, 22, and 23 at the Airport. The Director's Determination¹³ directed the Town to submit a Corrective Action Plan. The Plan required the Town to: (1) end the practice of awarding long-term leases of the federally funded ramps that had the effect of granting one party control over the majority of the ramps on the Airport; (2) put in place a short-term ramp leasing permit policy for the Airport to assert more control of the federally-funded ramps, and, (3) regain the Airport's rights and powers to access the '1100 Foot Strip.¹⁴ The Town appealed and the Determination was upheld in FAA Final Agency Decision and Order, Docket No. 16-07-03, (August 14, 2008).

Following the FAA decision, in a letter to the Airport Manager on January 27, 2010,¹⁵ the Director of the FAA's Office of Airport Compliance and Field Operations (now 'Airport Compliance and Management Analysis') deemed the Town's corrective action plan to be complete stating "...A review of the Town's proposed CAP and follow-up documentation demonstrates that the corrective actions are acceptable. In conclusion, we find the Town's CAP acceptable, as submitted. The FAA finds the Town of Norwood in compliance with its Federal obligations..."

While there are several issues and arguments presented in FAA Docket No. 16-07-03 similar to the issues presented by BEH, the two cases are distinct, not only in factual terms, but also in scope and detail of the issues and relevant facts. The FAA adjudicated the issues in that case and the Respondent/Town completed a Corrective Action Plan to the FAA's satisfaction. While the Director will not ignore relevant references and precedent, the Director will not question or otherwise revisit the issues and actions raised in FAA Docket No. 16-07-03. Rather, the Director's focus is the present Complaint by BEH based on its merits and the specifics of the case and pleadings submitted by the parties.

Relevant Non-Parties

Boston Metropolitan Airport, Inc.

Boston Metropolitan Airport, Inc. (BMA) is not a party to the formal complaint; however, background on BMA is relevant for context purposes. In 1967, BMA entered into a long-term lease with the Town, whereby BMA¹⁶ acquired a significant amount of Airport property for a

¹³ Exhibit 1, Item 1, Exhibit 4.

¹⁴ Exhibit 1, Item 1, Exhibit 135.

¹⁵ Exhibit 4, Item, Exhibit 17.

¹⁶ Exhibit 4, Item 1, Exhibit 23.

lease period up to 80 years. The master lease between Commission and BMA is in effect until 2047. BMA is the lease proprietor for BEH and Flight Level Norwood, LLC.

On October 19, 2012, BMA leased Lot F to BEH that had been previously leased by Swift Aviation.¹⁷ BMA is not a party in this complaint but is a tenant on the airport controlling the sublease to BEH and Flight Level and has offered an opinion against BEH in matters concerning leaseholds at the Airport.¹⁸

Flight Level Norwood, LLC

Flight Level Norwood, LLC, (Flight Level) is also not a party to this complaint; however Flight Level is prominently involved in this dispute. Flight Level acquired its long-term leasehold from the prior tenant, Eastern Air Center (EAC) Realty Trust II, and BMA leases Lots G and H to Flight Level, affording Flight Level much of the space on the Airport ramp and flight line areas for its commercial aviation services.¹⁹

Flight Level is the only FBO operating at the Airport. BEH seeks to become the second FBO and would become Flight Level's primary competitor. The record includes a 15-page unsigned letter from Flight Level to the Commission's Chairman outlining numerous points in opposition to BEH being allowed to operate as an FBO and fuel vendor on the Airport.²⁰

The record further indicates that many of EAC's employees, and some of its leadership, also transferred to Flight Level.²¹ As mentioned above, EAC was the dominant FBO in the previous part 16 complaint. Flight Level holds a sublease to part of an area known as the "1100-foot strip" which is under the 80-year lease to BMA. In total, Flight Level leases approximately 14 acres of airport property.²²

Papa Whiskey 1 LLC (Papa Whisky)

Papa Whiskey 1 LLC (Papa Whisky), is also not a party to the complaint, however the Papa Whisky and Flight Level share common ownership. The Complaint alleges a pattern of conduct by the Commission based on Papa Whiskey's successful bid for the leasehold for 'DC-3 Apron'. BEH did not submit a Bid for the DC-3 Apron. The Complaint alleges the Town permitted Flight Level to dominate leaseholds at the Airport partly through Papa Whiskey's leasehold.

b. Background and Chronology of BEH's Request for Apron Lease

BEH claims it has requested additional space at the Airport since 2008, seeking permission to conduct fueling and other FBO services, all consistent with the Airport's Minimum Standards.²³ BEH contends it is experienced in operating, handling, storing, and fueling both rotary-wing and fixed-wing aircraft and that it is qualified to provide fueling and other FBO services to aircraft.

¹⁷ Exhibit 4, Item 1, Exhibit 31.

¹⁸ Exhibit 1, Item 1, Exhibit 77.

¹⁹ Exhibit 1, Item 1, Exhibit 112.

²⁰ Exhibit 1, Item 1, Exhibit 79.

²¹ *FBO Profile: Flight Level Aviation*, Aviation International News, Gordon Gilbert, July 28, 2009.

²² Exhibit 1, Item 1, Exhibit 5.

²³ Exhibit 1, Item, 1 Exhibits 1, 2, and 3.

BEH states it maintains the types and amounts of insurance appropriate to an FBO and holds all necessary permits for conducting aircraft handling and fueling operations on the Airport.²⁴

The record provides that BEH first approached the Airport in April of 2008, when it indicated its desire to appear before the Commission to apply for an Airport Commercial Operator's permit.²⁵ BEH received great support from the airport manager as well as from the president of the incumbent FBO, Flight Level, when it requested approval to establish a commercial business at the airport. In a letter to the airport manager, the president of Flight Level praised BEH's attempt to establish a commercial business at the airport, stating, "they [BEH] will contribute positively to the airport community."²⁶

On May 12, 2010, BEH first appeared before the Commission. BEH's business plan provided that the ultimate goal of the company was to become an "Executive Helicopter on-demand charter operation."²⁷ Over the next few months, BEH began inquiring into the availability of additional space on the airport. The record reflects two such inquiries on September 1, 2010,²⁸ and September 27, 2010.²⁹ Over the next few months, BEH continued to inquire about additional space on the airport.³⁰

In its May 12, 2010, business plan submitted to the Commission, BEH indicated it had a positive relationship with Flight Level, stating, "we have an excellent relationship with our Fixed Based Operator, Flight Level Aviation Services."³¹ The airport manager also expressed his support for BEH's initial effort to establish a business on the airport. In an email dated May 13, 2010, the airport manager congratulated the president of BEH, commending him on his "nice presentation," and welcoming BEH to the airport.³²

On October 13, 2010, five months after BEH's initial appearance before the Commission, BEH submitted a request for additional space, indicating a desire to expand its earlier business plan. BEH stated that it wanted to include activities such as flight training, aircraft rentals; aircraft repair, and eventually operate as a full-service FBO at the Airport.³³ BEH continued to ask, both in writing and in oral presentations, for more ramp space for an FBO operation.³⁴ BEH has appeared at least 28 times at Commission meetings since 2010.³⁵ As part of its efforts, BEH submitted modified business plans to the Commission.

On January 28, 2013, the Commission issued a Request for Proposal (RFP) for lease of the "DC-3" Ramp, which limited limiting the use of the ramp to aircraft parking only. BEH requested that the ramp be made available for commercial use, including aircraft handling and fueling, but the Commission declined. The Respondent awarded the Lease to Papa Whiskey, the entity that shares common ownership with Flight Level, the sole existing FBO.³⁶

²⁴ Exhibit 1, item 1, Para 11.

²⁵ Exhibit 4, Item 1, Exhibit 3.

²⁶ Exhibit 4, Item 1, page 6 and Exhibit 11.

²⁷ Exhibit 1, Item 1, Exhibit 27.

²⁸ Exhibit 1, Item 1, Exhibit 1.

²⁹ Exhibit 1, Item 1, Exhibit 2.

³⁰ Exhibit 1, Item 1, Exhibits 1 & 2.

³¹ Exhibit 1, Item 1, Exhibit 27.

³² Exhibit 4, Item 1, Exhibit 10.

³³ Exhibit 1, Item 1, Exhibit 3.

³⁴ Exhibit 1, Item 1, Exhibits 1, 2, 3.

³⁵ Exhibit 1, Item 1, Exhibit 10.

³⁶ Exhibit 1, Item 1, Exhibits 12, 33, 34.

In a February 13, 2013, meeting,³⁷ the Commission approved the request from BEH to assume a sublease from Swift Aviation, a company occupying Lot F totaling 30,000 square feet with a sublease term to May 31, 2029, including an option for another 15-year term.³⁸ Swift Aviation leased Lot F from BMA, Inc.³⁹ The previous hangar collapsed prior to BEH's possession and the leasehold contained only a hangar foundation. In accordance with requirements imposed by the Airport,⁴⁰ the FAA reviewed the BEH sublease from Swift.⁴¹ BEH subsequently constructed a new 15,000 square foot hangar and built a fuel farm for a total reported cost of \$2.5 million. The record indicates that BEH self-funded this investment with no reported financing. BEH asserts that it is without debt.

By letter dated August 23, 2013, BEH was informed that the Commission had unanimously decided not to grant the request from BEH to install a pedestrian gate adjacent to the airport's vehicle Gate 3.⁴²

On January 27, 2014, BEH renewed its request for apron space and specifically requested space on the available areas of the West Ramp, the only remaining public ramp within the Commission's control.⁴³

On March 17, 2014, the Commission offered BEH a lease for 6,889 square feet in a corner of the West Apron for the operation of the FBO for BEH.⁴⁴ The letter advised BEH that "use of the leased premises shall be conditioned on BEH holding all necessary permits, licenses, certificates and approvals (as applicable) to operate as a fixed-base operator on the Norwood Airport (Section IV)." There is a dispute regarding the acceptance of this lease offer.

