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

Boca Airport, Inc., d/b/a Boca Aviation
COMPLAINANT
v.
Boca Raton Airport Authority
RESPONDENT

FAA Docket No. 16-00-10

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on an appeal filed by Boca Aviation Inc. (Complainant or Boca Aviation), from the Director's Determination of April 26, 2001, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings found in Title 14 Code of Federal Regulations (CFR), Part 16. The Complainant argues on appeal that the Director (a) failed to make findings of fact supported by a preponderance of reliable, probative, and substantial evidence, and (b) made conclusions of law not in accordance with applicable law, precedent, and public policy. The Complainant alleges that these errors caused the FAA to dismiss the complaint erroneously.

In its formal complaint, Boca Aviation alleged that Boca Raton Airport Authority (Authority) violated Federal law and ten grant assurances. Boca Aviation alleged:

- The Authority violated grant assurance 1, *General Federal Requirements*, grant assurance 6, *Consistency with Local Plans*; grant assurance 7, *Consideration of Local Interest*; and grant assurance 8, *Consultation with Users*, by issuing a Request for Proposals for a qualified proposal to lease, and improve for use, the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport.

- The Authority violated grant assurance 19, *Operation and Maintenance*; Title 49 United States Code (U.S.C.) §47107(a)(16) and related grant assurance 29, *Airport Layout Plan*; and grant assurance 5, *Preserving Rights and Powers*, 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.

- The Authority violated Title 49 U.S.C. §47107(a)(1) and (5) and related grant assurance 22, *Unjust Economic Discrimination*, by prohibiting Boca Aviation from competing for the 15-acre parcel at issue, by filing a counter claim against Boca Aviation in State court proceedings, and by approving and negotiating with Premier Aviation for the construction of a site plan that is allegedly in violation of airport's minimum standards.

- The Authority violated Title 49 U.S.C. §47107(a)(13) and related grant assurance 24, *Fee and Rental Structures*, 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.

- The Authority violated Title 49 U.S.C. §47107(b)(1) and related grant assurance 25, *Airport Revenues*, by agreeing to pay a bonus of $500,000 to private law firms if they successfully terminate the Authority's lease with Boca Aviation.

The Complainant's appeal from the Director's Determination asserts that the issues listed above were improperly resolved, specifically with regard to: (a) interpretation and application of grant assurance 1, *General Federal Requirements;* (b) application of airport minimum standards; (c) implementation of a Corrective Action Plan from an earlier Director's Determination; (d) interpretation and application of grant assurance 19, *Operation and Maintenance;* (e) accuracy of the Authority's Airport Layout Plan and application of grant assurance 29, *Airport Layout Plan;* (f) application of grant assurance 5, *Preserving Rights and Powers;* and (g) interpretation of grant assurance 25, *Airport Revenues*. In addition, the Complainant alleges on appeal that the Director failed to address certain statements of fact and improperly characterized the actions in a separate Florida state court case filed by Boca Aviation against the Authority.

The seven issues argued on appeal by the Complainant were reviewed by the Associate Administrator to determine whether the Director made substantive errors in the interpretation of the record evidence or procedural errors in the investigation that caused the Director to dismiss the complaint inappropriately. Specifically, the Associate Administrator reviewed the allegations and record evidence to determine whether (a) the findings of fact made by the Director are supported by a preponderance

of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. The Complainant's seven issues, and the Associate Administrator's conclusions, are discussed in detail in part VI, Analysis and Discussion, of this Final Decision and Order.

II. SUMMARY OF FINAL DECISION

Upon appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, p. 21 (12/30/99) and 14 CFR, Part 16, §16.227]

In arriving at a final decision on this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, and the appeal and reply submitted by the parties in light of applicable law and policy.

The Director's Determination, issued April 26, 2001, found the Authority was not in violation of its applicable Federal grant assurances or the airport's minimum standards by:

(a) issuing a Request for Proposals for a qualified proposal to lease, and improve for use, the last remaining 15-acre parcel of undeveloped property at the Boca Raton Airport;

(b) accepting a development proposal that proposes the non-aeronautical use of a portion of the last remaining 15-acre parcel of undeveloped property;

(c) 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 was allegedly in violation of the airport's minimum standards;

(d) 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; or

(e) agreeing to pay a bonus of $500,000 to private law firms if the firm successfully terminated the Respondent's lease with the Complainant.

Based on the reexamination of this record, the FAA affirms the Director's Determination. The Associate Administrator concurs with the Director's findings with one exception. That exception relates to the Director's assumption that by giving

conditional approval for the December 2000 Airport Layout Plan, the FAA had given implied approval for the interim non-aviation use of a portion of the 15-acre parcel. under discussion.

Exception to the Director's Determination.
The Director's Determination noted that the Respondent was required to obtain FAA approval for the interim non-aviation use of aeronautical property. The Administrative Record reflects that the Respondent did not, in fact, make a formal request for FAA approval, and the FAA did not prepare any documentation signifying approval for a temporary parking facility constructed on the site. In addition, the temporary parking structure was not specifically depicted on the December 2000 Airport Layout Plan conditionally approved by the FAA Orlando Airports District Office.

The Director determined that FAA's conditional approval of the Authority's Airport Layout Plan depicting the preliminary 15-acre development site implicitly included approval for the temporary parking facility. The Director concluded that since the temporary parking facility fell within the development site depicted on the Airport Layout Plan and would eventually accrue to the developer, the issue of explicit FAA approval for the parking lot was moot.[1]

The Associate Administrator does not agree with this conclusion. Rather, the Associate Administrator finds that explicit FAA approval for interim non-aviation use of aeronautical property is required. The record discloses that the FAA Orlando Airports District Office was aware of the Respondent's interim use and did not object because there was no adverse impact to the safety, utility, or efficiency of the Boca Raton Airport. In short, the FAA Orlando Airports District Office has already implicitly made the required findings regarding the interim use. The record also indicates that when the FAA's Orlando Airports District Office discussed the interim use with the Respondent, there was an understanding that the temporary use could be cancelled within 30 days at the discretion of the Respondent and that the Respondent would receive financial benefit for the temporary use. It is not necessary for interim use facilities to be fully documented on the Airport Layout Plan, but supporting documents[2] to identify interim uses, and their approval, should be maintained with the Airport Layout Plan. The Respondent's failure to make a formal request and obtain FAA approval prior to constructing the temporary parking facility is a correctable condition, however, and does not rise to the level of noncompliance; it is a harmless error, not a reversible error in the Director's Determination. The correction is for the Respondent to request in writing FAA approval from the FAA Orlando Airports District Office for the interim non-aviation use of the aeronautical-use parcel for the temporary parking lot.[3] These

[1] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 32.
[2] Supporting documents need not be formal; they may be in the form of e-mails, records of telephone conversations, maps, overlays, pencil notations, etc.
[3] It is common practice for the FAA to approve interim use of airport property for non-aeronautical purposes informally. However, the approval should be documented in writing to ensure the Airport Sponsor is aware of the restrictions identified in FAA Order 5190.6A, section 4-17(g).

issues are discussed more fully under Issue V(2) in the Analysis and Discussion section of this order.

With this one exception, which does not constitute reversible error, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The appeal did not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

III. 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 1982 (AAIA), as amended, 49 U.S.C. §47101, *et seq.*[4]

For the twelve months ending July 20, 2000, the airport had 132,000 operations and 282 based aircraft.[5] Since 1984, the airport sponsor has entered into seven AIP grant agreements with the FAA totaling $2,345,870.[6]

IV. BACKGROUND AND PROCEDURAL HISTORY

The majority of the initial complaint focused on Boca Aviation's allegation that the Authority failed to develop the airport according to terms of a 19th amendment to the Master Lease between the Complainant and the Respondent. That 19th amendment was the direct result of an earlier 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 Authority was 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 the Complainant's lease was a part of the Authority'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. The 19th amendment provided that the Authority, using its proprietary rights, would develop the last remaining parcel of airport property and would provide certain aeronautical facilities.

The Authority elected to develop the last remaining parcel of land through a private developer. Because the Complainant was the sole fixed-base operator[7] on the airport,

[4] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 2
[5] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 1
[6] FAA Appeal Exhibit 1, Item 31
[7] A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. (FAA Order 5190.6A, Appendix 5)

Boca Aviation was not permitted to compete with other developers for this remaining parcel. Boca Aviation contends the development effort is not consistent with the Corrective Action Plan identified as part of the 19th amendment. In addition, Boca Aviation alleges the Authority has improperly permitted the developer to use aeronautical land for non-aeronautical purposes contrary to the best interest of the airport.

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.[8] Thus, the 15-acre parcel would be developed and operated by a fixed-base operator and not by the Authority, as indicated in the 19th amendment to Boca Aviation's lease.[9]

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 Authority*, No. 00-00777AE (Fla. 15th Cir. 2000).[10]

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.[11] The Respondent subsequently filed a counter claim.[12] The Complainant alleged that the Respondent's counterclaim established a violation of grant assurance 22, *Economic Nondiscrimination*, because the Respondent had not filed counterclaims against other tenants in similar circumstances. The Complainant also alleged that the attorney fees agreed to by the Respondent were exorbitant and not legitimate operating costs of the airport, thereby violating grant assurance 25, *Airport Revenues*.[13]

On March 15, 2000, the Authority issued a Request for Proposals (RFP) to lease and improve state-owned property referred to as the 15 acres. The Complainant alleged that the Respondent's decision to issue an RFP was contrary to the requirements of the Final Director's Determination issued in the proceedings under FAA Docket No. 16-97-06 and resulted in a violation of grant assurance 1, *General Federal Requirements*.[14]

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

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[8] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, Exhibit 25.
[9] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 6.
[10] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, page 17.
[11] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 33.
[12] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 10, page 49.
[13] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 7.
[14] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 7.

its lease by requesting proposals from third parties to construct, develop, and operate the 15 acres of land.[15]

On May 15, 2000, Premier Aviation of Boca Raton, LLC, (Premier) submitted its proposal in response to the RFP.[16]

On May 17, 2000, the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, held that the Authority could, as a matter of law, assign or subcontract its rights and obligations to a third party.[17]

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.[18]

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.[19]

On June 2, 2000, the Respondent's RFP Committee ranked the Premier Aviation proposal as "first" of three proposals submitted.[20]

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.[21]

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 was inconsistent with the City's objectives for the Airport. The Complainant alleges that the City Council resolution establishes a violation of grant assurance 6, *Consistency with Local Plans*, and grant assurance 7, *Consideration of Local Interests*. The Respondent denied this allegation.[22]

On June 12, 2000, Boca Aviation filed the Part 16 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 alleged that because the Respondent chose to issue an RFP for development of the 15 acres that "...the Authority is short changing its customers, the flying public and the Boca Raton

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[15] FAA Appeal Exhibit 2, Item 1 (Director's Determination), page 7.
[16] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 7.
[17] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 7.
[18] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 7.
[19] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 8.
[20] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 8.
[21] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 8.
[22] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 8.

business community by not constructing, developing and operating the facilities deemed necessary by the Authority and its consultant."[23]

On June 13, 2000, the Authority obtained an *ex parte* hearing before the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, seeking a 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.[24] (The City appealed the order issuing the temporary injunction without notice on June 16, 2000.)[25]

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. The Complainant alleged that Premier's proposal established that only half of the 15-acre parcel would be developed for aviation use, which the Complainant alleged was in violation of the Respondent's airport minimum standards and grant assurance 19, *Operation and Maintenance,* grant assurance 29, *Airport Layout Plan,* and grant assurance 5, *Preserving Rights and Powers.* The Respondent denied these allegations.[26]

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.[27]

On June 19, 2000, the Respondent entered into a license agreement with Muvico 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" section of the license agreement indicated that Muvico wanted to use 85,586 square feet of the undeveloped 15-acre parcel for the construction of the temporary parking facility. The Complainant alleged 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 Airport Layout Plan, in violation of grant assurance 24, *Fee and Rental Structure*, and grant assurance 29, *Airport Layout Plan.*[28]

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.[29]

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 judgment 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.[30]

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[23] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 8.
[24] FAA Appeal Exhibit 1, Item 1 (Director's Determination), pages 8-9.
[25] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 18.
[26] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 8.
[27] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.
[28] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.
[29] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.
[30] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.

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 provided additional arguments to support the violations alleged by the Complainant. The motion was granted and the amended complaint was admitted to the record.[31]

On July 24, 2000, the FAA issued an Order, "Notice of Docketing," advising that the Complaint had been docketed under FAA Docket No. 16-00-10, and requesting that the Respondent object to or answer the Amended Complaint.[32]

On August 16, 2000, the Authority filed a Motion to Dismiss, Memorandum in Support, and Answer to the Amended Complaint.[33]

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.[34]

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.[35]

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 Aviation's formal complaint.[36]

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.[37]

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 passed on June 12, 2000, concerning the Boca Raton Airport.[38]

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.[39]

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[31] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.
[32] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.
[33] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 9.
[34] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[35] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[36] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[37] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[38] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[39] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.

