

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

The Aviation Center, Incorporated
COMPLAINANT

V.

City of Ann Arbor, Michigan

RESPONDENT

Docket No. 16-05-01

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 Enforcement Proceedings (FAA Rules of Practice), 14 Code of Federal Regulations (CFR) Part 16.

The Aviation Center, Incorporated (Complainant) has filed a formal complaint pursuant to 14 CFR Part 16 against the City of Ann Arbor, Michigan, (City/Respondent) owner and operator of Ann Arbor Municipal Airport (Airport). Complainant alleges that the City is engaged in economic discrimination and has granted another fixed-base operator an exclusive right in violation of Title 49 United States Code (U.S.C.) §§47107(a) and 40103(e) and the respective Federal Grant Assurance 22 *Economic Nondiscrimination* and 23, *Exclusive Rights*.¹

Complainant is a Michigan corporation, and a fixed-base operator on the Airport. According to the Complainant, the issues to be resolved are:

- Whether the City, through its policies and practices, has granted an exclusive right, constructively or directly, to another fixed-base operator on the Airport by virtue of having permitted the other fixed-base operator to operate on the airport in violation of the airport's minimum standards, and in violation of

¹ A fixed-base operator (FBO) is a commercial entity, providing aeronautical services, such as maintenance, storage, ground and flight instruction, etc. to the public. [FAA Order 5190.6A, Appendix 5]

Title 49 U.S.C. §40103(e), and related Federal Grant Assurance 23, *Exclusive Rights*.

- Whether the City has discriminated against the Complainant by executing an agreement with another fixed-base operator in violation of the Airport's minimum standards and whether the City's actions in this regard constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107(a)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*.²

Summary of Issues and Findings

The Complainant alleges that it was discriminated against, and that Solo Aviation, another fixed-base operator, was granted an exclusive right when the City of Ann Arbor permitted Solo Aviation to operate on the Airport as a fixed base operator without complying with the Airport's Operational Standards. Complainant alleges it has suffered the loss of a T-hangar and the threat of eviction, denied the right to construct a self-fueling facility, and been subjected to an unfair competitive advantage by a fixed-base operator whose operation is subsidized by the City.

The City argues that it has not granted Solo Aviation an exclusive right nor discriminated against the Complainant by entering into an agreement with Solo Aviation. The City charges all fixed base operators the same rates and permits them to use the Airport terminal and terminal apron. The Complainant has not been barred from conducting business on the Airport, leasing space or servicing its customers.

The FAA finds, as explained in this decision, the City is within its right as the airport proprietor to enter into an agreement with Solo Aviation to provide fixed-base operator services on the Airport.

Under the particular circumstances existing at the Airport and the evidence of record, as discussed below, the FAA concludes that:

- The City is not in violation of Title 49 U.S.C. §47107(a)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*, as it has not denied the Complainant reasonable use and access to the Airport on reasonable terms and conditions for the purpose of conducting a commercial aeronautical activity, and the City's actions in this regard do not constitute an unreasonable denial of access and unjust discrimination.

² The Complainant also alleged a violation of Title 14 CFR 151.7 *Federal-Aid Airport Program (FAAP)*. That regulation was applicable to the FAAP under the Federal Airport Act. See 14 CFR § 151.1. The Federal Airport Act was repealed by section 52(a) of the Airport and Airway Development Act of 1970 (Pub. L. 91-258). The complaint alleges violations of a subsequent airport development act, the Airport and Airway Improvement Act of 1982, codified at 49 USC § 47101, et seq. Part 151 is inapplicable to this case.

- The City is not in violation of Title 49 U.S.C. §40103(e), and the related Federal Grant Assurance 23, *Exclusive Rights*, as it has not granted an exclusive right, constructively or directly, by executing an agreement with Solo Aviation to conduct a commercial aeronautical activity on Ann Arbor Municipal Airport.

The FAA's decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties, reviewed by the FAA, which comprises the administrative record reflected in the attached FAA Exhibit 1.

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 city of Ann Arbor is the airport owner and operator responsible for compliance with all Federal grant assurances. Ann Arbor Municipal Airport is a general aviation airport.

During the last reported twelve-month period ending in 2004, there were 165-based aircraft and 72,048 operations annually at the Airport.³ Since 2001, the City of Ann Arbor, the airport sponsor, has received \$433,800 in federal airport development assistance for airfield improvements.⁴

III. BACKGROUND

A. The Aviation Center, Incorporated

The Aviation Center, Incorporated (Aviation Center), the Complainant, is a fixed-base operator on Ann Arbor Municipal Airport in Ann Arbor, Michigan. Under an agreement with the City of Ann Arbor, dated December 1, 1998, Aviation Center has the right to provide the following goods and services:

- The sale of aviation fuels and lubricants;
- The sale and leasing of aircraft, aircraft parts, supplies and accessories;
- The rental of aircraft;
- The servicing, maintenance and repair of aircraft and related equipment, and the provision of supplies and accessories;

³ FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Airport.

⁴ 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 2001 to the date of this decision.

- The sale of specialized aviation sundries and flight crew equipment such as navigational computers, maps, charts, map cases, specialized flying clothing, and similar accessories;
- Other services and facilities such as pilot training, aircraft storage, transient aircraft services, pilot's lounge, briefing room and restrooms, car rental and optional services not required, but encouraged.

(See FAA Exhibit 1, Item 3, exhibit 3.)

The Aviation Center lease agreement with the City is for a term of 10 years with two five-year renewal terms for a total of 20 years.⁵ Aviation Center leases 65,340 square feet of land and initially paid the City an annual land rent of \$0.248 per square foot or \$16, 204.32 with annual increases indexed to the Consumer Price Index. In 2004, Aviation Center paid the City \$19,000 in land rent due to the most recent adjustment under the Consumer Price Index. Aviation Center also rents five T-hangars from the City and pays the City an additional rental, \$14,280 annually. The Aviation Center lease agreement recognizes that Aviation Center holds title to a hangar approximately 8,000 square feet in size on its leased premises. As a part of the lease agreement, Aviation Center agreed to make improvements to its hangar, facilities and other leased premises over the initial 10-year term and spend a minimum of \$255,000. (See FAA Exhibit 1, Item 3 page 3, Item 3 exhibit 3, and Item 5 pages 8 and 9.)

In the early summer of 2004, two fixed base operators, Aviation Center and Bijan Air, were serving the Airport. According to the Complainant, both fixed –base operators were approved to sell aviation fuel on the Airport. While Aviation Center sold aircraft fuel, Bijan Air specialized in helicopters and did not provide aircraft fueling service. (See FAA Exhibit 1, Item 5.)

B. Solo Aviation, Incorporated

On September 1, 2004, the City entered into an agreement with Solo Aviation, Incorporated to provide fixed base operator services at Ann Arbor Municipal Airport. Solo Aviation is authorized under its lease agreement with the City to provide the following services:

- The sale of aviation fuels and lubricants;
- The sale and leasing of aircraft, aircraft parts, supplies and accessories;
- The rental of aircraft;
- The servicing, maintenance and repair of aircraft and related equipment, and the provision of supplies and accessories;
- The sale of specialized aviation sundries and flight crew equipment such as navigational computers, maps, charts, map cases, specialized flying clothing, and similar accessories;

⁵ Copy of lease was not fully executed by the City. However, neither party has alleged that there is not a lease in full force and effect. (See FAA Exhibit 1, Item 3, exhibit 3.)

