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

BOCA AIRPORT, INC., d/b/a BOCA AVIATION COMPLAINANT v. BOCA RATON AIRPORT AUTHORITY RESPONDENT	FAA Docket No. 16-00-10

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

Boca Airport, Inc. d/b/a Boca Aviation (hereinafter Complainant/Boca Aviation), through its counsel, has filed a complaint against the Boca Raton Airport Authority (hereinafter Respondent/Authority). The Complaint alleges that Respondent, in operating the Boca Raton Airport (Airport) has engaged in activity contrary to its Federal obligations.

The record in this case establishes that as a result of a complaint filed previous to and separate and apart from the instant complaint, this Office concluded that the Respondent was in violation of its Federal obligations prohibiting the Authority from granting an exclusive right. The Authority was found in violation of its Federal obligations because it had leased the only remaining undeveloped parcel of land at issue in this Complaint to Boca Aviation, Inc. (the instant Complainant), the sole fixed base operator (FBO)[1] at the Boca Raton Airport. *See Boca Raton Jet Center v. Boca Raton Airport Authority FAA Docket No. 16-97-06.* Consequently, this Office ordered the Authority to submit a Corrective Action Plan (CAP) to eliminate the continuation of an exclusive right to Boca Aviation. The Authority submitted a CAP to this Office establishing that the Authority, under its proprietary rights, would construct and operate several aeronautical facilities on the last remaining 15 acres of undeveloped land at the Boca Raton Airport. Consequently, this Office issued a Final Director's Determination accepting the CAP proposed by the Authority as adequate to extinguish the continuation of the exclusive right granted to Boca Aviation, and dismissing the Complaint filed by Boca Jet.

Subsequent to the FAA's acceptance of the CAP, the Authority passed a resolution to amend the CAP to permit the issuance of a Request for Proposals (RFP) for a qualified proposer to lease, and improve for use the 15-acre parcel; Premier Aviation of Boca, LLC (Premier), among other proposers, responded to the Authority's RFP; and the Authority voted to negotiate with Premier for the lease of the 15 acres and ultimately signed a lease agreement with Premier.

The Complainant maintains that it is directly and substantially affected by the Respondent's violation of and failure to comply with the Final Director's Determination regarding FAA Docket No. 16-97-06. According to the Complainant, the Respondent, by leasing the remaining 15 acres of land at the Airport to a competing FBO, and by various other actions, has violated 49 U.S.C. Section 47107 *et seq.*, including but not limited to 49 U.S.C. Section 47107(a)(1) and (5) and related Grant Assurance No. 22 regarding unjust economic discrimination; 49 U.S.C. Section 47107(a)(13) and related Grant Assurance No. 24 regarding fee and rental structures; 49 U.S.C. Section 47107(b) and related Grant Assurance No. 25 regarding airport revenues; 49 U.S.C. Section 47107(a)(16) and related Grant Assurance No. 29 regarding airport layout plans; and the airport sponsor Grant Assurance No. 1 ("General Federal Requirements"), No. 5 ("Preserving Rights and Powers"), No. 6 ("Consistency with Local Plans"), No. 7 ("Consideration of Local Interests"), and No. 8 ("Consultation with Users").

The Respondent denies the Complainant's allegations and asserts that the FAA should dismiss the Complaint because the Complainant fails to state a cause of action upon which relief may be granted and/or alleges injury that is speculative

[1] A fixed-base operator (FBO) is a commercial entity, providing aeronautical services, such as maintenance, storage, ground and flight instruction, etc., to the public. [FAA Order 5190.6A, Appendix 5]

and thus not ripe for review. Generally, the Respondent contends that it has complied with the terms of the Final Director's Determination in the prior complaint proceedings, and has done so in order to comply with Federal law and the FAA grant assurance prohibiting the granting of an exclusive right to any entity providing aeronautical services to the public, pursuant to 49 U.S.C. §§ 40103 and 47107(a)(4).

The decision in this matter is based on applicable law and FAA policy and review of the arguments and supporting documentation submitted by the parties. With respect to the allegations presented in this Complaint, under the specific circumstances at the Boca Raton Airport as discussed below, and based on the evidence of record in this proceeding, I find that the Respondent is not in violation of its Federal obligations. Additionally, I find that the alternative Corrective Action Plan implemented by the Respondent with respect to FAA Docket No. 16-97-06 to be consistent with the express intent of the Final Director's Determination issued in that proceeding and its obligations under the grant assurances. The changes in the Corrective Action Plan with respect to the Complainant's lease were a matter of local law, which were upheld by the appropriate court.

II. THE AIRPORT

Boca Raton Airport is a public-use airport located in Boca Raton, Florida. The airport is owned by the state of Florida and operated by the Boca Raton Airport Authority. The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of l982 (AAIA), as amended, 49 U.S.C. Section 47101, *et seq.* [FAA Exhibit 1, item 1]

During 1997, there were 261 based aircraft and 146,000 annual operations at the airport. Since 1984, the airport sponsor has entered into four AIP grant agreements with the FAA and has received a total of $740,000 in federal airport development assistance. In 1989, the airport received its most recent AIP grant in the amount of $476,729 to construct an apron. [FAA Exhibit 1, Item 2]

III. BACKGROUND

The majority of the complaint comprises Boca Aviation's allegation that because the Respondent failed to develop the Airport according to the terms of a 19th amendment to the Master Lease between Complainant and the Respondent, that "the Authority [Respondent] has/is shortchanging its customers, the flying public and the Boca Raton business community by not constructing, developing and operating the facilities deemed necessary by the Authority and its consultant." Boca Aviation alleges that "[the Respondent's] failure is jeopardizing the

continued viability of the Airport and the grants and contributions previously made." [FAA Exhibit 1, Item 3, p. 11]

The 19th Amendment to the lease between Complainant and Respondent, at issue in the instant complaint, is a direct result of the prior complaint filed with the FAA, separate and apart from this proceeding. *See Boca Raton Jet Center v. Boca Raton Airport Authority, FAA Docket No. 16-97-06.* In that proceeding, the FAA found the Respondent in violation of its Federal obligations regarding unjust economic discrimination and exclusive rights and related grant assurances #22 and #23, respectively. The 19th Amendment to Complainant's lease was a part of Respondent's Corrective Action Plan submitted to the FAA to cure the violations found in connection with the proceedings under FAA Docket No. 16-97-06.

According to the Complainant, Boca Aviation agreed to the 19th Amendment to its lease because it would be in the best interest of the airport, the public and it's users by providing for the reinstatement of airport financial aid and the resolution of the then Part 16 action. [FAA Exhibit 1, Item 3, p. 8] The 19th Amendment was an acceptable corrective action to the FAA in that it served to require that Boca Aviation relinquish any and all rights in to the last remaining parcel of land at the Airport. [FAA Exhibit 1, Item 41, p. 3] The 19th Amendment provided that the Authority, using its proprietary rights, would develop and provide certain aeronautical facilities.

A. FAA Docket No. 16-97-06, Boca Raton Jet Center v. Boca Raton Airport Authority

On July 19, 1997, the Boca Raton Jet Center, Inc. (Boca Jet), filed a formal complaint against the Boca Raton Airport Authority in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (Part 16), alleging that it was denied the opportunity to operate as an FBO at the Boca Raton Airport.

On December 22, 1997, this Office issued a Director's Determination, FAA Docket No. 16-97-06, finding that by denying a lease to Boca Jet, and leasing the last remaining parcel of undeveloped land (the 15 acres) to Boca Aviation -- the only full service fixed based operator at the Airport -- via a fifteenth (15) amendment to its lease, the Boca Raton Airport Authority was in noncompliance with the provisions regarding exclusive rights as set forth in 49 U.S.C. Section 47107(a)(4), and the Authority's Federal grant agreements implementing 49 U.S.C. §§ 40103(e) and 47107(a)(4). This Office directed the Boca Raton Airport Authority to present a plan for FAA approval on how it intended to eliminate the continuation of the exclusive right to Boca Airport, Inc., d/b/a Boca Aviation (instant Complainant), or face termination of eligibility for new FAA grants. [FAA Exhibit 1, Item 40]

On April 17, 1998, the Authority submitted a Revised Corrective Action Plan but requested that the FAA delay commenting until negotiations with Boca Aviation were complete. [FAA Exhibit 1, Item 41, p. 1]

On July 24, 1998, the Authority submitted an amendment to its lease with Boca Aviation (18th amendment), dated July 17, 1998. This amendment did not satisfy the requirements of the Director's Determination. First, the amendment did not meet the requirement to eliminate the exclusive right to Boca Aviation as determined in the Director's Determination, because it gave Boca Aviation the right to approve any aeronautical use not described in the amendment. Secondly, the approval rights granted to Boca Aviation in the 18th amendment violated provisions of the grant assurance requiring the Authority to preserve the rights and powers of the airport sponsor, by giving Boca Aviation the power to approve new aeronautical activities at the airport. [FAA Exhibit 1, Item 41, p. 2]

On September 22, 1998, the Authority submitted the 19th Amendment to Boca Aviation's Lease and Operating Agreement. The changes to Boca Aviation's lease served to meet the conditions Ordered in the initial Director's Determination; i.e. to extinguish the continuation of an exclusive right granted to Boca Aviation. The 19th Amendment was acceptable to the FAA in that it served to require that Boca Aviation relinquish any and all rights in and to the 15-acre parcel at issue in this proceeding. [FAA Exhibit 1, Item 41, p. 3]

The 19th amendment states, among other things, that:

> The Lessor and Lessee acknowledge and agree that, upon (a) conceptual approval by the Federal Aviation Administration (FAA), in writing, of the interim change to the Airport Layout Plan set forth in Section 2...(b) approval by the FAA, in writing, of this Nineteenth Amendment, (c) termination and final dismissal of the Part 16 Action (Docket No. 16-97-06) by the FAA and (d), execution of this Nineteenth Amendment by Lessor and Lessee, the Fifteenth Amendment shall be terminated and cancelled, and the parties hereto shall be released from their respective obligations. The Lessor and Lessee acknowledge and agree that the conceptual approval by the FAA of the interim change to the Airport Layout Plan as set forth...is specific inducement to the Lessee to terminate the Fifteenth Amendment and extinguish its rights thereunder.

