

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Richard Corbett d/b/a Modesto Flight Center

Complainants

v.

City of Modesto, California, owner/operator of the
Modesto City-County Airport

Respondents.



FAA Docket 16-08-10

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

Richard Corbett, d/b/a Modesto Flight Center (MFC/Complainant) has filed this Complaint against the City of Modesto, California (City or Respondent). MFC alleges that the Respondent, as sponsor of Modesto City-County Airport (Airport), has engaged in activity contrary to its Federal obligations.

Specifically, the Complainant alleges that the Respondent has delayed approval of a self-serve fuel station for anti-competitive purposes. Complainant also alleges that the Respondent is requiring environmental reviews under the National Environmental Policy Act of 1969 (NEPA) and the California Environmental Quality Assurance (CEQA) regulations that are unnecessary. [FAA Exhibit 1, Item 1, page 1-2]

Complainant alleges that Respondent violated FAA's Advisory Circulars 150/5190-6¹ and 150/5190-7² and the Airport Grant Assurances. The Complainant specifically alleges that the City has engaged in unreasonable standards and has offered an exclusive right to Sky Trek Aviation, a fixed base operator on the Airport, in violation of the grant assurances. [FAA Exhibit 1, Item 1, page 3]

¹ Advisory Circular 150/5190-6, Exclusive Rights at Federally Obligated Airports, January 4, 2007.

² Advisory Circular 150/5190-7, Minimum Standards for Commercial Aeronautical Activities, August 28, 2006.

Specifically, the Respondent denies that it acted with any improper motive in processing the application submitted by Richard Corbett and Modesto Flight Center for a second fuel facility at the Modesto City-County Airport. The City admits that some errors were made but states that its staff continued to work diligently to bring the Complainant's project to fruition. The City states that its employees processed the Lease application in good faith and it was not deliberately delayed because of improper interference with existing fuel provider SkyTrek, or its principal, John Rogers. [FAA Exhibit 1, Item 8, page 1-2]

The Complainant alleges violations of two specific Advisory Circulars and as well as Grant Assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. Part 16 jurisdiction applies to allegations of grant assurance violations. [See 14 CFR 16.1] The grant assurances and Federal law are controlling, not the Advisory Circulars. For the purposes of this Complaint, the Director will construe that the Complainant is alleging that the City is in violation of Grant Assurance #22, *Economic Nondiscrimination*, and Grant Assurance #23, *Exclusive Rights* and Federal law 49 U.S.C. 47107(a)(1) and (4).

Based on the Director's review and consideration of the evidence submitted, the administrative record designated at FAA Exhibit 1, the relevant facts, and the pertinent laws and policy, the Director concludes that the Respondent is currently not in violation of grant assurances 22, *Economic Nondiscrimination*, or grant assurance 23, *Exclusive Rights* nor Federal law regarding Exclusive Rights

The basis for the Director's conclusion is set forth herein.

II. Parties

A. The airport and its Federal Obligations

The Modesto City-County Airport (Airport) is owned and operated by the City of Modesto, California (City). The Modesto City County Airport is a primary service airport with more than 180 based general aviation aircraft and scheduled commercial service. Federal Aviation Administration (FAA) records indicate the planning and development of the Airport has been financed 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.* Since 1982, the Airport has received more than \$11,596,137.00 in Federal financial assistance. [See FAA Exhibit 1, Item 13]

B. Complainant

The Complainant is Richard Corbett, owner of the Modesto Flight Center (MFC). Complainant is seeking to install two (2) above ground 12,000 gallon fuel tanks to sell Avgas and Jet A fuel to based and transient aircraft. Complainant had a business on the Airport that provided flight instruction, aircraft maintenance, pilot supplies, aircraft rental and other related services.³

³ In MFC's March 9, 2009 Reply it is noted that, "Modesto Flight Center, Inc. has closed as of January 27, 2009." [FAA Exhibit 1, Item 9, page 1]

III. Background and Procedural History

On December 11, 2007, the Modesto Flight Center (MFC) applied to the City of Modesto for permission to install an aviation fueling facility on or contiguous to its existing leasehold. The fuel facility would consist of two (2) 12,000 gallon fuel storage tanks, one containing Avgas and the other containing Jet A fuel. The fuel station was intended to be a self-service facility.