- Other services such as pilot training, transient aircraft services and car rental; the City must approve any additional services in advance.

(FAA Exhibit 1, Item 3, exhibit 5.)

The Solo Aviation lease agreement is for a term of three years, expiring on June 30, 2007, with a renewal option of two additional years.⁶ Solo Aviation leases 287 square feet of office space in the airport terminal building at \$15.32 per square foot, and 1,000 square feet of vehicle parking space at \$1.20 per square foot and pays \$5,596.84 with annual adjustments for the lease of both areas. Solo Aviation rents three T-hangars at an annual rental of \$12, 096. The lease agreement contains a provision that requires Solo Aviation to relocate its business should land and facilities become available.⁷ (See FAA Exhibit 1, Item 3, exhibit 5 and Item 5 pages 11 and 12.)

C. Operational Standards

On August 19, 1981, the Airport Advisory Committee approved *Operational Standards for Fixed Base Operations at Ann Arbor Municipal Airport*. (FAA Exhibit 1, Item 3, exhibit 1.) Mr. John Robbins, the City's Transportation Director, at that time, said in a memorandum, "'Standards' will provide us with a management tool to control the operation at the Airport by preventing 'gypsy' type operators from performing aircraft services out of the trunk of a vehicle." (Some of the pertinent parts of the Operational Standards require the operator to lease 65,340 square feet of land and to construct a hangar with a minimum floor space of 8,000 square feet. The Operational Standards also give the City the right to waive any provisions when it is deemed in the public interest to do so. The Ann Arbor City Council adopted the Operational Standards on October 5, 1981. (FAA Exhibit 1, Item 3, exhibit 1.)

On September 1, 2004, the City signed an agreement with Solo Aviation to commence service as a fixed-base operator on the Airport. Complainant voiced objections to the terms in Solo Aviation's lease. (FAA Exhibit 1, Item 3, exhibit 4.) The Record indicates that the airport manager was not aware that the City Council had enacted Operational Standards. The Operational Standards were uncovered as a result of a search of municipal records in response to a Freedom of Information Act Request made by the Complainant. (FAA Exhibit 1, Item 5, exhibit 1.) Notwithstanding the existence of these Operational Standards, the City contends that it allowed the Complainant and others to

⁶ Copy of lease was not fully executed by the City. However, neither party has alleged that this lease is not in full force and effect. (See FAA Exhibit 1, Item 3, exhibit 5.)

⁷ The second part of Paragraph 1 of the Lease reads as follows: *It is understood that the City and Lessee have entered into this Lease for that portion of the Premises described in Exhibit A in recognition of the unavailability of adequate land/private building space to perform the services required by this Lease. Should during the term of this Lease land and/or an adequate private building become available for purchase or lease which would allow Lessee to construct a building or renovate or otherwise modify an existing building to provide sufficient square footage to locate Lessee's operations required by this Lease to that site, Lessee agrees, as evidenced by its signature on this Lease, to take all necessary actions to relocate its operations in the terminal to that site. This provision is a material term of this Lease.*

operate on the Airport without complying with the Operational Standards and it entered into agreements without requiring compliance with those Operational Standards. (FAA Exhibit 1, Item 5.)

The City cites Paragraph 6 of the Operational Standards that gives the City the right *...to waive any of these provisions when it is deemed in the public interest to do so*. The City argues that over the years, the City has waived these provisions, and it entered into agreements that varied with the Operational Standards because it was viewed in the public interest. (FAA Exhibit 1, Item 5, page 3.) The City further argues that its actions of not enforcing the Operational Standards have resulted in a waiver of those Standards, thereby amending or rescinding the Standards adopted by the Council on October 5, 1981. (FAA Exhibit 1, Item 5, page 6.)

Complainant argues that the City is bound by those Operational Standards and references Section 2-1 of FAA Advisory Circular 150/5190-5 which in part states:

“In exchange for the opportunity to do business on the airport, the business operator agrees to comply with minimum standards developed by the airport sponsor. The minimum standards then, by virtue of the business operator’s agreement become mandatory.” (FAA Exhibit 1, Item 6, page 9.)

The Complainant further argues:

“Once the City entered into agreements with the FBOs pursuant to its minimum standards, those standards became mandatory on both parties. The plain language of the Advisory Circular says “mandatory” without any modification, ...”(FAA Exhibit 1, Item 6, page 10.)

In support of its position, Complainant submits an affidavit of Mr. Charles Ferguson, a retired city employee and former airport manager between 1979 and 1996. The affidavit represents Mr. Ferguson’s beliefs, views, recommendations and his management practices and experience regarding the operation of the Airport and the *Operational Standards for Fixed Base Operations at Ann Arbor Municipal Airport*. (See FAA Exhibit 1, Item 6, exhibit 8.) The City acknowledges that Mr. Ferguson was previously employed as the airport manager, but states he is currently not a city employee and he does not represent the City or is authorized to speak on the City’s behalf. (FAA Exhibit 1, Item 7, page 3.)

D. Complainant’s Allegations

Complainant alleges that the City violated 49 U.S.C. §§40103(e) and 47107(a)(1), (4) and (5) by engaging in discriminatory practices and by failing to adhere to its own minimum standards to which it is bound through the statutes and its lease agreement with Complainant when it did not require Solo Aviation to comply with the Operational Standards. (FAA Exhibit 1, Item 3, pages 8-12.)

The Complainant's loss of T-hangar, E-5

Complainant alleges it was leasing the T-hangar E-5 from the City and in turn subleased it to Mr. George Meyer, an aircraft owner. Complainant alleges that the City violated the prohibition on exclusive rights when it took possession of T-hangar E-5, a city owned hangar from the Complainant. Complainant alleges that the City leased the hangar to a third party, not on the T-hangar waiting list and associated with Solo Aviation. Complainant suffered a loss of income from the hangar sublease, fuel sales and maintenance revenue. (FAA Exhibit 1, Item 3.) The Complainant argues that he was forced to accept a substitute hangar or not have a T-hangar at all.

The T-hangar Lease is for a term of six months and automatically renews until either party notifies the other of an intention to terminate. The City argues that the Complainant was subleasing T-hangar E-5 without the City's written consent. Complainant's lease with the City requires the Complainant to obtain the written consent of the City prior to subleasing the T-hangar to a third party. (FAA Exhibit 1, Item 5.) According to the City, Complainant voluntarily surrendered the T-hangar in exchange for another. The City leased T-hangar E-5 to AAA Air Charter who was on the waiting list for a T-hangar E-row in an effort to keep the company on the Airport. (FAA Exhibit 1, Items 5 and 7.) According to the City, AAA Air Charter threatened to leave the Airport unless it had a direct lease with the City. A copy of the lease is included in the Administrative Record. The City believes that AAA Air Charter leases the aircraft from George Meyer, the former subtenant of the Complainant and stores it in T-hangar E-5. The T-hangar lease indicates that the aircraft stored in the hangar, identifying them by aircraft registration number, belongs to either Meyers & Meyers Corporation or AAA Air Charter. (FAA Exhibit 1, Item 6, exhibit 13.)