Additionally, Section 2 of the 19th amendment states that:

> Interim Change to the Airport Layout Plan. Within fifteen (15) days of the date of this Nineteenth Amendment, the Lessor shall submit an interim change to the Airport Layout Plan relative to the lands previously utilized for the golf driving range to the FAA for its approval, which interim change in the Airport Layout Plan shall

provide for the construction, development and operation by the Lessor of at least seventy thousand (70,000) square feet of hangar space containing T-hangar units and corporate hangars, approximately twenty four thousand (24,000) square feet of hangar space to be used as community or corporate hangar space or aircraft maintenance space (including such additional aeronautical services as deemed desirable to support viable commercial operations, as long as such additional services are offered in accordance with the Minimum Standards of the Airport Authority), a wash rack, together with an Airport Authority operated operations/administration building, an Airport Authority operated training building, with appurtenant parking.

[FAA Exhibit 1, Item 3, Exhibit 18]

On August 20, 1999, this Office issued a Final Director's Determination providing that the Authority's implementation of the provisions of the 19th Amendment will resolve the issue of the exclusive right as previously granted to Boca Aviation. Accordingly, this Office dismissed the Complaint filed under Docket No. 16-97-06. [FAA Exhibit 1, Item 41] That Final Director's Determination was never appealed pursuant to 14 CFR § 16.33(b). *See* also 14 CFR 16.33(e) and 16.247.

On November 17, 1998, the FAA Orlando Airports District Office issued a letter to the Respondent indicating that the 19th Amendment to the Boca Raton Airport Authority lease with Boca Aviation, d.b.a. Boca Aviation, and the interim change to [the Authority's] ALP had been reviewed and approved.[2] [FAA Exhibit 1, Item 13, Exhibit 68]

B. The Instant Complaint: Boca Airport, Inc., d/b/a Boca Aviation v. Boca Raton Airport Authority (16-00-10)

On January 25, 2000, the Authority adopted Resolution #8 to amend the Corrective Action Plan submitted to the FAA in conjunction with the prior Complaint. Resolution #8 permitted the Authority to disseminate a request for proposals from private commercial aeronautical service providers for the development of the 15-acre parcel referred to in the Final Director's Determination of August 20, 1999. [FAA Exhibit 1, Item 3, Exhibit 25] Thus, the 15-acre parcel would be developed and operated by a fixed based operator and not by the Authority, as indicated in the 19th Amendment to Boca Aviation's lease.

[2] This approval to an interim change is the conceptual approval referred to in the 19th Amendment to Boca Aviation's lease, discussed above, that provides for the "specific inducement to the Lessee to terminate the Fifteenth Amendment." It depicts the facilities to be developed by the Respondent under its proprietary powers as set forth in the 19th Amendment and the Final Director's Determination relating to Boca Raton Jet Center v. Boca Raton Airport Authority, FAA Docket No. 16-97-06. As discussed below, the FAA Orlando ADO approved a subsequent change to the ALP on December 28, 2000, as a result of the Respondent's decision to allow Premier Aviation to develop the 15-acre parcel.

On or about January 24, 2000, Boca Aviation filed a lawsuit against the Authority seeking to enforce the 19th Amendment to its lease. (*Boca Airport, Inc., v. Boca Raton Airport Auth., No. 00-00777 AE (Fla. 15th Cir. 2000)*. [FAA Exhibit 1, Item 3, p. 17]

On February 10, 2000, the Respondent entered into an agreement with a law firm for legal representation in connection with the lawsuit styled Boca Airport Inc. v. Boca Raton Aviation Authority, Case No. 00-00777 AE. [FAA Exhibit 1, Item 3, Exhibit 33] The Respondent subsequently filed a counter claim. [FAA Exhibit 1, Item 10, p. 49] The Complainant alleges that the Respondent's counter claim establishes a violation of Grant Assurance No. 22, "Economic Nondiscrimination," because the Complainant had not filed counter claims against other tenants in similar circumstances. The Complainant also alleges that the attorney fees (i.e. a "$500,000 bounty") that the Respondent agreed to pay the lawyers if they succeeded in nullifying the Complainant's long-term lease are exorbitant and not legitimate operation costs of the airport, thereby violating Grant Assurance No. 25, "Airport Revenue".

On March 15, 2000, the Authority issued an RFP to Lease and Improve State Owned Property Referred to as the 15 Acres. The RFP established that proposals were due prior to 2:00 PM on May 15, 2000. [FAA Exhibit 1, Item 3, Exhibit 26] The Complainant alleges that the Respondent's decision to issue an RFP is contrary to the requirements of the Final Director's Determination issued in the proceedings under FAA Docket No. 16-97-06 and results in a violation of Grant Assurance No. 1, "General Federal Requirements."

On April 17, 2000, the Complainant filed an amended complaint in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, alleging that the Authority had evidenced an intent to breach its obligations under the 19th Amendment to its lease by requesting proposals from third parties to construct, develop and operate the 15 acres of land. [FAA Exhibit 1, Item 10, Exhibit 2]

On May 15, 2000, Premier Aviation of Boca Raton, LLC, (Premier) submitted its proposal in response to the Request for Proposals (RFP). [FAA Exhibit 1, Item 3, Exhibit 29]

On May 17, 2000, the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, held that the 19th Amendment was unambiguous, and as a matter of law, the Authority could assign or subcontract its rights and obligations to a third party. [FAA Exhibit 1, Item 10, Exhibit 1]

On May 23, 2000, the Complainant filed a motion for rehearing with the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. [FAA Exhibit 1, Item 10, Exhibit 2]

On May 24, 2000, the Complainant's motion for rehearing before the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, was denied. [FAA Exhibit 1, Item 10, Exhibit 2]

On June 2, 2000, the Respondent's RFP Committee ranked the Premier Aviation proposal as "first" of three proposals submitted. [FAA Exhibit 1, Item 10, p. 44]

On June 12, 2000, the Complainant filed a Motion for Temporary Injunction in the United States District Court for the Southern District of Florida, seeking a declaratory judgment that the Respondent's enactment of Resolution #8, which awards development rights to third parties, violated the Complainant's rights under the Contracts Clause of the United States Constitution. [FAA Exhibit 1, Item 10, Exhibit 2]

On June 12, 2000, the Boca Raton City Council passed a resolution that found, among other things, that the RFP to lease Airport land for the proposed development use of the land is inconsistent with the City's objectives for the Airport. [FAA Exhibit 1, Item 9, Exhibit 37] The Complainant alleges that the city council resolution establishes a violation of Grant Assurance No. 6, "Consistency with Local Plans," and No. 7, "Consideration of Local Interests." The Respondent denies this allegation.

On June 12, 2000, Boca Aviation filed this instant complaint to protest the Respondent's decision not to develop the last remaining parcel of aeronautical use land at the Airport under its proprietary rights as had been defined in the 19th amendment to the lease between Boca Aviation and the Authority. Boca Aviation alleges that because the Respondent chose to issue a Request for Proposals (RFP) for development of the 15-acres that "...the Authority is short changing its customers, the flying public and the Boca Raton business community by not constructing, developing and operating the facilities deemed necessary by the Authority and its consultant." [FAA Exhibit 1, Item 3, page 11]

On June 13, 2000, the Respondent chose the Muvico/Lake joint venture (i.e. Premier proposal) as the successful bidder and entered into contract negotiations regarding the lease of the 15-acre parcel. [FAA Exhibit 1, Item 9, p. 2 and Item 10, p. 52] The Complainant alleges that Premier's proposal establishes that only half of the 15-acre parcel will be developed for aviation use in violation of the Respondent's Airport Minimum Standards and Grant Assurance No. 19, "Operation and Maintenance," No. 29. "Airport Layout Plan," and No. 5, "Preserving Rights and Powers. The Respondent denies these allegations.

On June 13, 2000, the Authority obtained an ex parte hearing before the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, seeking an temporary injunction without notice to prevent the City from enforcing or relying

on the resolution passed on June 12, 2000. The court entered a temporary injunction without notice.

On June 16, 2000, the City of Boca Raton appealed the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County's order issuing the temporary injunction. [FAA Exhibit 1, Item 18]

On June 19, 2000, the Respondent entered into a license agreement with Muvick Entertainment, LLC (a co-participant in the Premier joint-venture) to construct temporary parking improvements on a portion of the 15-acre parcel at issue. The "RECITALS" of the license agreement indicate that Muvico desires to utilize 85,586 square feet of the undeveloped 15-acre parcel for the construction of the temporary parking facility. [FAA Exhibit 1, Item 10, Exhibit 10] The Complainant alleges that the Authority's approval was given without requiring the payment of rent for use of the parcel and without an interim change to the ALP, in violation of Grant Assurance No. 24, "Fee and Rental Structure," and No. 29, "Airport Layout Plan."

On June 21, 2000, the FAA issued a Notice of Extension of Time extending the issuance of the Notice of Docketing or Dismissal of this complaint to July 21, 2000. [FAA Exhibit 1, Item 5]

On June 28, 2000, the United States District Court for the Southern District of Florida denied the Complainant's Motion for Temporary Injunction and entered final judgement for the Respondent, noting that Boca Raton Airport Authority had a strong public interest in introducing competition and preventing the perpetuation of a monopoly at the Boca Raton Airport facilities. [FAA Exhibit 1, Item 10, Exhibit 2]

On July 3, 2000, the Complainant filed a Motion for Leave to File an Amendment to the Formal Complaint. The Amended Complaint provided an update on facts occurring subsequent to the date the initial complaint was filed and additional arguments to support the Complainant's alleged violations.[3] [FAA Exhibit 1, Items 8 and 9]

On July 24, 2000, the FAA issued an Order, "Notice of Docketing," advising that the Complaint has been docketed under FAA Docket No. 16-00-10, and requesting that the Respondent object to or answer the Amended Complaint. [FAA Exhibit 1, Item 6]

On August 16, 2000, the Authority filed a Motion to Dismiss, Memorandum in Support, and Answer to the Amended Complaint. [FAA Exhibit 1, Item 10]

[3] The motion is granted and the amended complaint is admitted to the record.

