UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Roadhouse Aviations, LLC **COMPLAINANT/APPELLANT** **v.** **City of Tulsa & the Tulsa Airports Improvement Trust** **RESPONDENTS/APPELLEES**	Final June 26, 2007 **Docket No. 16-05-08**

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Roadhouse Aviation, LLC (Complainant, or Appellant) from the Director's Determination of December 14, 2006, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in Title 14 Code of Federal Regulations (CFR) Part 16.

Complainant argues on appeal to the Associate Administrator for Airports that the Director committed errors in conducting the investigation and interpreting the evidence, causing the FAA to dismiss the Complaint erroneously. Complainant argues on appeal the Director:

A. Erred in concluding the Respondents are not currently in violation of Grant Assurance 19, *Operations and Maintenance,* by permitting access through Complainant's tie-down blocks and Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide Complainant a lease comparable to leases provided to similarly situated tenants; and,

B. Erred in concluding the Respondents are not currently in violation of Grant Assurance 23, *Exclusive Rights,* by permitting the assignment of the last remaining large bulk aircraft storage hangar on the flight line to Christiansen Aviation.

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In its initial Complaint, the Complainant alleged that Respondents[1] violated certain Federal Grant Assurance, summarized as follows:

[1] Tulsa Airports Improvement Trust (TAIT) leases land for operation at the Richard L. Jones Jr. Airport. While both the City of Tulsa and TAIT are considered the airport sponsors, the Record reflects that the airport tenant leases are between individual private entities and TAIT. TAIT's lease agreements are called 'subleases' and will be referenced by 'sublease' from this point forward.

A. Respondents violated Grant Assurance 19, *Operation and* Maintenance, by creating a safety hazard and permitting access through the Complainant's tie-down blocks;

B. Respondents violated Grant Assurance 22, *Economic Nondiscrimination,* by creating disparate lease terms in tie-down subleases;

C. Respondents violated Grant Assurance 5, *Preserving Rights and Powers,* when Christiansen Aviation did not obtain Respondent's approval prior to purchasing the large bulk aircraft storage hangar.

D. Respondents violated Grant Assurance 23, *Exclusive Rights,* by permitting a monopoly when it permitted the assignment of the last remaining large bulk aircraft storage hangar on the flight line.

E. Respondents violated Grant Assurance 22, *Economic Nondiscrimination,* through its disparate treatment of Complainant with regard to enforcement of applicable Airport signage policies;

F. Respondents violated Grant Assurance 22, *Economic Nondiscrimination,* by means of its audit of Complainant's fuel flowage fees;

G. Respondents violated Grant Assurance 22, *Economic Nondiscrimination,* with regard to measuring and marking of Complainant's tie-downs leaseholds.[2]

As a result of his review, the Director found that the Airport sponsors' actions regarding this matter were consistent with its Federal obligations. Specifically, the Director found:

(i) Respondents' actions permitting Christiansen Aviation's access through Complainant's subleased tie-down blocks conform to Complainant's lease and such access does not create an FAA flight safety hazard. Thus, Respondents have not violated applicable Federal obligations, including Grant Assurances 19, *Operation and Maintenance*; and 22, *Economic Nondiscrimination*. FAA also finds that Respondents have not provided Complainant with disparate lease rates and terms when compared to Christiansen Aviation.

(ii) Respondents have not violated Grant Assurances 5, *Rights and Powers*; 22, *Economic Nondiscrimination,* and 23, *Exclusive Rights,* when they approved the assignment of the ATI hangar to Christiansen Aviation.

[2] The Complainant also alleges that Christiansen Aviation's access through its leasehold violates FAA Order 5190.6A, *Airport Compliance Requirements.* The Director stated:

FAA Order 5190.6A is not regulatory and is not controlling with regard to airport sponsor conduct. Complainant ceded its rights when it signed a lease, which expressly provides that taxilanes inside the leasehold are to remain free and clear for public access. Furthermore, FAA declines to investigate this issue at this point since the allegation is not related to a grant assurance violation.

Christiansen Aviation is not the only provider of FBO services on the Airport. In addition, it appears there are other sites available to erect a large-bulk aircraft storage hangar on the Airport.

(iii) Respondents are not in violation of Grant Assurance 22, *Economic Nondiscrimination*, with regard to their enforcement of the current Airport Sign Policy or its fuel flowage fee audit. Respondents' actions regarding measuring and marking Complainant's tie-down leaseholds were not unjustly discriminatory and not a violation of Grant Assurance 22. Respondents' actions were a means of clarifying and resolving a dispute between two tenants on the Airport.

III. PARTIES

A. Airport

Richard Lloyd Jones Jr. Airport (Airport) is a public-use, general aviation airport located in Tulsa, Oklahoma, owned and operated by the City of Tulsa and the Tulsa Airports Improvement Trust, respectively. The Airport, located five miles south of Tulsa, Oklahoma, is classified as a reliever airport with 540 based aircraft and 338,357 annual operations.[3]

The Airport has three runways: Runway 1L-19R - 5,102 feet by 100 feet, Runway 01-19L – 4,208 feet by 100 feet, and Runway 13-31 – 2,808 feet by 50 feet.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA to the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* As a result, the City of Tulsa is obligated to comply with the FAA sponsor assurances and related federal law, 49 U.S.C. § 47107.

B. Complainant/Appellant

Roadhouse Aviation, LLC (Complainant, or Appellant) is a fixed-base operator (FBO) at the Airport in Tulsa, Oklahoma, operating since 2002. Under its agreement with the Respondents, the Complainant provides aircraft rentals, flight instruction, fuel sales, pilot supplies, charter services, and aircraft sales. Complainant subleases multiple blocks of land at the Airport including three tie down blocks located along the flight line and the Lot 1 Fuel Farm area.

IV. PROCEDURAL HISTORY and FACTUAL BACKGROUND

A. Procedural History

On June 1, 2005, pursuant to 14 CFR Part 16, the formal complaint for *Roadhouse Aviation. v. City of Tulsa and the Tulsa Airports Improvement Trust*, was filed.

[3] FAA Form 5010 Airport Master Record for twelve-month period ending September 19, 2005, Airport Facility Directory effective March 15, 2007, printed March 26, 2007.

On June 13, 2005, the Notice of Docketing for *Roadhouse Aviation. v. City of Tulsa and the Tulsa Airports Improvement Trust*, was issued, and the case was docketed as FAA Docket No. 16-05-08.

On July 6, 2005, the Answer of the City of Tulsa and the Tulsa Airports Improvement Trust was filed for FAA Docket No. 16-05-08. J. Gordon Arkin's Answer for the Tulsa Airports Improvement Trust was submitted and accepted as the Answer of both Respondents.

On July 19, 2005, the Reply of Roadhouse Aviation was filed.

On July 28, 2005, the Rebuttal of the City of Tulsa and the Tulsa Airports Improvement Trust was filed.

Between October 18, 2005, and December 21, 2005, the Complainant filed five Motions to Amend.

On December 20, 2005, FAA filed a Request for Additional Information.