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.[40]

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.[41]

On October 17, 2000, the Complainant filed an Answer to Boca Raton Airport Authority's September 29th Motion for Leave to File Additional Exhibit arguing that the motion should be denied. The motion was granted and the exhibit was admitted to the record.[42]

On October 27, 2000, the complainant filed a Motion to Disqualify, seeking to disqualify FAA employee Ms. Kathleen Brockman from participation in this matter. The Complainant alleged that statements made by Ms. Brockman demonstrated that she had pre-judged the central issues.[43]

On November 11, 2000, the Respondent filed an Opposition to the Motion to Disqualify.[44]

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.[45]

On December 21, 2000, Mr. Ken Day, Airport Manager, Boca Raton Airport Authority, sent a letter to Mr. Vernon Rupinto, Program Manager, FAA Orlando Airports District Office, regarding the Airport Layout Plan amendment and FAA Form 7460-1.[46]

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 CFR §16.23(e) and (j). In addition, the Complainant alleged serious concerns about the identity, authenticity, and dissemination of the evidence. The Respondent's motion of December 18, 2000, was denied and the exhibit in question was not admitted.[47]

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[40] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[41] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[42] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 10.
[43] FAA Appeal Exhibit 1, Item 1 (Director's Determination), pages 10-11.
[44] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11.
[45] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11.
[46] FAA Appeal Exhibit 1, Item 23.
[47] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11.

On December 28, 2000, the FAA Orlando Airports District Office conditionally approved the Airport Layout Plan for the 15-acre parcel at issue in this proceeding.[48]

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."[49]

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.[50]

On January 19, 2001, the Respondent sent a letter to Mr. David Bennett, Director, Airport Safety and Standards, indicating 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 the FAA. Since the Respondent did not agree to an extension of time to explore settlement, the Complainant's request of January 17, 2001, was denied.[51]

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 Appeal for the 11th Circuit.[52]

On April 23, 2001, the Complainant submitted a Notice of Filing, providing six photographs.[53]

On April 26, 2001, the Director of the FAA Office of Airport Safety and Standards determined in a Director's Determination that the Authority was not in violation of its Federal obligations regarding:

> Grant Assurance No. 1, *General Federal Requirements*,
> Grant Assurance No. 5, *Preserving Rights and Powers*,
> Grant Assurance No. 6, *Consistency with Local Plans*,

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[48] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11.
[49] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11.
[50] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11; and FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 34.
[51] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 11.
[52] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 12. This court case was subsequently dismissed by the court at the request of the petitioner.
[53] FAA Appeal Exhibit 1, Item 21.

Grant Assurance No. 7, *Consideration of Local Interest*,
Grant Assurance No. 8, *Consultation with Users*,
Grant Assurance No. 19, *Operation and Maintenance*,
Grant Assurance No. 22, *Economic Nondiscrimination*,
Grant Assurance No. 24, *Fee and Rental Structure*,
Grant Assurance No. 25, *Airport Revenues,* or
Grant Assurance No. 29, *Airport Layout Plan.*

The Director dismissed the complaint.[54]

On May 3, 2001, Mr. Ken Day, Airport Manager, Boca Raton Airport Authority, sent a letter to Mr. Vernon Rupinto, Program Manager, FAA Orlando Airports District Office, regarding the Airspace Study Checklist for the 15-acre development site. May 3, 2001, Airspace Study Checklist attached.[55]

On May 22, 2001, FAA sent a letter to Complainant's counsel agreeing to permit Complainant to file appeal in 16-00-10 on May 30 rather than May 29.[56]

On May 30, 2001, the Complainant filed an appeal of the Director's Determination to the FAA Associate Administrator for Airports. The Complainant argues on appeal that the Director made substantive errors in interpreting the evidence and making conclusions from the evidence. The Complainant identifies seven issues for argument on appeal, including allegations that the Authority continues to be in violation of its Federal obligations regarding:

Grant Assurance No. 1, *General Federal Requirements*;
Grant Assurance No. 5, *Preserving Rights and Powers*;
Grant Assurance No. 19, *Operation and Maintenance*;
Grant Assurance No. 25, *Airport Revenues*; and
Grant Assurance No. 29, *Airport Layout Plan*;

as well as the airport's minimum standards for a fixed-base operator.[57]

On June 6, 2001, the Respondent filed a reply to the Complainant's appeal of the Director's Determination.[58]

On August 29, 2001, the Complainant filed a Notice of Filing Supplemental Authority in support of its allegation that the Director erred by not finding the Respondent in violation of grant assurance 1, *General Federal Requirements*. This relates to the issue of the 19th amendment in the lease between Boca Aviation and the Authority.[59]

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[54] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 44.
[55] FAA Appeal Exhibit 1, Item 24.
[56] FAA Appeal Exhibit 1, Item 22.
[57] FAA Appeal Exhibit 1, Item 2.
[58] FAA Appeal Exhibit 1, Item 3.
[59] FAA Appeal Exhibit 1, Item 5.

On September 4, 2001, the FAA extended the date by which the Associate Administrator would issue the Final Agency Decision in this matter to November 20, 2001. This extension of time was necessary for a fair and complete determination in this case.[60]

On September 18, 2001, the Respondent filed a Notice of Substitution of Patrick A. Barry, Esq. for Bill T. Smith, Jr., Esq. as co-counsel for the Boca Raton Airport Authority.[61] On November 20, 2001, Ms. Barbara Curtis, attorney for the Complainant, sent a letter to Ms. Woodie Woodward, FAA Associate Administrator for Airports, regarding request to stay a decision on the appeal.[62]

On November 27, 2001, Mr. Jonathan Cross, attorney for the FAA Office of the Chief Counsel, sent a letter to Mr. Patrick Barry, attorney for the Respondent, requesting confirmation or denial that the Respondent concurs with Ms. Curtis' request to extend the time for issuing the Final Agency Decision.[63]

On December 5, 2001, Mr. Jonathan Cross, attorney for the FAA Office of the Chief Counsel, sent a letter to Mr. Patrick Barry, attorney for the Respondent, and Ms. Barbara Curtis, attorney for the Complainant, stating that the Final Agency Decision will be deferred until January 23, 2002 at the request of both parties.[64]

On January 16, 2002, Mr. Richard L. Schmidt, Principal, Stuart Jet Center, LLC, sent a letter to Ken Day, Airport Director, requesting the Airport consider a proposal from Stuart Jet Center, LLC, to operate a full-service FBO on the Airport.[65]

On January 17, 2002, Complainant's counsel sent a letter to the FAA enclosing Boca Airport, Inc.'s Notice of Filing Supplemental Authority and Motion to Strike Attachment to Authority's Brief.[66]

On January 25, 2002, the Respondent's counsel Patrick Barry sent a letter to Thomas Devine, Foley & Lardner, discussing the filing of a response to Complainant's January 17, 2002 pleadings.[67]

On January 29, 2002, Respondent's counsel sent a letter to FAA confirming that the parties agreed to, and FAA granted, an extension of time to February 13, 2002, for the Respondent to respond to Complainant's Motion to Strike Amendment and Notice of Filing Supplemental Authority.[68]

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[60] FAA Appeal Exhibit 1, Item 6.
[61] FAA Appeal Exhibit 1, Item 7.
[62] FAA Appeal Exhibit 1, Item 25.
[63] FAA Appeal Exhibit 1, Item 27.
[64] FAA Appeal Exhibit 1, Item 28.
[65] FAA Appeal Exhibit 1, Item 10.
[66] FAA Appeal Exhibit 1, Item 11.
[67] FAA Appeal Exhibit 1, Item 12.
[68] FAA Appeal Exhibit 1, Item 13.

On February 14, 2002, the parties requested a 30-day extension while they continue substantive settlement negotiations.[69]

On February 15, 2002, FAA issued an Order extending the due date of the final agency decision to March 18, 2002, and closing the record to further pleadings or submissions with the exception of the Respondent's response to Complainant's *Notice of Filing Supplemental Authority.*[70]

On February 25, 2002, Respondent filed a Motion for Leave to File and attached the February 25, 2002 Response of Boca Raton Airport Authority to Boca Aviation's Notice of Filing Supplemental Authority.[71]

On March 15, 2002, Patrick Barry, Counsel for the Boca Raton Airport Authority, sent a facsimile transmission to Mr. Dean Stringer, Manager, FAA Orlando Airports District Office regarding settlement of the litigation with Boca Aviation at the Boca Raton Airport.[72]

On March 21, 2002, Patrick Barry, Counsel for the Boca Raton Airport Authority, sent a facsimile transmission to Mr. Dean Stringer, Manager, FAA Orlando Airports District Office advising that the Airport Authority approved a settlement concept conditioned upon final review set for April 17, 2002.[73]

On November 20, 2002, FAA issued an Order advising that since settlement discussions had been terminated, the FAA would lift its stay on the issuance of the Final Agency Decision and issue the decision on or before December 20, 2002.[74]

On December 20, 2002, Mr. Matthew Thys, Program Manager, FAA Orlando Airports District Office, sent a letter to Mr. Ken Day, Airport Manager, Boca Raton Airport, regarding the unconditional approval of the December 2000 Airport Layout Plan for Boca Raton Airport. The letter noted that "planned" or "constructed" facilities should be depicted on the Airport Layout Plan at the next regular update of the plan or the next request for FAA approval of the plan, whichever comes first.[75]

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the FAA's enforcement responsibilities; the FAA compliance program; statutes, sponsor assurances, and relevant policies; and the appeal process.

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[69] FAA Appeal Exhibit 1, Item 14.
[70] FAA Appeal Exhibit 1, Item 15.
[71] FAA Appeal Exhibit 1, Items 16 and 17.
[72] FAA Appeal Exhibit 1, Item 18. Agreement was never reached on a settlement solution.
[73] FAA Appeal Exhibit 1, Item 19.
[74] FAA Appeal Exhibit 1, Item 20.
[75] FAA Appeal Exhibit 1, Item 30.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C., §40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. Various legislative actions augment the Federal role in encouraging and developing civil aviation. These actions 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, and 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.

B. FAA Airport Compliance Program

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

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

FAA Order 5190.6A (Order) sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the

assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

C. Statutes, Sponsor Assurances, and Relevant Policies

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

The Complainant alleged a violation of ten grant assurances in the initial complaint, but carried forward only five of those into the appeal. The sponsor assurances argued on appeal are: (1) grant assurance 1, *General Federal Requirements,* (2) grant assurance 5, *Preserving Rights and Powers,* (3) grant assurance 19, *Operation and Maintenance,* (4) grant assurance 25, *Airport Revenues,* and (5) grant assurance 29, *Airport Layout Plan.* In addition, the Complainant argues on appeal that the FAA's policy concerning the airport's minimum standards was not properly applied.

1. General Federal Requirements

Grant assurance 1, *General Federal Requirements*, states in pertinent part,

> "[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..."

Among the list of Federal Regulations included in this grant assurance is 14 CFR Part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings. This is the regulation covering the steps and actions leading to a Director's Determination and, if appealed, the Final Decision and Order issued by the Associate Administrator under a Part 16 complaint. This section is particularly relevant to this case because the Complainant argues that the airport sponsor did not comply with the requirements of an earlier Director's Determination.

2. Preserving Rights and Powers

Grant assurance 5, *Preserving Rights and Powers*, implements the provisions of the AAIA, 49 U.S.C., §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 grant 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.]

3. Operation and Maintenance

Grant assurance 19, *Operation and Maintenance*, implements 49 U.S.C., §47107(a)(7), and states in its entirety:

a. 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. It will suitably operate and maintain the airport and all facilities thereon or connected therewith with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary.

   In furtherance of this assurance, the sponsor will have in effect at all times arrangements for –
   (1) Operating the airport's aeronautical facilities whenever required;
   (2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and
   (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 facilities which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

b. It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

4. Airport Revenues

Grant assurance 25, *Airport Revenues*, implements the provisions of 49 U.S.C. §47107(b) et. seq., and requires in pertinent part:

> "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..."

The Complainant also cites the FAA's *Policy and Procedures Concerning the Use of Airport Revenue* [64 FR, 7696; February 16, 1999], which defines unlawful revenue diversion as "the use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property..." [Section II(C)]

This policy contains a section on permitted uses of airport revenue, expressly allowing:

> "...attorney fees to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement." [Section V(A)(5)]

This policy also contains a section on prohibited uses, which includes the following statement:

> "Direct or indirect payments that exceed the fair and reasonable value of those services and facilities 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)]

5. Airport Layout Plan

Grant assurance 29, *Airport Layout Plan*, which implements the provisions of 49 U.S.C. §47107(a)(16) states in its entirety:

a. [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 non-aviation 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 alternations 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.

b. 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.

6. Airport 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.]

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

Pursuant to 14 CFR, Part 16, §16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The Complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the Complainant was directly and substantially affected by the things done or omitted by the Respondents. [14 CFR, Part 16, §16.23(b)(3,4)]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, §16.29]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). [*See* also, *Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 US 267, 272 (1994); *Air Canada et al. v. Department of Transportation*, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR §16.229(b) is consistent with 14 CFR §16.23, which requires the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR §16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

2. Right to Appeal the Director's Determination

A party adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, §16.33]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, §16.23(b)(3)] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Administrative Record upon which such determination was based. Under Part 16, Complainants are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversarial proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. [*See Sims v. Apfel*, 530 US 103, 108-110 (2000) citing *Hormel v. Helvering*, 312 US 552 (1941) and *US v. LA Tucker Truck Lines*, 344 US 33, (1952).]

