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

Office of the Associate Administrator
for Airports

800 Independence Ave., SW.
Washington, DC 20591

MAY 25 2012

CERTIFIED MAIL – Return Receipt

Mary A. Schu, President
Desert Wings Jet Center, LLC
Spirit Flight Inc., dba Wings of the Cascades
7 N.E. Tandem Way, #217
Hillsboro, Oregon 97124

Steven D. Bryant, Esq.
Bryant, Emerson & Fitch, LLP
888 S. W. Evergreen Avenue
P. O. Box 457
Redmond, OR 97756

RE: Desert Wings Jet Center, LLC Spirit Flight Inc., dba Wings of the Cascades, Mary A. Schu v. City of Remond, Redmond, OR

FAA Docket No. 16-07-16

Dear Ms. Schu and Mr. Bryant:

Enclosed is a copy of the final decision and order of the Federal Aviation Administration (FAA) with respect to the above-referenced matter.

Based on the record in this proceeding, the FAA finds that the Determination made by the Director of Airport Compliance and Management Analysis is supported by a preponderance of reliable, probative, and substantial evidence. I affirm the Director's Determination and further affirm the Director's acceptance of the Respondent's Corrective Action Plan.

The reasons for upholding the Director's Determination are set forth in the enclosed Final Agency Decision and Order.

Sincerely,

for Christa Fornarotto
Associate Administrator
for Airports

Enclosure

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2012, I caused to be placed in the United States mail (first class mail, postage paid) a true copy of the foregoing document addressed to:

For Complainant
Mary A. Schu, President
Desert Wings Jet Center, LLC
Spirit Flight Inc., dba Wings of the Cascades
7 N.E. Tandem Way, #217
Hillsboro, Oregon 97124

For Respondent
Steven D. Bryant, Esq.
Bryant, Emerson & Fitch, LLP
888 S. W. Evergreen Avenue
P. O. Box 457
Redmond, OR 97756

Hand Delivered to:
FAA Part 16 Airport Proceedings Docket
FAA Airport Compliance and Field Operations, ACO-100

Anne Torgerson
Office of Airport Compliance
and Management Analysis

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

DESERT WINGS JET CENTER, LLC **SPIRIT FLIGHT INC. dba WINGS OF THE CASCADES,** **Mary A. Schu, President and Owner** **COMPLAINANT** **V.** **CITY OF REDMOND** **REDMOND, OREGON** **RESPONDENT**	**Docket No. 16-09-07**

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Desert Wings Jet Center, LLC Spirit Flight Inc. dba Wings of the Cascades (Appellant or Complainant) from the Director's Determination of November 10, 2010, issued by the Director of the FAA Office of Airport Compliance and Field Operations,[1] pursuant to the *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR) Part16 (FAA Rules of Practice). The Director's Determination dismissed the Complainant's allegations against the City of Redmond, Oregon (City/Respondent), regarding the City's federal obligations associated with its operation of the Redmond Roberts Field Airport (Airport), in Redmond, Oregon.

On appeal, the Complainant states, "I respectfully disagree with the findings of the FAA Director's Initial Determination [...] and ask that the complaint be reviewed and revisited." [FAA Exhibit 1, Item 20A, page 1.] In an appeal, the Complainant must show that the Director erred by making findings of fact that were not supported by a preponderance of reliable, probative, and substantial evidence or made conclusions of law that were not in accordance with applicable law, precedent, and public policy. The Complainant does not identify how the Director erred in findings of fact or conclusions of law. The Complainant

[1] Effective May 6, 2011, the Office of Airport Compliance and Field Operations has been renamed the Office of Airport Compliance and Management Analysis. This change in office title designation has no impact on the Director's Determination or on this Final Agency Decision.

does not point to specific grant assurances in its appeal, does not point to any specific piece of evidence, and does not point to any specific page number in the Director's Determination as an example of error. Nor does the Complainant attach any evidence to its Appeal. Rather, the Complainant reiterates its arguments in the case and discusses areas of disagreement with the Director's finding. Absent this information, nonetheless, the Associate Administrator construes the Complainant's objections to the extent the FAA can do so reasonably and fairly, and attempts to review the Director's Determination in order to give the parties as complete an analysis as possible.

Upon an appeal of a part16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, page 9 (December 30, 1999) (Final Decision and Order) (Ricks FAD), and title 14 Code of Federal Regulations (CFR), §16.227.]

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Complainant's Appeal and the Respondent's Reply under applicable law and policy. Based on this reexamination, the FAA affirms the Director's Determination. The Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In the November 10, 2010, Director's Determination, the Director identified three issues for review under Grant Assurances 19, *Operation and Maintenance*; 22, *Economic Nondiscrimination*; and 23, *Exclusive Rights*. [FAA Exhibit 1, Item 19, p. 14-15.] The Director also addressed four issues pertaining to the Complainant's allegations regarding Grant Assurances 25, *Airport Revenues*; 29, *Airport Layout Plan*; and 30, *Civil Rights*; as well as an allegation that Respondent violated an Oregon State obligation.[2] [FAA Exhibit 1, Item 19, p. 15.]

The Director dismissed the four issues under grant assurances 25, 29, 30, and the Oregon State obligation, stating:

[2] As stated in the Director's Determination, this allegation is outside the scope of FAA's role in monitoring grant assurance compliance. Complainant failed to state a claim related to the grant assurances for this issue. [DD page 18]

Complainant has misinterpreted the definition and application of Grant Assurances 25, 29 and 30, and misconstrued the FAA's authority as to purported state and local incentive programs [...]. Accordingly, the FAA finds these issues do not warrant further review and the allegations raised in the complaint as to these violations are dismissed.[3] [FAA Exhibit 1, Item 19, page 18.]

The Director fully examined the record with regard to three other issues, all discussing the Complainant's attempts to complete its leasehold improvements for its proposed aeronautical businesses under three consecutive leases provided by the Respondent, the City of Redmond. With regard to these opportunities for aeronautical development, the Director concluded that the Respondent was not in violation of its relevant grant assurances. Specifically, the Director found:

- The Respondent's treatment of the Complainant's consecutive leasehold parcels did not violate Grant Assurance 19, *Operation and Maintenance*. The Director stated that Grant Assurance 19 does not apply to the circumstances regarding the Complainant's leasehold, but rather refers to maintaining the aeronautical utility of common-use areas essential to the public's aviation use and protecting the taxpayer's investment in federally funded improvements.[4] [FAA Exhibit 1, Item 19, page 21.]

- The Respondent's application of its business standards and requirements to the Complainant's attempts at aeronautical development (including the requirement to pay rent) did not violate Grant Assurance 22, *Economic Nondiscrimination*. However, the Director cautioned the Respondent that the FAA has found sponsors in noncompliance in the past when the record shows a high degree of obstructionist behavior by the Respondent. [FAA Exhibit 1, Item 19, page 34.]

- The Respondent had not granted an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*, by preventing the Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport. This alleged constructive granting of an exclusive right to Complainant's competitor correlates to the allegations under Grant Assurance 22, *Economic Nondiscrimination*, and fails for the same reasons. [FAA Exhibit 1, Item 19, page 35.]

The Associate Administrator carefully examined the Director's Determination under the Appeal with regard to Grant Assurances 19, *Operation and Maintenance*; 22, *Economic Nondiscrimination*; and 23, *Exclusive Rights*.

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[3] The Complainant has not alleged that the Director erred in dismissing the allegations under these grant assurances or the Oregon State obligation.

[4] The Complainant has not alleged the Director erred in dismissing the allegations under Grant Assurance 19, *Operation and Maintenance*.

III. PARTIES

A. The Airport

Redmond Roberts Field (RDM or Airport) is a commercial service airport. It holds an airport operating certificate under title 14 CFR part139 *Airport Certification.* The planning and development of RDM has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, title 49 United States Code (U.S.C.), § 47101, *et seq.*[5] During the last reported twelve-month period ending December 31, 2009, there were 112-based aircraft and 55,913 annual operations at the Airport.[6]

B. Complainant

Complainant is a commercial aeronautical service provider on the Airport. Complainant provides flight training and aircraft charter service under the name of Spirit Flight, Inc., dba Wings of the Cascades. Complainant also operates Desert Wings Jet Center, which Complainant describes as an approved fixed-base operation. [FAA Exhibit 1, Item 3, pages 1 and 14.] At one time, Complainant leased space for its business from competitor Redmond Air. [FAA Exhibit 1, Item 3, pages 11 and 15.] Complainant has attempted, unsuccessfully, to develop its own leasehold as a fixed-base operator on the Airport. [FAA Exhibit 1, Item 3, page 12.]

IV. FACTUAL BACKGROUND and PROCEDURAL HISTORY

A. Factual Background

Since 2005, Complainant has tried unsuccessfully to build tenant-financed improvements at the Airport to support Complainant's commercial aeronautical activities. Complainant states it has been subjected to discriminatory actions and unreasonable standards imposed by the Respondent. Complainant entered into three lease agreements with Respondent for tenant-financed improvements. There are two other fixed-base operators on the Airport: Butler Aircraft and Redmond Air.[7] [FAA Exhibit 1, Item 3, page 12.]

1. Complainant's 2005 Wings of Cascade Lease

On July 26, 2005, Complainant, as president and owner of Wings of Cascade, entered into a twenty (20) year ground lease with Respondent to construct a 15,000 square foot hangar and 57,818 square foot ramp on the Airport. The lease included two five-(5) year renewal options. [FAA Exhibit 1, Item 7, exhibit 1.] The lease required Complainant to complete substantial improvements within a one (1) year time frame or face lease termination.

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[5] FAA Exhibit 1, Item 2B provides the Airport Sponsor's AIP grant history listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor from 1982 to December 7, 2011.

[6] FAA Exhibit 1, Item 1B provides a copy of the most recent FAA Form 5010 for the Airport, showing the last inspection date of June 20, 2011.

[7] The lease for Redmond Air is listed as KC Aero/Keeton & King. [*See* FAA Exhibit 1, Item 4, exhibit 38.]

Respondent indicated the one-year construction requirement is a standard provision in all airport leases for unimproved property. The lease also required Complainant to submit construction plans and to obtain the City's approval through a site plan review application before commencing construction. The original term of the lease was for a period of twenty years from August 1, 2005, until July 31, 2025.

Approximately, eleven months later on June 27, 2006, Respondent agreed to Complainant's request to extend the start of construction until the end of September 2006. [FAA Exhibit 1, Item 7, exhibit 2.] The City claims Complainant did not submit construction plans nor did it begin construction on the hangar as required. As a result, the City terminated Complainant's Wings of Cascade lease at the end of 2006. [FAA Exhibit 1, Item 7, page 2.]

2. Complainant's 2007 Desert Wings Jet Center Lease

On January 12, 2007, Complainant, as president and owner of Desert Wings Jet Center, signed a twenty (20) year lease agreement with the City for 152,899 square foot parcel[8] to operate a fixed-base operation. The lease included two five (5) year renewal options and the requirement for substantial completion of tenant improvements within a one (1) year time frame or Complainant would face lease termination. The original term of the lease was for a period of twenty years from January 1, 2007, until December 31, 2027. [FAA Exhibit 1, Item 7, exhibit 3.]

During the implementation of the 2007 leasehold improvements, Complainant claims it was confronted by a number of problems that prevented it from complying with the one-year time frame for substantial completion of tenant improvements. Complainant states these problems were Respondent's responsibility to address. [FAA Exhibit 1, Item 3, pages 24, 27 and 38.]