On August 22, 2000, Boca Aviation filed a Motion for Extension of Time to File its Reply and Answer in Opposition to the Motion to Dismiss. [FAA Exhibit 1, Item 11]

On August 30, 2000, the counsel for the Respondent sent a letter to the FAA Office of Chief Counsel in opposition to the Complainant's request for an extension of time to file a Reply and Answer to the Motion to Dismiss. [FAA Exhibit 1, Item 12]

On September 14, 2000, Boca Aviation filed an Answer to Boca Raton Airport Authority's Motion to Dismiss and Reply to the Authority's Answer to Boca Airport, Inc.'s Formal Complaint. [FAA Exhibit 1, Item 13]

On September 25, 2000, Boca Raton Airport Authority filed a Rebuttal in Support of its Motion to Dismiss, Memorandum in Support, and Answer to Part 16 Complaint. [FAA Exhibit 1, Item 17]

On September 26, 2000, Boca Aviation filed a Notice of Filing Supplemental Authority providing the September 20, 2000, decision of the Fourth District Court of Appeal reversing the Ex Parte Temporary Injunction entered on June 13, 2000, by the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach. The *ex parte* injunction had enjoined enforcement of the Boca Raton City Council Resolution concerning the Boca Raton Airport. [FAA Exhibit 1, Item 18]

On September 28, 2000, counsel for the Respondent sent FAA a letter with a copy of the executed lease between Boca Raton Airport Authority and Premier Aviation of Boca Raton, L.L.C. [FAA Exhibit 1, Item 19]

On September 29, 2000, the Respondent filed a Motion for Leave to File Additional Exhibit consisting of a copy of a check for $5,705.20 from Muvico to the Authority. [FAA Exhibit 1, Item 20]

On October 4, 2000, the FAA Orlando Airports District Office sent a letter to the Respondent indicating that it had no objection to the proposed lease agreement between the Respondent and Premier Aviation, the successful RFP bidder, for the lease of the 15-acres of airport land at issue in this proceeding. [FAA Exhibit 1, Item 21]

On October 17, 2000, the Complainant filed an Answer to Boca Raton Airport Authority's Motion for Leave to File Additional Exhibit arguing that the Motion should be denied.[4] [FAA Exhibit 1, Item 22]

On October 27, 2000, the Complainant filed a Motion to Disqualify, seeking to disqualify FAA employee, Ms. Kathleen Brockman, from participation in this

[4] The motion is granted and Exhibit 22 is admitted later in this decision.

matter. The Complainant alleged that statements made by Ms. Brockman demonstrate that she has prejudged the central issues. [FAA Exhibit 1, Item 25]

On November 11, 2000, the Respondent filed an Opposition to the Motion to Disqualify. [FAA Exhibit 1, Item 26]

On December 18, 2000, the Respondent filed a Motion for Leave to File Supplemental Exhibit consisting of a copy of a portion of the written submission from Premier Aviation that was intended to be included in support of the Respondent's Motion to Dismiss, Memorandum in Support, and Answer to the Complaint. [FAA Exhibit 1, Item 27]

On December 27, 2000, the Complainant filed an Answer to the Respondent's Motion for Leave to File Supplemental Exhibit arguing that the motion to supplement should be denied because the extremely late filing would deprive Boca Aviation of the ability to respond, which is contrary to 14 C.F.R. §§ 16.23(e) and (j). In addition, the Complainant alleged serious concerns as to the identity, authenticity and dissemination of the evidence.[5] [FAA Exhibit 1, Item 28]

On December 28, 2000, the FAA Orlando Airports District Office conditionally approved the Airport Layout Plan for the 15-acres at issue in this proceeding. [FAA Exhibit 1, Item 30]

On January 9, 2001, this office issued an Order denying the Complainant's Motion to Disqualify. The Order stated "Boca Aviation has failed to demonstrate that the investigator, Kathleen Brockman, has departed from her public duty to conduct the investigation in an objective manner or that she has performed her job in anything less than a professional fashion. The e-mail messages, which form the basis of the Motion to Disqualify, do not show bias requiring that the investigation of the complaint be reassigned to another investigator or that the investigator, Kathleen Brockman, be disqualified." [FAA Exhibit 1, Item 32]

On January 17, 2001, counsel for the Complainant sent a letter to this Office requesting a 120-day extension of time for the issuance of our determination of this matter, indicating that the Complainant had been exploring the possibilities of settlement; and that an amicable resolution to these matters would be advantageous to the FAA, the public, and the parties themselves. [FAA Exhibit 1, Item 33]

On January 19, 2001, the Respondent sent a letter to this Office indicating that there were no settlement discussions between the parties; and that it was in the best interest of all parties to have a timely determination from this Office.[6] [FAA Exhibit 1, Item 34]

[5] The Respondent's motion is denied and Exhibit 23 is not admitted.

[6] Since the Respondent does not agree to an extension of time to explore settlement, the Complainant's request is denied.

On February 26, 2001, the Complainant sought review of FAA's December 28, 2000, conditional approval of the Respondent's Airport Layout Plan in the United States Court of Appeals for the 11th Circuit.

IV. ISSUES

Upon review of the record as summarized above in the Background Section and listed in the attached Index of Administrative Record, the FAA has determined that the following issues require analysis in order to determine Respondent's compliance with applicable Federal law and FAA policy:

1. Whether the Respondent, by issuing a Request for Proposals for a qualified proposer to lease and improve for use the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport, is in violation of Grant Assurance No. 1, "General Federal Requirements"; No. 6, "Consistency with Local Plans"; No. 7, "Consideration of Local Interest"; and No. 8, "Consultation with Users".

2. Whether the Respondent, by accepting a development proposal that proposes the non-aeronautical use of a portion of the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport parcel, is in violation of Grant Assurance No. 19, "Operation and Maintenance,"49 U.S.C. 47107(a)(16) and related Grant Assurance No. 29, "Airport Layout Plan," and Grant Assurance No. 5, "Preserving Rights and Powers."

3. Whether the Respondent, by (a) prohibiting Boca Aviation from competing for the 15-acre parcel at issue, (b) filing a counter claim against Boca Aviation in state court proceedings, and (c) approving and negotiating with Premier Aviation for the construction of a site plan that is allegedly in violation of the Airport Minimum Standards, is in violation of 49 U.S.C. § 47107(a)(1) and (5) and related Grant Assurance No. 22 regarding unjust economic discrimination.

4. Whether the Respondent, by approving the use of a portion of the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport as a temporary parking facility without requiring the payment of rent, is in violation of 49 U.S.C. Section 47107(a)(13) and related Grant Assurance No. 24 regarding fee and rental structures.

5. Whether the Respondent, by agreeing to pay a bonus of $500,000 to private law firms if they successfully terminate the Respondent's lease with the Complainant, is in violation of 49 U.S.C. § 47107(b)(1) and related Grant Assurance No. 25 regarding airport revenue.

V. APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design; construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, *Airport Compliance Requirements*, 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. FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. FAA Order 5190.6A is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. FAA Order 5190.6A, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47107(a), *et seq.*, sets forth requirements to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are

included as assurances in every airport improvement grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring airport sponsor compliance with Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's investment in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

General Federal Requirements

Grant Assurance No. 1, "General Federal Requirements," states:

> It [the airport sponsor] will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to . . .
> 14 CFR Part 16 – Rules of Practice For Federally Assisted Airport Enforcement Proceedings.

Airport Owner Rights and Responsibilities

Grant Assurance No. 5, "Preserving Rights and Powers," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. Section 47107(a), et seq., and requires, in pertinent 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."

FAA Order 5190.6A describes the responsibilities under Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. *See* FAA Order 5190.6A, Secs. 4-7 and 4-8.

Consistency with Local Plans

Grant Assurance No. 6, "Consistency with Local Plans," states:

> The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport.

Consideration of Local Interest

Grant Assurance No. 7, "Consideration of Local Interest," states:

> It [the airport sponsor] has given fair consideration to the interest of the communities in or near where the project may be located.

Consultation with Users

Grant Assurance No. 8, "Consultation with Users," states:

> In making a decision to undertake any airport development project under Title 49, United States Code, it [the airport sponsor] has undertaken reasonable consultations with affected parties using the airport at which project is proposed.

Operation and Maintenance of the Airport

Grant Assurance No. 19, "Operation and Maintenance," implements 49 U.S.C. 47107(a)(7), and requires, in pertinent part, that the sponsor of a Federally-obligated airport assure:

> The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes . . .

> In furtherance of this assurance, the sponsor will have in effect arrangements for-
>
> (1) Operating the airport's aeronautical facilities whenever required,
>
> (2) Promptly marking and lighting hazards resulting from airport conditions,
>
> (3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.
>
> Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor."

The owner should adopt and enforce adequate rules, regulations or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, we advise that adequate rules covering, *inter alia*, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection be established. See FAA Order 5190.6A, Sec. 4-7(b).

Economic Nondiscrimination

Grant Assurance No. 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) 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)

Assurance 22 also provides specifically that

> Each fixed-based operator at any airport owned by the sponsor shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators

> making the same or similar uses of such airport and utilizing the same or similar facilities. Assurance 22(c)

Assurance 22 further requires that the federally obligated airport sponsor

> 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...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)

Assurance 22(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.

The FAA Order 5190.6A describes in detail the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance.

Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. *See* FAA Order 5190.6A, Sec. 3-12.

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies an aeronautical activity access to a public-use airport. Such determinations often include consideration of whether failure to meet the qualifications of the standard is a reasonable basis for such denial and/or whether the application of the standard results in an attempt to create an exclusive right. *See* FAA Order 5190.6A, Sec. 3-17(b).

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the airport users. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. *See* FAA Order 5190.6A, Sec. 3-17(c).

FAA Order 5190.1A, *Exclusive Rights at Airports*, provides that an airport sponsor may impose minimum standards on those engaged in aeronautical activities; however, an unreasonable requirement or any requirement which is applied in an unjustly discriminatory manner could constitute the grant of an exclusive right. *See* FAA Order 5190.1A, Para. 11.c.

Airport Lease and Use Agreements

The FAA considers the prime obligation of a federally assisted airport owner to be the operation of the airport for the use and benefit of the public. The public benefit is not assured merely by keeping the runways open to all types, kinds and classes of aircraft operations; we also consider it important that flight services and flight support services be available to airport users, to the extent possible.

While an airport owner is not required to construct hangars and terminal facilities, it has the obligation to make available suitable areas or space on reasonable terms to those who are willing and qualified to offer flight services to the public (*e.g.*, air carrier, air taxi/charter, flight training, etc.) or support services (*e.g.*, fuel, storage, tie-down, flight line maintenance, etc.) to aircraft operators. Unless it provides these services itself, the airport owner has a duty to negotiate in good faith for the lease of such premises as may be available for the conduct of aeronautical activities. *See* FAA Order 5190.6A, Sec. 4-15.

The FAA's interest in lease and use agreements is confined to their impact on the owner's obligations to the Federal Government. For example, the FAA is concerned that the airport owner establish and maintain a fee and rental structure for facilities and services that will make the airport as self-sustaining as possible. The airport owner is obligated to make the facilities available on fair and reasonable terms without unjust discrimination. *See* FAA Order 5190.6A, Sec. 6-3(d).

The type of document or written instrument used to grant airport privileges is the sole responsibility of the airport owner. In reviewing such documents, the FAA will evaluate the nature of the arrangement established; determine whether such arrangement has the effect of granting or denying rights to use the airport facilities contrary to the requirements of law and the applicable Federal obligations; and to identify any terms and conditions of such arrangement which could prevent the realization of the full benefits for which the airport was constructed. *See* FAA Order 5190.6A, Sec. 6-3(a).