On January 12, 17, and 18, 2006, Complainant and Respondents filed Requests for Extension of Time to Respond.

On January 19, 2006, FAA granted a Notice of Extension of Time to Respond to Request for Additional Information and Motions to Amend.

On February 6, 2006, a Motion to Amend (6) by Complainant was filed.

On February 20, 2006, a Response to Requests Directed to Respondents was filed.

On February 20, 2006, a Response to Requests Directed to Complainant was filed.

On February 22, 2006, a Notice of Extension of Time was issued.

On March 3, 2006, Complainant's Reply to Requests Directed to Respondents was filed.

On April 3, 2006, Respondents' Reply to Motions to Amend was filed.

On May 25, 2006, August 3, 2006, and November 8, 2006, Notices of Extension of Time for FAA Docket No. 16-05-08 were issued.

On December 14, 2006, FAA issued the Director's Determination in this matter.

On January 9, 2007, Complainant requested an Extension of Time to file an appeal.

On January 12, 2007, a Notice of Extension of Time to file an appeal was issued.

On February 12, 2007, Complainant appealed the Director's Determination.

On February 27, 2007, Respondents requested additional time to file Reply to Appeal.

On March 2, 2007, a Notice of Extension of Time to file a Reply to Appeal was issued.

On April 6, 2007, Respondents replied to Complainant's appeal.

On May 23, 2007, FAA issued an Extension of Time for the Issuance of the Final Agency Decision.

B. Factual Background

Complainant is a fixed-base operator (FBO) at the Airport in Tulsa, Oklahoma, operating since approximately 2002. [FAA Exhibit 1, Item 3, Attachment A and J.] Services provided by Complainant include aircraft rentals, flight instruction, fuel sales, pilot supplies, charter services, and aircraft sales. [Source: www.roadhouseaviation.com] Complainant subleases multiple blocks of land at the Airport including three tie down blocks (Blocks 15, 16, and 17) located along the flight line; the Lot 1 Fuel Farm Area; Lot 8, Block 3; and Lot 1A, Block 4. [FAA Exhibit 1, Item 3, Attachment A and J and Item 31.]

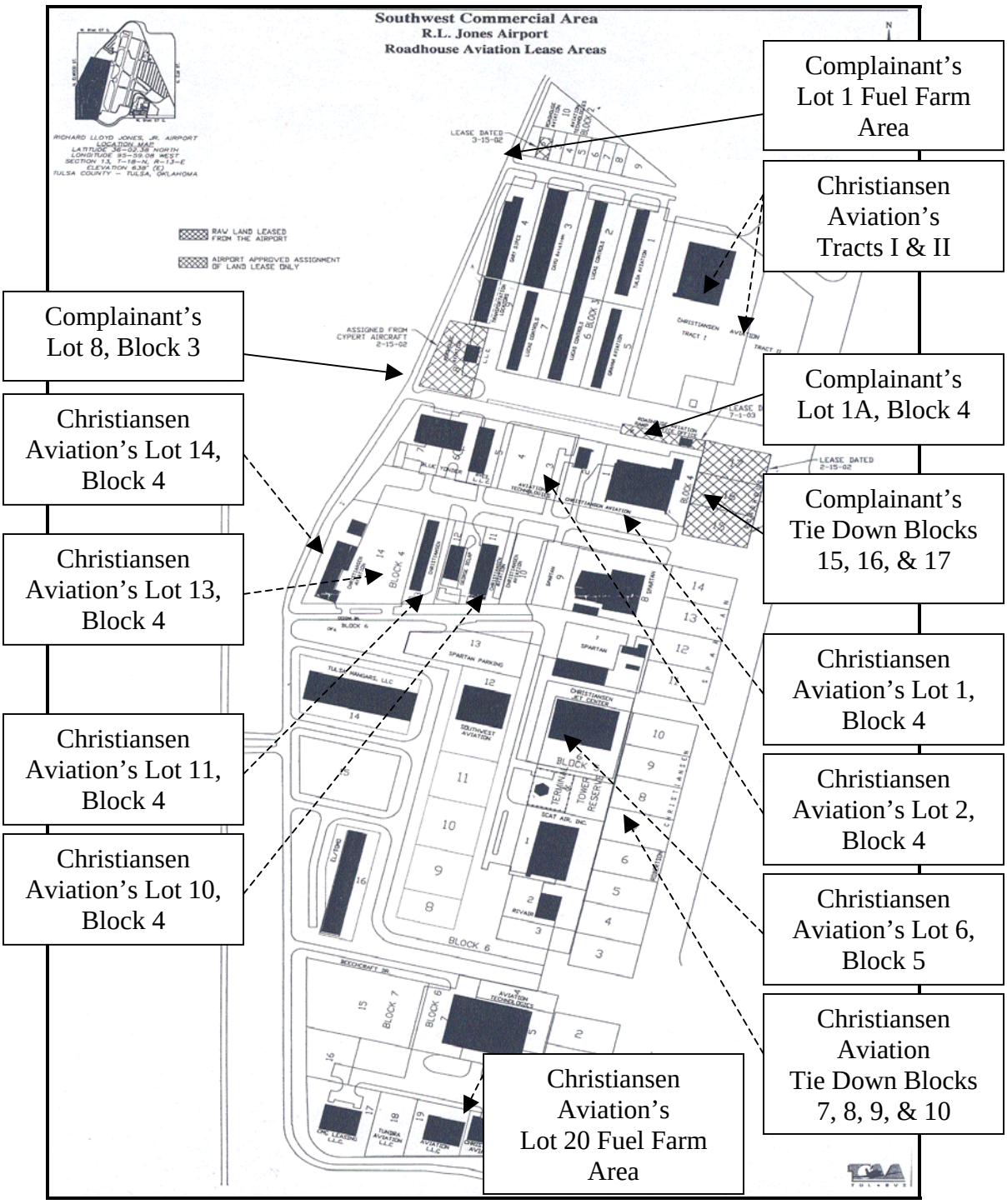

Figure 1
Richard L. Jones Jr. Airport
Airport Southwest Commercial Area

In addition to Complainant, four other operators hold the status and classification of FBO on the Airport. These operators include Aviation Technologies Incorporated, Christiansen Aviation, Rivair, and Scat Air. [FAA Exhibit 1, Item 17, Attachment A-1.] Of the five FBOs, Christiansen Aviation is the largest and holds the most leased space. [FAA Exhibit 1, Item 3, pg. 2.] However, since starting operations on the Airport, Complainant has taken some of Christiansen Aviation's market share. [FAA Exhibit 1, Item 3, pg. 2.]

Christiansen Aviation, a full service FBO, acquired much of its leasehold interests through assignments from other tenants and not through new leases offered by the Respondents. [FAA Exhibit 1, Item 3, pg. 2.] Similar to Complainant, Christiansen Aviation leases tie-down blocks and other property with improvements. [*See* FAA Exhibit 1, Item 3, Attachment A.] However, unlike Complainant, Christiansen Aviation holds the lease for Tracts I and II which are the only exclusive use apron areas on the Airport. Christiansen Aviation acquired Tracts I and II through an assignment from Bristol Aviation in June 2001. [id.]