Also on December 11, 2007, Jerome Thiele, Airport Manager, sent a letter to MFC stating that the proposed refueling facility must meet with FAA approval and that while waiting for that approval, the Airport would work with MFC through the process for City approval. The letter also noted that the project should take 90 days from start to finish. [FAA Exhibit 1, Item 1, exhibit C]

On January 16, 2008, the initial advisory meeting was held by the Airport Advisory Committee to discuss MFC's proposed project. John Rogers, owner of Sky Trek Aviation, the only supplier of aviation fuel at the Modesto Airport, was also the chairman of the Modesto Airport Advisory Committee. [FAA Exhibit 1, Item 7, page 1] MFC alleges that at this meeting Mr. Rogers trivialized the proposed project, stating, "*go ahead and amuse us.*" [FAA Exhibit 1, Item 1, page 1] Mr. Rogers recused himself from the decision making process after this meeting and the project was subsequently approved by the Advisory Committee on February 20, 2008. [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, page 3]

On May 15, 2008, Mr. Thiele sent a letter to MFC and stated that, "*To advance with your proposed fuel farm...your project's Plans and Specifications will need to be presented for review by City Planning. As you already know, City Planners will be reviewing the documents subject to the California environmental laws that projects of this nature trigger. It is quite possible that this project will require California Environmental Quality Assurance (CEQA) review or other environmental clearance before being allowed to proceed.*"

The letter also stated that in addition to the Plans and Specifications, the City would need other documents requested in a March 14, 2008 letter⁴, as listed below:

1. Five-year Financial Outlook and Business Plan
 - a. Review of old versus new operation
 - i. Include new aviation fuel venture and helicopter operations
2. One-year audited consolidated Financial Statement
3. Personal Financial Statement based on generally accepted accounting principals
4. Aviation Fuel Venture – Fuel Farm Development and Truck Operation

⁴ The March 14, 2008 letter was not included in the pleadings to this Complaint but was referred to in the May 15, 2008 letter.

- a. Construction Budget
 - i. Identify dollars and time to accomplish task (construction cost estimated by design architect or contractor)
 - ii. Confirmation of construction financing or other source of construction monies
 - iii. Performance Bond Commitment and type (to complete project)
- b. Proposed terms of an agreement with the City regarding potential for fuel farm to cease operation and either be removed at your expense or assigned to City. [FAA Exhibit 1, Item 1, exhibit C]

On June 9, 2008, the Modesto Economic Development Committee reviewed MFC's proposal and recommended that a lease be negotiated and presented to the City Council for approval. All three members of the Economic Development Committee voted in favor of the recommendation. [FAA Exhibit 1, Item 1, page 2]

On June 23, 2008, a Statement of Exemption for CEQA review for the installation of fuel storage facility at the Airport was signed by Brad Wall, Principal Planner for the City. [FAA Exhibit 1, Item 9, exhibit 8] With this determination, the City proceeded to place the item on the City Council agenda for the July 8, 2008 meeting. [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, page 4]

On June 30, 2008, Michael Dworkin, counsel for Sky Trek Aviation, sent a letter to the Mayor of Modesto, the City Clerk and the Airport Manager listing various reasons why Sky Trek objected to the Complainant's proposed fueling station. Specifically, the letter stated, "This proposal falls short on several grounds:

- A second fueling facility at the Airport is simply not viable in today's market;
- The construction and operation of a fueling facility at the location proposed by MFC would violate the Airport Master Plan..."
- The construction and operation of a second fueling facility would violate FAA grant assurances..."
- The proposal, if implemented, would give MFC an unfair advantage in terms of both pricing and location..."
- The lease, construction and operation of a second fueling facility without the requisite environmental reviews would violate the California Environmental Quality Act (CEQA)." [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit C]

On July 2, 2008, the office of Public Works – Airports, pulled from consideration the adoption of a resolution approving the lease agreement with MFC for the fuel tanks from the July 8, 2008 Council Meeting. [FAA Exhibit 1, Item 1, exhibit D]

On July 3, 2008, Charles Brunn, counsel for MFC, sent an email to MFC stating that he had spoken to Brad Wall and was told that the previous finding that an environmental review was not needed was incorrect. [FAA Exhibit 1, Item 9, exhibit 15]

On August 19, 2008, Tamorah Bryant, P.E. with Geological Technics, Inc., responded to a letter from Charles Brunn and opined that, *“It is my opinion that although the public agency having jurisdiction will ultimately make that determination, it can be suggested that the change in the environment is not a significant effect in the context of CEQA Guideline 14 C.C.R., Section 15064(i), and the approval by the public agency may be ministerial so no further action may be required under CEQA.”* [FAA Exhibit 1, Item 9, Item 31]