Complainant alleges Respondent violated its Federal obligations under the grant assurances when Respondent (1) failed to correct waste water and drainage problems on the Complainant's leasehold, (2) failed to define Complainant's leasehold boundaries, (3) failed to prevent competitor Redmond Air from unauthorized trespass and from trenching Complainant's leasehold, (4) implemented changes to the City's site plan review requirements, and (5) breached its contract with Complainant. [FAA Exhibit 1, Item 3, pages 8, 24, and 43.]

On December 18, 2007, Respondent's counsel advised Complainant that Complainant's lease would terminate on January 12, 2008, for failure to substantially complete construction within the allotted one-year period. Respondent's counsel reminded Complainant that the required building plans had not been submitted for review. Respondent's counsel also requested that Complainant submit the following documents:[9]

(a) A copy of the company business plan for the project;

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[8] Addendum Lease number 1, exhibit C for 18, 870 square feet was prepared November 9, 2006. [FAA Exhibit 1, Item 7, exhibit 3, *see exhibit A to Lease.*]

[9] There is no response from Complainant to this request contained in the Record.

(b) Copies of contracts or correspondence indicating negotiations with airlines for flight training;
(c) Copies of correspondence indicating Horizon Airlines' intention to use Complainant's hangar for overnight operations; and
(d) Estimated cost of the project and proof of financial ability to construct the project;

In the same correspondence, Respondent addressed Complainant's questions about the leasehold regarding:

(e) Formal request to change lease boundaries;

(f) Waste water removal issue resolution;

(g) Taxiway attachment and expansion project, identified as the tenant's responsibility;

(h) Building height approval; and

(i) Reimbursements of tenant lease payment for properties encumbered by Salmon Avenue.

[FAA Exhibit 1, Item 7, exhibit 4.]

On January 10, 2008, Complainant, on behalf of the Desert Wings Jet Center, filed a Breach of Contract action against the City of Redmond in the Circuit Court of the State of Oregon. Complainant charged the City breached the lease by:

- Failing to deliver possession of the leased premises, including a fifty-foot strip of the leased property representing the location of a vacated right-of-way for a City street, thus preventing Complainant/plaintiff from being able to use and develop the leased property; and

- Allowing the lessee of adjoining property also owned by the City to trespass upon the leased premises by making a four-foot deep trench forty or more feet upon the leased property.

[FAA Exhibit 1, Item 3, page 4 and Item 4, Exhibit 8, page 2.]

Complainant charged in court documents that the City's failure to deliver the leased property and to defend the Complainant's right to quiet enjoyment of the property constituted a breach of the covenant of good faith and fair dealing. [FAA Exhibit 1, Item 4, Exhibit 8, page 2.]

Complainant requested Respondent deliver the leased property and defend Complainant's right of quiet enjoyment by preventing trespassing from its neighboring tenant. Complainant also requested $100,000 in damages and reimbursement of Complainant's legal fees. [FAA Exhibit 1, Item 4, exhibit 8, page 7.]

Between January 2008 and May 2009, Respondent and Complainant discussed terms and conditions for a new lease. The administrative record indicates:

- Respondent increased the size of Complainant's leasehold;
- Respondent provided a copy of as-built for utility locations for Airport and Salmon Avenues and associated lease properties, which were also requested by Complainant;

- Respondent agreed to work with Complainant to relocate any city utilities such as water and sewer lines, specifying that Complainant is responsible for all design and relocation costs of the public utilities; and

- Respondent also informed Complainant that city personnel and equipment could not be used for a private development project.

[FAA Exhibit 1, Item 4, exhibits 6 and 7.]

In a separate letter to Complainant dated May 15, 2008, Respondent's Counsel addressed Complainant's remaining concerns as follows:

- Complainant must submit a site and design review application;

- Complainant must provide all engineering services and create new documents;

- Complainant must pay all charges and fees;

- The lease rate for the property will be $0.21 per square foot, which is the current rate the Respondent is charging all new tenants;

- The lease boundaries will not be expanded to include any more property beyond that identified in the lease;

- Respondent cannot approve a building 70 feet high; the city development code limits building height to 45 feet;

- Respondent will not build a maintenance/fixed-base operator hangar and lease it back to the Complainant. Respondent was willing to construct a building for the U.S. Forest Service, but not for individuals and corporations;

- The term of the lease will be 20 years with two five-(5) year extensions, and the hangar rent will commence on the date the new lease is executed;

- Respondent will not provide or pay for engineering or construction services for any portion of the Complainant's project, including all trenching and relocation of utilities, sewer, and roadway; and

- Respondent will not refund rent paid or pay the Complainant's costs or attorney fees.

[FAA Exhibit 1, Item 4, exhibit 16.]

3. Complainant's 2009 Desert Wings Jet Center Lease

Complainant and Respondent reached an out-of-court settlement on the 2007 Desert Wings Jet Center lease breach-of-contract dispute, and both parties signed a new lease for Desert Wings Jet Center effective April 1, 2009.

Key provisions of the new lease included:

- A twenty (20) year lease agreement with the Respondent for 152,899[10] square foot parcel to operate a fixed-base operation;
- Desert Wings Jet Center must submit a complete application for site and design review of all proposed improvements on the leased premises within 180 days of lease execution;
- After the Respondent has approved the site and design plans, Complainant, on behalf of Desert Wings Jet Center, must submit final plans to the City Building and Engineering Departments; and
- Complainant, on behalf of Desert Wings Jet Center, must begin construction within 180 days after receiving site and design approval.

[FAA Exhibit 1, Item 7, exhibit 7.]

Complainant signed the new lease even though Complainant now states the lease provisions are inequitable and discriminatory in (a) lease term and (b) lease recording. Eventually, this lease was also terminated. These lease terms are not at issue here.

(a) Lease Term

Complainant's lease provides for a term of 20 years with two five-(5) year extensions while competitor Redmond Air has 55 years on the full term of its lease.

(b) Lease Recordation

Complainant objects to Respondent's newly instituted procedure withdrawing the City's consent to record Airport leases with the County Clerk.

In a March 25, 2009, letter to Complainant, Respondent wrote:

> *The City does not consent to recording the lease. For a significant number of years, the City's policy has not been to record leases or memorandum of leases for property subject to the FAA patent. What the City does and*

[10] While the 2009 lease says 152,899 sq ft, lease exhibits actually total 199,082 sq ft as described in "Exhibit 'A' Leases for the City of Redmond." [*See* FAA Exhibit 1, Item 7, exhibit 7, "Exhibit B" (Survey 1).] The main lease area shows 152,125 sq ft; Addendum Lease Number 1 shows 18,870 sq ft; Addendum Lease Number 2A shows 18,000 sq ft; and Addendum Lease number 2B shows 10,087 sq ft.

continues to do is provide leasehold mortgage protection for tenants who are borrowing money to make improvements on their leasehold interest. The lease agreement between the City and Desert Wings Jet Center provides specifically for leasehold mortgage protection in Section 12B of the lease. Those provisions allow the lender to register with the City and to receive notices of any default, and opportunity to cure the default, and assume the underlying lease. [FAA Exhibit 1, Item 4, exhibit 10.]

All lease exhibit surveys are stamped *"NOT FOR RECORDING PURPOSES."* [*See*, for example, FAA Exhibit 1, Item 7, exhibit 7, "Exhibit B" (Survey 1).]

Complainant alleges Respondent engaged in discriminatory action because Respondent will not record Complainant's lease with the County Clerk while it has recorded the leases of other tenants. Complainant argues that without a recorded lease, it cannot obtain title insurance and without title insurance, it cannot obtain a loan. Complainant provides a list of 15 lease agreements that Respondent recorded with the County Clerk from January 25, 1999, to July 14, 2008. Respondent recorded competitor Redmond Air's lease on July 14, 2008. [FAA Exhibit 1, Item 5, exhibit 49.]

Complainant initially contacted the local FAA Airports District Office (ADO) in Seattle, and later, the FAA Washington Headquarters Office to clarify the City's position on recordation. In response to an FAA inquiry, the City Counsel clarified the Respondent's position on lease recording in an April 13, 2009, letter to the FAA ADO Project Manager. The City Counsel wrote:

It has been the City's policy for a number of years not to record any documents against the lease property. The reason for this policy is that such recordings add additional cost and expense to the City when terminating a lease or at the end of a lease period. It also creates the possibility of a tenant or lender asserting an interest in the real property. By not consenting to the recording, the City is able to avoid those potential disputes and the related significant costs. All of the airport leases contain an extensive provision for mortgage leasehold protection. [11]

[...] *the leasehold protection provides greater rights to the lender than the tenant has under the lease, including a longer period to cure any default or to assume the lease. The City included this provision to facilitate the tenant's ability to finance improvements to the leasehold. The City has successfully used and is using this provision with lenders. The lenders I have talked to about the leasehold protection have been satisfied with its terms. I have not been contacted by any lenders raising any concerns about the inability to record their loans to tenants.*

[FAA Exhibit 1, Item 7, exhibit 15(b), pages 1-2.]

[11] The administrative record includes a copy of a recent leasehold mortgage protection agreement used to finance a hangar purchased at the Airport. The agreement is dated May 22, 2009. [FAA Exhibit 1, Item 14, exhibit 1.]

On the subject of other leases being recorded, City Counsel wrote:

> *I am aware that a City staff member did not understand the City's no recording policy and was allowing lease agreements to be recorded. Because the recorded documents were not being returned to the City, the error was not discovered until recently.* [FAA Exhibit 1, Item 7, exhibit 15(b), page 3.]

In response to Complainant's inquiry to the FAA prior to filing this Complaint, the FAA Acting Associate Administrator for Airports (Associate Administrator) advised Complainant in a May 28, 2009, letter that recorded leases may not be consistent with the Airport's Federal obligations under Grant Assurance 5, *Preserving Rights and Powers.* Grant Assurance 5 states:

> *[An airport sponsor] will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application* [...] *without approval by the Secretary.*

The Associate Administrator wrote to Complainant:

> [...]*ADO staff aptly deferred to the judgment of the city of Redmond about whether recording leases, as a matter of state and local real property law, had the potential to result in encumbrances that would be inconsistent with their obligations under Grant Assurance No. 5. If recording a lease results in a claim by a tenant asserting an interest in the airport land, FAA would probably require the airport sponsor to remove the encumbrance. Encumbrances are not prohibited as a matter of Federal law since they can be approved by FAA."* [FAA Exhibit 1, Item 7, exhibit 15(a), page 1.]

The Associate Administrator determined – based upon the information provided by the City and Complainant – the problem could be attributed to a misunderstanding. The Associate Administrator recommended Complainant:

- Show Complainant's lender the correspondence from the City; and
- Have the lender contact the City to discuss the specific terms of the lender protection clause in the lease. [FAA Exhibit 1, Item 7, exhibit 15(a), page 2.]

(c) Lease Termination

On July 1, 2009, the Respondent terminated Complainant's Desert Wings Jet Center lease for nonpayment of rent. [FAA Exhibit 1, Item 7, exhibit 8.] Complainant admits it did not pay rent on this lease because the lease was "incomplete and useless." Complainant states it could not use the property. [FAA Exhibit 1, Item 3, pages 8 and 18.]

Complainant alleges it has incurred $16,000,000 in damages as a result of the Respondent's actions. Complainant estimates it has lost $56,000,000 over the term of the lease. [FAA Exhibit 1, Item 3, page 60.]

B. Procedural History

On July 13, 2009, Complainant's formal complaint was filed. [FAA Exhibit 1, Item 3.]

On July 24, 2009, FAA issued Docket Notice for this case as FAA Docket No 16-09-07. [FAA Exhibit 1, Item 8.]

On August 18, 2009, Respondent's Answer was filed. [FAA Exhibit 1, Item 7.]

