

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

**ROGER LEONARD
CARDINALS' PILOT SHOP, INCORPORATED
(Complainant)**

v.

**CHEESAPEAKE AIRPORT AUTHORITY
(Respondent)**

Docket No. 16-01-06

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), Title 14 Code of Federal Regulations (CFR) Part 16.

Roger A. Leonard, as General Manager of Cardinals' Pilot Shop, Incorporated, (hereinafter Complainant) has filed a formal complaint pursuant to 14 CFR Part 16 against the Chesapeake Airport Authority (hereinafter Respondent or Airport Authority), operator of Chesapeake Regional Airport (CPK), alleging that the Airport Authority is engaged in economic discrimination and has failed to comply with Federal Grant Assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*.

The Complainant is a corporation with its principal business at Suffolk Municipal Airport, Suffolk, Virginia. The Complainant is a fixed-base operator (FBO)¹ at Suffolk Municipal Airport providing commercial aeronautical services including aircraft rental services. The Complainant indicated he planned to establish a customer pick-up site at Chesapeake Regional Airport for his aircraft rental business operated out of Suffolk Municipal Airport. The Complainant alleges that:

¹ A fixed-base operator (FBO) is an individual or firm operating at an airport and providing general aircraft services such as maintenance, storage, ground and flight instruction. [FAA Order 5190.6A, Airport Compliance Requirements, Appendix 5]

- The Respondent has denied the Complainant reasonable access to, and use of, CPK on reasonable terms for the purpose of establishing a customer pick-up site for his aircraft rental service operated out of Suffolk Municipal Airport, and the Respondent's actions in this regard constitute unjust discrimination in violation of Title 49 U.S.C. § 47107 (a)(1)(5) and Federal Grant Assurance 22, *Economic Nondiscrimination*.
- The Respondent, through its policies and practices, has constructively granted Horizon Aviation Services an exclusive right as the only fixed-base operator on the airport by imposing minimum standards that discourage competition among commercial aeronautical services at CPK in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights*.

Summary of Issues and Findings

The Complainant alleges that he applied for access to CPK to establish a customer pick-up site for aircraft rental services operated out of Suffolk Municipal Airport and was denied reasonable access for unjust reasons in violation of Grant Assurance 22, *Economic Nondiscrimination*. He also alleges that this denial reflects the airport's protection of an exclusive right granted to another entity already conducting business at Chesapeake Regional Airport in violation of Grant Assurance 23, *Exclusive Rights*.

In our review of the evidence submitted, we found the Airport Authority initially denied the Complainant's request to establish a customer pick-up site at CPK. The Airport Authority cited as its reason a lack of available office space coupled with the airport's minimum standards that required the prospective tenant to maintain office space and staffing on the airport. At the insistence of the FAA Eastern Region, the Airport Authority eventually found temporary office space that would meet the appropriate minimum standards for the Complainant.

The Complainant declined to accept the temporary arrangements offered and challenged the reasonableness of the minimum standards requiring him to maintain office space and staffing at CPK.

Although the Complainant did not accept the arrangements offered, the Respondent did provide a means for the Complainant to obtain access to the airport to conduct the aeronautical activity requested. As such, the Complainant is not currently being denied access to, and use of, CPK. However, based on the record evidence and our review, we determined that this access is subject to unreasonable terms, resulting in unjust discrimination against the Complainant. As such, even though the Respondent has made the airport available to the Complainant, the conditions applied violate Title 49 U.S.C. §47107(a)(1)(5) and Federal Grant Assurance 22 regarding economic nondiscrimination.

In addition, by establishing unreasonable terms as a condition for access to CPK, the Airport Authority has effectively limited competition and constructively granted the one FBO on the airport an exclusive right in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights*.

Based on our review and consideration of the evidence submitted and the pertinent laws and policy, we conclude that the Chesapeake Airport Authority is in violation of its grant assurances regarding economic nondiscrimination and exclusive rights. The basis for our conclusion is detailed in this report.

II. THE AIRPORT

The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.*

The Airport is a public-use general aviation airport located in Chesapeake, Virginia. The airport is owned and operated by the Chesapeake Airport Authority, a political subdivision of the Commonwealth of Virginia, and is located within the boundaries of the City of Chesapeake. During the last reported twelve-month period ending in February 1997, there were 65-based aircraft and 42,200 operations annually at the airport.² Since 1983, the Airport Sponsor has entered into seven grant agreements with the FAA and has received a total of \$4,405,635 in federal airport development assistance. In 1998, the Airport Sponsor received its most recent AIP grant of \$1,012,207 for taxiway rehabilitation.³

III. BACKGROUND

A. Cardinals' Pilot Shop, Inc.

Cardinals' Pilot Shop, Incorporated, the Complainant, operates a full-service fixed-base operation at Suffolk Municipal Airport and has requested to operate a customer pick-up site for aircraft rental services at Chesapeake Regional Airport. Cardinals' Pilot Shop, Inc., provides a range of services at Suffolk Municipal Airport including flight instruction, aircraft rental, aerial tours, aircraft maintenance, avionics, aircraft parts and supplies, aircraft sales and leasing.⁴ According to Complainant, Cardinals' Pilot Shop, Inc., maintains an aircraft pick-up site for its aircraft rental business at Newport News/Williamsburg International Airport and Norfolk International Airport to service its

² FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Airport.

³ FAA Exhibit 1, Item 2 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 the Present.

⁴ See FAA Exhibit 1, Item 13. WWW.Airnav.com/SFQ/CARDINALS

customers.⁵ Arrangements for the rental of the aircraft are made via telephone with the Cardinals' Pilot Shop office at Suffolk Municipal Airport. This service is manned twenty-four hours a day.

B. Chesapeake Airport Authority

The City of Chesapeake created the Chesapeake Airport Authority in 1970 to build and operate the Chesapeake Regional Airport for the general aviation needs of the City of Chesapeake. The Airport Authority's governing board consists of individuals appointed from the city government and the local community. The Airport Authority relies on the City of Chesapeake Economic Development Department to provide administrative and staff support. The City of Chesapeake also provides financial support to the Airport Authority in the form of loans, annual operating funds, and bond guarantees. The airport's fixed-base operator has historically provided airport management services. First, it was Mid-Eastern Airways, Inc. in 1979, then Horizon Aviation of Virginia, Inc. in 1993 after Horizon Aviation purchased Mid-Eastern Airways' leasehold interest.

In July 1999, Horizon Airport Management, Inc. provided airport management services under a separate agreement, while its sister company, Horizon Aviation Services, continued to provide full FBO services. After a City Audit questioned this practice, the

⁵ The Respondent argues the Complainant is operating an aircraft rental operation at Newport News/Williamsburg International Airport without the knowledge of airport management and in apparent violation of the airport's rules, regulations and minimum standards. [See FAA Exhibit 1, Item 5, Answer, page 5, footnote 1, and FAA Exhibit 1, Item 5, Answer, exhibit 17, Affidavit of Mark Fallin, Airport Manager of News/Williamsburg International Airport.] Mr. Fallin told the FAA Compliance Officer that the company was a "gypsy" operation, an operator on the airport without a permit. [FAA Compliance Officer's conversation with Mark Fallin on 14 November 2001.] Complainant indicates that it was a subcontractor to Flight International, an existing FBO on Newport News/Williamsburg International Airport, from November 1999 to November 2000 and it did not contract directly with the airport as an FBO. [FAA Compliance Officer's conversation with Roger Leonard of Cardinals' Pilot Shop, 14 November 2001.] This was verified with Mr. David Sharp, Manager of Flight International. According to Mr. Sharp, Cardinals' Pilot Shop provided aircraft rental and pilot training as a requirement of Flight International's contract with the Newport News/Williamsburg International Airport. The Complainant did not contract directly with the airport. After November 2000, Mr. Leonard remained on the airport for six months; Mr. Sharp believes he might have been transporting students to his flight school at Suffolk. [FAA Compliance Officer's conversation with David Sharp, Flight International, 13 December 2001.] Kenneth R. Scott, Airport Director for Norfolk International Airport indicates Cardinals' Pilot Shop is a customer of the fixed-base operator and does not contract directly with the Norfolk Airport Authority. According to Mr. Scott, Mr. Leonard recently signed a contract with the FBO to provide pilot training. [FAA Compliance Officer's conversation with Kenneth R. Scott, Airport Director, Norfolk International Airport, 14 December 2001.]

airport management contract with Horizon Airport Management, Inc. was terminated and the Airport Authority hired its own manager in June 2001.

C. Fixed-Base Operator and Management Agreements

1. Mid-Eastern Airways, Inc.

On January 1, 1979, the Chesapeake Airport Authority and Mid-Eastern Airways, Inc., entered into a lease agreement to provide a full-service fixed-base operation at Chesapeake Municipal Airport. The lease encompassed a five-acre parcel of land designated as the Fixed-Base Operations Area and a parcel of land known as the Paved Apron Area. Mid-Eastern was required to construct buildings and facilities on its leasehold. The term of the lease was for five years with an additional four terms of five years each, ending January 1, 2004.

As a part of its agreement with Mid-Eastern, the Airport Authority agreed not to enter into another lease on terms that were more advantageous or upon conditions less stringent than those offered to Mid-Eastern. It also offered Mid-Eastern the first right of refusal on any other lease agreement. Mid-Eastern paid rent for the lease of the Fixed-Base Operations Area and the Paved Apron Area and a fuel flowage fee on all the fuel it sold. It also assumed maintenance responsibilities for its leased area and the airport lighting system. As part of the agreement, the Airport Authority could not adopt any changes to the airport's minimum standards without the approval of Mid-Eastern. [FAA Exhibit 1, Item 5, exhibit 1]

2. Horizon Aviation Services, Inc.

In May 1993, the agreement with Mid-Eastern was amended when Mid-Eastern transferred its assets and assigned its leasehold to Horizon Aviation of Virginia, d/b/a Horizon Aviation Services. The amended lease granted Horizon a first right of refusal on any expanded area of the ramp not designated for a private hangar facility. Horizon was also given exclusive occupancy of the customer service counter and reception area of the terminal building. The Airport Authority assumed maintenance responsibilities for the airport lighting systems and all pavements not included in the leased area. [FAA Exhibit 1, Item 5, exhibit 2] The amended lease was extended to May 8, 2013.