Complainant further objects to Solo Aviation received three T-hangars without being on the waiting list. (FAA Exhibit 1, Item 6, page 18.) The City indicates that it often gives commercial aeronautical businesses high priority for hangar space; a practice also enjoyed by Complainant. (FAA Exhibit 1, Item 7, page 9.)

The City's denial of Complainant's Request for Self-Fueling Facility.

Complainant requested approval from the City to install a 24-hour self-fueling facility on the Airport. According to the Complainant, the City denied the requests without explanation. (FAA Exhibit 1, Item 3, page 5.)

The Administrative Record indicates that the City denied the Complainant's request because of the Complainant's lack of progress in completing its agreed upon improvements as outlined in its 1998 lease agreement. (FAA Exhibit 1, Item 5, exhibit 4.). The City says that these improvements have still not been completed. Complainant disputes this allegation, but provides no evidence of completion. (FAA Exhibit 1, Item 6, page 26.) The City indicates that it reviewed the Complainant's request with the Airport Advisory Committee and decided to deny the

Complainant's request because of the Complainant's failure to comply with its lease obligations regarding the improvements and concerns regarding possible contamination with the City's water supply, an aquifer under the Airport provides twenty percent of the City's drinking water. (FAA Exhibit 1, Item 7, page 9.)

Unfair Competitive Advantage

Complainant alleges that Solo Aviation has an unfair competitive advantage by using the airport terminal. The airport terminal apron is the focal point of the Airport and has a large aircraft-parking apron in front of it. Each fixed-base operator has its own aircraft-parking apron and according to the Complainant, a fixed-base operator has never used both its own apron and the terminal apron. (FAA Exhibit 1, Item 3, page 3.)

Complainant alleges it must keep a fuel truck and attendant on the terminal ramp to compete with Solo Aviation. (FAA Exhibit 1, Item 3, exhibit 4, paragraph 14.)

The City acknowledges that the airport terminal is the focal point of the Airport and has a large aircraft-parking apron. The apron is not leased to any party. The airport terminal lounge area and meeting room are open to the public and customers of all fixed base operators. The Complainant continues to use both the terminal and apron to service aircraft, passengers and flight crews. Over the years, the airport manager repeatedly offered the Complainant the opportunity to have an office and counter in the terminal building. The Complainant rejected the offer. (FAA Exhibit 1, Item 5 page 7.)

Threat of Eviction

Complainant alleges that James R. Hawley, airport manager violated the exclusive rights prohibition when he allegedly threatened eviction of the Complainant in a letter to Mr. Rick Hammond, Michigan Department of Transportation. The pertinent part of the letter reads as follows:

If this nonsense about treating Mr. Roisen unfairly or giving Solo Aviation preference continues, I can only imagine what the City's position will be when the current lease term runs out and Mr. Roisen ask for a renewal.

(FAA Exhibit 1, Item 5, exhibit 8.)

City denies that the Complainant was threatened with eviction or non-renewal or that the letter to Mr. Hammond, a third party, can be construed in such a manner.⁸ (FAA Exhibit 1, Item 7.)

⁸ FAA's primary role in this investigation is to determine if the City acted in a manner consistent with its grant obligations. Conjectures or statements by a City official to a third party about things that may or may not happen contingent on some future event are not germane to this investigation. The Complainant has not been evicted or officially notified of a possible eviction. Consequently, the FAA will not further address this issue. The allegations regarding the City's actions concerning potential grant violations are the subject of this investigation.

City subsidizes Solo Aviation's fixed base operation

Complainant alleges that the City subsidizes Solo Aviation, a "full-service" FBO by: 1) allowing it to become an FBO without meeting minimum standards; 2) performs commercial maintenance in T-hangars, the Airport's standard T-hangar lease prohibits commercial maintenance; 3) Solo Aviation is not subject to the same charges as other FBOs and the City subsidizes Solo Aviation's utility charges; and 4) City permits Solo Aviation to operate from the terminal in lieu of leasing available land.

- 1) Complainant alleges that Solo Aviation became a fixed-base operator without complying with the Airport's Operational Standards. While the Complainant must comply with the Airport's Operational Standards, Solo Aviation is permitted to operate from the airport terminal and use its apron.

Solo Aviation leases 287 square feet of office space in the airport terminal and a 1,000-square foot parking lot for its fuel trucks. Solo Aviation's customers use the terminal public parking lot and terminal aircraft apron, the terminal lounge area as a pilot lounge, the City's computerized weather station and the public restrooms.

Complainant argues Solo Aviation does not have the cost of maintaining aircraft aprons and parking lots, or a mortgage for a building because it has none. The lack of these costs represents a direct subsidy of its operation by the City, the Complainant and other airport users. It also represents an unfair competitive advantage by its preferential location in the terminal and a violation of the exclusive rights prohibition. (FAA Exhibit 1, Item 6, page 19.)

The City argues that neither the airport manager nor the Complainant were aware of the Operational Standards at the time the Complainant's lease was executed in 1998. (FAA Exhibit 1, Item 5.) The City claims that the Complainant's lease requirements are the result of a negotiated agreement and not required by the Operational Standards. The City believes it has no obligation to develop minimum standards pursuant to Federal Law and the Grant Assurances, as the Complainant believes. (FAA Exhibit 1, Item 5, page 5.)

The City claims that the Operational Standards do not require fixed-base operators to construct or occupy a certain size building and lease a specific amount of land. The City submitted copies of fixed-base operator agreements that were executed after City Council adopted the Operational Standards in October 5, 1981 and none of the agreements comply with the Operational Standards. (FAA Exhibit 1, Item 7.). The City admits that neither the Complainant nor other users are required to lease 65,340 square feet of land or construct an 8,000 square foot hangar. The City believes that the Complainant leased the 65,340 square feet of land because it wanted to do so and its hangar is on a 65,340 square foot site that existed under a previous lease agreement with the former owners of the hangar. (FAA Exhibit 1, Item 7, page 7.)

The City of Ann Arbor argues that it has waived provisions of the Operational Standards when it is deemed in the public interest to do so. The City has allowed the Complainant and others to operate without complying with the Operational Standards and has entered into agreements without requiring the Operational Standards to be met. The airport manager indicates that fixed-base operators at the Ann Arbor Municipal Airport are not required to lease 65, 340 square feet of land or to construct an 8,000 square foot building. The airport manager said that Bijan Air, another fixed-base operator on the Airport, was not aware that the Operational Standards existed until recently.

(FAA Exhibit 1, Item 5 and Item 7, exhibit 12.) Bijan-Air does not sell fuel.

(FAA Exhibit 1, Item 3.) Complainant's current lease with the City does not require the Complainant to construct an 8,000 square foot hangar. The City argues that Complainant agreed to provide a pilot's lounge, briefing room, parking, aircraft storage and other amenities prior to entering into a commercial agreement with the City. The Complainant currently rents five T-hangars from the City at a total cost of \$14,280 and Solo Aviation currently rents three T-hangars at a total annual cost of \$12,096.

(FAA Exhibit 1, Items 3 and 5.)

