

Aviation Insights: **FAA Enforcement of Airport Improvement Program Grant Assurances (February 2019)**

Aviation is a highly “federalized” industry. Federal statutes, regulations, and policy typically take priority over – or entirely preempt – state and municipal requirements. This is especially true for airports, which are often dependent on the Federal Aviation Administration’s (FAA) Airport Improvement Program (AIP) funding for capital improvements – and thus are subject to the “strings” that are attached to AIP grants.

The Airport Improvement Program was established by the Airport and Airways Improvement Act of 1982, and since has become an essential source of funding for safety, capacity, security, and other improvements at airports.¹ The allocation scheme for AIP grants is complex, but few of the more than 3,300 airports included in the National Plan of Integrated Airport Systems (NPIAS) have not applied for and received AIP funds. In FY2018, more than 1,700 new AIP grants were awarded to airports, totaling more than \$3.4 billion.

But AIP funding comes with conditions. Airports must comply with 39 “grant assurances” that are incorporated into the grants.² The assurances typically apply not just to the improvements specifically funded by the grant but to all of an airport’s operations. Likewise, although most of the assurances have a limited term (typically 20 years), others are perpetual – and since airports typically accept new grants on a recurring basis, their obligations are effectively perpetual.³ As a result, the obligations imposed in exchange for AIP grants are significant not only to airports but to tenants and other users – who typically are the intended beneficiaries of the assurances.⁴

Many of the grant assurances are relatively uncontroversial – e.g., requirements that an airport abide by generally-applicable federal laws, such as civil rights and disadvantaged business enterprise requirements. But others set forth requirements for airports that are both unique to the industry and require ongoing attention to ensure compliance, notably including:



The firm’s practice encompasses virtually every aspect of aviation law, including advising airports and their users and tenants about FAA compliance obligations imposed through the Airport Improvement Program and other means. For further information regarding any of the matters discussed in this article, please contact:

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- **The prohibition of “unjust discrimination”** – assurance #22 requires all types of aeronautical activities to be allowed access to an airport on reasonable and comparable terms; i.e., an airport must provide the same opportunities to similarly-situated tenants, and cannot exclude any aeronautical activities that it is capable of safely accommodating. However, in practice this assurance does not require absolute uniformity; for example, an airport may be able to justify different lease conditions for tenants because they are engaged in different lines of business, or located in different locations on the airfield, or have different timing for their leases.
- **The prohibition of exclusive rights** – assurance #23 prohibits airports from granting “exclusive rights.” For example, an airport cannot explicitly or constructively shield an incumbent FBO from competition by not allowing other FBOs to operate at the airport. However, there is a significant exception: an airport can choose to itself be the exclusive provider of certain services at the airport, if those services truly are provided in-house. Additionally, an application to provide services at an airport may be denied for legitimate reasons apart from competition (e.g., if the applicant does not meet reasonable minimum standards set by the airport).
- **The prohibition on revenue diversion** – assurance #25 generally requires revenues raised by an airport – even from non-aeronautical activities – to be exclusively devoted to aeronautical purposes. This requirement has been the source of considerable controversy and has generated various supplemental guidance from FAA. Notably, in 2014 FAA took the position that this requirement (and a related statute) was applicable to state and local taxes on jet fuel. In 2018, a challenge to the FAA’s interpretation – Clayton County, Georgia v. FAA, 887 F.3d 1262 (11th Cir. 2018) – was dismissed on procedural grounds, as untimely.

Other significant assurances include #5, which prohibits the municipal sponsors of airports from depriving themselves of the rights and powers necessary to oversee the airport; #21, which requires airports to endeavor to ensure compatible uses of neighboring property; and #29, which requires airports to maintain accurate plans of the airport’s layout and uses.

In 1996, FAA established a special set of procedures to review complaints – from tenants and users, or the agency itself –that an airport was not in compliance with its assurances.⁵ Since then, more than 300 complaints have been docketed – approximately half of which have been resolved through a public order by the FAA (the others having been dismissed as insufficient; settled; or still pending). Often, FAA has found that the allegations are insufficient to establish a violation of the assurances, or that in the interim the airport has re-established compliance and thus no further action is necessary. But if an airport is found to be out of compliance, the remedies available to FAA include – but are not limited to – a prohibition on the airport receiving further AIP funds until the compliance issue is resolved. However, this procedure does not provide any opportunity for private claims for damages.