On October 2, 2009, Complainant filed its Reply. [FAA Exhibit 1, Item 11.]

On October 15, 2009, Respondent filed its Rebuttal. [FAA Exhibit 1, Item 12.]

On February 26, 2010, FAA issued Request for Additional Information and Notice of Extension of Time. [FAA Exhibit 1, Item 13.]

On March 24, 2010, Respondent submitted its Response to FAA Request for Additional Information. [FAA Exhibit 1, Item 14.]

On April 14, 2010, Complainant submitted its Response to FAA Request for Additional Information. [FAA Exhibit 1, Item 15.]

On November 10, 2010, the FAA issued the Director's Determination. [FAA Exhibit 1, Item 19.]

The Complainant appealed the Director's Determination without including a date.[12] [FAA Exhibit 1, Item 20A.]

On April 1, 2011, the Respondent submitted its Reply to the Appeal. [FAA Exhibit 1, Item 21.]

On June 3, 2011, the FAA issued a Notice of Extension of Time to September 7, 2011. [FAA Exhibit 1, Item 22.]

On September 28, 2011, the FAA issued a Notice of Extension of Time to November 18, 2011. [FAA Exhibit 1, Item 23.]

On November 23, 2011, the FAA issued a Notice of Extension of Time to January 31, 2012. [FAA Exhibit 1, Item 24.]

On February 18, 2012, the FAA issued a Notice of Extension of Time to March 27, 2012. [FAA Exhibit 1, Item 25.]

[12] The envelope was postmarked February 26, 2011.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

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

A. FAA Enforcement Responsibilities

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

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

FAA Order 5190.6B, *FAA Airport Compliance Manual,* September 30, 2009, (hereinafter Order) sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the

conveyance of Federal property for airport purposes. The Order, *inter alia,* analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable Federal obligation to be grounds for dismissal of such allegations. [*See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, page 5, (August 30, 2001) (Final Decision and Order) (Wilson FAD).]

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), codified at title 49 U.S.C., § 47101, et seq., the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C., § 47101, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included in every Airport Improvement Program (AIP) grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal Government.

Three grant assurances are relevant to the Complainant's appeal: Grant Assurance 19, *Operation and Maintenance*; Grant Assurance 22, *Economic Nondiscrimination;* and Grant Assurance 23, *Exclusive Rights*.

1. Grant Assurance 19, Operation and Maintenance

Grant Assurance 19, *Operation and Maintenance,* requires, in pertinent part,

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

2. Grant Assurance 22, Economic Nondiscrimination

Grant Assurance 22, *Economic Nondiscrimination*, requires the owner of any airport developed with federal grant assistance to operate the airport for the use and benefit of the

public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Grant Assurance 22 deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

> [The airport owner or sponsor] *will make the airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.* [Assurance 22(a).]
>
> *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-based operators making the same or similar uses of such airport and utilizing the same or similar facilities.* [Assurance 22(c).]
>
> [The airport owner or sponsor] *may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.* [Assurance 22(h).]
>
> [The airport owner or sponsor] *may[...]limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.* [Assurance 22(i).]

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 that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [*See* FAA Order 5190.6B, § 14.3.]

FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor 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* FAA Order 5190.6B, Chapter 9.]

The owner of an airport developed with Federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activities on reasonable terms and without unjust discrimination. [*See* FAA Order 5190.6B, § 9.1(a).]

3. Grant Assurances 23, Exclusive Rights

Title 49 U.S.C., § 40103(e), provides that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended."

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

Grant Assurance 23, *Exclusive Rights*, implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport:

> [...]*will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under title 49, United States Code.*

An exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right. [*See* FAA Advisory Circular 5190-6 *Exclusive Rights at Federally Obligated Airports*, January 4, 2007.]

Therefore, it is FAA's policy that the sponsor of a federally obligated airport will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public and will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities. FAA Order 5190.6B clarifies the applicability, extent, and duration of the prohibition against exclusive rights under 49 U.S.C., § 40103(e) with regard to airports developed with FAA-administered grant assistance and Federal property conveyances.

The exclusive rights prohibition remains in effect as long as the airport is operated as an airport. The FAA takes the position that the grant of an exclusive right for the conduct of any aeronautical activity on such airports is regarded as contrary to the requirements of the applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means.

FAA's policy on exclusive rights broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have upheld FAA findings of the grant of an exclusive right where a

significant burden has been placed on one competitor that is not placed on another. [*See* e.g. City of Pompano Beach v FAA, 774 F.2d 1529 (11th Cir. 1985).]

FAA Order 5190.6B provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* FAA Order 5190.6B, Chapter 8.]

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

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

> If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR § 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." Title 5 U.S.C., § 556(d). [*See* also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F.3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

2. Right to Appeal the Director's Determination

A party to this decision 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 § 16.33.]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR § 16.23(b)(3).] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. Under part16, complainant is 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 administrative agency practice for contestants in an adversarial proceeding before the agency to develop fully all issues there. The Court has 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 U.S. 103, 108-110 (2000) citing Hormel v. Helvering, 312 U.S. 552 (1941) and US v. LA Tucker Truck Lines, 344 U.S. 33 (1952).]

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR § 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 FAD, page 9 and 14 CFR, § 16.227.]

VI. ANALYSIS AND DISCUSSION

Upon consideration of the Complaint, the Director of the Office of Airport Compliance and Management Analysis[13] determined the City is not currently in violation of its Federal obligations under Grant Assurances 19, *Operation and Maintenance*; 22, *Economic Nondiscrimination;* and 23, *Exclusive Rights*.

In addition, the Director dismissed Complainant's other allegations regarding Grant Assurances 25, *Airport Revenues*; 29, *Airport Layout Plan; 30, Civil Rights*; and a state law issue. [FAA Exhibit 1, Item 19, pages 15-18.] On appeal, the Complainant does not challenge these issues.

On appeal from a Director's Determination, the Complainant must demonstrate that the Director erred by (a) making findings of fact that were not supported by a preponderance of

[13] Previously designated as Director of Airport Compliance and Field Operations. [*See* footnote #1.]

reliable, probative, and substantial evidence, or (b) by making conclusions of law that were not in accordance with applicable law, precedent, and public policy.[14]

The Complainant makes numerous allegations regarding the Director's findings, but does not refer to any evidentiary support in the record or to prior argument. Nor does the Complainant specify where in the Director's Determination the alleged errors are noted. The Associate Administrator is not required to construe such comments as an appealable issue. Nonetheless, we attempt to be as comprehensive in our review as possible to maintain fairness and accuracy.

This case is about the Complainant's failure to initiate construction of aeronautical facilities at the Airport – despite holding three consecutive leases for development – and the allegation that the Respondent obstructed such development by its actions in violation of its grant assurances. As such, this case is about civil engineering, design standards, zoning requirements, construction document review, and major capital improvements on Airport property. With the exception of meeting fixed-base operator standards, the Complainant did not complain about aeronautical practices, standards, or requirements.[15] The Complainant does not raise this issue regarding fixed-base operator standards on Appeal.

This Appeal is a matter of determining whether the Director erred in finding the actions of the Respondent were not sufficiently confounding, deceptive, or difficult as to erect an unreasonable barrier to aeronautical development for the Complainant. This Appeal is also a matter of determining whether the Director erred in finding the Respondent has not treated the Complainant in a manner that is economically unjustly discriminatory. The Appeal also touches on whether the Director erred in finding the Respondent has adequately operated and maintained the Airport.

A sponsor's Federal obligation is to institute policies and programs to protect the public's interest in civil aviation.[16] A proponent of a business at an airport has a responsibility to pursue its proposed development, overcoming the inherent challenges associated with design and construction of complex and expensive infrastructure. These challenges include details of location, site selection and mitigation, financing, zoning, codes and standards. The grant assurances allow an airport sponsor to expect that a proponent will pursue its development and overcome some reasonable difficulties and act proactively to clear up questions or concerns. A complainant failing to act toward its own contractual obligation and then alleging that a respondent failed to make up for this failure requires that the complainant show overt manipulation, deception, or persistent unresponsiveness. The grant assurances do

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[14] *See* e.g. 41 North 73 West dba AVITAT v. Westchester Co., NY, FAA Docket No. 16-07-13, pages 21-22 (September 18, 2009) (Final Decision and Order) (AVITAT FAD).

[15] Complainant alleged it was required to meet standards for operating as a fixed-base operation on the Airport that two other fixed-base operators were not required to meet.

[16] In Penobscot Air Service v. Knox County, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination) (Penobscot DD), the FAA stated: *"The purpose of the grant assurances is to protect the public interest in the operation of federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws*[...]" [Penobscot DD at page 24; decision upheld on appeal, *see* Penobscot Air Service v. FAA, 164 F3d 713 (1st Cir., 1999).]

not require that a sponsor actively compensate for difficulties that any proposed aeronautical service provider may experience in developing major capital improvements; nor do the grant assurances require that a sponsor provide assistance, or protect the interests of a leaseholder or applicant for a lease.[17] Agreements between the sponsor and its tenants or airport users may reasonably require the sponsor to provide assistance as a matter of negotiated terms.

As in all part16 deliberations, the burden of proof is on the Complainant to show a violation of the grant assurances. As such, when the Complainant alleges that the sponsor unreasonably denied access, the Complainant must show that the sponsor actually denied access, unreasonably. It is not enough to show that the Complainant's preferred development did not occur and that the Respondent was somewhat not helpful or was difficult or inconsistent. When a Complainant alleges unjust economic discrimination, the Complainant must show that the Respondent granted some preferential treatment to a similarly situated entity, that the Complainant also requested that same treatment, and the Respondent unreasonably denied that treatment to the Complainant.

We have identified the following issues for review on this appeal:

Issue A: Determine whether the Director erred in characterizing Complainant's leases as having been terminated for cause, thereby leading to incorrect assumptions and conclusions influencing the Director's decision regarding Complainant's access to the Airport under Grant Assurance 22, *Economic Nondiscrimination.*

Issue B: Determine whether the Director erred in concluding Respondent is not currently in violation of Grant Assurance 19, *Operation and Maintenance*, by failing to correct waste water and drainage problems on Complainant's leasehold, as well as failing to define Complainant's leasehold boundaries properly and permitting a competitor unauthorized trespass and trenching of Complainant's leasehold.

Issue C: Determine whether the Director erred in concluding the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by using unreasonable standards and changing requirement to effectively deny access for Complainant to expand its leasehold and become a fixed-base operator.

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[17] In ALCA et al v. Miami-Dade County, Fla., FAA Docket No. 16-08-05 (August 31, 2010) (Director's Determination) (ALCA), the Director cited precedent for the concept that a sponsor's grant assurances do not require it to assist an aeronautical proponent, stating, "Respondent objected to Complainants' assertions that it is incumbent upon Respondent [...] to facilitate Complainants' requests and business plans. Specifically, Respondent states: '*Complainants, as potential users of the airport, have the obligation to approach the Respondent or any of the current developers to discuss their needs so that the Respondent and the developers can respond.*' Respondent's position is tenable in this instance. In Atlantic Helicopters Inc./Chesapeake Bay Helicopters v. Monroe County, Fla., FAA Docket No. 16-07-12 (September 11, 2008) (Director's Determination), 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]*" [ALCA, pages 35-36.]

Issue D: Determine whether the Director erred in concluding the Respondent is not currently in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to another fixed-base operator while preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of unreasonable standards and changing requirements.