On September 8, 2008, Jerome Thiele sent a letter to MFC formally advising it that a CEQA review was necessary before proceeding with the lease agreement. The letter also provided cost estimates of \$18,970 if no NEPA work was needed; if a NEPA review was needed, there would be additional costs of \$1,500 to \$8,800. The letter also noted that MFC could not select an environmental consultant that had not been previously approved by the City and the City would retain control of the review process. The letter concluded by stating that the project could move forward to the City Council after the environmental review and findings had been received and reviewed by City staff. [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit D]

On September 11, 2008, Jerome Thiele sent an electronic message to Dennis Turner and others regarding a conversation with Anthony Garcia, Certification and Compliance Specialist with the FAA’s Western Pacific Region and asked that Brad Wall or R. Stevens return the call regarding questions Mr. Garcia had regarding the CEQA requirements. [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit E]

On September 12, 2008, Roland Stevens, Assistant City Attorney, sent an electronic mail message to Anthony Garcia, Certification and Compliance Specialist with the FAA’s Western Pacific Region, stating, *“NEPA is not being required by the city. A local CEQA consultant did an abbreviated initial study and determined that a mitigated negative [declaration] was appropriate in this instance.”* The message also stated, *“We cannot respond to what other California airports do with respect to CEQA. It has been our experience that local judges are conservative with respect to CEQA requirements. Also, if we are sued in CEQA, and lose, the City pays the CEQA plaintiff’s attorney fees. Additionally, this project has opposition, and the potential plaintiff’s counsel has threatened to sue in CEQA.”* [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit E]⁵

On September 22, 2008, Charles Brunn sent a letter to Susana Woods (*sic*), City Attorney; this letter noted that *“...we are still not clear as to why a CEQA, let alone a NEPA preliminary investigation is necessary. The only reason...is that Sky Trek has objected to the City approving a lease agreement between the City and our client.”* The letter went on to state, *“It took over two months for the City to present us with the names of consultants who could conduct a preliminary investigation.”* The letter also articulated reasons why the environmental reviews were unnecessary and requested that the lease that was

⁵ This message was apparently prefaced by a message to Ronald Stevens, among other recipients, that Mr. Garcia wanted a telephone conversation with Brad Wall or Roland Stevens. Message was dated September 11, 2008. [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit E]

submitted for the July 8th City Council meeting be approved. [FAA Exhibit 1, Item 9, exhibit 38]

Also on September 22, 2008, Racior Cavole, Airport Compliance Specialist for the FAA's Western Pacific Region, sent a letter to Jerome Thiele regarding an informal complaint that had been filed by MFC. The letter states, "*It appears that an initial review of the project resulted in an exemption from the requirements of the California Environmental Quality Act (CEQA)...Subsequently, we understand the City did not require CEQA action. We understand two CEQA determinations have been given. A third is now required. Although the City has the right to require CEQA, we are aware airports do construct fueling facilities that do not require CEQA.*" The letter asks three questions, (1) why the project was initially exempted, (2) why two CEQA documents were required and their findings, and (3) why a third is now required. [FAA Exhibit 1, Item 8, Declaration of Dennis Turner, exhibit D]

On October 1, 2008, the City of Modesto replied to Racior Cavole, and responded, "*Because of the confusion over the CEQA requirements, I made the decision to seek an independent opinion on the level of CEQA we should be pursuing. I did not want to proceed down a new course only to find that I had missed another important requirement which would further delay the project. The City paid for this review and Mr. Corbett was not asked to reimburse the cost...I subsequently received the independent opinion that CEQA was needed and would probably result in a Mitigated Negative Declaration.*" The letter went on to explain, "*I am uncertain what Mr. Corbett's attorney is referring to as the second document. At several points in this process, Mr. Corbett's attorney advised me that he had obtained an opinion and estimate from another consultant who would complete the work at less cost...It is possible that this is the second review referenced in Mr. Corbett's complaint.*" The letter further states, "*Based on the opinion of the independent consultant, the City developed a Request for Proposals...This is the first and only CEQA/NEPA review document being sought by the City and the only work for which Mr. Corbett is being asked to pay the costs*" The letter also notes, "*At the September 23, 2008 City Council meeting, Mr. Corbett's attorney made a presentation and appealed for an expedited process for his client. Mr. Corbett's attorney has consistently maintained that neither CEQA nor NEPA apply to this project...This debate has significantly hampered our ability to move beyond the determination of applicability and into the substance of the review process.*" [FAA Exhibit 1, Item 8, Declaration of Dennis Turner, exhibit E]⁶

On November 14, 2008, Susan Alcala Wood⁷, City Attorney, sent a letter to Charles Brunn, counsel for MFC, and provided a conceptual time line for completion of the CEQA and NEPA documentation for the MFC fuel farm and lease agreement. The letter also noted that the approximate cost for the environmental reviews was \$18,000.00. [FAA Exhibit 1, Item 8, exhibit B]

⁶ Complainant filed this instant formal complaint on December 5, 2008. Because of this action FAA's regional office did not produce a finding on the informal complaint.

