

UNITED STATES DEPARTMENT OF TRANSPORTATION
AVIATION ADMINISTRATION
WASHINGTON, DC

Friends of East Hampton Airport, Inc. *et al.*,

Complainant,

v.

Town of East Hampton, NY

Respondent.

FAA Docket No. 16-15-02

DIRECTOR'S DETERMINATION WITH REGARD TO UNCONTESTED CLAIMS

In response to the Complaint filed by the Friends of the East Hampton Airport, Inc. *et al.* (Complainants), on January 29, 2015, Respondent Town of East Hampton ("Town") filed a Motion to Dismiss Parts of the Complaint. That motion is herein denied. However, as part of its motion, the Town states that it "does not contest compliance" with regard to certain issues. The Town's motion also states that the Town agrees to enter into a Corrective Action Plan with FAA regarding:

- *Non-aeronautical revenues, including leases with the Maidstone Gun Club, The Hertz Corporation, the Town Police Department and the East Hampton Fire Districts Training Facility, Inc.; and the adequacy of reimbursements from the Town to the Airport Fund.*
- *The preparation and implementation of a formal Pavement Maintenance Management Program.*

The Town's Motion to Dismiss indicates that it "does not dispute that there are legitimate questions of compliance with its Sponsor Assurances," and that it "does not contest compliance" with regard to the issues listed above (collectively the "Uncontested Claims"). The other claims raised in the Complaint remain disputed ("Contested Claims").

Based on the above, the Director has issued an order bifurcating this case into two parts. In that order the Director indicated that he would issue two determinations in this matter, one covering the Uncontested Claims and the other covering the remaining claims, i.e., the Contested Claims. This is the Director's Determination that covers the Uncontested Claims. The Contested Claims will be addressed at a later time and remain subject to investigation pursuant to 14 CFR § 16.29.

Applicable Law, Policy and Limitations

The East Hampton Airport's last Airport Improvement Program grant was in 2001, and thus it is an obligated airport. As a condition precedent to providing airport development assistance under the Airport Improvement Program, title 49 U.S.C., § 47101, et seq., the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C., § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6B, Airport Compliance Requirements, September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Federal Grant Assurances that apply directly to the circumstances of this Partial Director's Determination are (1) Grant Assurance 11, Pavement Preventive Maintenance, (2) Grant Assurance 24, Fee and Rental structure, and Grant Assurance 25, *Airport Revenues*.

1. Grant Assurance 11, Pavement Preventive Maintenance.

Title 49 U.S.C., § 47105(e) requires a sponsor assurance on preventative maintenance for project applications involving airfield pavements. For any project to replace or reconstruct pavement, the sponsor must assure the FAA that they have implemented an effective pavement maintenance management program. The amendment also provides for the submittal of reports addressing the pavement condition and the management program.

The requirement to establish a pavement maintenance management program applies to any pavement at the airport, which has been constructed, reconstructed, or repaired, with Federal assistance after January 1, 1995. All grants involving pavement rehabilitation or reconstruction contain a Grant Assurance that addresses the pavement maintenance obligation.

Airfield pavement needs regular maintenance to seal cracks and repair damage, and major rehabilitation is usually needed on a 15 to 20 year cycle to remedy the effects of age and exposure. If the pavement is neglected, severe pavement deterioration may exponentially increase the pavement repair costs and cause damage to people and property.

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

Grant Assurance 24, *Fee and Rental Structure*, states in pertinent part:

[The airport] will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

3. Grant Assurance 25, Airport Revenues

Grant Assurance 25, *Airport Revenues*, states:

- a. All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport. Provided, however, that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.
- b. As part of the annual audit required under the Single Audit Act of 1984, the sponsor will direct that the audit will review, and the resulting audit report will provide an opinion concerning, the use of airport revenue and taxes in paragraph (a), and indicating whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, United States Code and any other applicable provision of law, including any regulation promulgated by the Secretary or Administrator.
- c. Any civil penalties or other sanctions will be imposed for violation of this assurance in accordance with the provisions of Section 47107 of Title 49, United States Code.

4. 2005 Settlement Agreement

In this agreement with the Committee To Stop Airport Expansion, et al., The FAA agreed that after December 31, 2014, Grant Assurances 22a, 22h, and 29 will not be enforced. An exemption was provided for Grant Assurance 29 in the event that the Town of East Hampton took an action that adversely affected the safety of the airport.