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, §16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In each such case, it is the Associate Administrator's responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. *Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19, p.21 (12/30/99) and 14 CFR, Part 16, §16.227]

VI. ANALYSIS AND DISCUSSION

Upon consideration of the complaint from Boca Airport, Inc., d/b/a Boca Aviation, filed with the FAA on June 12, 2000, the Director of the Office of Airports Safety and Standards determined on April 26, 2001, that the Boca Raton Airport Authority is not currently in violation of its obligations under 49 U.S.C. §47107(a)(1), (5), (13), or (16) and §47107(b)(1) or related grant assurances. Specifically, the Director determined the Authority is not currently in violation of any of the following grant assurances:

Grant Assurance No. 1, *General Federal Requirements*
Grant Assurance No. 5, *Preserving Rights and Powers*
Grant Assurance No. 6, *Consistency with Local Plans*
Grant Assurance No. 7, *Consideration of Local Interest*
Grant Assurance No. 8, *Consultation with Users*
Grant Assurance No. 19, *Operation and Maintenance*
Grant Assurance No. 22, *Unjust Economic Discrimination*
Grant Assurance No. 24, *Fee and Rental Structure*
Grant Assurance No. 25, *Airport Revenues*
Grant Assurance No. 29, *Airport Layout Plan*

In addition, the Director determined the Authority is not in violation of its minimum standards for a fixed-base operator.[76]

The Complainant appealed the determination of the Director[77] under Title 14 Code of Federal Regulations (CFR), Part 16 §16.31(c), which states, "A party adversely affected by the Director's Determination may appeal the initial determination to the Associate Administrator as provided in §16.33." Specifically, the Complainant appealed the Director's findings regarding the minimum standards for a fixed-base operator and the following grant assurances:

Grant Assurance No. 1, *General Federal Requirements*
Grant Assurance No. 5, *Preserving Rights and Powers*
Grant Assurance No. 19, *Operation and Maintenance*
Grant Assurance No. 25, *Airport Revenues*
Grant Assurance No. 29, *Airport Layout Plan*

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. *Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19, p. 21 (12/30/99) and 14 CFR, Part 16, §16.227] It is incumbent on the party filing the appeal to provide

[76] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 43.
[77] FAA Appeal Exhibit 1, Item 2.

evidence to support an allegation that the Director erred in making the determination. [14 CFR, Part 16, §16.229(b) and (c)]

The Complainant offers seven arguments and 23 statements of fact intended to demonstrate that the Director erred in making the determination. After reviewing the record evidence provided in the administrative record, we find these arguments and statements of fact are insufficient to support a reversal of the Director's Determination based on the allegation that the Director (a) failed to make findings of fact supported by a preponderance of reliable, probative, and substantial evidence, or (b) made conclusions of law not in accordance with applicable law, precedent, and public policy. The Associate Administrator concurs with the Director's findings, with one exception, which is a harmless error and does not rise to the level of a reversible error. That exception relates to the Director's assumption that by giving conditional approval for the December 2000 Airport Layout Plan, the FAA had given implied approval for the interim non-aviation use of a portion of the 15-acre parcel under discussion.

Exception to the Director's Determination.

The Director's Determination noted that the Respondent was required to obtain FAA approval for the interim non-aviation use of aeronautical property. The Administrative Record reflects that the Respondent did not, in fact, make a formal request for FAA approval, and the FAA did not prepare any documentation signifying approval. In addition, the temporary parking structure was not specifically depicted on the December 2000 Airport Layout Plan conditionally approved by the FAA Orlando Airports District Office.

The Director determined that FAA's conditional approval of the Authority's Airport Layout Plan depicting the preliminary 15-acre development site implicitly included approval for the temporary parking facility. The Director concluded that since the temporary parking facility fell within the development site depicted on the Airport Layout Plan and would eventually accrue to the developer, the issue of explicit FAA approval for the parking lot was moot.[78]

The Associate Administrator does not agree with this conclusion. Rather, the Associate Administrator finds that explicit FAA approval for interim non-aviation use of aeronautical property is required. The record discloses that the FAA Orlando Airports District Office was aware of the Respondent's interim use and did not object because there was no adverse impact to the safety, utility, or efficiency of the Boca Raton Airport. In short, the FAA Orlando Airports District Office has already implicitly made the required findings regarding the interim use. The Respondent's failure to obtain formal FAA approval prior to constructing the temporary parking facility is a correctable condition. It is a harmless error and not a reversible error in the Director's Determination. The correction is for the Respondent to request FAA approval from the FAA Orlando Airports District Office for the interim non-aviation use of the

[78] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 32.

aeronautical-use parcel for the temporary parking lot.[79] The record also indicates that when the FAA's Orlando Airports District Office discussed the interim use with the Respondent, there was an understanding that the temporary use could be cancelled within 30 days at the discretion of the Respondent and that the Respondent would receive financial benefit for the temporary use. Any such receipt of revenues assists the sponsor meet its grant assurance obligation to operate its airport in a manner that is as self-sustaining as possible.

The Complainant argues that the interim use parking lot is not depicted on the approved Airport Layout Plan, and therefore the Respondent is in violation of grant assurance 29, which requires the airport sponsor to keep the Airport Layout Plan up to date at all times. During our review, we found the Complainant is correct in noting that the interim-use parking lot is not depicted on the Airport Layout Plan revised December 2000 and unconditionally approved by the FAA Orlando Airports District Office in December 2002. However, grant assurance 29 does not directly address temporary structures, and the FAA does not require airport sponsors to produce a new Airport Layout Plan update for temporary or interim structures.[80] Even if the airport had been found in noncompliance for failing to annotate the parking structure on the Airport Layout Plan, the remedy to bring to airport into compliance would be a pencil change approved by the FAA. This issue is discussed below in issue V(2).

A. Arguments Presented by the Complainant on Appeal

Boca Aviation presents seven issues in its argument to persuade the Associate Administrator that the Director erred in findings of fact or conclusions of law. Upon reviewing those seven arguments and all related documents, we find the Complainant did not present sufficient evidence to justify a reversal of the Director's Determination. The issues argued are discussed below.

> ***Issue I.*** "The Director erred in determining that the Authority's issuance and acceptance of a proposal to develop the 15 acres was not in contravention of the Authority's 'General Federal Requirements' grant assurance."[81]

Boca Aviation asserted in its initial complaint that the Authority was obligated under a previous Director's Determination to develop the 15-acre parcel in accordance with the terms of the 19th amendment to the Master Lease between Boca Aviation and the Authority. The 19th amendment was the direct result of an earlier complaint filed with

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[79] It is common practice for the FAA to approve interim use of airport property for non-aeronautical purposes informally. Approval should be documented in writing to ensure the Airport Sponsor is aware of the restrictions identified in FAA Order 5190.6A, section 4-17(g).

[80] Even the largest commercial service airports do not produce new Airport Layout Plan (ALP) maps with every change to the ALP. The sponsor may make an interim update to the ALP, which will result in a pen/ink change on the existing approved ALP. FAA documentation should reflect these approved changes. After there are several interim changes or there is major development that needs to be revised, the ALP map set should be updated and approved by the FAA.

[81] FAA Appeal Exhibit 1, Item 2, page 13.

the FAA, separate and apart from this proceeding. [See *Boca Raton Jet Center v. Boca Raton Airport Authority*, FAA Docket No. 16-97-06] The 19th amendment to the Complainant's lease was part of the Authority's Corrective Action Plan submitted to the FAA to cure the violations found in connection with that earlier proceeding. Boca Aviation argued that deviation from that Corrective Action Plan constituted a breach of General Federal Requirements.[82]

Grant assurance 1, *General Federal Requirements*, states in pertinent part that 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..." One of the Federal Regulations listed in this grant assurance is Title 14 CFR, Part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings. This is the regulation covering the steps and actions leading to a Director's Determination and, if appealed, the Final Decision and Order issued by the Associate Administrator under a Part 16 complaint.

Since the Corrective Action Plan resulted from a previous Director's Determination under a Part 16 complaint, Boca Aviation alleges the Authority is obligated to follow that Corrective Action Plan as stated, and alleges that deviation from that plan results in a violation of grant assurance 1, *General Federal Requirements*. The Director, however, determined in that the Authority was not in violation of its General Federal Requirements under grant assurance 1 by deviating from the initial plan. Rather, the Director determined the initial Corrective Action Plan was only one method by which the Authority could accomplish the FAA's objectives under the previous determination.[83] The Director also concluded that the Boca Jet Director's Determination did not require 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 Complainant disagrees with the findings of the Director. In its initial complaint, Boca Aviation provided extensive arguments objecting to the Authority's alternative plan to contract with a third party to construct, develop, and operate the 15 acres of land. In addition, the Complainant brought the issue before the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.[84] According to Respondent, however, on May 17, 2000, the Court dismissed the three counts addressing the 15 acres with prejudice, holding that the 19th Amendment was unambiguous, and, as a matter of law, the Authority could assign or sublease its rights and obligation to a third party. The Court denied Boca Aviation's motion for rehearing on May 24, 2000.[85]

The Complainant also appeals this issue to the FAA Associate Administrator for Airports, devoting more than five pages to explain why the Authority should not have

[82] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3.
[83] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 25.
[84] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 7.
[85] FAA Appeal Exhibit 1, Item 3, page 13.

been permitted to contract with a third party to construct, develop, and operate the 15 acres of land.[86] However, Complainant's arguments do not provide evidence that the Director (a) failed to make findings of fact supported by a preponderance of reliable, probative, and substantial evidence, or (b) made conclusions of law not in accordance with applicable law, precedent, and public policy as required by Title 14 CFR, Part 16, §16.229(b) and (c).

In its appeal, the Complainant alleges that the Director failed to consider the relation between the Boca Jet Final Director's Determination and the 19th Amendment.[87] Boca Aviation argues, "the Director's reading of the Boca Jet Final Director's Determination demonstrates a fundamental misinterpretation of the words actually employed."[88] Mr. David L. Bennett, Director of Airport Safety and Standards, issued both that Determination and the one currently under appeal.[89] The Associate Administrator is not convinced that the Director did not interpret the words in his own report correctly. The fact that the Final Director's Determination in Boca Jet contemplated that the Authority would operate the aeronautical facilities on the parcel was not material to the decision.

As the Director noted in his April 26, 2001 Director's Determination, the prior Boca Jet Final Director's Determination neither specified the facilities to be constructed nor required the Authority itself to construct and operate facilities on the parcel. What was material to the Final Director's Determination in Boca Jet was that the Authority eliminate Boca Aviation's exclusive right and not permit Boca Aviation to have the power to approve new aeronautical activities at the Airport. As the Respondent points out in its Reply to the Appeal, the proposed 18th Amendment to the lease between the Authority and Boca Aviation was not acceptable to the FAA because it did not eliminate Boca Aviation's exclusive right and it provided the power to Boca Aviation to approve new aeronautical activities at the Airport.[90] The approval power given to Boca Aviation under the 18th Amendment violated the grant assurance requiring the Authority to preserve its rights and powers.[91] The resolution achieved through the 19th Amendment and the Corrective Action Plan was consistent with the intent of the Boca Jet Final Director's Determination and the Authority's continuing Federal obligations under the grant assurances.

Boca Aviation asserts that the FAA incorporated the terms of the 19th Amendment into its Boca Jet Final Director's Determination and that the 19th Amendment is an agreement enforceable by the FAA.[92] Boca Aviation essentially reargues from its Complaint that the Authority's actions breached the 19th Amendment and that it is the FAA's duty to enforce the Amendment because "the Final Director's Determination

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[86] FAA Appeal Exhibit 1, Item 2, pages 13-18.
[87] FAA Appeal Exhibit 1, Item 2, page 15.
[88] FAA Appeal Exhibit 1, Item 2, page 14.
[89] FAA Appeal Exhibit 1, Item 3, Attachment 1, page 4; and Item 1 (Director's Determination), page 44.
[90] FAA Appeal Exhibit 1, Item 3, page 12.
[91] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, Exhibit 17, page
[92] FAA Appeal Exhibit 1, Item 2, pages 15-17.

and the 19th Amendment are inextricably intertwined."[93] As a result, the enforceability of the 19th Amendment, Boca Aviation asserts, "is not merely a state law issue."[94]

The Associate Administrator finds that the Director did properly consider the relationship between this complaint, the 19th Amendment, and the decision issued under the Boca Jet Final Director's Determination at length and addressed it satisfactorily in the Director's Determination.[95] As the Director pointed out in his April 26, 2001 Determination, construing the 19th Amendment is a matter of state law according to the United States District Court for Southern Florida and therefore is not appropriate for adjudication or enforcement under Part 16. Boca Aviation implores the FAA to consider the 19th Amendment to be an "agency concern" and cites various cases to attempt to show that the FAA has a legal duty to enforce the 19th Amendment. Again, what *is* an agency concern is both ensuring the elimination of Boca Aviation's exclusive right at the Airport, and, consistent with Congress' will, ensuring that competition in fixed-base operation services exists at Boca Raton Airport, a recipient of Federal airport funding. 49 U.S.C. 40116(e).

In the United States district court case, the court abstained from addressing Boca Aviation's motion for temporary injunction and held that it had no jurisdiction. In this case, Boca Aviation had claimed that the Authority's Resolution #8, which provided that construction and development of the 15 acres would be contracted out to a third party, impaired the parties' contract in violation of the Contracts Clause of the United States Constitution. The decision makes clear that issues regarding interpretation of the 19th Amendment are state issues to be litigated in state court:

- "This case involves the simple application of the common law of Florida, despite the fact that [Boca Aviation] has tried to recharacterize the nature of this case by re-filing its claims in federal court." 2000 U.S. Dist. LEXIS 14757, 10-11.