New Part 16 Decisions

In 2018, the FAA released decisions in twelve proceedings, eight of which were resolved in favor of the airport respondents (albeit sometimes with caveats that the airport should be more attentive to its obligations) and four of which were resolved in favor of the complainants:

- Arlet Aviation, LLC v. Puerto Rico Ports Authority, Order, October 24, 2018 (no. 16-17-17; FAA-2018-0083). In this proceeding, the complainant alleged that a FBO had been allowed to operate at two airports in Puerto Rico without a valid and current lease, in violation of grant assurance #22 (unjust discrimination). FAA concluded that the complainant lacked standing to bring the complaint because it was not directly and substantially affected by the alleged violation, and further concluded that the complaint was moot because the FBO subsequently had entered into a contract with the Puerto Rico Ports Authority. FAA also declined to consider complainant’s request to amend its complaint in order to raise new allegations, namely that the contract itself violated grant assurance #22 as well as grant assurance #25 (airport revenues).

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- Port Hangars Association, Inc. and Winn Williams v. County of Los Angeles, California, Order of the Director, August 13, 2018 (no. 16-17-14; FAA-2017-0941). In this proceeding, Brackett Field was alleged to have violated grant assurance #22 (unjust discrimination) and #23 (exclusive rights) because it declined to renew the lease of a tenant which was in the business of sub-leasing hangars. FAA sided with the airport, holding that Brackett Field was entitled to enhance its minimum standards such that the hangars at issue no longer met the airport's requirements, as well as that there was no evidence that any other entity had been granted an exclusive right over hangar space at the airport.
- Dover Development, LLC and Cedarhurst of Bethalto Real Estate, LLC v. St. Louis Regional Airport Authority, Final Agency Decision, May 23, 2018 (no. 16-17-09; FAA-2017-0679). In this proceeding, St. Louis Regional Airport was alleged to have violated grant assurance #21 (compatible land use) by allowing a senior living facility to be developed neighboring the airport. FAA concluded that the complainant – a competing senior living facility – lacked standing to bring the complaint, and in any case that the location of the facility was consistent with the current noise contour map for the airport.
- Atlantic Beechcraft Services, Inc. and Southeast Turbines, Corp v. City of Fort Lauderdale, Florida, Director's Determination, March 7, 2018 (no. 16-17-03; no. FAA-2017-0429). In this proceeding, Fort Lauderdale Executive Airport was alleged to have violated grant assurance #23 (exclusive rights) by preventing them from providing certain maintenance services. FAA concluded that the dispute was ultimately premised on the applicable lease terms and that the airport had not prohibited the complainant from providing maintenance services; FAA emphasized that the prohibition on exclusive rights requires an opportunity to conduct commercial activities, but does not guarantee an airport user the right to access a specific location on an airport. The complainant has filed an administrative appeal to the Associate Administrator for Airports.
- Susan Boggs, et al. v. City of Cleveland, Ohio, Final Agency Decision, January 26, 2018 (no. 16-16-15; no. FAA-2016-9337). In this proceeding, the complainants alleged that operations at Cleveland Hopkins International Airport had rendered their home worthless, and that the inclusion of the home on the Airport Layout Plan and non-compliance with various grant assurances obligated the airport to purchase it. FAA rejected these contentions, noting – among other misconceptions – that the obligations of grant assurance #21 (compatible land use) did not create a right for neighbors to seek compensation from an airport for diminution of property value. The decision has been appealed to the U.S. Court of Appeals for the Sixth Circuit (no. 18-3242).
- Michael Pelzer and Pegasus Parachuting Services v. State of Michigan, Director's Determination, May 16, 2018 (no. 16-16-05, FAA-2016-4973). In this proceeding, the complainants alleged that they had not been allowed to conduct skydiving operations at Romeo State Airport, in violation of grant assurances #5 (preserving rights and powers), #22 (economic nondiscrimination) and #23 (exclusive rights). FAA concluded that many of the complainant's allegations did not amount to violations of the grant assurances, but the airport's overall lack of transparency in lease negotiations did amount to a violation of assurance #22, as did the airport's refusal to even consider a temporary agreement while the negotiations for a permanent agreement continued.
- Air Transport Association of America, Inc. d/b/a Airlines for America, et al. v. Port of Portland, Oregon, Final Agency Decision, May 18, 2018 (no. 16-16-04, FAA-2016-4972). In this proceeding, airlines serving Portland International Airport alleged that its payment of stormwater fees to Portland, Oregon amounted to revenue diversion in violation of grant assurance #25 (airport revenues). FAA concluded that the fees could be paid out of airport revenues, because they constituted ordinary airport operating costs; even if some of the fees were used to mitigate off-airport stormwater issues, it was reasonable for the utility to bill for its general operating costs, and those costs were fairly and transparently billed to all users, not just the airport. The decision has been appealed to the U.S. Court of Appeals for the District of Columbia (no. 18-1157).