Prohibition Against Exclusive Rights

Title 49 U.S.C. § 40103(e), in which Congress recodified and adopted substantially unchanged the exclusive rights prohibition prescribed in Section 303 of the Civil Aeronautics Act of 1938 and subsequently included in Section 308(a) of the Federal Aviation Act of 1958, as amended, prohibits exclusive rights at

certain facilities and states, in pertinent part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended."

Title 49 U.S.C. § 47107(a)(4) requires that "a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport."

Grant Assurance No. 23, "Exclusive Rights," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and 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 person providing, or intending to provide, aeronautical services to the public...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...and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.

In FAA Order 5190.1A, *Exclusive Rights At Airports*, issued October 10, 1985, the FAA published its exclusive rights policy which defined exclusive rights as proscribed by the various relevant statutes, broadly identified the aeronautical activities subject to the statutory prohibition against exclusive rights, and enunciated FAA policy regarding the extent and duration of the exclusive rights prohibition.

Section 303 of the Civil Aeronautics Act of 1938, as amended, provided that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." Section 308(a) of the Federal Aviation Act of 1958, as amended, adopted this language intact and expanded the proscription to include the providing of services at an airport by a single FBO, *i.e.*, commercial aeronautical activity, subject to certain specific conditions. *See* FAA Order 5190.1A, para. 7.a.

While federally assisted public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, established FAA policy provides that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Nonetheless, we recognize that, under some circumstances, a person may be denied the right to engage in an aeronautical activity at an airport for reasons of airport safety, efficiency and

utility. The justification for such restrictions, if challenged, must be fully documented by the airport owner.

Fee and Rental Structure

Grant Assurance No. 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of 49 U.S.C. 47107(a)(13). It provides, in pertinent part, that "It [the sponsor] 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."

The FAA's Policy and Procedures Concerning the Use of Airport Revenues (64 Fed. Reg., 7696) provides, among other things, the Federal Aviation Administration's policy on the maintenance of a self-sustaining rate structure by Federally-assisted airports. It provides, in relevant part, that:

> Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible. (Section VII(B)(1))
>
> If market conditions or demand for air service doe not permit the airport to be financially self-sustaining, the airport proprietor should establish long-term goals and targets to make the airport as financially self-sustaining as possible. (Section VII(B)(2))
>
> ...the FAA does not consider the self-sustaining requirement to require airport sponsors to charge fair market rates to aeronautical users. Rather, for charges to aeronautical users, the FAA considers the self-sustaining assurance to be satisfied by airport charges that reflect the cost to the sponsor of providing aeronautical services and facilities to users. (Section VII(B)(5))
>
> ...the FAA interprets the self-sustaining assurance to require that the airport receive fair market value for the provision of nonaeronautical facilities and services, to the extent practicable considering the circumstances at the airport. (Section VII(C))

Airport Revenue

Grant Assurance No. 25(a), "Airport Revenue," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(b), *et. seq.*, and requires, in pertinent part, that:

> 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 . . . [Assurance 25(a)]

The FAA's Policy and Procedures Concerning the Use of Airport Revenues (64 Fed. Reg., 7696) provides, among other things, the Federal Aviation Administration's policy on the use of airport revenue. It provides, in relevant part, that:

> Unlawful revenue diversion is the use of airport revenue for purposes other than the capital and operating costs of the airport, the local airport system, or other local facilities owned and operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. [Section II(C)]
>
> Prohibited uses of airport revenue include but are not limited to: 1. Direct or indirect payments that exceed the fair and reasonable value of services provided to the airport. The FAA generally considers the cost of providing the services or facilities to the airport as a reliable indicator of value. [Section VI(B)(1)]

Airport Layout Plan

Grant Assurance No. 29, "Airport Layout Plan," which implements the provisions of 49 U.S.C. § 47107(a)(16) states, in relevant part, that

> It [the airport sponsor] will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plans and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the

Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility or efficiency of the airport.

If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the airport layout plan as approved by the Secretary, the owner or operator will, if requested, by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.

VI. ANALYSIS AND DISCUSSION

Issue #1

Whether the Respondent, by issuing a Request for Proposals for a qualified proposer to lease and improve for use the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport, is in violation of Grant Assurance No. 1, "General Federal Requirements"; No. 6, "Consistency with Local Plans"; No. 7, "Consideration of Local Interest"; and No. 8, "Consultation with Users".

As discussed more fully above in the Section III, "Background", as a result of a complaint filed previous to and separate from the instant complaint, this Office concluded that the Authority was in violation of its Federal obligations prohibiting the Authority from granting an exclusive right of airport use to Boca Aviation, Inc. Consequently, this Office ordered the Authority to submit a Corrective Action Plan (CAP) to eliminate the continuation of an exclusive right to Boca Aviation. Upon submission of the Authority's CAP, this Office issued a Final Director's Determination accepting the CAP proposed by the Authority. The CAP provided that the Authority, under is proprietary rights, would construct and operate several aeronautical facilities on the last remaining 15 acres of undeveloped land at the Boca Raton Airport.

The record reflects that on January 5, 2000, the Authority passed a resolution to amend the CAP to permit the issuance of a Request for Proposals (RFP) for a qualified proposer to lease, and improve for use the 15 acre parcel [FAA Exhibit 1, Item 3, Exhibit 25]; Premier Aviation of Boca, LLC (Premier), among other proposers, responded to the Authority's RFP [FAA Exhibit 1, Item 9, Exhibit 41, p. 3 and Item 3, Exhibit 29]; the Authority voted to negotiate with Premier for the

lease of the 15 acres; and, on June 21, 2000, the Authority and Premier signed a lease agreement with Premier Aviation. [FAA Exhibit 1, Item 19]

A. General Federal Requirements

The Complainant contends that the Final Director's Determination in the prior proceeding is unambiguous and specifically approves and orders the Authority itself to develop and construct facilities identified in the CAP. [FAA Exhibit 1, Item 13, p. 25] According to the Complainant, the Final Director's Determination has the full force and effect of law and must be adhered to pursuant to AIP Grant Assurance No. 1, "General Federal Requirements." [FAA Exhibit 1, Item 3, p. 11]

Grant Assurance No. 1, "General Federal Requirements," provides, in relevant part, that

> It [the Sponsor] will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds . . . including . . . [among other things,] . . . 14 CFR Part 16 – Rules of Practice for Federally Assisted Airport Enforcement Proceedings.

While I agree that the language of the Final Director's Determination is unambiguous, I do not share in the Complainant's conclusion that it required the Authority to construct specific facilities on the 15-acre parcel or that the Authority was required to operate any facilities under its proprietary rights.

The Final Director's Determination incorporated the preceding Director's Determination that ordered the Authority to

> . . . present a plan for approval by the Orlando Airports District Office within 20 days from the date of . . . [the] Director's Determination on how it intends to eliminate the continuation of an exclusive right to Boca Aviation.

[FAA Exhibit 1, Item 40, p. 17]

A plain reading of the Director's Determination reveals that the FAA's sole purpose for requiring the Authority to submit a CAP was to ensure that the exclusive right granted to Boca Aviation, the Complainant in the instant complaint, was in fact extinguished. The Director's Determination neither specified the facilities to be constructed nor required the Respondent itself to construct and operate facilities on the parcel.

Likewise, the Final Director's Determination that accepted the Authority's CAP was limited to ensuring that the exclusive right was extinguished. Specifically,

the Final Director's Determination concluded that the CAP, as embodied in the 19th Amendment to Boca Aviation's lease, ". . . was acceptable in that it served to require that Boca Aviation relinquish any and all rights in and to the Additional Premises . . .." [FAA Exhibit 1, Item 41, p. 3]

Despite the Complainant's extensive argument to the contrary, I conclude that the CAP did not require the Respondent itself to construct or operate the facilities described in the 19th Amendment to Boca Aviation's lease. Rather, this Office accepted the Respondent's proposal as one way to extinguish the exclusive right granted to Boca Aviation.

If the public's interest in extinguishing the exclusive right granted to Boca Aviation can be achieved through an alternative plan, the FAA does not object. Moreover, I find the Authority's alternate Corrective Action Plan to be consistent with the express intent of the Final Director's Determination and the Authority's continuing Federal obligations under the grant assurances.

I also agree with the Respondent's assertion that the Final Director's Determination specifically contemplated that the Respondent may choose an alternative CAP. [FAA Exhibit 1, Item 10, p. 10] Specifically, the Final Director's Determination states

> . . . we [the FAA] request that the Authority seek guidance from the ADO on any future change in the use or operation of these facilities, including any intent to lease the facilities to a commercial aeronautical service provider.

[FAA Exhibit 1, Item 41, p. 3]

To this end, the record reflects that the Respondent consulted with the FAA on the process used by the Authority to solicit and obtain proposals to develop the 15-acre parcel [FAA Exhibit 1, Item 10, Exhibit 5]. The Authority sought FAA review and received no FAA objection on the proposed lease with Premier [FAA Exhibit 1, Item 21]. It received conditional approval to the Airport Layout Plan depicting the facilities to be constructed by Premier [FAA Exhibit 1, Item 30], as it did not violate any grant assurances.

Also, the Complainant alleges the Authority's actions to issue the RFP have breached the 19th Amendment to its lease, causing Boca Aviation to be substantially and directly affected by the Authority's failure to comply with the Final Director's Determination. [FAA Exhibit 1, Item 3, p. 2] However, this issue will not be addressed here, as it is a matter of State contract law. As indicated by the United States District Court for Southern Florida, "This exact issue, a state law issue, is the subject of existing state court proceedings."[7] [FAA Exhibit 1, Item 10, p. 4]

I also note that the Complainant contends that the actions of the Authority have caused an undue and harmful delay in the construction of the facilities approved by the FAA. According to the Complainant, there is a lack of hangar space at the Airport. [FAA Exhibit 1, Item 3, p. 11] To the extent that a delay, undue or otherwise, in the implementation of the Authority's Corrective Action caused any harm, an acceptable remedy is already underway. Specifically, as discussed elsewhere in this decision, I find Premier's proposal includes hangar space and is consistent with the express intent of the Final Director's Determination and the Authority's continuing Federal obligations under the grant assurances.

The Complainant's allegations regarding Grant Assurance No. 1 are dismissed.

