U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Associate
Administrator for Airports

800 Independence Ave., S.W.
Washington, D.C. 20591

APR 15 2011

Mr. Thomas Abbott
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Ms. Cynji Lee
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Miami-Dade County Attorney
P.O. Box 025504
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Mr. Ted H. Bartelstone, P.A.
Dadeland Office Park, Suite 208
9200 South Dadeland Blvd
Miami, FL 33156

RE: ***BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida***
Docket No. 16-05-16

Dear Messrs Abbott and Bartelstone and Ms Lee:

Enclosed is a copy of the Final Decision and Order on Remand of the Federal Aviation Administration (FAA) with respect to the above-referenced matter.

Complainants argued on appeal to the United States Circuit Court that the Associate Administrator erred in affirming the Director's Determination in the March 5, 2007, Final Decision and Order. Specifically, Complainants argued on appeal that the FAA erred in concluding the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide Complainants a lease comparable to leases provided to similarly situated tenants. Complainants did not argue on appeal to the United States Circuit Court that the Associate Administrator erred in affirming the Director's Determination with regard to other issues addressed in the March 5, 2007, Final Decision and Order, which is incorporated by reference in this Final Decision and Order on Remand.

In arriving at this Final Decision and Order on Remand, the FAA reexamined the record, including the Director's Determination, the March 5, 2007, Final Decision and Order, the administrative record supporting these decisions, and the supplemental evidence submitted by the parties in accord with the Court's order dated April 8, 2008. In light of applicable law and policy, based on this reexamination, the Associate Administrator finds and concludes the additional information submitted by the

Respondent and the Complainants provides sufficient support for the Respondent's disparate treatment of its tenants and for its inability so far to enter into a long-term development agreement with the Complainants.

Accordingly, based on the record, analysis, and conclusions therein, the Associate Administrator affirms that Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*. The reasons for this conclusion are set forth in the enclosed Final Decision and Order on Remand.

Sincerely,

Catherine M. Lang
Acting Associate Administrator
for Airports

Enclosure

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 15, 2011, I placed in the United States mail (first class, postage paid) a true copy of the foregoing Final Decision and Order on Remand addressed to:

For Respondents
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FAA Part 16 Airport Proceedings Docket
FAA Airport Compliance and Field Operations, ACO-100
FAA Southern Region, ASO-600

Anne Torgerson,
Office of Airport Compliance
and Field Operations

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

BMI Salvage Corporation & **Blueside Services, Inc.** **COMPLAINANTS/APPELLANTS** **v.** **Miami-Dade County, Florida** **RESPONDENT/APPELLEE**	**Docket No. 16-05-16**

FINAL DECISION AND ORDER ON REMAND

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on remand from the Eleventh Circuit Court of Appeals in BMI Salvage Corp. v. FAA, 272 Fed.Appx. 842 (11th Cir. 2008). [FAA Exhibit 1, Item 30A.] Petitioners/Complainants BMI Salvage Corporation and Blueside Services, Inc. appealed the FAA's Final Decision and Order issued March 5, 2007. The Final Decision and Order was issued after Complainants appealed the Director's Determination issued July 25, 2006, by the Director of the FAA Office of Airport Safety and Standards,[1] pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in Title 14 Code of Federal Regulations (CFR) Part 16.

Because the Court found the record supporting the agency's final order "inadequate" for it to make a meaningful review, the Court remanded the case to the Administrator to give the County the opportunity to present legally and factually sufficient justifications for the County's failure to enter into an agreement with BMI and Blueside Services, Inc. to occupy or develop constructed facilities at the Airport. [*See* FAA Exhibit 1, Item 30A, page 27.]

The Court indicated that the County should have the opportunity to supplement the record "with legitimate explanations for its differential treatment of BMI and Blueside Services, Inc. as compared to [Miami Executive Aviation (MEA)] and Clero Aviation." [FAA Exhibit 1, Item 30A, page 25.] In response to the Court's order, the agency issued a July 17, 2008 Order for Supplemental Pleadings [FAA Exhibit 1, Item 31] and a July 30, 2009 [FAA Exhibit 1, Item 41] Request for Additional Information and Extension of Time.

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[1] At the time the Director's Determination was issued, the FAA office responsible for airport compliance was under the Office of Airport Safety and Standards. That office has since been designated the Airport Compliance and Field Operations Division.

Significant points in this case:

- Aircraft salvage and demolition operations are nonaeronautical in nature and as such, Grant Assurance 22, *Economic Nondiscrimination* does not afford any tenant the absolute right to airport access for the purpose of establishing such an operation.

- The Respondent confirms it is willing to lease its undeveloped area to the Complainants on a long-term development lease for the purpose of establishing a stand-alone fixed-base operation, to include aircraft repair service, at rates that would reflect the complete lack of infrastructure on the site. [FAA Exhibit 1, Item 43, page 7.]

- Complainants state a long-term development lease that does not include a full-time salvage component is unacceptable. [FAA Exhibit 1, Item 42, pages 3 and 4; Item 44, page 2, and page 7 #6.]

- Complainants state they will not accept a long-term development lease to develop and operate a stand alone fixed-based operation, to include aircraft repair service, separate and apart from their salvage operation. [FAA Exhibit 1, Item 44, page 7, #5.]

- Clero Aviation and Miami Executive Aviation are not similarly situated to Complainants.

II. SUMMARY OF THE AGENCY'S MARCH 5, 2007, FINAL DECISION AND ORDER

Complainants appealed the agency's initial decision, arguing that the Director (1) erred in concluding the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide Complainants a lease comparable to leases provided to similarly situated tenants; and (2) erred in making decisions about the evidence without conducting an evidentiary hearing in violation of Complainants' due process rights guaranteed by the Fifth Amendment of the United States Constitution.

On appeal, the Associate Administrator noted the initial allegations were not clearly, concisely, or completely described as required by Part 16, and pointed out that the Director can make findings only on clear, reliable facts. The Associate Administrator further pointed out that the record was unclear and included conflicting statements from the Complainants. [FAA Exhibit 1, Item 29, *Final Decision and Order*, March 5, 2007, page 13.]

The Associate Administrator found the Complainants were not similarly situated to other aeronautical tenants on the Airport with whom the Complainants compared themselves. Specifically, the Associate Administrator stated the Complainants were not comparable to Clero Aviation, noting Complainants were in the aircraft demolition business while Clero Aviation was in the aircraft repair business. [FAA Exhibit 1, Item 29, *Final Decision and Order*, March 5, 2007, page 14.] The Associate Administrator further stated the Complainants were not similarly

situated to fixed-base operator[2] Miami Executive Aviation. [FAA Exhibit 1, Item 29, *Final Decision and Order,* March 5, 2007, pages 15-16.] The Associate Administrator explained that the Part 16 process does not require the opportunity for a complainant to have a hearing in this case. The Associate Administrator affirmed the Director's Determination in a Final Decision and Order issued March 5, 2007.

Complainants argued on appeal that the FAA erred in concluding the Respondent County is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide Complainants a lease comparable to leases provided to similarly situated tenants. Complainants do not argue on appeal that the Associate Administrator erred in affirming the Director's Determination with regard to Complainants' due process rights.[3]

For the reasons stated herein/within this document, the Associate Administrator affirms the Director's Determination. In addition, the March 5, 2007, Final Decision and Order is incorporated by reference for all other issues not raised with the United States Court of Appeals, including due process rights [*see* FAA Exhibit 1, Item 29, pages 20-21] and exclusive access [*see* FAA Exhibit 1, Item 29, pages 21-22].

III. PARTIES

A. Airport

Opa-Locka Airport (OPF) is a public-use, general aviation airport located in Miami-Dade County, Florida. The County of Miami-Dade, Florida, owns the Airport and is the sponsor of federal grants. [FAA Exhibit 2.] The Miami-Dade Aviation Department (MDAD) operates Opa-Locka Airport. (Both the County of Miami-Dade, Florida, and the Miami-Dade Aviation Department are referred to in this document as the Respondent.) The development of the Airport has been financed, in part, with funds provided to the County as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 United States Code (U.S.C.) § 47101, *et seq.* [FAA Exhibit 3.] As a result, the County is obligated to comply with the FAA sponsor assurances and related federal law, 49 U.S.C. § 47107. The Airport was transferred by the United States of America to the County by Quitclaim Deed dated November 16, 1961. [FAA Exhibit 1, Item 6, exhibit C.] The Respondent is bound by this Quitclaim Deed issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. §§ 47151 through 47153. [*See* FAA Exhibit 2.]

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[2] 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. [*See* FAA Order 5190.6A, Appendix 5. *See also* FAA Order 5190.6B, page 8-11, footnote #25.]

[3] Since this issue was not raised by Complainants in their petition to the Court of Appeals, it will not be addressed herein. The Associate Administrator's determination regarding this issue from the March 5, 2007, Final Decision and Order holds, and Complainants' right of appeal has run. [*See* March 5, 2007, Final Decision and Order, pages 20-21.]

B. Petitioners/Complainants

This case involves two complaining parties: BMI Salvage Corporation and Blueside Services, Inc. BMI and Blueside Services, Inc. are described as separate legal entities, both owned and/or managed by Mr. Stephen O'Neal.

Complainants describe BMI as a small aviation business and existing tenant at Opa-Locka Airport, working from 13 temporary work containers and a mobile office. [FAA Exhibit 1, Item 1, page 5.] BMI specializes in the teardown and demolition of over 100 transport category aircraft. [FAA Exhibit 1, Item 1, page 5.] BMI operated at Opa-Locka Airport on a five-year lease with a 30-day relocate or vacate clause for ramp space. This was later changed to a one-year cancellation clause because it would be difficult or impossible for BMI to relocate in less than 365 days if it were in the process of demolishing an aircraft at the time the lease was cancelled. [*See* FAA Exhibit 1, Item 33, pages 7-8.]

Complainants describe Blueside Services, Inc. as a Florida corporation and proposed tenant at Opa-Locka Airport. Blueside Services, Inc. has proposed to offer fixed-base operator services to general, corporate, and cargo activities, including an aircraft repair station, at Opa-Locka Airport. [FAA Exhibit 1, Item 1, pages 6 and 14.] Blueside Services, Inc. is not currently operating on the Airport.

IV. PROCEDURAL HISTORY, FACTUAL BACKGROUND, AND SUPPLEMENTAL INFORMATION

A. Procedural History

August 18, 2005,[4] Stephen O'Neal, President of BMI and Blueside Services, Inc. filed this formal Complaint on behalf of both BMI and Blueside Services, Inc.. The parties refer to Stephen O'Neal's pleadings and statements as having been made by the "Complainants." In the pleadings, Stephen O'Neal signs and submits all pleadings, acting pro se, speaking for both BMI and/or Blueside Services, Inc. (the "Complainants").

September 7, 2005, the FAA issued a notice of docketing in this case, Docket No. 16-05-16.

September 21, 2005, the FAA granted Respondent's motion for extension of time to file its answer.

October 19, 2005, Respondent submitted its answer and motion to dismiss.

October 20, 2005, FAA granted Complainants' first motion for extension of time to file their reply.

November 10, 2005, FAA granted Complainants' second motion for extension of time to file their reply.

[4] The Complaint is dated August 12, 2005, but was received by FAA August 18, 2005.

November 22, 2005, Stephen O'Neal submitted Complainants' reply.[5]

December 23, 2005, FAA granted the Respondent's motion for extension of time to file its rebuttal.

January 20, 2006, the Respondent filed its rebuttal.[6]

February 1, 2006, Respondent submitted a withdrawal of exhibit H to its rebuttal and jointly submitted exhibit I.

July 25, 2006, FAA issued the Director's Determination in this matter. [FAA Exhibit 1, Item 22.]

August 31, 2006, Complainants appealed the Director's Determination. [FAA Exhibit 1, Item 23.]

September 25, 2006, Respondent replied to Complainants' appeal. [FAA Exhibit 1, Item 24.]

December 13, 2006, FAA issued a Notice of Extension of Time extending the time by which a decision would be rendered on this appeal to January 18, 2007. [FAA Exhibit 1, Item 25.]

January 17, 2007, FAA issued a second Notice of Extension of Time extending the time by which a decision would be rendered on this appeal to March 1, 2007. [FAA Exhibit 1, Item 26.]

March 1, 2007, FAA issued a Notice of Extension of Time extending the time by which a decision would be rendered on this appeal to March 23, 2007. [FAA Exhibit 1, Item 28.]

March 5, 2007, FAA issued its Final Decision and Order. [FAA Exhibit 1, Item 29.]

Complainants petitioned the United States Court of Appeals for the Eleventh Circuit for review of FAA's March 5, 2007, Final Decision and Order.

April 8, 2008, the United States Court of Appeals for the Eleventh Circuit issued its opinion and remanded the case to the FAA for further consideration. [FAA Exhibit 1, Item 30A.]

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[5] Complainants' motion Requesting Further Investigation and Audit under § 16.29, served with Complainants' Reply, was denied. The FAA investigated the allegations raised by the Complainants in this proceeding. [*See* Part 16, § 16.29(b)(1).] Similarly, the request for an audit of airport financial records and transactions over the last 40 years (since 1965) pursuant to § 16.29 (b)(3) was excessive and not required for resolution of the issues addressed in this proceeding..

[6] Respondent's motion to strike exhibits A-F, L, N, O and X was denied. The exhibits at issue are unsworn, unsigned statements containing opinions and other information. Complainants are proceeding *pro se,* and Part 16 does provide that the pleadings should contain complete statements of the facts to substantiate pleadings, and should be filed with supporting documentation. [*See* Part 16, § 16.23(g) and (i).] Respondent's alternative request for additional time to conduct discovery was also denied since Part 16 does not provide for discovery except when there is a hearing following a Director's Determination. [*See* 14 CFR Subpart F.]

July 17, 2008, FAA issued an Order for Supplemental Pleadings to Respondent and Complainants. [FAA Exhibit 1, Item 31.]

FAA issued an Order Granting an Extension of Time to October 30, 2008, for Respondent to provide its Supplemental Pleadings. [FAA Exhibit 1, Item 32.]

October 31, 2008, FAA received Respondent's Supplemental Pleadings. [FAA Exhibit 1, Item 33.]

February 6, 2009, FAA received Complainants' Response to Respondent's Supplemental Pleadings. [FAA Exhibit 1, Item 36.]

February 6, 2009, FAA received Complainants' Notice of Filing Affidavit of James Stephen O'Neal in Support of Complainants' Response to Respondent's Supplemental Pleading. [FAA Exhibit 1, Item 37.]

February 6, 2009, FAA received Complainants' Notice of Filing of Affidavit of Jorge Clero in Support of Complainants' Response to Respondent's Supplemental Pleading. [FAA Exhibit 1, Item 38.]

March 24, 2009, FAA issued a Notice of Extension extending the date by which the final agency decision on remand would be issued to June 17, 2009. [FAA Exhibit 1, Item 39.]

June 19, 2009, FAA issued a Notice of Extension extending the date by which the final agency decision on remand would be issued to August 27, 2009. [FAA Exhibit 1, Item 40.]

July 30, 2009, FAA issued a Request for Additional Information and Notice of Extension of Time, requesting supplemental information from both parties and extending the date for issuing the final agency decision on remand to December 18, 2009. [FAA Exhibit 1, Item 41.]

October 9, 2009, Complainants submitted their Preliminary Response to FAA Request for Additional Information, received October 13, 2009. [FAA Exhibit 1, Item 42.]

October 13, 2009, Respondent submitted its Response of Miami-Dade County to the FAA's Request for Additional Information, received October 16, 2009. [FAA Exhibit 1, Item 43.]

October 21, 2009, Complainants submitted their Supplement Response to FAA Request for Additional Information, received October 22, 2009. [FAA Exhibit 1, Item 44.]

December 16, 2009, FAA issued a Notice of Extension extending the date by which the final agency decision on remand would be issued to February 18, 2010. [FAA Exhibit 1, Item 45.]

February 16, 2010, FAA issued a Notice of Extension extending the date by which the final agency decision on remand would be issued to April 7, 2010. [FAA Exhibit 1, Item 46.]

March 23, 2010, FAA issued a Notice of Extension extending the date by which the final agency decision on remand would be issued to May 6, 2010. [FAA Exhibit 1, Item 47.]

May 4, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to July 1, 2010. [FAA Exhibit 1, Item 48.]

June 23, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to August 15, 2010. [FAA Exhibit 1, Item 49.]

August 11, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to September 23, 2010. [FAA Exhibit 1, Item 50.]

September 2, 2010, internal email message from AGC to the Airport Compliance and Field Operation Division advising staff of the correct address for Complainants' attorney, Ted H. Bartelston, Esq. [FAA Exhibit 1, Item 51.]

September 22, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to November 5, 2010. [FAA Exhibit 1, item 52.]

October 12, 2010, Petitioners' Motion for Writ of Mandamus to Compel Respondent FAA to Rule Pursuant to Court Remand, received October 12, 2010. [FAA Exhibit 1, Item 54.]

November 19, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to December 20, 2010. [FAA Exhibit 1, Item 53.]

B. Factual Background

The factual background listed below includes those elements related to the Appeal to the Associate Administrator for Airports and the Appeal to the Circuit Court. The Director's Determination includes additional detail in the factual background section related to issues and allegations, some of which were resolved in the Director's Determination and not appealed. Those facts are incorporated herein by reference. [*See* FAA Exhibit 1, Item 22, pages 3-5.]

November 16, 1961, the United States of America deeded Opa-Locka Airport to Dade County by a Quitclaim Deed pursuant to the Surplus Property Act of 1944. [FAA Exhibit 1, Item 6, exhibit C.]

April 27, 1993, the Dade County Board of Commissioners issued a Memorandum and Resolution constituting Dade County's Authorization for County officials to execute standard aviation leases. [FAA Exhibit 1, Item 15, exhibit I.]

March 7, 1995, the Dade County Board of Commissioners issued a Memorandum and Ordinance (Ordinance) constituting Dade County's revision of Aviation Department Rules and Regulations. This contained a provision regarding nonoperating aircraft. [FAA Exhibit 1, Item 15, exhibit J.]

Between May 6, 1997, and November 10, 1999, the Respondent entered into four development leases with different companies to improve infrastructure and aeronautical facilities at the Airport. Under each development lease agreement, the County gave the developer the exclusive right to control all development within its premises. [FAA Exhibit 1, Item 33, pages 3-4.]

- May 6, 1997, the Respondent entered into a development lease agreement with Opa-Locka Community Development Center (CDC) for development of approximately 121 acres at Opa-Locka Airport. [FAA Exhibit 1, Item 33, page 4.]

- March 17, 1998, the Respondent entered into a development lease agreement with J.P. Aviation Investments, Inc. for development of 34.7 acres at Opa-Locka Airport. [FAA Exhibit 1, Item 33, page 4.]

- August 9, 1999, the Respondent entered into a development lease agreement with Stagecoach Aviation OPF LLC (Stagecoach) for development of approximately 240 acres at Opa-Locka Airport. Stagecoach was later taken over by Opa-Locka Group (OAG) [*see* FAA Exhibit 1, Item 33, exhibit 18] and its rights were later purchased by developer AA Acquisitions LLC. [*See* FAA Exhibit 1, Item 33, page 3 and page 5, footnote #13.]

- November 10, 1999, the Respondent entered into a development lease with The Renaissance Airpark Corp. for development of 178.65 acres at Opa-Locka Airport. [FAA Exhibit 1, Item 33, page 4.]

The parties agree that BMI Salvage Corporation relocated to Opa-Locka Airport and entered into a five-year lease (1999 Lease) agreement for certain facilities at Opa-Locka Airport that included 2.2 acres of a larger concrete ramp. The ramp contained no Airport buildings or facilities. The 1999 Lease expired upon its own terms on December 31, 2004. [FAA Exhibit 1, Item 6, para. 5 and exhibit D.] Prior to Stephen O'Neal establishing BMI Salvage Corporation's business at Opa-Locka Airport, the parties agree that he conducted "salvage work" at Miami International Airport. [FAA Exhibit 1, Item 11, para. 3.]

March 20, 2002, Stephen O'Neal expressed interest to the Respondent in leasing a building at Opa-Locka Airport (Building 407). [FAA Exhibit 1, Item 11, exhibit P.] No building lease was executed. In the early part of 2000, the Airport had 37 buildings that were capable of being occupied by aeronautical tenants. The bulk of these buildings had been constructed during the World War II era and were in extremely poor shape. Pursuant to inspections of these buildings required by state and local law, 21 of the 37 buildings failed the recertification requirement. [FAA Exhibit 1, Item 33, page 11.] The Respondent used the 16 remaining buildings to relocate existing tenants who were evicted from the condemned buildings. [*See* FAA Exhibit 1, Item 33, page 12.]

From the late 1990's, because of the development lease agreements entered into with CDC, J.P. Aviation Investments, Stagecoach, and The Renaissance Airpark Corp., the Respondent states it had no legal power to enter into long-term lease agreements for any land or facilities falling within any of the developers' premises. [FAA Exhibit 1, Item 33, pages 4-5.] Respondent states the premises desired by BMI Salvage Corporation for long-term development purposes were

located on the area leased to Stagecoach for development purposes. [FAA Exhibit 1, Item 33, page 3.]

May 11, 2004, the FAA advised the Respondent that the terms of the Stagecoach lease were not consistent with the Respondent's federal obligations. [FAA Exhibit 1, Item 33, page 5, footnote #13.]

November 4, 2004, the Respondent advised Stagecoach that the Respondent was exercising its rights under the lease to take back three separate sites on the Stagecoach premises so that other prospective tenants, including CDC and Blueside Services, Inc., could construct aeronautical facilities on the sites. [FAA Exhibit 1, Item 33, page 5, footnote # 13.] Stagecoach threatened a lawsuit; the parties mediated the dispute in late 2005, and an agreement was reached whereby the Respondent would pay $20 million to purchase Stagecoach's leasehold rights. [FAA Exhibit 1, Item 33, page 5, footnote #13.] The Board of County Commissioners of the Respondent, however, refused to approve the agreement in 2006, and the parties were at an impasse. The impasse was resolved when AA Acquisitions LLC agreed to purchase Stagecoach's rights and the Respondent approved the transaction in 2007. [FAA Exhibit 1, Item 33, page 5, footnote #13.]

October 1, 2004, Stephen O'Neal, President of Blueside Services, Inc. agreed to enter into a sublease agreement with the Opa-Locka Community Development Corporation (CDC) for development of an aeronautical services business at Opa-Locka Airport. The CDC had a 30-year development lease with the Respondent to develop significant portions of Opa-Locka Airport. Subleases under the CDC required concurrence by the Respondent. [FAA Exhibit 1, Item 11, exhibit G.] The Respondent did not approve the proposed sublease between CDC and the Complainants. The Respondent and CDC had not executed a development lease that would allow CDC to then sublease the property in question to Blueside Services, Inc. [FAA Exhibit 1, Item 11, exhibit H.]

December 31, 2004, BMI Salvage Corporation's 1999 Lease expired under its own terms. BMI Salvage Corporation continued to occupy its leasehold. [FAA Exhibit 1, Item 6, exhibit D.] There is no record of the Respondent taking action to remove BMI Salvage Corporation from its leasehold.