- 2) Complainant alleges Solo Aviation was permitted to perform commercial maintenance in T-hangars, although none of the T-hangars were leased in its name. The standard T-hangar lease prohibits commercial maintenance. The City Council has never passed an ordinance allowing commercial operations in T-hangars. (FAA Exhibit 1, Item 3, page 6.)

The City says that the standard T-hangar lease permits commercial aeronautical activities in T-hangars when the operator enters a commercial agreement with the City. The hangar lease states:

“Unless Lessee enters into a written airport commercial agreement with the City, he/she shall not engage in any business, including but not limited to offering any of the following services to the public from the above-described property: aircraft sales, storage and repairs, fuel and aircraft equipment sales, flight training, or aircraft operation for charters, tests or sightseeing.”

(FAA Exhibit 1, Item 5, exhibit 5.)

These commercial aeronautical activities can include, but are not limited to: aircraft sales, storage and repairs, fuel and aircraft equipment sales, flight training, or aircraft operation for charters, tests or sightseeing. The City further states there is no requirement for the City Council to enact an ordinance to allow commercial maintenance, when existing airport policy already permits it. There is nothing that prevents commercial maintenance from occurring in T-hangars if a lessee enters into a written airport commercial agreement with the City. Solo Aviation leases 3 T-hangars and an end room.

(FAA Exhibit 1, Item 3, exhibit 6, and Item 5, exhibit 6.)

- 3) Complainant alleges that the City subsidizes Solo Aviation, in violation of 49 U.S.C. §§47107(a)(1)(4)(5) and 40103(e) and the relevant grant assurances. Complainant also alleges that Solo Aviation is not subject to the same rates and charges imposed on other FBOs as required by 49 U.S.C. §47107(a)(5) which says:

Fixed-base operators similarly using the airport will be subject to the same charges.

Complainant believes that the requirement that fixed-base operators similarly using the Airport will be subject to similar charges include the costs of conducting a business on the Airport because of provisions in its lease with the City. These costs include but are not limited to the cost associated with building, buying or leasing the building and also paying the cost to maintain that land and building. Complainant alleges that Solo Aviation does not pay for these types of charges or pay for electrical utility charges (including heating) for the T-hangars that it occupies. (FAA Exhibit 1, Item 6, page 22.)

City denies the Complainant's interpretation of the statute. City attests that all similarly situated airport tenants pay the same rental rate per square foot for land or facilities owned by the Airport. That is, tenants leasing the same type of airport land or building space will pay the same rental per square foot. The City also denies that it required Complainant to lease a minimum amount of land or own or occupy a building and assume the financial obligations associated with the leasehold. (FAA Exhibit 1, Item 7, page 17.)

According to the City, Complainant voluntarily entered into negotiations with the City for the use of the leasehold and for the amortization of improvements to its real property (hangar). Furthermore, Complainant owned the hangar before it entered into an agreement with the City to operate a fixed-base operation. The City states that airport rental rates are the same for all similarly situated lessees and hangar rental rates are determined in part by the City's cost for electrical service to the hangars. The T-hangars do not have electrical meters so utility costs are recovered in the rates established for leasing T-hangars. (FAA Exhibit 1, Item 5.).

The City asserts that the fees and rent paid by all lessees and users of the Airport recover, in part, the costs for the airport terminal lounge area, the terminal meeting room and the computerized weather station. The Complainant, like Solo Aviation and other airport users have an equal right of access to all public areas in the terminal. The City further denies that Solo Aviation is receiving a subsidy because it is not required to lease a paved parking lot and an aircraft-parking apron and other leased premises and incur the costs for snow removal, mowing and maintaining such leased premises. Solo Aviation, like other airport users, pays rent for the property it leases and other fees for the privilege of operating at the Airport. (FAA Exhibit 1, Item 5, page 15.) The City admits that Solo Aviation does not pay for any aircraft parking space. Solo Aviation's customers use the terminal apron for aircraft parking; the apron was constructed with Federal and state

grant funds. All fixed base operators have equal access to the terminal apron. The City denies that it has granted Solo Aviation an exclusive right. The City further denies that just because Complainant may have higher capital and operating expenses that Solo Aviation, does not mean that the City, the Complainant and other airport users are subsidizing Solo Aviation. (FAA Exhibit 1, Item 5, page 16.)

- 4) Complainant alleges that the City permits Solo Aviation to operate from the terminal even though there are buildings and land available on the Airport for lease would make Solo Aviation compliant with the Airport's minimum standards. There is also undeveloped land west of the Avfuel hangar set a side for future FBO development. (FAA Exhibit 1, Item 3, page 4.)

The City says that it plans to demolish a 4,800 square foot hangar located on the east side of the Airport; the building is not habitable or leaseable because of the presence of asbestos and lead paint. The City argues that it is under no obligation to rent the building to Solo Aviation or any other party. Development of the site west of the Av fuel hangar; would obstruct the line of sight from the tower to certain taxiways requiring the tower to be moved or elevated. The City claims that there is no 8,000sqft hangar available for Solo Aviation nor is Solo Aviation obligated to rent an 8,000 square foot hangar. (FAA Exhibit 1, Item 6.)

E. Pre-Complaint Resolution

Complainant requested the State of Michigan, Department of Transportation, conduct an informal investigation of the Complainant's allegations.⁹ The State found that the City's actions were consistent with its agreements with the FAA and the State of Michigan. The State's decision said:

In summary, we find that in no instance have you been deprived of your right to conduct business on the Ann Arbor Municipal Airport and that the terms of conducting business to which you are now obligated by agreement cannot legitimately be claimed as unreasonable as these were terms you yourself negotiated and agreed to.

(FAA Exhibit 1, Item 5, exhibit 3.)

Complainant's formal complaint with the FAA was docketed on March 1, 2005, and is requesting compensatory award of \$75,000.¹⁰ Complainant also requests that Solo Aviation be required to comply with the Operational Standards and lease 65, 340 square feet of airport land and occupy a building of at least 8,000 square feet. Respondent's

⁹ The State of Michigan is a Block Grant State under Title 49 U.S.C. Section 47128 for purposes of administering the Airport Improvement Program. Under an agreement with the Federal Aviation Administration, Block Grant States conduct investigations into matters regarding possible grant violations and attempt to resolve informal complaints.

¹⁰ The FAA has enforcement authority over an airport sponsor and does not award compensatory damages. While the Complainant has requested an award of compensatory damages, the sum of damages alleged to be suffered by the Complainant is not under review in this Part 16 proceeding.

answer was docketed on March 23, 2005; Complainant's reply was docketed on docketed March 29, 2005, and the Respondent's Rebuttal was docketed on April 20, 2005.¹¹

IV. ISSUES

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

- Whether the City has discriminated against the Complainant by executing an agreement with Solo Aviation for fixed-base operation services and whether the City's actions in this regard constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107(a)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*.¹²
- Whether the City, through its policies and practices, has granted an exclusive right, constructively or directly, to Solo Aviation, another fixed-base operator on the Airport by virtue of having permitted Solo Aviation to operate on the Airport in violation of the Airport's minimum standards, in violation of Title 49 U.S.C. §40103(e), and related Federal Grant Assurance 23, *Exclusive Rights*.