B. Local Plans and Interest and Consultation with Users

The Complainant alleges that the Authority failed and refused to cooperate with the Mayor and City Council of the City of Boca Raton and failed to consider a request from the Mayor for a public hearing. According to the Complainant, because of the lack of cooperation by the Authority, the Boca Raton City Council passed a Resolution stating that the proposed action of the Authority was inconsistent with the objectives of the City and transmitted it to the FAA Orlando Airport District Office. The Complainant contends that this lack of cooperation constitutes a violation of Grant Assurance No.'s 6 and 7.[8] [FAA Exhibit 1, Item 13, p. 66 – 68; and Item 25, p. 4 – 5]

Grant Assurance No. 6, "Consistency with Local Plans," provides that "The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport."

[7] Additionally, the Court found that even if the case were appropriately before it, Boca Aviation failed to demonstrate a substantial likelihood of success on the merits. The Court noted that under the facts in this case, the Defendant had a strong public interest in introducing competition and preventing the perpetuation of a monopoly at the Boca Raton Airport facilities. (2000 WL 963365, *4 (S.D. Fla.)) [FAA Exhibit 1, Item 10, Exhibit 2]

[8] I note that the Complainant also alleges that the Respondent violated Grant Assurance No. 8, "Consultation with Users." However, the Complainant provides no argument throughout its filings to support this alleged violation. Consequently, I find the Complainant's allegation without merit. In any event, Grant Assurance No. 8 applies only to projects that are being funded with Airport Improvement Program funds administered by the FAA, as discussed more fully below.

The terminology of "the project," as used in the grant assurances, refers to the project for which Airport Improvement Program Funds are being provided in each grant agreement. Consequently, the application of this grant assurance is specific to each project being funded under a grant for which the sponsor makes the aforementioned assurance. Grant Assurance No.'s 7 and 8 contain the same or similar reference to "the project."

As the Complainant does not assert and the record does not indicate that any of the projects contained in Premier Aviation's proposal for airport development have been, or will in fact be funded, in part or in whole, with Airport Improvement Program Funds provided pursuant to 49 U.S.C. § 47101, *et. seq.*, I cannot find that the Respondent's actions are inconsistent with Grant Assurance No.'s 6, 7, and 8. Consequently, I dismiss the Complainant's allegations of violations of Grant Assurance No. 6, 7 and 8.

Issue # 2

Whether the Respondent, by accepting a development proposal that proposes the non-aeronautical use of a portion of the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport parcel, is in violation of Grant Assurance No. 19, "Operation and Maintenance;" 49 U.S.C. 47107(a)(16) and related Grant Assurance No. 29, "Airport Layout Plan;" and Grant Assurance No. 5, "Preserving Rights and Powers."

The record reflects that the Respondent submitted an interim change to the Airport Layout Plan (ALP) for the Boca Raton Airport in September 1998 as part of its CAP to resolve the exclusive right violations determined in the prior proceeding. *See Boca Raton Jet Center v. Boca Raton Airport Authority FAA Docket No. 16-97-06.* The then current ALP proposed that the 15-acre parcel at issue in this proceeding be used entirely for aeronautical purposes, including the construction of:

- 70,000 square feet of hangar space containing T-hangar units and corporate hangars,
- approximately 24,000 square feet of hangar space to be used as community or corporate hangar space or aircraft maintenance space, and
- a wash rack

[FAA Exhibit 1, Item 3, Exhibit 15 and 16]

These facilities were to be owned and operated by the Respondent under its proprietary rights, as discussed above. However, the Authority subsequently passed a resolution to issue an RFP for a qualified proposer to lease, and improve for use the 15-acre parcel. Based on the proposals submitted, the Respondent voted to negotiate with Premier for the lease of the 15 acres; and,

on June 21, 2000, the Respondent and Premier signed a lease agreement with Premier Aviation to develop and use the 15-acre parcel.

The site plan submitted by Premier in connection with the RFP process shows the following aeronautical facilities to be constructed on the 15-acre parcel. [FAA Exhibit 1, Item 3, Exhibit 29]

- 298,000 square feet of paved ramp with paved access to taxiway.
- 33,030 square feet of common storage hangar space with no hangar less than 8,000 square feet. Additionally, two hangars of 12,990 square feet each that are dedicated to the storage of tenant or transient Aircraft, and one hangar of 11,990 square feet dedicated to the provision of Aircraft Maintenance.
- A 7000 square foot FBO building.
- 1000 square feet of office and shop space dedicated to the administration and provision of Aircraft Maintenance.
- Twenty-five parking spaces for FBO use.
- A fuel storage facility with a minimum capacity to store 24,000 gallons of Jet A fuel and 12,000 gallons of Avgas fuel.

Additionally, the Premier site plan indicates that a portion of the 15-acre parcel will be used for non-aeronautical purposes, as alleged by the Complainant. Specifically, the proposal indicates that a restaurant and an office building are to be constructed on the parcel.[9] [FAA Exhibit 1, Item 3, Exhibit 29]

Most recently, the Respondent submitted a revised ALP to the FAA Orlando Airports District Office depicting facilities similar to those identified in Premier's site plan, including an office building and a restaurant. The FAA Orlando Airports District Office conditionally approved the ALP, subject to any required environmental review and necessary airspace study, indicating the FAA found that the proposed airport development shown on the plan did not adversely affect the utility or efficiency of the airport. [FAA Exhibit 1, Item 30]

[9] The Respondent contends that the office building will be considered an aviation use because, through the lease for the property, the Authority will require that 50% of the tenants in the office building be aviation-related entities. According to the Respondent, this is consistent with the treatment of a similar building on Boca Aviation's leasehold. [FAA Exhibit 1, Item 10, p. 25] I find that the office building will be used, at least in part, for non-aeronautical purposes.

A. Operation and Maintenance

The Complainant alleges that the acts of the Authority to convert land previously committed to aeronautical use for non-aeronautical use will jeopardize the Airport's utility and usability in violation of Grant Assurance No. 19, "Operation and Maintenance." [FAA Exhibit 1, Item 3, p. 15] While the Complainant admits that the site plan shows that 9.5 acres of land will be dedicated for the use of a fixed base operation providing aeronautical services to the public [FAA Exhibit 1, Item 13, p. 38], it contends that by not constructing, developing and operating the facilities deemed necessary by the Authority and its consultants, the Authority is short changing it's customers, the flying public and the Boca Raton business community. [FAA Exhibit 1, Item 3, p. 11] According to the Complainant, a consultant for the Respondent indicated that all remaining aviation use development property on the airport should be focused on providing additional hangar space. [FAA Exhibit 1, Item 3, p. 8] Additionally, the Complainant presents evidence from a 1996 request by the Authority to lease 2.3 acres of the parcel at issue for a hotel, in which the FAA indicated it could not approve any type of non-aviation facility on aviation land due to its great need and demand for aviation land. [FAA Exhibit 1, Item 3, p. 3]

In its Answer to the Complaint, the Respondent argues that the RFP for the 15-acre parcel and the bids received clearly provide for the construction and operation of an FBO on the site. Thus Boca Aviation's assertion that the Authority is improperly allowing non-aeronautical use of aeronautical use land through the RFP process is simply incorrect. [FAA Exhibit 1, Item 10, p. 24] The Respondent asserts that it is well within the Authority's lawful discretion to determine the best use of airport property and that the Complainant fails to allege the basis upon which the Authority's consultant reports imposed mandatory requirements on the Authority. [FAA Exhibit 1, Item 10, p. 43]

Additionally, the Respondent contends that the Complainant injects a number of irrelevant issues into its allegation, including advice provided by the FAA, in 1996, concerning a proposed hotel project. The Respondent argues that in that instance, the FAA had raised concerns that the Airport was not responding to FBO applications for use of the land, and the agency indicated that it would file an action against the Airport for non-compliance if it proceeded with hotel development in violation of the approved ALP., The Respondent asserts that in the current case, the Authority will insist that the FBO operation be developed first. [FAA Exhibit 1, Item 10, p. 28]

Grant Assurance No. 19(a) provides that

> The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required by applicable Federal, state and

> local agencies for maintenance and operation. It [the sponsor] will not cause or permit any activity or action thereon which would interfere with its use for airport purposes.

I am not persuaded that the Respondent has violated its Federal obligation established in Grant Assurance No. 19. The Complainant's allegation reveals a basic misunderstanding of the Respondent's Federal obligations established by Grant Assurance No. 19.

The purpose of Grant Assurance No. 19(a) is to ensure existing facilities that serve the aeronautical users of the airport will be operated, at all times, in a safe and serviceable condition. This express intent is demonstrated by FAA policy regarding Grant Assurance No. 19. For example, FAA policy requires that if infield lighting is installed, the owner of the airport is responsible for making arrangements for it and the associated airport beacon and lighted wind and landing direction indicators to be operated through each night of the year or when needed. Also, FAA policy requires that all structures should be checked frequently for deterioration. Where necessary, repairs should be made. [See FAA Order 5190.6A, Sec. 4-6] The record does not support a finding that existing airport facilities are not being operated at all times in a safe and serviceable condition.

The public's interest in the planning and proposed development of airport land is monitored by the FAA through the Airport Layout Plan (ALP) approval process, as discussed more fully below.

B. Airport Layout Plan

As discussed in the FAA Order 5190.6A, the ALP reflects the agreement between the FAA and the airport owner as to the specific operational and support functional usage. It also reflects the agreement between FAA and the airport owner as to the proposed allocation of areas of the airport to specific operational and support functional usage. The approved ALP thus becomes an important instrument for controlling the subsequent development of airport facilities. Any construction, modification, or improvement that is inconsistent with such a plan requires FAA approval of a revision to the ALP. [FAA Order 5190.6A, Sec. 4-17(a)]

Continued adherence to an ALP is a compliance obligation of the airport owner. The conversion of any area of airport land to a substantially different use from that shown in an approved layout plan could adversely affect the safety, utility, or efficiency of the airport. [FAA Order 5190.6A, Sec. 4-17(f)]

As discussed above, our investigation determined that the non-aeronautical uses of airport property identified in Premier's site plan are reflected in the Respondent's most recent change to its ALP submitted for FAA approval. After review of the proposed changes, the FAA Orlando Airports District Office, on

December 28, 2000, conditionally approved the ALP subject to the completion of any required environmental review and an airspace study. Additionally, the FAA Orlando Airports District Office's conditional approval indicated that it found the that the proposed airport development shown on the plan did not adversely affect the utility or efficiency of the airport.