⁷ It appears that in all other relevant documents contained in the docket Ms Wood's first name is written "Susana."

On December 5, 2008, MFC filed a Complaint alleging that the City of Modesto was in violation of Grant Assurances #22, *Economic Nondiscrimination* and #23, *Exclusive Rights*, for causing delay in approving MFC's proposed fuel storage tanks, requiring an unnecessary environmental review and for granting an exclusive fueling right to Sky Trek Aviation. [FAA Exhibit 1, Item 1, page 1-2]

On December 5, 2008, Susana Alcala Wood sent an electronic message to Charles Brunn noting that the estimated cost for the CEQA review was estimated to be approximately \$18,000 with a \$5,000 deposit due to for an initial study before the work could begin. [FAA Exhibit 1, Item 8, exhibit A]

On January 27, 2009, MFC closed its business at the Modesto Airport. [FAA Exhibit 1, Item 9, page 1]

On January 27, 2009, the City of Modesto filed its Answer to the Complaint and denied the allegation that it delayed the project for anti-competitive purposes. Specifically, the City states that it "...has not acted with any improper motive in processing the application submitted by Richard Corbett and the Modesto Flight Center...for a second fuel facility at the Modesto City-County [A]irport." Although the City admits that some errors were made, the City states that [its] staff has continued to work diligently to bring applicant's project to fruition. [FAA Exhibit 1, Item 8, page 1]

On March 11, 2009, the Complainant sent its Reply and continued to assert its position that the City of Modesto had discriminated against it. The Reply also stated that the Modesto Flight Center had closed its business on January 27, 2009. The Complainant noted that there were, "...multiple contributing factors. Some of which are economy based, while others dealt with fuel price gouging at Modesto Airport during the summer of peak fuel prices, and the constant delays placed upon me by the city of Modesto during my process to obtain a lease for a fuel farm." [FAA Exhibit 1, Item 9, page 1]

On March 31, 2009, the Complainant submitted a supplemental pleading that consists of a hand-written document that purports to recount a conversation between Jerome Thiele, Complainant and Mr. Michael Dye regarding conflicting statements made by Mr. Thiele about city council delays and about the location of the proposed fuel farm. [FAA Exhibit 1, Item 10]

On May 26, 2009, the city of Modesto submitted its Response to the Complainant's supplemental material/reply. The City renewed its Motion for Dismissal and noted that the Complainant was reiterating the same information and documents that were filed in the Complaint. [FAA Exhibit 1, Item 11, page 2]

IV. ISSUES

The FAA is responsible for adjudicating airport compliance matters involving Federally-assisted airports arising under the Airport and Airway Improvement Act (AAIA) of 1982,

as amended; certain airport-related provisions of the Federal Aviation Act of 1994, as amended; the Surplus Property Act, as amended; predecessors to those acts; and regulations, grant agreements, and documents of conveyance issued or made under those acts. [*See, FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, 14 CFR Part 16]

In accordance with this mandate, this Director's Determination addresses the following issues:

1. Whether the City has delayed approval of a refueling station in order to prevent competition with another aeronautical service provider at the Airport in a manner that unjustly discriminates against Modesto Flight Center in violation of Federal grant assurance #22, *Economic Nondiscrimination*.
2. Whether the City has delayed approval of the Complainant's refueling station by requiring unnecessary environmental studies to protect Sky Trek Aviation from competition in violation of 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 reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

V. APPLICABLE LAW AND 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.

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.

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.⁸ FAA Order 5190.6B, FAA *Airport Compliance Manual* (FAA Order 5190.6B), issued on September 30, 2009,⁹ 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. The grant assurances relevant to the issues raised in the Complaint are the following:

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

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

Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c).]

[The airport owner or sponsor] will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the

⁸ 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

⁹ The previous version of the order, FAA Order 5190.6A, issued October 2, 1989, was effective during the alleged non-compliance. It is the Director's responsibility to determine if a sponsor is in *current* compliance. See, *Wilson*, *infra*. FAA Order 5190.6B is therefore appropriate for use in the analysis here. Additionally, the application of the concepts in FAA Order 5190.6B herein do not differ substantively from those found in FAA Order 5190.6A.