FAA's 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 1.¹³

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

¹¹ Complainant submitted a Notice of Availability of Additional Relevant Evidence and Affidavit. [FAA Exhibit 1 Item 8] This submittal was not in compliance with the procedural filing requirements of 14 CFR Part 16. Pursuant to Part 16, submissions other than the pleadings listed in 14 CFR § 16.23 must be submitted by motion pursuant to 14 CFR § 16.19. Accordingly, this submission will not be considered in making findings and conclusions in this Director's Determination.

¹² The Complainant also alleged a violation of Title 14 CFR 151.7 *Federal-Aid Airport Program (FAAP)*. That regulation was applicable to the FAAP under the Federal Airport Act. See 14 CFR § 151.1. The Federal Airport Act was repealed by section 52(a) of the Airport and Airway Development Act of 1970 (Pub. L. 91-258). The complaint alleges violations of a subsequent airport development act, the Airport and Airway Improvement Act of 1982, codified at 49 USC § 47101, et seq. Part 151 is inapplicable to this case.

¹³ FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

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.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, and enforcement of Airport Sponsor Assurances.

A. The Airport Improvement Program

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. Title 49 U.S.C. §47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. §47107, *et seq.*, 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.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.¹⁴ FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued on 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 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.

Three Federal grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 22, *Economic Nondiscrimination*; (2) Grant Assurance 23, *Exclusive Rights*; (3) Grant Assurance 29, *Airport Layout Plan*.

¹⁴ *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(k), 47107(l), 47111(d), 47122.

1. Economic Nondiscrimination

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. Federal Grant Assurance 22, *Economic Nondiscrimination*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 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. [Assurance 22(a)]

...will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform. [Assurance 22(f)]

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

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

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [FAA Order 6A, para. 4-8]

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, Sec. 4-7(a).] 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 Order, Secs. 4-7 and 4-8]

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

...each fixed-base 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-base operators making the same or similar uses of such airport and utilizing the same or similar facilities.
[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. [See Order, Secs. 4-14(a)(2) and 3-1]

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

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 implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport

...will permit no exclusive right for the use of the airport by any 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.

FAA policy on exclusive rights broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See e.g. Pompano Beach v FAA*, 774 F.2d 1529 (11th Cir, 1985).]

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

3. Airport Layout Plan

Assurance 29, "Airport Layout Plan," implements 49 U.S.C Section 47107(16) and, in pertinent part, requires the airport owner to "keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon. Such airport layout plan and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or in any of the facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport."

An airport layout plan (ALP) depicts the entire property, current facilities, and plans for future development of the airport. The FAA requires an approved ALP as a prerequisite to the grant of Federal funds for airport development. FAA approval of the ALP represents the concurrence of the FAA in the conformity of the plan to all-applicable airport design standards and criteria. Any construction, modification, or improvement that is inconsistent with the ALP requires FAA approval of a revision to the ALP. *See* Order, Sec. 4-17(a).

4. Minimum Standards

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. 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, however, be reasonable and not

unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied.

FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies an aeronautical activity access to a public-use airport. Such determinations often include consideration of whether failure to meet the qualifications of the standard is a reasonable basis for such denial and/or whether the application of the standard results in an attempt to create an exclusive right.¹⁵

The airport owner may quite properly amend the minimum standards from time to time in order to ensure a higher quality of service to the airport users. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable.¹⁶

FAA Advisory Circular 150/5190-5, *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities* states:

In exchange for this opportunity, a business operator agrees to comply with minimum standards developed by the airport sponsor. The minimum standards then, by virtue of the business operator's agreement, become mandatory.¹⁷

The Advisory Circular cautions airport sponsors from using minimum standards to establish an exclusive right:

The use of minimum standards as a vehicle to effect an exclusive business operation is prohibited. The FAA recognizes that some sponsors might attempt to design their minimum standards to protect only the interests of one business operator, which can be interpreted as the grant of an exclusive right and a potential violation of the FAA's policy.¹⁸

C. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its 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.

¹⁵ See FAA Order 5190.6A, Sec.3-17 (b)

¹⁶ See FAA Order 5190.6A, Sec.3-17(c)

¹⁷ See FAA A/C 150/5190-5, dated June 10, 2002

¹⁸ See FAA A/C 150/5190-5, dated June 10, 2002

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 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 Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01); upheld in Wilson Air Center, LLC v. FAA, 372 F.3d 807 (C.A. 6, June 23, 2004).

D. 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 are contained in the FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings 14 CFR Part 16. These Rules were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996.

VI. ANALYSIS AND DISCUSSION

The Complainant alleges the City violated Title 49 U.S.C. §47107 (a)(1)(4)(5), and Federal Grant Assurance 22, *Economic Nondiscrimination* and Title 49 U.S.C. §40103(e), and Federal Grant Assurance 23, *Exclusive Rights* by (i)

engaging in discriminatory practices against the Complainant, and (ii) not requiring a similarly situated lessee to comply with the Airport's Operational Standards.

Complainant alleges that the City is bound to its Operational Standards by the statutes and its agreement with Complainant. The City argues that it did not engage in discriminatory practices toward the Complainant, it did not grant another fixed-base operator an exclusive right and that provisions of the Operational Standards passed by the City Council in 1981 have been waived.

These matters are reviewed in the framework of the FAA's analysis of two issues: (1) whether the City has discriminated against the Complainant by executing an agreement with Solo Aviation for fixed-base operation services and whether the City's actions in this regard constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107(a)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*, and (2) whether the City, through its policies and practices, has granted an exclusive right, constructively or directly, to Solo Aviation, another fixed-base operator on the Airport by virtue of having permitted Solo Aviation to operate on the Airport in violation of the Airport's minimum standards, in violation of Title 49 U.S.C. §40103(e), and related Federal Grant Assurance 23, *Exclusive Rights* as discussed below.

A. Discriminatory Practices

The Complainant's loss of T-hangar, E-5

Complainant alleges that the City violated the exclusive rights prohibition when the City reclaimed T-hangar E-5. The City's action resulted in Complainant's loss of T-hangar sublease, fuel sales and aircraft maintenance revenues.

The Administrative Record indicates that George Meyer, Complainant's sublessee, owned the aircraft in T-hangar E-5. AAA Air Charter leased the aircraft from George Meyer to operate its charter business. The City argues that notwithstanding the fact that the Complainant never received the City's consent to sublease the T-hangar to George Meyer as required by its lease, neither AAA Air Charter nor George Meyer wanted to continue renting from the Complainant. The City contends that George Meyer requested a direct lease with the City and threatened to leave the Airport completely. The City claims the Complainant voluntarily surrendered the hangar and accepted another hangar. The Complainant disagrees and says it was forced to accept another T-hangar offered by the City or not have a hangar.

Regardless of the dispute over subleasing T-hangar E-5, the Record shows that the standard T-hangar lease agreement provides for 60-day notice for either party to terminate the agreement. The Complainant accepted these terms at the time the agreement was signed. The agreement gives the City the right to reclaim its property on 60-day notice and the Complainant the right to surrender the property with equally sufficient notice.

The Complainant's premise that the City's actions resulted in a loss of T-hangar sublease, fuel sales and aircraft maintenance income is flawed in that the Complainant had agreed to a lease that contemplated such a possible outcome if the City exercised its right to terminate the lease on 60-days notice. Moreover, the Complainant received a replacement T-hangar, though smaller, providing the opportunity to maintain a source of revenue.