With regard to leasing practices, Respondents typically lease the raw land of the Airport to commercial and private tenants. [FAA Exhibit 1, Item 3, Attachment A, pg. 2.] The tenant makes the real property improvements such as a hangar.

Respondents include a number of provisions in their leases to subordinate them to the grant assurances and to ensure the protection of the Respondents' rights and powers. [*See* FAA Exhibit 1, Item 3, Attachment 17B.] One such provision requires prior written approval for any assignment of a leasehold interest in Airport property. [id.]

Christiansen Aviation acquired the lease of Lot 1, Block 4 in a September 2004 assignment from Aviation Technologies. [FAA Exhibit 1, Item 3, Attachment A.] The improvements erected on Lot 1, Block 4 include a large bulk aircraft storage hangar. The property is also directly adjacent to Complainant's leasehold on Lot 1A, Block 4, and behind the Complainant's three tie down blocks (Tie-Down Blocks 15, 16, and 17.) [FAA Exhibit 1, Item 3, Attachment A.]

Respondents began their audit of Complainant's fuel flowage records on September 27, 2005. [FAA Exhibit 1, Item 17, Attachment G-1.] However, Complainant terminated the audit on September 29, 2005, alleging improper auditing procedures. [*See* FAA Exhibit 1, Item 10, pg. 1 & Item 17, Attachment G-1.]

The Administrative Record reflects that Respondents have re-measured and marked Complainant's tie-down blocks multiple times, but have not measured or marked any of the other Airport tenant's tie-down blocks. [FAA Exhibit 1, Items 6 & 17.]

V. APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in developing civil aviation has been augmented by various legislative actions that authorize programs for providing funds and surplus federal property to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

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

FAA Order 5190.6A, *Airport Compliance Requirements*, (October 2, 1989) (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out functions related to federally obligated airport owners' compliance with sponsor assurances and restrictive covenants in property deeds and conveyance instruments.

A. The Airport Sponsor Assurances and Deed Covenants

The AAIA, 49 U.S.C. § 47107, et seq., sets forth assurances to which an airport sponsor must agree as a condition precedent to receiving federal financial assistance. Pursuant to 49 U.S.C. § 47107(g)(1), the Secretary is authorized to prescribe project sponsorship requirements to ensure compliance with 49 U.S.C. § 47107. These sponsorship requirements are included in every AIP agreement as explained in the Order, Chapter 2, "Sponsor's Obligations." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the federal government.

The City is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. §§ 47151 through 47153.

A Surplus Property Deed provides, in relevant part, that ". . . the property transferred hereby … shall be used for public airport purposes, and only for such purposes, on reasonable terms and without unjust discrimination." These deed covenants are the same as the federal grant assurances discussed below and that are also imposed upon the City. Our analysis and enforcement of the obligations is identical.

1. Federal Grant Assurance 22, Economic Nondiscrimination

Federal grant assurance 22, *Economic Nondiscrimination*, is relevant to this appeal. It deals with the sponsor's obligation to make the airport available for aeronautical use on reasonable and not unjustly discriminatory terms.

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

> …will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [grant assurance 22(a)]
>
> …may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [grant assurance 22(h)]
>
> ...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [grant assurance 22(i)]

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

This grant assurance specifically addresses the issue of the treatment of fixed-base operators, stating that "Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities." [Assurance 22(c).] Subsection (c) specifies the application of subsection (a) to the treatment of fixed-base operators, providing additional specific guidance as to the sponsor obligations.

The Order describes the responsibilities under grant assurance 22, *Economic Nondiscrimination*, assumed by the owners of public-use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport, and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* Order, Secs. 4-14(a)(2) and 3-1.]

The FAA considers it inappropriate to provide federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.[4] [*See* Order, Sec. 3-8(a).]

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[4] Operating the airport for aeronautical use is not a secondary obligation; it is the prime obligation. This prime obligation includes the opportunity for leaseholders to develop airport property for aeronautical use. [*See* United

2. Federal Grant Assurance 23, Exclusive Rights

Federal grant assurance 23, *Exclusive Rights*, implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> "…will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public."
>
> "…will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities…"
>
> "…will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code."

In FAA Order 5190.6A, *Airport Compliance Requirements*, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* Order, Sec.3-9 (e).]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* Order, Sec. 3-9(c).]

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* Order, Ch. 3.]

B. The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. Sponsor obligations are the basis

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States Construction Corporation v. City of Pompano Beach, FL, FAA Docket No. 16-00-14, (July 10, 2002) (Final Agency Decision).]

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

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. The Order 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 receiving federal funds or 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 the interpretation of grant assurances by FAA personnel.

1. The Complaint Process

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 that the complainant 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."

In accordance with 14 CFR § 16.109, if the Director in his determination proposed to issue an order withholding approval of an application for a grant apportioned under 49 U.S.C. § 47114 (c) and (e), or a cease and desist order, or any other compliance order issued by the Administrator to carry out the provisions of a statute listed in 14 CFR § 16.1, and required to be issued after notice and opportunity for a hearing, then a respondent will have the opportunity for a hearing at which the complainant will be a party. [*See* 49 U.S.C. § 47106(d).] Courts have held that the Part 16 hearing rules are consistent with 49 U.S.C. § 46101. [*See* e.g., Penobscot Air Services LTD v FAA, 164 F3d 713, 720 (1st Cir., 1999); Lange v FAA, 208 F3d, 389, 391 (2nd Cir., 2000); Wilson Air Center v FAA, 372 F3d 807 (6th Cir., 2004).]

2. Right to Appeal the Director's Determination

A party to this Complaint 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 such cases, 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, (December 30, 1999) (Final Decision and Order) page 21 and 14 CFR, Part 16, § 16.227.]

It is well established that in an agency's appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr. Administrative Law and Practice, Vol. 1, § 6.76. A party may not correct a mistake in its original selection of evidence by then compelling the agency to consider it on appeal. Koch, supra, § 6.76.

VI. ANALYSIS AND DISCUSSION

Upon consideration of the Complaint from the Complainant, filed with the FAA June 1, 2005, the Director of the Office of Airport Safety and Standards determined that the Respondents are not currently in violation of its federal obligations under 49 U.S.C. § 47107(a) and related Grant Assurances 5, *Rights and Powers,* 19, *Operation and Maintenance*, 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights* regarding the issues argued in the Complaint.

On appeal, Complainant alleges the Director made serious errors in evaluating the evidence and has misapplied applicable case law and precedent. Complainant argues the Director's Determination should be reversed and the Respondents directed to comply immediately with the grant assurances.