In May 1999, the agreement with Horizon Aviation Services, Inc. was revised when the Airport Authority purchased the leasehold rights and hangar facilities previously owned by Horizon and Chesapeake Hangar Associates, another operator on the airport. In what the Airport Authority calls a "restatement" of the lease, intended to clarify contractual arrangements and separate full FBO services and airport management responsibilities, Horizon's rights regarding "first right of refusal" for development and prior approval of revisions to the minimum standards were eliminated. The new agreement requires only prior notification regarding third party development proposals. [FAA Exhibit 1, Item 5, exhibit 3]

Horizon was granted the exclusive right to operate the Fuel Farm during the initial term and any extension to the agreement. As defined in the lease,

Fuel Farm shall mean any facility within the boundaries of the Airport used for bulk fuel storage and fueling operations which is owned, leased, or otherwise under the control of the [Airport] Authority, the real estate upon which any such facility is located and the improvements, fixtures and equipment thereon.

The lease also includes a hangar/office building identified as item number 1 on sheet number 3 of the Airport Layout Plan by Talbert & Bright, Engineering & Planning Consultants, dated August 1997. Runways, taxiways, apron, and roadways were excluded from the lease and are considered common use. Although it is not mentioned in the lease, Horizon continues to occupy most of the terminal (item 6 on the Airport Layout Plan).⁶ The Authority's Airport Manager also has an office in the terminal.

Horizon serves as an airport-leasing agent for the Airport Authority, renting hangars and tie-downs on the airport. The Airport Authority assumes responsibility for most of the maintenance on the hangars, terminal building⁷ and Fuel Farm.⁸ The lease requires Horizon to reserve adequate apron area for loading and unloading, and priority hangar space for Authority-owned or leased aircraft.⁹

Horizon provides a full range of FBO services including aircraft storage, aircraft maintenance and repair, retail sales of fuel and oil, aircraft parts and supplies, and aircraft removal. Horizon is authorized to provide, at its discretion, aircraft sales and leasing, flight instruction, aircraft storage, charter service, aircraft rental, and ground transportation.

In return for a 20-year lease ending April 30, 2019, Horizon agreed to pay the Airport Authority \$1,667 per month adjusted periodically based on the Consumer Price Index. The monthly rent is also subject to increases attributed to the cost of Authority-funded improvements. Horizon agreed to pay the Airport Authority a fuel flowage fee of \$0.05 per gallon for fuel pumped from the Fuel Farm up to and including 750,000 gallons and \$0.075 per gallon for fuel pumped over 750,000 gallons. Horizon retains all tie-down rentals and has the right to rent the airport's hangars.

⁶ Interview with Nancy Goodnight, FAA Washington Airports District Office, Dulles International Airport, 27 December 2001. FAA Exhibit 1, Item 5, exhibit 2, page 3, provides Horizon exclusive occupancy of the terminal for 20 years commencing May 8, 1993.

⁷ See FAA Exhibit 1, Item 5, exhibit 3, page 8, paragraph 5.

⁸ See FAA Exhibit 1, Item 5, exhibit 3, page 7 and 8, paragraphs 2, 3, 4.

⁹ See FAA Exhibit 1, Item 5, exhibit 3, page 9.

3. Horizon Airport Management Agreement, Inc.

In July 1999 the Airport Authority signed an agreement with Horizon Airport Management, Inc to provide airport management services including management, operation and maintenance, lease negotiation, contract administration, financial administration, marketing, and public and governmental affairs. John Beaulieu, president of Horizon Aviation Services and Horizon Airport Management, Inc., served as the airport manager until the contract was terminated on June 30, 2001. At that time, the Airport Authority hired its own airport manager. [FAA Exhibit 1, Item 5 and exhibit 4]

Until June 2001, there were four Horizon companies located at CPK: Horizon Airport Management, Inc.; Horizon Aviation of Virginia, Inc.; Horizon Aircraft Sales & Leasing, Inc.; and Horizon Aviation Services, Inc. John Beaulieu serves as president of all four companies. [FAA Exhibit I, Item 3, exhibit ee, page 2] Horizon also operates an FBO at Norfolk International Airport.

4. Chesapeake Airport Authority Preliminary Report¹⁰

In June 2000, Chesapeake's City Manager requested the City's Audit Services Department to audit the management, finances, and operation of the Chesapeake Airport Authority. The city auditors made several findings and recommendations.

One of the findings concerned the Airport Authority's purchase of two properties totaling \$705,000 without obtaining independent appraisals. The Airport Authority made a policy decision that it wanted to own and control all real property on the Airport. Prior to 1999, all hangars constructed upon the airport were privately owned facilities on land leased from the Airport Authority. On May 12, 1999, the Airport Authority purchased three T-hangar buildings and the leasehold interest of Chesapeake Hangar Associates for a cash purchase price of \$505,000. On June 30, 1999, the Airport Authority obtained two hangars and related improvements and the leasehold interest from Horizon Aviation Services in exchange for \$200,000 and a new 20-year FBO agreement.¹¹

The Airport Authority in its response to the city audit report¹² argues that there were several valid reasons for not obtaining independent appraisals:

First, the unimproved portion of the property leased by Chesapeake Hangar Associates had significant value because it was critical to the airport's development plan.

¹⁰ Final Audit Report has not been issued; Chesapeake Airport Authority is working to resolve outstanding issues. [FAA Compliance Officer conversation with Mr. Jay Poole, Director of Audit Services, City of Chesapeake, Virginia, November 16, 2001.]

¹¹ See FAA Exhibit 1, Item 7(B).

¹² See FAA Exhibit 1, Item 7(B) Appendix A.

Second, the Airport Authority viewed these two properties as unique. William J. Herring, Chairman of the Airport Authority, in the response to the Audit findings and recommendations, indicated:

It is extremely rare that airports and/or their related facilities are sold in "arms length" transactions. If such properties are sold, it is most often in distressed situations. Other sales result from plans to convert them to other uses. A lack of available information on comparable property sales hindered the ability to obtain a fair market valuation.

Third, the Airport Authority believes that estimating replacement cost is another way of determining the value of the property. Based upon information provided by contractors specializing in hangar construction, the Airport Authority determined replacement costs at \$407,000 (Horizon) and \$708,000 (Chesapeake Hangar Associates) with an allowance for depreciation. The purchase prices were \$200,000 and \$520,000 (+/-) respectively. The replacement cost doesn't reflect the value of the land leases, which was included as a cost-free "bonus." The Airport Authority believes that this method, when viewed from an income approach, was reasonable since the Horizon hangars were being leased back to the FBO.

Finally, the Airport Authority believes the cost of the appraisals would have been an unnecessary cost for unreliable information.

The audit findings also addressed concerns regarding: a) awarding a management contract without competitive bidding, b) potential claims for conflict of interest regarding the airport management firm, c) lack of airport staff, d) inadequate funding, and, e) pending non-compliance with FAA requirements. The Airport Authority did not concur with the auditor's findings on the awarding of the management contract without competitive bidding, inadequate staffing and pending noncompliance with FAA requirements, and offered rebuttals to the Auditor's recommendations.¹³ [See FAA Exhibit 1, Item 7(B)]

D. History of Complainant's Request and Allegations Regarding Grant Violations

Initial Request. On August 20, 1999, in a letter to William J. Herring, Chairman of the Airport Authority, the Complainant expressed an interest in establishing a customer pick-up site at Chesapeake Municipal Airport to service its aircraft rental customers in the Chesapeake and Portsmouth area. [FAA Exhibit 1, Item 3, exhibit a] The Complainant believed there was sufficient customer demand to support such an operation. In order to initiate this operation, the Complainant indicated he required ramp

¹³ See FAA Exhibit 1, Item 7, exhibit B. One of the findings addressed the Authority's failure to comply with the requirements of the FAA Regional Determination on Mr. Leonard's original complaint.

parking for two aircraft and use of the public facilities at CPK.¹⁴ In a letter dated September 11, 1999, to William J. Herring, Chairman of the Airport Authority, the Complainant made it clear that he would continue to retain his primary base of operations at Suffolk Municipal Airport. Since the Complainant was not interested in becoming an FBO at CPK, he believed that CPK's minimum standards would not apply to his proposed level of activity. [FAA Exhibit 1, Item 3, exhibit c]

In October 1999, at the request of John Beaulieu, CPK Airport Manager, the Complainant submitted an application for a commercial operating permit, along with his existing business license for Suffolk County and aircraft insurance certificate for the commercial operation at Suffolk Municipal Airport. [FAA Exhibit 1, Item 3, exhibit d]
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Denial of Request. On November 3, 1999, the Chesapeake Airport Authority Rules Committee denied the Complainant's request to conduct a commercial operation at the airport.¹⁶ The Committee cited the lack of any space available on the airport. The Committee noted that the Complainant, as an aircraft operation, is required to rent suitable office space from the Airport Authority to comply with Sections 7.6.1 and 6.4.1d of the Minimum Standards/Rules and Regulations, [FAA Exhibit 1, Item 5, exhibit 13] which include:

Section 7.6.1. *Except as otherwise provided in any agreement between the FBO and the Airport Authority, an FBO offering aircraft for rental shall be required to provide:*

- a) *Suitable office space on the airport for consummating rentals and keeping proper records in connection therewith;*
- b) *At least one airworthy aircraft maintained and certified;*
- c) *Hangar storage space for at least one aircraft to be used for rental purposes, if available;*
- d) *Adequate facilities for servicing and repairing the aircraft;*
- e) *Adequate arrangements for parking of the aircraft;*
- f) *A properly certified pilot capable of conducting flight checks of prospective renters must be available during business hours;*

¹⁴ The Complainant did not define the "public facilities" to which he requires access. We assume that this means restrooms, telephone, and cafeteria, if available.