Procedural Issues

In addition, the Complainant raises procedural complaints against the Director, including (1) alleged ex parte communication, (2) missed deadlines, (3) failure to provide an independent investigation, (4) failure to provide a hearing, and (5) failure to provide FAA Form 5010 and the Respondent's grant history (Items 1 and 2 in the Index of Administrative Record). Complainant also (6) requests an audit of the Respondent, and (7) makes reference to a Freedom of Information Act (FOIA) request. [FAA Exhibit 1, Item 20A, pages 5-6.]

(1) Ex parte Communication: On appeal, Complainant alleges ex parte communication between the Director and the Respondent, stating, "Information that has been added to the determination does not readily appear in the response or rebuttal from the respondent. Conversations that may have occurred are clearly not allowed between the FAA and respondent." [FAA Exhibit 1, Item 20A, page 5.] As this Complaint has not been notified for a hearing, the ex parte communication rules in 14 CFR 16.303(a) do not apply. *See* 14 C.F.R. § 16.303(a) and Town of Fairview v. City of McKinney, FAA Docket No. 16-99-04, page 16, n.3 (July 26, 2000) (Director's Determination on Remand). *See also* Platinum Aviation and Platinum Jet Center BMI v Bloomington-Normal Airport Authority, Illinois, FAA Docket No. 16-06-09, pages 41-42 (November 28, 2007) (Final Agency Decision), stating that the FAA's part16 investigation may include the pleadings "supplemented by any informal investigation the FAA considers necessary and by additional information furnished by the parties at FAA request." Because of the contractual relationship between the FAA and the airport sponsor, the FAA may contact the sponsor at any time to discuss sponsorship issues, subject to 14 C.F.R. part16, subpart I.

In any event, the Associate Administrator finds no evidence of communication between the FAA and the Respondent that is not part of the record. Complainant does not identify the specific information it is referencing. The Associate Administrator notes an index reference to email documenting the FAA investigator's telephone conversation with a representative of the Oregon Bankers Association, dated June 15 and 17, 2010. [*See* FAA Exhibit 1, Item 16.] This is not ex parte communication; it is information gathering documented in the record. *See* Platinum Aviation above. The Associate Administrator also notes correspondence between the FAA and the Respondent that occurred on April 13, 2009, prior to the part16 Complaint being docketed on July 13, 2009. [*See* FAA Exhibit 1, Item 7, exhibits 15(a) and 15(b); and Item 3.] This could not be construed as ex parte communication since it occurred prior to the part16 Complaint. The Respondent confirms, "At no point have any City of Redmond staff or representatives had discussions with the FAA on the issues raised in this complaint." [FAA Exhibit 1, Item 21, page 7.]

(2) Missed Deadlines: On appeal, Complainant argues the part16 timelines were not followed and extensions were not done in a formal written format. The Associate Administrator concurs that the determination took longer to complete than the prescribed 120-days following the final submission of pleadings. Extensions are often necessary to ensure the Director has sufficient time to conduct a careful review of the record. In this case, additional information was requested from the parties February 26, 2010. [*See* FAA Exhibit 1, Item 13.] The requested additional information was received March 24, 2010, and April 14, 2010. [*See* FAA Exhibit 1, Item 14 and 15.] The Director's Determination was issued seven months later on November 10, 2010. [*See* FAA Exhibit 1, Item 19.] The Associate Administrator notes formal written extensions were issued to the parties on June 4, 2010, extending the deadline to August 31, 2010, [*see* FAA Exhibit 1, Item 17] and again on August 31, 2010, extending the deadline to October 8, 2010 [*see* FAA Exhibit 1, Item 18]. There is no record of a written extension extending the deadline from October 8, 2010, until November 10, 2010, when the Director's Determination was issued. These are procedural issues, not errors in findings of fact or conclusions of law. These procedural issues have no bearing on the outcome of the decision.

(3) Independent Investigation: On appeal, Complainant argues the Director's Determination "appears to have no investigation or discussion with anyone outside the respondent and complainant to verify information." [FAA Exhibit 1, Item 20A, page 5.]

The FAA makes conclusions of fact and law regarding the Complainant's allegations. Underlying these conclusions is the basic requirement of Part16 that the Complainant show with evidence that the airport owner or sponsor is violating its commitments to the Federal Government to serve the interests of the public by failing to adhere to its grant assurances. [*See* Part16 § 16.23 and 16.29.]

It is the Complainant's responsibility to substantiate that the airport owner or sponsor has unreasonably denied access, unjustly discriminated against him or her, granted an exclusive right, or violated some other applicable grant assurance. The FAA *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, 14 CFR § 16.23(3), provides that complaints filed under this subpart shall "Provide a concise but complete statement of the facts relied upon to substantiate each allegation." Additionally, 14 CFR § 16.29 provides that "In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance." Specifically, a claim of unjust discrimination must include a showing that similarly situated users have been treated dissimilarly without adequate justification.

There is no obligation on the part of the Director or the Associate Administrator to conduct additional research to support either party's position in a part16 action. Nonetheless, in this case, the Director reached out to the parties to obtain additional relevant information. [*See* FAA Exhibit 1, Item 13.] In addition, the Director contacted the Oregon Bankers Association to obtain an understanding of banking practices in Oregon for secured financing. [*See* FAA Exhibit 1, Item 16.] On appeal, Complainant objects that its own bankers were not

contacted. [FAA Exhibit 1, Item 20A, page 6.] The Director's decision to request information from an independent source is both reasonable and prudent.

(4) Hearing: On appeal, Complainant objects that it was not provided an opportunity for a hearing with all sides present to further investigate the allegations and substantiate the exhibits. [FAA Exhibit 1, Item 20A, page 5.] As noted above, it is the responsibility of the parties to present all evidence to be relied upon with their pleadings. The FAA offers a hearing to Respondents found in noncompliance with their Federal obligations only when the FAA contemplates withholding funds. Hearings are not offered to Complainants. [*See* 14 CFR § 16.33 subpart F.]

(5) FAA Form 5010 and Grant History: On appeal, Complainant objects to the fact that the FAA Form 5010 and grant history (Items 1 and 2 in the Index of Administrative Record) were not included in documents mailed to the Complainant. [FAA Exhibit 1, Item 20A, page 6.]

FAA Form 5010 is the Airport Master Record. It provides general information about the airport, including the services and facilities available, runway information, the number of based aircraft, and the date of the last inspection, among other things. The FAA Form 5010 is always reviewed in part16 decisions, but is typically not part of the record given to either the complainant(s) or respondent(s) and is not served with the Director's Determination or the Final Agency Decision. FAA Form 5010 is a public document, however, and either party may choose to review it.[18]

Likewise, an airport's grant history is always reviewed in Part16 decisions, but is typically not part of the record given to either the complainant(s) or respondent(s) and is not served with the Director's Determination or the Final Agency Decision. The grant history is a public document, however, and either party may choose to review it on request. The FAA Web site provides instructions for obtaining copies of grant histories.[19] Table 1, *Obtaining Grant Histories*, below, shows the phone number that applies in this case.

Table 1: Obtaining Grant Histories

To obtain AIP grant histories for particular facilities, please contact the appropriate Regional Airports Division at the numbers listed below.

Region	States in Region	Phone Number
Northwest Mountain	CO, ID, MT, OR, UT, WA, WY	(425) 227-2610

[18] The Web site to access FAA Form 5010 generally is: http://www.gcr1.com/5010web/
The Web site to access FAA Form 5010 for Redmond Roberts Field is:
http://www.gcr1.com/5010Web/airport.cfm?Site=RDM

[19] http://www.faa.gov/airports/aip/grant_histories/#history

Complainant alleges on appeal that failure to provide these two documents to the Complainant may indicate possible ex parte conversation between the Respondent and the FAA that excluded the Complainant. [FAA Exhibit 1, Item 20A, page 6.] These are public documents; accessing them does not involve conversation with either party.

(6) Audit Request: On appeal, Complainant objects that its request for the FAA to conduct an audit of the books of the City of Redmond was not completed. [FAA Exhibit 1, Item 20A, page 5.] Such an audit is not required under a Part16 action. It was not warranted here. As the recipient of federal funding, the City of Redmond is subject to an annual single audit. The Respondent points out that the City has a full audit of all departments, including the airport each year. [FAA Exhibit 1, Item 21, page 7.] These records are available to the Complainant.[20]

(7) Freedom of Information Act: On appeal, Complainant makes several references to Freedom of Information Act (FOIA) requests involving this part16 matter, including:

- Notes from all conversations with the Respondent.
- Evidence that information in part16 pleadings was corroborated by sources other than the Complainant and Respondent.
- Evidence that an audit of the City of Redmond was conducted.

[FAA Exhibit 1, Item 20A, page 5.]

Submitting a formal FOIA request is not done through the Part16 appeal process. We are not aware that the FAA has received a proper FOIA request with regard to the matters listed above. Nonetheless, the Associate Administrator can confirm (a) there are no notes from ex parte conversations with the Respondent since these did not occur; (b) there is no evidence that the Part16 pleadings were corroborated by sources other than the Complainant and Respondent because this did not occur other than conversations with the Oregon Bankers Association, which is documented in the record [*see* FAA Exhibit 1, Item 16]; and (c) there is no evidence that an audit of the City of Redmond was conducted by the FAA as part of this proceeding because it was not done. If Complainant chooses to do so, it should contact the City of Redmond to obtain records from the Single Audit conducted annually.

The seven allegations raised above are procedural matters; they do not represent errors in findings of fact or conclusions of law, nor does the Complainant allege these are errors in findings of fact or conclusions of law. As such, they have no bearing on the outcome of the Director's Determination or this Final Agency Decision.

The following four issues are reviewed to determine whether the Director erred in findings of fact or conclusions of law.

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[20] Respondent states, "Complainant has the right under both state and Federal law to request public records from the City, subject to payment for the cost associate with gathering those records." [FAA Exhibit 1, Item 21, page 7.]

Issue A: Determine whether the Director erred in characterizing Complainant's leases as having been terminated for cause, thereby leading to incorrect assumptions and conclusions influencing the Director's decision regarding Complainant's access to the Airport under Grant Assurance 22, *Economic Nondiscrimination.*

Complainant argues on appeal that the Director incorrectly described the situation regarding Complainant's three leases. Complainant acknowledges that the final lease[21] was terminated for cause for nonpayment of rent, but stresses the lease was "useless" since it could not be recorded. The Complainant argues the other two leases[22] were not terminated for any type of cause. Complainant argues the Respondent twisted and distorted the facts to "paint the Complainant as derelict in their lease requirements and unable to comply with the rules." Complainant alleges these assumptions were accepted by the Director, leading to arbitrary and capricious assumptions made in the Director's Determination. [FAA Exhibit 1, Item 20A, page 1.]

The Complainant does not point to any specific finding of fact, or even any specific conclusion or page of the Director's Determination that contains a finding by the Director constituting prejudicial error with regard to the characterization of the prior two leases held by the Complainant. In examining the Complainant's prior two leases at the Airport, the Director stated:

> *2005 Wings of Cascade Lease*
>
> *As detailed in the background, Complainant originally signed a lease with Respondent for a twenty (20) year term on July 26, 2005. The lease required Complainant to substantially complete the improvements within a one (1) year time frame or face lease termination. According to Respondent, the one-year construction requirement is a standard provision in all Airport leases for unimproved property. This lease was ultimately terminated by Respondent at the end of 2006. Complainant makes no allegations about this lease in the complaint other than to say Complainant has been trying since 2000, to build leasehold improvements on the Airport.*
>
> *2007 Desert Wings Jet Center Lease*
>
> *As detailed in the background, Complainant signed a twenty (20) year lease agreement with the Respondent for* [a] *152,899 square foot parcel to operate a fixed-base operation. The lease included two five-(5) year renewal options and the requirement for substantial completion of tenant improvements within a one (1) year time frame or face lease termination.*
>
> *On January 10, 2008, Complainant, on behalf of the Desert Wings Jet Center, filed a Breach of Contract action against the City of Redmond in the Circuit Court*

[21] Complainant's 2009 Desert Wings Jet Center Lease (2009 Lease).