Respondents argue the Record supports the Director's Determination that its actions are consistent with Federal grant obligations, and Complainant's appeal should be dismissed. Furthermore, the Respondents contend Complainant has improperly submitted new evidence for the first time on appeal and that evidence should be disregarded. [FAA Exhibit 1, Item 33]

Preliminary Issue on Complainant's Exhibits to Appeal

The Complainant submitted seven exhibits including three undated photographic copies depicting what appears to be Beech King Air aircraft on a parking apron;[5] three diagrams of the Complainant's parking apron; a copy of an email from Sean Dailey about being instructed to leave Christensen Aviation's ramp; a copy of the Tulsa Airport website page; and the aviation fuel sold, consumed or dispensed by a number of the Airport's fixed base operators for the twelve months of calendar 2006. [FAA Exhibit 1, Item 31, Exhibits 1-7] Complainant states this new evidence is submitted on appeal as additional information needed by the FAA to provide more clarity on which to base its decision.

It is well established that in an agency's appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr. Administrative Law and Practice, Vol. 1, § 6.76. (1997). The new evidence will not be considered if the party could reasonably have known of its

[5] According to FAA Advisory Circular 150/5300-13 *Airport Design,* the wingspan of a King Air can range from 45.8feet to 50.2 feet.

availability. Koch, supra, § 6.76. A party may not correct a mistake in its original selection of evidence by then compelling the agency to consider it on appeal. Koch, supra, § 6.76.

Part 16 requires all relevant facts to be presented in the complaint documents. [See Sims v. Apfel, 530 U.S. 103, 108-110 (2000)] The FAA may, under 14 CFR § 16.29(b)(1), rely entirely on the complaint and responsive pleadings provided by the parties in reaching its initial determination. If the parties could supplement the Director's Determination after it is issued, the administrative process would be endless and contrary to the expedited procedures provided under Part 16. [See Preamble, Rules of Practice for Federally Assisted Airport Proceedings, Summary, 61 Fed. Reg. 53998 (Oct. 16, 1996)]

Pursuant to 14 CFR § 16.23(b)(2), the Complainant was required to submit all of its pleadings and other documentation in support of its case so that in rendering the Director's Determination, the FAA would have the entire record before it. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Record upon which such determination was based. Complainant made no showing that its new evidence met any of the standards necessary to permit the Associate Administrator to consider them on appeal.

Specifically, Complainant has not explained, nor does the Record show, why the seven appeal exhibits were not available or could not have been discovered for the investigation before the Director's Determination was issued. Additionally, most of the seven appeal exhibits appear to have been created after the Director's Determination was issued. For these reasons, the seven appeal exhibits from Roadhouse Aviation consisting of new evidence will not be considered in this appeal. Respondents' Motion to Strike from the Record on appeal is granted in part; the seven appeal exhibits attached to FAA Exhibit 1 Item 31 will remain in the Record, but will not be considered on appeal.

Issue 1: Have Respondents' actions permitting Christiansen Aviation's access through Complainant's subleased tie-down blocks violated applicable Federal obligations?

Complainant contends on appeal that the Director's "failure" lies in the paucity of evidence. Complainant claims that while the Director found the taxilanes on Roadhouse's ramp were appropriate for Airplane Design Group I Aircraft[6], larger aircraft were using its ramp to access the Christiansen Aviation hangar. Complainant claims that he has on multiple occasions observed larger aircraft and vehicular traffic crossing through its premises, creating a safety hazard. [FAA Exhibit 1, Item 31]

Complainant alleges that permitting aircraft to use the taxilanes through its leasehold is a safety hazard and is unjustly discriminatory because Christiansen Aviation has an exclusive use ramp and Complainant does not. Complainant wants Christiansen Aviation to stop using the taxilanes through its leasehold and instead use the west side entrance to gain access to its hangar.

[6] FAA Advisory Circular 150/5300-13 *Airport Design* identifies Airplane Design Group I as a grouping of airplanes based on wingspan up to but not including 49 feet. [FAA A/C 150/5300-13, Chapter 1. para. 2.]

The Respondents allege that the Complainant has identified nothing to call into question the propriety of the Director's Determination. The Record indicates that the Complainant subleases three tie-down blocks from Respondents. The Complainant's tie-down blocks are between the flight line and a large bulk aircraft storage hangar owned by Christiansen Aviation.[7] Aircraft accessing the hangar can either use the west side door or east side door. The east side door provides the most direct access to the flight line. However, east side access to the hangar utilizes the common-use taxilanes through Complainant's tie-down blocks. Complainant's sublease requires that the taxilanes be accessible at all times. [FAA Exhibit 1, Item 29]

The Associate Administrator is not persuaded that Christiansen Aviation's access through the Complainant's subleased tie-down blocks violate applicable Federal obligations. Specific alleged grant assurance violations raised on appeal are discussed individually.

A. Grant Assurance 19, *Maintenance and Operation*

Complainant alleges the Director made errors by misreading the facts and the law as it applies in this case. [FAA Exhibit 1, Item 31]

Specifically, the Complainant alleges the Director erred in concluding the Respondents were not currently in violation of Grant Assurance 19, *Maintenance and Operation.* Complainant provides new evidence submitted on appeal demonstrating larger aircraft and vehicular traffic are crossing through Complainant's leased premises, creating a safety hazard. On appeal, Complainant notes that it has observed aircraft with wingspans much larger than 49 feet crossing the ramp regularly. Complainant believes Christiansen Aviation is taxiing or allowing the taxiing of aircraft at very high speeds without the use of wing walkers. In support of its allegation, the Complainant includes as an exhibit, a photograph depicting two parked aircraft on an apron. [FAA Exhibit 1, Item 31, exhibit 4]

As previously stated, Respondents argue that Complainant has improperly submitted seven additional exhibits that were not submitted during the complaint process. The Associate Administrator agrees with the Respondents' assertion that Complainant should not be permitted to submit new evidence for the first time on appeal. Notwithstanding, the Respondents argue the evidence submitted does not substantiate the charge that the taxilane is unsafe and operated in violation of applicable Federal obligations. Respondents continue to assert Complainant had the burden of proof, and it was required to submit all documents and other evidence necessary to support its complaint. Respondents allege that the Complainant simply failed to carry its burden of proving its contention; the fact that Complainant disagrees with the Director's Determination and seeks a second opportunity to prove its "erroneous" contentions is not the proper function of an appeal. [FAA Exhibit 1, Item 33]

The Associate Administrator agrees with the Director's finding that Respondents do have an obligation under Grant Assurance 19, *Operation and Maintenance* to ensure that aircraft movements on public taxiways and taxilanes are conducted in a safe manner. Grant Assurance 19, *Operation and Maintenance*, provides in pertinent part:

[7] See Figure 1. Christensen Aviation hangar on Lot 1 Block 4 with access through Complainant's Tie down Blocks 15, 16, and 17.

"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 or operation…"

FAA Advisory Circular 150/5300-13, *Airport Design*, provides guidance on taxilanes:

"Taxilanes are located outside the movement area. Taxilanes provide access from taxiways (usually an apron taxiway) to airplane parking positions and other terminal areas. When the taxilane is along the edge of the apron, locate its centerline inward from the apron edge at a distance equal to one-half of the width of the taxiway structural pavement and satisfy other apron edge taxiway criteria…" [AC 150/5300-13, Par. 414(b).]