Therefore, notwithstanding that ALP Assurance No. 29 is the appropriate grant assurance governing the proposed efficient use of airport property, the FAA Orlando Airports District Office's conditional ALP approval that is subject to FAA environmental and airspace review, constitutes a conditional FAA action. Part 16 is not the appropriate forum in which to challenge even a final FAA action. Part 16 is the appropriate forum for complaints against federally assisted airports not against the FAA. *See* e.g. Town of Fairview, Texas v. City of McKinney, Texas, FAA Docket No. 16-99-09, (Part 16 does not govern complaints alleging violations of the National Environmental Policy Act by the FAA.)

Part 16 addresses exclusively airport compliance matters arising under an airport sponsor's Federal obligations pursuant to the AAIA, as amended; certain airport-related provisions of the Federal Aviation Act of 1994, as amended; the Surplus Property Act, as amended; predecessors to those acts; and regulations, grant agreements, and documents of conveyance issued or made under those acts.[10] The FAA's role in the Part 16 process is to determine the airport sponsor's compliance with its Federal obligations arising under any of the aforementioned acts.

Additionally, I note that the Complainant has sought review of the FAA's conditional approval of the ALP in the United States Court of Appeals for the 11th Circuit. *See* Boca Airport Inc. v. FAA, No. 01-109480 (11th Cir., filed February 26, 2001.) The court of appeals would be the proper forum for a challenge to a final order issued by the FAA.

Regarding the Complainant's specific allegations that the activity by the Respondent leading up to the ADO's approval of the most recent ALP change was in violation of Grant Assurance No. 29 ("Airport Layout Plan"), I offer the following analysis.

1. Non-Aeronautical Use of Land

The Complainant alleges that the actions of the Respondent to commit airport land to non-aeronautical uses is in contravention of the ALP approved by the FAA in November 1998. The letter of approval of November 28, 1998, confirmed that the 15 acres of aeronautical use land would be developed, constructed upon and operated by the Authority. The letter confirmed that any additional services were required to be offered in accordance with the Authority's Minimum Standards. [FAA Exhibit 1, Item 3, page 9]

[10] *See* Summary, Rules of Practice for Federally Assisted Airport Proceedings, 61 FR 53998 (1996).

In its Answer, the Respondent asserted that there was no violation of the ALP as no permanent facilities had been constructed, nor will any permanent facilities be constructed at the airport without an approved amendment of the ALP. [FAA Exhibit 1, Item 10, page 54]

I agree with the Respondent that there was no violation of Grant Assurance No. 29. The record reflects that the Respondent selected the Premier proposal in June 2000. [FAA Exhibit 1, Item 10, p. 69] The Respondent sought FAA approval of the ALP in December 2000. [FAA Exhibit 1, Item 30] This appears to be a reasonable amount of time for the Respondent to make changes to the ALP based on Premier's proposal for submission to the FAA for approval.

In any event, the Complainant's allegation with respect to the 1998 ALP is moot since, as discussed above, the FAA Orlando Airports District Office conditionally approved a revised ALP depicting facilities similar to those depicted in Premier's site plan on December 28, 2000. I also note that airport owners commonly request revisions to their ALPs to reflect more nearly the current development plans of the airport. Furthermore, as discussed more fully below, I find the development proposed by Premier is consistent with the Respondent's Airport Minimum Standards.

2. Temporary Parking Facility

The Complainant alleges that the Respondent approved a request to construct a temporary parking lot for a movie theatre on aeronautical-use land without an interim change to the ALP. [FAA Exhibit 1, Item 3, p. 14]

In its Answer, the Respondent admits that it approved a request to construct a temporary parking lot to serve a movie theatre, but denies that such a temporary use requires a change to the ALP. [FAA Exhibit 1, Item 10, p. 44]

In its Reply, the Complainant argues that FAA approval is required. [FAA Exhibit 1, Item 13, p. 59]

I disagree with the Respondent that ALP approval for the interim use of airport property as a temporary parking facility was not required. FAA Order 5190.6A provides, in relevant part, that the FAA may approve the interim use of the aeronautical property for nonaviation purposes until such time as it is needed for its primary purpose. Such approval shall not have the effect of releasing the property from any term, condition, reservation, restriction or covenant of the applicable compliance agreement. To avoid any misunderstanding, the document issued by the FAA approving interim use must so indicate. [FAA Order 5190.6A, Sec. 4-17(g)]

However, I also find this allegation to be moot since the FAA Orlando Airports District Office's conditional approval of the current ALP implicitly contains the temporary parking facility. Specifically, the Complainant admits that

> "The temporary parking lot falls directly within Muvico/Lake's [Premier's] development plan for the 15 acres. As such, the improvements will inure to the direct benefit of Muvico/Lake [Premier's] . . . who will utilize these improvement (sic) in its development of the 15 acres."
>
> [FAA Exhibit 1, Item 13, p. 35]

In other words, the temporary parking facilities will become a part of the permanent facilities depicted on the current ALP conditionally approved by the ADO. Consequently, I find that the construction of the temporary parking facility is not currently inconsistent with the ALP.

The Complainant's allegations regarding Grant Assurance No. 29 are dismissed.

C. Preserving Rights and Powers

The Complainant alleges that the Authority's action to convert aeronautical use land to non-aeronautical uses, as discussed above, is jeopardizing the Airport's utility and usability in violation of Grant Assurance No. 5, "Preserving Rights and Powers."

Grant Assurance No. 5, "Preserving Rights and Powers," requires, in pertinent 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."

As discussed above, the FAA has determined that the Respondent's decision to lease the only remaining 15-acre parcel of land to Premier Aviation, for development and operation consistent with that identified in its site plan proposal and the current ALP, is not in violation of its Federal obligations. Consequently, the FAA cannot determine that the Respondent has taken or permitted an action that 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 its grant agreements.

The Complainant's allegations regarding Grant Assurance No. 5 are dismissed.

Issue #3

Whether the Respondent, by (a) prohibiting Boca Aviation from competing for the 15-acre parcel at issue, (b) filing a counter claim against Boca Aviation in state court proceedings, and (c) approving and negotiating with Premier Aviation for the construction of a site plan that is allegedly in violation of the Airport Minimum Standards, is in violation of 49 U.S.C. § 47107(a)(1) and (5) and related Grant Assurance No. 22 regarding unjust economic discrimination. [11]

A. Prohibition from Competing in the RFP

The Complainant alleges that the Respondent's action to prohibit it from competing for the 15-acre parcel is in violation of Grant Assurance No. 22 regarding unjust economic discrimination. [FAA Exhibit 1, Item 3, p. 15]

In its Answer, the Respondent asserts that the Complainant's own evidence shows that the FAA stated the Authority should conduct a new bid process and prohibit Boca Aviation from bidding. Additionally, the Respondent contends that *FAA Advisory Circular (AC) on Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*, AC No. 150/5190-5 (April 7, 2000) at § 1.3 explicitly states that a sponsor can exclude an FBO from responding to a request for proposals, based on the sponsor's desire to create competition at the airport. [FAA Exhibit 1, Item 10, p. 46]

I find the Respondent's observations of § 1.3 of AC No. 150/5190-5 accurate. Additionally, I note that allowing Boca Aviation, the sole FBO operating at the Boca Raton Airport, to compete for the only remaining parcel of undeveloped land at the Airport would have defeated the purpose the Director's Determination and Final Director's Determination in the prior Part 16 proceeding -- to extinguish the exclusive right granted to Boca Aviation. FAA policy provides that the existence of an exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the using public of the benefits of competitive enterprise. [FAA Order 5190.6A, Sec. 3-8]

[11] I also note that the Complainant appears to allege that the Authority, by failing to require rent payments for one year for a parking lot constructed on the 15-acre parcel at issue, is violating Grant Assurance No. 22 regarding economic non-discrimination. [FAA Exhibit 1, Item 3, p 15]. However, the Complainant provides no argument or explanation as to how the Authority's actions unjustly discriminated against the Complainant. Assuming that the Complainant is alleging that the Authority did not provide it with similar lease terms, the Complainant has provided no argument or evidence to substantiate that it requested and was denied similar treatment, or that it was making similar use of the Airport at the time the Authority agreed to allow Premier to construct a temporary parking lot. In any event, this allegation is moot since, as discussed more fully in the next section under Issue #4, the Authority has subsequently required Premier to pay the rent the Authority could have received over the past year.

B. State Court Counter Claim

The Complainant contends that after June, 1999, the Florida Legislature increased the number of Authority members and changed its make-up, new members were appointed, the Authority attorney was fired, a new chairman was elected, the Airport Director resigned and the assistant manager was dismissed. According to the Complainant, prior to those events, the Airport director and the Authority had begun the implementation of the requirements in the Final Director's Determination and the 19th amendment. The Complainant also asserts that immediately following the release of the Director's Determination in August, 1999, the 'new' Authority took steps to prevent the implementation. On or about January 24, 2000, Boca Aviation filed a lawsuit against the Authority seeking to enforce its rights and the Authority's obligations under the 19th Amendment to the lease[12]. The record reflects the Authority filed a counterclaim in response to the Complainant's lawsuit. [FAA Exhibit 1, Item 3, page 17]

The Complainant alleges that "[n]o other tenant at the Airport has been sued to cancel its lease as a subterfuge to extract additional rent over and above its contractual rent. As such, the Authority's conduct towards its long term tenant is a violation of 49 U.S.C. Section 47107(a)(1) and its grant agreements including assurance 22, Economic Nondiscrimination." [FAA Exhibit 1, Item 3, page 18]

In its Answer, the Respondent admits that it has filed a counter claim that it believes is valid and brought in good faith. [FAA Exhibit 1, Item 10, p. 49] The Respondent states that the grounds for the Authority's counter claim is Boca Aviation's failure to pay due and owing rents; and that under the provisions of the Boca Aviation's lease itself, the violation asserted by the Authority in its counter claim is grounds for canceling the lease. The Respondent argues that the Complainant's allegations are not relevant to the asserted unlawful discrimination claim, other than to the extent that they actually contradict a claim of unlawful discrimination. According to the Authority, the Complainant provides no evidence that Boca Aviation has been, is, or would be treated in a discriminatory fashion compared to similarly situated airport users. To support this argument, the Authority notes that no other tenant has sued the Authority for breach of its lease, and the Authority does not believe that any other tenant is "shortchanging" it on lease payments. [FAA Exhibit 1, Item 10, p. 50]

In its Reply, the Complainant concedes that the Authority has not sought to discriminate against Boca Aviation as an FBO, as Boca Aviation is the only FBO at the Airport. Rather, the Complainant contends that the Respondent has

[12] As discussed in the "Background Section" above, Boca Aviation filed a complaint in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, *(Boca Airport, Inc., v. Boca Raton Airport Auth., No. 00-00777 AE (Fla. 15th Cir. 2000)*. In that suit, Boca Aviation alleged that the Authority had evidenced an intent to breach its obligations under the Nineteenth Amendment by requesting proposals from third parties to construct, develop and operate the 15 acres of land. As a remedy, Boca Aviation sought declaratory and injunctive relief. On May 17, 2000, the Court held that the 19th Amendment was unambiguous, and as a matter of law, the Authority could assign or subcontract its rights and obligations to a third party.

sought to discriminate against Boca Aviation because its rent payments do not reflect current fair market value as opposed to other aviation users. According to the Complainant, the Authority's attempt to coerce and extort higher rents from Boca Aviation is unjustly discriminatory and in violation of Grant Assurance No. 22. The Complainant also challenges the Respondent's assertion that there is no evidence that Boca Aviation has been, is, or would be treated in a discriminatory fashion compared to similarly situated airport users. According to the Complainant, First Flight sued the Authority for breach of its lease and, in that case, the Authority did not counterclaim against First Flight. [FAA Exhibit 1, Item 13, p. 66-67]

In its Rebuttal, the Respondent contends that the First Flight's complaint was that the Authority had failed to tender a lease to it, despite First Flight's allegation that all material terms had been agreed to. According to the Authority, in the First Flight case, there was no rent that First Flight was obligated to pay, or a lease for that matter. [FAA Exhibit 1, Item 17, p. 15]

Upon review of the record, I agree with the Respondent that there is no evidence that the Respondent has, or will treat similarly situated tenants dissimilarly with respect to believed violations of a tenant's lease agreement. Moreover, I find the Complainant's claim of unjust discrimination resulting from the counter claim filed by the Authority to be without merit.