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- Luther Kurtz and Skydive Coastal California d/b/a Phoenix Area Skydiving v. Casa Grande, Arizona, Final Agency Decision, November 15, 2018 (no. 16-16-01; FAA-2016-3829). In this proceeding, the complainants alleged that they had been denied the use of an airport for skydiving, despite FAA analysis that skydiving could safely be conducted there, and also denied the commercial use of space in the airport terminal, in violation of grant assurance #22 (economic discrimination) and #23 (exclusive rights). FAA agreed with the complainant, noting that the agency's determinations took precedence over an airport sponsor's opinions on safety, as well as that the airport had allowed other entities to engage in commercial operations in the terminal.
- National Business Aviation Association, Inc., et al. v. Town of East Hampton, New York, Director's Determination, March 26, 2018 (no. 16-15-08; FAA-2015-2467). In this proceeding, users and tenants of East Hampton Airport alleged that the City's use of airport funds to defend local ordinances restricting operations at the airport – which in separate litigation were held to be inconsistent with federal law – amounted to revenue diversion in violation of grant assurance #25 (airport revenues). FAA concluded that the litigation costs could be paid out of airport revenues, because they constituted ordinary airport operating costs, and that there was no requirement that expenditures for litigation costs must benefit an airport or its users. The complainants have filed an administrative appeal to the Associate Administrator for Airports.
- Boston Executive Helicopters v. Town of Norwood, Massachusetts and Norwood Airport Commission, Revised Director's Determination, November 2, 2018 (no. 16-15-05, FAA-2015-0885). In this proceeding, the complainant alleged that it had been denied access to the airport and that the incumbent FBO had been favored, in violation of grant assurances #5 (preserving rights and powers), #22 (economic nondiscrimination), #23 (exclusive rights), and #29 (airport layout plan). FAA concluded that the airport had remedied some of the allegations, and others did not amount to violations, but that the airport also remained out of compliance with its obligations. Notably, FAA held that the airport's overall lack of transparency in lease negotiations and favoritism to the incumbent FBO violated assurances #22 and #23, and also that its unauthorized lease of airport property to a non-aeronautical tenant comprised a violation of assurance #29. The airport has filed an administrative appeal to the Associate Administrator for Airports.
- United Airlines, Inc. v. The Port Authority of New York and New Jersey, Director's Determination, November 19, 2018 (no. 16-14-13, FAA-2015-0026). In this proceeding, United alleged that the fees it was charged by the Port Authority for its use of Newark-Liberty International Airport exceeded those of other airports managed by the Port Authority and were used for impermissible purposes, in violation of grant assurances #22 (economic nondiscrimination) and #25 (airport revenues). Although FAA cautioned that fees may legitimately differ among airports, it also was critical of the Port Authority's recordkeeping, and concluded that the Port Authority had failed to justify the differential in fees paid by United. Similarly, although "grandfathered" conditions allowed the Port Authority to use some airport revenue for non-aeronautical purposes, Port Authority recordkeeping was held to be inadequate. The Port Authority has filed an administrative appeal to the Associate Administrator for Airports.
- Mansfield Heliflight, Inc. v. City of Burlington, Vermont, Final Agency Decision, June 22, 2018 (no. 16-14-06, FAA-2015-0033). In this proceeding, the complainant alleged that it had been denied access to Burlington International Airport to develop a new FBO, in violation of grant assurances #22 (economic nondiscrimination) and #23 (exclusive rights). FAA concluded that there had been no violation of the assurances because the complainant had been offered access to the airport, even if it was not at the location and on the terms that it preferred. FAA also found that the new minimum standards that the airport had adopted for FBOs were not intended to protect the incumbent FBO. The decision was appealed to the U.S. Court of Appeals for the Second Circuit (no. 18-2500), but was dismissed after Mansfield Heliflight failed to submit a brief.