On April 14, 2005, the County Manager sent a memo to the Miami-Dade County Board of Commissioners, recommending Board approval of a 35-year development lease with Miami Executive Aviation, an aeronautical service provider at Opa-Locka Airport. [FAA Exhibit 1, Item 1, exhibit H.]

On May 9, 2005, Respondent advised CDC that it was in default under its 1997 lease. This letter did not terminate the CDC lease agreement or the relationship with CDC, but did propose the parties engage in a mutual termination of the lease agreement. [FAA Exhibit 1, Item 33, pages 21 and 25.] This lease was formally terminated on April 20, 2007. [FAA Exhibit 1, Item 33, page 25, footnote # 73.]

On May 11, 2005, Respondent and BMI Salvage Corporation President Stephen O'Neal executed a Lease Modification Letter enlarging BMI Salvage Corporation's leasehold. [FAA Exhibit 1, Item 6, exhibit E.]

May/June 2005, Respondent's staff forwarded to Mr. O'Neal a draft Lease Agreement between Respondent and Blueside Services, Inc. at Opa-Locka Airport. [FAA Exhibit 1, Item 6, page 11, and Item 6, exhibit K.] This agreement was never executed. [*See* FAA Exhibit 1, Item 6, page 11.]

June/July 2005, Complainants sent e-mail messages to Respondent confirming interest in proceeding with a five-year development lease and expanding the existing leasehold. [FAA Exhibit 1, Item 33, page 23.] Complainants proposed taking over a common-use area in addition to surrounding properties; this was not acceptable to the Respondent. [FAA Exhibit 1, Item 33, pages 23-24.]

Respondent and Complainants actively worked to discuss options for the Complainants' development plans until the Part 16 Complaint was filed. [FAA Exhibit 1, Item 33, page 24.]

On August 12, 2005, Complainant Stephen O'Neal, President of BMI Salvage Corporation and Blueside Services, Inc. filed its formal Part 16 Complaint. (*See* "Procedural History" above for a record the documents filed by both parties.)

On December 13, 2005, Respondent and Stephen O'Neal executed a Lease Modification Letter adding space to BMI Salvage Corporation's lease.

July 25, 2006, FAA issued the Director's Determination in this matter. [FAA Exhibit 1, Item 22.] The Director found the Respondent was not currently in violation of its federal obligations pursuant to 49 U.S.C. § 47107(a) or Grant Assurance 22, *Economic Nondiscrimination.*

August 31, 2006, Complainants appealed the Director's Determination. [FAA Exhibit 1, Item 23.] Complainants argued on appeal the Director erred in concluding the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide Complainants a lease comparable to leases provided to similarly situated tenants [FAA Exhibit 1, Item 23, page 1]; and erred in making decisions about the evidence without conducting an evidentiary hearing in violation of Complainants' due process rights guaranteed by the Fifth Amendment of the United States Constitution. [FAA Exhibit 1, Item 23, page 3.]

March 5, 2007, FAA issued its Final Decision and Order. [FAA Exhibit 1, Item 29.] The Associate Administrator found the Complainants were not similarly situated to other aeronautical tenants on the Airport with whom the Complainants compared themselves. The Associate Administrator also explained that the Part 16 process does not mandate the opportunity for a complainant to have a hearing. The Associate Administrator affirmed the Director's Determination in a Final Decision and Order issued March 5, 2007. [FAA Exhibit 1, Item 29, page 23.]

Complainants petitioned the United States Court of Appeals for the Eleventh Circuit for review of FAA's March 5, 2007, Final Decision and Order.

April 8, 2008, the United States Court of Appeals for the Eleventh Circuit issued its opinion and remanded the case to the FAA for further consideration. [FAA Exhibit 1, Item 30A.] The Court found there was insufficient evidence to support FAA's finding that (a) differences between aircraft demolition and aircraft repair justified the airport sponsor's disparate treatment, and (b) aeronautical service providers were not similarly situated. [*See* FAA Exhibit 1, Item 30A, pages 18 and 21.]

C. Supplemental Information

July 17, 2008, FAA issued an Order for Supplemental Pleadings to Respondent and Complainants. [FAA Exhibit 1, Item 31.]

October 31, 2008, FAA received Respondent's Supplemental Pleadings. [FAA Exhibit 1, Item 33.] Respondent makes the following points:

> Complainants primarily wanted land. [FAA Exhibit 1, Item 33, pages 8-10.] Land desired by the Complainants was located on property already leased to a developer, which prevented Respondent from entering into anything other than a short-term lease with Complainants. [FAA Exhibit 1, Item 33, page 3.] All new leases in the developer's leasehold were limited to a maximum of five years. [FAA Exhibit 1, Item 33, pages 5-8.]
>
> While there were some constructed facilities at the Airport, most had been condemned. The Respondent moved existing tenants from condemned facilities to the remaining buildings. All buildings were either occupied or condemned. That left no building space for the Complainants. [FAA Exhibit 1, Item 33, pages 11-12.]
>
> Clero Aviation had a short-term lease for facilities; Complainants wanted a long-term lease for land. [FAA Exhibit 1, Item 33, page 12.]
>
> Miami Executive Aviation is an established fixed-base operator on the Airport. It had a pre-existing lease that superseded the developer's lease. [FAA Exhibit 1, Item 33, page 15.]
>
> Complainants' proposed long-term lease agreement through CDC was unacceptable because (a) CDC had long been in default under its own lease, (b) the arrangement required CDC to acquire a new lease on property that was already subject to another developer's lease and then sublease the new property to Complainants, and (c) neither CDC nor the Complainants had provided sufficient evidence of financial ability to complete the project. [FAA Exhibit 1, Item 33, pages 25-26.]

February 6, 2009, FAA received Complainants' Response to Respondent's Supplemental Pleadings. [FAA Exhibit 1, Item 36.] Complainants make the following points:

Clero Aviation was granted access to a building while Complainants were not. [FAA Exhibit 1, Item 36, page 2.] Clero Aviation was given a development lease without any requirement to provide financial information. [FAA Exhibit 1, Item 36, page 11; *see also* FAA Exhibit 1, Item 38, pages 1-2.]

Complainants' history of making rent payments consistently over a period of years "more than demonstrates [Complainants'] financial capability." [FAA Exhibit 1, Item 36, page 11.] In addition, the record contains no evidence of Miami Executive Aviation's financial capability to complete its project. [FAA Exhibit 1, Item 36, page 10.]

Land other than the developers' land was available on the Airport. Complainants point to a 1999 development plan that shows at least 34 acres of existing development property. [FAA Exhibit 1, Item 36, page 14.]

February 6, 2009, FAA received Complainants' Notice of Filing Affidavit of James Stephen O'Neal in Support of Complainants' Response to Respondent's Supplemental Pleading. [FAA Exhibit 1, Item 37.] In this affidavit, Complainants address notices of violations [FAA Exhibit 1, Item 37, pages 1-4]; financial information [FAA Exhibit 1, Item 37, pages 4-5]; challenges the Respondent's list of short-term leases [FAA Exhibit 1, Item 37, page 5-6]; identified available development land [FAA Exhibit 1, Item 37, pages 6-7]; and identifies tenants within the Stagecoach Aviation OPF LLC leasehold [FAA Exhibit 1, Item 37, page 7].

February 6, 2009, FAA received Complainants' Notice of Filing of Affidavit of Jorge Clero in Support of Complainants' Response to Respondent's Supplemental Pleading. [FAA Exhibit 1, Item 38.] In this affidavit, Mr. Jorge Clero describes the opportunity Clero Aviation had to relocate and the development rights Clero Aviation obtained. Mr. Clero states he was not asked by Respondent to provide financial information to support the lease obligations. [FAA Exhibit 1, Item 38, pages 1-2.]

July 30, 2009, FAA issued a Request for Additional Information and Notice of Extension of Time, requesting supplemental information from both parties and extending the date for issuing the final agency decision on remand to December 18, 2009. We specifically wanted to know what property might be available for Complainants' current and proposed businesses and whether the Respondent was willing to consider the Complainants' desire to collocate their proposed fixed-base operator and repair facilities with their salvage operations. We also wanted to discern whether Complainants were prepared to make the minimum financial investment required and whether Complainants were willing to operate their proposed businesses from separate sites. [FAA Exhibit 1, Item 41.] We asked the following seven questions:

For Respondent:

1. Can the Respondent make property available from the premises of one of the established developers for the Complainants to develop and operate a stand-alone fixed-base operation (FBO), to include aircraft repair service, under a long-term development lease with the Respondent?

2. Can the Respondent make property available from the premises of one of the established developers for the Complainants to develop and operate an FBO, to include aircraft repair service, combined with a salvage operation, under a long-term development lease with the Respondent?

3. a. Does the Respondent have 34 acres (or some amount more or less than 34 acres) of available development land at the southern portion of the Airport – or in any other location on Airport property – designated for aviation development that it may lease directly to Complainants under a long-term development lease?

   b. If not, please explain the disposition of the aforementioned 34 acres.

   c. If so, would the Respondent consider leasing an amount of land in this area for the Complainants to develop and operate a stand alone FBO, to include aircraft repair service, under a long-term development lease? If the answer is in the negative, please explain why not.

   d. If so, would the Respondent consider leasing an amount of land in this area for the Complainants to develop and operate an FBO, to include aircraft repair service, combined with a salvage operation, under a long-term development lease? If the answer is in the negative, please explain why not.

4. Please describe the Airport's minimum standards and rules and regulations that apply to developing and operating a stand alone FBO, to include aircraft repair service, and to a combined FBO, to include aircraft repair service, with a salvage operation.

For Complainants:

5. Will Complainants accept a long-term development lease to develop and operate a stand alone FBO, to include aircraft repair service, separate and apart from Complainants' salvage operation in the areas described above in (1) or (3), investing no less than the required minimum investment (previously stated at $10,000 per acre per annum)?

6. Will Complainants accept a long-term development lease to develop and operate an FBO, to include aircraft repair service, combined with a salvage operation in the areas described above in (2) or (3), investing no less than the required minimum investment (previously stated at $10,000 per acre per annum)?

7. Will Complainants submit a proposed development plan for development consistent with (5) and/or (6) above, in sufficient detail – including, but not limited to, a business plan, demonstrated financial capability, scope of services, level of investment, a date for the completion of new facilities, and demonstrate the project will meet the Airport's minimum standards and rules and regulations for the type of business/service projected?

October 9, 2009, Complainants submitted their Preliminary Response to FAA Request for Additional Information, received October 13, 2009. [FAA Exhibit 1, Item 42.]

Complainants object to the requirement to file additional documents, stating, "Complainants believe that the Opinion of the United States Court of Appeals for the Eleventh Circuit, remanding this matter to the FAA, solely requires and provides an opportunity for [Respondent] to furnish evidence to justify its long time refusal ... to provide Complainants with a development lease...." [FAA Exhibit 1, Item 42, page 2.]

Nonetheless, Complainants responded to FAA's questions 5, 6, and 7 above.

> *Response to Questions 5 and 6:* Complainants state they are unable to reply with a "yes" or "no" response without seeing the detailed terms of a potential long-term development lease. Complainants state it is their intent to combine their salvage operations with their fixed-based operation. Complainants do not state they are willing to invest no less than $10,000 per acre per annum. Rather, Complainants state the minimum standards for the construction and development of a fixed-base operation with regard to a required minimum investment have not been finalized. Complainants state they are "willing to invest sufficient sums as have been required of other tenants." [FAA Exhibit 1, Item 42, pages 2-4.]
>
> *Response to Question 7:* Complainants state the Respondent never argued Complainants failed to provide a sufficient business plan or demonstrate suitable financial capability, scope of services, level of investment, date for the completion, or to demonstrate that any proposed project would meet the Airport's minimum standards and Rules and Regulations. Complainants state they would be pleased to respond with sufficient detail concerning their plans at such time as the Respondent provides a sufficiently detailed identification of premises for a long-term development lease. [FAA Exhibit 1, Item 42, pages 4-5.]

October 13, 2009, Respondent submitted its Response of Miami-Dade County to the FAA's Request for Additional Information, received October 16, 2009. [FAA Exhibit 1, Item 43.]

> *Response to Questions 1 and 2:* Respondent has contacted developers at the Airport who indicated a willingness to engage in discussions with the Complainants. Respondent cannot directly make property available for the premises of one of the established developers and cannot enter into an agreement with the Complainants directly for any of this property. In addition, Respondent states it will not allow any developers to permit sub-tenants to operate a full-time salvage operation. [FAA Exhibit 1, Item 43, pages 1-3.]
>
> *Response to Question 3:* Respondent states it has approximately 31 acres in the southern portion of the Airport and could lease a major portion of the property (approximately 25 acres) directly to the Complainants under a long-term development lease. There are currently no infrastructure facilities to the area. Respondent would be willing to lease this area to the Complainants for a fixed-base operation combined with an aircraft repair

service, but will not consider allowing a salvage operation. [FAA Exhibit 1, Item 43, pages 4-8.]

Response to Question 4: Respondent provides a copy of the "Minimum Standards for Conducting Commercial Aeronautical Activities at the Miami-Dade County General Aviation Airports," with an effective date of September 11, 2009. [FAA Exhibit 1, Item 43, exhibit B.] Respondent states that existing fixed-base operators are grandfathered. When it comes time for a renewal of their leases, the tenant or new tenant must comply with the current minimum standards. [FAA Exhibit 1, Item 43, pages 8-10.]

October 21, 2009, Complainants submitted their Supplement Response to FAA Request for Additional Information, received October 22, 2009. [FAA Exhibit 1, Item 44.]

Complainants argue the Respondent's reply to Question 1 is unacceptable. Complainants state they have attempted in good faith to obtain a sub-lease from approved developers at the Airport with no success. Complainants want the Respondent to take back property from one of the developers to offer that property directly to the Complainants. [FAA Exhibit 1, Item 44, page 2.]

Complainants argue the Respondent's position to exclude a full-time salvage operation is unacceptable. [FAA Exhibit 1, Item 44, pages 2-4.]

Complainants object to the available land at the southern side of the Airport as not being economically feasible. Complainants' counter that the Respondent has an additional 12 acres outside of the developer leases, which would be suitable to the Complainants provided the Respondent permit the Complainants' salvage operation. [FAA Exhibit 1, Item 44, pages 4-5.] Complainants also provide more explicit replies to questions 5, 6, and 7. [FAA Exhibit 1, Item 44, pages 7-9.]

Response to Question 5: Complainants will not accept a long-term development lease for a fixed-base operation separate and apart from their salvage operation. [FAA Exhibit 1, Item 44, page 7.]

Response to Question 6: Complainants will not accept a long-term development lease for a combined fixed-base operation and salvage operation on the acreage available on the southern portion of the Airport. Neither will Complainants accept a long-term development lease for a combined fixed-base operation and salvage operation on the premises of one of the established developers. Complainants state they will accept a long-term development lease on the additional 12 acres Complainants identify in this supplemental response, but only for a combined fixed-base operation and salvage operation. [FAA Exhibit 1, Item 44, pages 7-8.]

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.

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

FAA Order 5190.6A, *Airport Compliance Requirements*, (October 2, 1989)[7] 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 Order 5190.6A, 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

[7] On September 30, 2009, the FAA published FAA Order 5190.6B, Airport Compliance Manual, and cancelled FAA Order 5190.6A. During the proceedings of the Director's Determination and appeal, FAA Order 5190.6A outlined the policies and procedures to be followed in carrying out the FAA's functions related to airport compliance. The citations attached to FAA Order 5190.6A have been retained in this Final Decision and Order on Remand. This has no bearing on the analysis contained herein.

assurances discussed below and that are also imposed upon the City. Our analysis and enforcement of the obligations is identical.

One grant assurance is relevant to this appeal: Federal Grant Assurance 22.

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-base 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.

FAA Order 5190.6A 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 5190.6A, 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.[8] [*See* Order 5190.6A, Sec. 3-8(a).]

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 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.

FAA Order 5190.6A 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 respondent. [14 CFR, Part 16, § 16.23(b)(3,4)]

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

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 generally 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.]

4. FAA's Responsibility on Remand

In this case, the reviewing Court found that "the current record lacks sufficient evidence for a meaningful review." [FAA Exhibit 1, Item 30A, page 2.] As a result, the Court remanded the case to the FAA for further consideration "in order to give the parties the opportunity to present additional evidence." [FAA Exhibit 1, Item 30A, page 2.] "We believe the County should have the opportunity to supplement the record... with legitimate explanations for its differential treatment of BMI and Blueside Services, Inc. as compared to MEA and Clero Aviation."[9] [FAA Exhibit 1, Item 30A, page 25.]

In a remand situation, an administrative agency has no power or authority to deviate from the mandate issued by a reviewing Court. [Federal Power Commission v. Pacific Power and Light Co., 307 U.S. 156, 160 (1939). *See also* In reWella A.G., 858 F.2d 725, 728 -729 (Fed. Cir. 1988); 2 Charles H. Koch, Jr., Administrative Law and Practice § 8.31 (2d ed. 1997); 73A C.J.S. Public Administrative Law and Procedure § 463 (2010) (The agency has the responsibility to follow the explicit instructions of the Court. It cannot on remand stray away from the instructions and take action not contemplated by the Court's order.)]

On remand, the FAA has reexamined the record, including the supplemental pleadings filed by the parties in response to the Court's order, and in light of applicable law and policy. Based on this reexamination, consistent with the Court's order, and pursuant to 14 CFR Part 16, the Associate Administrator hereby issues its second final agency decision and order.

[9] The Court found the record inadequate for a meaningful review. [FAA Exhibit 1, Item 30A, page 2.]

VI. ANALYSIS AND DISCUSSION

Complainants petitioned the United States Court of Appeals for the Eleventh Circuit for review of FAA's March 5, 2007, Final Decision and Order. On April 8, 2008, the Court issued its opinion that "the current administrative record lacks sufficient evidence for a meaningful review" and remanded the case back to the FAA.[10]

At the suggestion of the Court, the FAA requested supplemental information from both parties on July 17, 2008, [FAA Exhibit 1, Item 31] and July 31, 2009, [FAA Exhibit 1, Item 41] to enhance and clarify the administrative record. The Court specifically wanted to hear from the Respondent, stating, "... we believe the County should have the opportunity to supplement the record, if it can, with legitimate explanations for its differential treatment of BMI and Blueside Services, Inc. as compared to MEA and Clero Aviation. [FAA Exhibit 1, Item 30A, page 25.] We have identified the following issue to be reviewed on remand:

ISSUE: Whether the Respondent is currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide Complainants a lease comparable to leases provided to allegedly similarly situated tenants.

In response to the Court's decision, the FAA reviewed the entire record, including the parties' supplemental pleadings filed subsequent to the Court's decision. The agency (A) reviewed its position adopted in both the Director's Determination and the Final Decision and Order that aircraft salvage and demolition has both aeronautical and nonaeronautical elements; (B) evaluated the circumstances regarding available development land at the Airport; and (C) specifically considered whether the different treatment between Complainants' businesses and tenants Clero Aviation and Miami Executive Aviation Grant Assurance 22, *Economic Nondiscrimination*, regarding (1) the opportunity to refurbish and occupy condemned buildings, and (2) the opportunity to acquire a long-term development lease. The FAA also examined the allegations raised by Complainants in regard to (D) other tenants with development leases and (E) past notices of violation and continuing negotiation. Finally, FAA (F) provides direct responses to the Court's concerns in the Court's April 8, 2008, Decision.

First, as discussed below, the FAA has clarified its policy concerning aircraft salvage and demolition and now concludes that these activities should be treated as purely nonaeronautical activities. As a result, the County has no grant obligation to provide aeronautical access to BMI's demolition/salvage operations.[11] In the alternative, even if the FAA still viewed salvage and demolition as having both aeronautical and nonaeronautical elements, the agency would still find the County to be in compliance because the agency finds that neither BMI nor Blueside Services, Inc. are similarly situated to Clero Aviation or Miami Executive Aviation (MEA).

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[10] *See* FAA Exhibit 1, Item 30A, page 2.

[11] However, as discussed below, if Blueside Services, Inc. were to submit an application to operate an aeronautical business such as aircraft repair – with no salvage or demolition element – the County would have a duty under the grant assurances to provide access on reasonable terms and without unjust discrimination. Given the record, the FAA would expect the County to act expeditiously on such an application.

A. Salvage and Demolition are Nonaeronautical Activities

In its discussion of whether BMI and Clero Aviation are similarly situated, the Court noted that one of the bases that FAA relied upon in finding the two businesses to be not similarly situated was that Clero Aviation was engaged in an aeronautical activity[12] (*i.e.*, Clero Aviation is an FAA-approved aircraft repair facility that is in the business of repairing aircraft brakes and modifying aircraft structural components) while BMI was engaged in an activity – aircraft salvage and demolition – that included a nonaeronautical element. This difference provided the County a sufficient basis to discriminate in favor or Clero Aviation, which does not have a nonaeronautical element to its business. In its discussion, the Court stated that it understood that Clero Aviation and BMI are engaged in different activities, but indicated that "it is unstated in the record what relevance the different business purposes have to the decision whether to grant these particular existing tenants the right to refurbish and occupy condemned buildings." [FAA Exhibit 1, Item 30A, page 17.] The Court continued:

> ... we find the alleged nonaeronautical aspects of BMI's business to be an unpersuasive basis on which to conclude that the parties are not similarly situated. The record provides no reason why the nonaeronautical element, if there is one, is a reasonable justification to distinguish between BMI and Clero Aviation. [FAA Exhibit 1, Item 30A, pages 17-18.] ... The nonaeronautical element of BMI's business is at most *de minimis* in light of the need to locate an aircraft demolition business in proximity to aeronautical areas in the Airport. Until the County can explain how the hybrid nature of BMI's business is crucial to its decision whether to award a lease to occupy a condemned building, we find the current explanation for the apparently disparate treatment in this case to be deficient. [FAA Exhibit 1, Item 30A, page 18.]

In the Court's view, BMI's presence on the Airport was "a prerequisite for [its] demolition business," [FAA Exhibit 1, Item 30A, page 18] because aircraft must be flown to the site of BMI's business for demolition to begin. "Therefore," the Court continued, "the natural, perhaps only logistically feasible, place for such a business to operate is within the designated aeronautical area of the Airport." [FAA Exhibit 1, Item 30A, page 18.] The Court also noted that the FAA's definition of aeronautical activities "does not explicitly rule out the possibility that a business such as BMI's is a completely aeronautical activity," but acknowledged that a demolition business is not specifically included on the list. [FAA Exhibit 1, Item 30A, page 18, footnote #13.]