[22] Complainant's 2005 Wings of Cascade Lease and Complainant's 2007 Desert Wings Jet Center Lease.

of the State of Oregon. Complainant charged the City breached the lease by failing to deliver the leased property and failing to defend Complainant's right to quiet enjoyment of the property.

Complainant and Respondent reached an out-of-court settlement on the 2007 Desert Wings Jet Center lease breach-of-contract dispute, and both parties signed a new lease for Desert Wings Jet Center effective April 1, 2009.

[FAA Exhibit 1, Item 19, page 19.]

The Associate Administrator's review of the Director's Determination fails to discover a prejudicial error, or even the words "for cause." The Director made no findings with regard to the disposition of the earlier leases. Since the Complaint was filed after the parties settled disagreements over the prior lease terms and after the Complainant had entered into the third 2009 Lease on April 1, 2009,[23] the Director's obligation to review past leases (2005 and 2007) was limited to background.[24] Any issues remaining from the two earlier leases were presumably resolved between the parties in negotiating the third lease prior to filing the Complaint.

For its part, the Respondent states, "Complainant's contention that the prior leases were not terminated for cause is simply incorrect." [FAA Exhibit 1, Item 21, page 2.] Respondent states all three leases "terminated because of Complainant's failure to perform a material term of the lease." [FAA Exhibit 1, Item 21, pages 2-3.]

We note here that the Complainant's allegation of Director error with regard to prior leases fails to state a claim of harm against Complainant's case. Regardless of the disposition of the first two leases, the Respondent entered into subsequent leases with the Complainant, thus granting access. [FAA Exhibit 1, Item 7, exhibits 3 and 7.] In addition, we note the Respondent granted at least one extension of time to the Complainant to start construction on the Wings of the Cascades building [*see* FAA Exhibit 1, Item 7, exhibit 2] and offered to negotiate a new lease on December 18, 2007, after Complainant did not meet the 2007 construction deadline requirements. [FAA Exhibit 1, Item 7, exhibit 4.] The record contains no evidence or argument that the Complainant did begin construction of its proposed development. In fact, the record indicates that the Complainant did not construct any permanent improvement on any of its three leaseholds.

The question of whether there is default or cause of action under the specific terms of a lease agreement is the purview of state courts, not the FAA. In fact, the parties have previously availed themselves of state court assistance. [*See* FAA Exhibit 1, Item 4, exhibit 8.] The question for the FAA in the Complaint was whether the Complainant was unreasonably denied access to the Airport in violation of Grant Assurance 22, *Economic Nondiscrimination.*

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[23] The Complaint was filed in July 2009. [*See* FAA Exhibit 1, Item 3.]

[24] The FAA focuses on current compliance. The FAA will consider "the successful action by the airport to cure any alleged or potential past violation of applicable Federal obligations" to be grounds for dismissal of such allegations. [Wilson FAD, page 5.]

The Associate Administrator finds Complainant was not unjustly denied access. Moreover, Complainant acknowledges "There was always a lease in effect and no lapse between them." [FAA Exhibit 1, Item 20A, page 1.] The pattern of Respondent awarding subsequent leases provides *prima facie* evidence that the Respondent did not deny access to the Complainant. The record also shows the Respondent declined to enter into a fourth lease agreement for development only after the Complainant failed to pay its rent on the third 2009 Desert Wings Jet Center Lease. [FAA Exhibit 1, Item 7, exhibit 8.]

Associate Administrator's Conclusion on Issue A

The Associate Administrator finds the Director did not err in the characterization of Complainant's leases in the Director's Determination.

> **Issue B:** Determine whether the Director erred in concluding Respondent is not currently in violation of Grant Assurance 19, *Operation and Maintenance*, by failing to correct waste water and drainage problems on Complainant's leasehold, as well as failing to define Complainant's leasehold boundaries properly and permitting a competitor unauthorized trespass and trenching of Complainant's leasehold.

The Complainant does not make clear allegations of Director error with regard to the Director's findings under Grant Assurance 19, *Operation and Maintenance*, in the Appeal. Rather, Complainant states, "The capricious and arbitrary determination by the Director can further be seen in the trenching and trespassing conclusion. [...] the FAA has simply taken the word of the respondent as true and correct. However, there are exhibits and eyewitnesses that prove the contrary." [FAA Exhibit 1, Item 20A, page 4.]

Complainant does not identify the exhibits or sworn testimony that would support the allegations or Director error.

Even though the Complainant does not clearly challenge the Director's findings under Grant Assurance 19, *Operation and Maintenance*, we reviewed the Director's finding to provide a comprehensive review on (1) waste water and drainage; and (2) undefined lease boundaries, trespass, and trenching.

(1) Waste Water and Drainage

The Director found:

> *Respondent does not have an obligation under Grant Assurance 19 to conform a tenant's leasehold property to the tenant's specifications. In addition, the obligations under Grant Assurance 19 do not extend to leasehold property that is not common-use aviation property. As such, the Director finds Respondent is not currently in violation of Grant Assurance 19, Operation and Maintenance, as a result of failing to correct a flooding and draining problem on Complainant's leasehold property.* [FAA Exhibit 1, Item 19, page 21.]

We note here that the drainage condition, if not ideal, does not degrade the utility of aeronautical improvements, such as taxiways, aprons, runways, or lighting, etc. The facts, as presented by the Complainant, represent an isolated incident of flooding in a specific area, not a widespread disregard for preventable flooding conditions on the Airport. [FAA Exhibit 1, Item 3, pages 20-21 and Item 4, exhibit 36.] Furthermore, the Respondent has taken action to mitigate the impact of runoff. [FAA Exhibit 1, Item 12, exhibit 1, page 2.]

FAA Order 5190.6B outlines the standard for compliance. It is the FAA's position that the airport sponsor meets its commitments when: (a) the Federal obligations are fully understood, (b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor's commitments, (c) the sponsor satisfactorily demonstrates that such a program is being carried out; and (d) past compliance issues have been addressed. [*See* FAA Order 5190.6B § 2.8.b.]

The record demonstrates the Respondent has increased its requirements for building and site reviews. By applying more rigor to building and site reviews [FAA Exhibit 1, Item 21, page 5 and Item 12, exhibits 2 & 3] and requiring the neighboring leaseholder to address its runoff issues [FAA Exhibit 1, Item 12, exhibit 1, page 2], the Respondent demonstrates its compliance with Grant Assurance 19, *Operation and Maintenance*. The Complainant acknowledges that this condition was originally caused no later than 2003. [FAA Exhibit 1, Item 3, page 21.] While correcting the problem may also have created more stringent requirements for the Complainant to meet, the FAA acknowledges that no grant assurance requires an airport sponsor to perpetuate past poor practices in order to treat subsequent prospective tenants the same.[25] The disparity of treatment resulting from developing more stringent requirements is discussed under Issue C, below, since the increase in requirements is most germane to an allegation under Grant Assurance 22, *Economic Nondiscrimination*.

(2) Undefined Lease Boundaries, Trespass, and Trenching

The Director found:

> *The Director finds Respondent took appropriate action to correct a possible contractual deficiency resulting from another tenant's misappropriation of, and trespass on, Complainant's leasehold property. First, the Respondent compensated the Complainant by offering comparable space for the space appropriated by Redmond Air for its hangar. Complainant accepted this compensating action. Second, when Respondent became aware that Redmond Air was trespassing on Complainant's leasehold, Respondent instructed Redmond Air to cease trespassing and cease trenching.* [FAA Exhibit 1, Item 19, page 22.]

The Complainant does not place events in a timeline. So, the Director and Associate Administrator must reconstruct, as best we can, the sequence of events. As such, it appears here that the Complainant refers to events in 2003, before the first Wings of Cascades Lease in 2005. The Complaint states, "Redmond Air applied for a building permit on July 11,

[25] *See* Rick Aviation v Peninsula Airport Commission, FAA Docket No. 16-05-08, page 2 (November 6, 2007) (Final Agency Decision) (Rick FAD).

2003." [FAA Exhibit 1, Item 3, page 22.] In any case, these activities precede the Complainant's 2007 and 2009 Leases.

It appears from the record that the construction of a hangar by airport tenant Redmond Air exacerbated a water runoff problem and encroached on property not leased by Redmond Air, but also not leased by the Complainant at that time. While, the Respondent could have done a better job in monitoring the activities of Redmond Air, this lack of attention does not rise to the level of a violation of Grant Assurance 19, *Operation and Maintenance*. Grant Assurance 19 does not protect the rights and interests of any one leaseholder or potential leaseholder. Rather, it speaks to a pattern of action that fails to keep the airport operating as an airport. In any case, the reported events have passed; the Respondent is implementing site review procedures and requirements, which the Complainant objects to as well. [FAA Exhibit 1, Item 12, exhibits 2 & 3.] FAA encourages the Respondent to continue instituting programs to reasonably protect airport property from damage, including requiring appropriate site and design reviews.

The Complainant attempts to demonstrate a continuing pattern of lack of maintenance and violation of grant assurance 19 by alleging the Respondent allowed trespassing and trenching on Complainant's property by Redmond Air and/or its agents, stating:

> *From December 19, 2007 until January 9, 200[8] an attempt was made by Redmond Air*[...] *to trespass on my property, even digging under my fence, to hook up to gas line*[...] *From the attached emails, it appears that approval was given by Ms. Novick to dig the invasive trench*[...][26] [FAA Exhibit 1, Item 3, page 27.]

However, the Complainant provides no supporting email evidence. Rather, the email messages are typed into the Complainant's Reply. Even so, the correspondence does not support the Complainant's conclusion. In fact, it more nearly supports the position of the Respondent, which states in rebuttal:

> *At no point [in the emails] does the airport manager authorize Redmond Air, LLC to enter into the property leased by Complainant. Rather, both communications are clear that the work is to be performed in either the existing utility corridor or on Redmond Air, LLC's leased property* [...] *Moreover, the subsequent email included by Complainant demonstrate*[s] *that airport staff acted promptly to terminate the trespass.* [FAA Exhibit 1, Item 12, pages 2-3.]

The Respondent includes an affidavit from an agent of Redmond Air, LLC, supporting these conclusions. [FAA Exhibit 1, Item 12, exhibit 1.] The Complainant's allegations are inapposite and/or unsupported or contradicted by evidence.

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[26] From subsequent argument, the Associate Administrator presumes Complainant means January 9, 2008, not 2009. The Complainant does not include references to such emails. We cannot find such emails in the exhibits to the Complaint. Complainant typed emails into its Reply. Ms. Novick is the Airport Manager, about whom much of the Complainant's allegations surround. [FAA Exhibit 1, Item 11, pages 11-13.]

Complainant argues on appeal the "FAA has simply taken the word of the respondent as true and correct [...] there are exhibits and eyewitnesses that prove the contrary." [FAA Exhibit 1, Item 20A, page 4.] Yet the Complainant points to no exhibits or sworn testimony in the Appeal.

Lacking evidence to suggest the Respondent is not maintaining the Airport in a safe and serviceable condition, which is the primary focus of Grant Assurance 19, *Operation and Maintenance*, the Associate Administrator, finds the Director did not err in concluding Respondent is not currently in violation of grant assurance 19.