C. Alleged Violation of Minimum Standards

The Complainant states that the Minimum Standards and Requirements for Aeronautical Activities at the Boca Raton Airport prescribes the minimum amount of land to be used by an entity for the operation of an FBO; the Authority has mandated that an FBO at the Airport will have a minimum of 12 acres; and that Premier Aviation has admitted that its proposed FBO will be "7 or 8 acres," substantially less than the minimum 12 acres required by the Minimum Standards. [FAA Exhibit 1, Item 9, page 3] The Complainant alleges that the Authority's actions in approving and negotiating with Premier Aviation for the construction of the site plan is a violation of the minimum standards. Consequently, the Complainant asserts that "...as a provider of aeronautical services on the Boca Raton Airport, [it] will be prejudiced if the Authority is allowed to disregard it's own minimum standards." [FAA Exhibit 1, Item 9, page 4]

In its Motion to Dismiss, the Respondent argues that in determining that Premier's proposal complies with the Authority's minimum standards, the Authority has examined a written submission from Premier stating that its FBO operation will occupy 12.1 acres. Moreover, the Authority has interpreted its minimum standards to mean that, if the FBO operator has a site of more than 12 acres and it meets all of the specific space requirements for an FBOs contained

in the Minimum Standards (e.g. 7,000 sq. ft. of FBO building, 32,000 sq. ft. of common storage hangar space, etc.), the FBO meets the standard.

According to the Respondent, this is a reasonable interpretation of the Authority's minimum standards. The Respondent also states that Premier's proposed non-aeronautical use of a portion of the 15-acre parcel is particularly appropriate given the fact that the Complainant has non-aeronautical use as a hotel and an office building on its leasehold. The Respondent contends that in order to compete successfully, the new entrant should at least be given the opportunity to similarly diversify its revenue base so that it is not dependent solely on airside business. [FAA Exhibit 1, Item 10, p. 27 – 28]

In its Answer to the Respondent's Motion to Dismiss, the Complainant contends the Respondent's Minimum Standards require that Premier Aviation's proposed development must therefore have 12 acres devoted to aeronautical use. [FAA Exhibit 1, Item 13, p. 38]

The Respondent's Minimum Standards and Requirements, in relevant part, state:

> In addition to the General Requirements in Section II hereof, each Fixed Base Operator at the Airport shall comply with the following Minimum Standards . . .
>
> | Operating Standard | Acceptable Minimum |
> |---|---|
> | 1. Leased Premises | • A minimum of 12 acres of land upon which all required improvements for facility, ramp area, vehicle parking, roadway access, and landscaping will be located. |

[FAA Exhibit 1, Item 9, Exhibit 43]

While the Complainant goes on to argue that the Premier's site plan shows that the FBO facilities will be located on only approximately "9.5 acres of land" [FAA Exhibit 1, Item 13, p. 38 - 39], I find this fact to be irrelevant. I accept the Respondent's interpretation of its own minimum standards that if an FBO has a site of 12 acres or more and satisfies the specific space requirements, it meets the Minimum Standards. The Minimum Standards do not expressly state that all 12 acres required must be used for aeronautical purposes as the Complainant contends. Rather, the Minimum Standards require that an FBO's leasehold be at least 12 acres upon which required facilities and services must be constructed or provided.

The Minimum Standards go on to discuss these requirements, including improvements for facility, ramp area, vehicle parking, roadway access, and

landscaping. Specifically, the Minimum Standards provide that the following facilities must be provided on an FBO's leasehold.

- Paved Tie-down facilities for a minimum of 50 aircraft.
- A paved ramp adequate to accommodate all Tie-down facilities, all Transient Aircraft Activities of the FBO and all approved sublessee(s) of FBO (but not less than 215,000 square feet) plus paved access to taxiways.
- At least 32,000 square feet of common storage hangar space with no hangar less than 8,000 square feet. A minimum of 8,000 square feet must be "dedicated" to provision of Aircraft Maintenance and 24,000 square feet must be "dedicated" to the storage of tenant or transient Aircraft.
- At least 7,000 square feet of facilities including adequate space for crew and passenger lounge, administration, operations, public telephones, and restrooms.
- At least 1,000 square feet of office and shop space "dedicated" to the administration and provision of Aircraft Maintenance.
- Sufficient paved vehicle parking space to accommodate FBO and tenant customers, passengers, and employees on a daily basis.

Additionally, the Minimum Standards require that the lessee construct (or install) an on-Airport above-ground fuel storage facility with a storage capacity of 24,000-gallon facility for Jet A Fuel storage and 12,000 gallon facility for Avgas Fuel storage. [FAA Exhibit 1, Item 9, Exhibit 43]

A review of the Premier Aviation Park Site Plan, as provided by the Complainant, shows the following aeronautical facilities to be developed upon the 15-acre leasehold.

- 298,000 square feet of paved ramp with paved access to taxiway.
- 33,030 square feet of common storage hangar space with no hangar less than 8,000 square feet. Additionally, two hangars of 12,990 square feet each that are dedicated to the storage of tenant or transient Aircraft, and one hangar of 11,990 square feet dedicated to the provision of Aircraft Maintenance.
- A 7000 square foot FBO Building.
- 1000 square foot of office and shop space dedicated to the administration and provision of Aircraft Maintenance.
- Twenty-five parking spaces for FBO use.
- A fuel storage facility with a minimum capacity to store 24,000 gallons of Jet A and 12,000 gallons of Avgas.

[FAA Exhibit 1, Item 3, Exhibit 29]

Consequently, I conclude that the Authority's interpretation of its own minimum standards is reasonable and that Premier's site plan meets the minimum

standards prescribed by the Authority. The Respondent's motion to dismiss this allegation is granted.

The Complainant's allegations regarding violations of 49 U.S.C. Section 47107(a)(1) and (5), and related Grant Assurance No. 22, are dismissed.

Issue # 4

Whether the Respondent, by approving the use of a portion of the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport as a temporary parking facility without requiring the payment of rent, is in violation of 49 U.S.C. Section 47107(a)(13) and related Grant Assurance No. 24 regarding fee and rental structures.[13]

According to the Complainant, on May 22, 2000, the Respondent approved a request by Muvico, a co-owner of Premier, for a temporary use of aviation land for a parking lot for Muvico's movie theatre complex located immediately south and adjacent to the 15-acre parcel at issue. [FAA Exhibit 1, Item 3, p. 14] The Complainant alleges the approval of the non-aviation use was without rent payments by Muvico for the first year, in violation of Grant Assurance No. 24, "Fee and Rental Structures". [FAA Exhibit 1, Item 3, p. 15]

In its Motion to Dismiss the Complaint, the Authority denies that the license agreement it entered with Muvico violates its grants assurances. According to the Authority, under the license agreement between the Authority and Muvico, the improvements revert to the Authority after six months. These improvements will be incorporated into the Authority's plans for the development of the 15-acre parcel. The Authority will be able to lease that portion of the parcel at a higher rate (taking into account the improvements), than if it merely leased the land and the tenant had to improve it. According to the Respondent, reversion to the Airport of all interest in the parking lot improvements no later than 6 months after their construction provides far greater value to the Airport than forgone use or license payments.[14] [FAA Exhibit 1, Item 10, page 19 - 20]

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[13] The Complainant also alleges that the Respondent, by agreeing to pay a bonus of $500,000 to a private law firm if it successfully terminates the Respondent's lease with the Complainant, is in violation of Grant Assurance No. 24 regarding fee and rental structures. However, Grant Assurance No. 24 establishes an airport sponsor's Federal obligations with respect to the generation of airport revenues; not the use of airport revenues. A sponsors Federal obligations regarding the use of airport revenues is established by Grant Assurance No. 25, "Airport Revenue," as discussed more fully in the next section under Issue #5. Therefore, I find the Complainant's allegation that the "bonus payment" violated Grant Assurance No. 24 to be without merit.

[14] The Respondent provides actual invoices to demonstrate that construction of the parking lot, including landscaping and lighting, cost approximately $107,000. [FAA Exhibit 1, Item 10, Exhibit 16] According to the Respondent, the fair market rental of the unimproved parcel, as measured by the highest bid of $0.20/sq. ft. annually for the 15-acre parcel, prorated over approximately 85,586 sq. ft. area of the parking lot, would amount to only about $1425 per month. Consequently, the Respondent concludes that it has entered into an arrangement that greatly benefits the Airport. [FAA Exhibit 1, Item 10, p. 23]

In its Answer to the Motion to Dismiss, the Complainant argues that the Respondent's contention that it will receive a material benefit in excess of $100,000 in improvements because the temporary parking lot will revert back to the Authority does not represent actual truth. According to the Complainant, the temporary parking lot falls directly within Premier's development plan for the 15 acres. Consequently, the Complainant concludes that the Authority does not get anything it would not have received anyway under the Premier Development Plan. [FAA Exhibit 1, Item 13, p. 35]

I disagree with the Complainant. I accept the Authority's argument that it may consider the value of assets that will eventually become lease fee improvements (improvements upon which rent will be assessed) *in lieu of rent*. *See* e.g. Wilson Air Center, LLC v. Memphis And Shelby County Airport Authority, FAA Docket No. 16-99-10 (August 2, 2000); (an airport may determine that lessee improvements that eventually will become lease fee improvements -- improvements upon which rent will be assessed -- can be considered in lieu of rent.) I find no evidence to rebut the Respondent's contention that reversion of the asset to the Respondent will allow it to charge a higher rent for the property, as improved, upon subsequent lease of the property to Premier.

