

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

<hr/> Kent J. Ashton))
)		
COMPLAINANT))
V.)	<hr/> Docket No.' 16-00-01	
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City of Concord, NC)		
)		
RESPONDENT)		
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FINAL DECISION AND ORDER

INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) as an Appeal by Kent J. Ashton of the Director's Determination (DD) issued on October 16, 2000 by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings, 14 CFR Part 16 (FAA Rules of Practice).

The Complaint by Kent Ashton (Complainant), filed on January 28, 2000, raised the following issues for FAA consideration:

- (1) Whether the Respondent, by terminating the Complainant's Aircraft Storage Permit for use of public T-hangar facilities at the Concord Regional Airport, is in violation of 49 U.S.C. 47107 (a)(1) and FAA grant assurance #22 regarding reasonable access to a public use airport without unjust economic discrimination.
- (2) Whether the Respondent violated Complainant's due process liberty interests as protected by the Fourteenth Amendment of the United States Constitution. [FAA Exhibit 1, Item 12, page 3]

With respect to the allegations presented in this Complaint, under the specific circumstances at the Concord Regional Airport as discussed below, and based on the evidence of record in this proceeding, the DD concluded that the City was not currently in violation of its Federal obligations. Furthermore, the DD determined that the FAA does not have the jurisdiction to decide the Complainant's alleged violations of the Fourteenth Amendment to the United States Constitution. [FAA Exhibit 1, Item 12, page 17]

On November 3, 2000, Kent J. Ashton appealed the DD in accordance with FAA Rules of Practice. The Complainant presents numerous objections to the judgment of the Director, but does not present new evidence. The Acting Associate Administrator will discuss the specific objections in the “Analysis and Discussion” Section below. Also, the Complainant cites, as deficiencies of the DD, omissions of analysis of issues that he had not clearly alleged or argued in his Complaint.

As stated in his Appeal, Mr. Ashton presents the following grounds for his appeal of the DD to the Acting Associate Administrator:

- “a. The Director failed to apply mandatory presumptions that the exercise of First Amendment rights cannot be the basis for denial of use of a federally funded airport and that. retaliation under color of law for exercise of Constitutional right is prima facie unlawful.
- b. ... the agency improperly declined to investigate the Complaint in light of the presumptions of constitutional and civil rights law and failed to find the facts.
- c. c. ... the agency failed to recognize that when fundamental rights are implicated, government, i.e., the Sponsor and the FAA, incur a burden-of-proof to show that Ashton’s fundamental rights were curtailed for a compelling governmental purpose.
- d. The Director admitted and relied upon inadmissible evidence: The agency admitted evidence of a criminal action under appeal and relied upon it, improperly, to show the truth of allegations in this civil action. It also admitted and relied on inadmissible hearsay. This was harmfully prejudicial to Ashton’s case.
- e. Many of the Agency’s sub-findings, by way of which it reached the overall conclusion, were made arbitrarily and capriciously, or were contrary to law, made without observance of procedure required by law or harmfully prejudicial to Complainant’s case.” [FAA Exhibit 1, Item 13, page 1]

In accordance with 14 CFR Part 16 §33, the FAA has reexamined the entire record to reassess the findings in the DD. Upon an appeal of a Director’s Determination, the Acting Associate Administrator must determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. Based on this reexamination, the FAA affirms the DD, which found the City of Concord had not violated 49 U.S.C. 47107(a)(1) or the FAA grant assurance #22, and that the FAA does not have the jurisdiction to decide the

¹Included in this section are two additional issues. The Complainant discusses in his Appeal the issue of his spouse having been unjustly denied access. However, the spouse is not a party to the Complaint, nor did the Complainant present any evidence in his pleadings of the spouse’s ability or inability to use the Airport as an airport. [FAA Exhibit 1, Item 13, page 1] Also, the Complainant argues on Appeal that the “Director failed to determine if the Sponsor’s treatment of Ashton compared to its other tenants was disparate so as to create the grant of an exclusive right to the other tenants.” [FAA Exhibit 1, Item 13, page 1] The Complainant did not raise the Exclusive Rights issue in his pleadings to the Complaint. Under Part 16 and Federal law generally, the complainant must raise all issues at the complaint stage. 14 C.F.R 16.23. However, since the exclusive rights prohibition was raised by the Complainant in his 1999 Complaint; since the Complainant’s 2000’ Complaint is a continuation of his prior Complaint factually; and since Complainant is not represented by counsel, we do address the exclusive rights allegation in this decision.

Complainant's alleged violation of the Fourteenth Amendment to the United States Constitution. Also, the FAA dismisses the allegation, raised on Appeal, of the granting of an exclusive right in violation of 49 U.S.C. 40103(e) or FAA grant assurance #23.

This Final Decision and Order finds that the Appeal did not contain persuasive arguments sufficient to reverse any portion of the DD.

Airport

Concord Regional Airport (CRA) is a public-use, general aviation airport located in Cabarrus County, North Carolina, approximately 7 miles west of Concord, North Carolina. The City of Concord owns the Airport. The Airport has approximately 88 based aircraft and 55,250 operations annually at the Airport. [FAA Exhibit 1, Item 1]

Concord Regional Airport opened in 1994 as a reliever airport to Charlotte/Douglas International Airport. The development of the Airport has been financed, in part, with funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.*, and as administered by the State of North Carolina in the State Block Grant Program. [FAA Exhibit 1, Item 2]

Procedural History

A. Prior Complaint (16-99-09)

On July 12, 1999, Kent J. Ashton filed a formal complaint (FAA Docket No. 16-99-09), separate and before this proceeding, pursuant to 14 CFR Part 16, alleging that the City of Concord, as sponsor of the Concord Regional Airport, had violated its airport grant agreements and had engaged in economic discrimination and had granted' an exclusive right. The complaint alleged that the City violated FAA grant assurances by: discriminating against his type, kind, or class of aeronautical use; by operating to prevent him from performing services on his own aircraft; by operating to restrict use of the Airport to favored types, kinds, or classes of aeronautical use, through a system of rules, regulations, lax enforcement, selective enforcement and special concessions; by requiring him to carry liability insurance for use of the Airport; by requiring him to make the City an additional insured on his liability insurance coverage; by requiring him to waive rights to recover damages against the City before being permitted to base an aircraft at the Airport; and by prohibiting tenants of T-hangars from storing more than one aircraft in the hangar. [FAA Exhibit I, Item 8]

On January 28, 2000², the FAA issued a Director's Determination, Docket #16-99-09, finding that the Concord Regional Airport was not in violation of its grant assurances pursuant to 49 U.S.C. section 40103(e) and 49 U.S.C. section 47107(a)(1) through (6). The Director considered the following issues raised by the Complainant in that prior Complaint: (i) Whether the City's regulations, standards or facilities constituted an

²The same day that the FAA received Mr. Ashtons second Complaint at issue here.

unreasonable denial of access; (ii) Whether the City's rules, regulations, enforcement thereof, and allegedly disparate facilities create unjust economic discrimination by preferring some similarly situated aeronautical users over other aeronautical users; and (iii) Whether the City has bestowed an exclusive right to two private operators by providing increased convenience for the conduct of self-maintenance within a leased hangar, as well as bestowing an exclusive right for the Airport's Fixed-base operator (FBO) by effectively prohibiting self-service for some. With respect to the allegations presented in Mr. Ashton's Complaint under FAA Docket No. 16-99-09, based on the record evidence in that proceeding, we found that the City, as the airport sponsor, was not in violation of its Federal obligations. [FAA Exhibit 1, Item 8]