Complainant's allegation that the Respondent failed to protect the boundaries of Complainant's leasehold is addressed under Issue C, below, since that argument is more germane under Grant Assurance 22, *Economic Nondiscrimination.*

Associate Administrator's Conclusion on Issue B

The Associate Administrator finds the Director did not err in concluding Respondent is not currently in violation of Grant Assurance 19, *Operation and Maintenance*, by failing to correct waste water and drainage problems on Complainant's leasehold, as well as failing to define Complainant's leasehold boundaries properly and permitting a competitor unauthorized trespass and trenching of Complainant's leasehold.

Issue C: Determine whether the Director erred in concluding the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by using unreasonable standards and changing requirement to effectively deny access for Complainant to expand its leasehold and become a fixed-base operator.

The Complainant's allegations of a pattern of obstruction by the Respondent form the gravamen of the Complaint and the Appeal. In the Complaint, the Complainant had the burden to prove some pattern of action or inaction resulting in an unreasonable denial of access or unjust discrimination in violation of Grant Assurance 22, *Economic Nondiscrimination.*

Generally, the Complainant's Appeal addresses the Director's findings with regard to Grant Assurance 22, *Economic Nondiscrimination.* However, the Complainant does not allege specific errors by the Director and does not provide specific cites to the Determination. Rather, the Complainant submits a free-flowing discussion with citations only to two exhibits from the administrative record.[27] The Complainant's failure to cite to specific evidence that

[27] The first reference occurs when the Complainant states in the Appeal, "The only time a lease was terminated and not replaced by another was the last lease which became useless once the city refused to survey and honor the court agreed upon footprint, Exhibit D." [FAA Exhibit 1, Item 20A, page 2.] There is no Exhibit D to the Appeal. The Index of Administrative Record does not contain an "Exhibit D." However, from context we believe the Complainant may be referring to a sub-exhibit to the 2009 Lease. There are two exhibit D's. One is a sub-sub-exhibit providing a legal description of a sub-parcel of the Complainant's leasehold. Another "Exhibit D" to the 2009 Lease depicts the Leasehold's proposed tenant improvements. This Exhibit D is also attached but is a photocopy of an aerial photograph of the airport with block labels

clearly supports its points creates difficulty in reviewing this Appeal. Nonetheless, we have attempted to construe Complainant's allegations of error to the extent that we can do so fairly and accurately. We reviewed the Director's findings to provide a comprehensive review on Complainants allegations regarding: (1) Respondent's failure to identify and protect Complainant's leasehold; (2) lease rates and lease terms; (3) fixed-base operator services; (4) height requirements; (5) site plan review and substantial completion; and (6) recording the lease.

(1) Failure to Identify and Protect Leasehold

Director's Determination

With regard to leasehold boundaries, the Director stated:

> *The Director finds Respondent took appropriate action to correct a possible contractual deficiency resulting from another tenant's misappropriation of, and trespass on, Complainant's leasehold property. First, the Respondent compensated the Complainant by offering comparable space for the space appropriated by Redmond Air for its hangar. Complainant accepted this compensating action. Second, when Respondent became aware that Redmond Air was trespassing on Complainant's leasehold, Respondent instructed Redmond Air to cease trespassing and cease trenching.* [FAA Exhibit 1, Item 19, page 22.]

The Director is correct to note that these actions occurred before the Complainant's most recent lease, the 2009 Lease. The Director correctly applied the precedent that the FAA reviews current compliance only. [*See* e.g. Wilson FAD, page 5.]

The grant assurances do not require a sponsor to protect a tenant's leasehold. The leaseholder should protect its leasehold. The administrative record does not support the allegation that the sponsor damaged the Complainant's leasehold. If Redmond Air damaged the leasehold, the Complainant can take action against Redmond Air in a state court action.

Complainant states on appeal that required information for completion of the design was withheld by the Respondent in the following areas: (a) footprint, (b) flooding issues, (c) height requirements, taxiway requirements, and utility location, etc. [FAA Exhibit 1, Item

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showing the approximate position of Complainant's proposed buildings. It is not an engineered drawing. The Associate Administrator cannot discern any deficiency on the part of the Respondent with regard to a missing, or inadequate "Exhibit D." [FAA Exhibit 1, Item 7, exhibit 7, exhibits C(d) and D.]

The second reference occurs when the Complainant states in the Appeal, "This conspiracy is clearly shown in the emails from the airport manager to the city attorney and the assistant city manager provided as exhibits in the complaint5 [sic]." Exhibit 5 to the Complaint is not an exchange of emails. The Complainant inserts email text throughout and within its exhibits, including exhibits 3, 9, 12, 13, 18, 26, 29, 31, 33, 47 and 48, etc. The Associate Administrator cannot discern a conspiracy, or a violation of the Respondent's grant assurances from these exhibits. The Associate Administrator does note that Exhibit 3 includes discussion of the Complainant's business plan, including relationships with prospective customers, including Horizon. [FAA Exhibit 1, Item 4, exhibit 3, page 9.]

20A, page 3.] In addition, Complainant argues on appeal (d) Respondent did not comply with specific lease requirements.

(a) Leasehold Footprint

The Complainant appears to mix "leasehold footprint" allegations within this category, alleging on Appeal that the Respondent withheld information regarding the 2007 and 2009 Leases' footprint. [FAA Exhibit 1, Item 20A, page 3.] However, the Associate Administrator's review of the theses leases shows that the Respondent included legal descriptions that appear to completely describe the parcel under lease to the Complainant. The Respondent states:

> [...] *there were no additional documents that the City needed to provide for Complainant to move forward with the site and design review. Each lease was independently complete and clearly identified the leasehold footprint. Once signed, it was up to the Complainant to submit a site and design review application to the City of the proposed use. It was the Complainant's responsibility to determine the height of its proposed building, the footprint of its building, the location of its utilities and to resolve any flooding issues within its leasehold.* [FAA Exhibit 1, Item 21, page 3.]

We agree with the Respondent's characterization of the 2007 and 2009 Leases. We note that only the 2009 Lease is material here, since the parties had disposed of the 2007 Lease and replaced it with the 2009 Lease prior to the Complaint. The FAA reviews current compliance.

Finally, we agree with the Respondent's characterization of the Complainant's responsibilities. The Complainant is responsible for engineering and design of its proposed leasehold improvements and to submit these proposals to the Respondent. The Respondent can rightly request information about the use of a leasehold, financing, business plans, etc. The Complainant is responsible for preparing and submitting this information.

(b) Flooding Issue

The Complainant does not state how the Respondent deceived the Complainant, which information was withheld, or how such withholding amounted to a grant assurance violation. The Associate Administrator notes that common due diligence is the responsibility of the leaseholder. We cannot find a prejudicial error by the Director, nor find reliable, probative or substantial evidence to find a grant assurance violation.

(c) Height Requirements, Taxiway Requirements, Utility Location

Height requirements are discussed below under #4, Height Requirements, rather than here.

The Complainant provides no information or evidence to support an allegation that taxiway requirements and utility location information was withheld, thereby impacting the Complainant's ability to complete its proposed development. The Associate Administrator

cannot fairly construe an allegation of error from the Complainant's mere mention of withheld information on taxiway requirements and utility location.

The Director's conclusion is supported by a preponderance of reliable, probative, and substantial evidence, and made in accordance with applicable law, precedent, and public policy.

(d) Trespass and Trenching

The Complainant states on Appeal:

> *It can be argued that [Desert Wings Jet Center] has suffered* [...] *economic discrimination and economic harm [through] specific lease requirements that were not complied with by the city of Redmond, the respondent.*

Complainant then lists as one of the specific lease requirements not complied with by the Respondent as,

> *Allowing trenching and destruction of the property footprint by the competitor FBO Redmond Air.*
>
> [FAA Exhibit 1, Item 20A, page 4.]

Complainant provides email messages typed into the Complainant's Reply as supporting evidence. However, as discussed previously under Issue B, the evidence typed into the Complainant's Reply does not support a conclusion that the Respondent allowed trespass and trenching. In fact, the typed evidence more nearly supports the position of the Respondent. The Respondent rebuts:

> *At no point [in the emails] does the airport manager authorize Redmond Air, LLC to enter into the property leased by Complainant. Rather, both communications are clear that the work is to be performed in either the existing utility corridor or on Redmond Air, LLC's leased property*[...] *Moreover, the subsequent email included by Complainant demonstrate that airport staff acted promptly to terminate the trespass.* [FAA Exhibit 1, Item 12, page 2-3.]

Respondent includes an affidavit from an agent of Redmond Air, LLC, supporting these conclusions. [FAA Exhibit 1, Item 12, exhibit 1.]

The Associate Administrator concurs with the Director's finding of fact with regard to the trenching and cannot conclude from the evidence that the Respondent purposefully allowed trespassing or is responsible for the trenching that occurred on the leasehold. Furthermore, it is the responsibility of the leaseholder to protect its leasehold from trespass. The grant assurances do not require the Respondent to protect the leaseholder's interest.

(2) Lease Rates and Lease Terms

Director's Determination

The Director stated:

> *The Director finds Respondent is not currently in violation of its federal obligations as a result of revising its lease term policy even though that change in policy caused the Complainant's lease term to be for a shorter duration than a competitor's lease term entered into at an earlier date. The different years in which negotiations took place is a factor in determining that Complainant and competitor Redmond Air are not similarly situated for the purposes of negotiated lease rates and lease terms.* [FAA Exhibit 1, Item 19, page 25.]

On appeal, the Complainant mentions the lease term, citing a lease time inequity. The Complainant implies that the lease time inequity between the Complainant's 40-year term and a competitor's 53-year term is a grant assurance violation. [FAA Exhibit 1, Item 20A, page 4.]

The Associate Administrator concurs with the Director's conclusion. Complainant Desert Wings Jet Center is not similarly situated to airport tenant Redmond Air because Redmond Air (or its predecessor) had been operating on the Airport for some time before the Complainant's leases began. Redmond Air is a fixed-base operator. The Complainant has never operated at the Airport as a fixed-base operator. Furthermore, Redmond Air had an existing lease (prior to 2003) with an unlimited term. The Respondent took action to limit Redmond Air's lease term in 2003 to the settled upon 53 years, all occurring prior to the Complainant's three leases. [FAA Exhibit 1, Item 5, exhibit 42, pages 6 & 7.] As such, the Associate Administrator notes the Respondent took action in 2003 to limit a previously unlimited lease term, thereby improving a past bad business practice. By the time of Complainant's 2005 Lease, the Respondent had continued to improve its practices by adopting an extended lease term policy of 40 years. This is consistent with FAA policy and does not constitute unjust economic discrimination.[28]

[28] The FAA has found that differences in lease terms executed at different points in time can be justified. In Wilson FAD, the FAA held that differences in lease terms that result from an airport sponsor improving its business practice does not result in a *per se* violation of Grant Assurance 22, *Economic Nondiscrimination.* [Pages 12-13. *See also* August 2, 2000 Director's Determination (Wilson DD), page 17.] "A sponsor does not have an obligation to equalize the terms of use, but can pursue agreements with the more recent leaseholders that more nearly serve the interests of the public and provide for more professional business practices" [Wilson FAD, page 12-13]. The grant assurances do not require a sponsor to adhere to past business practices that are outdated or no longer serve the needs of the airport. [*See* Wilson DD, page 17.]

(3) Fixed-Base Operator Services

Director's Determination

The Director stated:

> *The Director finds Respondent is not currently in violation of its federal obligations as a result of negotiating [fixed-base operator] service requirements with Complainant that are more extensive than the service requirements negotiated with two other fixed-base operators. The Director notes, however, that if the airport sponsor has minimum standards for fixed-base operators that are being applied in a discriminatory manner, the FAA may find the sponsor in noncompliance at such time as the FAA becomes aware of such discrepancies. If such a case exists, the airport sponsor is advised to correct any resultant inconsistencies in the application of its minimum standards.* [FAA Exhibit 1, Item 19, page 27.]