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[12] An aeronautical activity is defined as any activity that involves, makes possible, or is required for the operation of aircraft or that contributes to or is required for the safety of such operations. Activities within this definition, commonly conducted on airports include, but are not limited to, the following: general and corporate aviation, air taxi and charter operations, scheduled and nonscheduled air carrier operations, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, aircraft sales and services, aircraft storage, sale of aviation petroleum products, repair and maintenance of aircraft, sale of aircraft parts, parachute or ultra light activities, and any other activities that, because of their direct relationship to the operation of aircraft, can appropriately be regarded as aeronautical activities. Activities such as model aircraft and model rocket operations are not aeronautical activities. [*See* FAA Advisory Circular 150/5190-6, "Exclusive Rights at Federally Obligated Airports" (Jan. 4, 2007), appendix 1, par. 1.1.a; FAA Order 5190.1A, par. 6.b.(1), "Exclusive Rights at Airports;" "FAA Policy Statement on Exclusive Rights at Airports," 30 Fed. Reg. 13,661 (Oct. 27, 1965); and FAA Order 5190.6B, par. 8.4.b.]

In light of the Court's comments, the FAA has reviewed its policy as set forth in the Director's Determination and Final Decision and Order. The Court is correct that in the final order, the agency stated that "BMI Salvage Corporation has a nonaeronautical element to its aircraft demolition business. That is, it takes aircraft and dismantles them; the aircraft will never fly again" [FAA Exhibit 1, Item 29, page 15] and that BMI "as an aircraft demolition operation – is not a completely aeronautical activity." [FAA Exhibit 1, Item 29, page 13.] In the Director's Determination, the FAA opined that while aircraft demolition "is not a completely aeronautical activity" it recognized that "the receipt of aircraft unto the leasehold for demolition, along with a reasonable time period after the aircraft is last parked under its own power, is an aeronautical activity." [FAA Exhibit 1, Item 22, page 10.] The Director further noted that "BMI is in the business of removing the aeronautical nature of aircraft ... the business of aircraft demolition and/or salvage occupies the boundary between aeronautical and nonaeronautical activities. Nonaeronautical activities must not be conducted on aeronautical areas of the airport and must be charged fair-market value." [FAA Exhibit 1, Item 22, page 14, footnote #10.]

Upon review, the agency agrees that it needs to be more definitive in its analysis of the propriety of aircraft salvage and demolition activities on federally obligated airports. As a result of its review, the FAA concludes that aircraft salvage and demolition should be treated as a purely nonaeronautical activity. Our reasoning is as follows.

First, as the Court noted, FAA's official definition of "aeronautical activity" does not include aircraft salvage and demolition. [*See* FAA Advisory Circular 150/5190-6, Exclusive Rights at Federally Obligated Airports (Jan. 4, 2007), Appendix 1, par. 1.1.a; FAA Order 5190.1A, par. 6.b.(1), Exclusive Rights at Airports; FAA Policy Statement on Exclusive Rights at Airports, 30 Fed. Reg. 13,661 (Oct. 27, 1965); and FAA Order 5190.6B, par. 8.4.b.]

Second, while the list of examples of aeronautical activities is not exhaustive, it is indicative of the agency's stated intent. The policy makes clear that only activities having a "direct relationship to the operation of aircraft" can appropriately be regarded as aeronautical activities. The key is that neither aircraft salvage nor demolition bears a "direct relationship to the operation of aircraft." While the FAA has stated that "the receipt of aircraft onto the leasehold for demolition, along with a reasonable time period after the aircraft is last parked under its own power, is an aeronautical activity" [FAA Exhibit 1, Item 22, page 10], that activity consists of a single flight operation. Clearly, that one operation is an aeronautical activity, but the lengthy business of disassembling the aircraft after that flight is not.

The salvage/demolition activity that follows is entirely about the dismantling of aircraft into parts and scrap materials, and bears no further relationship to "the operation of aircraft." Even if some parts are eventually sold for use on operational aircraft, the recovery of those parts does not need to be done on airport property any more than new aircraft parts need to be manufactured on airport property. Manufacture of new aircraft parts is not an aeronautical activity entitled to reasonable access to an airfield, and neither is the removal of used parts from a salvage aircraft.

Third, while the FAA has not specifically ruled on aircraft salvage before this case, there is a useful analogy to aircraft salvage and demolition in aircraft manufacturing. Aircraft manufacturing is not recognized by the FAA as an "aeronautical activity." In at least one Part 16

decision, the FAA has concluded that aircraft construction is not an aeronautical activity. In Kent J. Ashton v. City of Concord, North Carolina, FAA Docket No. 16-99-09, (January 28, 2000) (Director's Determination), we concluded that assembling a home built aircraft in an airport hangar is not a protected aeronautical activity. Even in large-scale aircraft manufacturing, the aircraft is typically built off-airport because the construction process need not be done on the airport. When the construction is completed, the aircraft can be taxied onto the airport from the off-airport location. The only step in this process that would be considered "aeronautical" would be use of the airfield by the completed aircraft after the manufacturing process is essentially finished.

The aircraft salvage process is the mirror image of aircraft manufacturing, except that it has a far more tenuous relation to the operation of aircraft. The salvage/demolition process begins only after the sole aeronautical activity – arrival of the salvage aircraft – ends. The salvage/demolition business arguably needs to be near the airport for the one delivery operation, but does not need to be on the airport and certainly not on valuable aeronautical areas of the airport. The aircraft could be towed to a nonaeronautical area of the airport or to an off-airport location. The FAA's Airport Compliance Handbook explicitly recognizes aircraft manufacturing as an activity that is appropriate for through-the-fence access to an airport without the use of airport property itself. [*See* FAA Order 5190.6B, Airport Compliance Manual, para.12.7d.] If airport sponsors are not required to provide reasonable access for aircraft manufacturers, other than taxi access to the airfield from nonaeronautical property or from off the airport altogether, then sponsors have no greater obligation to provide reasonable access to the airfield by an aircraft salvage/demolition business.

Therefore, we respectfully disagree with the Court's view that "[t]he nonaeronautical element of BMI's business is at most *de minimis* in light of the need to locate an aircraft demolition business in proximity to aeronautical areas in the Airport." [FAA Exhibit 1, Item 30A, page 18.] Indeed, the opposite is true: the one last flight of the arriving aircraft – basically delivery of materials – is the only aeronautical activity in the entire process. For the above reasons, the FAA concludes that aircraft salvage and demolition should be treated as a purely nonaeronautical activity for the purpose of providing reasonable access to a grant-obligated airport.

If the FAA were to review BMI's complaint afresh today and apply its policy clarification that aircraft salvage and demolition should be treated as a purely nonaeronautical activity, it would find that BMI's salvage and demolition operation is not a protected aeronautical activity. As a result, the FAA would not require the County to provide access to BMI's salvage/demolition business activities.

However, were BMI and/or Blueside Services, Inc. to apply to the County today to operate an aircraft repair station or fixed-base operation on the Opa Locka Airport – without an aircraft salvage/demolition component – the County's grant assurances would require the County to provide reasonable and nondiscriminatory access provided the Complainants meet the Airport's minimum standards and rules and regulations.

Given the record indicating Complainants' strong interest in providing aeronautical services at the Airport, the FAA would expect the County to provide expeditious review to any application

submitted by Complainants to establish an aeronautical business on the Airport, including but not limited to aircraft repair or fixed-base operator services.

B. Available Development Land at the Airport

In order to analyze the question of similarly situated tenants, FAA first examined the Respondent's ability to enter into lease agreements.

Complainants argue that Respondent refuses to provide Complainants a development lease. [FAA Exhibit 1, Item 1, page 6.] Complainants are comprised of two entities; BMI Salvage Corporation and Blueside Services, Inc. Complainants seek a development lease that would run five years or longer.

Regardless of which entity sought the long-term lease, the issue is whether the Respondent granted other tenants or prospective tenants long-term development leases while unjustly denying Complainants' requests.

Complainants were offered a five-year lease. [*See* FAA Exhibit 1, Item 6, exhibit K.] However, Complainants argue they were never offered a development lease. [FAA Exhibit 1, Item 36, pages 10-11.] Complainants appear to desire only a long-term development lease (one of at least five years). [FAA Exhibit 1, Item 1, page 30.]

Complainants assert that in May 1999, January 2000, March 2000, and April 2002, BMI requested to enter into a long-term development lease at the airport. [FAA Exhibit 1, Item 23, pages 3 and 6-7.] As BMI made formal requests to obtain a long-term development lease, Complainants maintain Respondent ignored the requests other than to direct Complainants in 2000 and 2002 to contact one of three developers who had control of the airport's land. [FAA Exhibit 1, Item 23, page 3.] In 2004, Blueside Services, Inc. negotiated a long-term development lease with Respondent's fourth "approved developer" [13] - Opa-Locka Community Development Corporation (CDC). [FAA Exhibit 1, Item 1, page 6.] In 2005 Complainants submitted a development summary to the Respondent for an immediate investment of $350-500k for a five-year development lease while waiting for approval of a long-term development lease with the Board of County Commissions (BOCC). [FAA Exhibit 1, Item 1, page 6 and page 30 (exhibit B).]

Complainants point out that even though the Respondent entered into agreements for long-term development with certain developers, this land set-aside for those developers was not the only land available. Complainants argue the Opa-Locka Development Plan issued in 1999 showed 34 acres of available development land at the southern portion of the Airport designated for future

[13] In the late 1990s, the Respondent engaged in a concerted effort to find developers that would enter into long-term leases with the Respondent and commit to making multi-million dollar investments into new and improved infrastructure and aeronautical facilities at the airport. [FAA Exhibit 1, Item 33, page 3.] The Respondent eventually entered into development leases with four developers, including Stagecoach and CDC. [FAA Exhibit 1, Item 33, pages 3-4.] Under these development lease agreement, the Respondent gave each developer the exclusive right to control all development within its premises. These four developers are referred to as "approved" developers.

aviation development. These 34 development acres were in three separate parcels of eight acres, nine acres, and 17 acres.[14] Complainants note that the map exhibits submitted by the County in its Supplemental Pleading[15] no longer show this future development site. Complainants state this land has "disappeared." [*See* FAA Exhibit 1, Item 36, pages 13-14.]

In response to FAA's request for additional information, Respondent confirmed it does have approximately 25 acres of this 34-acre area available for development. [FAA Exhibit 1, Item 43, page 4.] However, Respondent points out the property is not currently usable. There are no infrastructure facilities to the area, no water, sewer, or utility facilities. There is also a storm water management issue that would need to be addressed. Any developer going into this area would be required to expend its own money to make the property usable, including constructing airfield access and aprons for aircraft desiring to access the parcel. [FAA Exhibit 1, Item 43, pages 4-5.] Following the Respondent's response regarding the availability of this acreage for a long-term development lease with Complainants, the Complainants admitted that the 34 acres of land at the southern side of the Airport is not economically feasible for their development goals. [FAA Exhibit 1, Item 44, page 4.]

Complainants maintain that Respondent's refusal to approve their long-term development agreement was unjustly discriminatory and in violation of Respondent's federal obligations. [*See* FAA Exhibit 1, Item 23, pages 9-11.] In addition, Complainants maintain that Respondent's failure to provide a direct long-term lease was also unjustly discriminatory and in violation of Respondent's federal obligations. [*See* FAA Exhibit 1, Item 36, page 1.]

The Respondent argues it did not have the legal authority to enter into a long-term development lease with the Complainants because of existing development agreements at the Airport. [FAA Exhibit 1, Item 33, page 5.]

In regard to those agreements, Respondent states:

- In August, 1999, Respondent entered into a development lease with Stagecoach Aviation OPF LLC ("Stagecoach") for development of approximately 240 acres of the eastern portion of the Airport. [FAA Exhibit 1, Item 33, page 3, exhibit 1.] This property contains the premises that Complainants desire for long-term development purposes.

- On November 10, 1999, Respondent entered a development lease with The Renaissance Airport Corp. ("RAC") for development of approximately 178 acres of the western portion of the Airport. [FAA Exhibit 1, Item 33, page 4, exhibit 2.]

- On March 17, 1998, Respondent entered a development lease with J.P. Aviation Investments, Inc. ("J.P. Aviation") for development of approximately 34 acres of the southern portion of the Airport. [FAA Exhibit 1, Item 33, page 4, exhibit 3.]

[14] *See* map at FAA Exhibit 1, Item 37, exhibit 3

[15] *See* map at FAA Exhibit 1, Item 33, exhibit 5

- On May 6, 1997, Respondent entered a development lease with Opa-Locka Community Development Corporation ("CDC") for development of approximately 121 acres of the southeaster portion of the Airport. [FAA Exhibit 1, Item 33, page 4, exhibit 4.]

BMI's original leasehold and current premises are located on the Stagecoach Premises.[16] [FAA Exhibit 1, Item 33, page 5; and Item 37, exhibit 4]

Respondent states Complainants were not actually seeking an existing constructed facility, but wanted land on which to construct their own facilities. [FAA Exhibit 1, Item 33, page 12.]

Most importantly, Respondent alleges that the County had no legal power to enter into a long-term lease agreement with the Complainants for any land or facilities "falling within any of the developers' premises." [FAA Exhibit 1, Item 33 and exhibit 1.] The terms of the Stagecoach leases prevented Respondent from legally entering into any agreement conflicting with Stagecoach's phased development plans. [FAA Exhibit 1, Item 33, pages.4 and 25.] Respondent offers lease excerpts in support of that proposition. [FAA Exhibit 1, Item 33, exhibit 1.]

Respondent also asserts it was initially willing to consider the Blueside Services, Inc.-CDC project. [FAA Exhibit 1, Item 6, page 10; and FAA Exhibit 1, Item 33, pages 26-27.]

At the same time, in 2005, Respondent states CDC was in default of its lease for failing to develop any portion of the property. [FAA Exhibit 1, Item 33, page 25.] The Respondent claims it communicated to Blueside Services, Inc. that its proposed sublease for the Stagecoach leasehold was more problematic as it was subject to the County and CDC resolving CDC's current default arising under its lease agreement. The Respondent explained that consideration of the sublease was complicated by CDC's viability and CDC's failure to develop other portions of the airport in accordance with its obligations. [FAA, Item 33, pages 25-26.]

Respondent claims the following:

- On May 9, 2005, Respondent sent CDC a letter advising it of its default and proposed that the parties mutually terminate the lease. [FAA Exhibit 1, Item 33, page 25 and exhibit 28.]

- On April 20, 2007, Respondent terminated the CDC lease for CDC's failure to comply with its development obligation. [FAA Exhibit 1, Item 33, page 4 & 25.] On July 17, 2008, Respondent approved a Development Lease Agreement with another organization, The Carrier Meek Foundation ("CMF") for development of essentially the same 121 acres contained in the CDC lease. [FAA Exhibit 1, Item 33, pages 4 and 25.]

Respondent also approached Stagecoach to initiate the process of taking back three parcels of land, one of which was the proposed site for Blueside Services, Inc..[17] [FAA Exhibit 1, Item 33, pages 26-27.]

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[16] Complainants seek to expand the amount of square feet in its current leasehold for long-term business development.

Respondent explains Stagecoach threatened a lawsuit against the County.[18] Nonetheless, Respondent continued to move forward to obtain the Stagecoach parcels. Eventually, Respondent approved an MEA long-term development lease on June 22, 2005. [FAA Exhibit 1, Item 33, page 27.]

FAA's Analysis Regarding Available Development Land

The Associate Administer notes that in November 1999, Respondent entered into a five-year lease with BMI Salvage Corporation for premises located on the Stagecoach development leasehold. BMI Salvage Corporation continues to occupy those premises as a sub-tenant on a month-to-month basis with Stagecoach's successor, AA Acquisitions LLC. [FAA Exhibit 1, Item 33, pages 4-5.]

The record indicates that between May 6, 1997, and November 10, 1999, the Respondent entered into four development leases with different companies to improve infrastructure and aeronautical facilities at the Airport. Under each development lease agreement, the County gave the developer the exclusive right to control all development within its premises. [FAA Exhibit 1, Item 33, pages 3-4.] Respondent informed Complainants on March 1, 2001, that all development of facilities at the Airport was under the auspices of the approved developers, and it could not offer long-term agreements to others. [FAA Exhibit 1, Item 33, page 9.]

It is clear that the land and facilities Complainants ultimately want for their expansion was leased to Stagecoach. The Blueside Services, Inc.-CDC development lease negotiated in 2004 required property that was not part of CDC's leasehold. As stated above, that area and eventual lease, as desired by Blueside Services, Inc., falls within the Stagecoach Premises. [FAA Exhibit 1, Item 37, exhibit 4.] The 2004 proposed agreement contemplated that CDC would acquire property subject to the Stagecoach leasehold and sub-lease it back to Blueside Services, Inc.. [FAA Exhibit 1, Item 33, page 26; *see also* FAA Exhibit 1, Item 33, page 5, exhibit 7.]

Complainants dispute Respondent's position and have suggested that Respondent's position that the Stagecoach lease prevented Respondent from entering a long-term development lease with Complainants is "new justification." [FAA Exhibit 1, Item 36, page 3.]

While perhaps not directly expressed in such terms in the past, Respondent has consistently maintained it was free to enter into only a five-year lease with Complainants for Stagecoach's premises. [FAA Exhibit 1, Item 33, page 6.] Moreover, Respondent directed Complainants in 2000 and 2002 to contact one of the developers who had control of the Airport's land. Thus Complainants cannot reasonably claim that they were unaware of the development lease terms.

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[17] Included in these parcels was one designated for the MEA long-term development lease agreement executed on June 22, 2005. [FAA Exhibit 1, Item 33, pages 26 and 27.]

[18] The dispute was thought to be resolved; however, the County Commissioners refused to approve the agreement in 2006. The dispute was not resolved until 2007 when AA Acquisitions LLC took over the Stagecoach lease. [FAA Exhibit 1, Item 33, page 27. *See also* FAA Exhibit 1, Item 33, page 5, footnote #13.] AA Acquisitions is the current developer holding the rights to develop the former Stagecoach site, including the Complainants' desired development sites. [FAA Exhibit 1, Item 33, page 5.]

The Complainants also point out, however, that as of 1999, the Respondent had set aside 34 acres for future aviation development at the southern portion of Opa-Locka Airport that is not within any of the other developers' premises. [FAA Exhibit 1, Item 36, pages 13-14.] The Opa-Locka Airport Development Plan (date unreadable, but purported to be issued in 1999) shows three separate parcels of future development for aviation with 8 acres, 9 acres, and 17 acres each. [*See* FAA Exhibit 1, Item 37, exhibit 3.] All of these parcels are outside the perimeters shown as development leaseholds in a March 23, 2005, Opa-Locka Airport Leasehold Plan submitted by Complainants. [*See* FAA Exhibit 1, Item 37, exhibit 4.] The March 2005 plan shows the area of 34 acres in the southern portion of the Airport, but does not identify it as aviation development (or any other use) and does not designate it as three separate parcels. Respondent also submitted a leasehold map (date unreadable). On that map, the 34-acre southern portion is shown within the Airport perimeter, but is not labeled or identified in any way. [*See* FAA Exhibit 1, Item 33, exhibit 5.]

We asked the Respondent specifically whether it has 34 acres (or some amount more or less than 34 acres) of available development land at the southern portion of the Airport – or in any other location on Airport property – designated for aviation development that it may lease directly to the Complainants under a long-term development lease. [FAA Exhibit 1, Item 41, page 3, request #3.]

Respondent states it has approximately 31 acres in the southern portion of the Airport. Respondent further states it is willing to lease a major portion of this area – identified as 25± acres[19] – to the Complainants under a long-term development lease.[20] [FAA Exhibit 1, Item 43, page 4.] Respondent advises, however, that there are no infrastructure facilities in the area in question, i.e., there is no water, sewer, or utility facility. In addition, the area is subject to storm water management requirements. It seems likely that any developer will need to raise the level of the ground to acceptable levels and to install storm water detention and distributions systems in certain areas. The Complainants would also have to construct airfield access (taxiways and taxi lanes and aprons) for aircraft desiring to access this parcel of land. [FAA Exhibit 1, Item 43, pages 4-5.]

In their supplemental pleadings, Complainants made a point of identifying this available development property, stating the Respondent was trying to "hide the fact of available development land from [Complainants] as well as FAA." Complainants objected that

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[19] Of the 31 acres, 3 acres have been promised to an existing tenant, The Cylinder Shop, for construction of a hangar and aircraft repair facility; and 3 acres have been promised to another tenant, Alca Avionics, for construction of a hangar. The Respondent has stated a willingness to negotiate a long-term development lease with Complainants for the remaining 25± acres. [FAA Exhibit 1, Item 43 page 4.]

[20] The Respondent confirms it is willing to lease the area to the Complainants on a long-term development lease for the purpose of establishing a stand-alone fixed-base operation, to include aircraft repair service, at rates that would reflect the complete lack of infrastructure on the site. The Respondent is unwilling at this time to allow Complainants to combine their current salvage operation with the new development of a fixed-base operation and aircraft repair service facility in this area. [FAA Exhibit 1, Item 43, page 7. *See also* discussion under paragraph (e) "Combined Salvage Operation" below.]

"development land was readily available but not offered to [Complainants] ... without explanation." [FAA Exhibit 1, Item 36, page 14.]

However, following the Respondent's affirmative response to FAA's specific question regarding the availability of this acreage for a long-term development lease with Complainants,[21] the Complainants admit that the 34 acres of land at the southern side of the Airport is not economically feasible for it and their development goals. [FAA Exhibit 1, Item 44, page 4.] It would appear that the investment required to make use of this land would be substantial.

The Complainants are also arguing that a different and separate 12 acre parcel "subject to the removal of derelict and multiyear abandoned aircraft, a 727 on its eastern boundary next to the sewage plant ... and the 747 blocking of its western boundary" would be suitable with the conditions that "two of the 12± acres adjacent to the nonaeronautical sewage treatment plant and could be utilized as an approved aircraft wash rack/salvage operation with appropriate environmental controls and the additional 10 acres as a full service [fixed-base operation] providing FAA approved aircraft services all with commercial and industrial zoning, unrestricted airside access to the taxiways/runways and direct landside access to NW 37th Avenue." [FAA Exhibit 1, Item 44, page 5.] Thus, Complainants have conditioned their acceptance of the 12 acre parcel.

Moreover, Complainants state they will not accept a long-term development lease to develop and operate a stand alone fixed-based operation, to include aircraft repair service, separate and apart from their salvage operation.[22] [FAA Exhibit 1, Item 44, page 7, #5 and #6.]

Complainants have further stated they will not submit a proposed development plan in sufficient detail – including but not limited to a business plan, demonstrated financial capability, scope of services, level of investment, as well as a date for the completion of new facilities – and demonstrate the project will meet the Airport's minimum standards and rules and regulations for the type of business/service projected for any parcel of land *except* the 12 acre parcel they now say they want. [FAA Exhibit 1, Item 44, page 8, #7, answer.]

It appears that Complainants are stating that this 12-acre parcel is the *only* parcel acceptable to it. Moreover, Complainants have a set of mandatory conditions it requires for any development lease. [FAA Exhibit 1, Item 44, page 8, #7, answer.] Complainants state the 12-acre parcel would be suitable subject to the removal of derelict and multiyear abandoned aircraft and provided two acres adjacent to the nonaeronautical sewage treatment plant could be used as an approved aircraft wash rack and salvage operation with appropriate environmental controls.