- "Not only are the Florida courts perfectly open and willing to vindicate the parties' rights [under the 19th Amendment], but there is no reason this case should ever be tried in federal court at all." [2000 U.S. Dist. LEXIS 14757, 11.]

- "[Boca Aviation's] breach of contract claims ... were finally decided in state court." [2000 U.S. Dist. LEXIS 14757, 12.]

- "In an overabundance of caution, even assuming that this case was appropriately before this Court, the Court finds [Boca Aviation] has failed to demonstrate a substantial likelihood of success on the merits." [2000 U.S. Dist. LEXIS 14757, 12-13.]

- "[U]nder the facts of this case, [the Authority] had a strong public interest in introducing competition and preventing the perpetuation of a monopoly at the Boca

[93] FAA Appeal Exhibit 1, Item 2, page 15.
[94] FAA Appeal Exhibit 1, Item 2, page 15.
[95] FAA Appeal Exhibit 1, Item 1 (Director's Determination), pages 4-8, 22-25.

> Raton Airport facilities ... monopolies are against public policy." [2000 U.S. Dist. LEXIS 14757, 13-14.]

The Associate Administrator concurs with the Respondent that the Final Director's Determination in the Boca Jet case did not preclude the Authority from subleasing the 15 acres to comply with the Corrective Action Plan. As the Respondent points out, the FAA ordered the Corrective Action Plan to eliminate Boca Aviation's exclusive right.

In its appeal, the Complainant submitted a case from the United States Court of Appeals, Federal Circuit, [see *Kathryn Conant, Petitioner, v. Office of Personnel Management*, Respondent, No. 99-3459] to demonstrate that "where a settlement agreement between parties is relevant to an administrative proceeding, directly addresses an issue in dispute, and is not contrary to law, an administrative agency cannot choose to ignore the agreement."[96] In that case, the Complainant alleged the Respondent included negative information from a dispute already resolved to influence the decision in a subsequent application for disability retirement, contrary to an agreement between the parties.[97] In the case at hand, Boca Aviation alleged the Authority, by not honoring a provision in its lease agreement, is in violation of a Federal grant assurance. We find Conant not to be relevant to the Boca Part 16 matter.

First, Conant addresses a formal settlement agreement entered into between a Federal agency, the Internal Revenue Service, and a Federal employee. The Final Director's Determination in Boca Jet is not a settlement agreement as described in Conant. In addition, the FAA is not a party to the 19th Amendment. What Boca Aviation is really complaining about is the fact that in its view, the 19th Amendment is not being enforced. That agreement, made at the local level and enforceable under state law, represents an amendment to a lease between Boca Aviation and the Authority.

Second, Conant addresses an agency's breach of a settlement agreement that "materially compromised" the complainant Conant's eligibility for disability retirement. [*Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, 2002 MSPB LEXIS 401 (January 10, 2002) at 14.] In the Boca Raton matter, Complainant Boca Aviation has not demonstrated how it has been "materially compromised" by the Director's Determination in Boca Jet or, for that matter, the Director's Determination under appeal (other than the fact that the Authority has been required to eliminate Boca Aviation's unlawful exclusive right). To the extent that Boca Aviation believes that it has suffered damages as a result of the 19th Amendment, its remedy lies in state court.

Complainant Boca Aviation also appears to assert that under *Texas Eastern Transmission Corp. v. FERC*, 966 F.2d 1506 (D.C. Cir. 1992), which cites in turn language from *Cajun Electric Power Cooperative, Inc. v. FERC*, 924 F.2d 1132 (D.C. Cir. 1991), because the FAA "approved" the 19th Amendment, the Amendment is an agreement to be enforced by the FAA, the 19th Amendment being "closely akin" to an

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[96] FAA Appeal Exhibit 1, Item 5.
[97] FAA Appeal Exhibit 1, Item 5.

FAA order.[98] The Associate Administrator does not concur and Texas Eastern is not relevant to the matter at issue here. Once again, the whole intent of the Final Director's Determination in the Boca Jet matter was to resolve the issue of the exclusive right as previously granted by the Authority to Boca Aviation. The Authority and Boca Aviation negotiated an amendment to their lease that satisfied the FAA that Boca Aviation's unlawful exclusive right would be eliminated. Of importance to the FAA is that the Authority complies with the Federal exclusive rights statute, 49 U.S.C. 40116(e). In order to comply with the statute, the Authority may not permit Boca Aviation to monopolize airport services at Boca Raton Airport. In order to comply with Federal law, the Authority must have the 15-acre parcel developed in a manner that will offer competition on the airport consistent with Congress' intent. Assuming the fixed-base operator on the 15 acres complies with the Authority's minimum standards, it matters not to the FAA who actually operates the FBO just so that the operator is *not* Boca Aviation (*i.e.*, the identity of the operator, just so that it is not Boca Aviation, is not material to the FAA's Boca Jet Final Director's Determination).

Neither Texas Eastern nor Cajun Electric is relevant to the 19th Amendment or the issues before the FAA in this appeal. In Cajun Electric, Cajun challenged a Federal Energy Regulatory Commission (FERC) interpretation of a contract between Cajun and a utility company, which was filed as a rate schedule with FERC. Cajun filed a complaint asking FERC to order enforcement of the contract pursuant to 16 U.S.C. 824(d) and 825(e). First of all, there is no such statutory basis for the FAA to enforce the terms of the 19th Amendment as in Cajun Electric. FAA has no authority to enforce a state law lease. The FAA does have authority to require a recipient of Federal funding to comply with Federal law and the sponsor assurances. This is what the FAA has done. In addition, in Cajun Electric, FERC never enforced the contract at issue. Moreover, Cajun Electric involves Federal utility rate regulation complexities that are not present in the situation before the FAA in this appeal. Finally, even if the 19th Amendment was a settlement agreement to be enforced by the FAA, which its is not, Cajun Electric and Texas Eastern hold that the FAA's interpretation would be entitled to deference and that "when the agency reconciles ambiguity in such a contract it is expected to do so by drawing upon its view of the public interest." [Cajun Electric, 924 F.2d at 1135; Texas Eastern, 966 F.2d at 1509.] FAA's view of the public interest is consistent with the exclusive rights statute and FAA exclusive rights policy - that Boca Aviation's unlawful exclusive right be eliminated and that Boca Aviation have no rights in and to the 15-acre parcel. It would not be material to the public interest that a private operator, rather than the Authority itself, were to compete with Boca Aviation in the supply of aeronautical services at the Airport. For these same reasons, Texas Eastern is not relevant.

The dispute with the Corrective Action Plan centers around the Director's Determination in the previous, related Part 16 complaint involving Boca Raton Jet Center, Inc. [*Boca Raton Jet Center, Inc. v. Boca Raton Airport Authority*, Docket No. 16-97-06, issued August 20, 1999.] That decision affected the current Complainant, Boca Aviation, by forcing the Authority to terminate an exclusive rights agreement

[98] FAA Appeal Exhibit 1, Item 2, page 17.

with Boca Aviation.[99] At issue here is whether the Authority was obligated to follow a single option for extinguishing that right.[100] Boca Aviation alleges the single option was the *only* option since it was discussed in the Director's Determination and was included as part of the legal contract between Boca Aviation and the Airport Authority in the 19th Amendment to that contract. The Complainant also alleges the FAA has a responsibility to enforce that section of the contract since it was referred to in the Director's Determination in *Boca Raton Jet Center, Inc. v. Boca Raton Airport Authority*.[101]

In its appeal to the FAA, the Complainant requests the Associate Administrator to reverse the Director's Determination and find that the Boca Jet Final Director's Determination and the 19th Amendment, individually and collectively, created enforceable rights and that those rights were violated by means of the inconsistent development plans for the 15 acres.[102] We cannot do that for the reasons discussed above. The intent of the Director's Determination in the Boca Jet case was to eliminate an exclusive rights violation at the airport. That was done.[103] Whether the option exercised by the Authority in following through on its plan to develop the 15 acres violated a specific issue of contract law between the Complainant and the Respondent is a matter for a state court to decide; a Part 16 complaint is not the right forum to resolve that issue.[104]

The Associate Administrator is not persuaded the Director erred in either substance or process in determining that the Authority's alternate plan for developing the 15 acres did not violate the Authority's General Federal Requirements under grant assurance 1.

> *Issue II.* "The Director's finding that a [fixed-base operator] on 9.5 acres of land or less complies with the *Minimum Standards* when the standards require a minimum of 12 acres is not supported by any evidence and is arbitrary and capricious."[105]

The airport's minimum standards require a fixed-base operator to lease 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.[106] The Complainant's position is that the entire 12 acres must be devoted to aeronautical activity.[107] The Authority's position is that as long as the fixed-base operator meets individual minimum standards for each aeronautical activity that is part of that fixed-base operation, *and* leases a minimum of 12 acres, then that fixed-base operator meets the

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[99] FAA Appeal Exhibit 1, Item 3, Attachment 1, pages 2-3.
[100] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 24.
[101] FAA Appeal Exhibit 1, Item 2, pages 13-17.
[102] FAA Appeal Exhibit 1, Item 2, pages 17-18.
[103] FAA Appeal Exhibit 1, Item 3, Attachment 1, pages 2-3.
[104] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 25.
[105] FAA Appeal Exhibit 1, Item 2, page 18.
[106] FAA Appeal Exhibit 1, Item 2, Attachment 11, page 22, #2.
[107] FAA Appeal Exhibit 1, Item 2, page 19.

airport's minimum standards for a fixed-base operator.[108] The Director agreed with the Authority, noting that the minimum standards do not expressly state that all 12 acres required must be used for aeronautical purposes as the Complainant contends.[109]

The Complainant disagrees with the Director's finding. In its appeal, Boca Aviation states, "...the interpretation of the Authority that 12 acres does not have to be dedicated to aeronautical use, accepted by the Director, flies in the face of FAA Order 5190.6A, Sec. 3-12."[110] That section of the Order states in its entirety:

> "ADMINISTRATION OF POLICY. The foregoing policies are not intended to expose purveyors of aeronautical services to irresponsible competition. A prudent airport management should establish minimum standards to be met by all who would engage in a commercial aeronautical enterprise 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 fair, equal and not unjustly discriminatory. That is to say, they must be relevant to the proposed activity, reasonably attainable, and uniformly applied. FAA's position is that the opportunity to offer those aeronautical services not provided by the airport owner must be available to those who meet acceptable standards." [FAA Order 5190.6A, Sec. 3-12]

The FAA encourages airports to establish minimum standards to ensure a safe and efficient operation without making the standards so stringent that it restricts opportunities at the airport for otherwise qualified commercial aeronautical businesses.

The Authority states that its minimum standards require a minimum of a 12-acre parcel with the aeronautical purposes defined. Within the 12 acres, square footage is allocated for specific items, but there is no requirement that all 12 acres be used for aeronautical purposes.[111]

Boca Aviation argues that the minimum standards apply only to aeronautical activities, and as such, the 12 acres required in the minimum standards must be dedicated to aeronautical activities.[112] Boca Aviation further argues that the Director's Determination is flawed because the Director relied on the Authority's interpretation of its minimum standards, which it did not interpret in a reasonable fashion (*i.e.*, as requiring that the entire parcel be used for aeronautical purposes).

FAA Advisory Circular 150/5190-5, change 1, dated June 10, 2002, *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*, defines *minimum standards* as the qualifications or criteria that may be established by an airport owner as

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[108] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 10, pages 27-28.
[109] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 36.
[110] FAA Appeal Exhibit 1, Item 2, page 19.
[111] FAA Appeal Exhibit 1, Item 3, page 24.
[112] FAA Appeal Exhibit 1, Item 2, page 19.

the minimum requirements that must be met by businesses engaged in on-airport aeronautical activities for the right to conduct those activities. The FAA suggests that airport sponsors establish reasonable minimum standards that are relevant to the proposed aeronautical activity with the goal of protecting the level and quality of services offered to the public. Once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical activities and services.

The Complainant does not assert that it requested and was denied the same interpretation in relation to its fixed-base operation. Further, the Authority notes that since Boca Aviation has a hotel and an office building on its leasehold, it is reasonable that the new fixed-base operator be allowed to diversify its revenue base as well.[113]

Developing minimum standards is the responsibility of airport management. It is reasonable to rely on the interpretation of the airport management in defining its own minimum standards. Boca Aviation supplies no evidence that the Director's Determination regarding this issue is not supported by a preponderance of reliable, probative, and substantial evidence. The Director's Determination is consistent with applicable law, precedent, and FAA policy as described above. It is not enough that Boca Aviation disagrees with, or does not like, the Authority's interpretation of its own minimum standards. Therefore, the Associate Administrator affirms the Director's position that leasing a minimum of 12 acres meets the minimum standards for a fixed-base operator provided the other elements of the minimum standards are met for each aeronautical activity.

The issues remaining then are: (a) Did the fixed-base operator lease the minimum of 12 acres, and (b) Does the fixed-base operator meet the minimum standards for each aeronautical activity?