On February 24, 2000, Mr. Ashton filed an appeal of the Director's Determination regarding his previous Complaint, (Docket No. 16-99-09), with the FAA's Acting Associate Administrator for Airports. In his appeal, Mr. Ashton alleged that "...the Director made procedural errors in the conduct of the investigation and substantive errors in interpreting the evidence and making conclusions from the evidence." [FAA Exhibit 1, Item 9]

On July 3, 2000, the Acting Associate Administrator issued a Final Agency Decision with respect to Mr. Ashton's previous Complaint, FAA Docket No. 16-99-09, affirming the Director's Determination of January 28, 2000. The Acting Associate Administrator determined that " the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy." [FAA Exhibit 1, Item 9, p. 23]

On August 30, 2000, Mr. Ashton filed a petition for review of the Final Agency Decision in the first proceeding (16-99-09) with the United States Court of Appeals for the 4th Circuit.³

B. Present Complaint (16-00-01)

On January 28, 2000, Kent Ashton filed a second Complaint (FAA Docket No. 16-00-01), which commences the instant proceedings. [FAA Exhibit 1, Item 3]

On February 17, 2000, the FAA issued a Notice of Docketing advising that it was docketing the instant Complaint. [FAA Exhibit 1, Item 4] Notwithstanding the fact that Mr. Ashton's instant Complaint (FAA Docket 16-00-01) contained many of the same issues as his previous complaint (FAA Docket No. 16-99-09), the FAA docketed the instant complaint only because the Respondent's termination of Mr. Ashton's Aircraft Storage Permit was not at issue in Mr. Ashton's previous complaint.⁴

³The Department of Justice, representing the FAA, did not object to a motion made by Mr. Ashton to the U.S. Court of Appeals for the Fourth Circuit to hold his petition regarding FAA Docket No. 16-99-09 in abeyance until such time as all administrative remedies regarding the instant complaint (FAA Docket No. 16-00-01) have been exhausted.

⁴In the instant complaint (FAA Docket No. 16-00-01), Mr. Ashton re-argued that: (i) the City's verbal directives to, among other things, "not enter any area not required for his aviation activity" were unjustly discriminatory, did not apply to all users, and were not necessary for safety and efficiency and were

On March 17, 2000, the City filed an Answer and Motion to Dismiss to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 5]

On March 27, 2000, Mr. Ashton filed a Reply to the City's Answer to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 6]

On April 12, 2000, the City filed a Rebuttal to Mr. Ashton's Reply to the instant Complaint, FAA Docket No. 16-00-01. [FAA Exhibit 1, Item 7]

On October 16, 2000, the FAA issued the Director's Determination, Docket #16-00-01, finding that the Concord Regional Airport was not in violation of its grant assurances and dismissing Mr. Ashton's Complaint. It stated:

The FAA Office of Airport Safety and Standards finds and concludes as follows:

(1) The Respondent, by terminating the Complainant's Aircraft Storage Permit for use of public T-hangar facilities at the Concord Regional Airport, is not in violation of 49 U.S.C. 47107(a)(1) and FAA grant assurance #22 regarding reasonable access to a public use airport without unjust discrimination.

(2) The FAA does not have the jurisdiction to decide the Complainant's alleged violations of the Fourteenth Amendment of the United States Constitution. [FAA Exhibit 1, Item 12, page 17]

On November 3, 2000, the Complainant filed an Appeal of the DD, Docket # 16-00-.01 [FAA Exhibit 1, Item 13]

On November 3, 2000, the Complainant also filed a Motion for Judicial Notice [FAA Exhibit 1, Item 14] and a Notice of Change of Address Notice [FAA Exhibit 1, Item 15].

On November 27, 2000, the City of Concord filed its Reply to the Complainant's Appeal. [FAA Exhibit 1, Item 16]

Factual Background

This section describes the facts relevant to the instant complaint (Docket No. 16-00-0 1) after review of the information presented in the record.

On July 7, 1998, the Complainant signed an Aircraft Storage Permit⁵ for the Concord Regional Airport. This Permit contained a provision (Para. 10) that allowed the City or

confusing in nature; (ii) the Sponsor is under the misconception that it has an unfettered right to deny access to individuals, to make and enforce unwritten rules to restrict access and to allegedly arbitrarily deny access to the public; and (iii) his entry into Hangars-In-Common to speak with pilots, mechanics and other members of the public in those hangars, or to take a photograph was an aeronautical use of the airport and not unlawful. These issues were adjudicated in the prior administrative proceeding (FAA Docket No. 16-99-09) -- Final Agency Decision, p. 25 - 32, issued July 3, 2000; [FAA Exhibit I, Item 91 and Director's Determination, "Analysis" section, p. 25 - 32; issued January 28, 2000 [FAA exhibit I, Item 8].

⁵While Mr. Ashton indicates that he signed an Aircraft Storage Permit, the City, in its Answer and Rebuttal, refers to the Aircraft Storage Permit as a lease. In this Final Agency Decision, we use the terms

the Permittee to cancel the lease for any reason with ten (10) days written notice and states, "violations of any conditions hereof by Permittee... shall constitute cause of cancellation." It also contained a provision (Para 4A.) that stated, "permittee shall abide by the Airport rules of the City of Concord Aviation Department..." In addition, the Permit states that the Permittee shall have 10 days from receipt of a notice of termination of the Permit within which to file an appeal to the Aviation Director. [FAA Exhibit 1, Item 3, exhibit Q]

In a letter dated December 21, 1999, the City terminated the Complainant's Permit to the T-hangar at the Concord Regional Airport, effective December 31, 1999. This letter also provided for an appeal of the termination within 10 days as stated in the Permit. [FAA Exhibit 1, Item 3, exhibit G]

In its Answer, the City stated that the reason for the termination is that the Complainant, under the guise of collecting information concerning the Airport, photographed, bothered and harassed other tenants at the Airport beginning on or about January 1, 1999. [FAA Exhibit 1, Item 5, page 1] Additionally, the City contends that the Complainant used the Airport for non-aeronautical purposes and entered areas of the Airport that he knew he was not entitled to enter. [FAA Exhibit 1, Item 5, page 3, para. 17]

According to the City, "...on numerous occasions...employees at CRA, as well as officers with the Concord Police Department, limited Mr. Ashton's access at the Airport to those portions of the restricted area at CRA necessary for Complainants' use and enjoyment of his aircraft due to his bothering and harassing other tenants." On September 20, 1999, after being notified by Airport authorities that he was in an area of the airport where he had no business, after the Concord Police were called and asked him to leave the area, and after he refused to leave, Mr. Ashton was cited for trespassing by the Concord Police Department. [FAA Exhibit 1, Item 5, page 3, para. 19]

Mr. Ashton admits that the City terminated his Permit to the T-hangar on December 21, 1999. The notice of termination informed the Complainant of his appeal rights. The Complainant also admits that he sometimes entered the airfield solely for the purpose of observing airfield activities of others and talking with these tenants, and that he "photographed tenants without their permission and that the process was unpleasant and bothersome for all parties involved." However, Mr. Ashton contends that "So long as the Complainant, or any member of the general public, is able to move about the airfield safely...he must be allowed to proceed." [FAA Exhibit I, Item 3, pgs 2-4]

Subsequent to his arrest, Mr. Ashton was convicted of trespassing by the Cabarrus County District Court.⁶ [FAA Exhibit 1, Item 3, page 2; FAA Exhibit 1, Item 5, page 4].