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[21] *See* discussion above and also at FAA Exhibit 1, Item 43, pages 4-5.

[22] Although the Complainants have stated they would not accept such an arrangement, it should be noted the Respondent has stated it will not likely allow developers at the Airport to permit their sub-tenants to operate a full-time salvage operation. [*See* FAA Exhibit 1, Item 43, page 2, #2.] Aircraft salvage operations are nonaeronautical in nature and, as such, Grant Assurance 22, *Economic Nondiscrimination*, does not afford any tenant the absolute right to airport access for the purpose of establishing such as operation. The FAA does not normally intervene in the business decisions of the airport sponsors where grant assurance violations are not at issue. [*See* Jet 1 Center Inc. v. Naples Airport Authority, FAA Docket No. 16-04-03 (January 4, 2005) (Director's Determination) page 25.]

[FAA Exhibit 1, Item 44, page 5.] Complainants also state the Respondent would need to provide financial incentives to offset the Respondent's prior refusal to provide a development lease when the Complainants' financial circumstances and market conditions were much different. [FAA Exhibit 1, Item 44, pages 8-9.]

Complainants' refusal to accept terms based on available leaseholds or parcels ripe for development is contrary to their allegations that Respondent is not open to negotiation and is evidence that the airport is not violating its federal obligations.

Associate Administrator's Conclusion Regarding Available Development Land

Upon review of the Respondent's lease excerpts, it is not unreasonable to conclude that the Stagecoach premises were exclusively leased for development in accordance with Stagecoach's phased plans. [FAA Exhibit 1, Item 33, Attachment C, exhibit 1, pages 9 and 17.] The lease excerpts also make clear the agreement is subordinate to the airport's federal obligations and contemplates amendment and changes from time to time. [FAA Exhibit 1, Item 33, Attachment C, exhibit 1, pages 9 and 58.] More importantly, Section 21.01K specifically provides "County agrees that it will not grant new or extended leasehold interests in conflict with the terms hereof." [FAA Exhibit 1, Item 33, Attachment C, exhibit 1, page 64.] That would include the contemplated phased development plans and thus supports Respondent's contention that it did not have a legal right to enter into a long-term development lease with a prospective tenant without Stagecoach's approval.

In addition, Section 2.10 expresses the Lessor's (Respondent's) right to buy back undeveloped premises when the lessee has failed to commence construction. [FAA Exhibit 1, Item 33, exhibit 1, page 20.] The Lessor's right to buy back does not guarantee that the Lessee will cooperate and come to terms. Unfortunately, Respondent fails to include the specific provisions addressing all of the Lessee's exclusive rights under the leasehold in Section 3.02, which would have been helpful in a larger context. [FAA Exhibit 1, Item 33, exhibit 1, page 20.] We note the Respondent also fails to include the termination provisions in Article 12. However, Respondent does include Section 21 describing Lessor's obligations and thus presents a reasonable picture of the primary terms.

Respondent admits it has awarded 11 leases to prospective tenants within the Stagecoach premises, each with a lease term of five years or less. Included in those 11 leases was the lease to BMI. With the exception of BMI Salvage Corporation, each lease contained a cancellation clause of 120 days or less. BMI Salvage Corporation had a one-year cancellation clause because it would be difficult or impossible for BMI Salvage Corporation to relocate in less than 365 days if it were in the process of demolishing an aircraft at the time the lease was cancelled. [FAA Exhibit 1, Item 33, pages 7-8.] Clero Aviation's lease for Building 137 was also within the Stagecoach premises and included a 90-day cancellation clause. [FAA Exhibit 1, Item 33, pages 7-8.] BMI's extended termination clause would suggest that BMI Salvage Corporation obtained better lease terms than the leaseholds to which it seeks to compare itself.

Respondent also admits it awarded a long-term development lease to Miami Executive Aviation (MEA). [FAA Exhibit 1, Item 33, pages 16-17; *see also* FAA Exhibit 1, Item 1, exhibit H

(page 38).] MEA's leasehold was one of the parcels recovered under the Stagecoach lease. [FAA Exhibit 1, Item 33, page 16.] The Respondent denies it has unjustly discriminated in favor of MEA over Complainants because the entities are not similarly situated and we agree. [*See* discussion at Section VI(C)(2) below.]

The original complaint fails to present specifics or comparisons of similarly situated fixed-base operators that were awarded leaseholds. [FAA Exhibit 1, Item 1.] The complaint is limited to the statement "Miami Executive Aviation and JP Aviation, both of whom have multiple derelict and nonoperational aircraft on their respective leaseholds were granted authority to develop in April and May 2005. [FAA Exhibit 1, Item 1, page 21 and exhibit H.] The similarity of these entities is discussed below. It is standard language in the airport's leases to require Respondent's approval for the presence of nonoperational aircraft beyond 60 days.[23] More importantly, the Associate Administrator notes that both MEA and JP Aviation are in the business of aircraft repair and are not full-service fixed-base operators.

The Respondent has confirmed the availability of 25± acres at the southern portion of the Airport. It is willing to lease the 25± acres to the Complainants on a long-term development lease for the purpose of establishing a stand-alone fixed-base operation, to include aircraft repair service but not a full-time salvage operation, at rates that would reflect the complete lack of infrastructure on the site. [FAA Exhibit 1, Item 43, page 7.] Complainants have countered that they are no longer interested in this acreage because of the lack of infrastructure and development costs. Instead, Complainants counter that they will accept an agreement *only* on a 12± acre parcel of land identified for the first time in their supplemental response and only under certain conditions. [*See* FAA Exhibit 1, Item 44, pages 4-5.]

The Complainants and Respondent may enter into negotiations regarding the 25± acres previously identified by the Complainants; they may enter into negotiations regarding the 12± acres the Complainants now identifies. Since those 12+ acres appear to be within the control of the Respondent, Respondent is obligated to negotiate in good faith for available land to make the Airport available for aeronautical purposes for public use on reasonable terms. Operating the airport for aeronautical use is not a secondary obligation; it is the prime obligation. This obligation includes the opportunity for leaseholders to develop airport property for aeronautical use. [*See* United States Construction Corporation v. City of Pompano Beach, Florida, FAA Docket No. 16-00-14, (July 10, 2002) (Final Agency Decision).] In any case, the FAA is not a party to the negotiations, and the Part 16 process is not the venue for the Complainants to present conditions and stipulations regarding potential negotiating points.

The Respondent has fulfilled its obligations to the extent permitted by terms of its existing development leases and has offered Complainants its available land. The Respondent is not obligated to provide Complainants with exactly the agreement they prefer. Specifically, the

[23] *See* FAA Exhibit 1, Item 33, Attachment C, exhibit 7, page 3 (1999 BMI Salvage lease); exhibit 10, page 4 (2002 National Aviation Services, Inc. lease); exhibit 11, page 4 (2003 Miami Executive Aviation, Inc. lease); exhibit 12, page 4 (2003 Air Cargo Management, Inc. lease); exhibit 13, page 3 (2004 Miami Executive Aviation, Inc. lease); exhibit 14, page 3 (2004 Hangar 41 Association Inc lease); and exhibit 18, page 3 (2006 Miami Executive Aviation, Inc. lease). In addition, the record shows a 1997 Miami Executive Aviation, Inc, lease limited nonoperational aircraft to 30 days. [FAA Exhibit 1, Item 33, Attachment C, exhibit 22, page 4; *See also* FAA Exhibit 1, Item 6, page 20.]

Respondent is not obligated to provide the Complainants with a development agreement that includes a salvage operation. Failure to achieve an agreement satisfactory to all parties following reasonable negotiations does not automatically constitute a violation of Grant Assurance 22. Grant Assurance 22, *Economic Nondiscrimination*, obligates the airport sponsor to make the airport available for public use on reasonable terms. It does not require the airport sponsor to offer certain convenience or a certain level of cost effectiveness to its tenants and airport users. [*See* Asheville Jet, Inc. d/b/a Million Air Asheville v Asheville Regional Airport Authority; City of Asheville, North Carolina; and Buncombe County, FAA Docket No. 16-08-02, (October 1, 2009) (Director's Determination), page 18.]

C. Clero Aviation and Miami Executive Aviation

We reviewed concerns related to the two tenants alleged by the Complainants to be similarly situated to the Complainants. Specifically, we considered: (1) whether the disparate treatment between Complainants' aircraft demolition business and tenant Clero Aviation's aircraft repair service violated Grant Assurance 22, *Economic Nondiscrimination*, regarding the opportunity to refurbish and occupy condemned buildings, and (2) whether the different treatment between Complainants and competitor Miami Executive Aviation violated Grant Assurance 22, *Economic Nondiscrimination*, regarding the opportunity to acquire a long-term development lease.

Complainants' current leasehold falls entirely within the old Stagecoach development boundary, which has since been acquired by developer AA Acquisitions LLC. The leaseholds of Clero Aviation and Miami Executive Aviation ("MEA") also fall within this boundary, as well as the leaseholds for Opa-Locka Flightline ("Flightline") and Natoli/Biscayne Capitol, LLC ("Natoli") (referenced later in this document). [*See* FAA Exhibit 1, Item 37, exhibit 4.] Complainants specifically allege that Respondent gave preferential treatment to Clero Aviation, MEA, Flightline, and Natoli. On appeal, Complainants contend Respondent failed to provide Complainants with leases comparable to the leases it provided similarly situated tenants. [FAA Exhibit 1, Item 23.]

1. Clero Aviation and Access to Condemned Buildings

Comparison of Entities

Complainants argue that BMI/Blueside Services, Inc. and Clero Aviation are similarly situated aeronautical businesses. Complainants argue it was denied development opportunities presented to "similarly situated" Clero Aviation. [FAA Exhibit 1, Item 23, pages 1-3.] Specifically, Complainants allege that Clero Aviation was granted priority access to airport facilities with Respondent's permission to refurbish a condemned building while Complainants were denied such development opportunities. [FAA Exhibit 1, Item 23, pages 5-7.]

BMI Salvage Corporation operated at the Airport on a standard five-year lease with a 30-day relocate or vacate clause for *ramp space*. [*See* FAA Exhibit 1, Item 33, Attachment C, exhibit 7.] This was later changed to a one-year cancellation clause because it would be difficult or impossible for BMI Salvage Corporation to relocate in less than 365 days if it were in the

process of demolishing an aircraft at the time the lease was cancelled. [*See* FAA Exhibit 1, Item 33, pages 7-8.]

Complainants state Clero Aviation operated on a standard five-year lease with a 30-day relocate or vacate clause for *Building 66*. [*See* FAA Exhibit 29, page 15.] Clero Aviation later entered into a three-year lease with two six-month options for extensions for *Building 137* with a 90-day cancellation clause. [FAA Exhibit 1, Item 33, pages 8 and 14.]

Complainants state they wanted to lease one or more condemned buildings on terms similar to the terms offered to Clero Aviation. Complainants state: "all efforts by BMI Salvage [Corporation] to lease various other condemned buildings at the Airport from Respondent were simply ignored or summarily rejected without any effort by Respondent to meet and negotiate acceptable business terms with BMI Salvage [Corporation]." [FAA Exhibit 1, Item 23, page 6.]

Complainants further argue that other tenants granted development leases or development rights at the Airport were not required to provide financial information in more detail than that provided by Complainants, including Clero Aviation. [FAA Exhibit 1, Item 37, page 5; and Item 36, page 13.]

Respondent disputes Complainants' contention that they are similarly situated with Clero Aviation. Respondent states Clero Aviation is in the business of repairing aircraft brakes and modifying aircraft structural components, while Complainants are in the salvage business with a desire to expand to fixed-base operator (FBO) Services. [FAA Exhibit 1, Item 33, page 13.] Respondent asserts that Clero Aviation's business requirements are different from Complainants. [FAA Exhibit 1, Item 33, page 13.]

Respondent further asserts Complainants primarily desired land on which to construct their own facilities and not the existing constructed facilities at the Airport. [FAA Exhibit 1, Item 33, page 8; *see also* FAA Exhibit 1, Item 11, exhibit B at pages 1, 3, and 5.]

Refurbishment of Condemned Buildings

Respondent states 21 of its 37 buildings for aeronautical tenants failed to meet building code and life/safety requirements during the early 2000s. [FAA Exhibit 1, Item 33, page 11; *see also* Item 33, exhibit 20 & 21.] The Respondent further states it had few funds to renovate condemned facilities and no funds to build new facilities. [FAA Exhibit 1, Item 33, page 12.] The Respondent maintains it had an obligation to make the few adequate facilities available for those existing tenants whom the Respondent had to relocate or evict from condemned buildings. [FAA Exhibit 1, Item 33, page 12.] Respondent stresses that existing facilities/buildings at the Airport are very limited. [FAA Exhibit 1, Item 33, page 12.]

Respondent denies in its supplemental pleadings that Clero Aviation and the Complainants are similarly situated with regard to priority access. Respondent evicted Clero Aviation from Building 66 after that building was declared unsafe and condemned. [*See* FAA Exhibit 1, Item 33, page 14.] Respondent and Clero Aviation negotiated for a relocation facility in

Building 137.[24] [FAA Exhibit 1, Item 33, page 14.] Respondent and Clero Aviation entered into a three-year lease with two six-month options for extensions for Building 137 with a 90-day cancellation clause. [FAA Exhibit 1, Item 33, pages 8 and 14.] Respondent provides its lease dated January 7, 2005 with Clero Aviation to occupy and upgrade Building 137. [FAA Exhibit 1, Item 33, Exhibit 16.]

Respondent points out that Clero Aviation was allowed to occupy and refurbish one of the limited condemned buildings that could reasonably be brought up to code. [FAA Exhibit 1, Item 33.]

Respondent contends Complainants was not entitled to priority access to any of these limited condemned buildings to occupy and refurbish because Complainants – unlike Clero Aviation – were not among the entities that were evicted from uninhabitable buildings. [FAA Exhibit 1, Item 33.]

Different Business Purposes and Space Requirements

In its supplemental pleadings, Respondent also explains how Complainants' demolition business needs differ from Clero Aviation's repair service needs for leased space. Respondent also explains how Complainants' proposed fixed-base operator needs for leased space differ from both.

Clero Aviation's repair service requires an enclosed facility with a secure roof and walls to meet FAA's requirements to maintain its license as an FAA-approved repair facility. It can be located anywhere on the Airport. Clero Aviation's space need not be adjacent to an aircraft ramp or pavement area. [FAA Exhibit 1, Item 33, page 13.]

Specifically, Clero Aviation's premises are limited to aircraft component maintenance, structural aircraft modification, aircraft maintenance consulting, and aircraft leasing. Moreover, Section 2.03 of Clero Aviation's lease specifically prohibits Clero Aviation from "aircraft or maintenance of aircraft in the building; performing the services of a [fixed-base operator] or any other services not specifically mentioned herein including the lease of aircraft tie-down and the sale of fuel. Stripping, doping and fuel transfer in the building are expressly prohibited." [FAA Exhibit 1, Item 33, exhibit 16, page 4.]

Complainants' BMI Salvage Corporation requires a substantial paved area on which aircraft can be parked during the salvage operation and which provides a catch area for hazardous materials that would otherwise contaminate soil if no pavement were there. [FAA Exhibit 1, Item 33, page 13.]

Complainants' Blueside Services, Inc. proposed fixed-base operator site requires immediate proximity to aircraft ramps, pavement, and taxi lanes in order for aircraft to access the Complainants' facility. [FAA Exhibit 1, Item 33, page 13.]

[24] Respondent agreed to provide $160,000 in maintenance to bring the building up to the minimum required standards for occupancy and Clero Aviation agreed to complete work on the building at an estimated cost of $360,000. [FAA Exhibit 1, Item 33, page 14.]

Because of these differing leased space needs and different business purposes/missions, Respondent contends these entities are not similarly situated for the purposes of leasing space. [FAA Exhibit 1, Item 33, pages 12-15.]

FAA's Analysis regarding Clero Aviation and Access to Condemned Buildings

The different business purposes between Complainants and Clero Aviation and scope of leaseholds are relevant here. Clero Aviation is an FAA - and EASA - certified repair station. Clero Aviation specializes in the overhaul and repair of brakes, wheels, starters, generators, blowers and hydraulic components for corporate and military aircraft. [*See* http://www.cleroaviation.com]

Complainants desire a development lease at the Airport. [FAA Exhibit 1, Item 1, pages 6 and 30.] Complainant Blueside Services, Inc. is described as a Florida corporation and proposed development tenant at the Airport. Blueside Services, Inc. has proposed to offer fixed-base operator services to general, corporate, and cargo activities, including an aircraft repair station, at the Airport. [FAA Exhibit 1, Item 1, pages 6 and 14.] Although Blueside Services, Inc. is not currently operating on the Airport, it has been construed that Blueside Services, Inc. will absorb BMI in the future. [FAA Exhibit 1, Item 6, exhibit B, page 3.][25] Regardless, Blueside Services, Inc. seeks to offer fixed-base operator services. Fixed-base operator services are aeronautical activities. As aeronautical services, fixed-base operators are protected under the grant assurances. Activities and services that are not aeronautical are not protected by the grant assurances. [*See* discussion at Section VI(A) above.]

Both parties agree Clero Aviation is not a full service fixed-base operator. Clero Aviation is limited to aircraft component maintenance and is an FAA approved repair facility. [FAA Exhibit 1, Item 33, page 12.] Complainants desire to establish a fixed-base operator business combined with their aircraft salvage and demolition component. Clero Aviation is not a full service fixed-base operator and does not have a salvage component. The salvage and demolition component of Complainants alone makes the entities dissimilar. The differences in size and scope of business make the entities dissimilar.

Since developed space on the airport was limited, it appears that the Respondent's Aviation Department attempted to find replacement facilities for the tenants of condemned buildings that desired to remain on the Airport. [FAA Exhibit 33, page 12.] Clero Aviation was one of those tenants. BMI Salvage Corporation and Blueside Services, Inc. were not.

Clero Aviation's relocation facility required investment by Clero Aviation. [FAA Exhibit 1, Item 33, page 14; Item 38, Affidavit of Jorge Clero.] Mr. Jorge Clero, president of Clero

[25] This is contrary to the Complaint which states "Blueside Services, Inc. is proposing to offer FBO services...which are totally different services from BMI which offers aircraft teardown services.... Blueside [Services, Inc.] does not intend to compete in demolition services..." [FAA Exhibit 1, Item 1, page 14.] However, the development plans in Complainants' exhibit B and other statements throughout the pleadings may be interpreted to suggest an eventual merger of the entities. [FAA Exhibit 1, Item 1, page 14 and exhibit B. *See also* FAA Exhibit 1,Item 30A, page 5.] The FAA accepts that there is a request to construct and develop an aircraft repair business and fixed-base operation at the Airport.

Aviation states in an affidavit that in January 2005, Clero Aviation entered into a lease agreement, including development rights, for a term of three years with two six-month extensions. The lease obligated Clero Aviation to spend in excess of $304,000 to develop and refurbish Building 137 while Respondent agreed to spend approximately $173,000 to upgrade the same building. [FAA Exhibit 1, Item 38, Affidavit of Mr. Jorge Clero, page 1.]

Complainants had a land lease only; they did not lease any building on the Airport as Clero Aviation did; they were not evicted as a result of condemned unsafe Airport-owned structures; and thus, they were not offered a relocation facility. [*See* FAA Exhibit 33, page 5.] Because they were not subject to an eviction, Complainants were not in the same situation as Clero Aviation.

In addition, Clero Aviation had, and required, an enclosed building facility for its active business while Complainants' BMI Salvage Corporation neither had, nor required, an enclosed building facility for its salvage and demolition business. The proposed Blueside Services, Inc. did not occupy an existing building facility. Nor, at the time, did it have a business to be damaged by an eviction. That fact is relevant to the decision to give existing tenants evicted from condemned buildings that could not be modified to meet building codes a higher priority right to refurbish and occupy the limited condemned buildings that could be modified to meet building code requirements. Complainants did not occupy an Airport-owned building that was condemned; they were not evicted from one of these buildings; they were not subject to relocation requirements; therefore, they were not extended a priority right to refurbish and occupy one or more condemned buildings. Complainants were not at risk of involuntarily losing access to the Airport as a result of the eviction process from the uninhabitable buildings. Respondent may be viewed as prioritizing an existing tenant subject to an unprovoked eviction over a proposed tenants seeking entrance to the Airport. That said, Complainants were not denied the opportunity to expand their business at the Airport.

Despite the entities' different business scopes, the record also shows the lease terms for both entities are not significantly disparate. The initial lease terms for both Clero Aviation and Complainants were standard five-year leases with 30-day relocate or vacate clauses. Current leases provide Clero Aviation with a 90-day cancellation clause; Complainants' lease, on the other hand, allows a 365-day cancellation clause *because* their business is aircraft demolition. All other terms are similar.

Financial Viability

Complainants further argue that other tenants getting development leases or development rights at the Airport were not required to provide financial information in more detail than that provided by Complainants, including Clero Aviation. [FAA Exhibit 1, Item 37, page 5; and Item 36, page 13.] In support of that proposition, Complainants offer the affidavit of Mr. Jorge Clero, who states "At no time during the negotiations with [Respondent] and through the signing of the Clero Aviation Lease Agreement was Clero Aviation asked by [Respondent] to provide financial information to support the Lease obligations." [FAA Exhibit 1, Item 38.]

Respondent states, "Although the Complainants provided the Respondent with some information as to the nature of the construction proposed for the 32-acre site and the dollar amount involved, the Complainants did not file sufficient documents showing their financial capability to complete their proposed project." [FAA Exhibit 1, Item 33, page 17.] Respondent points out Complainants never identified exactly how the funding for their construction project would occur and whether it would be sufficient to allow Complainants to complete the project. [FAA Exhibit 1, Item 33, pages 22-23.]

Complainants posit that they have consistently provided their financial plans to the County, that the County never requested more detailed financial information, and the County never indicated the development lease was being delayed pending the receipt of more detailed financial data. [FAA Exhibit 1, Item 37, page 5.] In addition, Complainants argue they have been airport tenants at Miami International Airport (since 1988) and Opa-Locka Airport (since 1999) and have never been remiss in their rent payments. Complainants argue that fact alone "more than demonstrates [their] financial capability." [FAA Exhibit 1, Item 36, page 11.] Complainants further state that since the County "never even put a development lease proposal on the table, [Complainants were] never asked to submit 'proof of financial capability'." [FAA Exhibit 1, Item 36, page 11.]

Complainants compare themselves to Clero Aviation, yet the Clero Aviation lease is not described or defined as a development lease. It is a lease agreement to renovate and update Building 137. [FAA Exhibit 1, Item 15, exhibit D-1, page 1.] The total aviation land included in the Clero Aviation lease agreement is approximately 52,625 square feet, not acres (as it is for Complainants' requested lease area).[26] The only possible reference to development is a section permitting Clero Aviation to enter into Tenant Airport Construction contracts for the purpose of constructing facilities or improvements deemed necessary or appropriate "from time to time." [*See* FAA Exhibit 1, Item 15, exhibit D-1, page 9.]