On May 3, 2014, BEH sent an email to the airport manager regarding the status of Lots A, B, and C that were under lease to Flight Level, as those leases were approaching expiration later in the year. BEH's email stated that BEH has "been requesting space at the Norwood Airport since 2010" and "Lots A, B, and C, has been leased by the Commission to Flight Level and the lease is set to expire ... in October of this year (2014)." BEH inquired whether Lots A, B, and C, had been leased to Flight Level, and if so under what terms.⁴⁵

On May 5, 2014, the Airport manager responded answering: "No." In another email to BEH just hours after his initial answer, the airport manager stated: "...the Norwood Airport Commission has advised me to pass along, that as far as the NAC members are concerned, Lots A, B, and C, are under lease for the next five years."⁴⁶ On May 7, 2014, the airport manager advised BEH that "...at its March 12 meeting—at the request of Flight Level—the NAC did vote to approve an additional five-year lease to Flight Level for lots A, B, and C."⁴⁷

On May 13, 2014, BEH's attorney informed the Commission that BEH formally accepted the West Apron lease offer of 6,889 square feet, but requested additional space. The letter stated

³⁷ Exhibit 1, Item 1, Exhibit 8.

³⁸ Exhibit 4, Item 1, Exhibit 31.

³⁹ Exhibit 1, Item 1, Exhibit 8.

⁴⁰ Exhibit 1, Item 1, Exhibit 15.

⁴¹ Exhibit 4, Item 1, Exhibit 24.

⁴² Exhibit 1, Item 1, Exhibit 106.

⁴³ Exhibit 1, Item 1, page 8

⁴⁴ Exhibit 1, Item 1, Exhibit 22

⁴⁵ Exhibit 1, Item 1, Exhibit 13.

⁴⁶ Id.

⁴⁷ Exhibit 1, Item 1, Exhibit 13.

that BEH was “ready, willing, and able to lease the entire West Apron.”⁴⁸ The minutes of May 14, 2014, Commission’s regular business meeting⁴⁹ states that BEH accepted the lease offer of 6,889 square feet in a corner of the West Apron for the operation of the FBO. The minutes stated, “on May 13, 2014, BEH has agreed to accept NAC’s proposal on March 17, 2014, for the lease of 6,889 square foot of space at the west apron.” However, at that meeting, BEH’s attorney also stated that an area of less than 7,000 square feet was inadequate for FBO operations.⁵⁰

On June 5, 2014, the New England Region FAA Airports division sent a letter to the Airport manager acknowledging BEH filed a Part 13 Informal Complaint concerning its efforts to expand operations at the Airport.⁵¹ The letter from the FAA asked the Airport to provide the status of any ongoing effort to mutually resolve any of the allegations. However, the Commission withdrew any further effort to accommodate BEH’s request for operating rights and adequate operating space.

At a June 11, 2014, meeting, the Commission voted to table further discussion on the BEH Lease and FBO Commercial permit request indefinitely, based solely on the Part 13 complaint.⁵²

On July 9, 2014, BEH submitted its third revised business plan to the Commission, requesting an area of 72,000 square feet on the West Apron to continue to establish its FBO, noting, “the company ...does not carry any institutional debt associated with the current and future operations.” In correspondence, the Commission’s Vice Chairman acknowledged that BEH’s business plan noted that BEH was requesting a long-term lease.⁵³

On November 4, 2014, BEH notified the New England Regional Office that it was withdrawing its informal complaint against the Airport and the Commission.⁵⁴

By letter dated February 12, 2015, the Commission’s attorneys informed BEH that the Commission voted in its February 11, 2015, meeting to “conditionally offer a lease for a portion of the West Apron, designated as so-called “Parcel A,” to BEH.” The letter stated that the “lease is subject to 3 conditions: (1) BEH has fifteen days to accept the lease offer; (2) BEH has thirty (30) days from accepting the lease offer to provide the NAC with detailed financial information; and (3) the detailed financial information submitted by BEH is approved by the NAC. The lease offer will be considered revoked, and therefore deemed null and void, if any of these conditions is not met.”⁵⁵ On the same day, BEH asserted that the specific conditions in the offer had not been required of other tenants.⁵⁶ BEH accepted the offer, under protest, to begin operations.

On February 13, 2015, Flight Level placed new barriers blocking BEH’s access to a taxiway easement utilized by Flight Level and its predecessors and BEH for over 30 years. The barriers blocked BEH’s access to its side hangar door.⁵⁷ Within days, BEH filed a state civil action against Flight Level seeking injunction relief to remove the barriers. On March 6, 2015, a

⁴⁸ Exhibit 1, Item 1, Exhibit 80.

⁴⁹ Exhibit 1, Item 1, Exhibit 21.

⁵⁰ Exhibit 1, Item 1, Exhibit 80.

⁵¹ Exhibit 1, Item 1, Exhibit 78.

⁵² Exhibit 1, Item 1, Exhibit 79 and 81.

⁵³ Exhibit 1, Item 1, Exhibit 11.

⁵⁴ Exhibit 4, Item 1, Exhibit 66.

⁵⁵ Exhibit 4, Item 1, Exhibit 68.

⁵⁶ Exhibit 1, Item 1, Exhibit 14. Exhibit 4, Item 1, Exhibit 68.

⁵⁷ Exhibit 1, Item 1, Exhibit 13.

Massachusetts Norfolk County Superior Court issued a preliminary injunction ordering Flight Level to remove the barriers.⁵⁸

On May 14, 2015, the Norwood Fire Department gave BEH final approval of its license, issued on January 22, 2013. In his comment regarding the approval, the fire department official stated the, "The facility is completed and given final approval..." and the license "can be released to the applicant." However, it does not appear that that BEH was included on the address line.⁵⁹

IV. APPLICABLE FEDERAL LAW AND FAA POLICY

This section discusses (a) the FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint process.

A. FAA Enforcement Responsibilities

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

In these programs, the airport sponsor assumes certain obligations, either by contract or by covenants in property deeds and conveyances, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. 49 USC § 47122 mandates the FAA to ensure airport owners comply with their grant assurances.

B. FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of federal property for airport purposes. These obligations in grant agreements and conveyance protect the public's interest in civil aviation and require compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure the national system of public-use airports is safe, properly maintained, and that airport sponsors operate consistent with their federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States they will protect in exchange for monetary grants and donations of federal property.

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

⁵⁸ Exhibit 1, Item 1, Exhibit 157.

⁵⁹ Exhibit 7, Item 1, Exhibit 159.

not control airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the continuing commitments airport owners make to the United States as a condition for the grant of federal funds or the conveyance of federal property for airport purposes. The order analyzes the airport sponsor's obligations and assurances, addresses the application of the assurances in the operation of public-use airports, and helps FAA personnel interpret the assurances and determine whether the sponsor has complied with them.

The FAA compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and operators of public-use airports that have been developed with FAA assistance. In addressing allegations of noncompliance, the FAA will determine whether an airport sponsor currently complies with the federal obligations. The FAA will also consider the successful action by the airport to cure an alleged or potential past violation of applicable federal obligation as grounds for dismissal of the allegations. *See Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order).

C. Statutes, Sponsor Assurances, and Relevant Policies

The *Airport and Airway Improvement Act of 1982*, (AAIA), as set forth in 49 USC § 47101, *et seq.*, establishes assurances to which an airport sponsor receiving federal financial assistance must agree as a condition before receiving the assistance. These sponsorship requirements are included in every AIP grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal Government.

The following grant assurances apply to the specific circumstances of this complaint.

Grant Assurance 22, Economic Nondiscrimination

The owner of an airport developed with federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Federal Grant Assurance 22, *Economic Nondiscrimination* deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 implements the provisions of 49 USC § 47107(a) (1) through (6), and comprise these subsections and requirements:

Assurance 22(a).

[The airport owner or sponsor] will make the airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

Assurance 22(b)

In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to (1) furnish said services on a

reasonable, and not unjustly discriminatory basis to all users thereof, and (2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

Assurance 22(c)

Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and using the same or similar facilities.

Assurance 22(d)

Each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport.

Assurance 22(f)

[The airport owner or sponsor] will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair and fueling) that it may choose to perform.

Assurance 22 (g)

In the event the sponsor itself exercises any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions.

Assurance 22(h)

[The owner or sponsor] may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.

Assurance 22(i)

...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”

The two subsections that relate to safety—Subsection (h) and Subsection (i) are exceptions to Subsection (a) that requires sponsors to make the airport available as an airport for public use without discrimination. These provisions permit the owner or sponsor to exercise control of the airport sufficient to prevent unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor of public-use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination (FAA Order 5190.6B, Chapter 9.1).

Grant Assurance 23, Exclusive Rights

- Grant Assurance 23, Exclusive Rights, carries out the provisions of 49 USC §§ 40103(e) and 47107(a) (4). It requires, in part, that the owner or sponsor of a federally obligated airport meet these assurances: It will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.
 - [It] will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities. . . .
 - [It] will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code.

The FAA Airport Compliance Program

In FAA Order 5190.6B, *FAA Airport Compliance Manual*, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, the FAA's position is that any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute the granting of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another *See Pompano Beach v FAA*, 774 F2d 1529, (11th Cir 1985). An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce on airport property equipment, personnel, or practices that would be unsafe, unsightly, detrimental to the public welfare, or affect the efficient use of airport facilities (Order 5190.6B, Sec. 11.2).

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise is construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease (*See* Order 5190.6B, Sec. 8.9.d *Space Limitation*).

Grant Assurance 29 Airport Layout Plan

Grant Assurance 29 requires the airport sponsor to keep up to date, "at all times an airport layout plan of the airport showing 1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; 2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; 3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon; and 4) all proposed and existing access points used to taxi aircraft across the airport's property boundary."

Airport layout plans and each amendment, revision, or modifications thereof, are subject to the approval of the FAA. The sponsor cannot make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the FAA and which might adversely affect the safety, utility, or efficiency of the airport.

If a change or alteration in the airport or the facilities is made which the FAA determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded

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

D. Minimum Standards

Advisory Circular AC 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities* (August 28, 2006) provides basic information pertaining to the FAA's recommendations on commercial minimum standards and related policies. Although minimum standards are optional, the FAA highly recommends their use and implementation as a means to minimize the potential for violations of federal obligations at federally obligated airports.

E. The Complaint Process

Under 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 and describe how they were directly and substantially affected by the things done or omitted by the respondents (14 CFR § 16.23(b)(3)(4)).

The proponent of a motion, request, or order has the burden of proof. (14 CFR § 16.23(k) (2)). A party who has asserted an affirmative defense has the burden of proving the affirmative defense. (14 CFR § 16.23(k) (3)). This standard burden of proof is consistent with the Administrative Procedure Act and Federal case law. The Administrative Procedure Act states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof" (5 USC § 556(d)). *See also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 US 267, 272 (1994); *Air Canada et al. v. Department of Transportation*, 148 F3d 1142, 1155 (DC Cir, 1998).