Other Information - 2016 Regional Inspection

From the regional inspection dated July 6, 2016 (Attachment 1), the Town's response to the region, October 26, 2016 (Attachment 2) and the FAA regional letter, Site Inspection Follow-up November 18, 2016 (Attachment 3), the Director has made the following additional conclusions:

1. Maidstone Gun Club (Club).

The current lease for Parcel 30 was executed in May 1983 and amended and extended in January 1993. It is set to expire on October 31, 2023. This lease agreement states that property will be used for "a shooting range for the club's members; local law enforcement

without charge to them; and for Town of East Hampton employees for Town sanctioned events.” (Attachment 2, Exhibit 9, Building 30). The FAA regional letter dated June 19, 2007 (Attachment 2, Exhibit 7) incorrectly stated that the Club can be considered as a community use. The uses described in the lease do not fall within the community purposes provision of the FAA *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, February 16, 1999 (*Revenue Use Policy*). The community purpose provisions in VII.D of the Revenue Use Policy, requires in part the following:

- (1) Public Acceptance. The contribution of the airport enhances public acceptance of the airport; property is put to general public use; the use does not adversely affect the capacity, security, safety or operations of the airport. Examples of acceptable uses include public parks, recreation facilities, and bike or jogging paths. Examples of uses that would not be eligible are road maintenance equipment storage; and police, fire department, and other government facilities if they do not directly support the operation of the airport.
- (2) Property Value. The property involved would not reasonably be expected to produce more than *de minimis* revenue at the time the community use is contemplated.
- (3) Reuse of Property. The community use does not preclude reuse of the property for airport purposes.
- (4) Airport Revenue. Airport revenue is not to be used to support the capital or operating costs associated with the community use.

The lease appears to limit the use of the facilities to club members, local law enforcement, and Town employees, which is contrary to provision number one above. The property values around the airport indicate that the property involved has the potential to generate more than \$100.00 per year; this is contrary to provision number two.

In addition, FAA Order 5090.6B par 21.6.f.(9) strongly discourages and considers shooting ranges as an incompatible land use, which clearly falls under the nonaeronautical land use category.

In support of the community use argument, the Town stated in response to the region that members of the Town police use this facility. However, the *Revenue Use Policy* in VII.D.1 states that government facilities that do not directly support the operation of the airport such as police, fire, and other departments are not considered community use. The proficiency and currency requirements of the city police officers and other law enforcement agencies personnel are not the responsibility of the airport or aeronautical users.

2. Town Police Department (EHPD) and the East Hampton Fire Districts Training Facility, Inc. (EHFD).

As indicated in the FAA Regional letter dated September 28, 2006, (Attachment 2, Exhibit 7) FAA had agreed to a 25% rent discount of the fair market value (FMV) in the form of “Payments to Other Government Units” to compensate for the police presence that directly benefits the airport. The approval was contingent on verification of the supporting records showing that the EHPD and EHFD provide the airport with in-kind services

equivalent to 25% of the FMV for this lease. We have not been able to locate records showing in-kind services equivalent to the proposed discount.

Conclusions

After considering the evidence and pleadings in this matter, the FAA issues this *Director's Determination With Regard to Uncontested Claims* and finds as follows:

1. Based on the Town's position of no-contest, the FAA finds violations of Grant Assurances 24 and 25 with regard to the failure to charge fair market rent for non-aeronautical leases as generally alleged in paragraphs 83 through 84 of the Complaint.
2. Based on the Town's position of no-contest, the FAA finds violations of Grant Assurances 24 and 25 with regard to the failure of the Town to adequately reimburse the Airport Fund as generally alleged in paragraph 85 of the Complaint.
3. Based on the Town's position of no-contest, the FAA finds a violation of Grant Assurance 11 for failure to prepare and implement a pavement maintenance plan as generally alleged in paragraph 41 of the Complaint.
4. Because the Town has not contested the allegations and the FAA has found the Town in violation of Assurances 24, 25, and 11, the Motion to Dismiss is denied.

The FAA's findings are based on the allegations contained in the Complaint and the Town's response in its Motion to Dismiss that it "does not dispute that there are legitimate questions of compliance with its Sponsor Assurances," and that it "does not contest compliance" with regard to the issues listed above.

The Respondent is directed to submit a Corrective Action Plan, acceptable to the FAA, within 60 days of receipt of this determination to address the violations found above. The Corrective Action Plan should also include the following information:

1. Copies of the current Pavement Maintenance Management Program and next four years tentative yearly budgets for pavement maintenance and rehabilitation projects, including their funding sources.
2. Club. At the expiration of the current lease on October 31, 2023, the Town will negotiate the lease for the actual property being used (approximately 10 acres) with a short-term (interim use) lease and at FMV. The revenue use requirements of grant assurances do not have an expiration date.
3. EHPD & EHFD. Provide the FAA with records indicating the amount of in-kind services provided to the Airport by the EHFD and EHPD, and establishing the value of such services to justify the 25% rent reduction from FMV. The records must be kept on an annual basis to justify discounted rent because the amount and value of the in-kind services could vary from year to year.