Complainants have asserted Clero Aviation was obligated to spend "in excess of $304,000" to renovate Building 137. [*See* FAA Exhibit 1, Item 38.] Based on the quantity of space leased to Clero Aviation, this amount is much higher than the airports required minimum investment.[27] We also note that Construction in excess of $200,000 required a performance bond and a payment bond in the full amount of the improvement. [FAA Exhibit 1, Item 15, exhibit D-1/d.]

Complainants have expressed their intent to invest an amount that would "exceed the County minimum of $10,000 per acre per annum," but they do not specify a minimum total amount or how the development would be capitalized. [FAA Exhibit 1, Item 33, exhibit 30; and Item 36, page 10.] Presumably, with 32 acres, Complainants would invest at least $320,000 for each lease year. On a five-year development lease, that would amount to $1,600,000. On a 35-year

[26] Clero Aviation's leased space includes 12,785 square feet for Building 137; 5,087 square feet for the Landside Vehicular Pavement; 34,753 square feet for the Airside Aircraft Pavement; with a total aviation land of 52,625 square feet. [FAA Exhibit 1, Item 15, exhibit D-1, page 2.] Complainants' desired lease area, on the other hand, is 32 acres upon which Complainants could construct their desired facilities in conjunction with CDC. [FAA Exhibit 1, Item 33, page 18.]

[27] One acre = 43 560 square feet. The minimum investment per year on this space is around $ 12K and thus Clero Aviation's investment of $ 304K is well over the required minimum of around $36K.

lease, that would be $11,200,000. At a *minimum*, Complainants' investment would be more than five times higher than that of Clero Aviation, and it could run more than 36 times higher.[28] (*See* Table 1 below: *Comparison of Clero Aviation's Investment to Complainants' Investment.*)

Table 1: *Comparison of Clero Aviation's Investment to Complainants' Investment*

TENANT	Leased Space	Projected Investment	RATIO	Complainants' Investment as Multiples of Clero Aviation
Clero Aviation (3 year lease)	52,625 square feet	$304,000	1:1	
Complainants (5 year lease)	32 acres	$1,600,000	1:5.263	Complainants' investment is more than *5 times* higher than Clero Aviation.
Complainants (35 year lease)	32 acres	$11,200,000	1:36.842	Complainants' investment is more than *36 times* higher than Clero Aviation.

Complainants stated it was financially viable and could develop the desired property. [FAA Exhibit 1, Item 11, page 13; and Item 36, page 10.] Generally, where a complainant makes an assertion in a Part 16 proceeding (in this instance on the Complainants' financial viability), they provide some evidence of proof. While not a requirement, Complainants have not offered any information on whether they could provide a performance bond or offered this proceeding any financial information that would demonstrate their ability to fulfill the investment commitment to develop presumably 32 acres.

Respondent's concerns are reasonable. In Atlantic Helicopters Inc./Chesapeake Bay Helicopters v Monroe County, Florida, FAA Docket No. 16-07-12, (December 3, 2008) (Director's Determination) (hereinafter "Monroe"), the Director found airport operators can demand clarity and stability in proposals and are not obligated to provide application assistance or business incubation [*See* Monroe at 37.] In addition, in Thermco Aviation, Inc., and A-26 Company v. City of Los Angeles, Los Angeles Board of Airport Commissioners, and Los Angeles World Airports, FAA Docket No. 16-06-07, (December 17, 2007) (Final Agency Decision) (hereinafter

[28] A PowerPoint presentation on Blueside Services, Inc. development dated October 28, 2008, shows a projected development investment between 2005 and 2009 of $9,025,000. [*See* FAA Exhibit 1, Item 33, exhibit 6, page 8.] This is the equivalent of more than 29 times the Clero Aviation Investment. Although the presentation estimates the cost of investment, this PowerPoint presentation does not describe how the investment would be made and the specific source of funding or financing. [FAA Exhibit 1, Item 33, exhibit 6, page 8.] In 2005, CDC was allegedly the source of investment and notably in breach of its development contract.

"Thermco"), the FAA held the grant assurances and federal obligations do no require that an airport sponsor recognize past occupancy as a preference for future occupancy. Nor do the federal obligations require sponsors to adhere to the location preferences of current tenants when planning for future development. [*See* Thermco at 18.]

Given the foreseeable financial commitment, it would not be unreasonable for the Respondent to expect some demonstration of financial capability from Complainants to support such an investment and specifically when asserting the comparison, one that is substantially greater than that required from Clero Aviation. It is not unreasonable to think that there might be differences in financial capability when an entity is seeking significantly higher amounts of money by financing. The Respondent's risk is much lower for projects around $304k versus projects at $1.6 million or $11 million. Although discussed by both the Complainants and Respondent, the record herein does not suggest that Complainants were denied a development lease because Respondent failed to request, and Complainants failed to provide, proof of financial capability. Clero Aviation's investment appears beyond the minimum financial investment requirement at the Airport. Clero Aviation's investment was reasonably supported by its existing business, and was significantly less than the financial investment needed for the Complainants' proposal.

Associate Administrator's Conclusion Regarding Clero Aviation

The Associate Administrator finds that the additional information provided by Respondent in its supplemental pleadings supports the Director's Determination that the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by allegedly failing to provide Complainants a lease comparable to the lease provided to Clero Aviation for a condemned building.

The Associate Administrator finds the different business purposes, different space needs on the Airport, and previous leasing history are relevant to the Respondent's decision to provide a replacement facility to Clero Aviation without offering a comparable building to Complainants.[29]

Based on the record herein and analysis above, Clero Aviation is an FAA - and EASA - certified repair station. Its business is limited to a certain type of repair specializing in the overhaul and repair of brakes, wheels, starters, generators, blowers and hydraulic components for corporate and military aircraft. [*See* http://www.cleroaviation.com] Complainants' business is that of aircraft demolition and proposed full-service fixed-based operator services (in support services for "all aeronautical activities" including cargo, hangers, commercial repair, instruction, GA parking, and fueling).[30] [FAA Exhibit 1, Item 6, Exhibit F.] Clero Aviation's lease for repair services is not similar to the development lease for fixed-base operator services desired by

[29] Although the Complaint asserts Complainants were denied access to a comparable building, the record suggests Complainants' desire for a building evolved over time. In particular, the need for a building is attributed to Blueside Services, Inc. and not BMI. [*See* Item 3, exhibit F; Item 11, exhibits B and C; and Item 33.]

[30] A fixed-base operator is a commercial entity providing multiple aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. [*See* FAA Order 5190.6A, Appendix 5; *see also* FAA Order 5190.6B, Airport Compliance Manual, (September 30, 2009), page 8-11, footnote #25.] Airport rules and regulations generally require entities to meet minimum service requirements to qualify as a fixed-base operator and to engage in the lucrative business of selling fuel to the public.

Complainants.[31] Accordingly, the Associate Administrator finds that the Complainants and Clero Aviation are not similarly situated tenants. Therefore, the unjust discrimination claim fails.

In addition, the Associate Administrator finds that even if the Complainants were similarly situated business entities, the Complainants were not similarly situated to Clero Aviation in regard to eviction from uninhabitable buildings, and thus Complainants were not entitled to priority access to occupy and refurbish a condemned building. Complainants never faced eviction from their leasehold because of condemnation.

Clero Aviation's eviction from an Airport-owned condemned building necessitated the relocation to another building that could be brought up to code. At that time, Complainants had a land lease only, were not occupying an Airport-owned structure, and were not evicted from such a structure. BMI's existing business was not impacted. At the time, Blueside Services, Inc. did not have an existing clientele or facility on the Airport to maintain and thus was not in the same position as Clero Aviation.

Despite the entities' different business scopes, the record also shows the lease terms for both entities are not significantly disparate. Except for the disparate termination clauses, all other terms are similar. The Associate Administrator notes that the more generous cancellation period for Complainants is supported by the nature of BMI Salvage Corporation's aircraft demolition business.

Finally, it is reasonable for the Respondent to require or request proof of financial capability when entering into a development lease. [*See* Flightline Aviation, Inc. v City of Shreveport through the Shreveport Airport Authority, FAA Docket No. 16-07-05, (March 7, 2008) (Director's Determination).] The record here does not indicate that negotiations ever progressed to a stage that the parties memorialized terms for any long-term development lease. Nor does the record reflect that the Respondent requested proof of financial capability. Even so, the record does not reflect that Complainants ever offered any proof on their own that they were financially capable of completing a long-term development lease. Respondent is entitled to seek clarity and stability in business proposals from prospective tenants and developers. [*See* Monroe at 17.] Although Respondent may have been looking for financial capability, it does not appear to be the primary reason that Complainants were not granted a long-term development lease. At any rate, the FAA has already concluded that Clero Aviation and Complainants are not similarly situated for the purpose of leasing space. Accordingly, whether or not the Respondent did or did not require such information from Clero Aviation has no bearing on this action.

Based on the analysis above, the Associate Administrator concludes that the differences in business purposes and needs between the Complainants' proposed fixed-base operator services with their current aircraft demolition business (which is nonaeronautical and not protected by the grant assurances) and Clero Aviation's aircraft repair business support the Airport sponsor's

[31] The Associate Administrator notes that Clero Aviation's repair business requires an enclosed facility with a secure roof and walls located anywhere on the Airport; while Complainants' business requires a paved area and proximity to aircraft ramps and taxi lanes. Clero Aviation's business requires less space than a full service fixed-base operator or fixed-base operator combined with a salvage component.

different treatment of the two tenants. In addition, the Associate Administrator concludes that the differences between the Complainants' proposed fixed-base operator service and Clero Aviation's aircraft repair business support the Airport sponsor's different treatment because Clero Aviation was a tenant whose premises were condemned and, as such, was entitled to a higher priority in relocation assistance than a prospective building tenant. Respondent's actions here are not unjustly discriminatory towards Complainants.

2. Miami Executive Aviation and Long-Term Development Lease

Comparison of Entities

Complainants argue that BMI/Blueside Services, Inc. and Miami Executive Aviation (MEA) are similarly situated aeronautical businesses. Complainants argue they were unjustly denied development opportunities presented to "similarly situated" MEA. [FAA Exhibit 1, Items 11, 23, and 36.] As discussed in Section VI(A) above, BMI's salvage operation is not an aeronautical activity and thus not protected by the grant assurances. Complainants argue that unlike Complainants, MEA obtained a 35-year development lease and did not have to use an "approved developer." [FAA Exhibit 1, Item 23, pages 2-3.]

Comparison of Complainants' Proposed Fixed-Base Operation

Complainants proposed to offer competing fixed-base operator services that would include the creation of an FAA-approved aircraft repair station.[32] [FAA Exhibit 1, Item 1, page 14.] Complainants also assert that Respondent has denied it a lease for failure to provide proof of financial viability without ever requesting this information, and argues Respondent did not request this information from other tenants. [FAA Exhibit 1, Item 36, pages 10-12.]

In support of their proposition:

- Complainants (whether BMI Salvage Corporation or Blueside Services, Inc.) requested a long-term development lease in May 1999, January 2000, March 2002, and April 2002[33]. [FAA Exhibit 1, Item 23, pages 3 and 6-7.]

- On October 4, 2004, Complainants, in conjunction with the Opa-Locka Community Development Corporation (CDC),[34] proposed a sublease agreement under which CDC would acquire a new lease from the Respondent on property then subject to the Stagecoach lease and sublease the new property to the Complainants. [FAA Exhibit 1, Item 33, page 26.]

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[32] The initial phase of Complainants' development proposal however, also included the construction of a new salvage facility. [FAA Exhibit 1, Item 33, exhibit 29.] Salvage and demolition is a nonaeronautical activity. [*See* Section IV(A) above.

[33] BMI's original leasehold and current premises are located on what is referred to as the Stagecoach premises. [FAA Exhibit 1, Item 36.]

[34] The Opa-Locka Community Development Corporation (CDC), a local non-profit organization, was an approved developer on the Airport. On May 6, 1997, the Respondent approved a development lease agreement with CDC for the development of approximately 121 acres at the Airport. [*See* FAA Exhibit 1, Item 33, pages 4 and 25.]

- Complainants initially proposed to develop a 32-acres site. [FAA Exhibit 1, Item 6, exhibit F.] That proposal included plans beyond fixed-base operator services. [FAA Exhibit 1, Item 6, exhibit F; FAA Exhibit 1, Item 33, exhibit 29.]

- Respondent was initially willing to consider the Blueside Services, Inc. – CDC project and approached Stagecoach to initiate the process of taking back three parcels of land, one of which was the proposed site for Blueside Services, Inc.[35] [FAA Exhibit 1, Item 11, page 122; FAA Exhibit 1, Item 6, pages 9-10; and FAA Exhibit 1, Item 33, pages 26-27.]

- In an e-mail dated June 22, 2005, Complainants proposed that Phase One of the development process would be to construct a centralized aircraft demolition/recycling facility and Phase Two would be the fixed-base operation. [FAA Exhibit 1, Item 33, exhibit 29.] On this same date, Complainants advised Respondent that the CDC was willing to fund the Blueside Services, Inc. project even though the lease applicable to the project would be an interim five-year development agreement solely between the Respondent and the Complainants.[36] [FAA Exhibit 1, Item 33, page 22.]

- In an e-mail dated June 28, 2005, Complainants stated the development would include some refurbishment of ramp areas and two small buildings with an estimated investment that "would exceed the County minimum of $10,000 per acre per annum." [FAA Exhibit 1, Item 33, exhibit 30.]

- Complainants advised the Respondent via e-mail dated July 24, 2005, that "I am funded..." [FAA Exhibit 1, Item 33, exhibit 32, page 2.] It further posits that they have consistently provided their financial plans to the County, that the County never requested more detailed financial information, and the County never indicated the development lease was being delayed pending the receipt of more detailed financial data. [FAA Exhibit 1, Item 36 at 12, and attached Affidavit of Mr. O'Neal at page 5; FAA Exhibit 1, Item 37, page 5.]

- In addition, Complainants argue they have been airport tenants at Miami International Airport (since 1988) and Opa-Locka Airport (since 1999) and have never been remiss in their rent payments. Complainants argue that fact alone "more than demonstrates [their] financial capability." [FAA Exhibit 1, Item 36, page 11.]

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[35] Included in these parcels was one designated for the MEA long-term development lease agreement executed on June 22, 2005. [FAA Exhibit 1, Item 33, pages 26 and 27.]

[36] Eventually, on April 20, 2007, Respondent terminated the CDC lease for CDC's failure to comply with its development obligation. [FAA Exhibit 1, Item 33, pages 4 and 25.] On July 17, 2008, Respondent approved a Development Lease Agreement with another non-profit organization, The Carrier Meek Foundation ("CMF") for development of essentially the same parcels contained in the CDC lease. [FAA Exhibit 1, Item 33, pages.4 and 25.]

- Complainants assert that the Affidavit of Mr. O'Neal proves Complainants' financial capability for the development in the CDC agreement. [FAA Exhibit 1, Item 36, page 11.]

- Complainants also state they have spent thousands of dollars in the preparation of construction plans and for design professionals to obtain building approvals. [FAA Exhibit 1, Item 37, page 4.] FAA interprets this statement as Complainants' suggestion that such expenditures are evidence of financial viability and the ability to proceed with their development plans.

- Complainants were also specific in their desire to extend BMI's five-year lease prior to completing and entering into a long-term development lease at the Airport. [FAA Exhibit 1, Item 33, exhibit 26.]

- Complainants state a long-term development lease that does not include a full-time salvage component is unacceptable. [FAA Exhibit 1, Item 42, pages 3 and 4; and Item 44, page 2.]

In response to Complainants allegations, Respondent states:

- MEA has been a fixed-base operator on the Airport since 1996. It initially took over the operation of a tenant that had been occupying the fixed-base operator hangar facility on a 12.29 acre site. [FAA Exhibit 1, Item 33, pages 15-16.]

- MEA's original leasehold was located on the Stagecoach premises, but MEA's lease was entered into before the Airport entered into the lease with Stagecoach. [FAA Exhibit 1, Item 33, page 15 and exhibit 22; *See also*, FAA Exhibit 1, Item 36, page 7.]

- Following a trial period to see if MEA could properly handle the fixed-base operator service out of the existing facility, the Respondent entered into a five-year agreement dated April 1, 1997, with MEA and renewed it on February 1, 2003. [FAA Exhibit 1, Item 33, page 15, # 24.]

- The new five-year lease included a 120 - day cancel/relocate clause. [FAA Exhibit 1, Item 33, exhibit 11.] The 2003 lease also recognized the disputed potential rights of Stagecoach. [FAA Exhibit 1, Item 33, exhibits 11 and 18.]

- The Respondent increased MEA's existing leasehold of approximately 12.29 acres with an additional 4.34 acres and entered into a 35-year lease agreement with Miami Executive Aviation in June 2005.[37] MEA agreed to construct a hangar facility on the 4.34 acres (representing $ 4.2 million of its total commitment and investment.) [FAA Exhibit 1, Item 33, exhibits 11 and 18.]]

[37] The Respondent also entered into a month-to-month lease with MEA with a 60-day termination provision for additional space (Building 41) with associated land and pavement. [FAA, Exhibit 1, Item 33, exhibit 18.]

- Respondent and MEA agreed that MEA would spend not less than $7,339,500 on construction while providing appropriate documents describing the proposed construction and evidencing their financial capability to complete the project by a certain date. [FAA Exhibit 1, Item 33, pages 16-17.]

- Respondent has explained it believed it had the right to lease the Stagecoach land. [*See* discussion above at Section VI(B).] However, Stagecoach threatened a lawsuit against the County.[38] Respondent continued to move forward to obtain the Stagecoach parcels. [FAA Exhibit 1, Item 33, page 27.]

- Respondent was initially willing to consider the Blueside Services, Inc. – CDC project and approached Stagecoach to initiate the process of taking back three parcels of land, one of which was the proposed site for Blueside Services, Inc.. [FAA Exhibit 1, Item 11, page 122; FAA Exhibit 1, Item 6, pages 9-10; and FAA Exhibit 1, Item 33, pages 26-27.]

- At the same time, in 2005, CDC was in default of its lease for failing to develop any portion of the property. [FAA Exhibit 1, Item 33, page 25.] On May 9, 2005, Respondent sent CDC a letter advising it of its default and proposed that the parties mutually terminate the lease. [FAA Exhibit 1, Item 33, page 25, exhibit 28.]

FAA Analysis Regarding MEA and a Long-Term Development Lease

Comparison of Entities

Complainants compare themselves to MEA. Both parties agree, MEA is a fixed-base operator. Complainants desire to establish a fixed-base operator business with an aircraft salvage and demolition component. As previously stated, Complainants are unwilling to proceed without the salvage component. [FAA Exhibit 1, Item 44.] In discussing Complainants' issue with MEA, FAA examined the entities' respective leases, their need for facilities, size and level of investment, as well as the allegations related to financial capability.

In addition, there is no indication in the record or on the company's web site that MEA conducts any type of salvage operation.[39] Moreover, the MEA leases generally prohibit non-flyable aircraft on the premises for periods in excess of 60 consecutive days without the prior written approval of the airport. [FAA Exhibit 1, Item 33, exhibits 11, 13, 18 & 22.] Any non-flyable

[38] The dispute was thought to be resolved; however, the County Commissioners refused to approve the agreement in 2006. The dispute was not resolved until 2007 when AA Acquisitions LLC took over the Stagecoach lease. [FAA Exhibit 1, Item 33, page 27.] AA Acquisitions is therefore the current developer holding the rights to develop the former Stagecoach site, including the Complainants' desired development sites. [FAA Exhibit 1, Item 33, page 5.]

[39] Complainants alleged MEA had "multiple derelict and nonoperating aircraft" on its leasehold. [FAA Exhibit 1, Item 1, page 21.] Complainants did not allege MEA operates a salvage business. Respondent states, "only BMI and one other tenant company are engaged in significant salvage and chopping work at [the Airport]." Respondent identifies the other tenant as "Airkraft Parts & Sales, Inc." [FAA Exhibit 1, Item 6, exhibit A, page 3, #15.] In addition, property manager George Lattis from Miami Executive Aviation confirmed via telephone on December 2, 2009 that MEA has no salvage operation.

aircraft on the premises for periods in excess of 60 days presumably have the approval of the airport or receive notice of violation. Those are essentially the same terms offered to other airport tenants. [FAA Exhibit 1, Item 33, exhibits 9, 12, 14, 15, 16 and 17.]

The salvage and demolition component of Complainants makes the entities dissimilar. Regardless, and in the alternative, FAA has also analyzed the other allegations raised by Complainants.

Long-Term Leases and Terms of Agreements

In analyzing the other allegations presented by Complainants, it is clear Respondent has granted MEA a 35-year lease that is a long-term development lease. [FAA Exhibit 1, Item 33.] Respondent apparently was able to take control of the land MEA desired. Moreover, MEA was able to come to an agreement with Respondent for an additional 4+ acres of that leasehold to expand its existing fixed-base operator business by building a hangar, entering into a long-term development agreement. [FAA Exhibit 1, Item 33.]

The record reflects that Respondent attempted to recover land from the Stagecoach leasehold as early as 2005 in order to facilitate a new agreement with both Complainants and MEA. [FAA Exhibit 1, Item 33.] Respondent appears to remain open to facilitating discussion for Complainants' long-term development with the other leaseholds. [FAA Exhibit 1, Item 43.] Like it did with MEA, Respondent also appears willing to lease its available land directly to Complainants.[40] [FAA Exhibit 1, Item 43] However, the record indicates that Complainants do not want this land. [FAA Exhibit 1, Item 44, page 4.]

Complainants are seeking a development agreement to expand a nonaeronautical business and add a whole new aeronautical fixed-base operator business. Complainants have a land lease only; they have not leased any building on the Airport; neither did they take over an existing fixed-base operator leasehold. [*See* FAA Exhibit 1, Item 6, page 8; and exhibit D.] Complainants' BMI Salvage Corporation neither had, nor required an enclosed building facility for its BMI business. The proposed Blueside Services, Inc. has never occupied an existing building facility at the Airport. Nor, has it operated as a business. Blueside Services, Inc.'s fixed-base operator business proposal suggests it will develop and occupy newly constructed facilities. [FAA Exhibit 1, Item 6, exhibit F; and Item 33, exhibit 6.] The record also suggests Complainants want to develop a large parcel of land with specific scope. That fact has some bearing on the analysis of "proof" of financial viability.

MEA had and required building facilities for its active business. MEA entered into the fixed-base operator business by taking over an existing facility and business that is wholly aeronautical. It entered into a development agreement to expand a wholly aeronautical business after demonstrating its competence to operate that business through short-term five-year leases. The expansion consisted of a hangar. As to expansion and investment, MEA was able to come to an agreement with Respondent for an additional 4+ acres of that leasehold. [FAA Exhibit 1,

[40] Complainants assert that Respondent had a 34-acre piece of land south of the airport that Respondent was able to lease for development. [FAA Exhibit 1, Item 36, page 14.] This is the same parcel Complainants later deemed unsuitable. [FAA Exhibit 1, Item 44, page 4.]