(a) Minimum of 12 Acres

There is no indication in the record that Premier Aviation leased fewer than 12 acres. The Authority's plan was to develop 15 acres of airport property.[114] The Request for Proposals (RFP) dated March 1, 2000, specifically referred to the property as "The 15 Acres."[115] Premier Aviation's May 15, 2000, response to the RFP offered to rent a total of 20.3 acres (including both the 15 acres plus an adjacent 5-acre site).[116]

The December 28, 2000, Airport Layout Plan identifies the site as 15 acres. [117]

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[113] FAA Appeal Exhibit 1, Item 3, page 24.

[114] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 10, Exhibits 6 and 14.

[115] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, Exhibit 26.

[116] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, Exhibit 29, signature page and "A" Attachment.

[117] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 30 Airport Layout Plan.

In its appeal, the Complainant referred to Premier Aviation's lease as being a total of 15 acres, arguing that the Premier Aviation fixed-base operator plan contains approximately 9.5 acres of aeronautical facilities[118] and 5.5 acres for non-aviation commercial development.[119]

In fact, the Complainant does not argue that Premier Aviation is leasing less than 12 acres. Rather, its argument is that Premier Aviation is *using* less than 12 acres for its *aeronautical* activity. Clearly, the leased property exceeds the 12-acre minimum. As the Director found, Complainant Boca Aviation's own exhibit[120] supports the fact that Premier is to develop 15 acres.[121]

The Associate Administrator also notes Respondent's Reply to the Appeal that since Boca Aviation has a hotel and an office building on its aviation leasehold, it is reasonable that the new fixed-base operator be allowed to diversify its revenue base so that it is not solely dependent upon airside business. Respondent is correct when its states that there is no requirement that *all* 12 acres be utilized for aeronautical purposes.

(b) Minimum Standards for Each Aeronautical Activity

In addition to the requirement to lease at least 12 acres of land, the Minimum Standards and Requirements for Aeronautical Activities at the Boca Raton Airport, dated March 17, 1999, include six points of acceptable minimum standards for leased premises of a fixed-base operator.[122] Of those six, the Complainant alleges on appeal that two are not met: (1) the number of paved tie-down facilities, and (2) the amount of paved ramp space.[123]

(1) Number of paved tie-down facilities. The minimum standards for leased premises of a fixed-base operator require paved tie-down facilities for a minimum of 50 aircraft.[124] In its appeal, the Complainant states, "...the December 28, 2000 Amended [Airport Layout Plan] does not depict 'Paved Tie-down facilities for a minimum of 50 aircraft'." Complainant is mistaken. There are exactly 50 tie-downs depicted on the December 28, 2000, Airport Layout Plan signed by the FAA Orlando Airports District Office.[125] My staff verified the accuracy of its count with the FAA Orlando Airports District Office Program Manager.[126] We also counted 50 tie-downs on the Premier Aviation preliminary site plan.[127]

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[118] FAA Appeal Exhibit 1, Item 2, pages 18 and 21.
[119] FAA Appeal Exhibit 1, Item 2, page 25.
[120] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, Exhibit 29.
[121] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 37.
[122] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[123] FAA Appeal Exhibit 1, Item 2, page 23.
[124] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[125] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 30, exhibit 1; and FAA Appeal Exhibit 1, Item 2, attachment 1.
[126] FAA Appeal Exhibit 1, Item 4.
[127] FAA Appeal Exhibit 1, Item 2, attachment 5.

(2) Amount of paved ramp space. The minimum standards for leased premises of a fixed-base operator require a paved ramp adequate to accommodate all tie-downs facilities, all Transient Aircraft Activities of the fixed-base operator and all approved sub-lessees(s) of the fixed-base operator (but not less than 215,000 square feet) plus paved access to taxiways.[128] The Complainant asserts that Premier Aviation does not meet this standard, but does not explain how Premier's plans fall short of the requirement.[129] The Authority states that the Premier Site Plan allows for 298,000 square feet of paved ramp with paved access to taxiways.[130] This is supported by the budget estimate prepared by Suffolk Construction Company, Inc., which has a line item for 298,000 square feet of concrete apron.[131] It is also supported by the Operational Plans and Design Proposal identifying a 298,000 square foot Ramp Area.[132] This exceeds the minimum 215,000 square foot requirement.

Boca Aviation argues that the Director failed to consider aircraft movement. Boca Aviation asserts that the Director failed to consider the FAA's own design standards in finding that Premier's proposed use of the 15 acres was consistent with Federal law and policy. For example, Boca Aviation states that neither the 2000 Amended Airport Layout Plan nor the Premier site plan filed with the City of Boca Raton meet FAA Advisory Circular 150/5300-13, Chapter 2, Table 2-3. Specifically, the Complainant asserts that the width of the taxi lane for the wingspan of aircraft in design group II (which is the aircraft design group designated for the Airport on the Airport Layout Plan) does not meet the recommended distance from the taxi lane centerline to a fixed or movable object.[133]

The advisory circular cited by the Complainant does, indeed, recommend greater distance from the taxi lane centerline to a fixed or movable object for design group II than the Airport Layout Plan shows for the Premier site plan. The Complainant, however, fails to recognize the scope and relevancy of the advisory circular. The advisory circular referred to applies to construction funded in whole or in part with Federal funds. The Premier site is a private construction project and is not receiving Federal funding of any kind. Therefore, the advisory circular cited is not applicable to the Premier site.

The advisory circular is guidance for the grant recipient to follow in assuring the airport owner or sponsor meets its grant assurance obligations for Federally funded projects. Each airport is expected to apply the guidance according to its own specific circumstances. The Associate Administrator finds it unlikely that any airport owner or sponsor would construct, or arrange for the construction of, aircraft hangars to accommodate aircraft that cannot taxi to or from the hangars. The taxiway should be of sufficient width to accommodate, in a safe manner, the aircraft expected to use the

[128] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[129] FAA Appeal Exhibit 1, Item 2, pages 23-24.
[130] FAA Appeal Exhibit 1, Item 3, page 24, chart.
[131] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 29.
[132] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 29.
[133] FAA Appeal Exhibit 1, Item 2, page 23.

hangars. In this case, it would seem probable that the aircraft expected to use the proposed hangars will be smaller than the Complainant has envisioned.

The remaining four minimum standards that relate to leased premises of a fixed-base operator include:

(3) 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 the provision of Aircraft Maintenance and 24,000 square feet must be "dedicated" to the storage of tenant or transient Aircraft.[134]

(4) At least 7,000 square feet of facilities including adequate space for crew and passenger lounge, administration, operations, public telephones and restrooms.[135]

(5) At least 1,000 square feet of office and shop space "dedicated" to the administration and provision of Aircraft Maintenance.[136]

(6) Sufficient paved vehicle parking space to accommodate fixed-base operator and tenant customers, passengers, and employees on a daily basis.[137]

The Complainant does not specifically allege that any of the above four remaining minimum requirements for leased premises of a fixed-base operator were not met by Premier Aviation.

Record evidence supports that the six individual minimum requirements were satisfactorily addressed for each aeronautical activity. Specifically, the Operational Plans and Design Proposal shows 71,000 square feet of hangar space, a 7,000 square foot fixed-base operator building, and a 112,000 square foot office building, all of which are supported by the Suffolk Construction Company budget estimate.[138] The optional site plan submitted with the offer to lease 20 acres provided for 420 parking spaces, including 25 designated for the fixed-base operator.[139] In its offer, Premier Aviation discusses its plan to provide vehicular connections between the parking areas and the adjacent Muvico Theater site to allow cross parking to occur.[140]

Premier Aviation agreed in its Response to Boca Raton Airport Authority Minimum Standards and Requirements for Aeronautical Activities, Section II, to meet the

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[134] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[135] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[136] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[137] FAA Appeal Exhibit 1, Item 2, attachment 11, page 22.
[138] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 29.
[139] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 29, Development Design Group Chart.
[140] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 29, Architectural Design Narrative.

minimum standards established by the airport.[141] The Airport Authority has provided a chart showing how Premier Aviation is meeting all six of the aeronautical activity minimum standards.[142] We find the Authority and Premier Aviation provided sufficient evidence of intent to meet the minimum standards for each aeronautical activity for leased premises to a fixed-base operator.

Finding no evidence to the contrary, we have determined that the fixed-base operator did lease the minimum of 12 acres and did meet the minimum standards for each aeronautical activity. Therefore, the Associate Administrator affirms the Director's Determination that the minimum standards in question were met.

> ***Issue III.*** "The Director erred in determining that harmful and undue delay in implementation of the [Corrective Action Plan] by the Authority is waived when no construction has begun on the needed hangars and the land is 'available.'"[143]

In the initial complaint, Boca Aviation contended that the actions of the Authority caused an undue and harmful delay in the construction of the facilities approved by the FAA as part of the Authority's Corrective Action Plan under an earlier Director's Determination. The Director dismissed this complaint, finding that an acceptable remedy was already underway.[144]

In its May 30, 2001 appeal, Boca Aviation contends that an acceptable remedy is not underway since the 15-acre site is vacant except for a two-acre auto parking lot.[145] As evidence, the Complainant provides photographs, dated April 19, 2001, of vacant land with a billboard-type sign advertising that the land is available and approved for 125,000 square foot class A office building.[146]

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[141] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 10, Exhibit 12. This exhibit does not include 11 unnumbered pages submitted by the Authority as part of its December 18, 2000 Motion for Leave to File Supplemental Exhibit, which motion was subsequently denied. The Director did not rely on those pages in his April 26, 2001 determination. Those 11 unnumbered pages were again submitted as part of the Authority's June 6, 2001 Reply to the Complainant's appeal. Boca Aviation requested the 11 pages be stricken from consideration in this appeal. The Associate Administrator agrees with the Complainant's request and has not considered those 11 pages in the review of this Final Agency Decision. [*See* FAA Appeal Exhibit 1, Item 11, attachment 1; Item 3, attachment 10; and FAA Appeal Exhibit 2, Item 10, exhibit 12.]

[142] FAA Appeal Exhibit 1, Item 3, pages 24-25.

[143] FAA Appeal Exhibit 1, Item 2, page 27.

[144] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 25.

[145] FAA Appeal Exhibit 1, Item 2, page 28.

[146] In the Notice of Filing accompanying the April 19th photographs, the Complainant states, "The documentation supports Boca Aviation's claim that the Boca Raton Airport Authority, in approving the response to the RFP by Muvico/Lake, approved and is permitting the non-aviation use of aviation land and thereby has/is short changing its customers, the flying public, and has/is jeopardizing the continued viability and usability of the airport." [FAA Appeal Exhibit 1, Item 2, attachment 7] These written comments substantiate that Boca Aviation's underlying complaint on this issue is focused on the aviation versus non-aviation use of the land. This is a theme the Complainant brings up throughout the appeal. That issue is addressed under issue II above dealing with minimum standards and will not be discussed again in this section.

As of the dates of the Director's Determination (April 26, 2001) and the Complainant's Appeal (May 30, 2001), there had been very little time to accomplish any significant construction. Both Boca Aviation and the Authority state that the preliminary site plan for the 15 acres was submitted to the City of Boca Raton for permits on March 7, 2001.[147] The April 19, 2001, photographs submitted by Boca Aviation show several views of a large sign advertising available future office space.[148] The action to obtain permits, and the action of advertising the available future office space, do indicate that a remedy was "underway." The Associate Administrator is not persuaded that failure to begin meaningful construction within six to twelve weeks of submitting the site plan for permits constitutes evidence that the airport is failing to move forward on the planned development.

As of January 2003, however, the 15-acre parcel continues to be undeveloped with the exception of the auto parking lot. In conducting our investigation into this matter, we identified mitigating circumstances that contributed to this delay.

- First, the Airport Layout Plan depicting the Premier site plan was not unconditionally approved by the FAA Orlando Airports District Office until December 20, 2002.[149] Grant assurance 29, *Airport Layout Plan*, stipulates that the airport sponsor will not make or permit any changes or alterations in the airport or any of its facilities that are not in conformity with the approved Airport Layout Plan. Thus, no development, including hangars, could have occurred on the parcel until at least December 20, 2002, when the FAA provided unconditional approval.

- Second, the record also reveals that litigation apart from this Part 16 complaint, filed in part by Boca Aviation, appears to have delayed the development of the 15 acres. Even if litigation didn't *prevent* construction from beginning, it would be risky for an investor to put capital into a venture that may be disallowed. Business prudence would warrant waiting for resolution.

- Third, the lengthy investigation period and delay in issuing this Part 16 final agency decision impacts the initiation of significant construction in the same manner as the litigation noted above. This delay was attributed, in part, to requests by both parties to stay the FAA's proceeding to permit time for settlements discussions between the Complainant and the Authority.[150]

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[147] FAA Appeal Exhibit 1, Item 2, page 2; and Item 3, page 5.
[148] FAA Appeal Exhibit 1, Item 2, attachment 7.
[149] FAA Appeal Exhibit 1, Item 30.
[150] The Airport Authority reported, and the Complainant confirmed, to the FAA that the Parties' settlement attempts had failed and that such discussions between the parties had been terminated. The FAA lifted its stay in this matter on November 20, 2002. [FAA Appeal Exhibit 1, Item 20]

From the record evidence, including the mitigating circumstances noted above, it appears that a remedy acceptable to the FAA was in place when the Director issued his April 26, 2001 determination, and is still in place today.