V. ANALYSIS AND DISCUSSION

Issue 1

Whether the Town is in violation of Grant Assurance 22, *Economic Nondiscrimination*, by denying BEH reasonable access to the airport to conduct an aviation business, by discriminating against BEH in making facilities unavailable for aviation business at the airport and in the application and enforcement of airport standards and policies.

A. FBO Permit

Complainant's Position

BEH alleges the Commission unreasonably delayed and withheld access to Airport property and denied permission to conduct an aviation business by requesting excessive financial information not required of other lessees and ultimately offering a lease on terms that did not meet the requirements to operate an FBO. BEH states the Commission initially approved the FBO

commercial permit for BEH in its June 15, 2016, meeting, with the condition “that there be a resolution of all legal matters between the Commission and BEH.”

By letter dated November 1, 2016, the Commission informed BEH that it had approved BEH’s FBO commercial permit with four conditions. “These conditions are:

1. BEH must provide the Commission with an irrevocable line of credit in an amount and under terms acceptable to the Commission;
2. BEH must provide evidence of insurance, to include spill coverage, commensurate with the insurance covered by Flight Level;
3. BEH must submit an updated fueling plan in the form of a scale drawing prepared by a professional engineer registered with the Commonwealth of Massachusetts, with fire protection setbacks acceptable to the Fire Chief and meeting FAA standards; and
4. BEH’s counsel, along with the NAC’s counsel, must enter into negotiations for a lease of lots A and B on the airport’s west apron.”⁶⁰

BEH contends that these conditions were previously met or are not specific enough to allow compliance.

Commission’s Position

The Commission contends that it has supported BEH’s efforts to become an FBO as evidenced by the June 15, 2016, and November 1, 2016, letters offering the FBO permit, albeit with conditions.⁶¹

BEH’s argument focuses on three issues: ramp space, financial information, and lease terms, discussed in sequence below.

Ramp Space

In reviewing Issue 1, the Director considered three sub-issues: Ramp Space, Financial Information, and Lease Term, arranged as (B), (C), and (D) below. Section (E) is the Directors analysis of those same issues.

B. Ramp Space

Complainant’s Position – Ramp Space

A review of the factual background regarding the availability of ramp space at the Airport is helpful. By email exchange from September 2010 to October 2010, BEH requested ramp space for commercial use, including aircraft ground handling and fueling, with the intent to become a full-service FBO.⁶²

From December 2012, through January 2013, the Commission issued a RFP for the DC-3 Apron, an area encompassing 15,295 square feet. A stated limitation in this RFP was that “The DC-3 Apron will be restricted to aircraft parking and aircraft ground-handling only.”⁶³

⁶⁰ Exhibit 11, Item 1, Exhibit 1.

⁶¹ Exhibit 4, Item 1 page 3.

⁶² Exhibit 1, Item 1, Exhibits 146.

On January 28, 2013, the Commission issued addendum #1 for the RFP for a lease of the DC-3 Apron, responding to questions regarding the limited use of the ramp to aircraft parking and ground handling only. The Commission states that the DC-3 Apron limited size of approximately 15,295 square feet restricts its utility as a site for a full-scale FBO given safety and efficiency concerns, along with the concerns for the future development of Airport property.⁶⁴

BEH obtained a copy of the RFP on January 2, 2013. The response deadline was February 8, 2013.⁶⁵ When questioned about the general connotation of “ground handling,” the Commission stated that fueling was not included in this lease.⁶⁶ On February 24, weeks after the February 8 deadline, BEH submitted several questions about the use restrictions of the DC-3 Apron. On March 14, the Commission declined to answer, stating the questions were untimely.

In a letter to BEH, the Commission Chairman explained the RFP for the DC-3 Apron did not prohibit self-fueling. The Chairman’s letter went on to say; “The successful proposer’s aircraft can be fueled on the DC-3 apron by a qualified fuel provider, authorized to perform such services, per applicable local, state and federal laws, regulations and other requirements.”⁶⁷

BEH alleges the Commission allocated almost the entire Airport ramp to Flight Level, the sole FBO at the Airport and that Flight Level currently leases Lots W, X, and Y; Lots 6 and 7; Lots A, B, and C; and lot Z, totaling approximately 561,000 square feet. BEH states that the only public ramp remaining under the direct control of the Commission is the West Apron.⁶⁸

BEH notes that it assumed an existing sublease of 30,000 square feet, used mostly for its hangar, and alleges that the Commission offered only minimal additional ramp space on the Airport on conditions not imposed on other tenants. BEH alleges that within this same timeframe, the Commission issued a new lease for the DC-3 Apron with seemingly arbitrary use restrictions that made it unusable for FBO purposes.⁶⁹

BEH states that in contrast to the obstacles the Commission erected to prevent BEH from expanding its operation on the Airport, in 2009, the Commission issued a lease renewal for the A, B, and C, apron to Flight Level. The Commission issued the lease in advance of its expiration date for an additional 5-year term ending in 2014,⁷⁰ executed at the same time BEH was attempting to secure a leasehold large enough to establish a competing full-service FBO.⁷¹

BEH notes that on March 13, 2013, the Commission awarded Papa Whiskey the lease for the DC-3 Apron. The record reflects that Papa Whiskey accepted the lease with the stated restrictions. Papa Whiskey’s principal owner is also the principal owner of Flight Level. Shortly after the Commission awarded Papa Whiskey the five-year lease term for the DC-3 Apron lease, the Commission offered BEH an area of less than 7,000 square feet on the West Apron, fully aware that this space would be inadequate for BEH’s intended FBO operations.⁷²

⁶⁴ Exhibit 1, Item 1, Exhibit 38.

⁶⁵ Exhibit 1, Item 1, Exhibit 38.

⁶⁶ Exhibit 1, Item 1 page 2.

⁶⁷ Exhibit 1, Item 1, Exhibit 38.

⁶⁸ Exhibit 1, Item 1, page 18.

⁶⁹ Exhibit 1, Item 1, pages 2 and 8.

⁷⁰ *Boston Air Charter v. Norwood Airport Commission, Norwood, Massachusetts*, FAA Director’s Determination, Docket No, 16-07-03, (June 7, 2011).

⁷¹ Exhibit 1, Item 1, page 3.

⁷² Exhibit 1, Item 1 page 10.

BEH states that on January 27, 2014, it renewed its request for apron space on the West Ramp. The Commission offered BEH the lease for 6,889 square feet in the corner of the West Ramp, with the Commission acknowledging that space was inadequate to operate an FBO.⁷³

BEH alleges that the Commission deliberately created limited ramp space through the Commission's leases with Flight Level.⁷⁴ The West Ramp has an area of approximately 95,381 square feet, and the relatively small space of 6,889 square feet offered to BEH.⁷⁵

The record reflects that during the May 14, 2014, Commission meeting, the attorney for BEH informed the Commission that BEH would accept the offer, but BEH would continue to request additional ramp space. A Commissioner, then reading from the minutes of the April 9, 2014, meeting, stated that BEH had "refused" the offer of the 6,889 square feet of ramp space in April.⁷⁶ BEH disputes that it refused the offer.

BEH also requested a lease for the entire West Apron and offered to pay the 5-year lease payment in advance. The Commission declined the request with the claim that leasing the entire space would displace customers.⁷⁷

BEH stated that on February 12, 2015, the Commission made a conditional offer to lease BEH 11,786 square feet on the West Apron for 5 years to conduct FBO operations with the requirement that BEH provide the extensive financial information. BEH accepted the offer under protest regarding the request for extensive financial information, inadequate ramp space and the short-term lease. BEH contends that as of the date of the Complaint, the Commission had not advised BEH whether the information provided was acceptable or if the Commission was prepared to enter into the lease.⁷⁸

In summary, BEH asserts that its proposed FBO services require ramp space, and a lease for an adequate working ramp is critical for BEH to amortize its investment.⁷⁹

Commission's Position – Ramp Space

The Commission states that the information and business plan submitted to the Airport May 10, 2010, provided BEH's intent to form a private company offering executive helicopter services and that BEH would utilize Flight Level services for its fuel needs.⁸⁰

BEH constructed a hangar on its subleased Lot F, and the Commission was cooperative and supportive as evidenced by the December 12, 2012, Airport Commission meeting minutes. At the meeting, BEH presented a detailed plan drawing for a new building, fuel tank, and grounds construction. The Commission voted unanimously to send a letter to the Board of Selectmen to

⁷³ Exhibit 1, Item 1, page 8. In a public meeting on April 9, 2014, BEH stated that the offered West Ramp leasehold would be insufficient to operate a full service FBO. In comparison, BEH pointed to a letter from the NAC dated March 14, 2013, in which the NAC stated that at 15,295 square feet the DC-3 Apron had limited utility as a site for an FBO and would be subject to "Safety and efficiency concerns." The letter further stated that the "limited size of the DC-3 Apron restricts its utility as a site for a full-service FBO," The DC-3 Apron is more than two and half times the size of the West Ramp area offered to BEH whose stated purpose was to conduct FBO operations. Exhibit 1, Item 1, Exhibit 38.

⁷⁴ Exhibit 1, Item 1, Exhibit 76.

⁷⁵ Norwood Airport Lease Plan from the Part 16 BAC complaint in Docket 16-07-03.

⁷⁶ Exhibit 1, Item 1, Exhibits 28 and 21.

⁷⁷ Exhibit 1, Item 1, Exhibit 37.

⁷⁸ Exhibit 1, Item 1, page 9.

⁷⁹ Exhibit 1, Item 1, page 14.