¹⁵ The Airport Minimum Standards requires the applicant to submit an insurance certificate for public liability and property damage with minimum amounts of \$1,000,000 bodily injury or death, \$1,000,000 property damage, and names the Authority and its agents as additional insured. The insurance certificate submitted by the Complainant was for aircraft based at Suffolk Municipal Airport; it did not contain the information requested by the Authority regarding public liability and property damage amounts. The insurance certificate refers to a Form 1007 that was not included in the application. The certificate also contained the following restriction on the use of the aircraft, "*the aircraft will be used for your pleasure [Cardinals' Pilot Shop] and business related purposes where no charge is made for such use and also will be used for the following purposes: Rental to, Others for their Pleasure and Business Use.*"

¹⁶ See FAA Exhibit 1, item 3, exhibit e.

- g) Adequate public liability and property damage insurance sufficient to protect the operator and the city from legal liabilities involved;
- h) Proper checklist and operating manual for all aircraft rented;
- i) An adequate supply of properly located fire extinguishers and other precautions and/or equipment required by city fire codes and;
- j) Auto parking for customers and employees.

Section 6.4.1. The Airport Authority may deny any application, or reject a bid or proposal to operate on the airport, if, in its opinion, it finds any one or more of the following ... (d) There is no appropriate, adequate or available space or building on the airport to accommodate the applicant at the time of the application. [Exhibit 5, item 13, page 17]

A conflict arose regarding whether or not the Complainant would be functioning as a fixed-base operator at CPK. The Complainant insisted he would not be an FBO at CPK; the Airport Authority believed he would. At various points, the Airport Authority also argued that the Complainant's business could be described as a through-the-fence operation. The FAA, on the other hand, believes the Complainant's operation would be neither that of an FBO nor that of a through-the-fence operation. Rather, the FAA believes the most appropriate designation for the Complainant's proposed business operation at CPK is that of a specialized aviation service operator (SASO).

The designation of the Complainant's business operation is critical to determining the applicable minimum standards he would need to meet in order to gain access to, and operate at, CPK. Understanding the three types of operations, and where the Complainant best fits, is essential to understanding the FAA's determination in this matter. We have included in this *Background Section* a brief description and discussion of the arguments presented for each of the following: (1) Through-the-Fence Operation, (2) Fixed-Base Operator, and (3) Specialized Aviation Service Operator.

1. Through-the-Fence Operation

A through-the-fence operator is an individual or entity operating from privately owned land adjacent to the airport. It is not part of the airport property. Through-the-fence operators conduct their business on private property, but require access to the aircraft movement area for landings and departures. The airport owner has no Federal obligation to provide a through-the-fence aircraft operator access to airport property from adjacent land. (See *FAA Order 5190.6A, para. 6-6.*)

The Respondent defines the Complainant's proposed business at CPK as a "through-the-fence" operation. The Airport Authority believes that using aircraft parking space at CPK while conducting scheduling, dispatching, and record keeping from a remote location is the very essence of conducting a through-the-fence operation. [See FAA Exhibit 1, items 5 and 6].

The FAA determined, however, that the Complainant is not transacting business from private property adjacent to the airport. The Complainant's proposed activity to provide a customer pick-up site at CPK would take place on airport property. The business transaction would be consummated at CPK by providing the customer with access to the aircraft. Without the customer's access to the aircraft at CPK, that transaction would not take place.

2. Fixed-Base Operator (FBO)

A fixed-base operator is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction to the public. (See *FAA Order 5190.6A, Appendix 5*).

The Complainant argues that he is not interested in becoming a fixed-based operator at CPK; all he wants is permission to lease two aircraft parking spaces with access to public facilities. He wants access to CPK only to support his aircraft rental operation based at Suffolk Municipal Airport, which is located several miles away. [See FAA Exhibit 1, item 6].

The Respondent raises questions regarding the proposed activity and the type of business the Complainant wants to conduct at CPK. Even though the Complainant states he only wants to conduct aircraft rental services, the Respondent is concerned the Complainant would possibly provide additional services consistent with operating as an FBO, such as pilot training. The Respondent indicates these concerns are based upon the Complainant's existing business practices at other airports. [See FAA Exhibit 1, item 8].

The Respondent also argues that the Complainant will be operating as an FBO based on the list of services the Complainant offers on its web site. Those services identify the Complainant as an FBO. [See FAA Exhibit 1, item 8].

The FAA notes, however, that the services identified in the web site refer to the Complainant's operation at Suffolk Municipal Airport and not at CPK. Even though the Complainant may be a full-service FBO at Suffolk Municipal Airport, his application for service at CPK is for a limited aeronautical activity, not an FBO.

3. Specialized Aviation Service Operator (SASO)

A specialized aviation service operator is an aeronautical business that offers a single or limited aeronautical service on the airport. (See *FAA Advisory Circular 5190-5*).

Neither the Complainant nor the Respondent identified Cardinals' Pilot Shop as a SASO in their arguments. The Complainant believed his operation was less than that of a SASO since he wanted only two aircraft parking spaces and access to public facilities on the airport. [See FAA Exhibit 1, item 3] The Respondent believed Complainant's operation would be greater than that of a SASO since the Airport Authority envisioned the Complainant expanding his business to include activities consistent with an FBO operation. [See FAA Exhibit 1, item 8]

The FAA agrees with the Respondent that the Complainant's request to use CPK for its proposed activity amounts to more than just a request for two aircraft parking spaces and access to public facilities. However, the FAA does not agree that the level of activity proposed is equivalent to that of an FBO. The Complainant, as a commercial operator, wants to provide aircraft rental services at CPK. This is a legitimate commercial aeronautical activity. It is also a single activity. As such, the Complainant's proposed activity best fits the description of a specialized aviation service operator.

In fact, the FAA Eastern Region determined that, based on the proposed activity at CPK, the Complainant's operation at CPK should be classified as a specialized aviation service operator. We concur with the FAA Eastern Region's informal determination on the Complainant's designation as an SASO.

Eventually, the Respondent *relented* and agreed the Complainant was not proposing to operate as a full-service FBO at CPK. The Respondent changed its position and agreed to require the Complainant to comply only with the requirements it imposes on other specialized aviation service operators.

At the time of the initial request, the Airport Authority regarded the Complainant as a fixed-base operator and applied the minimum standards applicable to an FBO when deciding how much office space the Complainant would be required to maintain and whether sufficient space was available. Although denying the initial request because adequate office space was not currently available on the airport, the Committee did advise the Complainant of its willingness to review the application some time in the future. The Airport Authority indicated it had plans to expand the terminal, which would create additional commercial space. No specific timeframe for this expansion and renewed evaluation was provided. [FAA Exhibit 1, Item 3, exhibit e]

Informal Complaint with FAA. The Complainant filed an informal complaint with the Washington Airports District Office, Federal Aviation Administration, on November 9, 1999. [See FAA Exhibit 1, item 3, exhibit f] The Complainant indicated that the Airport

Authority required him to lease office and hangar space that was not available and not needed to conduct his business as a condition to leasing aircraft parking space. The Complainant alleged that he was being denied permission to park his aircraft at CPK because Horizon Aviation Services, Inc. has a monopoly on existing commercial aeronautical services at the airport. The Complainant cited the following examples as evidence of the existence of an exclusive right:

- The Airport Authority awarded Horizon Aviation an FBO contract without competitive bidding or public notice;
- The Airport Authority awarded an airport management contract to Horizon Aviation without competitive bidding or public comment;
- The Airport Authority awarded a building management contract to Horizon Aviation without competitive bidding or public comment;
- The Airport Authority demolished Horizon Aviation's old fuel farm with public funds and awarded it a contract to operate the new fuel farm without competitive bidding;
- The Airport Authority awarded Horizon Aviation an exclusive agreement to manage ramp/tie down areas and retain all parking revenue without competitive bidding or public review;
- The Airport Authority is leasing all present space at CPK to Horizon Aviation at below market prices and on favorable terms.

[FAA Exhibit 1, Item 3, exhibit f]

The Complainant also alleged a conflict of interest among several members of the Airport Authority who personally leased aircraft from Horizon Aviation. He also alleged a conflict of interest with John Beaulieu, manager and owner of Horizon Aviation who, in his role as airport manager, adjudicate the interest of airport tenants who are in direct competition with his company. [FAA Exhibit 1, Item 3, exhibit f]

The Chesapeake Airport Authority chose not to respond directly to the Complainant's informal allegations about its management and operation of the airport. In its November 30, 1999, reply to the FAA, William J. Herring, Chairman of the Airport Authority, wrote:

"The Chesapeake Airport Authority strives to maintain high professional standards in all of its dealings. It is unfortunate that Mr. Leonard [the Complainant] has chosen to once again issue baseless allegations of wrongdoing and impropriety against the [Airport] Authority and airport

management, continuing a trend that began several years ago during his tenure as an Authority member."

[FAA Exhibit 1, Item 3, exhibit I]

The Airport Authority reaffirmed its previous position regarding the Complainant's operation and indicated that there was not sufficient space available to support the Complainant's operation. The Airport Authority was willing to reconsider the Complainant's proposal based upon the availability of space and his willingness to comply with the Authority's standards.

Following guidance provided by the FAA Washington Airports District Office, the Complainant defined his informal complaint to allege the Airport Authority violated certain sections of Grant Assurance 1, *General Federal Requirements*; Grant Assurance 22, *Economic Nondiscrimination*; and Grant Assurance 23, *Exclusive Rights*.¹⁷ However, the Complainant provided no documentation to support its allegations of assurance violations. On January 19, 2000, the FAA Washington Airports District Office forwarded the complaint to FAA Eastern Region Airports Division for resolution.

FAA Eastern Region Informal Determination. In his June 5, 2000, Informal Determination, Robert Mendez, FAA Eastern Region Airports Division Manager, found that the Respondent may be in violation of Grant Assurance 22, *Economic Nondiscrimination*, and Grant Assurance 23, *Exclusive Rights*. The Regional Determination directed Chesapeake Airport Authority to amend the current airport minimum standards to reflect reasonable requirements for specialized aviation service operators within 60 days. [FAA Exhibit 1, Item 3, exhibit u]

Mr. Mendez indicated that the Respondent has a Federal obligation under Grant Assurance 22, *Economic Nondiscrimination*, to make its airport available as an airport for public use on fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses.