Appendix 9, paragraph 2(a)(4) of AC 150/5300-13 provides for flexibility regarding taxilane centerline separation.

"Reduced clearances are acceptable because taxi speed is very slow outside the movement area, taxiing is precise, and special operator guidance techniques and devices are normally present."

The Associate Administrator notes that the Director correctly indicated that FAA recognizes the use of wing-walkers that walk on either side of the wings to ensure sufficient clearance when an aircraft is taxiing through a reduced width area.[8] The taxilane width is 81 feet[9] and Respondents indicate that only one aircraft residing in the Christiansen Aviation hangar is outside of the taxilane design standards. [FAA Exhibit 1, Item 29, page 17]

The taxilane at issue was designed for Group I aircraft, having a wingspan of up to but not including 49 feet. The aircraft the Complainant is complaining about, a Cessna 441A, has a wingspan of 49.3 feet and would be considered in Airplane Design Group II (airplanes with a wingspan 49 feet up to but not including 79 feet.).[10] FAA guidance permits reduced clearances for certain situations. In this case, the aircraft has a wingspan that puts it outside the standard by only .3 feet or 2 inches for each wing. Based on AC 150/5300-13 Appendix 9, paragraph 2(a)(4), in this particular case, where there is a difference in wingspan less than a few inches on one aircraft that utilizes the hangar, the Director correctly stated FAA would not require

[8] Wing-walkers are individuals that walk near or beside an aircraft that ensure clearance between wingtip and any objects.

[9] Each tie-down block has one-half a taxilane width of 40.5 on its north and south sides resulting in a taxilane of 81 feet between aircraft parking positions in the tie-down blocks.

[10] AC 150/5300-13 Appendix 9 recommends a taxilane centerline to object separation equal to .60 times the wingspan of the most demanding airplane plus 10 feet. As the Sponsor indicated in the original pleading, the taxilane centerline to an object separation for Cessna 441A should be 39.58 feet (49.3 multiplied by .6 plus 10 feet). This is less than 40.5 feet (one-half the taxilane). The Sponsor found that the existing taxilane width is adequate and in accordance with FAA design criteria. [See FAA Exhibit 1, Item 3]

Respondents to revise its taxilane design criteria for one aircraft that fails to meet the design category's initial criteria.

The Director referenced in his Determination that in order to ensure a diligent review of the safety matter he relies on the findings of FAA Oklahoma City Flight Standards District Office (FSDO) which also conducted an on site investigation. Upon investigation, the FSDO found no evidence of operational violations. [FAA Exhibit 1, Item 29] The FSDO inspector noted that he saw no operational violations when an aircraft, departing the hangar, taxied between Complainant's fuel trucks without coordinating the action with Complainant. The inspector states "the pilot exercised prudent judgment, there was no pedestrian traffic, and there was an estimated 13 feet clearance on either side of him." [FAA Exhibit 1, Item 29.]

As stated above, the FAA's Oklahoma City FSDO found no evidence of safety violations during an investigation that included a site visit. If the Complainant believes that aircraft are taxiing at unsafe speeds, Complainant has an obligation to report it to the airport operator. The Complainant has provided no evidence that safe practices are not being exercised.

Additionally, the Associate Administrator will not consider the unsubstantiated allegation that the taxilanes pose a safety hazard nor will the exhibits attached to the appeal as new evidence be considered since they have not been admitted into the Record.

Even if an occasional larger aircraft used the taxilane, both parties acknowledge that there is a flexibility in accommodating such aircraft where

> …*reduced clearances are acceptable because taxi speed is very slow outside the movement area, taxiing is precise, and special operator guidance techniques and devices are normally present.* [AC 150/5300-13, Appendix 9, paragraph 2(a)(4)]

As the Director indicated in his Determination, FAA has statutory authority in making determinations of safety.[11] In this case, based on the facts as stated, and the Record herein, FAA has determined that the taxilane separation has not caused a safety hazard, nor a violation of Respondents' obligations under Grant Assurance 19. While Complainant may or may not agree with FAA's safety determination, FAA is the final arbiter on matters regarding aviation safety.

The Associate Administrator finds the Director was correct in concluding the Respondents are not in violation of Grant Assurance 19, *Maintenance and Operation*, as a result of permitting Christiansen Aviation's use of the taxilanes through Complainant's subleased tie-down blocks.

[11] FAA has statutory authority in making determinations of safety. [*See* 49 U.S.C. §§ 40101, *et seq.*, and 40103(b).] FAA is final arbiter of matters regarding aviation safety. [*See* Skydive Paris, Inc. v. Henry County, Tennessee, FAA Docket No. 16-05-06, Director's Determination (January 20, 2006) & Glyn Johnson d/b/a Zoo City Skydivers v. Yazoo County, Mississippi, FAA Docket No. 16-04-06, Director's Determination (February 9, 2006).] [FAA Exhibit 1, Item 29]

B. Grant Assurance 22 – *Economic Nondiscrimination*

On appeal, Complainant rejects the Director's conclusion that the parties are not similarly situated. Complainant argues the Director's reference to *Adventure Aviation v. City of Las Cruces, New Mexico,* FAA Docket Number 16-01-14 is inappropriate because Complainant is not arguing over lease rates but rather its need for an exclusive lease area like its competitor. Complainant argues that the Courts have found unjust economic discrimination to exist when an airport sponsor treats two tenants markedly different. *City of Pompano v. FAA*, 774 F.2d 1529 (11th Cir. 1985). Complainant believes the Courts would find FAA action to deny the Complainant an exclusive lease area similar to its competitor to be arbitrary and capricious. [FAA Exhibit 1, Item 31]

Furthermore, Complainant objects to the Director's statement that it ceded its rights by signing a lease agreement. According to the Complainant, the Director's analysis is flawed for two reasons: 1.) FAA is obligated to investigate grant assurance violations regardless of existing contracts and 2.) Complainant could not have reasonably foreseen the problem with its existing lease. Complainant argues that its lease was negotiated in bad faith. Complainant did not understand how the taxilane access would be enforced. The FAA has found that a noncompliant sponsor "has the ability to change existing agreements to meet its Federal obligations." *Brown Transport Company v. City of Holland, Michigan,* FAA Docket Number 16-05-09. Complainant argues on appeal that FAA has an obligation to act on behalf of airport tenants and the public when it finds evidence of a grant violation and this case is related to a grant violation. [FAA Exhibit 1, Item 31]

Respondents counter that the Complainant fails to support its argument with evidence or facts that differentiate the situation presented in this matter, and Complainant completely fails to negate the applicability of the decisions it cites. Respondents assert that both Complainant and Christiansen Aviation pay $350 for tie-down blocks, while Christiansen pays a higher rate for its exclusive-lease ramp. Respondents acknowledge that the Director recognized that Christiansen and the Complainant, and a third aeronautical tenant were each paying the same rate for tie-down blocks and have the same provisions regarding taxilane access through their tie-down leaseholds. [FAA Exhibit 1, Item 33]

Complainant expresses concern that the Director accepted that Respondents have granted Christiansen Aviation 'exclusive lease area' while the same right is not extended to the Complainant. Complainant contends that he was given a lease that is functionally worthless. [FAA Exhibit 1, Item 31] On appeal, Respondents argue that converting Complainant's public access tie-down blocks into an exclusive lease area would restrict Christiansen Aviation from using the east door of its hangar.[12] This would eliminate Christiansen Aviation's direct access to the flight line (through Complainant's tie-down blocks) and require aircraft to be repositioned unnecessarily every time an aircraft sought to exit or enter the hangar through the single remaining west side access door, increasing the likelihood of aircraft damage. [FAA Exhibit 1,

[12] See Figure 1. Christensen Aviation hangar on Lot 1 Block 4 with access through Complainant's Tie down Blocks 15, 16, and 17.