⁸⁰ Exhibit 1, Item 4, page 5 and 6.

approve the design in its entirety. The approval was contingent upon a building permit, Fire Department approval, a Conservation Commission Order of Conditions, fuel permit approval from the Board of Selectmen, a review of the fuel cabinet, discussion of the gate valve on drainage, and incorporation of engineering.⁸¹

The Commission contends that the “support from the Airport Commission and Norwood airport management has not wavered, even as BEH’s business interests have broadened in the face of limitations imposed by federal standards, land area constraints on the sublease lot where BEH has property rights (*i.e.*, Norwood Airport Lot F), and the property rights of an abutting lot (*i.e.*, Norwood Airport Lot G) not under BEH’s control.”⁸²

The Commission states that four months after BEH’s first permit, “BEH began a pattern of communications with the Airport Manager and Airport Commission, which contradicted or obfuscated the commercial interests that BEH made clear in its initial business Plan...”⁸³ The Commission notes that after BEH executed the Assignment and Assumption Amendment of Lease for Lot F, BEH changed its position regarding financing, stating that it no longer needed financing for construction on Lot F. The Commission considered the subsequent reversal inconsistent with the necessary justification for the long-term, thirty-one (31) year sublease requested at the outset under the foregoing FAA guidance.⁸⁴

The Commission also notes that within months after BEH submitted its business plan, it began to request an expansion of its presence on the airport. The Commission contends that the result of this “mission creep” circumvents the formal solicitation process typically employed by the Airport for new Fixed Base Operators.⁸⁵

In 2014, the Commission executed a new five-year lease with Flight Level for Lots A, B, and C, following its request for a new lease. The Commission asserts that this was not a renewal as stated by the Complainant, and the lots are located on the south quadrant of the airport adjacent to Flight Level’s terminal. BEH is located on the north quadrant of the airport.⁸⁶ The Commission states that it justified issuing the new lease to Flight Level for Lots A, B, and C, based on its proximity to Flight Level’s existing leasehold, the specific projects identified, and its long-term investment.⁸⁷

The Commission states that it issued an RFP for the DC-3 Apron with restrictions on its use refuting the claim that the restriction was new, stating, “Yet, when BAC previously used the DC-3 Apron, consistent with the restrictions under the RFP when it issued in 2013, BAC similarly could only park its aircraft on the DC-3 Apron.”⁸⁸

According to the record, the Commission gave BEH several reasons for the restricted use of the DC-3 Apron including the “January 3, 2006, DC Apron as-built drawings submitted to the Airport Commission, the FAA, and MassDOT, expressly designated the DC-3 Apron as being used for an aircraft-parking apron only.”⁸⁹ The Commission also noted that the ramp was too small for commercial services at 15,295 square feet and there were other adequate facilities

⁸¹ Exhibit 4, Item 1, page 14.

⁸² Exhibit 4, Item 1, page 3.

⁸³ Exhibit 4, Item 1, page 14.

⁸⁴ Exhibit 4, Item 1, page 6.

⁸⁵ Exhibit 4, Item 1, page 43.

⁸⁶ Exhibit 4, Item 1, page 34.

⁸⁷ Exhibit 4, Item 1, page 34.

⁸⁸ Exhibit 4, Item 1, page 35.

⁸⁹ Exhibit 4, Item 1, page 34 and Exhibit 78.

available on the airport. The Commission states that it had worked to establish a larger presence for BEH on the airport, using the Lot F fuel farm as an example.⁹⁰

The Commission asserts that although BEH complains about the lease term for the West Apron, it did not submit a bid for the RFP for the DC-3 Apron. The Commission offered a 5-year lease term to Papa Whiskey for the DC-3 Apron and to Flight Level for Lots A, B, and C. Papa Whiskey accepted the lease with the stated restrictions.

On February 12, 2014, in an executive session, the Commission voted to offer BEH space on the West Apron for fueling, conditioned on BEH securing the proper permits and a successful final inspection of BEH's fuel farm by the fire department. The Commission claims that BEH had not yet delivered a business plan.⁹¹

On March 17, 2014, the Commission offered BEH approximately 6,889 square feet on the West Apron on the airport. It is disputed whether BEH refused the West Apron at the April 9, 2014, meeting and the Commission asserts that it did not withdraw the offer. The minutes for the April 9, 2014, regular business meeting, state that, "BEH and Mr. Foxx do not think the square footage offered by the Commission is adequate for fueling as an FBO. Presently, BEH would like to refuse the current offer of 83 x 83 square feet." The Commission asked BEH what would be adequate space.⁹²

The Commission further asserts that a member of the Commission advised BEH to accept the space offered and if BEH needed additional space, then the Commission would consider expanding the area.⁹³ The Commission noted it voted to offer BEH almost double the prior offer, 11,786 square feet, on the West Apron.⁹⁴

The Commission states that it was "reluctant to lease the entire West Apron for a number of reasons, which included:

1. BEH had not demonstrated to the Airport Commission enough business to warrant leasing out the entire West Apron to BEH;
2. BEH had yet to submit a business plan, and when that business plan was submitted, the Airport Commission informed BEH that it would explore the possibility of allocating more space on the Airport;
3. The Commission's March 2014, lease offer actually included more square footage than BEH had claimed it had fueling rights to on Lot G; and,
4. Notwithstanding viable BEH business growth projections and an identified need, leasing the entire West Apron to BEH would have required the Commission to terminate approximately seventeen (17) existing leases between the Airport Commission and individual aircraft owners.⁹⁵

At the May 14, 2014, Commission Regular Business Meeting, BEH attempted to accept the offer from March 17, 2014, for 6,889 square foot of space on the West Apron. The Commission read the minutes of the April 9, meeting wherein BEH refused the offered space on the West Apron.

⁹⁰ Exhibit 1, Item 1, page 17.

⁹¹ Exhibit 1, Item 1, Exhibit 14. Exhibit 4, Item 1, Exhibit 68.

⁹² Exhibit 4 Item 1, Exhibit 60.

⁹³ Exhibit 4, Item 1, page 25.

⁹⁴ Exhibit 1, Item 1, page 9.

⁹⁵ Exhibit 4, Item 1, page 25.

The Commission states that during an executive session on May 14, 2014, in consideration of a competing interest in the West Apron not from Flight Level, the prudent course required preparation of a feasibility study as well as a comprehensive master plan for the development of the West Apron and DC-3 Apron.⁹⁶

The Commission states that at its February 12, 2015, meeting, it voted to offer BEH a lease for a portion of the West Apron, 11,786 square feet, and contingent on BEH providing specific financial information consistent with its stated intent of operating a commercial FBO. The Commission stated that it felt that BEH had yet to provide the requested detailed financial information consistent with the Airport Minimum Standards.⁹⁷

C. Financial Information

Complainant's Position - Financial Information

BEH alleges once it requested additional lease space, the Commission demanded information that exceeded the information originally requested for BEH's initial acquisition and more information than was required in the published minimum standards. Within the business plan, BEH noted, "the company ... does not carry any institutional debt associated with the current and future operations..." The financial information was required as a condition of leasing a ramp area of 11,786 square feet, with a monthly rent of \$462.⁹⁸

According to the May 14, 2014, Commission meeting minutes, approved on July 30, 2014, a commissioner commented that he would like BEH to provide additional information. The Commissioner stated, "NAC is looking for every reassurance, they can get from an incoming vendor."⁹⁹ The Airport General Regulations or the Minimum Standards do not require some of the requested information, including:¹⁰⁰

- Financial information from the guarantor;
- 3-month business bank statements;
- Balance sheet;
- Income statement;
- Cash flow statement — Cash on hand — Financial reserves;
- Personal guaranty and Credit report — All individuals;
- Dunn and Bradstreet Corporation credit report;
- Certificate of good standing;
- Proof of insurance;
- Cash flow analysis;
- Market analysis;
- 12 months of Bank statements;
- Profit/Loss statement;
- Feasibility study;
- 36-month projection;
- Micro/Macro;
- Competitor's analysis;
- Personal financial statement from the Principals behind BEH; and

⁹⁶ Exhibit 4, Item 1, page 27.

⁹⁷ Exhibit 4, Item 1, page 29.

⁹⁸ Exhibit 1, Item 1, page 31.

⁹⁹ Exhibit 1, Item 1 page 12 exhibit 28.

¹⁰⁰ Exhibit 7, Item 1, Exhibit 174.

- Universal Commercial Certificate.

BEH asserts the Commission did not request this level of information when BEH acquired the Lot F leasehold, totaling 30,000 square feet, or when the Commission approved BEH's construction of a \$2 million hangar and \$500,000 fuel farm.¹⁰¹

By July 2014, BEH contends it had provided the Commission with an extensive amount of financial information, including a professionally prepared business plan. This information also included proof of insurance as well as copies of all required permits. BEH offered to pay the entire lease term in full.¹⁰²

BEH asserts the Commission is acting in a duplicitous manner in this instance. BEH alleges that the Commission never required this additional information from any other FBO applicant and the request is an attempt to delay or discourage BEH's lease of available ramp space.¹⁰³

BEH's evidence includes the RFP for the lease for an area of 13,617 square feet on the DC-3 Apron, wherein a solicitation not directed at any specific entity, the Commission did not demand the personal information it requested of BEH.¹⁰⁴ The DC-3 Apron concerns an area much larger than the 11,786 square foot area requested by BEH. Regarding the RFP for this area on the DC ramp, the record reflects the basic and nonspecific requirements below, from Section D (I)- Specifications in the RFP:¹⁰⁵

"Each bidder is required to submit the following:

- Type of business/aviation activity or activities proposed for this location
- Means and mode of conducting the operation
- Professional experience specific to the proposed business/aviation activity or activities
- Financial Plan
- Professional experience specific to the proposed business/aviation activity or activities
- Financial references"

Commission's Position - Financial Information

The Commission asserts that the Airport Minimum Standards require a business plan that includes detailed financial records including, current financial statement, proof of a minimum of three month's operating expenses, two-year business plan for the proposed operation, previous history of payment, and, three credit references.¹⁰⁶ The Commission states that the information sought is consistent with the prior information requested from prospective FBOs at the airport and consistent with the minimum standard established on or before 1988 by the Airport Commission.¹⁰⁷

¹⁰¹ Exhibit 1, Item 1 page 16.

¹⁰² Exhibit 1, Item 1, Exhibit 37.

¹⁰³ Exhibit 1, Item 1, page 9.

¹⁰⁴ Exhibit 1, Item 1, Exhibit 82.

¹⁰⁵ *Id.*

¹⁰⁶ Exhibit 4, Item 1, page 25 and Exhibit 36.

¹⁰⁷ Exhibit 4, Item 1, page 30 and 31.

The Commission further states that it continues to attempt to work with BEH, notwithstanding the expansion of the original application to include an FBO, an expansion which effectively denied the Town the opportunity to solicit for a second FBO through an RFP.¹⁰⁸

The Commission asserts that on April 30, 2014, the airport manager detailed the minimum information that BEH should provide including: “(1) a balance sheet from BEH's most recent quarter, to include BEH's detailed assets, liabilities, and net worth; (2) an income statement that includes all BEH income and expense accounts for the prior two (2) years; and (3) a cash flow analysis.”¹⁰⁹

By July 2014, BEH states that it had provided the requested information. The Commission responded BEH had provided insufficient financial data and it still required meaningful financial information, consistent with the Airport Minimum Standards, and a revised business plan.