"permit" and "lease" interchangeably. Both terms refer to the "Aircraft Storage Permit" signed by Mr. Ashton on July 7, 1998. [FAA Exhibit I, Item 3, Exhibit Q]

⁶The Complainant provides evidence of this conviction having been subsequently dismissed. [FAA Exhibit 1, Item 14] The Respondent concurs with this evidence, stating, "...the trespass charge was dismissed on August 30, 2000, while the earlier conviction in District Court was being appealed to Superior Court [of Cabarrus County]." [FAA Exhibit 1, Item 16] The "Dismissal Notice of Reinstatement" Form cites the

On December 28, 1999, the Complainant wrote to Gordon Belo, City Attorney, and requested additional information on the conduct of the hearing as identified in the December 21st notice of termination of his Permit. Mr. Ashton proposed that an FAA official from the FAA's Southern Region Airports Division be designated as a hearing officer. [FAA Exhibit 1, Item 3, exhibit H]

On December 29, 1999, James Greene, Jr., Assistant City Manager for Operations, responded to the letter the Complainant wrote to Gordon Belo and stated that "The Concord Regional Airport will not agree to utilize a representative of the FAA as the hearing officer on your appeal...I have also received a copy of your December 25th letter to Mr. Hiatt purportedly seeking a "mediation" of your eviction pursuant to FAA regulations in lieu of a hearing. Those regulations have no bearing on the current matter. The hearing will proceed." This letter also changed the date of the hearing for the Complainant's convenience to January 5, 2000. [FAA Exhibit 1, Item 3, exhibit K]

On December 30, 1999, the Complainant wrote again to James Green and noted five specific objections with regard to the hearing concerning his eviction. [FAA Exhibit 1, Item 3, exhibit I] The Complainant also noted that he believed that the City was not proceeding according to the published Concord Regional Airport Operations Code regarding arbitration.

On January 10, 2000, G. Tim Lowder sent a letter to the Complainant regarding the City's determination on the Appeal Hearing for Aircraft Storage Permit Termination. This letter established that a hearing was conducted with Mr. Ashton present concerning the notice of termination of Mr. Ashton's Permit, and that the hearing officer upheld the termination. However, Mr. Lowder noted that the Complainant would continue to have the right to use portions of the Airport for the general aviation public. [FAA Exhibit 1, Item 3, exhibit L]

On January 18, 2000, the Complainant filed a Complaint and Motion for Temporary Restraining Order in the state court (General Court of Justice) to stay the hangar eviction. In his request for the Order, Mr. Ashton alleged that (a) the Airport hearing was not conducted in accordance with the Concord Regional Airport Operations Code, Section V. (b) that the City is a party in opposition to the Complainant in a [Part 16] proceeding, (c) that the hearing officer is an employee of the City and not a neutral third-party, (d) the hearing was an ad hoc proceeding with the City refusing to specify any rules of procedure, rules of evidence, nor did the City notify Complainant of any grounds for eviction or evidence supporting eviction, (e) Complainant nominated an official of the FAA to be a neutral hearing officer, but was refused by the City. [FAA Exhibit 1, Item 5, exhibit 9]

On January 19, 2000, John Crosby, Aviation Director, sent a letter to the Complainant stating that because he had failed to remove his property from the T-hangar, the hangar

reason for dismissal as "Other: Problem being handled civilly. Future problems will be handled criminally" [FAA Exhibit 1, Item 14, exhibit B]

had been secured with a padlock to secure the property and to exercise the City's right to take possession of the hangar. [FAA Exhibit 1, Item 3, exhibit N]

Also on January 19, 2000, the Complainant sent a letter to W. Brian Hiatt, City Manager, stating that "As you are aware, I believe the City's eviction of me and the aircraft owned by my wife and I from your public airport as well as your interpretation of the law governing access to the public airfield are violations of various N.C. statutes. Accordingly, I decline to vacate the public hangar as you requested." [FAA Exhibit 1, Item 3, exhibit O]

On February 29, 2000, the Honorable Richard D. Boner, Superior Court Judge, denied Mr. Ashton's Motion for a Temporary Restraining Order for failure to state a claim. [FAA Exhibit 1, Item 5, exhibit 11]

APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in 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 each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

The planning and development of Concord Regional Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq.* This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, i.e., a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements, binding the sponsor upon acceptance of the Federal assistance. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides 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 Airport Sponsor Assurances

The AAIA, 49 USC § 47107(a), *et seq.*, sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Section 511(b) of the AAIA, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe project sponsorship requirements to insure compliance with Section 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every AIP agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Preserving Sponsor Rights and Powers

Assurance No. 5, "Preserving Rights and Powers", of the prescribed sponsor assurances implements the provisions of the AAIA, 49 U.S.C. 47107 *et seq.*, and requires, in relevant part, that the sponsor of a Federally obligated airport

...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of airports managed by agencies other than the sponsor.

Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

"...will make its 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(a)

"...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(h)

“...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.” Assurance 22(i)

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners 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. See Order, Sees. 4-14(a)(2) and 3-1.

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. See Order, Sec. 3-8(a).

The 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 reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

The Prohibition Against the Granting of an Exclusive Right

Assurance 23, “Exclusive Rights,” of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a Federally obligated airport:

“... 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 further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...”

Section 308(a) of the FAA Act, 49 U.S.C. § 40103(e), provides, in relevant part, that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.” 49 U.S.C. § 40103(e). An “air navigation facility” includes an “airport.” See 49 U.S.C. §§ 40102(a)(4), (9), (28).

Section 511(a)(2) of the AIA, 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that “there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.”

In the Order, the FAA discusses its exclusive rights policy and broadly identified 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, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. See Order, Sec.3-9(e).

The 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 accepts the transfer of Federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

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

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments 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, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

ANALYSIS AND DISCUSSION

Appropriately, the DD makes conclusions of fact and law regarding the Complainant's allegations. Underlying these conclusions is the basic requirement of Part 16 that the Complainant show with evidence that the sponsor is violating its commitments to the Federal government. See Part 16, Sections 16.23 and 16.29. As is discussed below, the

Complainant fails to present information in his Appeal to demonstrate any error of fact, law, or omission in the DD.