> ***Issue IV.*** "The Director erred in concluding that the failure of the Authority to build and operate necessary hangars was proper."[151]

This issue centers on the same concerns expressed by the Complainant in issue I above. The Complainant contends that the Authority was required to develop the 15-acre site in one specific manner only. In this instance, Boca Aviation is arguing its case under grant assurance 19, dealing with operation and maintenance of the Airport.

In the initial complaint, Boca Aviation alleged that the Authority converted land from aeronautical use to non-aeronautical use, jeopardizing the Airport's utility and usability in violation of grant assurance 19, *Operation and Maintenance*.[152] The Director disagreed that grant assurance 19 was violated, noting that the Complainant demonstrated a basic misunderstanding of the Authority's Federal obligations established by this grant assurance. The Director explained that the purpose of the assurance 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.[153]

The Director also observed that the FAA monitors the public interest in the planning and development of airport land through the Airport Layout Plan approval process, not through grant assurance 19.[154] Specifically, an airport sponsor must obtain approval of an Airport Layout Plan before constructing facilities. It is through this approval process that the FAA determines whether the public interest is served by a proposed use of airport property.

The Complainant alleges on appeal that the Director relied only upon the maintenance portion of the assurance in making his determination that grant assurance 19, *Operation and Maintenance*, was not violated.[155]

The applicable grant assurance 19, *Operation and Maintenance*, states in its entirety:

> (a) 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

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[151] FAA Appeal Exhibit 1, Item 2, page 28.
[152] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 28.
[153] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 29.
[154] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 29.
[155] FAA Appeal Exhibit 1, Item 2, page 28.

with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary.

In furtherance of this assurance, the sponsor will have in effect at all times arrangement for –

(1) Operating the airport's aeronautical facilities whenever required;
(2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and
(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 facilities which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

(b) It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

On appeal, the Complainant again alleges a violation of grant assurance 19, *Operation and Maintenance*, stating that the obligation requires the airport sponsors to operate facilities for the benefit of the public and to eliminate hazards to aircraft and to people on the ground.[156] The Complainant cites a study and a previous FAA case in support of its position.

The Complainant cites a 1998 study by Kimley-Horn and Associates, Inc. that found existing open hangar facilities at the airport were all being used at over 100 percent capacity. The study stated that the availability of hangar space would be a limiting factor in the actual number of based jet aircraft, multi-engine turbine aircraft, and helicopters that could be accommodated at the airport.[157] The Complainant noted that the increasing cost of repainting, maintenance, and insurance was driving the demand for hangars. The Complainant alleges the lack of available hangars at the airport violates the requirement to operate facilities for the benefit of the public and to eliminate hazards to aircraft.[158]

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[156] FAA Appeal Exhibit 1, Item 2, pages 28-29.
[157] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 11, pages 6-8.
[158] FAA Appeal Exhibit 1, Item 2, page 29.

The Complainant also cites a previous FAA case, noting, "An airport owner may not permit any activity or action that interferes with the airport's use for aviation purposes." [159] Unlike the situation at Boca Raton Airport involving how the 15 acres is to be used, the case cited involved an existing wildlife hazard to aircraft where birds were interfering with the safe flight of aircraft to and from the airport. [See *Town of Fairview v. City of McKinney*, Final Decision and Order, January 23, 2001, Docket No. 16-99-04] This case has no relevance here. Boca Aviation does not allege that current aviation activities are being curtailed or endangered because of some activity the Airport is engaging in or permitting.

Boca Aviation's underlying concern is that adequate hangar space has *not yet been* constructed on the 15-acre parcel. As the Director pointed out, however, the purpose of grant assurance 19 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. The Associate Administrator concurs with the Director that the record does not support a finding that *existing* airport facilities are not being operated at all times in a safe and serviceable condition. At this time, there are no existing facilities on the 15 acres other than the temporary parking lot, which is not at issue in Issue IV. The Complainant does not allege an unsafe or unserviceable condition. Therefore, there can be no violation of grant assurance 19, *Operation and Maintenance*.

As the Director observed, the FAA monitors the public interest in the planning and development of airport land through the Airport Layout Plan approval process. We note that Boca Aviation has already challenged FAA's approval of the conditional Airport Layout Plan in Federal court. In addition, as discussed in Issue III above, the Authority has been prevented from building and operating additional hangars until pending matters are resolved.

The Associate Administrator affirms the Director's Determination that the Authority is not in violation of grant assurance 19, *Operation and Maintenance*.

> ***Issue V(1).*** "The Director erred in concluding that the Premier plan of restaurant, office building and 400 space auto parking lot complies with the Airport Layout Plan which depicts the 15 acres as aviation-use land."[160]

Boca Aviation asserts the Director erred in concluding that the plan for a restaurant complies with the Airport Layout Plan.[161] Yet the Airport Layout Plan clearly depicts a restaurant within the 15-acre site.[162] In support of its position, Boca Aviation argues that restaurants and auto parking lots are not aeronautical activities.[163] Again, the issue

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[159] FAA Appeal Exhibit 1, Item 2, page 28.
[160] FAA Appeal Exhibit 1, Item 2, page 30.
[161] FAA Appeal Exhibit 1, Item 2, page 30.
[162] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 30.
[163] FAA Appeal Exhibit 1, Item 2, page 30.

behind the Complainant's argument is aeronautical versus non-aeronautical use of the land.

The Airport Layout Plan dated December 28, 2000, identifies the 15-acre site in question as "Preliminary 15 Acre [fixed-base operator] Site." The land-use legend identifies that same area as Airport Authority Aviation Development.[164] This appears to be the basis for Boca Aviation's interpretation that the land is required to be used for aeronautical purposes only.[165]

The issue of aeronautical versus non-aeronautical use of the land is discussed above in relation to the minimum standards in Issue II, in relation to the Corrective Action Plan in Issue III, and in relation to hangar space construction in issue IV. It surfaces again here in relation to the Airport Layout Plan. The Complainant insists that "the total 15 acres at issue are dedicated to aviation use," adding that "neither the Authority nor the FAA has applied for release from aeronautical uses nor advertised to remove approximately 5.5 acres of land from aeronautical uses to non-aeronautical uses."[166]

The Director determined that the non-aeronautical uses of airport property identified in Premier's site plan were reflected in the Authority's December 2000 change to the Airport Layout Plan submitted for FAA approval.[167] The FAA Orlando Airports District Office conditionally approved that Airport Layout Plan on December 28, 2000.[168] The Director also determined that the Complainant's allegations with respect to an earlier Airport Layout Plan were moot since the plan had been revised December 28, 2000, depicting facilities similar to those depicted in Premier's site plan.[169] Boca Aviation is dissatisfied with this result, stating on appeal, "...the Determination failed to address the circumstances surrounding the Orlando [Airports District Office's] approval of the Amended [Airport Layout Plan] on December 28, 2000."[170]

We find the Director did address sufficiently the circumstances surrounding the approval. The Director's Determination devotes nearly three full pages to discussing the Airport Layout Plan and the Complainant's allegation that the Respondent was in violation of grant assurance 29, *Airport Layout Plan*. The Director's Determination discusses what an Airport Layout Plan is, its importance as an agreement between the FAA and the airport, and the fact that it is a compliance obligation of the airport owner. The Director discusses the results of his investigation into the Airport Layout Plan for Boca Raton Airport Authority, including a discussion of the conditional approval of the Airport Layout Plan by the FAA Orlando Airports District Office. The Director clarified the FAA's role in the Part 16 process, and noted that the Complainant has sought review of

[164] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 30.
[165] FAA Appeal Exhibit 1, Item 2, page 31.
[166] FAA Appeal Exhibit 1, Item 2, page 30.
[167] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 29.
[168] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 30.
[169] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 31.
[170] FAA Appeal Exhibit 1, Item 2, page 8.

the FAA's conditional approval of the Authority's Airport Layout Plan in the United States Court of Appeals for the 11th Circuit.[171]

The Associate Administrator finds no error on the part of the Director with respect to the December 2000 Airport Layout Plan (which was subsequently given unconditional approval by the FAA Orlando Airports District Office in December 2002) and the restaurant, office building, and permanent auto parking lot.

> *Issue V(2).* "The Director erred in determining that the airport development of the temporary parking lot did not violate the Authority's *Airport Layout Plan* grant assurance."[172]

Boca Aviation has requested the FAA to find that the Authority failed to submit an interim change setting forth the temporary parking facility and is, therefore, in violation of the Airport Layout Plan and grant assurance 29.[173] In addition, Boca Aviation asserts the Authority remains in noncompliance with grant assurance 29, *Airport Layout Plan*, because the temporary parking structure is not depicted on any version of the Airport Layout Plan.

Failure to Obtain FAA Approval

Boca Aviation asserts that the Director recognized the airport was in noncompliance when the Authority failed to request and obtain approval for an interim change to the Airport Layout Plan for the Muvico Palace temporary parking lot. In its appeal, the Complainant submits the following statements, which were not specifically mentioned in the Director's Determination, to support its position:[174]

> "On December 11, 2000, Boca Aviations' counsel met with the FAA in Washington, D.C. Later that day, internal FAA e-mail indicates that the FAA questioned whether the Authority had requested a change to the [Airport Layout Plan] to incorporate the proposed development(s)."[175]
>
> "The following day, the FAA internal e-mail confirmed that the Authority had not submitted a request for an amended [Airport Layout Plan]. The Authority was contacted by the FAA that same day."[176]
>
> "On December 21, 2000, the Authority submitted its request for a change to the [Airport Layout Plan]. On December 26, 2000, the FAA Airports District Office in Orlando received the request for approval of the amendment to the [Airport Layout Plan]. At 9:40 a.m. on December 28, 2000, the FAA

[171] FAA Appeal Exhibit 1, Item 1 (Director's Determination), pages 29-32. This court case was subsequently dismissed by the court at the request of the petitioner.
[172] FAA Appeal Exhibit 1, Item 2, page 32.
[173] FAA Appeal Exhibit 1, Item 2, page 36.
[174] FAA Appeal Exhibit 1, Item 2, page 8.
[175] FAA Appeal Exhibit 1, Item 2, page 8, #21.
[176] FAA Appeal Exhibit 1, Item 2, pages 8-9, #22.

transmitted by facsimile to the Authority the approved amendment to the [Airport Layout Plan]."[177]

When evaluating allegations that an airport owner is not reasonably meeting its Federal obligations, such as in a Part 16 complaint, the FAA's goal is to bring the sponsor into a state of compliance. It is clear from the statements above, submitted by the Complainant in the appeal, that the FAA was working to accomplish that very goal. Nonetheless, the Authority did not request, and the FAA did not formally approve,[178] the interim non-aviation use of that portion of the aeronautical-use property upon which a temporary parking facility was constructed.

In his determination, the Director did find that the Authority failed to a submit request for the interim use as a temporary parking structure and was required to do so.[179] However, the Director also determined this issue was moot since the temporary parking facility was implicitly included in the Airport Layout Plan conditionally approved December 28, 2000, by the FAA Orlando Airports District Office.[180]

Boca Aviation disputes the Director's determination that the December 2000 conditionally approved Airport Layout Plan implicitly contains the temporary parking facility.[181] The Director's basis for the determination was that since the temporary parking lot falls wholly within the 15-acre site, and will eventually become part of the permanent facilities depicted on the Airport Layout Plan, by inference it is included in the Airport Layout Plan.[182]

Boca Aviation disagrees. While there is no dispute that the temporary parking lot will fall within the 15 acres, the Complainant is concerned that the parking lot encroaches on the location of the proposed office building, common storage hangar, proposed parking for the fixed-base operator, and proposed instrument shop.

Based on the drawings submitted by the Complainant, the temporary parking lot does encroach on the proposed common storage hangar and the proposed instrument shop. It also covers part of the area designated for the office building identified for Phase II on the Preliminary Site Plan.[183] Consequently, we find the Director's conclusion that the temporary parking lot was implicitly approved through the December 2000 Airport

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[177] FAA Appeal Exhibit 1, Item 2, page 9, #23. This was a conditional approval of the Airport Layout Plan (ALP), which subsequently received unconditional approval from the FAA Orlando Airports District Office in December 2002. This ALP depicted the planned permanent improvements for the 15-acre parcel, but did not depict the temporary interim-use parking facility.

[178] Neither did the FAA disapprove such a plan. Mr. Matthew Thys of the FAA Orlando Airports District Office (ADO) advised us during this investigation that the ADO became aware of the installation of the temporary parking lot and did not object since the temporary lot would not impact the safety, utility or efficiency of the airport. However, he confirmed that no formal approval had been placed in the ADO's file for the Airport.

[179] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 31.

[180] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 32.

[181] FAA Appeal Exhibit 1, Item 2, page 34.

[182] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 32.

[183] FAA Appeal Exhibit 1, Item 2, attachment 21.

Layout Plan approval, to be factually incorrect. In light of this factual error, the Associate Administrator conducted additional investigation to determine if the Director's error was harmless to the ultimate determination of the Authority's current compliance with its Federal obligations.

This investigation found that the Respondent did not, in fact, make a formal request for FAA approval, and the FAA did not prepare any documentation signifying approval for the temporary parking facility. However, the investigation also found that when the FAA Orlando Airports District Office became aware of the Respondent's interim use, the Airports District Office did not object because upon review, there was no adverse impact to the safety, utility, or efficiency of the Boca Raton Airport. Thus, the Orlando Airports District Office has already implicitly made the required findings regarding the interim use. Consequently, we conclude that the Director's error was harmless.