The Commission asserts, “the information sought by the Airport Commission is consistent with prior information requests for prospective FBOs at Norwood Airport. To that end, in 1988, through the Town of Norwood's then-airport management company, BMA, the Airport Commission solicited for a second FBO through an RFP. At that time, the Airport Commission required all FBO applicants to submit financial information similar to what BEH is now being required to submit.”¹¹⁰

D. Lease Term

Complainant's Position - Lease Term

BEH alleges that the Commission offered an unrealistically short-term lease for a ramp, with no provisions for an extension, and the term violates FAA policy on reasonable lease terms. On July 9, 2014, BEH submitted its third business plan to the Commission with an updated commercial permit application showing FBO operations.¹¹¹ In this business plan, BEH requested a long-term lease and an area of 72,000 square feet on the West Apron to establish an FBO¹¹². In a correspondence, the Commission Vice Chairman noted that BEH was requesting a long-term lease stated that, “the longest term lease per the FAA is 5 years.”¹¹³

Commission's Position - Lease Term

The Commission states that it tabled the request to lease space on the West Apron pending the outcome of the Part 13 complaint filed by BEH, to avoid actions that would be contrary to any findings from the Part 13 complaint. BEH withdrew the complaint on November 4, 2014.¹¹⁴

On November 25, 2014, the Commission began discussions of a new lease offer with BEH. An individual in the meeting became disruptive causing the meeting to adjourn early. At its next meeting on January 14, 2015, the Commission approved a lease offer to BEH for part of the West Apron, Parcel A. The Commission notified BEH of the offer, stating Parcel A is 11,786

¹⁰⁸ Exhibit 4, Item 1, page 28

¹⁰⁹ Exhibit 4, Item 1, page 26.

¹¹⁰ Exhibit 4, Item 1, page 30 and Exhibit 69, 71, and 72.

¹¹¹ Exhibit 1, Item 1, Exhibit 11.

¹¹² Exhibit 1, Item 1, Exhibit 11.

¹¹³ Exhibit 1, Item 1, Exhibit 83.

¹¹⁴ Exhibit 4, page 28.

square feet and almost doubled the size of the previous offer.¹¹⁵ The offer was contingent on BEH providing the requested financial information within 30-days of accepting the offered lease.

The Commission states that as required in the Master Lease for the sublease of Lot F, it directed BEH to send the draft documents to the FAA and MassDOT for review, not approval, of the request for a long-term lease. It also directed Flight Level to pursue the same course of action for a sublease review.¹¹⁶

The FAA New England Region reviewed the proposed sublease, opining that it did not have concerns with most of the terms and conditions but the justification for the 39-year term was insufficient, stating that it would require an amortization schedule with reasonable rates and payments.¹¹⁷ The FAA also suggested that tenant ground leases of 30 to 35 years were sufficient to retire debt.

Based on the opinion from the FAA as well as the finding from a previous a Part 16 regarding a long-term lease, the Commission requested an amortization schedule to justify the long-term sublease. BEH responded that amortization is based on financing and BEH did not intend to finance the project.

The Commission continued to work with BEH to approve the Assignment and Assumption of the Sub Lot F lease, granting approval for the long-term lease by letter dated February 22, 2013.¹¹⁸

E. Director's Analysis

Preliminary Discussion

It is not productive to recount the back and forth discussions on various allegations not relevant to grant assurance violations, including but not limited to, whether BEH refused the West Apron offer at the April 9, 2014, meeting and BEH helicopter operational issues.¹¹⁹

In addressing allegations of noncompliance, the FAA makes a determination on whether an airport sponsor is *currently* in compliance with the applicable federal obligations. The FAA may consider the successful action by the Airport to cure any alleged or potential past violation of the applicable federal obligation to be grounds for dismissal of such allegations. *See Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order).

Several issues have been resolved and require minimal discussion:

- At the February 13, 2013, meeting (Exhibit 8), the Commission approved BEH's request to assume the Swift Aviation sublease of Lot F, under a long-term lease, with a lease extension at the end of the initial term totaling 30,000 square feet, from BMA, Inc.¹²⁰
- The Fire Department issued the necessary permit to operate the Fuel Farm on May 14, 2015.¹²¹

¹¹⁵ Exhibit 4, page 29.

¹¹⁶ Exhibit 4, page 12.

¹¹⁷ *Id.*

¹¹⁸ Exhibit 4, page 13.

¹¹⁹ Item 1, Exhibit 4 page 25.

¹²⁰ Exhibit 1, Item 1, page 6.

¹²¹ Item 1, Exhibit 1, Item 1 exhibit 159.

- The required Business Plan is also no longer an outstanding issue.
- The Commission states that it accepted the third party review of the financial evaluation Aviation Management Consulting Group (AMCG) completed on BEH's financial information. The financial information is no longer outstanding as evidenced by the fact that the Commission did not request any additional financial information in the November 1, 2016, letter approving the FBO operating permit.¹²²

Several issues remain unresolved requiring further analysis. The Commission initially approved, BEH's FBO commercial permit in its June 15, 2016, meeting with the condition "that there be a resolution of all legal matters between the NAC and BEH."¹²³ By letter dated November 1, 2016, the Commission informed BEH that it reiterated conditional approval of BEH's FBO commercial permit with four conditions. These conditions are:

1. BEH must provide the Commission with an irrevocable line of credit in an amount and under terms acceptable to the Commission;
2. BEH must provide evidence of insurance, to include spill coverage, commensurate with the insurance covered by Flight Level;
3. BEH must submit an updated fueling plan in the form of a scale drawing prepared by a professional engineer registered with the Commonwealth of Massachusetts, with fire protection setbacks acceptable to the Fire Chief and meeting FAA standards;
4. BEH's counsel, along with the NAC's counsel, must enter into negotiations for a lease of lots A and B on the airport's west apron.¹²⁴

FBO Access

The Director considers conditions 1 and 2 above to be unduly vague and ambiguous by failing to provide BEH specific information necessary to meet the conditions. While requiring a prospective FBO to obtain a line of credit or liability insurance is not problematic, it is unclear how BEH would ascertain what amount and terms for the line of credit, which would be acceptable to the Commission. The level of "approval" by the Commission into BEH's finances, such as an "irrevocable line of credit in an amount and under terms acceptable to the Commission," is intrusive, unusual, and unreasonable. Similarly, BEH would not necessarily have reasonable access to the level of insurance coverage carried by Flight Level (as a larger commercial operation) or whether that level of insurance is reasonable for BEH. This level of control as a condition for making the airport available to a commercial entity for aeronautical use is not common. Such vague language gives the Commission the ability to continue to delay issuing the permit citing BEH's failure to meet the requirements. These conditions and actions constitute a continued pattern of delay to prevent BEH from completing the FBO permitting process.¹²⁵

Meanwhile, the evidence clearly shows the Commission continued to bestow greater control of airport ramp space to Flight Level, as demonstrated by offering Flight Level a new lease for the

¹²² Item 11.

¹²³ FAA Item 1, page 33.

¹²⁴ FAA Item 11.

¹²⁵ Previously, the FAA has recognized that unreasonable delay amounts to denial of airport access. See, *Jim Martyn v. Port of Anacortes, Wash.*, FAA Docket No. 16-02-03, at 31 (2003) (Director's Determination), (delay of three years); *U.S. Constr. Corp. v. City of Pompano Beach, Florida*, FAA Docket No. 16-00-14 at 18-19 (2001) (Director's Determination) (delay of over a year); *Centennial Express Airlines v. Arapahoe County Pub. Airport Authority*; *Kehmeier v. Arapahoe County Pub. Airport Auth.*; *Centennial Express Airlines v. Arapahoe County Pub. Airport Authority*, FAA Docket No. 16-98-05, at. 27 (1998) (Director's Determination).

A, B, and C, ramp for a 5-year term (solely because of FAA's clear direction to adopt shorter lease terms). The Commission simply returned the lease to Flight Level for another term, notwithstanding a pending request by BEH for more area on the Airport for its FBO. Simply awarding the lease to the incumbent because it leases abutting property is not necessarily justified nor does it give a right of first refusal. In other words, it is camouflaging an exclusive right.

The Director is persuaded that the Commission could have properly exercised its rights and powers to facilitate reasonable access for BEH. Flight Level is an established FBO on the airport, with more than adequate leaseholds to continue its operations.¹²⁶ Returning the A, B, and C ramp to Flight Level, devoid of any clear evidence of earnest efforts to accommodate BEH, the Commission chose to ignore the letter, spirit, and tenets of the previously ordered FAA corrective action plan.¹²⁷

The Director acknowledges that not all responsibility for the delays to provide BEH an FBO permit resides with the Commission. However, the Commission imposed varying and unduly vague, unclear and ambiguous conditions upon BEH that are unreasonable.

The Town and the Commission are in violation of Title 49 USC §47107(a)(1), and related Federal Grant Assurance 22, *Economic Nondiscrimination*, as the Complainant has been denied reasonable access to the Airport on reasonable terms for the purpose of conducting a commercial aeronautical activity. The Town and the Commission's actions constitute an unreasonable denial of access and unjust economic discrimination. The combination of delaying tactics, restrictions, and excessive financial information requests is sufficient to establish a violation of Grant Assurance 22.

Director's Analysis - Ramp Space - DC-3

The Commission issued an RFP for the lease of the DC-3 Apron with a restriction limiting the use of the ramp to aircraft parking and ground handling only. BEH asserts the use restriction represented an intentional decision by the Commission to make the DC ramp attractive to all airport users except an FBO and is not consistent with reasonable access.¹²⁸ BEH argues that Flight Level was the only entity that stood to benefit from leasing the DC-3 Apron through its common ownership with Papa Whiskey.

The Commission countered and the record supports that the January 3, 2006, DC-3 Apron as-built drawings submitted to the Airport Commission, the FAA, and MassDOT expressly designated the DC-3 Apron as being used for an aircraft parking apron only.¹²⁹ Commission also specifies that Papa Whiskey accepted the lease with the restrictions listed in the RFP.

Grant Assurance 22, *Economic Nondiscrimination*, obligates the airport sponsor to provide airport access. It does not obligate the airport sponsor to provide specific hangars or hangar types. Nonetheless, the airport sponsor does have an obligation to make available suitable areas or space on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public or support services to aircraft operators. *See Thermco Aviation, Inc., and A-26 Company v. City of Los Angeles, Los Angeles Board of Airport Commissioners, and Los Angeles World Airports*, FAA Docket No. 16-06-07, (June 21, 2007) (Director's Determination).