Mr. Mendez noted CPK's minimum standards required individuals interested in conducting a commercial aeronautical activity at CPK to obtain a commercial operating permit, maintain office space, and lease hangar storage. Mr. Mendez agreed that these facility requirements might be a necessity for a full-service FBO offering aircraft for rental as part of its operation, as stated in section 7.6.1 of CPK's minimum standards. However, Cardinals' Pilot Shop Inc. had indicated it would not be operating a full-service FBO operation at CPK; it would be conducting a single activity only. To

¹⁷ The Complainant alleged, without explanation, violations of the Sherman Act, Hatch Act, Clayton Act, Federal Trade Commission Act, Robinson-Patman Price Discrimination Act, Hart-Scott-Rodino Antitrust Improvement Act of 1976, Copeland Antikickback Act, 49 CFR Part 18-Uniform administrative requirements for grants and cooperative agreements to state and local governments. The Complainant failed to cite specific provisions of each Act that he believed were violated or to provide supportive documentation to support his claims.

conduct this activity, the Complainant indicated the facilities he required would be limited to parking for two aircraft and access to the airport's public facilities.

In his informal determination, Mr. Mendez indicated that the Complainant's proposed level of service at CPK fell within the definition of a specialized aviation service operator (SASO) and therefore would not fit the same category as a full-service FBO.¹⁸ Consequently, Mr. Mendez determined that the Airport Authority's insistence that the Complainant comply with full-service FBO minimum standards, which the Airport Authority admitted it could not accommodate, was unreasonable. [FAA Exhibit 1, Item 3, exhibit u]

Mr. Mendez noted in the Regional Determination that FAA Advisory Circular 150/5190-5, provides, in relevant part, that

"[w]hen SASO... apply to do business on an airport, difficulties can arise if the airport sponsor requires that all businesses on the airport comply with all provisions of the published minimum standards. This is not to say that all SASOs providing the same or similar services should not equally comply with all applicable minimum standards. However an airport should not, without adequate justification, require that an operator desiring to provide a single service also meet the criteria for a full-service FBO. An airport sponsor should develop reasonable, relevant and applicable standards for each type and class of service..."

[FAA Exhibit 1, Item 3, exhibit u]

Mr. Mendez noted that the Airport Authority had not provided an adequate justification for requiring the Complainant, a commercial operator seeking to provide specialized aviation services to the public, to meet the criteria for a full-service FBO. Mr. Mendez wrote:

"Even though the Complainant asserts that the airport minimum standards exceed the level of activity that he is requesting, the [Airport] Authority provides no justification for these standards in any of its responses to the [informal complaint]. This justification is essential since the [Airport] Authority continues to require the complainant to comply with these standards despite the fact that the standards are not even attainable."

¹⁸ Specialized aviation service operator (SASO), as defined in Appendix 1, Definitions, FAA Advisory Circular 150/5190-5, "Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities," which states: "An aeronautical business that offers a single or limited service. Examples of these specialized services may include aircraft flying clubs, flight training, aircraft, airframe and power plant repair/maintenance, aircraft charter, air taxi or air ambulance, aircraft sales, avionics, instrument or propeller services, or other specialized commercial flight support business."

While the FAA encourages the use of minimum standards at airports to ensure their safe and efficient operation, minimum standards should not operate to unreasonably deny a potential tenant the use of the airport facilities. Where minimum standards have the effect of denying access to a public-use airport, the FAA will make an official determination on the relevance and/or reasonableness of the standards. [FAA Order 5190.6A, par. 3-17(b)] Based on the record discussed herein, the FAA does not find that the Chesapeake Airport Authority has provided sufficient justification for the standards it is imposing on Cardinal."

[FAA Exhibit 1, item 3, exhibit u]

Mr. Mendez further indicated that the Airport Authority's actions appeared to have resulted in the constructive granting of an exclusive right at CPK. This determination resulted from the Airport Authority's (1) failure to provide adequate justification for the relevance of requirements imposed on the Complainant, and (2) imposition of requirements it admits were not attainable and had the effect of denying the Complainant an opportunity to provide aeronautical services at CPK.

Airport Authority Response to FAA. On August 9, 2000, in a letter to Robert Mendez, FAA Eastern Region Airports Division Manager, the Airport Authority disagreed with the Region's assessment that the Complainant is a SASO and provided justification for its denial of the Complainant's application for a business permit at CPK. The Airport Authority contended that Cardinals' Pilot Shop met the requirements of a fixed-base operator and that the Complainant intended to provide a variety of aeronautical services to CPK customers. Cardinals' Pilot Shop internet web site, www.airnav.com/airport/SFO/Cardinals, lists a variety of services including flight instruction and training, aircraft rental, sightseeing tours/rides, aircraft leasing/brokerage/sales, aircraft maintenance, avionics service, and the sale of aircraft parts/aviation accessories and pilot supplies. Based on this, the Airport Authority believed it was in the public's best interest that Cardinals' Pilot Shop be regulated through the issuance of an operating permit and a requirement for an onsite presence. According to the Airport Authority, the Virginia Director of Aviation believes it is a common practice for an airport to require a commercial aeronautical operator to have a permit, to maintain appropriate office space, and to compensate the airport for doing business on the airport.¹⁹ The Airport Authority also stated,

"If an airport sponsor surrenders its responsibility to monitor and control normal business activities on the airport, the likelihood of its incurring significant liability for any aircraft accident related to the airport or airport-based business operation increases dramatically."

[FAA Exhibit 1, Item 8]

¹⁹ Letter from the Commonwealth of Virginia Director of Aviation is not included in administrative record, only referenced in the Respondent's Answer.

The Airport Authority also believed that permitting the Complainant to conduct a satellite operation on the airport and allowing the Complainant to provide services listed on the Internet without meeting the minimum standards required for a full-service FBO would be creating an unfair competitive advantage for the Complainant over the existing FBO that does have to meet the minimum standards.

FAA's Reply. Mr. Mendez replied to the Airport Authority on October 27, 2000, stating.

"FAA's determination that [the Complainant] should be provided [aircraft] parking space does not prohibit the [Airport] Authority from requiring [the Complainant] to secure a business permit, complying with safety requirements or the Authority from monitoring the business practices. However, it does prohibit the [Airport] Authority from imposing unreasonable requirements that are not obtainable or necessary for the type of commercial aeronautical service proposed."

[FAA Exhibit 1, Item 3, item bb]

Mr. Mendez acknowledged that the Complainant appeared to be advertising services that would be considered a full-service fixed-base operation rather than the specialized aviation service operation. However, the Complainant's web page advertisement is for his fixed-base operation at Suffolk Municipal Airport. His request to operate an aircraft rental operation at CPK [FAA Exhibit 1, Item 3, exhibit bb²⁰] would be considered limited or a single activity. [FAA Exhibit 1, Item 3, exhibit ff] Mr. Mendez indicated that he failed to see the Airport Authority's argument of unfair competitive advantage.

Mr. Mendez warned the Airport Authority that its business arrangement with Horizon Aviation Services, Inc. might be in direct violation of Grant Assurance 23, *Exclusive Rights*.

The leasing to one enterprise of all available airport land and improvements planned for aeronautical activities will be construed as evidence of an intent to exclude others unless: (1) the lease contains provisions as listed in FAA Order 5190.6A, para. 6-5 (c) or (2) it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease.

The FAA Eastern Region believed that the Airport Authority failed to demonstrate that the entire leased area was presently required and immediately used or that the management agreement contained provisions that would protect the Sponsor's Federal obligations. The FAA Eastern Region found that available aircraft parking space on the airport and the exclusive control by one operator of all space for service, storage, and repair of aircraft was prima facie evidence of a serious imbalance in the development

²⁰ The Mendez letter actually says Suffolk, however it should say CPK

opportunities of airport facilities. [FAA Exhibit 1, item 3, exhibit bb, see pages 2 and 3] The Sponsor was instructed to submit a corrective action plan within 30 days.

FAA Action. On March 26, 2001, after providing repeated extensions to the Airport Authority to submit a corrective action plan and receiving none, the FAA Eastern Region informed the Airport Authority that the FAA would not program further discretionary funds until the matter was resolved. [See FAA Exhibit 1, item 3, exhibit ll]. It also informed the Complainant of his right to file a formal complaint under 14 CFR, Part 16. [See FAA Exhibit 1, item 3, exhibit kk]

Airport Authority Action. At that time, the Airport Authority offered the Complainant temporary office space in a trailer on airport property until the existing terminal could be expanded. [See FAA Exhibit 1, item 5, exhibit 15] The Complainant rejected the Airport Authority's offer to lease the trailer, and on April 6, 2001, the Complainant filed a Part 16 formal complaint.

In its Answer to the formal complaint, the Airport Authority argues that the airport's minimum standards provide for two classifications of FBO operators: one type of operator provides retail aviation fuel and oil sales; the other classification encompasses all other aviation providers, which would include the specialized aviation service operators. The Airport Authority believes that the latter standards are applicable to the Complainant. These standards require the operator to have suitable office space on the airport for consummating rentals and keeping appropriate records in connection with the business conducted on the airport. The standards also require the operator to have suitable staff available during business hours, make adequate arrangements for parking aircraft, and provide public liability and property damage insurance to protect the Airport Authority.

The Respondent implies that Mr. Mendez was mistaken in his belief that the Airport Authority demanded the Complainant to comply with the requirements of service for a full-service FBO; rather, it wanted only that the Complainant comply with the same standards imposed on the other specialized aviation service operators.

The Respondent also argues at this time that the Complainant's initial proposal was for a through-the-fence operation, in which commercial aeronautical services are provided to the public by a business located off the airport outside the control of the airport sponsor. The Respondent argues that the Cardinals' Pilot Shop proposal called for using the airport to rent aircraft without paying for the commercial use of the airport or complying with the standards required of all on-airport commercial operators. The Airport Authority argues:

"Airport Proprietors have a legitimate interest in protecting their revenue streams and in receiving rent from those wishing to do business at the airport, as well as in maintaining the quality of service to be provided at their airport."