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).]

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

The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [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 5190.6B, Section 8.8.a]

Grant Assurance 23, Exclusive Rights

Federal grant assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a) (4), and requires, in pertinent part, that the owner or 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.”

“...will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...”

“...will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code.”

In FAA Order 5190.6B, the FAA discusses its exclusive rights policy and 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, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the 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 F2d

1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See FAA Order 5190.6B; Section 11.2.]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless 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. [See FAA Order 5190.6B; Section 8.6.]

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

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.

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 5190.6B 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 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, (August 30, 2001) (Final Decision and Order)]

Enforcement of Airport Sponsor Assurances

FAA Order 5190.6B, *FAA Airport Compliance Manual*, dated September 30, 2009, covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters may be found at FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

The Complaint and Appeal Process

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

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR § 16.29.]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and federal case law. The APA provision states, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). [See also, Director, Office of Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR §16.23, which requires the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that “[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance.”

VI. ANALYSIS AND DISCUSSION

Economic Nondiscrimination:

As stated in the Issues section, above, the issue before the FAA is:

- 1. Whether the City has delayed approval of a refueling station in a manner that unjustly discriminates against Modesto Flight Center in violation of Federal grant assurance #22, *Economic Nondiscrimination*.**

The Director construes MFC's Complaint that the City violated Advisory Circulars 5190-6 and 5190-7 to be a violation of grant assurance 22 (a) based upon the Complainant's allegation. Federal Grant Assurance 22, *Economic Nondiscrimination*, requires the sponsor to make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

Arguments of the Parties

The Complainant (MFC) asserts that the Respondent (City) has delayed approval of an above-ground fuel storage facility for anti-competitive purposes. [FAA Exhibit 1, Item 1 page 1] MFC also alleges that the City is requiring environmental reviews under the National Environmental Policy Act of 1969 (NEPA) and the California Environmental Quality Assurance (CEQA) regulations that are unnecessary. [FAA Exhibit 1, Item 1, page 2]

At issue in this Complaint is whether the City of Modesto deliberately delayed their approval of MFC's proposed fueling station on the Airport. The gravamen of the Complaint is whether the City was unnecessarily requiring an environmental review for the installation of the fuel tanks. It is clear from the record that in the early stages of MFC's proposal to the City, MFC was not made aware of the potential for an environmental review.¹⁰ When informed of the necessity of the review, MFC believed this requirement to be unnecessary and an attempt by the City to protect the incumbent fixed base operator, Sky Trek Aviation. [FAA Exhibit 1, Item 1, page 2]

The Complaint states that, "*Despite the initial determination by the Planning Department that a CEQA investigation was not required, our client was later told the exact opposite. Sky Trek's attorney, Michael Dworkin, had apparently written a letter to the Mayor of Modesto, the City Clerk and the Airport Manager, Mr. Thiele, wherein he raised various issues regarding the proposal, including a CEQA review. The scheduled hearing for July 8, 2008, was dropped without notification to our client. We were informed by an assistant city attorney...that environmental assessment would be required despite a presumption of the validity of the initial CEQA exemption.*" [FAA Exhibit 1, Item 1, page 2]

¹⁰ See FAA Exhibit 1, Item 1, exhibit B and C.

The City states, *“The error in the determination of the level of environmental review required for this proposed project first came to my attention during the internal City Council agenda review process as the proposed lease agreement was being prepared for the July 8, 2008 City Council Meeting. On or about June 26, 2008, the City Attorney’s office advised that the overall proposed project did not qualify for the listed categorical exemption under the California Environmental Quality Act...which was listed on the Council agenda report, and further environmental review would be required. I subsequently contacted Mr. Corbett by telephone and provided him this information...”* [FAA Exhibit 1, Item 8, Declaration of Dennis Turner]

By Declaration, Brad Wall, Principal Planner with the Community and Economic Development Department, stated that *“On or about the end of June, 2008, it was brought to my attention that the City Attorney’s office...had determined that the proposed project did not qualify for a statutory exemption, since a Lease of land is specifically listed as a project subject to CEQA, and the terms of the lease being presented to the Council for approval specifically authorized the installation of the fuel facility...In light of this opinion, I reviewed the CEQA guidelines, realized the error, and informed the Public Works Department that I concurred with the City Attorney’s office and that CEDD¹¹ would require some level of environmental review of the project before it could advance to the City Council [sic].”* [FAA Exhibit 1, Item 8, exhibit Declaration of Brad Wall]