In addition, under the circumstances described by the City, George Meyer or AAA Air Charter no longer wanted to continue doing business with the Complainant and if George Meyer or AAA Air Charter left the Airport, as they threatened, the Complainant would still have suffered a loss of income had its subtenant left the Airport.

FAA can find no evidence that the City violated the exclusive rights prohibition by awarding a T-hangar Lease to AAA Air Charter. Title 49 U.S.C. §47107(a)(4) states in pertinent part,

“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.”

Neither AAA Air Charter nor Solo Aviation has exclusive control of the Airport's T-hangars. The Administrative Record indicates that the Complainant currently leases the most T-hangars, five, while AAA Air Charter has one and Solo Aviation has three. Furthermore, the evidence submitted does not support a direct relationship between Solo Aviation and AAA Air Charter. Even if a relationship between Solo Aviation and AAA Air Charter were established, this information alone would not sustain the Complainant's allegation that it has been denied access to the Airport, as it controls more T-hangars than Solo Aviation and AAA Air Charter combined. FAA finds that the City's actions were consistent with its Federal grant obligations.

The City's Denial of Complainant's Request for Self-Fueling Facility

The City argued that it denied the Complainant's request to install a self-fueling facility because the Complainant had not complied with its commitments under its existing agreement with the City. The Complainant responds to the City's claim but offers no proof of compliance with the terms of its agreement. We note that the Complainant continues to operate its existing aircraft fueling concession as provided for under its agreement.

The Grant Assurances do not identify or guarantee a specific method for fueling aircraft. Fueling rights are normally granted through an agreement with the airport sponsor subject to business, safety and environmental requirements. [See *Monaco Coach Corp. v. Eugene Airport and City of Eugene, Oregon*, FAA Docket No. 16-03-17, March 4, 2005]

The Complainant has not shown that the right to install and operate a self-fueling facility has been granted to another party but denied to the Complainant or that the City's explanation for denying the Complainant's request is unreasonable. The City's opposition is based on the Complainant's non-performance under the terms of its fixed-base operator agreement with the City and the City's concern over possible contamination of its water supply because an aquifer under the Airport provides twenty percent of the City's drinking water. FAA finds that the City's actions were reasonable and consistent with its Federal grant obligations.

Commercial Maintenance in T-hangars

Complainant claims that the standard T-hangar lease prohibits commercial maintenance and that the City Council has never passed an ordinance allowing commercial operations in T-hangars. Complainant alleges Solo Aviation was permitted to perform commercial maintenance in T-hangars, although none of the T-hangars were leased in its name.

The City counters by stating that the standard T-hangar lease permits commercial aeronautical activities in T-hangars when the operator enters an airport commercial agreement with the City. The hangar lease states:

“Unless Lessee enters into a written airport commercial agreement with the City, he/she shall not engage in any business, including but not limited to offering any of the following services to the public from the above-described property: aircraft sales, storage and repairs, fuel and aircraft equipment sales, flight training, or aircraft operation for charters, tests or sight-seeing.”

(FAA Exhibit 1, Item 5, exhibit 5.)

In addition, the City contends tenants holding an airport commercial agreement are not limited by the above list of commercial services. The City further states there is no requirement for the City Council to enact an ordinance to allow commercial maintenance, when existing airport policy already permits it. The City asserts that there is nothing that prevents commercial maintenance from occurring in T-hangars if a lessee enters into a written airport commercial agreement with the City. The City acknowledges that Solo Aviation was not on Complainant's copy of the T-hangar wait list dated September 1, 2004. (See FAA Exhibit 1, Item 3, exhibit 6.) Since that time, Solo Aviation has leased three T-hangars and an end room. (See FAA Exhibit 1, Item 5, exhibit 6.)

Complainant's assertion that the Airport's Operational Standards prohibit commercial aircraft maintenance in T-hangars is not consistent with the supporting documentation submitted for the Record. The Record confirms that there is no prohibition on commercial maintenance in T-hangars as long as a Lessee signs an Airport Commercial Agreement with the City.

The Respondent asserts that Solo Aviation has never used the hangar for a commercial maintenance operation to the best of its knowledge nor has evidence been submitted to the contrary. Moreover, the Complainant would not be prohibited from performing

commercial maintenance in the T-hangars it leases from the City if he meets the City's criteria and enters into a written airport commercial agreement with the City.

FAA finds that the City's actions were consistent with its Federal grant obligations.

B. Compliance with Operational Standards

Complainant alleges that Solo Aviation became a fixed-base operator without complying with the Airport's Operational Standards. Complainant claims that Federal Law and policy, and its lease agreement with the City require the City be bound by the *Operational Standards for Fixed Base Operators at the Ann Arbor Municipal Airport*. As support, Complainant references FAA Advisory Circular 150/5190-5 *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities* that in part states:

In exchange for this opportunity [conducting business on the airport] a business operator agrees to comply with minimum standards developed by the airport sponsor. The minimum standards then, by virtue of the business operator's agreement, become mandatory.

It should be noted that neither Federal Law nor policy requires the development of minimum standards. AC 150/5190-5, clearly states in the first paragraph,

Advice provided with respect to minimum standards is optional but highly recommended.

The Record indicates that Operational Standards were not included in either the Complainant's or Solo Aviation's lease agreements or a number of other commercial leases issued after the Council action. While, the City Council passed an ordinance to enact Operational Standards, the City never made them a mandatory requirement for commercial aeronautical activity at Ann Arbor Municipal Airport. While the Airport's aeronautical lease agreements require a lessee to agree that the "rules and regulations, as amended from time to time governing the Ann Arbor Municipal Airport, shall be binding and incorporated by reference into this lease" there is no specific reference to the Operational Standards.

The City has indicated that the Operational Standards are not part of the Complainant's lease and that Complainant's lease requirements were the result of negotiations between the parties at the time and not the Operational Standards. Bijan Air, another fixed-base operator, was not aware that the Operational Standards existed. The Administrative Record indicates that both the Complainant and the City became aware of Operational Standards adopted by the City in 1981 after the City conducted a search in response to the Complainant's Freedom of Information request. Upon this discovery, the Complainant then voiced opposition to the Solo Aviation lease for its lack of compliance with the Airport's Minimum Standards.

The Complainant provides no evidence to counter the City's contention that the Operational Standards are not part of either the Complainant's lease or other commercial aeronautical leases executed after the Council passed its ordinance. While the Complainant identifies the 65,340 square foot requirement in both the Operational Standards and its lease as proof the Standards were enforced, the fact remains that the 65,340 square foot leasehold predates the Complainant's lease and existed in the lease of the previous owners of the Complainant's hangar.

The City contends that it has granted the Complainant and others flexibility to operate when it is in the public interest to do so without concern with the Operational Standards. The City asserts that the lack of enforcement has had the effect of rescinding the Operational Standards. The airport manager indicated that fixed base operators are not required to lease 65,530 square feet or construct an 8,000 square foot building to obtain a commercial fixed-base operator lease on the Airport. The Administrative Record lends support to the airport manager's statement, and the facts presented indicate that the Operational Standards are not a recognized threshold to obtain a contract to be a fixed-base operator on the Airport. An airport sponsor has the continuing right to revise, change or eliminate its minimum standards.