Item 44, page 4.] Although investment was required of MEA, FAA notes that MEA did not face infrastructure challenges. MEA's expansion was limited to constructing an additional hangar and associated pavement. [FAA Exhibit 1, Item 44, page 4.] Regardless, MEA's expansion required a minimum capital investment. There is a significant difference in the amount of space required for the different leaseholds. Complainants' seek close to twice the amount of space compared to that occupied by MEA.

Despite the entities' different business scopes, the record also shows the initial lease terms for both entities were not significantly disparate. The initial lease terms for both MEA and Complainants were standard five-year leases with 30-day relocate or vacate clauses. MEA's lease provided it with a 120-day cancellation clause; Complainants' lease, on the other hand, allows a 365-day cancellation clause *because* their business is aircraft demolition. The difference in cancellation clauses is supported because of the differences in the two businesses. All other lease terms are similar.

Tenant's Financial Investment and Viability

In this case, the Respondent requires its tenants to invest at least $10,000 per acre per annum. [FAA Exhibit 1, Item 33, page 8; and Item 36, page 10.] Complainants allege that no other tenant with a development lease was required to furnish evidence of financial capability greater than that furnished by Complainants. [FAA Exhibit 1, Item 36, page 11.]

MEA agreed to spend not less than $7,339,500 on construction. Respondent alleges MEA provided appropriate documents describing the proposed construction and evidencing their financial capability to complete the project by a certain date. [FAA Exhibit 1, Item 33, pages 16-17.]

Complainants confirm that in regard to the general concept of a long-term development lease, they are willing to provide sufficient sums as have been required of other tenants. [FAA Exhibit 1, Item 42, page 4.] With regard to any specific level of investment, Complainants claim they cannot be held to a precise response to any "required minimum investment." [FAA Exhibit 1, Item 42, page 3 and 4.] Complainants claim a willingness to invest "sufficient sums" ..." at such time as [the] County provides a sufficiently detailed identification of premises... [and] ...would be pleased to respond with sufficient detail concerning [their] plans..." [FAA Exhibit 1, Item 42, page 4.] This set of circumstances is wholly different from MEA where the leasehold was fixed and definite.

The FAA can only recognize Complainants' intent to invest an amount that would "exceed the County minimum of $10,000 per acre per annum...." Complainants do not specify a minimum total amount or how their development would be capitalized. [FAA Exhibit 1, Item 33, exhibit 30.] Presumably, with 32 acres, Complainants would invest at least $320,000 for each lease year. On a five-year development lease, that would amount to $1,600,000. On a 35-year lease, that would be $11,200,000.[41] [*See* Table 1 on the page 39: *Comparison of Clero Aviation's Investment to Complainants' Investment.*]

[41] A PowerPoint presentation on Blueside Services, Inc. development dated October 28, 2008, shows a projected development investment between 2005 and 2009 of $9,025,000. [*See* FAA Exhibit 1, Item 33, exhibit 6, page 8.]

Complainants' allegation that no other tenant with a development lease was required to furnish evidence of financial capability greater than that furnished by Complainants is not supported in the record.[42] The record does not provide any documentation relating to other new fixed-base operators seeking entrance to the Airport. There is nothing to suggest that the Respondent would not seek financial information from other new entrants. It is prudent business judgment and in the airport sponsor's best interest to require evidence of financial capability from a prospective tenant proposing a substantial investment in airport construction.

Complainants claim that the Affidavit of Mr. O'Neal proves Complainants' financial capability for the development in the CDC agreement. [FAA Exhibit 1, Item 36, page 11.] It does not. Development of a new fixed-base operator business requires a substantial investment of money. Complainants' business is not an existing fixed-base operator business, but a new business with an existing salvage component. It is natural and reasonable for the Airport to ask the source of the funding. Reliance on a tenant's word alone would be ill advised.

Respondent states, "Although the Complainants provided the Respondent with some information as to the nature of the construction proposed for the 32-acre site and the dollar amount involved, the Complainants did not file sufficient documents showing their financial capability to complete their proposed project." [FAA Exhibit 1, Item 33, page 17.] Respondent points out Complainants never identified exactly how the funding for their construction project would occur and whether it would be sufficient to allow Complainants to complete the project. [FAA Exhibit 1, Item 33, pages 22-23.]

Complainants argue that the County was aware Complainants were prepared to make the minimum investment required for development on the Airport. Complainants state, "Had the County ever confirmed to me that it intended to provide BMI [Salvage Corporation] and/or Blueside [Services, Inc.] with a proposed development lease or development rights, with that confirmation, I would have been able to provide the County with as much specific additional financial details as they might reasonably require." Complainants state "The County and CDC never asked me for more detailed financial information than I had already provided, and never suggested that any development lease or the award of development rights was being held up pending the provision of more detailed financial information." [FAA Exhibit 1, Item 37, page 5.]

Financial viability is a legitimate business concern and arose at two key points in time in regard to Complainants. In 2005, CDC, Complainants' proposed developer and financer, was in breach

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Although the presentation estimates the cost of investment, this PowerPoint presentation does not describe how the investment would be made (details as to allocations to specific facilities or components of the leasehold) and the specific source of funding or financing. [FAA Exhibit 1, Item 33, exhibit 6, page 8.] FAA notes that in 2005, CDC was allegedly the source of investment and notably in breach of its development contract. [FAA Exhibit 1, Item 6, pages 9-10; and Item 11, pages 120-123.]

[42] Complainants offer only the affidavit from Clero Aviation, not all development tenants. [FAA Exhibit 1, Item 38.]

of its leasehold for failing to invest any money in airport development.[43] Arguably, it is possible that Complainants were not aware that CDC had not, at that time initiated any development of its leasehold at the Airport. However, Respondent conveyed its concerns to Complainants. [FAA Exhibit 1, Item 11, page 122; and Item 33, page 4.] It would be reasonable for the Respondent to question CDC's ability to finance Complainants' development in 2005.

Respondent could potentially suffer a financial loss if it assumes an entity is financially capable and then proved wrong. Respondent here has a lot of experience with developers who have breached their contracts. The FAA notes that Respondent agreed to pay more than $20 million dollars to buy back its interest in the Stagecoach leasehold. Ultimately, AA Acquisitions LLC acquired the leasehold. [FAA Exhibit 1, Item 33, Exhibit 33, page 5, footnote #13.]

The FAA notes that Respondent fails to include evidence of MEA's demonstration of financial capability, and that capability is not in question here. MEA is an ongoing business with an established fixed-base operator clientele and neither party has suggested that MEA is not a viable business. Even without physical documentation for this record, the Respondent is likely capable of concluding whether or not the addition of one new hangar and associated pavement is overly ambitious and unsupported by MEA's existing business.

Finally, in The Aviation Center, Inc. v. City of Ann Arbor, Michigan, FAA Docket No. 16-05-01, (December 16, 2005) (Director's Determination) (hereinafter "Michigan"), the FAA found aeronautical tenants were not similarly situated when one held a long-term lease (20 years) with a minimum capital investment while the second was operating under a short-term lease (five years) with no minimum capital investment even when both were providing the same or similar services. [*See* Michigan at 25.] Even when aeronautical tenants propose the same or similar use of the airport, if the level of investment and the business aspects are dissimilar, the FAA may appropriately find the aeronautical users are not similarly situated. [*See* Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona, FAA Docket No. 16-02-02, (March 7, 2003) (Director's Determination) pages 27-28.]

Here, the tenants are not similarly situated by virtue of the services provided, terms of the leases, and level of financial investment. Although desirous of a longer lease, Complainants have not been able to come to an agreement with the Respondent. In terms of Complainants' financial ability, it is reasonable to assume that the Airport would want finalized development plans and some sort of assurance that Complainants could complete the projects they start. In Monroe, the Director found airport operators can demand clarity and stability in proposals and are not obligated to provide application assistance or business incubation to allow a business to grow at the airport. [*See* Monroe at 37.] The size or level of that investment is relevant. Here, the level of investment required by Complainants is significantly larger than for MEA and is based on the Complainants' desire to expand their salvage component and add new fixed-base operator services. Thus, while the fixed-base operator service component could be similar, the Complainants and MEA are not similarly situated.

[43] In fact, Respondent ultimately terminated its agreement with CDC. [FAA Exhibit 1, Item 11, page 122; and Item 33, pages 4 and 25.]

Associate Administrator's Conclusion Regarding Miami Executive Aviation

The Associate Administrator finds that MEA, an established fixed-base operator is not similarly situated with the Complainants.[44]

Despite the entities' different business scopes, the record also shows the initial lease terms for both entities are not significantly disparate. Both entities started with a five-year lease. Except for the disparate termination clauses, all other terms are similar. The Associate Administrator notes that the more generous cancellation period for Complainants is supported by the nature of BMI Salvage Corporation's aircraft demolition business.

Respondent and MEA were able to reach an agreement. In contrast, Respondent and Complainants have been unable to come to terms. Complainants desire to expand their existing leasehold or develop a suitable parcel of land. The parties have tried to reach such an agreement. The administrative record is full of representations that both parties engaged in meetings and discussions in efforts to forge an acceptable agreement. [*See* FAA Exhibit 1, Item 1, exhibit D, pages 33-34; Item 6, exhibit B, page 5; Item 11, page 8; Item 15, page 6, Item 23, pages 8-9.]

A key difference between the entities is that MEA did not condition its presence at the Airport by requiring that a salvage operation be accommodated. Complainants profess to remain interested in fixed-base operator opportunities at the Airport with the caveat that Respondent accommodate their salvage operation. [FAA Exhibit 1, Item 44, page 5.] "Complainants have, on repeated occasions, communicated with Miami-Dade County, regarding possible proposals for a development lease at the Airport. Said communications have not been met with much approval or meaningful responses..." [FAA Exhibit 1, Item 42, pages 3 and 4.] It seems very likely that if Complainants will not consider developing a fixed-base operation without the salvage component, it will not be able to come to a successful resolution with the Respondent.

In response to FAA's inquiry as to whether it would accept a long-term development lease for a stand-alone fixed-base operation (that is, apart from Complainants' salvage operation), Complainants state "Complainants' salvage operations have always been an integral part of [their] activities at Opa Locka Airport and Miami International and it is presumed that such operations would be a part of any [fixed-base operation]..." [FAA Exhibit 1, Item 42, page 3.] The FAA concludes that Complainants appear to refuse to consider a fixed-base operation without a salvage operation. [FAA Exhibit 1, Item 42, pages 3 and 4.] Although the salvage operation is not a protected aeronautical activity, we will examine whether Complainants' fixed-base operator service would be offered space on the Airport.

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[44] Complainants, themselves, acknowledge that fixed-base operator services, including an FAA-approved repair station, are "totally different services" from Complainants' salvage operation. [*See* FAA Exhibit 1, Item 1, page 14.] A fixed-base operator is a commercial entity providing multiple aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. [*See* FAA Order 5190.6A, Appendix 5; *see also* FAA Order 5190.6B, Airport Compliance Manual, (September 30, 2009), page 8-11, footnote #25.] Airport rules and regulations generally require entities to meet minimum service requirements to qualify as a fixed-base operator and to engage in the lucrative business of selling fuel to the public.

Respondent appears to be willing to enter into agreements for five-year leases with Complainants. [FAA Exhibit 1, Item 15, page 6; and Item 33, page 22.] Respondent also seems to be willing to enter into long-term agreements with Complainants for land it controls. [FAA Exhibit 1, Item 43, page 5.] Land within the control of Respondent is available and was offered to Complainants. Complainants rejected that land.[45] Other land is available through sub-leases, and Respondent is willing to facilitate – but cannot necessarily control – whether parties can reasonably agree to terms. The salvage component of the Complainants' business may be a deal breaker for expanding their leasehold and adding fixed-base operator services. As discussed, the salvage component is not protected by the grant assurances since it is not an aeronautical activity.[46] [*See* discussion at Section VI(A) above.]

As discussed above, the grant assurances require the airport to provide access without unjust discrimination for aeronautical activities. The grant assurances do not dictate the terms of that access. In describing the two entities for comparison, it is clear MEA and Complainants' proposed businesses differ in that Complainants insist upon a salvage component, which is nonaeronautical and not a protected activity. Thus, MEA and Complainants are not similar fixed-base operators.

As to the long-term development agreement, it is significant that MEA demonstrated its ability to manage a fixed-base operation on an existing and relatively fully developed leasehold before receiving a longer development agreement to expand that business. Complainants, on the other hand, are seeking a development agreement on nonspecific plans for a fixed-based operation that will follow only after the expansion of the nonaeronautical salvage operation. MEA was required to invest in its leasehold; Complainants can also reasonably expect to invest at least the minimum requirement in any new leasehold. Given that it is possible the leasehold would be developed from scratch, it is possible that the required investment would exceed the minimum for a new fixed-base operator facility. Assuming the parties could reach agreement, nothing in the record demonstrates Complainants' financial capability or that Respondent treated it disparately.

In a formal Part 16 complaint, the complainant has the burden of proof to establish the complainant's allegations by a preponderance of substantial and reliable evidence.

Complainants have not demonstrated with sufficient factual evidence that Respondent unreasonably requested proof of financial capability from it, MEA or any other similarly situated tenant. Complainants have not provided the FAA with any documents or information from a similarly situated tenant or proposed tenant to demonstrate that the Respondent expected a higher level of proof regarding Complainants' financial commitment and capability than that expected from other tenants requesting or obtaining long-term development leases.

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[45] *See* discussions in Section VI(B).

[46] In 2005, Complainants stated they would be willing to discontinue their salvage operation in exchange for various leasing opportunities. [*See* FAA Exhibit 1, Item 43, page 3; and Item 44, page 4.] However, in their October 2009 supplemental response to FAA, they stated it is "unacceptable" to have a lease that excludes the full time salvage operation. [FAA Exhibit 1, Item 44, page 2.] Complainants state they will not accept a long-term development lease to develop and operate a stand alone fixed-base operation, to include aircraft repair service, separate and apart from Complainants' salvage operation. [FAA Exhibit 1, Item 44, page 7.]

Finally, it is reasonable for Respondent to require or request proof of financial capability when entering into a development lease. [*See* Monroe at 35.] We note Respondent has not identified any threshold or factors in their pleadings as to what is specifically sufficient. However, Respondent appears to require a performance bond for construction projects in excess of $200,000. [FAA Exhibit 1, Item 15, exhibit D-1/d.] Complainants allege they are financially capable of completing a long-term development plan. Based on the record herein, the Complainants have not provided any evidence or documentation of that financial capability to proceed with their proposed project estimated to require an investment between $1.6 million and $11.2 million.[47]

Although Complainants have been good tenants for a long time, the Associate Administrator cannot conclude this means the Complainants are also financially capable to complete the proposed development project. Complainants rely on their past history of paying rent on a timely basis as evidence of their financial capability to undertake a long-term development project. It is reasonable for Respondent not to accept this payment history as sufficient evidence of financial capability. Complainants' existing business is one of salvage, and they propose to add a full service fixed-base operation. Complainants have not offered any evidence as to ability to support such a business or increase their commitments at the Airport. While tenancy is a valid point to consider, rent history alone is not sufficient – nor even reasonable – proof regarding financial capability to complete a development project possibly reaching up to $11 million. The administrative record contains a PowerPoint presentation of the Complainants' development proposal,[48] as well as e-mails referencing the proposed development.[49] Once the CDC development deal was deemed rejected, personal assurances and past history of paying rents on time are not enough to support a claim of financial capability.[50]

Complainants have not met their burden because they did not provide any evidence and thus could not demonstrate with sufficient factual evidence that another similarly situated tenant

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[47] It is reasonable for an airport sponsor to require entities proposing to provide new aeronautical services on the Airport to take sufficient steps to demonstrate substantial or realistic intent in support of their proposed endeavors. [*See* Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority, FAA Docket No. 16-07-16, (February 27, 2009) (Director's Determination), page 38.] In this case, the Airport General Aviation Property Manager also noted in June 2005 that Complainants' proposal for its new fixed-base operation facility would not meet the Airport's minimum standards. [FAA Exhibit 1, Item 36, exhibit B, #3.] Where current or prospective aeronautical tenants have failed to submit a cohesive proposal consistent with the airport minimum standards for their desired business enterprise, the airport sponsor is not obligated by the grant assurances to permit the aeronautical enterprise to operate on the airport. [*See* M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination).]

[48] *See* FAA Exhibit 1, Item 33, exhibit 6.

[49] *See* FAA Exhibit 1, Item 33, exhibit 30.

[50] It is reasonable for an airport sponsor to require entities proposing to provide new aeronautical services on the Airport to demonstrate substantial or realistic financial intent in support of their proposed endeavors. This demonstration must go beyond the Complainants' proffer to make the minimum investment or personal assurance that it will succeed. [*See* Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority, FAA Docket No. 16-07-16, (February 27, 2009) (Director's Determination), page 38.]

received a development lease without providing the level of financial detail required of Complainants. While Complainants allege Respondent required proof of financial capability, the record does not reflect such a requirement or request from Respondent, nor that Complainants ever offered any specific proof on their own that they were financially capable of completing a long-term development lease. Although Respondent may have been looking for financial capability, it does not appear to be the reason Complainants were not granted a long-term development lease. Regardless, it is reasonable for an airport sponsor to require a prospective tenant or developer to provide evidence of financial capability commensurate with the scope of any proposed development.

The Associate Administrator has already concluded that MEA and Complainants are not similarly situated for the purpose of leasing space. Accordingly, the fact that Respondent did not provide evidence of MEA's financial capability has no bearing on this action.

Based on the analysis and record herein, the Associate Administrator concludes that the differences in scope of leasehold and needs between the Complainants' proposed fixed-base operator services and aircraft demolition business, which is nonaeronautical and not protected by the grant assurances, and MEA's fixed-base operator business justify the Respondent's disparate treatment of the two tenants.

In addition, the Associate Administrator concludes that should the Complainants be willing to engage in a pure fixed-base operator service business without the aircraft demolition component, it would be more akin to MEA's fixed-base operator business. As such, Respondent should encourage its developers to enter into a long-term development leasehold with Complainants for such a fixed-base operation if Complainants so desire. Despite the fact that potential land for a fixed-base operator is controlled by developers, the Respondent is obligated under the grant assurances to provide reasonable and not unjustly discriminatory access for this aeronautical purpose if land is available and the prospective tenant can meet the Airport's minimum standards and rules and regulations. The FAA will look to Respondent to make certain that such access is provided to Blueside Services, Inc. or any other potential fixed-base operator that can meet these requirements. That encouragement does not waive the prudence of proof of financial capability and any other minimum requirements. It is not unreasonable for the Respondent to require Complainants (or any prospective tenant proposing a similar level of investment) to provide evidence of financial capability greater than just showing a history of timely rent payments. Finally, Complainants are also free to develop the acreage directly available from the airport.

Like the findings in The Aviation Center, Inc. v. City of Ann Arbor, Michigan, FAA Docket No. 16-05-01, (December 16, 2005) (Director's Determination), Complainants are not similarly situated because MEA has a long-term lease (35 years) with an express capital investment (which meets or exceeds the airport's minimum) while Complainants were operating under a short-term lease (five years) with no minimum capital investment, and even if they had a long-term lease, they are not providing the same or similar services. At this point, even if MEA and Complainants were proposing the same or similar use of the Airport, the level of investment (Complainants' commitment) and the business aspects are dissimilar, and thus the aeronautical users are not similarly situated. [*See also* Skydance Helicopters, Inc. d/b/a Skydance Operations,

Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona, FAA Docket No. 16-02-02, (March 7, 2003) (Director's Determination) pages 27-28.]

Finally, Thermco held that the federal obligations do not require sponsors to adhere to the location preferences of current tenants. [*See* Thermco FAD at 18.] Grant Assurance 22, *Economic Nondiscrimination*, addresses the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. "Aeronautical access is a privilege to use the public areas of the airport; it is not a legal right to conduct an airport business." [*See* Goodrich Pilot Training Center, LLC and Aviation Management Group, LLC v Village of Endicott, New York, FAA Docket No. 16-08-03, (April 3, 2009) (Director's Determination), page 20.] A complainant is not entitled to a lease, long-term or otherwise, at the place of its choosing on preferred terms and conditions. [*See* Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica Air Center v. City of Santa Monica, California, FAA Docket No. 16-99-21, (February 4, 2003) (Final Decision and Order) (hereinafter "Santa Monica"), page 19. *See also* ALCA, The Cylinder Shop/Wayman Aviation, Suncoast Aviation, and National Aviation v. Miami-Dade County, FL, FAA Docket No 16-08-05 (August 31, 2010) (Director's Determination) (hereinafter "Miami-Dade"), pages 22 and 25.] The same is true here.

D. Other Airport Tenants with Development Leases

Complainants argue on remand that Respondent granted development leases and/or development rights to *four* Airport tenants, including Miami Executive Aviation, Clero Aviation, Opa-Locka Flightline, and Natoli/Biscayne Capitol, LLC.[51] Complainants name three other tenants that requested development leases and/or development rights but were denied such leases. [*See* FAA Exhibit 1, Item 37, page 6.]

Issues involving Miami Executive Aviation and Clero Aviation have been addressed fully above and will not be addressed again here. Issues involving Opa-Locka Flightline and Natoli/Biscayne Capitol, LLC are addressed briefly. In a Part 16 formal complaint, a party may not bring up new issues on appeal that were not alleged in the initial complaint and where that information was available during the initial complaint process. That information was not before the FAA and those allegations were not examined by the Director prior to issuance of the Director's Determination. Given the ongoing process for this case, the FAA has examined the new allegations briefly as support for the complainants' original allegations.

1. Opa-Locka Flightline

Complainants state the County took the acreage for the Opa-Locka Flightline lease from the Stagecoach lease, but argue the County claimed it was prevented from doing the same for the Complainants. [FAA Exhibit 1, Item 36, page 7.] Respondent stated that it advised Stagecoach in November 2004 of its intent to take back three separate parcels, including the Miami Executive Aviation site and the Complainants' 32-acre site that was to be developed in

[51] As noted previously, these leases all fall within the leasehold boundaries of the Stagecoach/AA Acquisitions, LLC.

conjunction with CDC. [FAA Exhibit 1, Item 33, page 16.] Both the Complainants and Respondent seem to suggest that a portion of the remaining parcel was for Opa-Locka Flightline.

In their more recent pleadings, Complainants point to a May 2008 letter from the Miami-Dade Aviation Department to Airport tenant Opa-Locka Flightline which suggests that negotiations were completed with Respondent for a long-term agreement for the development of a fixed-base operator facility on a 15-acre site for a fixed term of 30 years. [*See* FAA Exhibit 1, Item 36, page 7.] The letter also states that this lease is subject to the approval of the Miami-Dade County Board of County Commissioners and first by the Aviation and Tourism Committee. [FAA Exhibit 1, item 36, page 7.]

The Respondent's Supplemental Pleading filed in October 2008 contradicts the Complainants' assertion and maintains that it entered into a five-year lease (initial term of three years with two one-year extensions) on April 14, 2005. [FAA Exhibit 1, Item 33, page 8 and exhibit 17.] The record is devoid of any long-term agreement between Respondent and Opa-Locka Flightline.