The City has admitted that errors were made in the type and timing of the information provided to MFC during the application process. MFC had initiated their application process on or about December 11, 2007. The City informed MFC of the *potential* need for an environmental review in a letter dated May 15, 2008; however, on June 23, 2008, MFC was notified by the City that the project was exempt under CEQA and no review was required. [FAA Exhibit 1, Item 8, page 2] It was not until early July 2008, that MFC was notified verbally that the project had been misclassified as a categorical exemption under CEQA and that an environmental review was necessary [FAA Exhibit 1, Item 8, Declaration of Dennis Turner, page 2]. MFC states that it was not until September 8, 2008 that it was notified in writing that a CEQA review was required. [FAA Exhibit 1, Item 9, page 4]

MFC believed that the City was acting in a discriminatory manner towards its application, stating, *“... there were blatant issues and discriminating tactics that the city used throughout the process. The city will continue to hide behind the smoke screen of the CEQA being required and that I didn’t send the \$5000 deposit check to start the process. But it all falls back to delays. How long can Mr. Corbett go before ‘going away?’ I have been approached by other tenants on the field; I have been approached by the media, and have been on the local news and front pages of the newspaper. All these parties come to the same conclusion that I have been wronged in this process. That the city of Modesto, while by virtue of saying that it dealt with the process appropriately and that the onus was on me to supply the \$5000 to do the study, behind the scenes ensured that my proposal was to have multiple hurdles throughout the way.”* [FAA Exhibit 1, Item 9, page 3]

¹¹ CEDD means “Community and Economic Development Department.”

The City rebuts this allegation and stated that the City, “...has been forthright and incredibly thorough in its previous response, including the presentation of sworn declarations and multiple supporting documents in an effort to be completely transparent to the FAA and the complainant of all the events that transpired at the city concerning the underlying project, to try and dispel all notions that there was a conspiracy afoot to prevent Mr. Corbett from engaging in this enterprise....From a purely fiscal basis, it would simply make no sense for the City to try and stop that activity. Yes, there was some initial confusion as to the information the City required of the Modesto [F]light Center. That is one of the main reasons why Deputy Director Dennis Turner and other city officials (such as the city attorney) stepped in to try and personally ensure that this project was handled on a priority basis...and in as timely a manner as possible.”

The City also argues that, “The City has not violated any provisions of Title 14 in the operation of its airport. After some initial confusion as to the level of environmental review required...the City clarified the requirements....The complainant disagreed that his project required environmental review under state and federal law and did not want to pay for the work. Despite complainant’s assertions, the City has neither the discretion nor the ability to waive environmental clearance requirements.” [FAA Exhibit 1, Item 11, page 3]

In spite of objections by MFC that an environmental review was unnecessary, it appears that at some point MFC accepted the premise that its project would need an environmental review to move forward. On November 14, 2008, in a letter to Charles Brunn, counsel to MFC, Susan Alcala Wood, City Attorney, noted that, “You then contacted me on Thursday, November 6, 2008, and advised me that your client had directed you to proceed with filing a request with the City to begin the environmental review work as previously discussed, and deposit a check in the amount of \$5,000.00 toward that end.” The letter also provided a conceptual time line for preparation of CEQA and NEPA documentation for the MFC fuel farm and lease agreement, as well as an approximate cost estimate of \$18,000.00 to complete the environmental review.

The record shows that on December 5, 2008, in an electronic mail from Susana Wood to Charles Brunn, it was stated that, “I wanted to advise you that I received another phone call directly from your client Richard Corbett. In his message, he advised me that he wanted to move forward with having the city perform the CEQA work as we had discussed. He said he had provided your office with a deposit check in the amount of \$5,000 for the city to begin this work, and he was going to contact you to direct that the check be given to the city.” [FAA Exhibit 1, Item 8, exhibit A]

FAA’s Order 1050.1E, *Environmental Impacts: Policies and Procedures*, describes when an Environmental Assessment (EA) would normally be required under NEPA. Paragraph 401, *Actions Normally Requiring an EA*, lists “fuel storage and distribution” in paragraph 401f. According to the Order, the level of environmental review (i.e., whether an EA or EIS is required) is governed by the “overall significance” of the proposed action – in this case – the construction of an aircraft fueling facility.¹² The record also shows that the

¹² http://www.faa.gov/documentLibrary/media/order/energy_orders/1050-1E.pdf

Environmental Protection Specialist from the Western Pacific Region provided guidance to Jerome Thiele in an email on September 23, 2008 about the need for an Environmental Assessment for the project proposed by MFC. [FAA Exhibit 1, Item 12] In this email message, guidance was provided on the scope of the EA and included review of air quality, compatible land use, construction impacts, fish, wildlife and plants, floodplains, hazardous materials, pollution prevention and solid waste, historical, architectural, archaeological and cultural resources, water quality and wetlands. [FAA Exhibit 1, Item 12]