Item 33] Respondents argue that Complainant believes that not converting its tie-down blocks in front of the Christiansen Aviation hangar into an exclusive use area is discriminatory, in and of itself, and refuses to acknowledge the differences between tie-down blocks and exclusively leased areas. [FAA Exhibit 1, Item 33]

Respondents argue that Complainant's appeal attempts to redefine the facts to support the argument that it lost. Respondents believe that Complainant now asserts it is being charged a rate for the entire tie-down area that it cannot use. Respondents view this argument as specious. The Associate Administrator concurs with the Director's finding that Complainant's three tie-down block agreements include the following terms:

> *"i. Leased Premises means the area described and illustrated on Exhibit 'A' consisting of Tie-Down Block [ ]. A Tie-Down Block consists of an area 115' wide by 210' long (more or less 24,150 square feet), provided, however, each Tie-Down Block includes one-half (1/2) of a taxilane on the North and South side of each block for shared access with the adjoining Tie-Down Blocks and lease areas at the Airport. Each taxilane is approximately 81' wide (one-half of taxilane is thus 40.5'). Lessee understands and acknowledges that taxilanes, although a part of a Tie-Down Block, shall be used by Lessee on a non-exclusive use basis and taxilanes shall remain open and accessible to all authorized Airport tenants, licensees and users at all times…" [FAA Exhibit 1, Item 17, Attachment B]*

As noted by the Director, FAA Grant Assurance 22, *Economic Nondiscrimination*, provides in pertinent part that,

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

The Director thoroughly examined all the tie-down block agreements. [*See* FAA Exhibit 1, Items 17 and 29.] There are six tie-down block leases identified as: Tie-Down Block 6 subleased to Deanna D. Robertson, Tie-Down Blocks 7 and 8 subleased to Christiansen Aviation and Tie-Down Blocks 16, 17, and 18 subleased to the Complainant. [*See* FAA Exhibit 1, Item 17, Attachment B, and Item 29.] Of these six tie-down block subleases, all but one includes a public access provision. Both Complainant's and Christiansen Aviation's tie-down block subleases require taxilane access through the leasehold. The Director noted that of the applicable fixed-based operators utilizing these tie-down blocks, Christiansen Aviation and Complainant appear to have the same provisions with regard to taxilane access through their tie-down block leaseholds. [FAA Exhibit 1, Item 29]

The Associate Administrator agrees with the finding that the tie-down block leaseholds of the Complainant and Christiansen Aviation are not similarly situated to the exclusive lease area of Christiansen Aviation. Thus, the Respondents were not required to convert the Complainant's

tie-down block leasehold to an exclusive lease area.[13] Additionally, in this circumstance, Complainant's reliance on the Pompano case is misplaced since there was no evidence that a significant burden was placed on one competitor that is not placed on another.

The Director properly concluded that to apply the same leasehold terms of the Christiansen Aviation 'exclusive lease area' to the Complainant's tie-down block leases would eliminate the public-use taxilanes and derogate the access to the Christiansen Aviation hangar. The Associate Administrator agrees with the Respondents that they are not required to make Complainant's tie-down block lease equal to Christiansen's exclusive lease area.

Complainant has failed to proffer any argument on appeal to refute Respondents' assertion that the exclusive lease area is the only area of its kind on the Airport that is suitable for this type of lease.[14]

Moreover, as the Director noted, the Complainant executed a written agreement for the tie-down block lease, fully aware that public taxilane access provisions were part of the agreement. Complainant has not disputed that its owner attended Respondents' board meetings where discussion focused on Christiansen Aviation's concern regarding access out of the east side hangar doors. [FAA Exhibit 1, Item 16, Attachment 4 and Item 29.] Nor did Complainant refute the statement that Complainant ensured Respondents that access would not be an issue. [id.] Now on appeal, Complainant wants to register its discontent with the Director's discussion of Complainant "ostensibly ceding its rights by signing a lease agreement." [FAA Exhibit 1, Item 31] Complainant now asserts that at the time of signing, "Roadhouse understood 'open and accessible' to mean access to the ramp, not access through it." [FAA Exhibit 1, Item 31]

As the Director advised the parties, FAA does not normally intervene simply because a party to a contract later objects to a provision in the contract. As the Director stated, the grant assurances and the FAA compliance process are not devices by which a commercial aeronautical tenant can abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease are less profitable than the tenant anticipated. In this case, the Complainant's alleged misunderstanding of the lease terms does not rise to the level of a grant assurance violation, but may as the Director advised, be a state contract law issue.
[See Consolidated Services v. City of Palm Springs, FAA Docket No. 16-03.05 (June 10, 2004). Boca Airport, Inc. v. Boca Raton Airport Authority, FAA Docket 16-00-10 (April 26, 2001) and Morris Waller and M&M Transportation v. Wichita Airport Authority, FAA Docket No. 16-98-13 (March 12, 1999)] [FAA Exhibit 1, Item 29] Additionally, the Complainant agreed to the lease terms at the time of execution in 2002 and then ratified the terms in 2003, when the Complainant ensured that access would not be an issue. [FAA Exhibit 1, Item 29] Complainant's statement on appeal "that it agreed to abide by [Respondents'] unreasonable and unjustly discriminatory enforcement of those terms does not prove it consented to them when it

[13] *See* Aerodynamics of Reading, Inc. v. Reading Airport Authority, FAA Docket No. 16-00-03, Final Decision and Order (July 23, 2001) and Adventure Aviation v. City of Las Cruces, New Mexico, FAA Docket No. 16-01-14, Director's Determination August 7, 2002, where two operators may not be considered essentially similar even though they offer the same services to the public.

[14] No error in Director's acceptance of Respondents' position that the tie-down blocks leased by Complainant are not conducive to an exclusive lease area agreement since aircraft utilizing areas behind the tie-down blocks must be able to have access, via taxilane, to the flightline. [FAA Exhibit 1, Item 29]

entered into the agreement" is not convincing. [FAA Exhibit 1, Item 31]

The Associate Administrator finds that the facts and Record support the Director's findings. The Complainant's tie-down blocks with the common public-use taxilanes and Christiansen Aviation's exclusive leased area are not similarly situated. The two leaseholds are dissimilar by their function. The Complainant's tie-down blocks include common public-use taxilanes that provide direct access for another tenant through the tie-down block. Christiansen Aviation's exclusive lease area is the only leasehold on the Airport not requiring a common public-use access through the area. Respondents are under no obligation to convert Complainant's tie-down block leasehold in front of the Christiansen Aviation hangar into an exclusive use area.