The Opa-Locka Flightline lease was entered into on April 14, 2005. [FAA Exhibit 1, Item 37, exhibit 1-B.] Complainants also note a March 23, 2005, County Aviation Map entitled, "Opa-Locka Airport Leasehold Plan." [FAA Exhibit 1, Item 37, page 7.] The initial Complaint in this matter was filed with the FAA on August 12, 2005. Both of these items were in place prior to the date the Complaint was filed. This information was available at the time of the initial Complaint. As such, the comparison should not be brought up for the first time on appeal. The May 2008 letter is not proof that the Respondent entered into a long-term development lease. The letter itself states it is contingent on other factors. The record does not contain documents to support that these events came to pass.[52] Unlike the other fixed-base operators cited by Complainants, Complainants do not describe or provide any information on Opa-Locka Flightline's business and thus FAA cannot compare it. That said, if Opa-Locka Flightline does not have a salvage component, it is not a similarly situated entity to the Complainants. Otherwise, it appears that Opa-Locka Flightline's five-year lease is similar to Complainants' lease except for Complainants' more favorable termination clause.

2. Natoli/Biscayne Capitol, LLC

Complainants also point to a 25-year development lease for one-acre to Natoli/Biscayne Capitol LLC. [FAA Exhibit 1, Item 37, page 6.] This agreement appears to be for construction of a private hangar. This lease was entered into on August 14, 2007, long *after* the Part 16 Complaint was filed with FAA. [FAA Exhibit 1, Item 37, exhibit 2.] In addition, this lease was also subject to the concurrence of Opa-locka Aviation Group (OAG) under its development lease. [FAA Exhibit 1, Item 37, exhibit 2.] Unlike the parcels from the Stagecoach leasehold, OAG apparently concurred with the Respondent and agreed to the terms. While this is new

[52] The FAA is also aware through other sources including *Aviation News* that Opa Locka Flightline was at one time, and may still be, in litigation with Miami-Dade County and AA Acquisitions over its leasehold. Although Opa Locka Flightline may have reached an agreement for a long-term development lease with the Miami Aviation Department, AA Acquisitions appears to have objected, as the 15 acres of land is part of its leasehold and apparently not recovered by the airport. As of July 2009, eight months after Complainants filed their Response to Respondent's Supplemental Pleading, Opa Locka Flightline's leasehold consisted of approximately 2.5 acres pursuant to its 2005 lease.

information that was not available at the time the initial Complaint was filed, it is unclear beyond the term of the lease how it relates to Complainants' alleged discrimination.

The allegations suggest that certain factors would appear very different from Complainants' circumstance. First, private hangars are not akin to fixed-base operators. If Natoli/Biscayne Capital cannot be compared as a fixed-base operator, it is not similarly situated to the Complainants. Second, for sake of argument, if Natoli/Biscayne Capitol is a fixed-base operator and does not have a salvage component, it is not a similarly situated entity to Complainants. Third, Natoli's one acre of land is not comparable to the 30+ acres desired by Complainants. Here, Complainants do not provide any other information or documentation for the record and thus the FAA cannot provide a complete analysis and comparison of the entities.

Associate Administrator's Conclusion Regarding Other Airport Tenants with Development Leases

In short, Complainants mention these two development leases, as well as Miami Executive Aviation and Clero Aviation, to show "...the County has failed to offer any credible or substantial reasons why it refuses to provide BMI [Salvage Corporation] and Blueside [Services, Inc.] with a development lease, while it readily did so for others..." [FAA Exhibit 1, Item 36, page 19.]

The administrative record demonstrates the Respondent *is* willing to facilitate and negotiate development leases at the Airport for its property. Complainants recognize and pointed out that Respondent has not entered into development leases with all interested current or prospective tenants. [FAA Exhibit 1, Item 37, page 8.] As stated above, Complainants' insistence on including a salvage element to any new development leasehold appears to be a significant contributing factor. Complainants' insistence on particular parcels of land may also be an impediment. Failure to reach agreement, however, is not, in and of itself, a violation of the sponsor's federal obligations. [*See also* conclusions in Section VI(B), and VI(C)(1) and (2).]

E. Past Notices of Violation and Continuing Negotiations

1. Past Notices of Violation

Both parties acknowledge that certain activities of the Complainants on the BMI Salvage Corporation leasehold resulted in notices of violation being issued to the Respondent's Building Department. Respondent admits, "...Blueside [Services, Inc.'s] plans were sometimes placed on hold while specific activities of BMI [Salvage Corporation] needed attention, such as the time BMI [Salvage Corporation] was issued a Notice of Violation (NOV) for a County Code violation..." [FAA Exhibit 1, Item 29, *Director's Determination*, page 21.] These notices represent a violation of County law and are issued against the Respondent.

Respondent acknowledges that the presence of the notices of violation interfered with the negotiations with Complainants for a development lease on the Airport. Respondent states, "The Aviation Department is not inclined to do business with a tenant who has violated County law

and has outstanding [notices of violation] issued against the Aviation Department because of those violations." [FAA Exhibit 1, Item 33, page 19.]

Associate Administrator's Conclusion Regarding Past Notices of Violation

The Associate Administrator does not find the past notices of violation compelling or significant in the decision to delay or deny Complainants an opportunity to negotiate for a development lease on the Airport.

While Respondent may have been influenced by Complainants' notices of violation in the past, those violations have been cured and pose no impediment to further negotiations.

2. Continuing Negotiations

Respondent has indicated a willingness to negotiate with the Complainants. Respondent further states it has contacted the major developers at the Airport who indicated their willingness to engage in discussions with the Complainants for the development of a fixed-base operation with an aircraft repair service. [FAA Exhibit 1, Item 43, pages 1-2.]

Complainants prefer to enter into an agreement directly with the Respondent rather than with the developers, and Respondent has agreed that acreage identified by the Complainants in the southern area is available for development. Respondent has agreed to work directly with Complainants on access for land the Respondent controls. [FAA Exhibit 1, Item 43, page 4.]

Complainants identified development land in the southern portion of the Airport that is not currently leased to any developer. That land, which lacks total infrastructure development, is available for development purposes. Respondent has stated a willingness to enter into an agreement directly with Complainants, if they so desire, for this property at rates that would reflect the complete lack of infrastructure. Complainants now admit this land is unacceptable for lease as it is not feasible for Complainants' development. [*See* FAA Exhibit 1, Item 44, page 7.]

The Associate Administrator's Conclusions Regarding Continuing Negotiations

The Associate Administrator finds no clear, compelling evidence that the Respondent improperly denied or delayed successful negotiations with Complainants for a development lease. In fact, Respondent indicates a willingness to continue the process of negotiations directly with the Complainants. The challenge in reaching a successful negotiation is not wholly the responsibility of the Respondent. Complainants are equal partners.

In this case, we find the Complainants may be hampering their own efforts to reach a satisfactory negotiation. For example, Respondent is willing to negotiate for a development lease for a fixed-base operator business to include aircraft repair service, but not for the development of a new salvage operation combined with the fixed-base operator business.[53] Complainants insist,

[53] Complainants currently operate a separate salvage business on the Airport under BMI Salvage Corporation.

however, on combining their salvage operation with the proposed fixed-base operator business and have stated they will not consider any other option.[54] [*See* FAA Exhibit 1, Item 44, page 7.]

In addition, Complainants charged that the Airport has hidden development land that was not made available to the Complainants. [*See* FAA Exhibit 1, Items 37, pages 13-14, and Item 37, pages 6-7.] Yet when Respondent states it is willing to enter into an agreement with Complainants for development property in this very area, Complainants reject this very same parcel as not economically feasible. [FAA Exhibit 1, Item 44, pages 4-5.] This may well be true, and Complainants are not limited to negotiating only for this area, but Complainants should also participate in a good faith negotiation. Negotiations are generally communications between parties for the purpose of reaching an understanding. They should be straightforward and forthright. In their last filing, Complainants proposed a different parcel altogether, and demanded specific conditions and stipulations. [FAA Exhibit 1, Item 44, pages 4-5.] Again, Complainants are certainly permitted to suggest alternate locations and to negotiate conditions. At the same time, the Airport Sponsor is under no obligation to provide a specific tract of land or to provide specific facilities or infrastructure.[55] [*See* Santa Monica FAD at 19; and Miami-Dade DD at 22 and 25.] While Complainants do not currently have a long-term lease to develop a fixed-base operation with an approved aircraft repair business, we found no clear evidence that the Respondent improperly or unreasonably denied or delayed or deliberately hindered successful negotiations with the Complainants.

If the Complainants are willing to forego the salvage component, the FAA strongly encourages the Respondent to resume negotiations with Complainants for a reasonable development agreement for Complainants' proposed fixed-base operator services, including the creation of an FAA-approved repair station (if desired) on land under Respondent's control. Respondent has already stated a willingness to continue negotiations with the Complainants and has taken steps to contact developers on the Airport who are also willing to negotiate an agreement with the Complainants.

Failing to conclude successful negotiations is not, in and of itself, a violation of Grant Assurance 22, *Economic Nondiscrimination.* There may be many reasons unrelated to the sponsor's obligations for why a negotiation may fail. For example, any of the following would be a mitigating factor to justify failure to reach an agreement:

- Evidence the Complainants' financial capability is deficient to develop and operate the facilities contemplated by the agreement; or evidence that Complainants are not responsive in providing proof of financial capability;

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[54] In fact, the salvage operation is "phase one" of Complainants' development plan. [FAA Exhibit 1, Item 33, exhibit 29.]

[55] Complainants already have Airport access for the salvage business operated by BMI Salvage Corporation. The Part 16 process is not a negotiation forum for FAA to mediate between complainants and respondents exploring offers and counteroffers. Rather, it is a process to determine – based on record evidence – whether the Airport Sponsor is in compliance with its federal obligations, including the grant assurances. In this case, the Complainants alleged the Respondent is in violation of Grant Assurance 22, *Economic Nondiscrimination*, by failing to provide access for the Complainants to develop a fixed-base operation with an aircraft repair facility on the Airport.

- Evidence Complainants' proposed development plan is impractical or is inconsistent with the Airport's overall development plan;

- Evidence the Complainants' proposed service does not, or will not, meet the Airport's minimum standards or rules and regulations for the type of service contemplated;

- Evidence Complainants' proposed development could diminish the safety of the Airport or impede its efficiency; or,

- Evidence demonstrating Complainants are not responsive or are otherwise not eligible for the contemplated activity.

As noted, the grant assurances do not require the Respondent to provide access to a particular parcel or to meet conditions and stipulations desired by the Complainants.[56] These are issues to be negotiated between the airport sponsor and the prospective (or current) airport tenant. An airport sponsor is not obligated to enter into a lease agreement with every prospective tenant when the prospective tenant is not responsive to the requirements of the Airport or where the proposed development is not consistent with the Airport's development plan.[57] Finally, as discussed in Section VI(A) above, the Respondent is not required to provide access for nonaeronautical activities.

F. FAA's Direct Responses to the Court's Concerns in its April 8, 2008 Decision

Because the Court found that the FAA's final decision and order "lack[ed] sufficient evidence for meaningful review" [FAA Exhibit 1, Item 30A, page 2] and "explanation for the apparently disparate treatment in this case [was] deficient" [FAA Exhibit 1, Item 30A], the Court remanded the case in order to provide the Respondent with the opportunity to present additional evidence.[58] The Court noted that the "County has not proffered valid, particularized reasons for denying BMI and Blueside Services, Inc. the right to occupy or develop constructed facilities at the Airport," and that it would expect the County to support its actions with "nondiscriminatory justifications" in its treatment of BMI and Blueside Services, Inc. [FAA Exhibit 1, Item 30A.] The Court described the record evidence as "paint[ing] a picture that over numerous years BMI and Blueside Services, Inc. have been continuously denied without legitimate justification the right to occupy or develop constructed facilities at the Airport." [FAA Exhibit 1, Item 30A.]

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[56] As stated earlier in this document, a sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the Airport's land in a manner consistent with the public's interest. [*See* Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica Air Center v. City of Santa Monica, FAA Docket No. 16-99-21 (February 4, 2003) (Final Decision and Order).]

[57] Where current or prospective aeronautical tenants have failed to submit a cohesive proposal consistent with the airport minimum standards for their desired business enterprise, the airport sponsor is not obligated by the grant assurances to permit the aeronautical enterprise to operate on the airport. [*See* M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination).]

[58] In an effort to be fair, the FAA provided both parties with the opportunity to provide supplemental information as well as to respond to the information submitted by opposing parties. [FAA Exhibit 1, Items 31, 33, 36, 41-44.]

In its decision, the Court discussed a number of issues for the FAA to consider in its redrafting of the final order. The issues are listed below followed by the agency's response.

1. Why neither BMI nor Blueside Services, Inc. have a lease to occupy or develop constructed facilities at the Airport.

The Court noted that BMI and Blueside Services, Inc. claim that they are similarly situated with Clero Aviation and MEA, but that the FAA acknowledged that facts supporting these claims had not been clearly, concisely, or completely described as required by Part 16. The Court further noted that while there were some conflicting statements from BMI and Blueside Services, Inc., and that the FAA used this inconsistency to suggest that the record is not clear regarding which corporate entity's wishes to establish a new aircraft repair station, "there can be no mistake that Appellant made several requests, first through BMI then through Blueside [Services, Inc.], for a lease to occupy or develop constructed facilities at the Airport in order to open an aircraft repair business." [FAA Exhibit 1, Item 30A, page 13.] The Court then states its belief that "Appellant has stated with sufficient particularity his allegations that the County unjustly discriminated against BMI and Blueside [Services, Inc.] by refusing to grant either company a lease to occupy or develop constructed facilities at the Airport." [FAA Exhibit 1, Item 30A, page 13.]

First, Respondent did not appear to have the legal authority to directly provide a long-term development lease to Complainants without the agreement of its primary development tenants. [FAA Exhibit 1, Item 33, exhibits 1-3, 7, 9-18, 22.] [*See also* discussion at Section VI(B).]

In addition, the Court's order appears to be somewhat confused as to the type of development Complainants were seeking. The Complainants explain that Blueside Services, Inc. sought to develop as a fixed-base operation while BMI is a salvage operation. [FAA Exhibit 1, Item 1, pages 5-6.] While the Court refers to Complainants' attempts to obtain a development lease for "an aircraft repair business," it is important to clarify that an aircraft repair business is generally a small component of a fixed-base operator.[59] Complainants' desire is to establish a fixed-base operator business; Complainants did not limit themselves to an aircraft repair service provider. [FAA Exhibit 1, Item 1, pages 5-6; and Item 11, exhibit B.] A fixed-base operator is generally a significantly larger operation than an aircraft repair business. [*See* footnote 2.] This is relevant in determining whether tenants have received disparate treatment.

The grant assurances provide protection for similarly situated entities. As aeronautical businesses, that fact alone does not make the entities similarly situated. Significant differences like size, scope, investment, and business purpose generally make entities dissimilar and not similarly situated. Accordingly, an aircraft repair business and a fixed-base operator would not be similarly situated and would not be entitled to be treated similarly under the grant assurances.

[59] The Court also seems to have some misconceptions as to the nature of Clero Aviation's business. It suggests that "Clero [Aviation] repairs *non-flyable* aircraft, permitting the aircraft to fly again." [FAA Exhibit 1, Item 30A, page 16.] There is no support for such limitations in the record. Worn or faulty breaks do not necessarily make aircraft unflyable. Salvage on the other hand, does not restore an aircraft to flight. Salvage is not repair; it is dismantling. These businesses require different types of leaseholds, particularly in space and access. The significance is that one business is deemed to be engaged in a federally protected activity while the other is not. Nonaeronautical activities are not protected under the grant assurances. [*See* discussion at Section VI(A) above.]

Furthermore, a fixed-base operator with approximately 16 acres and existing facilities is not similarly situated to a new fixed-base operator without a tenancy and with a salvage component. Respondent is therefore not required to treat Complainants the same as Clero Aviation or MEA. [*See* at Section VI (A) and VI(C)(1) and (2).]

Complainants' existing leasehold does not include any existing buildings. [FAA Exhibit 1, Item 1, page 5.] The record also reflects that Complainants initially sought development of a large tract of land and existing facilities (buildings). [FAA Exhibit 1, Item 1, exhibit B; and Item 11, exhibit G.] More significant is Complainants' apparent refusal to consider new development without the salvage component. [FAA Exhibit 1, Item 44, pages 2-4 and 7.] As Complainants are not similarly situated to other tenants at the Airport or to other fixed-base operator seeking entry to the airport, the Associate Administrator, again, finds the Respondent has not violated Grant Assurance 22, *Economic Nondiscrimination.*

The Associate Administrator also notes that should Complainants be willing to develop a fixed-base operator business without a salvage component, the Respondent would be expected to enter into negotiations to provide access on reasonable and not unjustly discriminatory terms.

2. Whether the distinction between "new" vs. "established" or "existing" airport businesses is appropriate for the analysis of whether the businesses are "similarly situated."

The Court states that it found "troubling" the FAA's reliance upon the distinction between a new and existing or established business as a factor in determining whether airport businesses are similarly situated. In its final order, the FAA relied upon this distinction in determining whether BMI and Clero Aviation, BMI and MEA, and Blueside Services, Inc. and MEA are similarly situated.

The Court's opinion makes it necessary to clarify the FAA's rationale on why the entities are not similarly situated. Apparently, the first FAA final decision and order did not provide sufficient detail for the Court to discern that it is not a question of new vs. established business.

The distinction was intended to consider that the established businesses have an existing clientele and measurable income that the Respondent can use to assess whether Clero Aviation or MEA is able to commit the appropriate financial resources for the respective expansions of the leaseholds. Here, MEA (comparably the closest situated entity) sought approximately two more acres of land on which to develop a hangar, whereas Complainants sought 32 acres of land to develop an entire fixed-base operator business with a salvage component. The difference in level of investment between the two fixed-base operators is significant. It is hangar cost versus the entire fixed-base operator leasehold complete with buildings and pavement (ramps, taxiways, and facilities). Although Complainants have an on-going salvage business, it is not unreasonable to question whether that business is sufficient to support the enlarged scope of Complainants' proposed development. The record is lacking as to Complainants' financial capability. The Associate Administrator has addressed the Court's concern at Section VI(C)(1), page 37,

"*Financial Viability*" and at Section VI(C)(2), page 47, "*Tenant's Financial Investment and Viability.*"[60]

3. The nonaeronautical aspects of BMI's business and the aeronautical/nonaeronautical activity distinction.

The Court found the "alleged nonaeronautical aspects of BMI's business" to be an "unpersuasive basis on which to conclude that the parties are not similarly situated." [FAA Exhibit 1, Item 30A, pages 17-18.] The Court indicated it could find no reason why the nonaeronautical element is a reasonable justification to distinguish between BMI and Clero Aviation.

In the Court's view, the nonaeronautical element of BMI's business "is at most *de minimis* in light of the need to locate an aircraft demolition business in proximity to aeronautical areas in the Airport." [FAA Exhibit 1, Item 30A, page 18.] The Court cautioned that "[u]ntil the County can explain how the hybrid nature of BMI's business is crucial to its decision whether to award a lease to occupy a condemned building, we find the current explanation for the apparently disparate treatment in this case to be deficient." [FAA Exhibit 1, Item 30A, page 18.]

At this time, there are no condemned buildings to lease. Clero Aviation's situation was significantly different from Complainants' situation. [*See* discussion at at Section VI(C)(1)] Regardless, the grant assurances protect only aeronautical activity. [*See* discussion at Section VI(A) above.]

The Administrator notes that the Court inaccurately characterizes the salvage component of BMI's business as *de minimis.* Is not *de minimis*, but more correctly *de maximus* or of the greatest importance because at the time, it was Complainants' total business. As discussed in Section VI(A) above), FAA policy directs that a salvage business is not an aeronautical activity. Accordingly, BMI's salvage business is not protected by the grant assurances and, thus, not subject to Respondent's federal obligations. Respondent is not under an obligation to treat a salvage operation like a fixed-base operator. As noted above in Section VI(A), the sponsor is not obligated to provide access to nonaeronautical activities, including salvage and demolition.

The hybrid nature of Complainants' future business is critical. The Associate Administrator may also recognize certain details that might have alluded the Court; a new salvage business will likely require access from the Airport pavement; runways, taxiways, etc. to a substantial space with suitable parking and fencing. The fixed-base operator business will also require a certain amount of acreage for its components, which may include repair services, a flight school, hangar storage, tie down space, cargo operations, and fueling. Complainants initially desired approximately 32 acres, which included space for their salvage component. [*See* FAA Exhibit 1, Item 6, exhibit F, page 8.] Complainants' insistence on the salvage component limits the location for potential development at the Airport. In addition, there is no duty for Respondent to protect the salvage component. [*See* discussion at Section VI(A) above.] Moreover, none of the

[60] In regard to Clero Aviation, Clero Aviation rejuvenated a condemned building for its repair business. It, too, had an existing business that produced revenue that would assist the Respondent in evaluating whether it could honor its financial commitments. Clero Aviation is not a fixed-base operator and, thus, not remotely similarly situated to Complainants' proposals. [*See* discussion at Section VI(C)(1).]

other Airport tenants sought such a parcel. Finally, Respondent also has legal constraints on what it has the authority to lease. [*See* discussion at Section VI(B).]

4. Whether differential treatment between BMI and MEA is justified.

In appears that in the Court's view, there was no explanation in the record why BMI's demolition business is sufficiently distinct from MEA's fixed-base operator business to justify differential treatment with respect to a long-term lease. The Court conjectured that there may be numerous factors that could serve as the basis for legitimate distinctions, but that it failed to see them in the record. The Court pointed out that "[m]erely stating that one business is an existing tenant while another is a proposed tenant, or that one business is a fixed-base operator while another is a demolition business, is alone insufficient to justify differential treatment." [FAA Exhibit 1, Item 30A, page 21.] It concluded that it is not adequate under the law to deny an applicant the opportunity to operate at the Airport simply because there is an existing operator present.

The FAA's findings in its first decision and order were not based solely on the presence of an existing operator versus a new operator. The Associate Administrator has addressed the Court's concern at Section VI(C)(2). The FAA has clarified its earlier decision to expand its position so that the Court may better understand the record and FAA's rationale. The parties have provided additional supplemental material for the record. [FAA Exhibit 1, Items 33, 36-38, 42-44.] As discussed earlier and as stated above, MEA and Complainants are not similarly situated and, thus, Complainants are not entitled to substantially the same treatment as MEA. It is worth noting again that although MEA is a fixed-base operator and Complainants desire to develop a fixed-base operator business, MEA leased existing facilities whereas Complainants seek to develop a fixed-base operator facility from scratch. Accordingly, the level of investment required from the entities is significantly different. It is not unreasonable for Respondent to be concerned that Complainants may or may not be able to complete their development project. In addition, Respondent has offered Complainants a long-term lease on land it has authority to lease directly. Complainants have rejected this land.

As stated herein, should Complainants forego the salvage component and demonstrate financial capability to complete their plans for a fixed-based operator business, FAA would expect Respondent to assist Complainants with a lease on reasonable terms for any land it has the authority to lease, facilitate negotiations with its primary development tenants, or enforce its contracts.