The Airport Authority decided not to eliminate the space and staffing requirements in its minimum standards for aircraft rental operators. The Airport Authority did approve the Complainant's application for a commercial operating permit as a limited FBO subject to the conditions of meeting the office space and staffing requirements in the applicable minimum standards. To enable the Complainant to meet these minimum standards, the Airport Authority agreed to provide temporary facilities to Cardinals' Pilot Shop during the transitional period before completion of a planned terminal building expansion. Once the expansion was completed, the Complainant would have the opportunity to occupy more permanent facilities.

Complainant's Response. The Complainant was not satisfied with the decision of the Airport Authority to retain the space and staffing requirements, and refused to accept the temporary facilities offered by the Airport Authority. [See FAA Exhibit 1, item 3, exhibit nn] The Complainant believes the airport minimum standards, even as applied to a SASO, are unreasonable and burdensome for his limited use of the airport. According to the Complainant:

My use of the public airport should not be predicated upon the Chesapeake Airport Authority getting the most it can in fees from my small company, when the standard of those fees is unreasonable.

[FAA Exhibit 1, Item 6]

The Complainant also denies the claim that his business at CPK is a through-the-fence operation or that his company is requesting to do something different from what it does at other area airports. The Complainant indicates that he has operated his aircraft rental operation at Norfolk International Airport with only a contract for parking space with the FBO located there. At Newport News/Williamsburg International Airport, the Complainant operated for one year as a subcontractor to the airport's FBO until his contract was voluntarily terminated. ¹ [See FAA Exhibit 1, item 6]

The Complainant argues that the level of business anticipated at CPK does not warrant maintaining an office and staff that would, in effect, duplicate his operation at Suffolk Municipal Airport. He contends that maintaining an office on CPK will not make his operation safer, as the Airport Authority claims. Rather, it will make it harder, more expensive, and more difficult to operate his business. He further argues that the Airport Authority's requirement for office space and staffing has the effect of imposing a double standard, which the Complainant alleges is for the purpose of overcharging and discriminating against his small company. The Complainant argues that the standards applied to him are not the same as those applied to others. He argues that Horizon Aviation Services handles night aircraft rentals at CPK without any staff present. In addition, he argues that other tenants with temporary office space are not required to man them after regular business hours. ²¹

²¹ See FAA Exhibit 1, item 6

Allegation of Exclusive Rights. The Complainant also alleges in the complaint that the Airport Authority granted an exclusive right to the established FBO on the airport. The Complainant argues that the Airport Authority continues, through its actions, to protect and promote this exclusive right. The Complainant alleges that the Airport Authority has surrendered control of the airport to Horizon Aviation Services through a progression of control and funding diversions as evidenced by FBO agreements and actions on the part of the Authority. This "progression of control" is manifested in: (1) the restrictive covenants of the FBO agreements granting preferential rights to the FBO; (2) awarding contracts without competitive bidding; (3) acquiring Horizon's property without independent appraisals; (4) imposing unreasonable and burdensome requirements on other potential operators, essentially preventing them from operating at the airport; (5) allowing the airport manager to control the hangars; (6) requiring tenants to use FBO fuel; and (7) leasing all available space at the airport to the FBO. [FAA Exhibit 1, item 3, and item 6]

The Complainant includes a number of exhibits in his Reply to the Answer that he believes substantiate the Airport Authority's surrender of control over the airport to the FBO. These include:

- A page dated August 2, 1995, entitled "Minutes." Under Airport Manager's Report, Mr. Beaulieu registered a complaint about the storage of fuel by Coastal Aviation, a commercial operator, in large quantities in an unapproved truck on the airport. The matter was referred to the City Attorney. [FAA Exhibit 1, Item 6, exhibit 7-1]
- An August 21, 1995, notice from William J. Herring, Chairman of the Chesapeake Airport Authority, to Chesapeake T-hangar Occupants intended to correct some misinformation previously stated in an unauthorized letter. Mr. Herring states, "The Airport Authority exercises no control over [Horizon Airport Management, Inc.]" [FAA Exhibit 1, Item 6, exhibit 1]
- A September 6, 1995, letter from Robert H. Powel III to William J. Herring, Chairman of the Chesapeake Airport Authority, regarding Horizon Aviation's lease on the subject of grass cutting responsibilities and a banner tow operator performing self-fueling. [FAA Exhibit 1, Item 6, exhibit 7-2]
- A March 20, 1998, letter from John Beaulieu, Airport Manager to Mr. William R. Carver and Mr. Kevin L. Hubbard [affiliation unknown] regarding Mike Sasser's violation of his lease agreement for the T-hangars, and the need for the Airport Authority to acquire the T-hangars. [FAA Exhibit 1, Item 6, exhibit 6]

- A May 29, 1998, memorandum from R. J. Sitar, T-hangar tenant, to J. M. Sasser Company regarding concerns about a T-hangar rent increase. [FAA Exhibit 1, Item 6, exhibit 4]
- A May 29, 1998, memorandum from R. J. Sitar, T-hangar tenant, to Chesapeake Airport Authority expressing concerns about a T-hangar rent increase. [FAA Exhibit 1, Item 6, exhibit 5]
- A June 8, 1998, letter from Patrick T. Cleary, Chesapeake Airport Authority board member, to Dr. Alan P. Krasnoff, City Councilman, regarding (1) lack of independent appraisals for property acquisition, (2) John Beaulieu's role as both FBO and airport manager, (3) the low fuel flowage fee, and (4) Horizon Aviation's contracts with the Airport Authority. [FAA Exhibit 1, Item 6, exhibit 3]
- A March 16, 1999, letter from Brad Foster of Chesapeake Skydive Adventures to Nancy Goodnight, FAA Washington Airport District Office, regarding his attempts to maintain skydiving operations at CPK. [FAA Exhibit 1, Item 6, exhibit 2]

The Complainant also included a number of newspaper articles on the City Audit, the 14 CFR Part 16 formal complaint, and allegations of mismanagement of the airport.

Airport Authority's Response to Allegations. The Airport Authority summarized in its Rebuttal its position on the various allegations made by the Complainant:

First, the Airport Authority insists the airport minimum standards and their application to the Complainant's proposed operation are reasonable and non-discriminatory. The Airport Authority is not discriminating against him by imposing unreasonable burdens on his request for [aircraft] parking space. The Airport Authority believes that the Complainant's request is for more than simply space for parking aircraft. The Airport Authority believes the Complainant intends to operate an aircraft rental operation and possibly conduct pilot training. As such the Airport Authority believes that the Complainant should be required to have suitable space and maintain qualified staff as required by the airport minimum standards.

Second, the Airport Authority argues it should not be forced to waive its minimum standards to accommodate the Complainant or to permit the Complainant to conduct a through-the-fence operation. The Airport Authority believes that using aircraft parking space at CPK while conducting scheduling, dispatching, and record keeping from a remote location is the very essence of conducting a through-the-fence operation. The Complainant will be using the Chesapeake Regional Airport to conduct his business, but will be beyond the control of the Chesapeake Airport Authority by having his

administrative operation at Suffolk Municipal Airport. The Airport Authority argues that the FAA should permit each ...airport sponsor to exercise its managerial discretion to administer the affairs of its own airport as allowed by Federal Law. [See *United Aircraft Services, Inc. v. Hancock County Port and Harbor Commission and Hancock County Board of Supervisors, Director's Determination, FAA Docket 16-00-04, 2000 FAA LEXIS 1016, * 32 (October 12, 2000)*(an airport "sponsor can refuse to allow through-the-fence operations, without violating the grant assurance requiring access" to the airport).]

Third, the Complainant's application does not comply with the minimum standards. The Complainant argues that he does not need to maintain an office or provide staffing because his operation at Suffolk Municipal Airport is only a few miles away. Furthermore, because the Airport Authority is imposing these standards, he asserts he is being discriminated against in favor of Horizon. The Airport Authority contends that the airport minimum standards conform to industry practices and are applied uniformly.

Fourth, the Airport Authority has not granted (explicitly or implicitly) an exclusive right to Horizon FBO. The Complainant's main argument that Horizon FBO has an unfair advantage by the fact that it serves a dual role as airport manager has been rendered moot with the termination of the airport management agreement.

The Airport Authority believes that Horizon FBO does not have a de facto exclusive right; it does not lease all available space and hangars, nor does it control all of the airport's facilities. There are large tracts of land available for aeronautical development. The Airport Authority is planning a terminal expansion. Most of the hangars/T-hangars are leased directly to individual aircraft operators. The existence of a single FBO business on the airport is not, by itself, evidence of the existence of an exclusive right.

The Airport Authority denies it has colluded or colludes with Horizon FBO to the disadvantage of other operators. It insists it has not turned away commercial operators by imposing unreasonable and burdensome requirements. The Airport Authority asserts that findings of the City of Chesapeake Audit [June 2000] do not support allegations that Horizon FBO is being favored to the exclusion of others, and that its actions do not constitute a violation of state law.

The Airport Authority submits a Motion to Dismiss on the grounds that (1) Complainant fails to state a claim upon which relief can be granted; (2) as a matter of law, the Authority's actions do not violate the prohibition against exclusive rights in 49 U.S.C. §§ 40103(e) and 47107(a)(4), or the sponsor's assurances; and, (3) as a matter of law, the Authority's actions do not violate the prohibition against unjust economic discrimination.

IV. ISSUES

Upon review of the allegations and the relevant airport-specific circumstances, summarized in the Background Section above, the FAA has determined that the following issues require analysis in order to provide a complete review of the Sponsor's compliance with applicable Federal law and policy:

- Whether the Respondent has denied the Complainant reasonable access to, and use of, CPK on reasonable terms for the purpose of establishing a customer pick-up site for his aircraft rental service operated out of Suffolk Municipal Airport, and whether the Respondent's actions in this regard constitute unjust discrimination in violation of Title 49 U.S.C. § 47107 (a)(1)(5) and Federal Grant Assurance 22, *Economic Nondiscrimination*.
- Whether the Respondent, through its policies and practices, has constructively granted Horizon Aviation Services an exclusive right as the only fixed-base operator on the airport by imposing minimum standards that discourage competition among commercial aeronautical services at CPK in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights*.

Our decision in this matter is based on the applicable Federal law and FAA policy, review of the arguments and supporting documentation submitted by the parties and other interested persons, interviews with the parties and other interested persons, and the administrative record reflected in the attached FAA Exhibit 1.²²

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal 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 and 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 fair and reasonable access to the airport.

²² FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

The following is a discussion pertaining to (a) the Airport Improvement Program and Airport Sponsor Assurances, (b) the Airport Compliance Program, and (c) Enforcement of Airport Sponsor Assurances.

A. The Airport Improvement Program and Airport Sponsor Assurances

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. As a condition precedent to providing airport development assistance under the Airport Improvement Program, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

These sponsorship requirements, or assurances, are included in every airport improvement grant agreement as set forth in FAA Order 5100.38A, *Airport Improvement Program (AIP) Handbook*, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification."

The grant assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Upon acceptance of an AIP grant by an airport sponsor, the assurances become a contractual obligation between the airport sponsor and the Federal government. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. [See, *e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107, 47111(d), 47122.]

FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

The Complainant has alleged violations of two grant assurances: (1) Grant Assurance 22, *Economic Nondiscrimination*, and (2) Grant Assurance 23, *Exclusive rights*. Two additional grant assurances are also applicable in this case: (3) Grant Assurance 5, *Preserving Rights and Powers*, which prohibits the airport sponsor from relinquishing total control over the airport, and (4) Grant Assurance 19, *Operations and Maintenance*,

which requires the airport sponsor to operate the airport at all times in a safe and serviceable condition.

1. Economic Nondiscrimination

Grant Assurance 22, *Economic Nondiscrimination*, has multiple components. Two of these relate directly to the Complainant's allegations: (a) Public Use of the Airport, and (b) Reasonable and Not Unjustly Discriminatory Terms.

a. Public Use of the Airport

The owner of any airport developed with Federal grant 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 activity on fair and reasonable terms, and without unjust discrimination. Grant Assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Grant Assurance 22(a)]

may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Grant Assurance 22(h)]

may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Grant Assurance 22(i)]

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

The owner of an airport developed with Federal assistance is responsible for operating the aeronautical facilities for the benefit of the public. (*See FAA Order 5190.6A*) This means, for example, that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport. (*See FAA Order 5190.6A*) However, in all cases involving the airport owner imposing restrictions on the use of the airport for safety and efficiency reasons, the FAA will make

the final determination of the reasonableness of the airport owner's restrictions that deny or restrict use of the airport. (See *FAA Order 5190.6A*)

b. Reasonable, and Not Unjustly Discriminatory, Terms

Grant Assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances satisfies the requirements of Title 49 U.S.C. 47107 (a)(5), which requires that FBOs similarly using the airport must be subject to the same charges. Grant Assurance 22 provides, in pertinent part, that the sponsor of a federally obligated airport will ensure that

each fixed-based operator at any airport owned by the sponsor 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. [Grant Assurance 22(c)]

FAA Order 5190.6A describes the responsibilities under Grant Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on fair and reasonable terms without unjust discrimination, regardless of whether they are FBOs or not. (See *FAA Order 5190.6A, Sections 3-1 and 4-14(a)(2)*)

2. Exclusive Rights

Title 49 U.S.C. § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Title 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Grant Assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport

"...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...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 the Airport and Airway Improvement Act of 1982."

In FAA Order 5190.1A, Exclusive Rights, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition

against exclusive rights. While public use airports may impose qualifications and minimum standards upon those engaged 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. Pompano Beach v FAA, 774 F.2d 1529 (11th Cir, 1985).]

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

3. Preserving Rights and Powers

Grant Assurance 5, *Preserving Rights and Powers*, of the prescribed sponsor assurances implements the provisions of the AAIA, 49 U.S.C. 47107 et seq. and requires, in pertinent part, that the sponsor of a federally obligated airport

"...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish, or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

This assurance obligates the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements. If the airport is managed by any person or agency other than the sponsor, this assurance requires the sponsor to reserve sufficient rights and authority to ensure the airport will be operated and maintained in accordance with applicable Federal laws, rules, and grant agreements. It also places certain obligations on the sponsor regarding land upon which Federal funds have been spent.

FAA Order 5190.6A describes the responsibilities under Grant Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [See Order, Secs. 4-7 and 4-8]

4. Operations and Maintenance

Grant Assurance 19, *Operations and Maintenance*, places responsibility on the sponsor to operate and maintain the airport in a safe and serviceable condition and in accordance with reasonable minimum standards.

a. Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, reasonable, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [See FAA Order 5190.6A, Sec. 3-12]

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport. If such a determination is requested, it is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or whether the standard results in an attempt to create an exclusive right. [See Order, Sec. 3-17(b).]

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. [See Order, Sec. 3-17(c).] In addition, an unreasonable requirement, or a requirement that is applied in an unjustly discriminatory manner, could constitute the constructive grant of an exclusive right. [See FAA Order 5190.1A, Para. 11.c.]

b. Use Agreements Involving an Entire Airport.

FAA Order 5190.6A provides guidance in cases where sponsors elect to enter into arrangements involving the operation or maintenance of the airport.

Airport sponsors subject to continuing obligations to the Federal Government may enter into contracts to perform airport operations, maintenance, or administrative functions. It is important to note that the sponsor is in no way relieved of its own obligations to the Government by delegating its airport operations, maintenance, or administrative functions to a third party. [See Order 5190.6A, Para. 4-2 (c).]

FAA will at all times look to the airport owner for effecting such actions as may be required to conform to the owner's compliance obligations. A management corporation with a lease of the entire airport, or a tenant operator authorized to perform any of the owner's management responsibilities, shall be considered resident agents of the airport owner and not as principals.

When the sponsor elects to rely upon one of the commercial operators or tenants on the airport to carry out the maintenance and operating responsibilities assumed by the sponsor, there is a potential conflict of interest. Any agreement conferring such responsibilities on a tenant must contain adequate safeguards to preserve the owner's

control over the actions of its agent. For example, an airport owner shall not delegate authority to one FBO to negotiate an operating agreement (lease) with another FBO. Management responsibilities should, preferably, be in a contract separate from the contract that leases property or grants airfield use privileges. [See Order 5190.6A, Para. 4-2(c).]

If it is contemplated that the management company may, itself, engage in one or more aeronautical activities, FAA will carefully evaluate such an arrangement. Leasing all available land or improvements suitable for aeronautical activity to one person will be, under certain conditions, construed as evidence of intent to exclude others. Such evidence may be overcome in a lease to a management company if the substance of the following provisions is included:

- (i) The lessee (management company) agrees to operate the airport in accordance with the obligations of the sponsor to the Federal Government under [the agreements with the Federal Government]. In furtherance of this general covenant, but without limiting its general applicability, the lessee specifically agrees to operate the airport for the use and benefit of the public; to make all airport facilities and services available to the public on fair and reasonable terms and without discrimination; to provide space on the airport to the extent available; and to grant rights and privileges for use of the landing area facilities of the airport to all qualified persons, firms, and corporations desiring to conduct aeronautical operations on the airport.
- (ii) It is specifically understood and agreed that nothing herein contained shall be construed as granting, or authorizing the granting, of an exclusive right within the meaning of Title 49 U.S.C. Section 40103(e).
- (iii) The sponsor reserves the right to take any action it considers necessary to protect the aerial approaches of the airport against obstruction, together with the right to prevent the lessee from erecting, or permitting to be erected, any building or other structures on the airport which, in the opinion of the sponsor, would limit the usefulness of the airport or constitute a hazard to aircraft.
- (iv) The sponsor reserves the right to develop or improve the airport (landing area of the airport) as it sees fit, regardless of the desires or views of the management company, and without its interference.
- (v) This agreement shall be subordinate to the provisions of any existing or future agreement entered into between the sponsor and the United

States to obtain Federal aid for the improvement or operation and maintenance of the airport.

[FAA Order 5190.6A, Section 6-5]

B. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners comply with their Federal obligations through the Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

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

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures to be followed by FAA personnel 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 made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Airport 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 non-compliance, the FAA will determine whether or not an airport sponsor is *currently* in compliance with the applicable federal obligations. 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, (8/30/01).]

C. Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A covers all aspects of the Airport Compliance Program except enforcement procedures.

Enforcement procedures regarding airport compliance matters, absent the filing of a complaint under *FAA Rules of Practice for Federally-Assisted Airport Proceedings* (14 CFR Part 16), continue to be set forth in the predecessor order, FAA Order 5190.6 issued August 24, 1973, and incorporated by reference in FAA Order 5190.6A. [See FAA Order 5190.6, Sec. 5-3, and FAA Order 5190.6A, Sec. 6-2.] *FAA Rules of Practice for Federally Assisted Airport Proceedings* (14 CFR Part 16) were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.]

VI. ANALYSIS AND DISCUSSION

There are two primary issues that require analysis and discussion:

First, the Complainant alleges that the Respondent has denied the Complainant reasonable access to, and use of, CPK on reasonable terms, and that the Respondent's actions in this regard constitute unjust discrimination in violation of Title 49 U.S.C. § 47107 (a)(1)(5) and Federal Grant Assurance 22, regarding unjust economic discrimination.

Second, the Complainant alleges that the Respondent, through its policies and practices, has granted Horizon Aviation Services an exclusive right by imposing minimum standards that discourage competition among the commercial aeronautical service providers at CPK in violation of Title 49 U.S.C. §40103(e) and Federal Grant Assurance 23, regarding exclusive rights.

In both instances, the Respondent denies the allegations. The Respondent claims that the Complainant has been offered access to the airport pending the Complainant's compliance with the airport's minimum standards. The Respondent believes these minimum standards, and their application to the Complainant's proposed operation, are reasonable, not unjustly discriminatory, and not burdensome. Furthermore, the Airport Authority states it has not granted Horizon Aviation Services a de facto exclusive right since Horizon does not lease all available space on the airport and does not control airport facilities.

These two issues are analyzed and discussed separately below.

- **Issue 1:** Whether the Respondent has denied the Complainant reasonable access to, and use of, CPK on reasonable terms for the purpose of establishing a customer pick-up site for his aircraft rental service operated out of Suffolk Municipal Airport, and whether the Respondent's actions

in this regard constitute unjust discrimination in violation of Title 49 U.S.C. § 47107 (a)(1)(5) and Federal Grant Assurance 22, *Economic Nondiscrimination*.