¹²⁶ Exhibit 1, Item 1, Exhibit 5.

¹²⁷ *Boston Air Charter v. Norwood Airport Commission, Norwood Massachusetts*, FAA Director's Determination, Docket No. 16-17-03, (April 11, 2008) page 4 and FAA Final Agency Decision, Docket No. 16-17-03, (August 14, 2008), page 4.

¹²⁸ Item 1, Exhibit 7 page 13 and Exhibit 1, Item 1, page 2.

¹²⁹ Item 1, Exhibit, 4 page 34.

Grant Assurance 22, *Economic Nondiscrimination* states in part that owner of any airport developed with federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination.

The FAA takes the position that when more than one aeronautical service provider indicates a willingness to provide service, that willingness is sufficient evidence that such a need exists. An airport sponsor may not grant an exclusive right nor deny competition. The assertion that Flight Level has significantly more space is not a violation of Grant Assurance 22, *Economic Nondiscrimination*, and reasonable access under these facts does not mean equal space on the airport.

The Director notes that the record provides that the restricted use for the DC-3 has been in place since January 2006, prior to BEH's request to become an FBO and the RFP. Significantly, BEH did not submit a bid under the RFP for the DC-3 Apron. Papa Whiskey won and accepted the bid with the stated restrictions.¹³⁰

The Director finds that the Commission's enforcement of the restricted use of the DC-3 Apron as listed in the RFP and the awarding the lease to Papa Whiskey LLC is not a violation of *Grant Assurance 22*.

Director's Analysis - Financial Information

BEH alleges the Commission requested more financial information from BEH than required under the Airport's minimum standards in order to prohibit it from establishing an FBO. BEH alleges that the Commission sought to protect Flight Level, the sole established FBO.

The Commission admits the airport manager specifically requested, at a minimum, BEH provide: (1) a balance sheet from BEH's most recent quarter, to include BEH's detailed assets, liabilities, and net worth; (2) an income statement that includes all BEH income and expense accounts for the prior two (2) years; and (3) a cash flow analysis.¹³¹ The Airport's *General Regulations* list under "Additional Requirements – Initial Application": (a) three (3) months of business bank statements; (b) a balance sheet; (c) an income statement; (d) a cash flow statement/cash on hand/financial reserves; (e) a personal guaranty and financial information from the guarantor (including a credit report); (f) a Dunn and Bradstreet Corporation credit report; (g) a Certificate of Good Standing; and (h) a Proof of Insurance.¹³² The Commission cites *James Vernon Ricks, Jr. v. Millington Municipal Airport Authority*, FAA Docket No. 16-98-19, Director's Determination (July 1, 1999), to support that its request is consistent with FAA policy.¹³³

BEH alleges that the Commission did not request the extensive list of financial information when it acquired Lot F leasehold or when the Commission approved BEH's construction of a \$2-million-dollar hangar and \$500,000 fuel farm on Lot F totaling 30,000 square feet. The Commission only requested the additional financial information after BEH submitted its proposal to become an FBO.

¹³⁰ Exhibit 1, Item 1, Exhibit 12.

¹³¹ Exhibit 4, Item 1, page 26.

¹³² Exhibit 7, Item 1, Exhibit 174.

¹³³ Exhibit 4, Item 1, page 27.

In response, the Commission acknowledges BEH is a long-term tenant with a good payment history with substantial self-financed investments at the airport. Providing the requested financial information became an issue because BEH was unwilling to have all of its business and personal financial information available to the public as required by State law. Additionally, it appears that the specific information in the repeated request for financial information from the Commission was inconsistent, leading to delays.

On October 19, 2016, the Commission requested the same information from Flight Level as remunerated in the November 1, 2016, letter to BEH.¹³⁴

It is reasonable for an airport sponsor to require entities proposing to provide new aeronautical services on the airport to demonstrate substantial or realistic financial intent in support of their proposed endeavors. This demonstration must go beyond the Complainants' proffer to make the minimum investment or personal assurance that it will succeed. *See Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority*, FAA Docket No. 16-07-16, (February 27, 2009) (Director's Determination), page 38.

The Director notes that there appear to be inconsistencies between the information requested in writing and request made during the Commission meetings by an individual commissioner. The written requests appear to be consistent with the Airport's General Regulations and the information requested from Flight Level during the same time.

BEH objected to providing certain information because of concerns regarding the confidentiality of the financial information. State law requires that any individual, upon request, can obtain financial information in the Commission's possession and the Commission cannot provide confidentially for sensitive financial information. The Commission is subject to the Massachusetts Public Records Law, Massachusetts General Laws Chapter 66, Section 10, and its exemptions, which are contained in Massachusetts General Laws Chapter 4, Section 7(26). These exemptions are restrictive and stringently interpreted.¹³⁵ BEH offered to provide the financial information for review to an independent third party approved by the Commission, paid for by BEH. Initially, the Commission was not receptive.

Ultimately, BEH provided the requested financial information to the third-party vendor, AMCG under an agreement with the Commission. During the fall of 2015, AMCG provided the completed financial review to the Commission. The Commission states that it accepted the financial review completed by AMCG regarding BEH and the financials are no longer outstanding as evidenced by the fact that the Commission did not request any financial information in the November 1, 2016, letter.

The Director notes the Commission provided confusing guidance to BEH regarding the request for and the review of the financial information needed to operate an FBO. It also appears that initially the Commission did not request the same level of financial information from Flight Level.

The Director cautions the Town and the Commission to be clear, transparent, and consistent in its requests. The Commission eventually clearly stated what is required and requested the same financial information from Flight Level. The lack of clear and concise instructions that were in accordance with the Airport's General Regulations lead to a significant delay in completing the

¹³⁴ FAA Item 11.

¹³⁵ *Id.*

process for BEH to become an FBO. However, based on the Commission's acceptance of the financial information, the Commission is not currently in violation of Grant Assurance 22 related to the request for financial information.

Accordingly, the Director finds the issues related to the requested financial information are resolved. The Commission is not in violation of Grant Assurance 22 as it relates to its request for financial information from BEH. However, the Director cautions the Commission to adhere to a transparent and definable process in accordance with its Minimum Standards.

Director's Analysis - Lease Terms

In FAA Order 5190.6B, at 12.3(b) (3), the FAA provides guidance related to the consideration of reasonable lengths for leases to aviation service providers. The Order sets forth:

- Does the term exceed a period of years that is reasonably necessary to amortize a tenant's investment?
- Tenant ground leases of 30 to 35 years are sufficient to retire a tenant's initial financing and provide a reasonable return for the tenant's development of major facilities.
- Leases that exceed 50 years may be considered a disposal of the property in that the term of the lease will likely exceed the useful life of the structure erected on the property.

Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 USC § 47107(a) (1) through (6), and requires, in pertinent part:

- a) The airport owner or sponsor will make the airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.¹³⁶

At the February 13, 2013, meeting, the Commission approved BEH's request to assume the Swift Aviation sublease of Lot F, under a long-term lease, with a lease extension at the end of the initial term totaling 30,000 square feet, from BMA, Inc.¹³⁷ The issue of the lease term for the sublease of Swift Aviation sublease of Lot F is resolved and a decision by the Director on this issue is not required. There is no violation of Grant Assurance 22 as it relates to the lease term.

Director's Conclusion on Issue 1

The Director finds the Town is not in violation of Title 49 USC §47107(a) (1), and related Grant Assurance 22, *Economic Nondiscrimination* with respect to the Ramp Space (DC-3), requested Financial Information, and Lease Term. However, the Director finds the Town is in violation of Title 49 USC §47107(a)(1), and related Grant Assurance 22, *Economic Nondiscrimination* based upon the combined effect of its delaying tactics, unreasonable and unclear restrictions and requirements, along with the varied and intrusive excessive financial information requests. This pattern of conduct has had the effect of denying reasonable access to the Airport on reasonable terms for the purpose of conducting a commercial aeronautical activity (FBO Access). The Town and the Commission's actions in this regard constitute an unreasonable denial of access and unjust economic discrimination.

¹³⁶ Assurance 22(a).

¹³⁷ Exhibit 1, Item 1, Exhibit 8.

Issue 2 - Whether the Town and the Commission are in violation of Grant Assurance 22, Economic Nondiscrimination, by imposing taxi lane and pedestrian access restrictions on BEH.

Complainant's Position - Taxi Lane

BEH alleges the Commission intentionally placed an "unnecessary and inappropriate" "taxi-lane to nowhere" just to deprive BEH of the use of the ramp in front of its hangar. According to BEH, the taxiway object free area (TOFA), which extends 57.5 feet on either side of this taxi-lane's centerline, renders approximately 5,000 to 6,000 square feet of ramp in front of the hangar practically unusable for aircraft operations (aircraft parking, fueling and other aircraft handling) serving no aviation purpose and is not required by FAA standards.¹³⁸

BEH also contends the previous tenant, Swift Aviation, was not subject to the same restrictions. According to BEH, the Commission's enforcement of TOFA requirements did not occur until BEH assumed the Lot F lease. This enforcement of the TOFA effectively denies BEH full practical use of its leasehold. BEH contends no similar requirement is imposed on Flight Level, or was imposed on any other gate lanes prior to BEH submitting its fueling plan.¹³⁹ BEH further points to what they consider a similarly situated condition on the airport, in which a taxi-lane, in contrast to the situation to which BEH is subjected, ends before reaching the last hangar on that row.

BEH's further contends other tenants appear to have full use of the ramp area in front of their hangars and have no taxi-lane TOFA restrictions.¹⁴⁰ BEH adds it appears there are no significant differences between the Gate 2 ramp area not near BEH and Gate 3 ramp area near BEH, and the Commission does not seem inclined to adjustment the taxi-lane designation in order to accommodate BEH's requests for change.¹⁴¹ BEH asserts the taxi-lane restrictions now in place did not exist at any time in the 30-year period preceding BEH's occupation of this property.¹⁴²

Commission's Position - Taxi-lane

The Commission states that months prior to BEH beginning construction adjacent to Security Gate 3, the Commission memorialized the requirement for the taxi-lane object free area (TOFA) and that it had concerns about the proposed location of the fuel farm, relative to Security Gate 3 taxi-lane object free area. By letter dated December 14, 2012, the Commission specifically stated BEH must, "Comply with all taxi-lane object free area restrictions that apply to the siting of BEH's fueling equipment; per the airport's design standards, and clarifying guidance from the Federal Aviation Administration." The Commission states it expressly identified and communicated to BEH the Security Gate 3 TOFA considerations.¹⁴³

The Commission states it consulted with an airport engineering firm that consulted with the FAA and the engineering firm detailed its concerns and those expressed by the FAA. The

¹³⁸ AC 150/5300-13 A.