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New Part 16 Complaints

FAA also docketed seven new complaints in 2018, four of which were dismissed on procedural grounds and three of which remain pending:

- Star Marianas Air, Inc. v. Commonwealth Ports Authority (no. 16-18-01; no. FAA-2018-0159) – the complainant alleged that the airport had imposed excessive charges on its users and further accumulated an impermissible revenue surplus; the proceeding remains pending.
- Robinson Air Crane, LLC v. Saint Lucie County, Florida (no. 16-18-02; no. FAA-2018-0565) – the complainant alleged that the airport had refused to allow it to develop a new FBO at the airport, in order to protect the incumbent FBO; the proceeding remains pending.
- Karen Cushnyr v. City of Albuquerque, New Mexico (no. 16-18-03; no. FAA-2018-0840) – the complainant alleged that the airport did not provide adequate assistance to passengers with disabilities; the complaint was dismissed because it did not demonstrate prior good faith efforts to resolve the dispute, as required by FAA's procedures, and other procedural deficiencies.
- Diaz Aviation Corporation, et al. v. Puerto Rico Ports Authority (no. 16-18-04; no. FAA-2018-0841) – the complainants alleged that they had been unjustifiably evicted from the San Juan airport; the complaint was dismissed because it did not demonstrate prior good faith efforts to resolve the dispute, as required by FAA's procedures.
- Dean Pappas v. Northwest Arkansas Regional Airport (no. 16-18-05; no. FAA-2018-0969) – the complainant alleged that certain airport signage was inadequate; the complaint was dismissed because it failed to state a claim within the scope of the assurances.
- David E. Mealy, et al. v. Clarion County Airport Authority (no. 16-18-06; no. FAA-2018-0970) – the complainants allege that the airport evicted them in retaliation for their reporting of safety concerns; the proceeding remains pending.
- Diaz Aviation Corporation v. Puerto Rico Ports Authority (no. 16-18-07; no. FAA-2019-0087) – a second complaint by the same entity was also dismissed, because it again did not demonstrate prior good faith efforts to resolve the dispute, and also was premised on events that had taken place five years earlier.

Court Decisions

Additionally, in 2018 federal courts decided four cases involving the grant assurances, all in favor of the airport defendants:

- In SPA Rental, LLC v. Somerset-Pulaski County Airport Board, LLC, 884 F.3d 600 (6th Cir. 2018), the appellant had alleged before FAA that the airport had discriminated against it in favor of another service provider. In 2016, FAA had concluded that a change in the airport's minimum standards had been applied neutrally, as well as that the two service providers were not similarly situated. The U.S. Court of Appeals for the Sixth Circuit agreed with FAA.
- In Skydive Myrtle Beach, Inc. v. Horry County Department of Airports, 735 Fed. Appx. 810 (4th Cir. 2018), the appellant had alleged before FAA that the airport's refusal to allow skydiving was unjustly discriminatory. In 2016, FAA concluded that the airport's decision was not only justified but mandatory, in order to ensure safety. The U.S. Court of Appeals for the Fourth Circuit dismissed an appeal as untimely.
- In Star Marianas Air, Inc. v. Commonwealth Ports Authority, 2018 WL 4140780 (D.N.M.I 2018), the U.S. District Court for the Northern Mariana Islands held that a challenge to the airport's compliance with the grant assurances could not be brought in court, but rather could only be raised through FAA procedures.

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- In U.S. ex rel Durkin v. County of San Diego, 2018 WL 3361148 (S.D.Cal. 2018), the plaintiff alleged that misrepresentations by the airport (in particular, that land uses within its Runway Protection Zone complied with FAA requirements) in AIP grant obligations amounted to violations of the False Claims Act. However, the U.S. District Court for the Southern District of California held that there was insufficient evidence that even if any misrepresentations were made that they were knowing, as required by the False Claims Act.

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Airports – as well as tenants and users – that have questions about compliance can consult FAA’s general web page about the grant assurances, https://www.faa.gov/airports/aip/grant_assurances/ as well as FAA’s docket for Part 16 decisions, <https://part16.airports.faa.gov>. But it also may be advisable to consult with an attorney familiar with AIP, the grant assurances, and FAA procedures, including the firm of KMA Zuckert LLC.

¹ 49 U.S.C. § 47101, et seq.

² “Assurances: Airport Sponsors” (https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip.pdf).

³ 49 U.S.C. § 47107. See also Airports Compliance Handbook, FAA Order 5190.6B (https://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b.pdf).

⁴ Additionally, more than 500 airports are comprised in whole or in part of federal surplus property, and are subject to similar requirements based on the Surplus Property Act, as amended. 49 U.S.C. § 47151, et seq.

⁵ 14 C.F.R. Part 16.