Grant Assurance 22, *Economic Nondiscrimination*, provides protection from unjust economic discrimination to aeronautical activities. Specifically, assurance 22(a) provides that the sponsor of a federally obligated airport...

will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

In evaluating whether or not the Airport Authority is in compliance with Grant Assurance 22, *Economic Nondiscrimination*, it is necessary to analyze and discuss two separate points in this instant complaint: (a) Whether the Respondent has provided the Complainant access to CPK to conduct his proposed aviation activity, and (b) whether access to CPK is offered on reasonable terms. Both parts must be met for the Respondent to be in compliance with Grant Assurance 22.

A. Access to CPK

Grant Assurance 22, *Economic Nondiscrimination*, promotes the opportunity for public access to the airport. The assurance does not, however, require an airport sponsor to allow every aeronautical activity or every aeronautical entity to operate on the airport. There may be instances when an airport sponsor may be justified in rejecting a complainant's application under certain circumstances:

In this case, the record reflects that the Complainant's initial application to operate at CPK, including follow-up responses, did not meet the Airport Authority's requirements. For example, the requested insurance certificate submitted by Mr. Leonard was for aircraft based at Suffolk Municipal Airport and did not provide the public liability and property damage amounts requested by the CPK Airport Authority for conducting business at CPK. Furthermore, the administrative record indicates that the Complainant made no attempt to address the safety concerns of the Respondent. He did not explain how his aircraft rental operation would be conducted, other than to say his operation is safer than that of Horizon Aviation Services, Inc.

The Airport Authority also contends that Mr. Leonard's application was incomplete and did not reflect full disclosure. Specifically, Mr. Leonard applied for a commercial operating permit and described his intended business as an aeronautical activity and as aircraft parking for customer pick-up. The Airport Authority believes Mr. Leonard also intended to conduct an aircraft rental business at the airport, which was not disclosed in the application.

The Respondent rejected the Complainant's application for a commercial operating permit. The Airport Authority did not cite as its reasons any of the deficiencies noted above. Rather, it cited a requirement in its airport minimum standards for the tenant to maintain office space on the airport, coupled with the airport's inability to provide the required level of office space for the applicant.

At that point, the FAA Eastern Region stepped in and ruled that the Respondent had established unattainable standards that the Complainant could never achieve. While it is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation, such conditions must be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [See FAA Order 5190.6A, Sec. 3-12]

After repeated requests by the FAA Eastern Region for a corrective action plan, and termination of the Airport Improvement Program discretionary funds for CPK, the Airport Authority offered the Complainant temporary facilities in the form of an office trailer. Office space in the terminal would become available pending completion of the terminal building expansion. The office trailer space would satisfy the minimum requirements for maintaining office space on the airport. It was offered because the Respondent indicated there was no available space in the terminal. The administrative record indicates that, with the exception of the airport manager's office, the existing FBO continues to occupy the entire terminal without a lease.

By offering the temporary office space, the Airport Authority has made CPK available to the Complainant. Even though the Airport Authority did not make terminal space available, the Authority has met its obligation under Grant Assurance 22 to make the airport available to the Complainant by offering suitable temporary office space that will satisfy the airport's applicable minimum standards and allow the Complainant to operate his proposed aviation activity on CPK.

B. Access on Reasonable Terms and Conditions

Although accepting the proposed temporary office space would enable the Complainant to obtain access to the airport for the purpose of establishing his customer pick-up site, he was not satisfied with this solution. The Complainant continues to object to the airport's requirement that he maintain office space and staffing at CPK. The Complainant argues that the minimum standards requiring office space and staffing are burdensome, that he does not have a need for office space at CPK to operate his customer pick-up site there, and that he should not be required to maintain any office space on the airport.

The Respondent argues that the requirements to maintain a business presence on the airport are reasonable and that the minimum standards applied to the Complainant are consistent with the proposed level of activity.

The airport's minimum standards establish two classifications for commercial aeronautical activity on the airport: one group includes fixed-base operators providing retail aviation fuel and oil sales; the second group encompasses all other aviation service providers, including SASOs. The Complainant's proposed level of activity falls into the second category. The airport's minimum standards for this category requires the service operator to have: (a) suitable office space on the airport for consummating rentals and keeping proper records in connection with their operations, (b) suitable staff available during business hours, (c) adequate arrangements for parking aircraft, and (d) evidence of public liability and property damage insurance to protect the Respondent.

The Complainant argues that the minimum standards for a SASO are burdensome because they force him to duplicate staffing he already has at Suffolk Municipal Airport. The Complainant points out that there are no other specialized aviation service operators currently on the airport to lend evidence that the standards are reasonable. In addition, the Complainant argues that his company is not requesting to do something different at CPK from what it does at other area airports. The Complainant indicates that he has operated his aircraft rental operation at Norfolk International Airport with only a contract for parking space with the FBO located there. At Newport News/Williamsburg International Airport, the Complainant operated for one year as a subcontractor to the airport's FBO until his contract was voluntarily terminated.

It is common industry practice for SASOs to work in conjunction with FBOs. In cases where an FBO finds it uneconomical to provide a commercial aeronautical activity, that FBO will either subcontract the service to a separate business or permit a smaller operator to provide the service as a part of the FBO. This may be done to meet the FBO's contractual obligations to the airport or to satisfy consumer demand. In such cases, the FBO provides the on-site business presence for the SASO by conducting the SASO's business transactions with FBO employees or providing counter or office space to facilitate communication between the public and the SASO. It is also not unusual for a full-service FBO at one airport location to be a SASO at another airport location, depending on the type of business and the range of services that the marketplace will support. Generally, SASOs do conduct their business as a part of the FBO's operation, giving the SASO a business presence on the airport. It appears that the Complainant may have enjoyed a similar type of relationship with the FBOs at both Newport News/Williamsburg International and Norfolk International Airports. The Complainant has not proposed to operate his specialized aviation service through the FBO at CPK.

The FAA believes that a standard requiring a commercial operator to maintain a business presence on the airport is a reasonable request and a common industry practice. It is in the public's interest that the commercial operator should have a business presence on the airport. The public has an expectation that a commercial operator conducting business on the airport is a reputable ongoing business that complies with Federal, state, and local law. The public Sponsor also assumes a certain amount of liability for its commercial aeronautical activities.

The Respondent's minimum standard requires a *business presence* in that they require the commercial operator to have suitable office space and staffing. The Airport Authority has further defined in their Rebuttal what it considers *suitable* as sufficient space and staffing for the Complainant to conduct his scheduling, dispatching, and record-keeping functions for his aircraft rental activity at CPK.

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport. Such determination is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or whether the standard results in an attempt to create an exclusive right. [See Order, Sec. 3-17(b).]

Initially, the Airport Authority applied the minimum standards suitable for a full-service FBO to the Complainant, who is better described as a SASO. The Airport Authority also required the complainant to rent office space that was not available in order to gain access to CPK. At the request of the Complainant, the FAA Eastern Region stepped in and determined that the minimum standards, as applied, were not relevant to the Complainant's proposed business activity at CPK and were not attainable. The Airport Authority agreed to apply its minimum standards for a SASO to the Complainant and to make arrangements for temporary office space that would meet the required minimum standards. In the instant complaint, the Complainant challenges the reasonableness of the SASO airport minimum standards and has asked for a determination by the FAA Director for Airport Safety and Standards.

The FAA does not agree with the Complainant that the airport's minimum standards for SASOs are unreasonably burdensome merely because they require the Complainant to maintain office space and some level of staffing. A standard requiring a commercial operator to maintain a business presence on the airport is a reasonable request and a common industry practice. However, while the airport's minimum standards for a SASO may reasonably require the operator to maintain a business presence on the airport, the requirement for office space and staffing should be commensurate with, and relevant to, the level of activity proposed by the SASO.

The FAA agrees that it is reasonable to expect a company representative to be easily accessible to the public. It is reasonable to expect the Complainant to pay fees commensurate with the level of service the airport provides. It is reasonable to expect the business records to be easily accessible at CPK for inspection by the airport sponsor. However, we do not agree that it is reasonable to expect the Complainant to conduct his scheduling, dispatching, and record-keeping functions at CPK. As long as the airport sponsor has access to the appropriate records needed for review without having to travel to another location, it should make no difference where the record-keeping function is accomplished. Likewise, there does not appear to be a need for the Complainant to conduct his scheduling and dispatching from CPK when those services are already being handled at Suffolk Municipal Airport.

Moreover, we do not find it reasonable to require the Complainant to have continuous staff available at the airport during business hours. We find no record evidence to establish that having someone available at CPK during business hours is necessary for the safe and efficient operation of the CPK, so long as the Complainant has appropriate staff available to oversee and assist lessees at the time a leased aircraft is picked up by the lessee. While requiring a business presence is a level of service that can be determined by the airport sponsor, the extent of that business presence must be reasonably related to the business actually being conducted.

Therefore, while we find it is reasonable for the Complainant to maintain a certain level of business presence at CPK – including office space and staffing at the time of aircraft pick-up – we do not find it reasonable to require the Complainant to (1) conduct his scheduling, dispatching, and record-keeping functions at CPK, and (2) maintain continuous staffing of the office during business hours when the Complainant's aircraft based at CPK are not being leased.

We note the Respondent's concern that the Complainant may not limit its activities to aircraft rental services. Specifically, the Respondent mentions the potential for providing pilot training even though permission for such activity has neither been requested nor approved. There is no record evidence to support this expectation, but even if it were true, the FAA fails to see how renting additional office space would prevent the Complainant from engaging in this, or any other, unauthorized activity. Monitoring the tenant's activity would appear to be a responsibility of the airport operator. The airport operator must regulate the activities and services of all commercial aeronautical service providers to ensure that they fulfill the obligations of their agreements. Should the Complainant increase his level of activity *with* the Airport Authority's permission, the Airport Authority would at that time apply the appropriate minimum standards applicable to the specific operation. Should the Complainant increase his level of activity *without* the Airport Authority's permission, the Airport Authority would take appropriate action at that time to suspend the unapproved activity. Pre-emptive action is not contemplated. In the absence of special circumstances, denying a commercial operator access to the airport, or applying a higher minimum standard, because of a concern about what an operator *might* do is not a legitimate exercise of a sponsor's authority.