As stated in the Applicable Law and Policy Section, 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. 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, however, be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. Accordingly, it would behoove the City to review, update and execute new minimum standards so that its aeronautical tenants are fully aware of the rules and regulations governing the Airport which are binding upon such tenants. [See, *Adventure Aviation v. City of Las Cruces, NM*, FAA Docket Number 16-01-14, September 9, 2003.]

The FAA finds that the City's actions were consistent with its Federal grant obligations.

Reasonable Access and Not Unjustly Discriminatory Terms

Complainant contends that he and Solo Aviation are similarly situated and that the differences in terms, conditions and facilities under their leases with the City constitutes unjust discrimination by the City in violation of Federal Grant Assurance 22, regarding unjust economic discrimination.

Title 49U.S.C.§47107(1)(5) and Grant Assurance 22, *Economic Nondiscrimination* provides in pertinent part, that the sponsor of a federally obligated airport will ensure that

...the airport will be available for public use on reasonable conditions and without unjust discrimination. Assurance 22(a)

Each fixed-base 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-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. Assurance 22(c)

A primary issue is whether the Complainant and Solo Aviation are similarly situated and that the differences in lease terms, conditions and facilities agreed to by the Complainant and Solo Aviation in their agreements with the City is unjustly discriminatory in violation of Federal Grant Assurance 22.

A review of the Administrative Record including the evidence submitted indicates that the Complainant is not similarly situated with Solo Aviation regarding different lease terms, conditions, and of course, facilities, which the Complainant contests. Solo Aviation provides the same services as the Complainant with the exception of aircraft storage. Complainant can provide additional services without prior approval from the City while Solo Aviation must obtain prior approval before introducing new service. Most important, the lease terms differ significantly. The Complainant has a ten year lease term with two five year options totaling twenty years with a minimum capital investment of \$255,000 required to be made in the first ten years. Solo Aviation has a three-year lease term with an option for two years totaling five years and no minimum capital investment required. The leased facilities are not the same justifying dissimilar treatment and differing lease terms.

There are significant differences between a twenty-year long-term lease and a five-year short-term lease that have a bearing on financing and access to capital for equipment and facilities. It is a common practice to differentiate between fixed base operators having capital investment requirements under long-term leases and fixed-base operators with short-term leases making no capital investment. Airports routinely seek to initiate long-term leases to provide tenants with enough time to recover invested capital on the leasehold. Upon expiration of the lease, all facilities and improvements can become the property of the airport sponsor. [See, *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (8/30/01); upheld in *Wilson Air Center, LLC v FAA*, 372 F.3d 807(C.A. 6, June 23, 2004)]

FAA finds that the City's actions were consistent with its Federal grant obligations.

Available Land

Complainant alleges that the City permits Solo Aviation to operate from the terminal even though there is land and buildings available on the Airport for leasing. The City says that the building Complainant recommends for use is not inhabitable and the other parcel is not available without relocation of the air traffic control tower. While the Complainant disagrees, it is the City's right, under Grant Assurance 29, Airport Layout Plan to determine how airport land will be used, specifically... *the location and nature of all existing and proposed airport facilities and structures*. However, we also note that

the City has made provisions in Solo Aviation's agreement to lease land and construct a private building should adequate land become available.

It is a common practice to classify fixed base operators according to their level of capital investment. That is, fixed-base operators not obligated to make capital investments are limited to short term leases and fixed-base operators making capital investments are given longer term leases to amortize their investment. [See, *Jim Martyn v. Port of Anacortes, Washington*, FAA Docket Number 16-02-03, April 14, 2003.] The lease terms provided for both parties are reasonable and consistent with industry practices and their level of financial commitment to the Airport. Solo Aviation, as a new fixed-base operator, has the incentive to make a capital investment in the Airport in order to obtain a longer term lease. The Complainant, by pledging to make a capital investment, has earned the right to a longer term lease.

FAA finds that the City's actions were consistent with its Federal grant obligations.

A fundamental consideration of this finding is the recognition that the City made a formal determination that there is not adequate land or private building space at the Airport for Solo Aviation's FBO operations. The City's determination supports its rationale in permitting Solo Aviation to conduct its operations out of the terminal building on a short-term basis until adequate land or building space becomes available.

Terminal and Apron

Both the Complainant and the City agree that the airport terminal apron is the focal point of the Airport. The terminal and the apron constructed with Federal financial assistance are accessible to the public and available to all fixed base operators. Complainant claims that it has been a customary practice that aircraft are serviced only at a fixed-base operator's facility. Over the years, the airport manager repeatedly offered the Complainant the opportunity to have an office and counter in the terminal building. The Complainant rejected the offer. (FAA Exhibit 1, Item 5.) However, since Solo Aviation started providing service at the terminal, Complainant keeps a fuel truck and attendant on the terminal ramp to compete.

Complainant alleges that Solo Aviation has an unfair competitive advantage by using the terminal and terminal apron to provide aeronautical services to the flying public. FAA does not agree with the Complainant's position. The City wants aeronautical services to be provided at the terminal and the leaseholds of the Complainant and Bijan Air. Complainant wants aeronautical services to only be provided from leaseholds of 65,340 square feet in size and including an 8,000 square foot hangar. As airport proprietor and owner, it is within the City's right to determine and manage the quality and level of aeronautical services provided on the Airport. The fact that the City signed an agreement with Solo Aviation indicates that it wanted fixed base operator services on the Airport and specifically services at the terminal and terminal apron, the focal point of the Airport. We note the airport manager's comments to a Michigan Department of Transportation Official:

...Since Solo Aviation started operating on the airport, the fuel prices have dropped dramatically and the level of aircraft service provided by Aviation Center has increased as well. (FAA Exhibit 1, Item 5, exhibit 8.)

The terminal facilities are available to public and customers of all fixed base operators. The City has not restricted the Complainant's access to the terminal and at the terminal and terminal apron. The Complainant, as all other fixed-base operators, is free to provide aeronautical services to the public at the terminal and the terminal apron.

The key here is whether the airport's actions effectively promote competition, the public's use of the airport and the interest of civil aviation overall, and we conclude that the City's acts don't hinder these important aeronautical purposes.

FAA finds that the City's actions were consistent with its Federal grant obligations.

Dissimilar Costs

Complainant alleges that the City, in subsidizing Solo Aviation, is unjustly discriminating against it because Solo Aviation by virtue of its lease with the City is not exposed to the same costs of operating on the Airport as the Complainant. The Complainant defines these costs to go beyond the basic fees charged fixed-base operators to conduct business on the Airport to include a composite of other costs resulting from choices the Complainant made in negotiating a long-term agreement with the City. These costs include, but are not limited to, the cost associated with building, buying or leasing facilities and operating and maintaining facilities and leased premises.

FAA disagrees with the Complainant's interpretation of the statute and relevant grant assurances. There is no Federal requirement that an airport sponsor equalize the capital and operating costs of competing fixed-base operators. Complainant voluntarily negotiated its lease to amortize improvements to its real property facilities and derive the benefits of a long term lease. Additionally, evidence in the record indicates that airport tenants pay the same rental rate per square foot for land and facilities respectively.

FAA finds no basis for the Complainant's allegations and finds that the City actions are consistent with its Federal obligations.