5. Five-year leases and 30-day relocate clauses.

The Court noted that while the County offered Blueside Services, Inc. a direct five-year lease, the proposed lease did not grant Blueside Services, Inc. access to an existing building and it was "drafted for a term of five years, working against Appellant's plans to develop at the Airport over the long-term." [FAA Exhibit 1, Item 30A, pages 23-24.] The Court questioned whether the 30-day clause is standard in all Airport leases and that similarly situated tenants have used five-year leases with 30-day relocate clauses to successfully develop Airport property. In the Court's view, if this were the case, then "Blueside Services, Inc. will have less footing from which to argue that the proposed lease is discriminatory." [FAA Exhibit 1, Item 30A, page 24.]

As stated earlier, the 30-day clause is standard in the Airport leases, and Respondent has granted Complainants a 365-day termination clause, which is more advantageous than the other tenants have in their leases. The Associate Administrator finds the difference between the standard terms and Complainants' lease not unjustly discriminatory towards the other tenants because they are not similarly situated to Complainants and the nature of Complainants' existing business is such that the difference is warranted.

In addition, Complainants have been offered both a five-year lease for their fixed-base operator development, as well as additional airport property on a long-term lease. Although these offers do not extend to existing structures, Complainants' plans indicate they desire land to develop. [FAA Exhibit 1, Item 6, exhibit F; Item 11, exhibits B-G; Item 33, exhibit 6.] Complainants' current leasehold does not contain any buildings, and apparently there are no vacant buildings currently available for lease at the Airport. Complainants have rejected Respondent's offers. [FAA Exhibit 1, Item 44.]

The record demonstrates that it is the practice of the Respondents to offer prospective tenants essentially the same deal. [FAA Exhibit 1, Item 33, pages 7-8.]

VII FINDINGS AND CONCLUSION

In arriving at this Final Decision and Order on Remand, the FAA reexamined the record, including the Director's Determination, the March 5, 2007, Final Decision and Order, the administrative record supporting these decisions, and the supplemental evidence submitted by the parties in accord with the Court's order dated April 8, 2008. [FAA Exhibit 1, Item 30A.] In light of applicable law and policy, based on this reexamination, the Associate Administrator finds and concludes the additional information submitted by the Respondent and the Complainants provides sufficient support for the Respondent's disparate treatment of its tenants and for its inability so far to enter into a long-term development agreement with the Complainants.

Accordingly, based on the record, analysis, and conclusions herein, the Associate Administrator affirms that Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination.*

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 the Complaint be dismissed. Further, findings, discussions herein pertaining to Complainants' leasing opportunities compared with leasing opportunities of aeronautical tenants Clero Aviation and Miami Executive Aviation in the March 5, 2007, Final Decision and Order [*see* pages 13-16] are superseded by this Final Decision and Order on Remand. All other portions of the March 5, 2007, Final Decision and

Order are preserved in their entirety and incorporated by reference in this Final Decision and Order on Remand.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the Final Decision and Order on Remand 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 on Remand has been served on the party. The FAA requires the moving party to include a supporting brief with its Petition for Appeal. [14 CFR, Part 16, § 16.247(a).]

Catherine M. Lang
Acting Associate Administrator
for Airports

04/15/11
Date

BMI Salvage Corporation & Blueside Services, Inc.
v.
Miami-Dade County, Florida

Docket No. 16-05-16

INDEX OF ADMINISTRATIVE RECORD

Item 1 August 12, 2005, **Complaint** filed by Stephen O'Neal, President of BMI Salvage Corporation and Blueside Services Inc.

exhibit A	undated, photographs labeled "BMI Leasehold since January 1 2000."
exhibit B	undated, document described as a BMI Salvage Corporation Development Summary from Feb. 2005.
exhibit C	08-03-05, e-mail from Stephen O'Neal to Miami-Dade Aviation Department (MDAD) officials regarding August 8 meeting.
exhibit D	08-09-05, Complainant document "certifying" efforts to resolve dispute.
exhibit E	07-28-05, MDAD e-mail to Opa-Locka Airport (OPF) users regarding NOTAM.
exhibit F	08-05-05, MDAD e-mail to Stephen O'Neal and others, regarding non-flyable aircraft at OPF.
exhibit G	undated, excerpts of Dade County Code, Aviation Dept. Rules and Regulations.
exhibit H	04-14-05, excerpt of memo from Miami-Dade County Manager to Board of County Commissioners, recommending approval of a 35-year lease with Miami Executive Aviation at OPF.
exhibit Ha	undated, 6 photographs nonoperating aircraft at OPF.
exhibit I	undated, 6 photographs of anchoring of nonoperating aircraft at OPF.
exhibit J	undated , 14 photographs of various leasehold conditions and aircraft at OPF.
exhibit K	07-18-05, Letter from Stephen O'Neal the Opa-Locka Development Task Force.

exhibit L 04-07-05, e-mail from Stephen O'Neal to Bruce Drum regarding smoking.

exhibit M undated, 2 photographs of nonoperating aircraft/parts at OPF.

exhibit N 08-12-05, Letter from Gold Coast Engineering Consultants to Stephen O'Neal.

Item 2 September 7, 2005, FAA Notice of Docketed Complaint 16-05-16.

Item 3 September 19, 2005, Motion for Enlargement of Time, filed by the Assistant Miami-Dade County Attorney on behalf of MDAD.

Item 4 September 19, 2005, Letter from Stephen O'Neal opposing MDAD's Motion for Enlargement of Time to file Answer.

Item 5 September 21, 2005, Letter from FAA Airports Law Branch, granting Motion for Enlargement of Time.

Item 6 October 19, 2005, **Answer** and Incorporated Motion to Dismiss filed by Respondent.

exhibit A 10-13-05, Declaration of George Manion in Support of Miami-Dade County's Answer.

exhibit B 10-13-05, Declaration of Gregory C. Owens in Support of Miami-Dade County's Answer.

exhibit C 11-16-61 Quitclaim Deed to Dade County from United States for OPF.

exhibit D 11-01-99, Lease Agreement between MDAD and BMI Salvage Corporation.

exhibit E 05-11-05, Lease Modification Letter between MDAD and BMI Salvage Corporation.

exhibit F 10-22-04, Slide Presentation for a BMI Salvage Corporation development proposal at OPF.

exhibit G undated, photograph of aircraft at OPF.

exhibit H undated, excerpt of Dade County Code regarding derelict aircraft.

exhibit I 07-22-05, e-mail from Stephen O'Neal to George Manion of MDAD.

exhibit J 10-13-05, Declaration of Chris McArthur in Support of Miami-Dade County's Answer.

exhibit K undated, Draft Lease Agreement between Miami-Dade and Blueside Services, Inc. at OPF.

Item 7 October 19, 2005, Letter from Stephen O'Neal requesting Complainants' first extension of time to file Complainants' Reply.

Item 8 October 20, 2005, Letter from FAA Airports Law Branch, granting Complainants' first motion for extension of time to file Reply.

Item 9 November 7, 2005, Fax letter from Stephen O'Neal requesting Complainants' second extension of time to file Complainants' Reply.

Item 10 November 10, 2005, Letter from FAA Airports Law Branch, granting Complainants' second motion for extension of time to file Reply.

Item 11 November 22, 2005, Complainants' **Reply**.

exhibit A undated, unsigned, 25-page statement regarding OPF.

exhibit B undated, unsigned, 22-page statement regarding OPF long-term development.

exhibit C undated, unsigned, 6-page statement regarding OPF five-year development.

exhibit D undated, unsigned, 36-page statement regarding BMI Salvage Corporation's standard five-year lease.

exhibit E undated, unsigned, 16-page statement regarding trailers.

exhibit F undated, unsigned, 12-page statement regarding "Relationship with Respondent."

exhibit G 10-01-04, Sub-Lease Agreement between Opa-Locka Community Development Corporation and Blueside Services Inc.

exhibit H undated, unsigned, "Development Lease Agreement between Miami-Dade County, Florida, as Lessor, and the Opa-Locka Community Development Corporation as Lessee, at Opa-Locka Airport.

exhibit I 10-30-05, MDAD Opa-Locka Tenants List.

exhibit J undated, unsigned list labeled "Respondents Agents OPF."

exhibit K Affidavits, attached:

1. Sam Knaub
2. Stephen Kolski
3. Stephen O'Neal
4. Laphia Bromfield
5. George Seiler
6. Carl Daugherty

exhibit L	undated, unsigned 7-page essay on "Flying Clubs" at OPF.
exhibit M	11-22-02, "Second Amended Complaint for Damages and Declaratory Relief" filed by JP Aviation Investments against Miami-Dade County.
exhibit N	undated, unsigned, 5-page essay on "Self-Fueling" at OPF.
exhibit O	undated, unsigned, 8-page essay on "Building 137" at OPF.
exhibit P	03-20-02, fax from Stephen O'Neal to Rosy Pastrana, DCAD Properties.
exhibit Q	02-25-02, Letter from Stephen O'Neal to Carol Anne Klein, Manager MDAD Aviation Properties.
exhibit R	10-21-05, "Petition for Writ of Mandamus" filed by Stephen O'Neal upon Miami-Dade County Manager.
exhibit S	11-04-05, Herald.com news article, "MIA secures duty-free company.'
exhibit T	January 2003, Demolition Permit.
exhibit U	04-07-05, e-mail trail from Stephen O'Neal to Bruce Drum to Anne Syrcie Lee.
exhibit V	11-07-05, e-mail trail from Stephen O'Neal to William Logan and response.
exhibit W	11-07-05, FAA Registry Report of six aircraft.
exhibit X	undated, unsigned, description of Stephen O'Neal's complaint to MDAD regarding a leasehold issue from 1999/2000.
exhibit Y	12-24-02, e-mail from Stephen O'Neal.
exhibit Z	11/12-02, *Airliners* magazine article, "End of the Line, Scrapping an Airliner."

Item 12 December 2, 2005, Complainants' extra-procedural submission of errata and additional evidence from Stephen O'Neal to MDAD.

Item 13 December 22, 2005, Unopposed Motion for Enlargement of Time, filed by Assistant Miami-Dade County Attorney on behalf of MDAD.

Item 14 December 23, 2005, Letter from FAA Airports Law Branch, granting Motion for Enlargement of Time.

Item 15 January 20, 2006, **Rebuttal** of Respondent Miami-Dade County.

exhibit A 01-16-06, Declaration of Miguel Southwell in Support of Respondent Miami-Dade County's Rebuttal.

exhibit B 01-19-06, Declaration of Susan Warner Dooley in Support of Respondent Miami-Dade County's Rebuttal.

exhibit C 01-19-06, Declaration of Sonia Bridges in Support of Respondent Miami-Dade County's Rebuttal.

exhibit D 01-19-06, Declaration of John O'Neal in Support of Respondent Miami-Dade County's Rebuttal.

exh. 1 undated, Clero Aviation Lease at OPF.

exhibit E 01-19-06, Declaration of George Manion in Support of Respondent Miami-Dade County's Rebuttal.

exhibit F 01-19-06, Declaration of Gregory C. Owens in Support of Respondent Miami-Dade County's Rebuttal.

exhibit G 01-19-06, Declaration of Chris McArthur in Support of Respondent Miami-Dade County's Rebuttal.

exhibit H 12-13-05. WITHDRAWN Exhibit: Lease Modification Letter.

exhibit I 04-27-93, Memorandum and Resolution constituting Dade County's Authorization for County officials to execute standards aviation leases.

exhibit J 03-07-95, Memorandum and Ordinance constituting Dade County's revision of Aviation Department Rules and Regulations.

Item 16 February 1, 2006, Notice of withdrawal of Rebuttal Exhibit H and Joint Notice of Exhibit 1.

exh.1 12-13-05, Lease Modification Letter adding space to BMI Salvage Corporation's lease.

Item 17 February 23, 2006, Complainants' Request for an Evidentiary Hearing and On-Site Inspection.

Item 18 March 8, 2006, Respondent's Response to Complainants' Request (Item 17, above).

Item 19 November 8, 2005, Post-Inspection Land-Use Report for OPF with a cover letter from Orlando Airports District Office, FAA of the same date.

Item 20 May 1, 2006 Notice to Airmen, OPF.

Item 21 May 26, 2000, Notice of Extension of Time for Director's Determination.

Item 22 **Director's Determination**, signed July 25, 2006.

Item 23 Complainants' **Appeal** of the Director's Determination, dated August 31, 2006, received September 5, 2006.

Item 24 Respondent's **Reply** to Complainants' Appeal, dated September 25, 2006, received October 14, 2006.

Item 25 Notice of Extension of Time, dated December 13, 2006, and served December 18, 2006, extending the time by which a Final Agency Decision will be issued to January 18, 2007.

Item 26 Notice of Extension of Time, dated January 17, 2007, extending the time by which a Final Agency Decision will be issued to March 1, 2007.

Item 27 Notice of Closure of Offices and change of address for Complainants, effective January 1, 2007.

Item 28 Notice of Extension of Time, dated January 17, 2007, extending the time by which a Final Agency Decision will be issued to March 23, 2007.

Item 29 **Final Decision and Order**, issued **March 5, 2007**.

Item 30A **Remand** from the United States Court of Appeals, Eleventh Circuit, April 8, 2008, No. 07-12058.

Item 30B **Remand** from the United States Court of Appeals, Eleventh Circuit, April 8, 2008, Westlaw.

Item 31 Order for Supplemental Pleadings, July 17, 2008

Item 32 Order Granting Extension of Time to October 30, 2008, for Respondent to submit its Supplemental Pleadings.

Item 33 Supplemental Pleadings of Respondent, served October 30, 2008, and received October 31, 2008.

Attachment A Declaration of Miguel Southwell in regard to supplemental pleading of Respondent, dated October 29, 2008.

Attachment B Declaration of Gregory C. Owens in regard to supplemental pleading of Respondent, dated October 29, 2008.

Attachment C Declaration of Maria Anon in regard to supplemental pleading of Respondent, dated October 29, 2008.

exhibit 1 Development lease between Miami-Dade and Stagecoach Aviation OPF, LLC entered into August 9, 1999.

exhibit 2 Development lease between Miami-Dade and the Renaissance Airpark Corp. entered into November 10, 1999.

exhibit 3 (1) Resolution No. R-718-05 approving first amendment to development lease and concessional agreement between Miami-Dade County and J.P. Aviation Investments, Inc., for development of Opa-Locka Airport conditional upon dismissal of pending state court action, etc.

(2) June 7, 2005, memorandum regarding first amendment to development lease and concession agreement with JP Aviation Investments, Inc.

exhibit 4 (1) Resolution No. 465-97 approving revived and amended agreement for development of Opa-Locka Airpark with Opa-Locka Community Development Corporation (CDC), adopted May 6, 1997.

(2) May 6, 1997, memorandum regarding Resolution No. 465-97.

(3) May 6, 1997 agreement between Dade County and the Opa-Locka Community Development Corp for development of the Opa-Locka Airpark.

(4) Graphic depiction of CDC lease area, dated May 6, 1997.

exhibit 5 Graphic depiction of Opa-Locka Leasehold on the airport.

exhibit 6 E-mail from Stephen O'Neal to Greg Owens regarding OPF development. PowerPoint slides attached.

exhibit 7 Five-year lease agreement between Miami-Dade and BMI Salvage Corporation for aircraft demolition only entered into November 1, 1999, and effective January 1, 2000; terminating December 31, 2004.

exhibit 8 (1) May 11, 2004, letter from Ilia A. Quinones, FAA Orlando Airports District Office, to Susan Warner Dooley, Assistant Director of Business Management, Miami-Dade Aviation Dept, regarding Opa-Locka Aviation Group (OAG) lease and review of the development schedule and project phasing.

(2) March 1, 2005, letter from Charles Erhard, FAA Airport Compliance Division, to Susan Warner Dooley, regarding potential grant assurance violations with the Opa-Locka Aviation Group (OAG) lease.

exhibit 9 Lease agreement between Miami-Dade and Alca Avionics, Inc. entered into June 21, 2001, and effective July 1, 2001.

exhibit 10 Lease agreement between Miami-Dade and National Aviation Services entered into January 21, 2002, and effective January 21, 2002.

exhibit 11 Lease agreement between Miami-Dade and Miami Executive Aviation, Inc. entered into February 1, 2003 and effective February 1, 2003.

exhibit 12 Lease agreement between Miami-Dade and Air Cargo Management, Inc, entered into March 13, 2003.

exhibit 13 Lease agreement between Miami-Dade and Miami Executive Aviation entered into March 4, 2004, and effective January 22, 2004.

exhibit 14 Lease agreement between Miami-Dade and Hangar 41 Association, entered into March 19, 2004 and effective February 11, 2004.

exhibit 15 Lease agreement between Miami-Dade and Opa-Locka Airport Executive Center dba National Aviation, entered into December 2, 2004.

exhibit 16 Lease agreement between Miami-Dade County and Clero Aviation Corp, entered into January 7, 2005.

exhibit 17 Lease agreement between Miami-Dade County and Opa-Locka Flightline, LLC, entered into April 14, 2005, effective April 1, 2005.

exhibit 18 Lease agreement between Miami-Dade County and Miami Executive Aviation, entered into October 24, 2006, effective August 1, 2006.

exhibit 19 Miami-Dade County Building Code, chapter 8.

exhibit 20 Notice of Board Decision, Unsafe Structures Board, dated March 24, 2004.

exhibit 21 Opa-Locka 40-year recertification status report (9/25/2000)

exhibit 22 Lease agreement between Miami Executive Aviation (MEA) and the Airport, entered into July 14, 1997, and effective April 1, 1997.

exhibit 23 Series of e-mails between Stephen O'Neal, John O'Neal, and Susan Warner Dooley regarding notices of violation, lease extension, office space, etc. sent between December 16-17, 2004.

exhibit 24 E-mail from Stephen O'Neal to Susan Warner Dooley regarding allowing him to expand while working through the Notice of Violation (NOV), sent March 5, 2005.

exhibit 25 Series of e-mail messages between Stephen O'Neal and Susan Warner Dooley regarding five-year interim lease, the CDC development lease, permits to secure trailer and containers to code, sent between April 9-10, 2005.

exhibit 26 E-mail message from Stephen O'Neal to Susan Warner Dooley regarding BMI Salvage Corporation's lease expiration and CDC's lease approval, sent November 28, 2004.

exhibit 27 January 6, 2005, letter from Susan Warner Dooley, Assistant Aviation director for Business Management, to Stephen O'Neal regarding notice of violation and cure required to avoid notice of default under the lease for BMI Salvage Corporation.

exhibit 28 (1) May 9, 2005, letter from Susan Warner Dooley to Mr. Willie Logan, Opa-Locka Community Development Corporation (CDC)

regarding separate lease for new premises that will be subleased to Blueside Services, Inc.

(2) April 20, 2007, letter from Jose Abreu, Aviation Director, to Mr. Willie Logan, Opa-Locka Community Development Corporation (CDC) regarding notice of default and immediate termination of agreement.

exhibit 29 E-mail message from Stephen O'Neal to Susan Warner Dooley regarding five-year development agreement, sent June 22, 2005.

exhibit 30 E-mail message from Stephen O'Neal to Lillian LeBlanc regarding five-year development lease, sent June 28, 2005.

exhibit 31 E-mail message from Stephen O'Neal to Susan Warner Dooley regarding trailer expansion, sent July 5, 2005.

exhibit 32 E-mail message from Stephen O'Neal to Steve Baker regarding five-year development, sent August 5, 2005.

exhibit 33 Miami-Dade Legislative Item File Number 060366: Purchase of Leasehold Interest of Opa-Locka Aviation Group.

Item 34 Letter from Complainants requesting extension of time for submitting supplemental pleadings. Letter dated December 5, 2008; received December 16, 2008.

Item 35 Order Granting Extension of Time to February 6, 2009, for Complainants to submit supplemental pleading.

Item 36 Complainants' Response to Respondent's Supplemental Pleading, received February 6, 2009.

exhibit A April 14, 2005, Memorandum from George M. Burgess, County Manager, regarding: "Development Lease Agreement with Miami Executive Aviation, Opa-Locka Airport."

exhibit B June 29, 2005, Memorandum from Lillian J. LeBlanc, General Aviation Property Manager, regarding: "Blueside Services, Inc./BMI Proposal for 5 Year Development Lease."

Item 37 Notice of Filing Affidavit of James Stephen O'Neal in Support of Complainants' Response to Respondent's Supplemental Pleading, received February 6, 2009.

exhibit 1-A May 20, 2008, letter from Gregory Owens, Division Director, Real Estate Management & Development, Miami-Dade Aviation Department, to Ed Brown, Opa-Locka Flightline.

exhibit 1-B Lease Agreement between Miami-Dade County, Florida, and Opa-Locka Flightline, LLC, at Opa-Locka, entered into April 14, 2005.

exhibit 2 Development Lease Agreement between Miami-Dade County, Florida, as Lessor, Biscayne Capitol LLC as Lessee, at Opa-Locka Airport.

exhibit 3 Opa-Locka Airport Development Plan

exhibit 4 Flightline Development Leasehold 2005

Item 38 Notice of Filing of Affidavit of Jorge Clero in Support of Complainants' Response to Respondent's Supplemental Pleading, received February 6, 2009.

Item 39 March 24, 2009, Notice of Extension extending the date by which the final agency decision on remand will be issued to June 17, 2009.

Item 40 June 19, 2009, Notice of Extension extending the date by which the final agency decision on remand will be issued to August 27, 2009.

Item 41 July 30, 2009, Request for Additional Information and Notice of Extension of Time, requesting supplemental information from both parties and extending the date for issuing the final agency decision on remand to December 18, 2009.

Item 42 October 13, 2009, Complainants'/Appellants' Preliminary Response to FAA Request for Additional Information, dated October 9, 2009, received October 13, 2009.

Item 43 October 16, 2009, Response of Miami-Dade County to the FAA's Request for Additional Information, dated October 13, 2009, received October 16, 2009.

Item 44 October 22, 2009, Complainants' Supplement Response to FAA Request for Additional Information, dated October 21, 2009, received October 22, 2009.

Item 45 December 16, 2009, Notice of Extension of Time extending the date by which the final agency decision on remand will be issued to February 18, 2010.

Item 46 February 16, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand will be issued to April 7, 2010.

Item 47 March 23, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to May 6, 2010.

Item 48 May 4, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to July 1, 2010.

Item 49 June 23, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to August 15, 2010.

Item 50 August 11, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to September 23, 2010.

Item 51 September 2, 2010, internal email message from AGC to the Airport Compliance and Field Operation Division advising staff of the correct address for Complainants' attorney, Ted H. Bartelston, Esq.

Item 52 September 22, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to November 5, 2010.

Item 53 November 19, 2010, Notice of Extension of Time extending the date by which the final agency decision on remand would be issued to December 20, 2010.

Item 54 Petitioners' Motion for Writ of Mandamus to Compel Respondent FAA to Rule Pursuant to Court Remand, received October 12, 2010.