It is also important to note that the structures impacted by the parking lot are *proposed*, and the parking lot itself is *temporary*. When the FAA's Orlando Airports District Office discussed the interim use with the Respondent, there was an understanding that the temporary use could be cancelled within 30 days at the discretion of the Respondent[185] and that the Respondent would receive financial benefit for the temporary use. Any such receipt of revenues assists the sponsor meet its grant assurance obligation to operate its airport in a manner that is as self-sustaining as possible.[186]

The Airport Layout Plan is a planning document for the airport and the FAA to ensure planning is thoughtful and adequate. The applicable Federal grant assurance 29, *Airport Layout Plan*, states in part,

> "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."

The grant assurance goes on to state,

> "If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency ... 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 a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety,

[184] FAA Appeal Exhibit 1, Item 33.
[185] FAA Appeal Exhibit 1, Item 33.
[186] Grant Assurance No. 24, *Fee and Rental Structure*. See footnote 200.

utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities."

The Complainant does not cite examples of how the temporary parking lot adversely affects the safety, utility, or efficiency of the airport, other than the repeated objections to the issue of aeronautical versus non-aeronautical use of the land. As noted, Mr. Matthew Thys of the FAA's Orlando Airports District Office has confirmed that the temporary parking lot does not impact the safety, utility, or efficiency of the airport.[187] Based on the record evidence, the Associate Administrator is not persuaded that the safety, utility, or efficiency of the airport is adversely affected by the temporary parking lot.

Still, the Associate Administrator finds that explicit FAA approval for interim non-aeronautical use of aeronautical property is required. The Respondent's failure to make a formal request and obtain FAA approval prior to constructing the temporary parking facility is, however, a correctable condition. It is a harmless error and not a reversible error in the Director's Determination. Temporary use of aeronautical property for non-aviation purposes does not release the property from any term, condition, reservation, restriction or covenant of the compliance agreement. [FAA Order 5190.6A, 4-17, g(1)]

The remedy in this case is for the Respondent to request FAA approval from the FAA Orlando Airports District Office for the interim non-aviation use of the aeronautical-use parcel for the temporary parking lot.[188] In this Final Decision and Order, we direct the FAA Orlando Airports District Office to work with the Respondent to document the request and approval of the temporary interim-use parking lot within 30 days.

Failure to Depict Temporary Parking Facility

The Complainant asserts that the Authority is still not in compliance with grant assurance 29, *Airport Layout Plan*, because the temporary parking structure is not depicted on the December 28, 2000, Airport Layout Plan.[189]

The Administrative Record reflects that the temporary parking structure is not specifically depicted on the December 2000 Airport Layout Plan conditionally approved by the FAA Orlando Airports District Office. Neither is it depicted on the Airport Layout Plan unconditionally approved December 2002 by the FAA Orlando Airports District Office.

Grant assurance 29, *Airport Layout Plan*, does state, "[the airport] will keep up to date at all times an Airport Layout Plan of the airport ..."

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[187] FAA Appeal Exhibit 1, Item 33.

[188] While we found it is common practice for the FAA Airports District Offices to approve interim use of airport property for non-aeronautical purposes informally, the Associate Administrator believes this approval should be documented in writing to ensure the Airport Sponsor is aware of the restrictions identified in FAA Order 5190.6A, section 4-17(g).

[189] FAA Appeal Exhibit 1, Item 2, page 34.

However, this assurance was not intended to require a costly revision to the approved Airport Layout Plan for each *interim* use anticipated.[190] It is common FAA practice to permit temporary, interim use without annotating such use directly on the Airport Layout Plan. Rather, such use is generally annotated through supporting documents such as letters, e-mails, records of telephone conversations, and notes maintained by the FAA in the airport's Airport Layout Plan file. Interim use may also be designated through attached maps, overlays, or pencil notations to the Airport Layout Plan, among other methods. Even if it were determined that the interim use should be depicted directly on the Airport Layout Plan, the remedy in this case would be to annotate the temporary parking facility on the plan itself.

Again, based upon the record evidence in which the Complainant offers no evidence to suggest that the temporary parking lot construction has created an adverse impact on the safety, utility, or efficiency of the Airport, and the verbal assurance of Mr. Thys of the Orlando Airports District Office that no adverse impact has been realized, the Associate Administrator is not persuaded that the safety, utility, or efficiency of the airport is adversely affected by the temporary parking lot. In addition, failure to obtain prior approval for constructing the temporary parking facility is a correctable condition. It is a harmless error and not a reversible error in the Director's Determination.

> ***Issue VI.*** "The Director abdicated his responsibility to ensure grant assurance compliance."[191]

Boca Aviation has alleged the Director failed or refused to find the Authority in noncompliance with statutes and assurances by claiming that an approval of the amended Airport Layout Plan by the FAA Orlando Airports District Office absolved and/or resolved the violations.

While the Complainant does not specify the statues and assurances referred to, the appeal document does reference Issue #2 and pages 27, 29, 31, and 32 of the Director's Determination.[192] Issue #2 of the Director's Determination deals with grant assurance 19, *Operation and Maintenance;* grant assurance 29, *Airport Layout Plan;* and grant assurance 5, *Preserving Rights and Powers.*[193]

The allegations involving grant assurance 19, *Operation and Maintenance*, are addressed above in Issue IV. The allegations involving grant assurance 29, *Airport Layout Plan*, are addressed above in Issues V(1) and V(2). The specific allegation that the Director failed or refused to find the Authority in noncompliance with statutes and assurances by claiming that an approval of the amended Airport Layout Plan by the

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[190] As we stated above, even the largest commercial service airports do not produce new Airport Layout Plan (ALP) maps with every change to the ALP. The sponsor may make an interim update to the ALP, which will result in a pen/ink change on the existing approved ALP. FAA documentation should reflect these approved changes. After there are several interim changes or there is major development that needs to be revised, the ALP map set should be updated and approved by the FAA.

[191] FAA Appeal Exhibit 1, Item 2, page 36.

[192] FAA Appeal Exhibit 1, Item 2, pages 36-37.

[193] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 26.

FAA Orlando Airports District Office absolved and/or resolved the violations is addressed under Issue V(2) above.

With regard to grant assurance 5, *Preserving Rights and Powers*, this section of the appeal states only, "[On 12/11/2000,] the Airport had been violating, for more than 5 months, assurance 5, *Preserving Rights and Powers*."[194] In the initial complaint, Boca Aviation alleged that the Authority's action to convert aeronautical-use land to non-aeronautical uses jeopardizes the airport's utility and usability in violation of grant assurance 5.[195]

Grant assurance 5 does not deal with the aeronautical versus non-aeronautical use of airport property. Grant assurance 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."

The Complainant has not alleged that any entity has an outstanding right or claim of right that would interfere with the Authority's performance. There is nothing to indicate the Authority 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.

Grant assurance 5 also states in pertinent part, "If the sponsor is a private sponsor, it will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with these assurances for the duration of these assurances."

While the Complainant argues that aeronautical-use land is being diverted to non-aeronautical use, Boca Aviation has not alleged that the airport will cease to function as a public-use airport, or is at risk of ceasing to function as a public-use airport because of such action. In addition, the airport sponsor, Boca Raton Airport Authority, is a public sponsor rather than a private sponsor.

The Complainant does not present persuasive evidence to support a finding of noncompliance with grant assurance 5, *Preserving Rights and Powers*.

The issue of aeronautical versus non-aeronautical use of the land is addressed above in Issues II, III, IV, and V(1). The Director determined, and the Associate Administrator agrees, that the Authority'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 Airport Layout Plan is not in violation of its Federal obligations.[196]

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[194] FAA Appeal Exhibit 1, Item 2, page 38.
[195] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 32.
[196] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 32.

The Associate Administrator is not persuaded the Director abdicated his responsibility to ensure grant assurance compliance.

> *Issue VII.* "The Director erred in determining that the Authority's attorneys' fee agreement did not violate the Authority's *Airport Revenue* grant assurance."[197]

This issue is discussed under three sections: (a) grant assurance 25, *Airport Revenues;* (b) grant assurances 24, *Fee and Rental Structure,* and 22, *Economic Nondiscrimination;* and (c) FAA's Revenue Use Policy.

(a) Grant Assurance 25, Airport Revenues

Boca Aviation argues that the arrangement between the Authority and its law firm for legal fees exceeded the fair and reasonable value of those services and was, therefore, in violation of grant assurance 25, *Airport Revenues.*[198]

Boca Aviation focuses this portion of the appeal on grant assurance 25, *Airport Revenues.* This assurance requires, in pertinent part, that all revenues generated by the airport be expended for the capital or operating costs of the airport. Boca Aviation agrees that attorneys' fees are a legitimate operating cost of the airport.[199] As such, using airport revenues for such fees is appropriate and not a violation of grant assurance 25, *Airport Revenues.* The Complainant's objection is with the *amount* of the fee rather than with the legitimacy of paying attorney's fees from airport revenue. Grant assurance 25 does not address the reasonableness of airport fees.

(b) Grant Assurance 24, Fee and Rental Structure, and Grant Assurance 22, Economic Nondiscrimination

To the extent that an individual would want to challenge the *amount* of a fee, such a complaint would more appropriately be raised under the self-sustaining requirement,[200] 49 U.S.C. 47107(a)(13) and grant assurance 24, *Fee and Rental Structure,* or under

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[197] FAA Appeal Exhibit 1, Item 2, page 38.

[198] FAA Appeal Exhibit 1, Item 2, pages 38-39.

[199] FAA Appeal Exhibit 1, Item 2, page 39.

[200] Under FAA policy, the self-sustaining assurance is a goal rather than an absolute requirement. Airport proprietors must maintain a fee and rental structure that, in the circumstances of their particular airport, makes the airport as financially self-sustaining as possible. However, if market conditions or demand for service do not permit the airport to be financially self-sustaining, FAA looks to the proprietor to establish long-term goals and targets to move the airport toward the self-sustaining goal. [*Policy Regarding Airport Rates and Charges,* 61 Fed. Reg. 31994, 32021 (June 21, 1994).] Taking into account the FAA's *Policy Procedures Concerning the Use of Airport Revenue* and the fact that no fee bonus has yet been paid, the application of the self-sustaining requirement to the bonus would be especially premature and hypothetic In any event, the FAA does not generally step in to assess the reasonableness of a legitimate airport charg from airport revenue unless there is an allegation under grant assurance 22, *Economic Nondiscrimination* Even in those cases, the FAA's role is to ensure an individual or entity alleging economic discrimination not been unjustly assessed rates and charges inconsistent with the rates and charges applied to other aeronautical enterprises of the same class or type.

grant assurance 22, *Economic Nondiscrimination.* The Complainant does not allege, and there is no evidence to support, a violation of grant assurance 24, *Fee and Rental Structure;* or grant assurance 22, *Economic Nondiscrimination.*

(c) FAA's Revenue Use Policy

Boca Aviation argues that the *agreed-upon* fees allegedly represent unlawful revenue diversion because the large amount of the fee is neither fair nor reasonable. At issue is a $500,000 bonus payment to the law firm if it is successful in terminating Boca Aviation's lease. Boca Aviation considers this payment, if made, to be tantamount to revenue diversion under the FAA's *Policy and Procedures Concerning the Use of Airport Revenue* (64 FR 7696; February 16, 1999), (Revenue Use Policy) because of its amount.[202]

The Director disagreed that the bonus payment, regardless of the amount, would constitute unlawful revenue diversion. The Revenue Use Policy defines revenue diversion as, "the use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property ...." [64 FR 7696, Section VI(A)] The Revenue Use Policy expressly permits the use of airport revenue for "...attorney fees to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement." [64 FR 7696, Section V(A)(5)].

In the Determination, the Director states, "The FAA's *Policy [and Procedures] 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."[203]

Boca Aviation argues in its Appeal that the Revenue Use Policy does not limit revenue diversion to those specific circumstances where airport revenue is used for non-airport public purposes. Rather, Boca Aviation asserts the policy is part of a greater design to ensure proper utilization of airport revenue. Specifically, the Complainant refers to Section VI (B)(1) of the Policy as identifying as a prohibited use "direct or indirect payments that exceed the fair and reasonable value" for services and facilities provided to the airport.[204]

In its Appeal, the Complainant mistakenly combines the attorney fee provision, section V(A)(5) under *Permitted Uses of Airport Revenue* with section VI (B)(1) under *Prohibited Uses of Airport Revenue.* Section V(A)(5) under *Permitted Uses of Airport Revenue* allows airport revenue to be used for:

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[202] FAA Appeal Exhibit 1, Item 2, pages 38-39.
[203] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 42.
[204] FAA Appeal Exhibit 1, Item 2, page 39.

"Lobbying fees and attorney fees to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement. See Section VI: Prohibited Uses of Airport Revenue."