C. Exclusive Rights

Complainant alleges that Solo Aviation was granted an exclusive right which was not offered to him.

The Administrative Record does not support the Complainant's allegation that Solo Aviation was granted an exclusive right and that Complainant was denied reasonable access and use of the Airport or that it was unjustly discriminated against by the City,

through any policy or practices that benefited another fixed-base operator at the expense of the Complainant.

The finding here is consistent with the FAA's position that the application of an unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right.¹⁹

FAA finds no basis for the Complainant's allegations and finds that the City actions are consistent with its Federal obligations.

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:

- The City is not in violation of Title 49 U.S.C. §47107(a)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*, as it has not denied the Complainant reasonable use and access to the Airport on reasonable terms, and the conditions for the purpose of conducting a commercial aeronautical activity, and the City's actions in this regard do not constitute an unreasonable denial of access and unjust discrimination.
- The City is not in violation of Title 49 U.S.C. §40103(e), and the related Federal Grant Assurance 23, *Exclusive Rights*, as it has not granted an exclusive right, constructively or directly, by executing an agreement with Solo Aviation to conduct a commercial aeronautical activity on Ann Arbor Municipal Airport.

ORDER

ACCORDINGLY, the FAA does not find the City of Ann Arbor to be in violation of Federal law or its Federal grant obligations. The Complaint is dismissed.

All Motions not expressly granted in this Determination are denied.

This Determination is made under 49 U.S.C. §§40103(e), 40113, 40114, 46104, and 46110, respectively, and 49 U.S.C. §§ 47107(a), 47107(g)(1), 47122, respectively.

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute a final agency action and order subject to judicial review. [14 CFR 16.247(b)(2)] A party

¹⁹Courts 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 \(11th Cir. 1985\)](#).] This is not the case here.

to this Complaint 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.



December 16, 2005

David L. Bennett
Director
Office of Airport Safety and Standards

Date: _____

Director's Determination
INDEX OF ADMINISTRATIVE RECORD
Docket No. 16-05-01

The Aviation Center, Incorporated
V.
The City of Ann Arbor, Michigan

The following documents (items) constitute the administrative record in this proceeding:

- Item 1.** FAA Form 5010 for the Airport last inspected 1 September 2004.
- Item 2.** Airport Sponsor AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor since fiscal year 1982.
- Item A.** Formal Complaint filed on behalf of The Aviation Center by Richard J. Durden, Tolley, Vandebosch, Korolewicz & Brengle, P.L.C, received December 22, 2004.
- Item B.** Letter from Director of Airport Safety and Standards advising that complaint was dismissed as incomplete under 14 CFR Part 16, dated January 11, 2005.
- Item 3.** Formal Complaint filed on behalf of The Aviation Center by Richard J. Durden, Tolley, Vandebosch, Korolewicz & Brengle, P.L.C. received February 11, 2005. Exhibits include:
- (1.)Operational Standards for Fixed Base Operators – Ann Arbor Airport, approved by City Council, October 5, 1981.
 - (2.)Airport Diagram from Jeppesen Manual, dated December 3, 2004.
 - (3.)Lease Agreement between City of Ann Arbor and The Aviation Center, Incorporated dated December 1, 1998.
 - (4.)Affidavit of Mark Roisen, President of The Aviation Center, dated February 8, 2005.
 - (5.)Lease Agreement between the City of Ann Arbor and Solo Aviation, Incorporated, dated September 1, 2004.
 - (6.)Listing of Airport Tenants/Lessees, dated September 1, 2004.
 - (7.)Letter from James Hawley, Airport Manager to Rick Hammond, Manager, Michigan Department of Transportation regarding informal complaint, dated September 27, 2004

Item 4. Docket Notice from the Elizabeth Newman, Attorney, Office of Chief Counsel, Federal Aviation Administration, dated March 1, 2005.

Item 5. Respondent's Answer to Complaint and Affirmative Defenses filed on behalf of the City of Ann Arbor by David W. Swan, Assistant City Attorney, docketed March 23, 2005. Exhibits include:

- (1.) Affidavit of James R. Hawley, dated March 18, 2005.
- (2.) City of Ann Arbor Department of Transportation Operational Standards for Fixed Base Operators, approved by Council October 5, 1981.
- (3.) Letter from Rick Hammond, Manager, Michigan Department of Transportation to Mark Roisen, The Aviation Center, regarding the informal complaint, dated October 15, 2004.
- (4.) Letter from James Hawley, Airport Manager to Mark Roisen, The Aviation Center, regarding Contract Term and Special Conditions, dated November 19, 2001.
- (5.) Ann Arbor Municipal Airport Hangar/Tie down Lease form.
- (6.) Ann Arbor Municipal Airport Lease information, dated March 14, 2005.
- (7.) List of users of terminal meeting room from January 2004 to January 2005.
- (8.) Letter from James Hawley, Airport Manager to Rick Hammond, Manager, Michigan Department of Transportation regarding informal complaint, dated September 27, 2004
- (9.) Memorandum from James Hawley, Airport Manager to Sue McCormick and Roger Fraser, regarding Aviation Center Complaint, dated September 13, 2004.
- (10.) Letter from James Hawley, Airport Manager to Mark Roisen, The Aviation Center and John Solo, Solo Aviation, regarding parking and refueling, dated September 13, 2004.

Item 6. Complainant's Reply to Respondent's Answer, filed by Richard J. Durden, Tolley, Vandenbosch, Korolewicz & Brengle, P.L.C., docketed March 29, 2005. Exhibits include:

- (8.) Affidavit of Charles Ferguson. dated March 25, 2005.
- (9.) Supplemental Affidavit of Mark Roisen. dated March 25, 2005, with ten attachments including pictures, diagrams and text.

- (10.) Affidavit of Patrick Richardson, dated March 24, 2005
- (11.) Selected page from 2005 Michigan Airport Directory.
- (12.) Photograph, undated.
- (13.) Ann Arbor Municipal Airport Hangar/Tiedown Lease for AAAir Charter, LLC, dated November 15, 2002.
- (14.) Airport Wait List, dated July 8, 2004
- (15.) Solo Aviation web page and redacted letter.
- (16.) Letter from Richard J. Durden, Tolley, Vandenbosch, Korolewicz & Brengle, P.L.C., to Rick Hammond, Manager, Michigan Department of Transportation, regarding informal complaint dated October 4, 2004.

Item 7. Respondent's Rebuttal to Complainant's Reply filed on behalf of the City of Ann Arbor by David W. Swan, Assistant City Attorney, docketed April 20, 2005. Exhibits include:

- (11.) Airport Leases for J&J Aviation, James A. Timoszyk, and Waypoint Aviation.
- (12.) Affidavit of James R. Hawley dated April 11, 2005.
- (13.) Memorandum from John E. Robbins, Transportation Director regarding Operational Standards for Fixed Base Operators, undated.
- (14.) Letter from James Hawley, Airport Manager to Mark Roisen, President, The Aviation Center regarding hangar leases, dated November 14, 2000.

Item 8. Notice of Availability of Additional Relevant Evidence, submitted by Complainant, filed on May 12, 2005.

Item 9. Notice of Extension of time extending the due date of the Director's Determination to November 21, 2005.