Director's Findings (16-00-01)

The Director cited findings of the previous DD (16-99-09), declining to reconsider issues of Mr. Ashton's conduct of nonaeronautical activity on the Airport. The Director appropriately identified the relevant issue: whether the termination of Mr. Ashton's lease for a T-hanger was contrary to the Sponsor's Federal obligations regarding reasonable, access and economic discrimination, embodied in the Sponsor's grant assurance #22.⁷ [FAA Exhibit 1, Item 12, page 15]

The Director discussed the nature of Mr. Ashton's nonaeronautical behavior, including photographing, bothering and harassing other tenants at the Airport, as well as entering various leaseholds, and the City's statement that it was this behavior that led to Mr. Ashton's eviction. [FAA Exhibit 1, Item 12, page 8] The Director notes Mr. Ashton's own admissions that he conducted nonaeronautical activities and photographed tenants without permission and that the behavior was "... unpleasant and bothersome..." [FAA Exhibit 1, Item 12, page 9] See also Complaint, FAA Exhibit 1, Item 3, pages 3, 4 and 6. These issues were also addressed in Mr. Ashton's prior Complaint (Docket #16-99-09). The Director acknowledged that the Sponsor enacted a verbal rule, in response to Mr. Ashton's admitted bothersome nonaeronautical behavior, that restricted Mr. Ashton to those areas required for aeronautical activity. [FAA Exhibit 1, Item 12, page 16] The Director had previously found that these restrictions were not shown to be unreasonable or unjustly discriminatory.⁸

The Director found that Mr. Ashton's eviction from his hanger has not had the effect of denying him access to the public airfield [FAA Exhibit 1, Item 12, page 11] and that the City's "non-voluntary lease termination provision, by itself does not establish a violation of Assurance 22." [FAA Exhibit 1, Item 12, page 15] Concerning the possibility that the Sponsor did have sufficient cause to evict Mr. Ashton, the Director noted:

...we are persuaded that the City may have had sufficient cause to exercise the lease termination provision at issue. Specifically, the record reflects that Mr. Ashton was arrested and convicted, for criminal trespass at the Airport.

⁷The issue of the granting of an exclusive right, raised in the Appeal but not in Complainant's pleadings, will be discussed below.

⁸In the Director's Determination in Docket #16-99-09, the Director stated, "The Complainant states that other users of the Airport were not subject to the increased scrutiny of their nonaeronautical activities, as was the Complainant, suggesting that this amounted to unjust discrimination under grant assurance 22. As stated above, the nonaeronautical activities described above are beyond the jurisdiction of the FAA grant assurances. Furthermore, a Sponsor may be acting within the letter and spirit of the grant assurances by restricting the nonaeronautical activity of an individual, if that activity has the effect of interfering with the safe and efficient enjoyment of the conduct of aeronautical activities by users of the Airport. Even if the Complainant were to be exonerated of any alleged violation of state or local law, he would still have to show that his use of the Airport as an Airport was subject to unreasonable terms or restrictions, or that another similar aeronautical user was provided with a preference amounting to unjust economic discrimination," [FAA Exhibit I, Item 8, page 32]

Mr. Ashton's conviction, while not an issue within the jurisdiction under 14 CFR Part 16, supports the City's argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit. Specifically, Paragraph 4-A of the Aircraft Storage Permit requires that permittees must abide by, among other things, airport rules and local ordinances [FAA Exhibit 1, Item 12, page15]

The Director found that there was no unjust economic discrimination because Mr. Ashton had failed to show that another tenant had conducted similar nonaeronautical activities at the Airport and not had his T-hanger permit terminated.⁹ [FAA Exhibit 1, Item 12, page 16]

Regarding allegations of economic discrimination, the Director found that:

Mr. Ashton admits that he has entered the airport to observe the activity of other T-hanger tenants [FAA Exhibit 1, Item 3, p. 3] and to photograph their activities; admits that the process was unpleasant and bothersome for all parties involved [FAA Exhibit 1, Item 3, p. 6]; and admits that on several occasions the Airport authorities gave him various verbal instructions to, among other things, "not enter any area not required for his aviation activity." [FAA Exhibit 1, Item 3,p.4]...

Mr. Ashton has provided no evidence to show that another tenant at the airport had been repeatedly warned of violations of the airport rules and regulations and did not have their T-hanger permit terminated. Accordingly, the FAA can find no unjust economic discrimination with respect to Mr. Ashton's eviction from the T-hanger he occupied. See FAA Exhibit 1, Item 12, page 16.

Finally, the Director found that "The FAA's administrative complaint process for matters pertaining to federally assisted airports is not the proper forum for review of Complainant's claims of violations of constitutional, state, or local laws." [FAA Exhibit 1, Item 12, page 14]

For these reasons, the Complaint was dismissed.

Complainant's Appeal and Acting Associate Administrator's Analysis

As quoted in the Introduction Section, above, the Complainant presents five grounds for his appeal of the DD to the Acting Associate Administrator. Generally, these grounds focus on issues of constitutional protections, burden of proof and rules of evidence regarding the Sponsor's actions, including those relevant to Mr. Ashton's prior Complaint, and the FAA's consideration of these actions. The Complainant does not present new facts, but rather questions the reasoning used and the legal basis for the Director's Determination. The Complainant does not expound on these grounds directly, listing as a

⁹The FAA notes that the incidental breaking of airport rules by airport users does not constitute a Sponsor's noncompliance with Federal obligations. [See Order, Sec 5-6(a)(2)] Furthermore, in this case, the behavior in question is nonaeronautical and not subject to the Federal grant assurances.

separate section, “Errors in the Director’s Determination” without direct reference’ to the five grounds.

Separate from his discussion of alleged errors, Mr. Ashton objects to the Director’s conclusions regarding his current ability to use the Airport. The Complainant cites a letter from the Sponsor in his Appeal that states, “You may not access any restricted area at the airport... Any unauthorized access by you within restricted areas will be deemed a trespass and will be treated accordingly.” [FAA Exhibit 1, Item 3, exhibit N] However, that sentence is immediately followed by this sentence: “As Mr. Hiatt advised you, you may utilize public areas and public facilities of the Airport available for use by the aircraft operators, as set forth in the Airport’s Rules and Regulations.” [FAA Exhibit 1, Item 3, exhibit N] Furthermore, the Respondent states,

The City has repeatedly and consistently stated that Complainant has the same rights at the Airport as any other non-tenant. So long as Complainant follows the rules and regulations governing the Airport, he may take-off and land, drop-off and pick-up passengers, have his aircraft serviced, and have his aircraft refueled. There has been no attempt by the City to prevent Complainant from using the Airport in the same manner as any other non-tenant. [FAA Exhibit 1, Item 16, page 4]

The Director found that “Although it is apparent from the record that Mr. Ashton is no longer permitted the privilege of storing his aircraft in a City-owned T-hangar at the Airport, the FAA is not persuaded that the Respondent has denied the Complainant access to the public airfield.” See FAA Exhibit 1, Item 12, page 11. Despite the Complainant’s objection in the Appeal, [FAA Exhibit 1, Item 13, page 2], the Acting Associate Administrator is persuaded that the City allows the Complainant to use the airfield.

The following is the Acting Associate Administrator’s discussion of the Complainant’s allegations of error in the DD.

- a. The Director failed to apply mandatory presumptions that the exercise of First Amendment rights cannot be the basis for denial of use of a federally funded airport and that retaliation under color of law for exercise of Constitutional right is prima facie unlawful.