It is apparent from the record that there was miscommunication between the City and MFC regarding the project from the early stages. MFC was not notified in the beginning that an environmental review would be required. This lack of accurate information from the City could understandably cause an applicant to question further actions or requests for information by the City. Nonetheless, the Director finds that the City corrected its earlier statements that an environmental review was not necessary, even to the extent of incurring expenses for an outside legal opinion on the necessity of the CEQA or NEPA review. [FAA Exhibit 1, Item 8, page 4]

The record shows that in December 2008, MFC appeared to be willing to move forward, as evidenced by its presentation of a \$5000 check to the City as a deposit so that the City could begin the environmental study. However, MFC states that it subsequently closed its business on January 27, 2009 due to “...multiple contributing factors...some of which are economy based, while others dealt with fuel price gouging at Modesto Airport during the summer of peak fuel prices, and the constant delay place[d] upon me by the city of Modesto during my process to obtain a lease for a fuel farm.” [FAA Exhibit 1, Item 9, page 1]

The Director cannot find that the City of Modesto is in noncompliance with Grant Assurance #22, Economic Nondiscrimination. Although there were delays in processing MFC’s application for the above ground fuel tanks, and the City is responsible for some of those delays, the Director is not persuaded that the actions amounted to a deliberate attempt to prevent MFC from establishing its fuel station. Additionally, the Director is not persuaded by MFC’s arguments that the environmental reviews were unnecessary. Although it is unfortunate that accurate and timely information was not provided to MFC early in their application process, the Director does not find that the City deliberately intended to delay fueling competition on the Airport by requiring unnecessary environmental reviews. But even if that had been the case, as stated in *BMI Salvage Corp. v Miami-Dade County*, FAA Docket No. 16-05-16, (July 25, 2006) (Director Determination) “motive or ill will does not, alone, amount to non-compliance, even if established by the Complainant. Such evidence must be accompanied by an actual unreasonable denial of access for an aeronautical activity or unjust economic discrimination. Motive alone does not establish non-compliance.” [DD, p. 16] In this case, there was no actual denial of access for MFC.

However, the Director cautions the City to make clear its requirements for future applicants to avoid potential complaints. This can be accomplished through airport

minimum standards that address various aeronautical activities that businesses may wish to engage in on the Airport, including any environmental reviews that would potentially be required. 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 an airport. It is the prerogative of the airport owner or sponsor to impose conditions on users of an airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. Once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical activities and services. [FAA AC 150/5190-7, section 1.1.] See Flightline v. Shreveport, FAA Docket No. 16-07-05 (March 7, 2008) (Director's Determination).

2. Whether the City's alleged undue delay with regard to approving MFC's fuel tanks constructively grants an exclusive right to SkyTrek Aviation in violation of grant assurance #23 and Federal law.

Federal Grant Assurance #23 states that an airport sponsor, "...will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

MFC asserts in its Complaint that the City delayed approval of the fuel farm proposal because of pressure brought to bear by the incumbent FBO, Sky Trek Aviation. MFC states, "*We believe that the issue of competition is at the heart of this problem, not any adverse environmental impacts. A cursory review of the proposal would reveal Sky Trek Aviation is exercising undue pressure on the City of Modesto and the relevant parties involved to ensure retention of a monopoly. John Rogers, the owner of Sky Trek Aviation, sits on the advisory committee board and only recused himself from this decision making process after displaying unabashed hostility towards our client's project at that initial meeting. Our client was then required to provide personal financial information, which has absolutely no bearing on the project at hand. We fear that his personal financial information was used to determine our client's capacity for pursuing this matter legally. Also, despite the initial letter of exemption from CEQA, the City reversed itself immediately upon receipt of the letter from Sky Trek's counsel.*" [FAA Exhibit 1, Item 1, page 2]

MFC stated, "*There is a reason why there hasn't been any Fixed Based Operators in the past 18 years that has been successful in placing an additional fuel farm at Modesto Airport. It is the clout and powers that John Rogers and Sky Trek has, and the affect that Mr. Rogers has on the city of Modesto.*" [FAA Exhibit 1, Item 9, page 5]