Contrary to Complainant's statement regarding the use of taxilanes on private leaseholds, Federal law does not prohibit public-use taxilanes on private leaseholds. FAA Order 5190.6A *Airport Compliance Requirements* provides internal policy guidance to FAA officials; it recommends that public-use areas such as airport taxiways and self-fueling areas should not be included in leased areas. The purpose is to ensure public access is not denied by the terms of a lease. The Order goes on to recommend that taxilanes not taxiways (normally larger than taxilanes) are the recommended means for maneuvering on leased apron areas. Since the Christiansen Aviation hanger abuts the leased apron, FAA finds the use of taxilanes for ingress and egress from the hangar to be consistent with policy guidance and standard airport practices.

Respondents, as airport owner and operator, have a right to maintain public access through tie down blocks to the airfield. It is also within an airport sponsor's power to determine how space on the airport will be best utilized to support the interests of all aeronautical users of the airport. This is a reasonable requirement and the Director's action in support of this requirement is not arbitrary or capricious.

The Associate Administrator agrees with the Complainant that the FAA is obligated to investigate possible violations of sponsor grant assurances. However, this does not obligate the agency to find violations of grant assurances where none exist because a tenant no longer favors the terms of a lease it has freely undertaken. In FAA Docket Number 16-97-04 *Penobscot Air Service, Ltd. v. County of Knox Board of Commissioners,* the Agency made it clear that

> *"The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant can abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease are less profitable that the tenant anticipated.* [*See* e.g., Penobscot Air Services LTD v FAA, 164 F 3d 713, 720 (1st Cir., 1999)]

The Associate Administrator finds that the Complainant's evidence fails to substantiate the Director erred in his decision, or that the Director failed to thoroughly investigate allegations in

the complaint. The Associate Administrator affirms the Director's Determination that the Respondent did not violate Grant Assurance 22, *Economic Nondiscrimination* by offering both tie-down block and exclusive area leases. Tenants with tie-down block leases, including Complainant, are not similarly situated to a tenant with an exclusive lease.

Issue 2: Have Respondents permitted a monopoly and exclusive right when it permitted the assignment of the last remaining large bulk aircraft storage hangar on the flight line to Christiansen Aviation in violation of Grant Assurance 23, *Exclusive Right?*

Complainant alleges on appeal that the approval of the assignment of the ATI Hangar to Christiansen Aviation was a violation of Grant Assurance 23, *Exclusive Rights* and states that it should have been afforded an opportunity to bid on the ATI Hangar in an open bid process. [FAA Exhibit 1, Item 31]

The Record shows that the Complainant alleged that the large bulk aircraft storage hangar, as discussed in Issue 1, was purchased by Christiansen Aviation through an assignment prior to Respondents' approval. [FAA Exhibit 1, Item 1, pg. 2.] Provisions in the lease documents condition the transaction on prior written approval, which must be granted by Respondents before an assignment of an Airport lease. [FAA Exhibit 1, Item 17, Attachment B.] Complainant infers that this transaction is a violation of Respondents' Federal obligations. [FAA Exhibit 1, Item 1, pg. 2.] Additionally, Complainant alleged that by approving the assignment, after the fact, Respondents permitted Christiansen Aviation to have a monopoly and exclusive right to the last remaining large bulk aircraft storage hangar on the flightline of the Airport and shut Roadhouse out of the market to service large, high performance aircraft. [FAA Exhibit 1, Item 33]

C. Grant Assurance 23 – *Exclusive Rights*

Opportunity to Bid and Approval of Assignment

Complainant argues that the Director committed a serious procedural error when he stated

> "whether Complainant made a serious offer or had the financial capacity to purchase the hangar is purely speculative and will not be considered when analyzing whether [Respondents are] in compliance with Grant Assurance 23." [FAA Exhibit 1, Item 31]

Complainant asserts that the Director did consider the Complainant's financial capacity to purchase the hangar as a part of its evaluation and this forms the basis for the agency's deference to the Respondents. [FAA Exhibit 1, Item 31] Whether the Complainant had the financial capacity to purchase the hangar is irrelevant to these proceedings just as whether this property should have been subjected to competitive bidding is a matter of local law and policy.

This is a sale of privately owned improvements on public property. The sale of those improvements is dictated by the terms agreed upon by the parties to the sale. The airport sponsor

is not a party to the sale but must address the issues tangential to the leasehold and its assignment. [FAA Exhibit 1, Item 29]

The Director clearly stated that the Complainant's financial capacity to lease the hangar **will not** be considered in determining the Respondents' compliance with Grant Assurance 23. The Associate Administrator does agree that Respondents do have an obligation to ensure its actions are consistent with the grant assurances, specifically in this case, Grant Assurance 23, *Exclusive Rights*.[15] However, the Associate Administrator does not see that Respondents' lack of participation in the negotiation of the terms of a private transaction rises to the level of granting an exclusive right.

The Record supports that Complainant attempted to negotiate a purchase with the previous owner of the hangar. For whatever reason, those parties could not reach an agreement. The former owner was, however, able to reach an agreement with Christiansen Aviation. As the Director indicated, the transfer of the hangar is the sale of privately owned improvements on public property dictated by the terms of the sale agreed upon by the parties to the sale. Respondents are not parties to the sale of the hangar. Respondents fulfilled their role by ensuring the replacement tenant/purchaser could perform under the terms of the lease. During this time, Complainant was not denied access to the Airport and three other fixed base operators with comparable service rights conducted business on the Airport. Furthermore, the Record does indicate that other space is available on the Airport to erect hangar facilities.

The exclusive rights prohibition does not guarantee an airport user the right to acquire a specific piece of private property, or access to a specific location on the airport. It does ensure that airport users have the right to access the airport to conduct commercial aeronautical activities. The Associate Administrator finds that the Director properly concluded that the Respondents did not violate Grant Assurance 23, *Exclusive Rights* in relation to the Complainant not being afforded an opportunity to bid on the ATI Hangar.[16]

Complainant argues on appeal that it rebuts the claim that there was no evidence that anyone other than Christiansen had both the need and financial ability to purchase the ATI Hangar. [FAA Exhibit 1, Item 31] The Complainant charges that the Director based his conclusion from the Complainant's statement "…that there is no reasonable possibility of obtaining any other space that would be **fiscally** [emphasis original] acceptable for the investment along the front row." Complainant argues on appeal that this was a misunderstanding and contends that it meant there was no acceptable investment opportunity along the flightline for bulk hangar space. [FAA Exhibit 1, Item 31]

Complainant claims on appeal that the Director erred when he indicated "five FBOs operating on the Airport make it somewhat improbable that Respondents have granted an exclusive right to anyone." [FAA Exhibit 1, Item 31] Complainant asserts there are only two fixed base operators providing general aircraft services such as maintenance, storage, ground, and flight instruction

[15] Grant Assurance 23, *Exclusive Rights*, in pertinent part, assures that an airport sponsor will permit "no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." [*See* Grant Assurance 23.]