The Complainant states that he was entitled “to a determination [by the Director] of the constitutional and civil rights claims, accompanied by a presumption by the FAA that discrimination against First and Fourteenth Amendment rights of speech, petition, and due process are prima facie unlawful and therefore unjustly discriminatory.” [FAA Exhibit Item 13, page 6] The Complainant cites court cases and concludes that “the Agency here is required to presume that discrimination against speech because of its message is unconstitutional, and the agency is required to find the facts of the case.” [FAA Exhibit 1, Item 13, page 6]

The Complainant also states that “The Agency must begin its investigation with a bedrock presumption that First Amendment activities are not actionable and exercise of First Amendment freedoms are not a basis for denial of federal benefit.” [FAA Exhibit 1, Item 13, page 11]

The Acting Associate Administrator finds that the Director’s declining to consider the Complainant’s First Amendment issues was appropriate because (1) the FAA does not have the jurisdiction to decide the Complainant’s alleged violations of the Fourteenth Amendment of the U.S. Constitution¹⁰; and (2) the Complainant’s admission that the conduct in question that he alleges is protected free speech was nonaeronautical behavior, and therefore outside the scope of the Sponsor’s obligations to the Federal government as embodied in the grant assurances. The City stated that Mr. Ashton was evicted for this non-aeronautical behavior, described as photographing, bothering and harassing other tenants. [FAA Exhibit 1, Item 5, page 1] The Complainant has repeatedly volunteered that he conducted nonaeronautical activity on the Airport and that that activity may have been bothersome, as discussed below. [FAA Exhibit 1, Item 3, pgs 2-4] See FAA Exhibit I, Item 12, page 9. The Director relied upon the Complainant’s own description of his activities at the Airport.

Therefore the Acting Associate Administrator finds that the Director appropriately focused on the relevant grant assurances, declining to consider the allegation of a violation of Mr. Ashton’s First Amendment rights as the basis for denial of use of a federally funded airport, and the allegation that retaliation under color of law for exercise of Constitutional right is prima facie unlawful.

- b. The agency improperly declined to investigate the Complaint in light of the presumptions of constitutional and civil rights law and failed to find the facts.

The Complainant states in his Appeal, “The Director incorrectly states that the agency does not have jurisdiction to determine violations of constitutional laws (DD. P 14). This statement is overbroad. Agencies... may determine violations of laws within their statutory authority.” [FAA Exhibit 1, Item 13, page 6] He also states, “The FAA was obligated here to apply its special expertise in the area of grant agreements, Assurances, airport operations and management, airport safety and the needs of civil aviation, to find the facts relating to Ashton’s claims. It did not do so.” [FAA Exhibit 1, Item 13, page 7] Mr. Ashton concludes, stating, “Agency is not entitled to conclusive presumptions which entirely dispense with the need to present proof to resolve a factual dispute. ... No admissible proof of unlawful or improper activity is in the record. Therefore the agency’s conclusions were not supported by evidence in the record.” [FAA Exhibit 1, Item 13, page 8]

Again, the Acting Associate Administrator finds that the question of whether or not Mr. Ashton’s nonaeronautical activity was constitutionally protected is not within the jurisdiction of the FAA, for the reasons cited in the DD, and above. Furthermore, the FAA does not have special expertise to resolve these issues. The FAA is unconvinced by

¹⁰Section 16.1 limits the types of issues that can be raised in a complaint.

the evidence that Ashton's admitted nonaeronautical behavior that is at issue here and that resulted in his eviction was within some constructed, broad definition of aeronautical use.

Simply put, the Complainant repeatedly described his nonaeronautical behavior (behavior that is not protected by the grant assurances) on the Airport, in the record. The City cited this behavior as the reason for the Complainant's conviction. The grant assurances do not require that a sponsor only take action if this nonaeronautical behavior is found to be unlawful. As discussed below, it would appear that the City was reasonable in taking action regarding the Complainant's nonaeronautical behavior in order to preserve standards of conduct that are consistent with the safe and efficient operation of the Airport. As stated above, these issues are nonaeronautical and largely admitted to by the Complainant.

Therefore, the Acting Associate Administrator finds that the agency properly declined to investigate this issue.

- c. The agency failed to recognize that when fundamental rights are implicated, government, i.e., the Sponsor and the FAA, incur a burden-of-proof to show that Mr. Ashton's fundamental rights were curtailed for a compelling governmental purpose.

The Complainant states that "The FAA clearly misunderstands the concept of burden-of-proof and how it can shift between parties." [FAA Exhibit 1, Item 13, page 8] He further argues:

...the Sponsor accused Ashton of wrongdoing and used the allegation as justification for denying use of the Airport. This allegation by the Sponsor clearly placed a burden on the sponsor to prove Ashton's wrongdoing. However, again, the evidence in the record does not prove wrongdoing.

Finally, the infringement on freedom of speech alleged by the complaint sets up a strict-scrutiny test which places a burden-of-proof on the government entity to show that curtailment of speech was required by compelling government interest. [FAA Exhibit 1, Item 13, page 8]

...Ashton's evidence was incontrovertible: The Sponsor retaliated under the guise of its management powers for Ashton's exercise of fundamental rights and it unlawfully denied a federal benefit for an unconstitutional reason and without due process. Consequently, the FAA's determination was arbitrary and capricious, and made without observance of procedure required by law. [FAA Exhibit 1, Item 13, page 9]

The Acting Associate Administrator finds that the burden of proof issue is not justiciable here. Also, this burden of proof issue is irrelevant, as a matter of fact, in as much as Mr. Ashton repeatedly admits that he conducted nonaeronautical activity on the Airport and that that activity may have been bothersome. As described by the Director in the DD:

The Complainant also admits that he sometimes entered the airfield solely for the purpose of observing airfield activities and talking with other tenants and that he “photographed tenants without their permission and that the process was unpleasant and bothersome for all parties involved.” [FAA Exhibit 1, Item 3, pgs 2-4] See FAA Exhibit 1, Item 12, page 9.

The City stated that the reason for the termination is that the Complainant, under the guise of collecting information concerning the Airport, photographed, bothered and harassed other tenants at the Airport beginning on or about January 1, 1999. [FAA Exhibit 1, Item 5, page 1] See FAA Exhibit 1, Item 12, page 8.

As stated by the Respondent, and confirmed by the Director and the Acting Associate Administrator:

In a letter from Complainant to the Airport Manager dated April 8, 1999, Complainant admits that “I concede that I have, on two occasions, entered Hangers A and B to speak with pilots and mechanics and photograph aircraft, henceforth, I will not enter any leased area without an invitation from the lessee or his representative.” In Complainant’s Motion for cease and Desist filed in his first FAA action, Complainant stated, “Complainant admits that he may have ‘bothered’ a few tenants.” In a letter to the City Manager dated June 1, 1999, Complainant stated that, “I believe I surprised this woman by taking a picture of her activity without first warning her...” An affidavit attached to Complainant’s Reply in support of his Complaint in this case describes a scene in which Complainant approached another tenant of the Airport to take pictures without permission and the tenant “became angry and tried to block Ashton’s photography. [The tenant] approached Ashton in a threatening manner and appeared ready to take Ashton’s camera. Ashton warned [the tenant] that if [the tenant] touched him or his camera, Ashton would charge [the tenant] with assault.” [FAA Exhibit 1, Item 16, page 3]

Once again, the Complainant states that the Director had to prove unlawful or improper nonaeronautical activity in order to find the facts to dismiss the case. This is incorrect. The circumstances that the Complainant alleges require additional proof are not related to Mr. Ashton’s use of the airport as an airport and therefore are not relevant to the Sponsor’s obligations to the Federal government that are embodied in its grant assurances and cognizable under Part 16.

it is the Complainant’s responsibility to substantiate that the City has, in fact, unreasonably denied access, unjustly discriminated against him or her or granted an exclusive right. Title 14 of the Code of Federal Regulations, Section 16.23, provides. in relevant part, that complaints filed under this subpart shall “Provide a concise but~ complete statement of the facts relied upon to substantiate each allegation.” Additionally, Section 16.29 provides that “In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and

argument necessary for the FAA to determine whether the sponsor is in compliance.” Specifically, a claim of unjust discrimination must include a showing that similarly situated users have been treated dissimilarly without adequate justification. In this case, Mr. Ashton does not provide evidence of others conducting bothersome, nonaeronautical activities at the Airport, much less show evidence that another Airport user confronted aeronautical users and took uninvited pictures, as admitted to by Mr. Ashton. [FAA Exhibit 1, Item 16, page 3] Discussion of these circumstances should not be construed as the Acting Associate Administrator’s acceptance of the premise that Mr. Ashton’s behavior was aeronautical in nature or protected by the grant assurances.