This conclusion is correct. The Associate Administrator adds that the alleged discrimination is speculative, since the Respondent has never been in a position to enforce the service provisions of its lease upon the Complainant. We do not know whether the Respondent would sanction the Complainant for failure to offer services; the Complainant has never been in a position to offer such services. Also, the FAA does not judge a respondent by the language of its agreements or rules and regulations; we judge them by their actions.[29] No actions had occurred as of the time the Complaint was filed.

The Associate Administrator cannot discern an appealable issue regarding requirements for fixed-base operator services from the Complainant's appeal.

(4) Height Requirements

Director's Determination

The Director stated:

> *The FAA airspace analysis designates the maximum height permissible. The airport sponsor may not approve a height above the FAA maximum permitted in the airspace analysis. It remains within the airport sponsor's proprietary rights, however, to establish a lower maximum height for construction at its Airport. The airport sponsor may be more restrictive, but not less restrictive in height*

[29] As stated in Self Serve Pumps v Chicago Executive Airport, FAA Docket No. 16-07-02, (March 17, 2008) (Director's Determination) (Self Serve DD), "The FAA does not judge an airport sponsor simply by the plain language of agreements or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances and interpretations. Rather, the FAA judges compliance by an airport sponsor's actions or inactions with respect to those agreements or minimum standards." [Self Serve DD, pages 31-32.]

limitations. In this case, Respondent has exercised its right to establish a lower maximum height for structures on the Airport. There is nothing in the administrative record to suggest Respondent acted maliciously in establishing this lower maximum height. Complainant has failed to demonstrate that the sponsor acted in an unreasonable manner by imposing the height restriction. [FAA Exhibit 1, Item 19, page 28.]

The Director is correct. The Respondent does retain the power to impose reasonable zoning requirements and retains the proprietary right to set prudent building standards to protect the ability of the airport to function effectively or to ensure that its plans for the development of the airport proceed reasonably. Generally, protecting line-of-sight options to increase flexibility for future development appears to be a prudent step. The mere fact that the standard may differ from one FAA benchmark is insufficient to determine that the standard is unreasonable.

No grant assurance requires an airport sponsor to perpetuate short-sighted planning or poor business practices from the past into the future.[30] The Associate Administrator stated that "airport sponsors may change lease terms, rates, and conditions of occupancy in order to balance the various legitimate interests of the public, including improved business practices." [Rick FAD, page 2.]

On appeal, the Complainant states:

[Desert Wings Jet Center] endured a pattern of discrimination which moved the ball, changed the requirements and made compliance impossible [including] the following:

Required information for completion of the design was withheld by the respondent in the following areas: footprint, flooding issues, height requirements, taxiway requirements, utility location, etc.

[FAA Exhibit 1, Item 20A, page 3.]

Complainant further states,

It can be argued that [Desert Wings Jet Center] has suffered the same economic discrimination and economic harm [through] specific lease requirements that were not complied with by the city of Redmond, the respondent.

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[30] The FAA recognizes that a sponsor may pursue agreements with more recent leaseholders that more nearly serve the interests of the public and provide for more professional business practices. [*See* Penobscot DD, pages 21-24.] Moreover, a Complainant does not establish a *per se* violation of Grant Assurance 22, *Economic Nondiscrimination*, simply by showing differences between two parties. The FAA has found that differences in lease terms executed at different points in time can be justified by the market conditions present at the time of lease execution. [*See* Wilson FAD, pages 12-13 and Wilson DD, page 17.] Additionally, FAA policy provides that an airport sponsor may quite properly increase its standards from time to time in order to ensure a higher quality of service to the public. [*See* Wilson DD, page 17.] That said, an airport sponsor that increases its standards may be required to apply those same standards to previously executed leases at the time those leases are modified or renewed. [*See* Maxim United, LLC. v. Board of County Commissioners of Jefferson County, Colorado, FAA Docket No. 16-01-10, page 22 (April 2, 2002) (Director's Determination).]

Complainant then lists as one of the specific lease requirement not complied with by the Respondent as,

> *Changing the city requirements once the [fixed-base operator] plan was approved by the FAA causing great delays and great economic expense due to revising architectural and entire site plan*
>
> *a. height restrictions and zone changes without public hearing or input.*
>
> [FAA Exhibit 1, Item 20A, page 4.]

The Complainant overestimates the standard of compliance. Airport sponsors are not required to assist proposers of development.[31]

Also, the record does not support the Complainant's representation that the Respondent unreasonably withheld information regarding height restrictions. The Respondent provides evidence [FAA Exhibit 1, Item 7, exhibit 14] to support the following statement:

> *Complainant had no pending projects at the time the code change was being considered. The code change was drafted in 2007. There were public hearings before the Planning Commission which unanimously approved the code changes, and multiple public hearings before the City Counsel*[...] *The City followed the required process for adopting an ordinance. The code change resulted from a city staff review of the development code, during which staff realized that there were no height restrictions within the Airport Zone.* [FAA Exhibit 1, Item 21, page 5.]

The Associate Administrator concurs with the Director that the Respondent's actions with regard to height restrictions are neither unjustly discriminatory nor an unreasonable denial of access. Contrary to the Complainant's assertion, the record does not support that the Respondent withheld information. In any case, the grant assurances do not impose the standard upon the Respondent that the Complainant's appeal presumes. The record reflects that the height requirements were publically noticed and the Complainant does not allege that the Respondent prevented the Complainant from participating in the public hearing process.

(5) Site Plan Review and Substantial Completion

Director's Determination

The Director stated:

> *The Director finds Respondent is not currently in violation of its federal obligations as a result of implementing a site review plan that includes exemptions for projects that meet specific criteria. The competitor's project met the criteria; Complainant's project did not. The Director also finds Respondent is not currently in violation of its Federal obligations as a result of establishing a*

[31] In Atlantic Helicopters Inc./Chesapeake Bay Helicopters v. Monroe County, Fla., FAA Docket No. 16-07-12 (September 11, 2008) (Director's Determination) (Monroe), the Director found that "Airport operators [...] are not obligated to provide application assistance or business incubation to allow a [tenant] to grow at the Airport." [Monroe at page 37.]

> *timeline for substantial completion or for allowing additional time to meet the substantial completion requirement based on individual circumstances. Nothing in the administrative record shows the requirement is unreasonable. Both the competitor and Complainant received additional time to achieve their goals – the competitor through a direct extension of time, Complainant through additional lease opportunities.* [FAA Exhibit 1, Item 19, page 30.]

The Director's conclusions are correct. The Complainant has not shown that the Respondent's treatment of the Complainant's prospective competitor is unjustly discriminatory. The competitor's site is not similarly situated to the Complainant's site; therefore, Complainant is not similarly situated to the prospective competitor. The Director is also correct that the Respondent's actions with regard to site review and construction timeline do not constitute an unreasonable denial of access.

On appeal, the Complainant states:

> *The requirement for complete site and design review is also a requirement by the airport manager strictly for [the Complainant]. All other previous building* [sic] *including any built by the competing FBO Redmond Air required only a building permit and were exempt from the design review. This requirement* [...] *added more hoops to the ability to compete on the airport.* [FAA Exhibit 1, Item 20A, page 3.]

On appeal, the Complainant disagrees with the Director regarding treatment of similarly situated tenants and the allowable different treatment of tenants that are not similarly situated, but does not point to specific error. The Director understood the Complainant was alleging the Site and Design Review requirement was an unreasonable and unjustly discriminatory requirement that prevented the Complainant's proposed development.

The Director's application of the similarly situated policy remains correct. The Complainant is not similarly situated to Redmond Air. For example, the Complainant's own proposal attached to its 2009 Lease shows extensive building frontage on Salmon Avenue and the planned relocation of a driveway or secondary roadway. At most, the competitor's parcel minimally touches this driveway that the Complainant's proposal eliminates entirely. The very fact that the Complainant proposes to remove – and the Respondent agreed to remove – this secondary roadway in the 2009 Lease establishes that Complainant's site is not similarly situated to Redmond Air's site. Complainant's proposed development appears to isolate the Redmond Air hangar from any contiguity or frontage with the access roads/driveways in question. [FAA Exhibit 1, Item 7, exhibit 7, exhibit D.] FAA notes both the Complainant and its prospective competitor got extensions of time to complete construction.

The Director stated the Complainant has failed to show that the requirement to substantially complete construction within one year is unreasonable or even nonstandard. The Associate Administrator observes that the Respondent did provide extensions to the Complainant as well as three leases. The last lease, the 2009 Lease, did not have the strict one-year requirement. [FAA Exhibit 1, Item 7, exhibit 7, pages 1-2.] As stated repeatedly, when evaluating a part16 Complaint, the FAA considers whether the Respondent is in current

compliance with its Federal obligations. In this case, even when viewed retrospectively, we find the Respondent entered into three leases with the Complainant. The Respondent terminated the most recent 2009 lease, which was more permissive and did not have the requirement to substantially complete the construction within one year, because the Complainant did not pay its rent. As such, the record does not contain a preponderance of substantial evidence to support a finding that the Respondent denied access to the Complainant for failure to substantially complete construction of its improvements. We note that the Complainant has not presented any substantial engineering documents to the record.

The record, as presented by the Complainant, shows the reasonableness of site reviews. Considering the run-off and flooding problems alleged by the Complainant, site reviews would appear to be a protection that the Respondent is wise to employ. Again, the grant assurances do not impose an obligation upon the sponsor to perpetuate past bad business practices.

(6) Recording the Lease

Director's Determination

The Director stated:

> *The FAA expects airport sponsors to preserve their rights and powers. Respondent's policy to refrain from recording leases with the County Clerk is consistent with this obligation. Respondent has provided an alternative in the mortgage protection clause, which Respondent argues is a suitable substitute to recording the lease. Respondent provides supporting evidence to show a tenant was able to use the mortgage protection clause to obtain financing even though the individual's lease was not recorded. While the Complainant argues the mortgage protection clause is not sufficient for obtaining financing, Complainant provides no evidence to demonstrate it was denied financing because the lease could not be recorded.*
>
> *Although Complainant shows other leases were recorded while its lease was not, the Respondent points out that those leases were recorded in error and in violation of its own policies. It is unfortunate that the error occurred. This does place Complainant in a different position from the other tenants whose leases were recorded. However, the grant assurances do not require an airport sponsor to perpetuate a mistake in order to make the tenants equal. Respondent has offered to discuss the lease mortgage protection clause directly with the Complainant's lender. Complainant has not accepted that offer. Respondent is not obligated to do more.*
>
> *The Director finds Respondent is not currently in violation of its federal obligations as a result of enforcing a policy not to record Complainant's lease even though leases were previously recorded for other tenants in error.*
>
> [FAA Exhibit 1, Item 19, page 33.]

The Director is correct.

In addition, we note the Director specifically asked for evidence from the Complainant to show it was denied credit because the leases could not be recorded.[32] Complainant did not provide such evidence.

On appeal, the Complainant states:

> *[The Respondent][...]for the first time in the history of the airport, did not allow the recording of the lease. This eliminated title insurance and funding. Although a common practice in the past and a common practice at all surrounding airports, [Complainant] was singled out for this economic discrimination.* [FAA Exhibit 1, Item 20A, pages 2-3.]

> *The corporate hangar [Redmond Air] built in 2006 and 2007* [...] *was approved for recording, recorded and financing was secured. This is in total contrast to [Complainant].* [FAA Exhibit 1, Item 20A, page 5.]