Since the Respondent has provided a means for the Complainant to obtain access to the airport to conduct the aeronautical activity requested, we cannot find that access is denied under Grant Assurance 22. However, Grant Assurance 22 also requires access to be on reasonable terms. While it is reasonable to expect the Complainant to maintain a business presence at CPK, it is not reasonable to expect the Complainant to duplicate administrative functions that create a financial burden for the Complainant and produce no noted safety or other benefit for the airport.

We find the Complainant is not currently being denied reasonable access to, and use of, CPK, but that this access is subject to unreasonable terms, resulting in unjust discrimination against the Complainant. As such, the Respondent is in violation of Title 49 U.S.C. §47107(a)(1)(5) and Federal Grant Assurance 22 regarding Economic Nondiscrimination.

- **Issue 2:** Whether the Respondent, through its policies and practices, has constructively granted Horizon Aviation Services an exclusive right as the only fixed-base operator on the airport by imposing minimum standards that discourage competition among commercial aeronautical services at CPK in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights*.

The Complainant has made two related allegations: (a) an allegation of a constructive exclusive right, and (b) an allegation of a progression of control favoring one entity on the airport.

A. Allegation of an Exclusive Right

The Complainant alleges the Airport Authority has created a exclusive right for Horizon Aviation Services by discouraging the Complainant from establishing a customer pick-up site at CPK for his aircraft rental service. The record reflects there are no other specialized aviation service operators on CPK and the only FBO on the airport is Horizon Aviation Services.

FAA Order 5190.6A, 3-9,c provides that “the leasing to one enterprise of all available airport land and improvements planned for aeronautical activities will be construed as evidence of an intent to exclude others” with certain exceptions. The Airport Authority believes it has not granted Horizon Aviation Services a de facto exclusive right since Horizon does not lease all available space on the airport and does not control airport facilities. While the Order provides that leasing all available space to one entity may be considered evidence of an exclusive right, the Order does not contemplate the reverse. The fact that the Airport Authority has not leased all available space to one entity is insufficient evidence by itself that an exclusive right does not exist.

The Order also provides that a single activity on an airport does not necessarily indicate the existence of an exclusive right. The presence on an airport of only one enterprise engaged in any aeronautical activity will not be considered a violation of the FAA exclusive rights policy if there is no understanding, commitment, express agreement, or apparent intent to exclude other reasonably qualified enterprises. *As long as the opportunity to engage in an aeronautical activity is available to those meeting reasonable qualifications and standards relevant to such activity, the fact that only one enterprise takes advantage of the opportunity does not constitute the grant of an exclusive right.* [FAA Order 5190.6A, 3-9,a]

Initially, the Respondent rejected the Complainant's application for a commercial operating permit because the airport's minimum standards required the tenant to lease office space, which was not available. In conducting its initial review of this case, the FAA Eastern Region ruled that the Respondent provided no justification for the standards requiring office space and staffing. Furthermore, by not making office space available, the Respondent had established unattainable standards that the complainant could never achieve. The FAA Eastern Region found that the lack of a justification for the standard, combined with the unavailability of office space, resulted in the Respondent granting a constructive exclusive right to Horizon Aviation Services.

The Airport Authority has since offered the Complainant temporary office space consistent with the airport's minimum standards. The Respondent believes these minimum standards – and their application to the Complainant's proposed operation – are reasonable, not unjustly discriminatory, and not burdensome. As such, the Airport Authority has provided the Complainant an opportunity to engage in the proposed aeronautical activity at CPK as long as the Complainant meets the airport's qualifications and standards for that activity. The pivotal question is whether the qualifications and standards required by the Airport Authority are reasonable and relevant.

As discussed in *Issue 1* above, we found it reasonable for CPK to require a business presence on the airport, but unreasonable to expect the Complainant to duplicate administrative functions already performed at Suffolk Municipal Airport. We determined the level of business presence required for the Complainant to operate at CPK was excessive under the circumstances, resulting in unjust discrimination against the Complainant.

By establishing excessive office space and staffing levels for the Complainant, and thus keeping the Complainant from operating at CPK, the Airport Authority has effectively protected the one FBO on the airport from competition. The Airport Authority has constructively granted Horizon Aviation Services an exclusive right by imposing minimum standards that discourage competition among commercial aeronautical services at CPK in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights*.

B. Allegation of a Progression of Control Favoring One Entity.

The Complainant raised additional allegations regarding the violation of Grant Assurance 23, *exclusive rights*, that warrant FAA review and discussion.

The Record reflects the Complainant alleges that the history of the Airport Authority's relationship with its FBO shows a progression of control that favored the existing FBO by: (1) granting preferential rights to the FBO through restrictive covenants of the FBO agreements; (2) awarding contracts without competitive bidding; (3) acquiring Horizon's property without independent appraisals; (4) imposing unreasonable and burdensome

requirements on other potential operators, essentially preventing them from operating at the airport; (5) allowing the airport manager to control the hangars; (6) requiring tenants to use FBO fuel; and (7) leasing of all available space at the airport to the FBO. [FAA Exhibit 1, item 3, exhibit f; and item 6]

Many of these allegations were brought to light following an audit review by the City of Chesapeake. The Airport Authority is working with the City Auditors to resolve many of these outstanding audit recommendations. For example, one of the audit recommendations was for the Airport Authority to terminate the airport management agreement with Horizon Aviation Services, Incorporated, and hire its own airport manager. FAA notes that the Authority did terminate the airport management agreement and hire its own airport manager. This action addresses the question of the FBO's control over airport policy and practices. The administrative record indicates that many of the restrictive covenants in the FBO agreement have also been eliminated.

Title 14 Code of Federal Regulations, §§16.23(b)(3) and 16.29(b)(1) require the Complainant to provide a concise but complete statement of the facts relied upon to substantiate each allegation, and provides that the FAA may rely entirely on the complaint and the responsive pleadings provided in rendering a determination. Based on the administrative record, we find the Complainant has failed to provide sufficient evidence to support allegations that the FBO continues to control the airport despite the fact that the restrictive covenant were eliminated from the FBO's lease.

Other allegations are also not supported by the record evidence. For example, the record contains allegations of restrictions on self-service, requiring airport tenants to use the FBO for aircraft services, but the Complainant does not allege that he is denied the right to self service his aircraft. In another example, the Complainant alleges the airport is imposing unreasonable and burdensome requirements on other potential operators, essentially preventing them from operating at the airport. The Complainant provides the names of five individuals or entities, but fails to offer sufficient evidence to support this allegation. In addition, the Complainant does not describe how the Airport Authority exercised its exclusive right or violated its grant assurances in relation to these prospective tenants.

We do find, however, that two allegations warrant further FAA review and possible action by the Airport Authority: (1) the Authority has given exclusive control of the fuel farm, the apron, and the terminal to the FBO; and (2) the FBO enjoys a long-term lease without providing incentives to the Airport Authority.

1. Exclusive Control of Fuel Farm, Apron, and Terminal

The Complainant alleges the FBO controls the (a) fuel farm and apron, and (b) the terminal.

a. Fuel Farm and Apron

Rather than imposing a capital investment requirement, the Airport Authority offered the long-term lease to the FBO in exchange for the airport's right to acquire land and land improvements. The Complainant alleges these acquisitions occurred without an independent appraisal to support the value received by the Airport Authority.

This was one of the allegations brought to light following the audit review by the City of Chesapeake. The failure of the Airport Authority to obtain appraisals for specific land acquisition was addressed in the City's audit. As stated previously, the Airport Authority is working with the City auditors to resolve many of these issues. Regarding this particular issue, the Airport Authority did not concur with the City's findings. The Authority provided justification to support its decisions. At this time we consider this a local issue. We will allow the City and the Airport Authority to resolve this finding. However, we suggest the sponsor review its standards for handling tenant-financed capital improvements to avoid potential conflicts and possible charges of unjust discrimination involving lease terms between tenants leasing property with or without invested capital.

VI. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions and responses by the parties, and the entire record herein, and the applicable law and policy and for the reasons stated above, the Director of the FAA Office of Airport Safety and Standards finds and concludes as follows:

- A. The Respondent is not currently denying the Complainant access to, and use of, Chesapeake Regional Airport (CPK), but has conditioned this access on the Complainant's acceptance of minimum standards that are excessive for the needs of both the Complainant and the Respondent. By imposing unreasonable requirements in its minimum standards for a specialized aviation service operator, the Respondent has engaged in unjust discrimination in violation of Title 49 U.S.C. §47107(a)(1)(5) and Federal Grant Assurance 22 regarding economic nondiscrimination.
- B. The Respondent has constructively granted Horizon Aviation Services an exclusive right by imposing unreasonable terms in its minimum standards for specialized aviation service operators that discourage competition among commercial aeronautical service providers at CPK in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, regarding the prohibition on exclusive rights.

ORDER

ACCORDINGLY, the FAA finds the Chesapeake Airport Authority is in violation of applicable Federal law and its Federal grant obligations.

The Chesapeake Airport Authority is hereby required to provide evidence to the FAA Eastern Region within 60 days that the Airport Authority has adjusted in accordance with

this decision, its minimum office space and staffing requirements to reflect the true needs of the airport in consideration of the administrative functions the Complainant performs at its full-service operation at Suffolk Municipal Airport.

In addition, the Chesapeake Airport Authority is hereby required to provide a legal basis and explanation within 60 days to the FAA Eastern Region explaining why the Complainant's revised space needs cannot be accommodated in the terminal, or make provisions to lease terminal space to the Complainant.

The FAA Eastern Region should review lease agreement provisions for the use of airport fueling facilities and control of federally funded aprons at CPK to ensure that restrictive covenants, if they exist, are eliminated.

Furthermore, FAA will withhold approval of any application by the Chesapeake Airport Authority for grants authorized under Title 49 U.S.C. §§ 47114(d), 47115 or 47116 pending approval of the corrective action plan by the FAA.

All motions not expressly granted are hereby denied.

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR 16.247(b)(2).] A party adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's Determination.



David L. Bennett
Director, Office of Airport
Safety and Standards

Date: OCT 22 2002