4. The Hertz Corporation. Provide copies of current agreements with the Hertz Corporation and appraisal used to determine current fair market rent for this property. If deficiencies exist in the current lease agreement, the airport must determine the next opportunity to correct these deficiencies.
5. Adequacy of reimbursements from the Town to the Airport Fund. We lack information about this issue and request the Town to explain the circumstances and facts about these reimbursements. Deficiencies must be properly addressed in the corrective plan.
6. Provide a drawing, such as a land occupancy drawing identifying all current non-aeronautical and aeronautical lands and their tenants.

FINDINGS AND ORDER

Accordingly, it is ordered that:

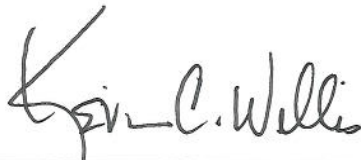
Respondent's *Motion to Dismiss Parts of the Complaint* is denied.

The Director determines that Respondent has violated Grant Assurances 11, 24 and 25.

The Director directs Respondent to provide within 60 days a Corrective Action Plan.

RIGHT OF APPEAL

This Director's Determination, FAA Docket No. 16-15-02, is an initial agency determination and does not constitute a Final Agency Decision and order subject to judicial review. [14 CFR § 16.247(b)(2)] A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination pursuant to 14 CFR § 16.33(c) within thirty (30) days after service of the Director's Determination.



Kevin C. Willis, Director
Office of Airport Compliance

Jan 31, 2017
Date

and Management Analysis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2017, I caused to be placed in the United States mail (first class mail, postage paid), a true copy of this *Director's Determination With Regard to Uncontested Claims*, for FAA Docket 16-15-02, addressed to:

Complainant

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Copy to:

FAA Part 16 Airport Proceedings Docket
FAA Airport Compliance Division (ACO-100)
FAA Eastern Regional Office (AEA-600)



Claudia Roberts
Office of Airport Compliance and
Management Analysis

Index of Administrative Record
Director's Determination

Attachment 1. FAA Regional Site Inspection Report, July 6, 2016.

- Exhibit 1 FAA's Eastern Flight Procedures Team letter to HTO, May 30, 2013.
- Exhibit 2 HTO - RNAV (GPS) X RWY 10.
- Exhibit 3 HTO - RNAV (GPS) Z RWY 10.
- Exhibit 4 HTO - RNAV (GPS) Y RWY 28.
- Exhibit 5 HTO - RNAV (GPS) Z RWY 28.
- Exhibit 6 HTO – VOR-A.
- Exhibit 7 HTO - RNAV (GPS) Y RWY 10.
- Exhibit 8 Letter Michael Baker International. 20:1 TERPS Surface Obstruction Analysis — Runway 10-28 at East Hampton Airport, New York (REVISED).
- Exhibit 9 HTO CIP Projects status, June 28, 2016, Letter Michael Baker International.
- Exhibit 10 AWOS Initial Commissioning Documentation and Maintenance Log.
- Exhibit 11 HTO – Airfield Pavement Maintenance Program.
- Exhibit 12 HTO – Daily Chores.
- Exhibit 13 HTO - Draft Comprehensive Airfield Pavement Evaluation (DCAPE), January 31, 2016.
- Exhibit 14 HTO – SOAR Grant Records.
- Exhibit 15 Grant Agreement, September, 10, 2001.
- Exhibit 16 Inappropriate Taxiway Marking - taxiway A intersection.
- Exhibit 17 East Hampton Town Board resolutions, adoption of budget references and Airport Revenues and Expenditures.

Attachment 2. Town's response, October 26, 2016.

- Exhibit 1 2010 Airport Master Plan GEIS (Excerpts).
- Exhibit 2 Work Authorization, Wind Analysis, October 20, 2016.
- Exhibit 3 Bid Documents for Obstruction Removal, October 3, 2016.
- Exhibit 4 Paid Parking resolutions, press release, and grant history.
- Exhibit 5 Tennis Club easement documents.
- Exhibit 6 Animal Rescue Fund easement documents.
- Exhibit 7 FAA and HTO Correspondence 2003 through 2008.
- Exhibit 8 Appraisal, January 27, 2005.
- Exhibit 9 Lease agreements for Parcels 14-16, 18-26, and 30-31.

Attachment 3. FAA Regional Letter, Site Inspection Follow-up November 18, 2016.