The Director acknowledged that some tenants did record leases, but this recording of leases was done in error and in contrast to the Respondent's policy. The Associate Administrator reiterates that no grant assurance requires an airport sponsor to perpetuate a business practice that does not serve a reasonable aim of the airport. In this case, the former practice of recording leases – whether in error or not – need not be continued. In any case, the Director is correct to note that the preponderance of reliable and substantial evidence in the record does not show the Respondent's actions denied Complainant access to the airport or prevented financing for the Complainant. The Complainant has not shown that it was denied access to the airport as a result of the inability to record the lease. The FAA supports the Respondent's actions to cease recording leases if it deems that such recordation cedes excessive rights to the leaseholder. [*See* FAA Exhibit 1, Item 7, exhibit 15(a), page 1.]

We note the Complainant points out, "The Respondent[...]for the first time in history[...], did not allow the recording of the lease."[33] [FAA Exhibit 1, Item 20A, pages 2-3.] Since the FAA accepts that this decision not to record leases is a valid policy decision by the Respondent, the FAA would expect the Respondent to implement this policy consistently going forward.

The record reflects that the Respondent itself expressed concern that it had failed to implement its policy not to record leases consistently. [*See* FAA Exhibit 1, Item 7, exhibit 15(b), page 3.] While failure to implement a policy effectively may be grounds for a finding of noncompliance, we do not find this is the case here at this time. An airport sponsor meets the standard for compliance when (a) the obligations are fully understood, (b) a program is in

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[32] *See* FAA Exhibit 1, Item 13, Request for Additional Information and Notice of Extension of Time, dated February 26, 2010.

[33] When discussing the Respondent's refusal to record leases, the Complainant appears to be referring to the 2009 Lease, entered into on April 1, 2009. See reference to "both of the previous leases –[of] 2006 and 2007[...]" [FAA Exhibit 1, Item 20A, pages1, 2-3.]

place that, in the judgment of the FAA, is adequate to carry out the sponsor's commitments, (c) the sponsor satisfactorily demonstrates that such a program is being carried out, and (d) past compliance issues have been addressed. [*See* FAA Order 5190.6B, section 2.8.b.]

The Complainant presents evidence that an airport lease was recorded as recently as July 14, 2008. [FAA Exhibit 1, Item 5, exhibit 49.] The Respondent expressed its concern about inconsistent recording of leases in a letter dated April 13, 2009. [FAA Exhibit 1, Item 7, exhibit 15(b), page 3.] Should the FAA determine that the Respondent has not successfully implemented corrective action to prevent leases from that date forward from being recorded, we could find the Respondent in noncompliance. However, Complainant did not provide evidence with its appeal to show any leases have been recorded subsequent to the Respondent's acknowledgment of the error. Therefore, at this time, we cannot find the Respondent in noncompliance for enforcing a reasonable policy that was previously not enforced in error.

Associate Administrator's Conclusion on Issue C

The Director's conclusions regarding Grant Assurance 22, *Economic Nondiscrimination*, are supported by a preponderance of reliable, probative, and substantial evidence, and made in accordance with applicable law, precedent, and public policy.

On appeal, the Complainant fails to establish any prejudicial error of the Director regarding an unreasonable denial of access. As discussed above, the Respondent granted the Complainant three leases and at least one extension of time to complete development of its aeronautical business facilities. The Complainant never succeeded in commencing substantial construction. The Complainant argues the Respondent's unreasonable actions – or failure to act – are the cause of the Complainant's inability to develop the leaseholds. The record does not support this basic allegation. Complainant's issues were fully examined by the Director and the Associate Administrator. The FAA found that where the Respondent has insisted on a term or requirement, such requirement was not unreasonable. Examples include site and design review, and height requirements established by the Respondent. The FAA also found that when the Complainant faced some impediments to its plan, those impediments were not the responsibility of the Respondent to resolve. Examples include the trenching and flooding issues raised by the Complainant. Finally, the Complainant, having been asked by the Director specifically for evidence that Complainant was denied credit because the leases could not be recorded,[34] was unable to establish that its lack of success at obtaining financing was due solely to Respondent's refusal to record Complainant's lease.

In a transaction such as a lease, both parties have rights and responsibilities. Generally, the lease agreement itself, interpreted by a court if necessary, determines those responsibilities. The grant assurances do not impose on any sponsor the degree of responsibility for a tenant's success that the Complainant presumes. The Complainant has failed to show that the Respondent is responsible through unreasonable impediment for the Complainant's failure to develop its leaseholds. The Complainant may have succeeded in showing that the

[34] *See* FAA Exhibit 1, Item 13, Request for Additional Information and Notice of Extension of Time, dated February 26, 2010.

Respondent failed to meet the Complainant's personal and business expectations. However, this does not constitute noncompliance with the Respondent's federal obligations.

The Complainant fails to show unjust economic discrimination. As discussed earlier, the FAA may find entities not to be similarly situated for the purposes of determining unjust economic discrimination by a variety of circumstances. In this case, space, time and business phase appear to be the main differences between the Complainant and its prospective competitor, Redmond Air. Redmond Air's site is near the Complainant's proposed site, but Redmond Air does not have the same circumstances with regard to street frontage or line-of-sight issues. Redmond Air's business arrangements preceded the Complainant's business arrangement in time, which happened to be prior to some improved business practices by the Respondent.[35] Finally, the Complainant never became a full-service fixed-base operator, so Complainant was never in a position to demonstrate it was treated differently on an operational basis.

Finally, the Complainant raises the allegation that the Respondent considered the Complainant's leasehold as a potential site for a parking lot.[36] This does not constitute an allegation of any violation of a grant assurance. It is a proffered motive. No grant assurance prevents airport management for considering making changes to its airport, including changes that would require the airport management to seek to change leases.

The Associate Administrator finds the Director did not err in concluding the Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by using unreasonable standards and changing requirement to effectively deny access for Complainant to expand its leasehold and become a fixed-base operator.

> **Issue D:** Determine whether the Director erred in concluding the Respondent is not currently in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to another fixed-base operator while preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of unreasonable standards and changing requirements.

FAA's policy on exclusive rights broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. City of Pompano Beach.]

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[35] *See* footnote 27. *See also* Wilson FAD, pages 12-13 and Wilson DD, page 17.

[36] FAA Exhibit 1, Item 20A, page 5.

Grant Assurance 23, *Exclusive Rights,* is closely tied to Grant Assurance 22, *Economic Nondiscrimination.* To be successful in either argument, the Complainant must demonstrate that the Respondent applied an unreasonable requirement or standard in an unjustly discriminatory manner. As discussed at in Issue C, above, the FAA has not made such a finding.

The Complainant raises the Pompano case[37] and argues on appeal the circumstances between the Pompano case and the Complainant's case are similar, stating

> *As shown throughout the [Desert Wings Jet Center] Complaint, [the Respondent's] treatment appears to be very similar to the treatment of James C Brettman in his complaint against the City of Pompano Beach, Florida. In the determination, the FAA found in Mr. Brettman's favor citing many reasons for discrimination by the city of Pompano Beach in the conditions and requirements placed upon him versus his on field competitors. The lease requirements changed, the FBO requirements change and the "ball kept moving" never allowing him to fairly compete. Although some of his issues were specific items in his lease, the results were the same.* [FAA Exhibit 1, Item 20A, page 3.]

The Respondent disputes the similarity to Pompano, stating,

> *Complainant's reliance on City of Pompano Beach v. Federal Aviation Administration, 774 F.2d, 1529 (1985) is misplaced. As the court made clear, the case involved the "protracted attempt" by an individual to lease property at Pompano Beach Air Park to construct aircraft hangars. 774 F.2d at 1532. In this matter, Complainant and the City of Redmond entered into three separate and complete leases. Once Complainant had the leases it simply took no action to perform as required by the leases.* [FAA Exhibit 1, Item 21, page 4, footnote #1.]

The Associate Administrator agrees with the Respondent. Pompano does not support Complainant's position.

The basic circumstances between the two cases are different. In Pompano, Brettman struggled to get a lease. In this case, the Respondent entered into multiple leases with the Complainant, thereby granting access. [FAA Exhibit 1, Item 7, exhibits 3 & 7.] In addition, the Respondent city of Redmond granted at least one extension of time to the Complainant [FAA Exhibit 1, Item 7, exhibit 2] and offered a new lease on December 18, 2007, after Complainant did not meet the construction deadline requirements of the 2007 Lease. [FAA Exhibit 1, Item 7, exhibit 4.] The record contains no evidence or argument that the Complainant began construction of its proposed development. In fact, the record is clear that the Complainant did not construct any permanent improvement on any of its three leaseholds.

The record also shows the Respondent declined to enter into a fourth lease agreement for development only after the Complainant failed to pay its rent on the third 2009 Desert Wings Jet Center Lease. [FAA Exhibit 1, Item 7, exhibit 8.] The Associate Administrator notes the

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[37] City of Pompano Beach v FAA, 774 F.2d 1529 (11th Cir, 1985).

last lease, the 2009 Lease, did not have the strict one-year construction requirement. [FAA Exhibit 1, Item 7, exhibit 7, pages 1-2.]

The Associate Administrator also notes that the Complainant misinterprets the logic of Pompano. The Associate Administrator rejected a similar argument from another recent appellant, stating:

> *Here, Avitat mistakenly applies the logic of Pompano Beach. Avitat needs to understand "it is well established that in order to show the constructive grant of an exclusive right, a claimant must show that it actually has been barred from conducting a 'particular aeronautical activity' at the airport," through the imposition of unreasonable standards.*[38]

The Director and Associate Administrator consider the facts of each case, including the specific circumstances, and judge whether or not the actions of the respondent(s) are outside the bounds of compliance. To be successful in an allegation of exclusive rights, the administrative record must establish that the Respondent has unreasonably denied access to the Complainant and/or unjustly discriminated against the Complainant in favor of another party or parties at the airport.[39] This has not been substantiated here. In Complainant's case, the FAA found some instances of alleged denial were not unreasonable, such as the requirements for site and design review, and height requirements. In other instances, the FAA found the Respondent did not directly cause the action, such as the complaints regarding trenching, flooding, and financing. Neither the Director nor the Associate Administrator can find that the record establishes unjust economic discrimination.

The Associate Administrator finds the Director's conclusions regarding Grant Assurance 23, *Exclusive Rights*, are supported by a preponderance of reliable, probative, and substantial evidence, and made in accordance with applicable law, precedent, and public policy. The Director did not err in concluding the Respondent is not currently in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to another fixed-base operator while preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of unreasonable standards and changing requirements.

VII. FINDINGS AND CONCLUSIONS

The FAA's role in this appeal is to determine only the narrow issues of whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination of November 10, 2010.

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[38] AVITAT FAD, page 37, upheld by U.S. Court of Appeals. *See* 41 NORTH 73 WEST, INC., d/b/a Avitat Westchester and Jet Systems v United States Department of Transportation, 408 Fed. Appx. 393 (2nd Cir. 2010)..]

[39] The FAA has long held that "[i]n order to establish a claim of unjust economic discrimination, a complainant must establish that it requested similar terms and conditions as other similarly situated airport users and was denied for unjust reasons." [Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, FAA Docket No. 16-00-03, page 19 (December 22, 2000) (Director's Determination).]

Upon an appeal of a part16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks FAD, page 21 and 14 CFR § 16.227.]

In arriving at a final decision on this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, and the appeal and reply submitted by the parties, in light of applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

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

ORDER

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

RIGHT OF APPEAL

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

Christa Fornarotto,
Associate Administrator
for Airports

May 25, 2012
Date