¹³⁹ Exhibit 1, Item 1, Exhibit 102.

¹⁴⁰ Exhibit 1, Item 1, Exhibit 89.

¹⁴¹ Exhibit 1, Item 1, Exhibit 91.

¹⁴² Exhibit 1, Item 1, page 20.

¹⁴³ Exhibit 4 Item 1, page 14 and 15.

FAA opined that the TOFA standard applies to all new construction, notwithstanding nonstandard, existing construction. The Commission notified BEH of this finding.¹⁴⁴

The Commission states BEH is correct in stating Swift was not subject to the TOFA, but the Assignment, Assumption and Amendment of Lease for Lot F included the language related to FAA requirements for future leases, as contained in the Corrective Action Plan *Boston Air Charter v. Norwood Airport Commission*, FAA Docket Number 16-07-03.¹⁴⁵ The Commission notes that during much of the development of Lot F, BEH stated its plan was to build a facility to service its own aircraft only, which would not be impacted by the restrictions.¹⁴⁶

Complainant's Position - Pedestrian Access

BEH alleges the Commission wrongfully denied BEH's request for reasonable pedestrian access to the BEH Leasehold. BEH claims a pedestrian gate in this area is consistent with the Airport's operational plans; however, despite the option in the Airport's Master Plan to install the gate. BEH points to the Airport Master Plan indicating the intent of the Airport to install a pedestrian gate adjacent to the BEH hangar facility.¹⁴⁷ BEH also states the only pedestrian access point to the airport enters at Gate 1 vehicle entrance where Flight Level's primary hangar and office facilities are located.¹⁴⁸ BEH contends that the Commission supports Flight Level in a superior manner to accommodate their pedestrian traffic. However, pedestrian customers for BEH must walk approximately a quarter of a mile along and through the flight line, through areas not designed or lighted for pedestrian use, to enter or exit the airport. BEH reiterates they have repeatedly asked the Commission for this "critical" gate, to include any necessary security features to allow customers to access the BEH property, and offered to pay for the gate installation.¹⁴⁹

BEH adds that in an August 23, 2013, letter the Airport manager informed BEH the Commission had discussed BEH's request for a pedestrian gate adjacent to Gate 3, but the board "voted unanimously not to install the gate", with no reason for the decision.¹⁵⁰ Finally, on October 1, 2013, BEH again wrote to the Commission offering a plan to remedy the Gate 3 access problem, offering a methodology to advance this effort.¹⁵¹ On April 16, 2013, BEH met with members of the Commission who stated, "BEH customers could walk the approximately one-fourth mile from the Gate 1 pedestrian gate attached to the Flight Level terminal building, through the active Airport ramp, to the BEH property."¹⁵²

Commission's Position - Pedestrian Access

On the issue of the pedestrian gate, the Commission agrees BEH raised the issue of the pedestrian gate on several occasions; however, it explained it saw no reason to install a pedestrian gate at that location.¹⁵³ According to the Commission, the Airport installed Security Gate 1, a pedestrian gate, on the south quadrant many years ago because it is

¹⁴⁴ Exhibit 4 page 17.

¹⁴⁵ Exhibit 4 page 14 and Exhibit 31.

¹⁴⁶ Exhibit 4, page 16.

¹⁴⁷ Exhibit 1, Item 1, Exhibits 105.

¹⁴⁸ Exhibit 1, Item 1, page 17.

¹⁴⁹ *Id.*

¹⁵⁰ Exhibit 1, Item 1, Exhibit 106.

¹⁵¹ Exhibit 1, Item 1, Exhibit 106.

¹⁵² Exhibit 1, item 1, page 18.

¹⁵³ Exhibit 4, page 36.

adjacent to the municipal parking lot. Security Gate 3, where BEH requested a pedestrian gate, is on the north quadrant and opens only to an access road where there are no sidewalks or municipal parking lot within an easy safe walking distance. The Commission also notes the Airport's Security Gate 3 also has no pedestrian gate for the very same reason.¹⁵⁴

The Commission also notes the Airport previously had two FBO's and one was located on the north quadrant, close the where BEH is located and the other on the south quadrant. During the time, the Airport had one pedestrian gate on the south quadrant adjacent to the municipal lot.¹⁵⁵

Director's Analysis

Taxi-lane

It is undisputed that in 2007, with FAA and MassDOT Airport Improvement Program funds, the area in question was approved for reconstruction and improvement with the taxi-lane designation and relevant markings. Thus, Gate 3 taxi-lane TOFA was established approximately three (3) years prior to BEH obtaining its first commercial permit from the Airport Commission and BEH knew about the TOFA restriction.¹⁵⁶ It is reasonable for an airport sponsor to take action to address a TOFA standard. The record supports that the Airport complied with FAA guidance on this matter.

Pedestrian Access at Gate 3

The Director notes the Airport Master Plan identifies a future need for improvement to the Gate 3 area, to include possibly adding "a tenant and customer access gates, to provide a more secure solution." However, the Master Plan is a planning document. A sponsor is not obligated to complete every aspect of its Master Plan. Not adhering to a specific item on a Master Plan or making changes outside the Master Plan are not a violation of the federal obligations.

Although the Director notes BEH offered to pay for the improvements for the pedestrian gate, an airport sponsor is not required to develop any parcels of land in a manner consistent with the wishes of any one party. The sponsor may exercise its proprietary rights and powers to develop and administer the Airport's land in a manner consistent with the public's interest. See *Jim DeVries, et al., v. City of St. Clair, Missouri*, Docket No. 16-12-07 (May 20, 2014), *ALCA, The Cylinder Shop, et al., v. Miami-Dade County, Florida*, Docket No. 16-08-05 (August 31, 2010), and *Santa Monica Airport Association, Krueger Aviation, Inc., et al. v. City of Santa Monica*, FAA Docket No. 16-99-21 (February 4, 2003). The airport would only need to have a reasonable explanation not to develop a particular airport parcel or install a particular airport improvement to deny a tenant's request. The decision not to add a pedestrian gate is based on a lack of related parking, which is reasonable.

Walking one-fourth mile from the Gate 1 pedestrian gate through a flight line may not an adequate logistical arrangement, but this limitation existed at the time BEH executed its lease. Although the Director has some reservations regarding the decision not to install an additional pedestrian access to the Airport, which may add value to the airport and its tenants, the Director will not substitute its airport planning or management decisions for that of the sponsors.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Exhibit 4, page 36.

Accordingly, the Director finds the Commission is not in violation of Grant Assurance 22, *Economic Non-Discrimination*, by imposing taxi-lane restrictions and deciding not to install the pedestrian access gate. There is sufficient information in the records to show that the Town's actions were not unreasonable.

Issue 3

Whether the Town and the Commission are in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to Flight Level to provide FBO services at the airport and use of a federally funded ramp.

Complainant's Position

BEH argues that while the Flight Level lease, with the subordination to the FAA clauses, allows the Commission to remedy any grant assurance violations, it has failed to do so. BEH also alleges that the Commission failed to act to prevent an exclusive right in favor of Flight Level by leasing the A, B, C, ramp to Flight Level.¹⁵⁷

BEH argues that the Commission "has violated grant assurance 23 by creating an effective exclusive right in one company, Flight Level, to provide FBO services at the airport." BEH cites the arguments presented and discussed in Issue 1 (Grant Assurance 22) as supporting its allegations under Grant Assurance 23. BEH concludes that the Commission "has effectively granted Flight Level an exclusive right to conduct FBO services at the Airport," and that "through unreasonable delays in approving requests, imposition of unreasonable terms on contract approval, and outright favoritism, NAC has continuously taken steps to assure that Flight Level will have no meaningful competition for its FBO business."¹⁵⁸

BEH argues that "NAC's actions and inaction have effectively granted an exclusive right to the single incumbent FBO at the Airport, Flight Level," and "while NAC's leases with Flight Level contain disclaimers of the intent to create an exclusive right, and reserve certain rights to NAC to prevent or remedy an exclusive right, NAC has not once used any of its authority in those leases to actually allow competition to Flight Level. In contrast, even where the NAC could act without amending Flight Level's leases, it has not done so." BEH cites the example that "when the A, B, and C ramp lease expired, the NAC was free to allocate it to a new entrant or issue an RFP, but chose to immediately again lease it to Flight Level."¹⁵⁹

BEH cites the lease to Flight Level for Lots A, B, and C, as an illustration of the Commission's willingness to work with Flight Level to support its FBO operations while placing obstacles to prevent BEH from establishing its FBO. The record provides that Lots A, B, and C, are adjacent to and previously under lease to Flight Level. The Director acknowledges these facts are presented to represent a pattern of support for Flight Level while denying that same support for BEH, as discussed above under Issue 1.

Commission's Position

The Commission states that it has not granted an exclusive right to Flight Level and it encourages competition, supporting BEH's efforts at the Airport, "which includes, but not

¹⁵⁷ Exhibit 1, Item 1 page 26.

¹⁵⁸ Exhibit 1, Item 1 page 22.

¹⁵⁹ Exhibit 1, Item 1 page 26.

limited to: (a) allowing BEH to communicate and/or coordinate its sublease interests on a Lot F; (b) accommodating updates about BEH's construction involving a hangar and fuel storage and dispensing facility; (c) working with BEH toward its interest in a full-service FBO commercial permit; and (d) discussing and providing leasehold opportunities on the West Apron. Additionally, Airport management has held meetings with BEH and met with the FAA on BEH's behalf."¹⁶⁰

Director's Analysis

The FAA generally does not evaluate an airport sponsor only by the plain language of agreements, airport rules, or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances, and interpretations. Rather, the FAA determines compliance by an airport sponsor's actions or inactions with respect to those agreements, airport rules, or minimum standards. *See Self-Serve Pumps v Chicago Executive Airport*, FAA Docket No. 16-07-02 (Director's Determination) (March 17, 2008) pp. 31-32, (Self-Serve Pumps).