In its Rebuttal the Respondent states:

> The Authority believes there is ample support for the position set forth in its Answer, and that it would therefore prevail on this issue on that basis. However, Authority management has determined that it is appropriate to pursue an alternative means of disposing of the issue. As a result, the Authority has requested that Muvico pay rent for the land upon which it built the parking lot, for the period commencing when Muvico built the lot through the time the Authority leases the property as part of the 15-acre site to the successful bidder in the RFP process.
>
> Muvico has agreed to do so. As set forth in the Authority's Answer, the appropriate rent is $1425 per month, based on the $0.20 /sq. ft. rent contained in the high bid for the 15-acre site. Thus, the Authority has done what Boca Aviation said it should have done, obtained rent for the site on which the temporary parking lot was built, and there is no remaining issue. Therefore, this count of the Complaint should be dismissed.
>
> [FAA Exhibit 1, Item 17, p. 21]

On September 29, 2000, the Respondent filed a Motion for Leave to File an Additional Exhibit. The additional exhibit is a copy of a check from Muvico Entertainment, L.L.C. (Muvico) for $5,705.72. In support of its Motion for Leave,

the Respondent asserts that the Authority received the check from Muvico after filing its Rebuttal, and therefore could not have filed a copy of it with the Rebuttal on September 25, 2000. [FAA Exhibit 1, Item 20]

On October 12, 2000, the Complainant filed an Answer to the Respondent's Motion for Leave to File Additional Exhibit. The Complainant argues that the check is a belated attempt by the Authority to purge its violation of grant assurance 24 and/or 49 U.S.C. § 47107. The violation occurred when the license agreement was approved. The motion should be denied. [FAA Exhibit 1, Item 24]

I disagree with the Complainant that the motion should be denied. The Respondent provides adequate justification as to why it could not previously provide the check as evidence in this proceeding. Moreover, in all cases alleging that an airport sponsor is in violation of its Federal obligations, the FAA will base its determination on whether the Airport is currently in compliance. *See* e.g., John C. Roberts v. Davies County, Indiana Board of Aviation Commissioner's, FAA Docket No. 16-00-06, (the FAA Airport Compliance Program is designed to achieve voluntary compliance on the part of the airport owner or operator with the applicable grant obligations; and the FAA will base its determination on whether the airport is currently in compliance).

Consequently, I grant the Respondent's Motion for Leave to File Additional Exhibit. Additionally, since the Respondent's Exhibit establishes that the Respondent has received rent for the temporary parking lot, I find the Complainant's allegation moot.

The Complainant's allegation regarding 49 U.S.C. § 47107(a)(13) and related Grant Assurance No. 24 is dismissed.

Issue #5

Whether the Respondent, by agreeing to pay a bonus of $500,000 to private law firms if they successfully terminate the Respondent's lease with the Complainant, is in violation of 49 U.S.C. § 47107(b)(1) and related Grant Assurance No. 25 regarding airport revenue.[15]

[15] The Complainant also alleges that the Respondent, by approving the use of aviation land as a temporary parking lot for a movie theatre without requiring rental payments, is in violation of Grant Assurance No. 25 regarding airport revenue. However, Grant Assurance No. 25 establishes an airport sponsor's Federal obligations with respect to the use of airport revenues; not the generation of airport revenues. A sponsors Federal obligations regarding the generation of airport revenues is established by Grant Assurance No. 24, "Fee and Rental Structure," as discussed more fully in the section under Issue #4. I find the Complainant's allegation that use of airport property for a temporary parking lot without payment of rent violated Grant Assurance No. 24 to be without merit.

The Complainant alleges that the Respondent has hired two law firms and agreed to pay them a $500,000 bounty if the lawyers succeed in nullifying the Respondent's long-term lease with Boca Aviation, in effect since 1984. According to the Complainant, the agreement...states in part that:

> *In addition, if the lease between the Authority and Boca Airport, Inc. is cancelled or voided, you agree to pay M&L an additional contingency fee of $100,000 per year for five consecutive years; provided that the maximum payment in any one year shall not exceed 30% of the Authority's net income for that year related to the property that has been leased to Boca Airport, Inc."*
>
> [FAA Exhibit 1, Item 3, page 16 and Exhibit 33]

Additionally, the Complainant asserts that revenue generated by federally assisted airports must be used only for airport capital improvements and operating costs, pursuant to 49 U.S.C. Section 47107(b) and related grant assurance 25. The Complainant contends that although attorney's fees may be considered operating costs under certain circumstances, the excessive and wasteful fees promised to attorneys to oust a long-term tenant is an abuse of the Authority's spending powers and an unlawful revenue diversion. According to the Complainant, the Authority is obligated to operate in a fiscally sound manner and to make the Airport as self-sustaining as possible; and the promise to pay up to 30% of the Authority's net income for each year related to the property leased by Boca Aviation is not a fiscally sound decision. [FAA Exhibit 1, Item 3, page 16]

In its Answer, the Respondent states that the allegations are at best, premature. The principal basis on which the Authority may cancel the Lease is Boca Aviation's own breach of the Lease for failure to meet its obligations thereunder. According to the Respondent, if Boca Aviation is in breach, it has no basis under Part 16, or federal or state law, to complain of the Authority's litigation costs in proving its case, other than to the extent Boca Aviation is required to pay for such costs. The Respondent also contends that since the costs at issue are contingent upon the outcome of the litigation, and have not yet been paid, the allegation is not ripe.

Additionally, the Respondent contends that if the counter claim is valid, such a result, and the expenses incurred to obtain it, is hardly unlawful revenue diversion. Moreover, absent a payment to a government entity affiliated with the Airport, and there is no such allegation here, there is no cognizable claim of unlawful revenue diversion. Alternatively, the Respondent argues that if the Authority proves Boca Aviation's breach, consideration of the reasonableness of legal fees incurred must be made in the context of the net benefit to the Authority, a determination that cannot be made until that case is decided. [FAA Exhibit 1, Item 10, page 47 - 48]

In its Answer to the Motion to Dismiss and Reply, the Complainant argues that FAA policy requires that airport expenditures not "exceed the fair and reasonable value of those services and facilities provided to the Airport," citing FAA's Final Policy Concerning the Use of Airport Revenues. To support its argument, that the Complainant contends that the Respondent could have hired other competent and able attorneys to handle the counterclaim at a fair and reasonable market value. Additionally, the Complainant contends that ripeness is not a defense to this proceeding. According to the Complainant, it is well-settled that an administrative agency, which is not subject to Article III of the Constitution of the United States and related prudential limitations, may issue a declaratory order in mere anticipation of a controversy or simply to resolve uncertainty. [FAA Exhibit 1, Item 13, p. 28 – 30]

I am not persuaded that the Respondent's agreement to pay a $500,000 bonus payment is tantamount to revenue diversion. The FAA's Policy Concerning the Use of Airport Revenue was not intended to provide a vehicle for a party to challenge the reasonableness of fees paid to private entities for airport-related services provided. Rather, it was to ensure that airport sponsors do not use airport revenues to create non-airport related benefits for other governmental activities.

While the Complainant is accurate in citing FAA policy that requires airport expenditures not "exceed the fair and reasonable value of those services and facilities provided to the Airport," the clear intent of the policy is to avoid airport revenue being used for non-airport public purposes, and in particular airport sponsor's subsidy of its non-airport public functions. A payment of airport revenue to a private firm can be considered unlawful revenue diversion if it is not for an airport purpose (i.e. for general economic development). If, as here, the payment to a private firm is for a proper airport purpose, then the reasonableness of the amount of the payment is not a matter of revenue diversion under the grant assurances. A payment from a sponsor to itself or another government agency, in contrast, must be related to the cost of actual services provided to avoid subsidy of non-airport functions. *See* e.g. Policy and Procedure Concerning the Use of Airport Revenues, 64 Fed. Reg. 7696, Section II(C).

While the "bonus payment" may appear large, there is no evidence to suggest that it is, or will be for a non-airport purpose. Consequently, the Complainant's allegation that the Respondent is in violation of 49 U.S.C. § 47107(b) and related Grant Assurance No. 25 is dismissed.

VI. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions and responses by the parties, and the entire record, herein, and the applicable law and policy and for the reasons stated above, I find and conclude as follows:

1. The Respondent, by issuing a Request for Proposals for a qualified proposer to lease, and improve for use the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport, is not in violation of Grant Assurance No. 1, "General Federal Requirements"; No. 6, "Consistency with Local Plans"; No. 7, "Consideration of Local Interest"; and No. 8, "Consultation with Users".

2. The Respondent, by accepting a development proposal that proposes the non-aeronautical use of a portion of the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport parcel, is not in violation of Grant Assurance No. 19, "Operation and Maintenance,"49 U.S.C. 47107(a)(16) and related Grant Assurance No. 29, "Airport Layout Plan," and Grant Assurance No. 5, "Preserving Rights and Powers."

3. The Respondent, by prohibiting Boca Aviation from competing for the 15-acre parcel at issue; filing a counter claim against Boca Aviation in state court proceedings; and approving and negotiating with Premier Aviation for the construction of a site plan that is allegedly in violation of the Airport Minimum Standards, is not in violation of 49 U.S.C. § 47107(a)(1) and (5) and related Grant Assurance No. 22 regarding unjust economic discrimination.

4. The Respondent, by approving the use of a portion of the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport as a temporary parking facility without requiring the payment of rent, is not in violation of 49 U.S.C. Section 47107(a)(13) and related Grant Assurance No. 24 regarding fee and rental structures.

5. The Respondent, by agreeing to pay a bonus of $500,000 to private law firms if they successfully terminate the Respondent's lease with the Complainant, is not in violation of 49 U.S.C. § 47107(b)(1) and related Grant Assurance No. 25 regarding airport revenue.

Order

Accordingly, it is ordered that:

1. The Complaint is dismissed.

2. All motions not expressly granted herein are denied.

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and Sections 511(a), 511(b), and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C.

§§47105(b), 47107(a) and (b), 47107(g)(1), 47110, 47111(d), and 47122, respectively.

RIGHT OF APPEAL

This Director's determination 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 adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's Determination.

David L. Bennett
Director, Office of Airport Safety
and Standards

Date: APR 26 2001