Therefore, the Acting Associate Administrator finds the Director ruled properly under Part 16 that the Complainant has the burden of proof.

- d. The Director admitted and relied upon inadmissible evidence: The agency admitted evidence of a criminal action under appeal, and relied upon it improperly to show the truth of allegations in this civil action. It also admitted and relied on inadmissible hearsay.

The ultimate issue raised in the Appeal is whether the Sponsor exercised the lease termination provision in an unjustly discriminatory manner in violation of the grant assurances and related statutory provisions. In the DD, the Director found that (1) the mere existence of the non-voluntary lease termination provision was not inconsistent with grant assurance #22, and (2) the City did not exercise the non-voluntary lease termination provision in a manner that was inconsistent with grant assurance #22. [FAA Exhibit 1, Item 12, page 15]

The Complainant states, “The FAA admitted and relied upon Ashton’s criminal trespass conviction under appeal as evidence of wrongdoing and nonaeronautical activity which warranted restrictions on his airport use.... Admission of this evidence was clearly improper.” [FAA Exhibit I, Item 13, page 9] Specifically, throughout his Appeal, the Complainant cites that this reliance was improper because:

- the conviction was not a final judgment in a criminal action;
- the Federal Rules of Evidence prohibited such reliance by the FAA;
- the conviction is not relevant to any FAA determination;
- there were no grounds for the arrest or charges;
- the arrest represented malicious prosecution by the City;
- the charge the Complainant was dismissed, the Director may not rely upon it;
- the elements of trespass were never met
- Complainant followed established laws and airport rules.

In finding that the City’s termination of Complainant’s lease was reasonable and not unjustly discriminatory, the Director relied upon Complainant’s pattern of conduct from the record. In his discussion of economic discrimination specifically, the Director noted that Complainant has admitted that (I) he entered the airport to observe the activity of other T-hangar tenants and to photograph their activities; (2) these activities were

unpleasant and bothersome for all parties involved, including other tenants;¹¹ (3) on several occasions, based upon the various non-aeronautical activities (photography, harassment of other airport users, and the like), the Airport management and local police warned him not to enter areas of the airport not required for his aviation activities.¹² [FAA Exhibit 1, Item 12, page 16]. The Director also noted that the record indicated that despite the verbal admonishments and other notifications of repeated violations received by Mr. Ashton, Complainant chose to continue' his pattern of behavior until he was eventually arrested on September 20, 1999, and subsequently charged with criminal trespass. [FAA Exhibit 1, Item 12, page 16] In his analysis, the Director did not rely exclusively upon the fact that Mr. Ashton was arrested and convicted. In fact, the Director describes a pattern of conduct by Complainant occurring prior to the September 20 incident that was inconsistent with the airport's rules and regulations.¹³

This pattern of behavior is further described in this record and in the record of the prior Complaint (Docket No. 16-99-09) that had previously examined and dismissed these allegations made by the Complainant in regard to the Sponsor's limiting Mr. Ashton's behavior at the Airport. The record discloses these other incidents, in addition to the September 20 incident, which support the City's termination of the lease. [See, FAA Exhibit 1, Item 16, page 3.] As discussed sub-section "c" above, the Complainant characterizes this behavior in his Appeal: "Ashton's speech may indeed have been bothersome..." [FAA Exhibit 1, Item 13, page 3] He admitted, in his Complaint, that he "entered the airfield solely for the purpose of observing airfield activities and talking with other tenants." [FAA Exhibit 1, Item 3, page 3] Again, the Complainant describes his behavior:

On two or more occasions, the Complainant observed other T-hangar tenants performing maintenance on their aircraft.... Since such actions are not permitted by the Sponsor..., the Complainant politely stated to these tenants to these tenants that these maintenance activities appeared to violate the storage

¹¹ According to the airport manager's affidavit:

"During 1999, Mr. Ashton began to drive and walk in areas of the Airport that were unnecessary for his use and enjoyment of the Airport. In particular, Ashton began to enter hangars and areas leased by other tenants. Ashton began to disturb these tenants and, on some occasions, took pictures of tenants without their permission. I received complaints from several tenants concerning Ashton's activities. The rules and regulations of the Airport prohibit conduct that constitutes a nuisance. Because of Ashton's activities, he was notified by me that he was to confine his activities on the Airport to those restricted areas necessary for the use and enjoyment of his aircraft ... Subsequent to my notification to Ashton that he not enter restricted areas unnecessary to the use and enjoyment of his aircraft, I personally observed Ashton in such areas. On these occasions, I requested that Ashton leave the restricted area and confine his activities to those areas required for the use of his aircraft." [FAA Exhibit 1, Item 3, exhibit R]

¹² As reflected in this record by the Respondent's submission of the DD in docket # 16-99-09, on at least two occasions prior to the September 20 incident, officers of the Concord Police Department were present at the airport and advised Mr. Ashton that he was not to go anywhere in the restricted areas of the airport that were not necessary for the use of his aircraft. [FAA Exhibit I, Item 5, exhibit 3, item 10, exhibit H] (Affidavit of Concord City Police Chief).

¹³ As reflected in this record by the Respondent's submission of the DD in docket # 16-99-09, the Concord Airport's Code, under "Disorderly Conduct," prohibits commission of "...any act of nuisance..." and under "Restricted Areas," prohibits any person from entering any restricted areas. [FAA Exhibit I, Item 5, exhibit 3, item 17]

permit.... The Complainant photographed these activities and reported them to the Airport authorities, who subsequently directed the tenants to stop what they were doing and admitted that these tenants had violated airport rules.¹⁴ Complainant admits that the process was unpleasant and bothersome for all parties involved. [FAA Exhibit 1, Item 3, page 6]

Again, as stated by Mr. Ashton, in a letter to Airport management, dated April 8, 1999:

When I visited your office on 7 April 1999 at 10:40 AM, you directed me to stop taking pictures at the airport, stop walking around with my “clipboard” and you stated that I was harassing other persons on the airport....

I concede that I have, on two occasions, entered Hangars A and B to speak with pilots and mechanics and photograph aircraft, henceforth, I will not enter any leased area without an invitation from the leasee or his representative....

I reserve the right to photograph any activity on the airfield....