In the prior Director's Determination, the FAA found that leases to the Airport's single FBO resulted in a monopolistic situation. That FBO already held leases for large parts of the airport until 2028 and some extending to the year 2047. The intent of the FAA's corrective action was to prevent expansion of the exclusive right by the incumbent FBO, not to prevent access to new entrants into the airport.

The exclusive rights arguments advanced by BEH are the same as those concerning Grant Assurance 22. Granting an exclusive right is not limited to situations resulting from an express agreement, and in this case, there is no "express" agreement between the Airport and Flight Level to provide the services in question – FBO services. However, an exclusive right may exist when one or many actions, spread over time would appear excusable if viewed alone, but provide a different picture if looked at in unison or in sequence. Also relevant is a review of the Airports' action within the context of the allegations and over the timeframe of the complaint process, both formal and informal.

The Director finds that the Commission considered BEH's requests, and allowed BEH to sublet the Swift leasehold to accommodate BEH's construction involving a hangar and fuel storage and dispensing facility. While it appears that the Commission worked with BEH toward its interest in a full-service FBO commercial permit, the vague, unclear, and inconsistent request for information to approve the permit served to delay unreasonably issuing an FBO permit to BEH.

The Airport subtly imposed unreasonable restrictions on BEH, as discussed above in Issue 1, which, when combined with the leasing practice with Flight Level, have the overall effect of solidifying Flight Level's position at the Airport to the detriment not just for BEH, but any other entity which would be seeking an opportunity to provide FBO services. The facts show that Flight Level has a significant portion of the available property useful for FBO services, approximately 80%, and rather than curtailing Flight Levels' leasehold, the Airport expanded it.¹⁶¹

The Commission's denial of any exclusive rights violation and the justifications it provided, such as BEH's "uncertain" business plan, questionable financials, or the "proximity of Flight Levels'

¹⁶⁰ Exhibit 4, page 26.

¹⁶¹ Exhibit 1, Item 1, Exhibit 7.

existing parcels being adjacent to the new parcel in question (Lots A, B, and C), are not defensible. The Commission's responses concerning Lots A, B, and C highlights its determination to award the Lots to Flight Level.¹⁶²

Against this background, the Director concludes that the Commission's action and inaction unreasonably restricted BEH efforts to expand while aiding in the expansion of Flight Levels' already significant footprint at the Airport. The Town and Commission are in violation of Grant Assurance 23. In this respect, this is similar to the FAA finding in FAA Docket 16-07-03.

Accordingly, the Director concludes that the Town and the Commission are in violation of Title 49 USC §47107(a) (1), and related Federal Grant Assurance 23, *Exclusive Rights*. The combination of the above factors as presented acted as a barrier to access to the Airport for the purpose of conducting a commercial aeronautical activity and a violation of the Grant Assurances.

Issue 4

Whether the Town and Commission are in violation of Grant Assurance 29, *Airport Layout Plan*, by leasing airport land to a nonaeronautical tenant without FAA concurrence.

As part of its Complaint, BEH claims the Commission is in violation of Grant Assurance 5, *Rights and Powers* because without contacting the FAA or obtaining a subsequent release, the Commission leased airport land to a non-aeronautical tenant to park commercial vehicles unrelated to any airport or aviation use.

BEH alleges that the Commission disposed of airport property for non-airport use without an FAA release, and has entered into lease agreements that seriously impair the Commission's ability to meet its obligations to provide reasonable access to the Airport, in violation of Grant Assurance 5. BEH points out that all of the above is in violation of the direction in FAA's corrective action in Docket 16-07-03.¹⁶³

However, upon review of the arguments presented by the Complainant, the Director has determined that the issues are not Grant Assurance 5 issues. Rather, on the issue of leasing airport property to a non-aviation tenant, the core issue is whether the Town and the Commission violated Grant Assurance 29, *Airport Layout Plan*. Thus, the analysis concerns only the allegations of leasing airport property to a non-aviation entity without FAA concurrence within the scope of Grant Assurance 29.

Complainant's Position

In 2007, the Commission leased an area of land at the north end of the flight line apron to a developer. The leased property sits partially within the Runway 10/28 Runway Protection Zone (RPZ). The lease included restrictions on permanent structures but did not include a requirement to retain the land, aeronautical property, for aviation use. The Commission later amended the lease to permit pavement and structures, and Verizon leased the land for non-aviation use. The Verizon lease is for 10 years with two 5-year extensions, totaling 20 years.

¹⁶² Exhibit 1, Item 1, Exhibit 13.

¹⁶³ BEH alleges that in "Recent applications by the Town for AIP grants do not mention that large areas of the Airport ramp, including the areas that were the subject of each grant, are leased to a private company..." [FAA Exhibit 1, Item 1, Page 24].

Commission's Position

The Commission asserts that it sought permission from the FAA to change the designated use for this property. The Commission further asserts that the property occupied by Verizon is not suitable for aeronautical purposes.

Director's Analysis

The allegations regarding the non-aviation use of airport property for Verizon vehicle parking has been under review by the FAA New England Regional office. The Commission requested a release of this property from FAA in 2010 and 2012, three years after the property was leased under a non-aviation use agreement.¹⁶⁴

On September 8, 2010, the Commission acknowledged that the tenant, Verizon, erected structures in the form of telephone poles on Airport property without having received prior permission from the FAA.¹⁶⁵ Further, the Commission discusses the possibility of using FAA AIP funding to prepare the land for non-aviation use.¹⁶⁶ Such an act would constitute revenue diversion and be a violation of federal grant assurance obligations. The sponsor is advised to be more proactive and consistent in enforcing its rights and powers to honor its federal obligations.

In an email to the president of BEH on April 18, 2013, the Airport's manager asserted that it was his understanding that the FAA had previously approved the release and designation of this Airport land for non-aeronautical use. The Airport manager further explained that after the Airport had formally applied to FAA for the release, it appeared that the Commission "was never required to apply for, or receive a formal release of the property from the FAA."¹⁶⁷

The FAA is responsible for enforcing the grant assurances and any action that is contrary to the sponsor's grant assurances is within the scope of the FAA to review and address. When information contained in the administrative record to a Part 16 complaint leads the agency to review areas of noncompliance — whether or not the complainant alleges them — the agency will nonetheless make a finding on those areas.¹⁶⁸ All potential grant assurance violations are within the scope of the FAA to review and address, whether alleged in a Part 16 complaint or identified through any other means.¹⁶⁹

On January 9, 2015, FAA informed the Airport that the FAA denied all requests to change the designation of this land from aeronautical to non-aeronautical land use. In denying this request, the FAA stated that it found that "civil aviation will receive no benefit from changing this parcel's designation from aeronautical to non-aeronautical land use." FAA further advised that it expected the Airport to "make every effort to develop this parcel of aeronautical property for the benefit of civil aviation, to address the lack of available ramp

¹⁶⁴ Exhibit 1, Item 1, Exhibits 53 and 54.

¹⁶⁵ Exhibit 1, Item 1, Exhibit 60.

¹⁶⁶ *Id.*

¹⁶⁷ Exhibit 1, Item 1, Exhibit 70.

¹⁶⁸ *M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board*, FAA Director's Determination, Docket No. 16-06-06, (January 19, 2007) Issue 7.

¹⁶⁹ *Boston Air Charter v. Norwood Airport Commission*, Norwood Massachusetts FAA Final Agency Decision, Docket No. 16-17-03, August 14, 2008), page 27.

space [at the Airport]”.¹⁷⁰ However, the record reflects that the Airport had already placed the land into a non-aeronautical use.

FAA compliance policy would have properly permitted only a temporary lease of this land, without permanent construction, however, and with a clause allowing this non-aeronautical use only to the point that an aviation need for the property became necessary.¹⁷¹ Given the airport’s current predicament in claiming inadequate space to accommodate aeronautical demands, it is unlikely that FAA would have approved a request by the Commission for any non-aeronautical disposal of this land even if the Airport had done so properly. This is evidenced by the FAA’s January 9, 2015, decision in not releasing this land to non-aeronautical use.¹⁷²

The Director notes that on March 15, 2010, the Airport manager disclosed to the Manager of the FAA’s New England Airports Division that this Airport property, “included in the Norwood Airport Exhibit A,” had been previously put into a non-aeronautical use status by the Airport. The Airport manager further disclosed that the property had been developed into a vehicle parking lot using municipal funds only. The Airport manager stated in the letter that the FAA requested that the Airport formally request a release of the land for non-aviation purposes. He continued his letter to the FAA saying, “We are moving forward on this now and expect to have the formal request for your review as soon as possible.” The Director also notes that the next letter to the FAA from the Airport manager was not until March 8, 2012, almost 2 years later.¹⁷³

The FAA acknowledges that the Airport had previously self-disclosed putting this land into non-aeronautical use. However, the fact remains that having done so without the approval of the FAA amounts to a violation of the grant assurance. Thus, the Director finds the Town and Commission in violation of Grant Assurance 29.

VI. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions, responses by the parties, the record herein, applicable law and policy, and for the reasons stated above, the Director of the FAA Office of Airport Compliance and Management Analysis finds that The Town of Norwood is currently in violation of Grant Assurance 22, Grant Assurance 23 and Grant Assurance 29.

VII. ORDER

ACCORDINGLY, the Director finds that the Town and Commission in violation of Federal law and its Federal grant obligations. The FAA directs the Town and Commission to take immediate steps to, 1) provide BEH any remaining requirements for the FBO permit and promptly complete the permitting process; 2) discontinue leasing practice that provides exclusive rights to a single FBO; and 3) to contact the appropriate FAA Regional office and comply with their direction regarding the Verizon property.

The Authority is hereby directed to submit a Corrective Action Plan to the Director within 30 days of the date of this Determination demonstrating how the Town and Commission will comply with the corrective actions prescribed above.

¹⁷⁰ Exhibit 1, Item 1, Exhibit 4, Item 93.

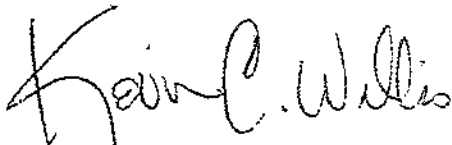
¹⁷¹ See FAA Order 5190.6B, paragraph 22.6.

¹⁷² Exhibit 1, Item 1, Exhibits 55 and 56.

¹⁷³ Exhibit 1, Item 1, Exhibit 55

VIII. RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review (14 CFR §16.247(b) (2)). A party to this Complaint adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR §16.33(c) within thirty (30) days after service of the Director's Determination.



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

Nov. 2, 2018

Date