The reference to Section VI is perhaps what gave rise to the Complainant's mistaken conclusion that "attorney's fees will be considered unlawful revenue diversion if the fees are neither fair nor reasonable."[205]

Section VI (B)(1), codified at 49 U.S.C. 47107 (l)(2)(A), and quoted by the Complainant does not refer to payments made to private firms. First, the provision was only partially quoted by the Complainant. The provision continues, "The FAA generally considers the cost of providing the services or facilities to the airport as a reliable indicator of value." In short, the provision was never intended to apply to non-governmental entities (i.e., profit-making private firms). It was intended, however, to permit governmental units to recover the cost of providing services to the airport but not to permit them to make a profit. Under a plain reading of the entire provision, it would make no sense if applied to private firms. For example, under Complainant's reasoning, and taking into account the entire provision, it would prohibit the airport from paying private firms any amount above the private firm's costs. Thus, the private firms would not be able to earn a reasonable profit and would have no incentive to do business with the airport.

The legislative history of Section VI (B)(1) supports the Director's interpretation. At the time of the passage of this provision (part of the FAA Authorization Act of 1994), the House Report[206] states that "[a] Federal grant should not furnish an opportunity for an airport to use federal funds to replace other airport generated funds, *and then use the latter for general governmental purposes*, resulting in no net capital improvements for the federal grant dollars expended." [H.R. Rep. No. 103-240, 103d Cong., 2d sess.,14, *reprinted in* 1994 U.S.C.C.A.N. 1676, 1683 (emphasis added).] In addition, the Report states that unlawful diversion "... typically occurs either through *payments by airports to other units of government* which exceed the value of services such units provide, or by *airports undercharging other units of government* for the use of airport property" (emphasis added).[207]

The Respondent argues in its Reply that the Director's finding should be upheld. The Respondent states that Boca Aviation complains of fees that may potentially be paid, but fails to explain the circumstances under which the fee might be paid. According to Respondent, those circumstances would be Boca Aviation's failure to pay rent. Only then would the fee arrangement be triggered.[208] The Respondent also states that Boca Aviation is the reason why the Respondent needed to expend legal fees in the first

[205] FAA Appeal Exhibit 1, Item 2, page 39.
[206] The House Bill was passed in lieu of the Senate Bill.
[207] The House Bill was passed in lieu of the Senate Bill.
[208] FAA Appeal Exhibit 1, Item 3, page 27.

place, and the fact that the Respondent was able to hire competent attorneys, at a reduced rate, should be of no concern to Boca Aviation.[209]

The Associate Administrator concurs with the Director that the Revenue Use Policy was intended to ensure airport sponsors do not use airport revenues for non-airport related purposes, and in particular to provide a subsidy for the airport sponsor's non-airport public functions. The Associate Administrator also concurs that the Revenue Use Policy was not intended to provide a vehicle for a party to challenge the reasonableness of fees paid to private entities for airport-related services. As both the Complainant and Director point out, the Revenue Use Policy contemplates the use of airport revenue to pay for the services of private, profit-making entities, such as law firms.[210] It is self evident that at least some of an airport's operating costs, which are expressly permitted to be paid with airport revenue, would have to be paid to profit-making private entities.

The Associate Administrator finds that the Director's conclusions are not "... contradicted by the clear and plain language ..." of the Revenue Use Policy as argued by the Complainant. [211] Rather, the Director's statements are consistent with the Revenue Use Policy and with the legislative history of the revenue use requirement as well. The Associate Administrator finds the Director did not err in determining that the Authority's attorneys' fee agreement violated neither grant assurance 25, *Airport Revenues,* nor the Revenue Use Policy.

B. <u>Alleged Failure to Address Statements of Fact</u>

The Complainant alleges the Director failed to make findings of fact supported by the evidence. Specifically, the Complainant stated, "The Determination failed to state or otherwise discuss uncontroverted facts...[and these] facts are significant in demonstrating that the Determination is unsupported by the record and contrary to law."[212] The Complainant offered 23 points of fact, which it claims demonstrate that the Determination is unsupported by the record and is contrary to law.[213]

Some of those statements of fact are incorporated into the seven issues argued by the Complainant above. For example:

> "At the May 15, 2000, Authority meeting, the topic of an agreement for **temporary parking** for Muvico Palace, adjacent to Muvico's leased

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[209] FAA Appeal Exhibit 1, Item 3, page 27

[210] The Complainant cites this provision incorrectly as being included in the Prohibited Uses of Airport Revenue section, 64 Fed. Reg. 7719. The correct cite is Section V – Permitted Uses of Airport Revenue, A(5), which states that "[l]obbying fees and attorney fees [constitute permitted uses of airport revenue] to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement." [64 Fed. Reg. 7718]

[211] FAA Appeal Exhibit 1, Item 2, page 38.

[212] FAA Appeal Exhibit 1, Item 2, page 4.

[213] FAA Appeal Exhibit 1, Item 2, page 4.

premises on the 15 aviation acres was first presented to the Authority." (Emphasis included by the Complainant.)[214]

"On May 22, 2000, the Authority approved a request by Muvico, co-owner of Premier for a temporary use of aviation land for a **parking lot** for the 20-screen movie theatre." (Emphasis included by the Complainant.)[215]

"On June 19, 2000, the Authority approved a license agreement with Muvico Entertainment, L.L.C. for the construction of a **temporary parking** facility for the movie theatre complex on the land designated for aviation use (the 15 acres) and adjacent to the Muvico 20-screen movie theater." (Emphasis included by the Complainant.)[216]

"On June 21, 2000, the Authority and Muvico signed the lease agreement enabling Muvico to use the aviation land for a **temporary parking** lot for the 20-screen movie theatre." (Emphasis included by the Complainant.)[217]

"On June 22, 2000, the next day, the **parking lot** on the aviation land adjacent to the Muvico 20-screen movie theatre was in place." (Emphasis included by the Complainant.)[218]

The temporary parking lot is addressed in issue V(2) above. Five additional statements of fact also refer to the parking situation.[219]

Three of the statements of fact refer specifically to the Airport Layout Plan. Those statements are also included in the discussion in issue V(2) above.[220]

It is not clear how the Complainant intended to incorporate other statements of fact into the issues argued. For example:

> "On August 16, 2000, Authority member Janet Sherr disclosed a conflict and stated that she will not be voting on issues regarding the 15 acres because her husband's law firm represents Muvico, a partner in Premier."[221]

A footnote indicates that on December 20, 1999, Ms. Sherr made the motion to select and appoint a committee to assess the need to amend the minimum standards and the

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[214] FAA Appeal Exhibit 1, Item 2, page 6, #8.
[215] FAA Appeal Exhibit 1, Item 2, page 6, #9.
[216] FAA Appeal Exhibit 1, Item 2, page 7, #13.
[217] FAA Appeal Exhibit 1, Item 2, page 7, #14.
[218] FAA Appeal Exhibit 1, Item 2, page 7, #15.
[219] See FAA Appeal Exhibit 1, Item 2, pages 5-8, #1, #3, #5, #10, and #19.
[220] See FAA Appeal Exhibit 1, Item 2, pages 8-9, #21, #22, and #23.
[221] FAA Appeal Exhibit 1, Item 2, page 7, #16.

Corrective Action Plan, and that she be the chairperson of that committee.[222] The Complainant fails to note that the FAA Orlando Airports District Office Program Manager Matthew Thys was also named to the committee, or that the amended minimum standards and Corrective Action Plan would be provided to the FAA and Florida Department of Transportation for comment and approval.[223] In addition, the Complainant does not argue that the potential conflict of interest existed on December 20, 1999, when the motion was made, or even prior to August 16, 2000, when the potential conflict of interest was disclosed.

In any event, the airport's minimum standards are discussed in issue II above. The issues surrounding the Corrective Action Plan are discussed in issue III above and again in the following section dealing with legal issues involving the 19th amendment.

Several other statements of fact were specifically stated in the background section of the Director's Determination, including the following activities:

- Passing of resolution #8 to amend the Corrective Action Plan,[224]
- Entering into negotiations for the 15-acre parcel,[225] and
- Entering into a lease for the 15-acre parcel.[226]

We reviewed the statements of fact presented in light of the arguments made by the Complainant. We disagree with the Complainant that the alleged failure to state or otherwise discuss specific statements of fact demonstrated that the Director's Determination was unsupported by the record or was contrary to the law.

Legal Issues Involving the 19th Amendment

Along with the allegation that the Director failed to state or otherwise discuss the statements of fact presented by the Complainant, Boca Aviation entered an objection to language in the Director's Determination describing the actions taken by the Complainant and Respondent in a Florida State Court case filed by Boca Aviation against the Airport Authority. Specifically, the Complainant states that the language used by the Director implied the case was final, when, in fact, the Complainant *intends* to appeal the order of the trial judge. In filing this objection, the Complainant refers to pages in the Director's Determination relating to the Florida State Court case. That case involved the 19th Amendment to a lease between the Complainant and the Respondent.[227] The Director's Determination includes the following statements on this matter:

> -- On January 25, 2000, the Authority adopted Resolution #8 to amend the Corrective Action Plan submitted to the FAA in conjunction with the

[222] FAA Appeal Exhibit 1, Item 2, page 7, footnote #4.
[223] FAA Appeal Exhibit 2, Administrative Record from the Director's Determination, Item 3, exhibit 23, pages 3-4.
[224] FAA Appeal Exhibit 1, Item 2, page 5, #4; and Item 1 (Director's Determination), page 6.
[225] FAA Appeal Exhibit 1, Item 2, page 7, #12; and Item 1 (Director's Determination), page 8.
[226] FAA Appeal Exhibit 1, Item 2, page 8, #18; and Item 1 (Director's Determination), page 10.
[227] FAA Appeal Exhibit 1, Item 2, page 4, footnote #3.

prior complaint. Resolution #8 permitted the Authority to disseminate a request for proposals from private commercial aeronautical service providers for the development for the 15-acre parcel referred to in the Final Director's Determination [of a separate but related complaint filed by Boca Raton Jet Center against Boca Raton Airport Authority] of August 20, 1999. 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.[228]

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).* [229]

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. The Respondent subsequently filed a counter claim. ...[230]

On March 15, 2000, the Authority issued an RFP to Lease and Improve State Owned Property Referred to as the 15 Acres. ... [231]

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.[232]

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.[233]

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.[234]

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[228] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 6.
[229] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 7.
[230] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 7.
[231] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 7.
[232] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 7.
[233] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 7.
[234] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 7.

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.[235]

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.[236]

On June 13, 2000, the Authority obtained an *ex parte* hearing before the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, seeking a 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.[237]

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.[238]

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 judgment 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.[239]

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.[240]

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.[241]

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[235] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 8.
[236] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 8.
[237] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), pages 8-9.
[238] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 9.
[239] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 9.
[240] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 10.
[241] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *background section*), page 11.

> On February 26, 2001, the Complainant sought review of FAA's December 28, 2000, conditional approval of the Respondent' Airport Layout Plan in the United States Court of Appeals for the 11th Circuit.[242]
>
> 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.[243]

In reviewing the Director's Determination and supporting documents regarding this allegation, we find the Director stated the facts as presented accurately. Legal actions taken by both parties and provided to the FAA were reported through February 26, 2001, in the background section of the Director's Determination, which was issued April 26, 2001. The Director's Determination did not speculate whether or not either party might proceed with further legal action in this or any related matter.[244]

We do not find the Director implied anything detrimental to either party by stating the facts as presented. In addition, we find it is unreasonable to expect the Director to anticipate and report on future actions, which may or may not be taken by either party to the case, or to delay his proceedings because future state court action might occur.

VII. CONCLUSION

Based on the foregoing discussion and analysis, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy as described above. The appeal does not provide a sufficient basis for reversing the Director's Determination with regard to alleged violations of Federal Grant Assurance 1, *General Federal Requirements;* grant assurance 5, *Preserving Rights and Powers;* grant assurance 19, *Operation and Maintenance;* grant assurance 25, *Airport Revenues;* or grant assurance 29, *Airport Layout Plan.* In addition, the appeal does not provide sufficient basis for reversing the Director's Determination with regard to the application of minimum standards.

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[242] FAA Appeal Exhibit 1, Item 1 (Director's Determination, *Background Section*), page 12.
[243] FAA Appeal Exhibit 1, Item 1 (Director's Determination), page 34, footnote #12.
[244] FAA Appeal Exhibit 1, Item 1 (Director's Determination).

The Director's conclusion that the temporary parking lot was implicitly approved through the December 2000 Airport Layout Plan approval was factually incorrect. However, since the parking lot creates no adverse impact on the safety, utility, or efficiency of the Airport, this is harmless error. The Complainant was not persuasive in demonstrating that this error directly and substantially affected the Complainant. This is a harmless error and is not a reversible error on the part of the Director.

When evaluating allegations that an airport owner is not reasonably meeting its Federal obligations, such as in a Part 16 complaint, the FAA's goal is to bring the sponsor into a state of compliance. The Associate Administrator directs the FAA Orlando Airports District Office to work with the Respondent to document the request and approval of the temporary interim-use parking facility within 30 days.

ORDER

The FAA dismisses this Appeal and affirms the Director's Determination pursuant to 14 CFR Part 16, §16.33.

APPEAL RIGHTS

A party to this decision suffering legal wrong because of final agency action, or adversely affected or aggrieved by final agency action is entitled to judicial review thereof in an appropriate United States District Court. [*See* 5 USC § 702, 28 USC §1331.] The scope of review by the district court is limited. [*See* 5 USC §§ 704, 706.]

Paul L. Galis

for: Woodie Woodward
Associate Administrator for Airports

3/20/03
Date