I reserve the right to photograph, approach and talk to any persons in the public areas of the airport. [FAA Exhibit 1, Item 3, exhibit C]

It appears that Complainant takes issue with the Director’s discussion of the reasonableness issue (FAA Exhibit 1, Item 12, page 15), in which the Director limits his reference to the record (by citing only Mr. Ashton’s arrest and conviction¹⁵) in discussing the support found in the record for the City’s termination of Complainant’s lease. Clearly, the Director could have cited other evidence, such as that discussed above, in addition to the September 20 incident (when Mr. Ashton disobeyed airport management and police requests to leave a restricted area of the airport) and should have done so to support more fully his reasonableness finding.¹⁶ I find that the record adequately supports the Director’s finding of reasonableness, even if the September 20 incident had not been cited or relied upon by the Director.

I further find that it was appropriate for the Director to have relied upon the September 20 incident for these reasons. First, what the Director actually relied upon was Mr. Ashton’s noncompliance with airport rules and regulations, for which he may or may not have been subject to arrest. The Director stated on page 15 of the DD, “Mr. Ashton’s conviction, while not an issue within the jurisdiction under 14 C.F.R. Part 16, supports the City’s argument that Mr. Ashton failed to abide by the terms and conditions of his Aircraft Storage Permit.” [FAA Exhibit 1, Item 12, page 15] The September 20 incident does just that — it supports the City’s argument that Mr. Ashton did not comply with the airport’s rules and regulations and supports the FAA’s finding as well — that the City did not violate the reasonableness and unjust discrimination provisions of 49 U.S.C.

¹⁴ The record supports that the Sponsor did follow-up on Mr. Ashton’s reports of other tenant’s violation of Airport rules. See Item 7, page 10 to the Director’s Determination (16-99-09). [FAA Exhibit I, Item 5, exhibit 3, page 30]

¹⁵ Mr. Ashton expressly acknowledged his arrest and conviction for criminal trespass in his Complaint. [Exhibit I, Item 3, page 2]

¹⁶ At the time the Director made his findings, the criminal charges against Mr. Ashton had not yet been dismissed. However, as will be discussed, the fact that Mr. Ashton’s charges were eventually dismissed is not relevant to the Director’s findings, nor mine.

47107(a)(1) and FAA grant assurance no. 22. The fact that Mr. Ashton was actually arrested and cited for criminal trespass is not material to the Director's findings, nor mine. If Mr. Ashton had not been arrested on September 20, his actions on that day would still appear to have been in violation of the airport's rules and regulations.¹⁷ Second, because it is not material to any FAA finding that Mr. Ashton was subject to arrest, it is not relevant that his charges were eventually dismissed.¹⁸ Again, from the point of view of the FAA's grant enforcement responsibilities, the September 20 incident is only relevant in that his conduct leading up to the arrest provides yet another example of Complainant's violation of the airport's rules and regulations.

As we have said in the DD and in pleadings related to Mr. Ashton's prior complaint, it is prudent for the City to condition tenant access to hangar facilities on compliance with local laws, which would include airport laws, minimum standards, and lease terms. I also affirm prior FAA statements to the effect that tenant violations of state or local laws (including airport laws, minimum standards, and lease provisions) could reasonably serve as a legitimate basis for the airport management to restrict that tenant's ability to conduct aeronautical activities on the airport.¹⁹

Mr. Ashton also argues that because his conviction was not yet a final judgment at the time the Director issued his decision, the Director should not have considered it. However, as stated above, the fact that Mr. Ashton was arrested and convicted is not relevant to the FAA's findings.

¹⁷The Concord Regional Airports Operations Code states at section 01:02(C)1, "Disorderly Conduct: No person shall be or become intoxicated or drunk, commit any disorderly, obscene or indecent act, or commit any act of nuisance..." At section 01 .02(C)6, the Code states, "Restricted Areas: No person shall enter upon the field area, utilities and service rooms or areas, or other areas as may be designated RESTRICTED..." [Item 17 to FAA Exhibit 1, Item 5, Exhibit 3] Mr. Ashton's lease contained a provision (Para. 10) that allowed the City or the Permittee to cancel the lease for any reason with ten (10) days written notice and states, "violations of any conditions hereof by Permittee... shall constitute cause of cancellation." It also contained a provision (Para 4A.) that stated, "permittee shall abide by the Airport rules of the City of Concord Aviation Department..." In addition, the Permit stated that the Permittee shall 'have 10 days from receipt of a notice of termination of the Permit within which to file an appeal to the Aviation Director. [FAA Exhibit 1, Item 3, exhibit Q]

¹⁸ However, we note, as does the City in its Reply to the Appeal, that the dismissal notice provided to us by Mr. Ashton indicates that his charges were not dismissed because there was "insufficient evidence to warrant prosecution" but because the "problem [was] being handled civilly." The notice also admonishes Mr. Ashton that "future problems will be handled criminally." [FAA Exhibit 1, Item 14]

¹⁹Perhaps it should be reemphasized that the grant assurance requirements enforced by the FAA concerning reasonableness, reasonable access, and unjust discrimination relate only to the aeronautical portions of the airport. The Part 16 preamble states, "... Most of an airport operator's obligations are intended for the benefit of aeronautical users. A complaint alleging that an airport operator's treatment of a nonaeronautical user violates such obligation would be dismissed even though the nonaeronautical user was directly and substantially affected by the alleged practice. For example, the assurance against unjust discrimination by an airport operator only applies to aeronautical users, so a complaint by a nonaeronautical user alleging unjust discrimination by an airport operator would be dismissed." 61 Fed. Reg. 53999 (Oct. 16, 1996). Although Mr. Ashton was an aeronautical user of the airport, his noncompliance with the airport's rules and regulations was non-aeronautical in nature (trespass, nuisance, photography in restricted areas, etc.).

Complainant next argues that the Federal Rules of Evidence prohibit reliance by the FAA on his criminal conviction. However, as stated above, the fact that Mr. Ashton was arrested and cited for criminal trespass is not relevant to the FAA's findings.

Concerning relevancy, the September 20 incident is relevant to the extent that it indicates an example in the record of Complainant's violation of airport rules and regulations. The record indicates that after having been warned by airport management that he was in a restricted area without permission, and by the police of his impending arrest for trespass (and given a chance to leave the area), Mr. Ashton refused to comply. Mr. Ashton's actions here are relevant. Again, Mr. Ashton's subsequent arrest is not relevant to the FAA's findings.

Whether lawful grounds existed for Mr. Ashton's arrest and whether the arrest represented malicious prosecution is not for the FAA to decide. As stated earlier, the FAA has no jurisdiction over local civil or criminal law or related prosecutions. Mr. Ashton's allegations concerning being singled out by the airport management and treated differently have already been addressed in FAA Docket No. 16-99-09.

As stated above, the fact that the charges against Mr. Ashton were dismissed has no bearing on whether the FAA may rely upon the fact that Complainant acted contrary to the City's airport rules and regulations. Even if this incident had never occurred, there are other examples in the record, as noted, that support the City's action.

The fact that Mr. Ashton believes that the legal elements of trespass law were not met in his case is not relevant to this FAA action. What is relevant is whether the City had a reasonable and not unjustly discriminatory basis to terminate Mr. Ashton's lease as an airport tenant. Complainant's conduct need not meet the common law definition of "trespass" to serve as one of the bases for the termination of his lease. The FAA need not prove any common law elements of trespass.