[16] The ATI hangar acquired by Christiansen Aviation is shown on figure 1 as Lot 1 Block 4.

and then provides a breakdown of the services it contends each of the aeronautical tenants at the Airport are providing. [FAA Exhibit 1, Item 31]

Respondents rely on the Director's statement that "regardless of how big or small these businesses are, they have the ability to provide similar commercial services on the Airport." [FAA Exhibit 1, Item 33]

It seems the Complainant on appeal has an incorrect understanding of what constitutes an FBO providing aeronautical service at an airport. The FAA has routinely defined a fixed-base operator (FBO) in numerous Part 16 decisions as a commercial entity, providing aeronautical services, such as a fueling, maintenance, storage, ground and flight instruction, skydiving training, etc., to the public. (FAA Order 5190.6A, Appendix 5.) [See e.g. Sanford Air v. Town of Sanford, FAA Docket 16-05-04 (March 5, 2007), BMI Salvage Corporation & Blueside Services v. Miami-Dade County, FAA Docket 16-05-16 (March 5, 2007)] It is important to note under the Order definition, a service provider does not need to provide all the described aeronautical services in order to be deemed an FBO. A review of the services provided by the Airport's tenants, as detailed by the Complainant in its appeal, confirms that the Director properly concluded that there are five FBOs operating at the Airport, even though only two are providing fueling services. [FAA Exhibit 1, Items 29, 31 and 33] The Director determined the Respondents have not permitted an exclusive right with regard to providing general FBO services on the Airport. This is consistent with the Record evidence that there are currently five entities on the Airport with rights to provide FBO services. Regardless of their size, they have the ability to provide similar commercial services on the Airport.

Complainant then goes on to assert that the "conferring of one exclusive right, such as the right to service one class of aircraft (i.e. large, high performance aircraft), ought to be seen as a clear breach of Grant Assurance 23 and applicable federal obligations." Complainant concludes his appeal by stating "it is unconscionable to look at the facts and believe the [Respondents have] done anything but hamper Roadhouse's business." [FAA Exhibit 1, Item 31]

Respondents recap the Director's finding that Grant Assurance 23 does not obligate the Respondents to provide bulk hangar space at a price acceptable to the Complainant or provide facilities that it does not have or own. [FAA Exhibit 1, Item 29]

The Associate Administrator recognizes that the Complainant believes the issue here is whether Respondents granted an exclusive right, a violation of Grant Assurance 23, *Exclusive Rights*, when it approved the assignment of the ATI Hangar to Christiansen Aviation. Again, Grant Assurance 23 provides that an airport sponsor will "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." [FAA Exhibit 1, Item 29]

The Associate Administrator relies on the assurance that the Respondents provided in its pleadings and reconfirmed in its reply that the ATI hangar is not the last remaining leasehold available for large bulk hangar storage. The Record reflects that the Respondents referenced Lots 8 to 11, Block 6; Lot 15, Block 6, and Lot 15, Block 7 as available for development of

hangars to support large aircraft [FAA Exhibit 1, Item 29 and 33] and approximately one-third of the Scat air hangar on Lot 1, Block 6, is available for sublease.[17]

Additionally, the Associate Administrator recognizes that the Director properly noted that Respondents appear to be making good faith efforts in accommodating Complainant's desire for a leasehold to provide large bulk hangar space. At the moment, apparently the "Scat Air" building is the only available space on the flightline. The grant assurances do not obligate Respondents to provide such space at a price acceptable to the Complainant. Moreover, Respondents cannot provide what it does not have or own.

FAA notes Respondents, in the past, appear to have put forth an effort to accommodate Complainant to ensure competition on the flightline. This point is supported by Complainant's own submissions to the Record. [FAA Exhibit 1, Item 16, Attachment 4, *see also* Respondents' submission in Item 17, pg.10] While Complainant's presence on the flightline may be smaller when compared to Christiansen Aviation, it appears that Respondents have shown a willingness to accommodate the needs of the Complainant.

With regard to Complainant's allegation that Christiansen Aviation did not demonstrate a need for the ATI hangar, the grant assurances do not require such a test for an airport to approve the assignment of a lease. It appears Complainant's allegation rests on the language in FAA Order 5190.6A, which provides:

> *"…A demonstrated immediate need for the space to be leased shall be documented by the FBO to preclude attempts to limit competition or to create an exclusive right." [Par 4-17(k)(2).]* [FAA Exhibit 1, Item 29]

Again, FAA Order 5190.6A is not regulatory. [*See* FAA Exhibit 1, Item 29] The intent of Grant Assurance 23 and companion guidance language in FAA Order 5190.6A is that an airport sponsor not lease all available land to one FBO, thereby granting an exclusive right. In this case, Christiansen Aviation has put the hangar into productive use and other space is available for Complainant.

Respondents have met their obligations under the grant assurances by providing aeronautical leaseholds for up to five FBOs. Therefore, the Associate Administrator finds Respondents are not in violation of Grant Assurance 23.

The Complainant argues on appeal that the Director erred when he did not consider the comments from the FAA Southwest Region Compliance Officer regarding the assignment of Christiansen Aviation's bulk hangar space or the operation of the Complainant's common-use public access taxilanes. Complainant goes on to argue on appeal that the Director arbitrarily ignores the comments from the FAA Southwest Region Compliance Officer that Christiansen Aviation occupies more than half of the flightline hangars large enough for high-performance aircraft. [FAA Exhibit 1, Item 31] The Associate Administrator disagrees since the Record shows that the Director did consider and weigh the comments of the Southwest Region

[17] Respondents admit that while the Scat Air building is not suitable for large bulk aircraft storage, the space would give Complainant more of a presence on the flightline. [FAA Exhibit 1, Item 33]

Compliance Officer provided during the informal complaint process. However, the conclusions made in the Director's Determination represent the more comprehensive and detailed factual evidence compiled in the Record during the course of the formal Part 16 proceeding. Additionally, the Southwest Region Compliance Officer is not a participant in this Part 16 proceeding.

The Associate Administrator finds that the Director did not err in finding the Respondents in compliance with its obligations under Grant Assurance 23, *Exclusive Rights.*

VII. CONCLUSION

In arriving at a final decision on this appeal, the FAA has reexamined the Record, including the Director's Determination, and the appeal and reply submitted by the parties, in light of applicable law and policy. Based on this reexamination, 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 does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

The Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the Appeal is dismissed, pursuant to 14 CFR § 16.33.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. [14 CFR, Part 16, § 16.247(a).]

D. Kirk Shaffer
Associate Administrator
for Airports

Date: June 26, 2007