Although Mr. Ashton states that he followed established laws and airport rules, the record, as noted, indicates otherwise. [See FAA Exhibit 1, Item 3, page 3; FAA Exhibit 1, Item 3, page 6; FAA Exhibit 1, Item 3, exhibit C; FAA Exhibit 1, Item 16, page 3]

Therefore, the Acting Associate Administrator finds that Mr. Ashton's pattern of behavior, including the conduct that led to his arrest, supports the City's termination of Mr. Ashton's lease as being reasonable and not unjustly discriminatory. The Director's actual reference to evidence of criminal action under appeal was not inappropriate. The Director did not rely on inadmissible evidence.

- e. Many of the Agency's sub-findings, by way of which it reached the overall conclusion, were made arbitrarily and capriciously, or were contrary to law, made without observance of procedure required by law or harmfully prejudicial to Complainant's case. [FAA Exhibit I, Item 13, page 1]

The Complainant does not directly describe the sub-findings that he objects to in this category. However, the investigator's review of the Appeal reveals several objections

presented by the Complainant throughout the Appeal. Many of the Complainant's objections surround the FAA's alleged misinterpretation or inadequate reasoning regarding the Sponsor's alleged actions against the Complainant.

The Complainant states that "the Sponsor committed malicious prosecution and abuse of process." [FAA Exhibit 1, Item 13, page 10] The Complainant states that "the Sponsor used its management powers for punishment, when it should have sought the legal recourse available to it in the courts." [FAA Exhibit 1, Item 13, page 11]

The Acting Associate Administrator again finds again that the question of malicious prosecution by the City of Concord is clearly outside the jurisdiction of the FAA. Furthermore, the Acting Associate Administrator notes that the Complainant admitted to bothersome, nonaeronautical behavior. The Sponsor admitted to evicting the Complainant because of the nature of this bothersome, nonaeronautical behavior. Whether this nonaeronautical behavior was protected free speech is not within the jurisdiction or the expertise of the FAA. The Sponsor did not limit the Complainant's ability to use the Airport as an airport.

Other Complainant's objections surround the DD's alleged omission of issues that should have been addressed in this case.

The Complainant states that the "Agency ignored the issue of Ashton's wife. The Sponsor denied to Ashton's wife, a right to base her aircraft at the federally funded facility... If the Agency declines to rule, Mrs. Ashton likely will file her own complaint." [FAA Exhibit 1, Item 13, page 11] However, the Acting Associate Administrator notes that the Complainant's spouse is not a party to this Complaint, nor has the Complainant presented any evidence of this person's ability to or interest in using the Airport as an airport. The fact that the Complainant's spouse may be a half-owner of certain equipment is not relevant because only the Complainant is a party to the lease (in addition to the City). The fact that Complainant's spouse may be a part owner of Complainant's aircraft is not relevant.

The Complainant cites the Director for not analyzing the Complainant's allegations concerning an exclusive right violation, 49 U.S.C. 40103 (e). As noted, the Complainant failed to allege such a violation in his Complaint, raising it for the first time on appeal. [FAA Exhibit 1, Item 13, page 10]. However, as discussed above, we will address it here. As stated in the Applicable Law and Policy Section, the prohibition against the granting of an exclusive right only applies to aeronautical activity. It does not protect a user's ability to conduct nonaeronautical activity. Moreover, the Acting Associate Administrator upholds the Director's conclusion that the Sponsor had not unreasonably denied access or unjustly discriminated. The Acting Associate Administrator has not found that the Complainant has shown that others were afforded greater rights to use the Airport as an airport, in the sense that another user was allowed to conduct admittedly bothersome, nonaeronautical activity without restriction. Nor has the Acting Associate Administrator found that the restrictions placed on Mr. Ashton unreasonably denied him the use of the Airport as an airport. Because the Complainant failed to raise the exclusive

rights issue in his Complaint, the Director appropriately declined to discuss this issue. However, as discussed, the prohibition on exclusive rights does not apply to non-aeronautical conduct.

Therefore, the Acting Associate Administrator finds that the Director did not conclusively rely upon any findings or sub-findings that were made arbitrarily and capriciously, were contrary to law, were made without observance of procedure required by law or were harmfully prejudicial to Complainant's case. [FAA Exhibit 1, Item 13, page 1]

Findings and Conclusion

As stated in the Applicable Law and Policy section above, the grant assurances are binding commitments to the Federal government designed to assure that the public interest will be served, in exchange for financial assistance to an airport sponsor for airport development. They do not preempt local rules or laws governing nonaeronautical behavior, nor do they prevent the airport from exercising proprietary powers, such as determining how to structure the leasing of property on the airport. They require, among other things, that the Sponsor structure such powers, as expressed in reasonable rules, standards, terms and conditions, so as not to degrade the value of the Federal taxpayers' investment in the Airport.

Toward that end, it was reasonable for the Sponsor to enact rules, regulations and local laws to promote safety and efficiency and to serve the aeronautical interests of the public. It is also reasonable for the Sponsor to enforce these rules upon its tenants, including Mr. Ashton, and to subsequently limit his access to restricted areas of the Airport. The relevant Federal obligations here address a person's use of the airport as an airport- in other words- aeronautical activity. Mr. Ashton has not been prevented, and is not currently being prevented, from using the public areas of the airport for aeronautical purposes.

Finally, the FAA would expect a sponsor to protect its tenants from nonaeronautical behavior that might have the effect of diminishing safety or reducing the efficient use of aeronautical facilities, impede the interests of the public in civil aviation or constitute a nuisance, through rules of conduct and reasonable terms in a lease. The Sponsor's response to Mr. Ashton's admitted nonaeronautical behavior is reasonable. The Director had previously determined in Mr. Ashton's prior Complaint (Docket #16-99-09) that the:

Sponsor may be acting within the letter and spirit of the grant assurances by restricting the nonaeronautical activity of an individual, if that activity has the effect of interfering with the safe and efficient enjoyment of the conduct of aeronautical activities by users of the Airport. Even if the Complainant were to be exonerated of any alleged violation of state or local law, he would still have to show that his use of the Airport as an airport was subject to unreasonable terms or restrictions, or that another similar aeronautical user was provided with a preference amounting to unjust economic discrimination. [FAA Exhibit 1, Item 8, page 32]

Based on the foregoing discussion and analysis, the Acting Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy as described above. The Appeal does not provide a sufficient basis, in fact or in law, for reversing the Director's Determination with regard to the City of Concord's obligations under 49 USC §40103(e), §47107(a) or its grant assurances. Furthermore, the FAA does not have jurisdiction to determine the Complainant's claims to constitutional protections of his rights relating to nonaeronautical behavior at the Airport. Furthermore, the Acting Associate Administrator finds that the Director did not err by not discussing the issue of exclusive rights; nor did he err by not considering the Complainant's spouse as a party to the Complaint.

ORDER

The FAA dismisses this Appeal and affirms the Director's Determination pursuant to 14 CFR Part 16.33. This Decision constitutes the final decision of the Acting Associate Administrator for Airports, pursuant to 14 CFR 16.33(a), under the authority of 49 U.S.C. Section 47122.

APPEAL RIGHTS

A person disclosing a substantial interest in this final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. Section 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of Appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued.

Woodie Woodward
Woodie Woodward
Acting Associate Administrator for
Airports

04/17/01
Date