The City denies this allegation and states, "*at no time was the application deliberately delayed because of improper interference with existing fuel provider Sky Trek, or its principal, John Rogers. In fact, much of the delay from December 2007 through May of 2008 was due to the fact that the applicant failed to provide sufficient information to the*

city to allow its staff to adequately address all of the project's requirements. [FAA Exhibit 1, Item 8, page 2]

In its Answer, the City avers that, *"From the time that the applicant was notified of the error in the classification of the environmental review required, until the present, the complainant and its attorneys have leveled constant charges and accusations of misconduct to the City and [its] staff. Despite repeated attempts to explain what actually transpired in the determination of the required level of environmental review, the complainant has continued to accuse the city of acting with an improper motive, specifically: that the City is delaying the project until the applicant runs out of money so that the existing fuel provider, John Rogers, dba Sky Trek can continue to prosper without competition [sic]."* [FAA Exhibit 1, Item 7, page 2]

John Rogers, owner of Sky Trek Aviation, and the only source for aviation fuel on the Airport, was also the Chairman of the Airport Advisory Committee during 2008. When MFC came before the Committee to present its project for approval, MFC alleged that Mr. Rogers *"trivialized and mocked our client's proposed project, at one point, even stating, go ahead and amuse us."* [FAA Exhibit 1, Item 1, page 1]

John Rogers also wrote a letter, through his attorney, to the Mayor of the City of Modesto on June 30, 2008, outlining in detail why he believed that *"This proposal falls short on several grounds."* The letter also noted, *"Sky Trek has served Modesto Airport for over 25 years, 18 of which as the Airport's sole fuel vendor. It has heavily invested in the Airport – having spent over \$8 million in the purchase of one and construction of five hangars, the construction of a state of the art underground fueling facility (costing several hundreds of thousands of dollars, as required by the City) and the construction of other facilities and improvements."* The letter concludes by stating, *"...Sky Trek Aviation opposes the MFC proposal. There is no demonstrated need for a second fueling facility and its effects would be economically devastating for Sky Trek, the Airport and eventually Airport users. However, to the extent that the Airport deems a second facility necessary or desirable, the Airport should require that MFC provide a full-service FBO facility on the Southwest side of the Airport consistent with current Airport Master Plan requirements. If the Airport is unwilling to adhere to this requirement it must initiate appropriate actions to amend the Master Plan and promulgate fair and equitable minimum standards to (i) permit the MFC project and (ii) concurrently permit Sky Trek to build an above-ground facility in a central location at the Airport and recompense Sky Trek for the remainder of its present underground fuel facility's useful life."* [FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit C]

It is understandable that MFC could construe that, along with the earlier misinformation regarding the need for an environmental review, the Airport was attempting to protect Sky Trek from fueling competition. The letter from Sky Trek makes clear that if MFC's proposal were approved, the Airport would be pressured to 'buy out' the remaining life of Sky Trek's underground fuel facility. Adding to this scenario is the fact that the City

recognized that Sky Trek opposed MFC's project and had threatened a lawsuit if an environmental review under CEQA was not performed.¹³

An airport sponsor has the obligation under Grant Assurance #23 to open their airport to competition on a fair and reasonable basis. Failure to do so could place the airport in noncompliance with its agreed upon obligations.

Under the Exclusive Rights prohibition, the sponsor may not grant a special privilege or a monopoly to anyone providing aeronautical services on the airport or engaging in an aeronautical use. The intent of this restriction is to promote aeronautical activity and protect fair competition at federally obligated airports.

An exclusive right is defined as a "power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements or by another means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or right, would be an exclusive right." FAA Order 5190.6B, paragraph 8.1.

We note that where the sponsor has not entered into an express agreement, commitment, understanding, or an apparent intent to exclude other reasonably qualified enterprises, the FAA does not consider the presence of only one provider engaged in an aeronautical activity as a violation of the exclusive rights prohibition. The FAA will consider the sponsor's willingness to make the airport available to additional reasonably qualified providers. FAA Order 5190.6B, paragraph 8.6.

The fact that a single business or enterprise may provide most or all of the on-airport aeronautical services is not, in itself, evidence of an exclusive rights violation. An exclusive rights violation is the denial by the airport sponsor to afford other qualified parties an opportunity to be an on-airport aeronautical service provider. The airport sponsor may issue a competitive offering for all qualified parties to compete for the right to be an on-airport service provider. The airport sponsor is not required to accept all qualified service providers without limitation. The fact that only one qualified party pursued an opportunity in a competitive offering would not subject the airport sponsor to an exclusive rights violation. However, the airport sponsor cannot, as a matter of convenience, choose to have only one FBO to provide services at the airport regardless of the circumstances at the airport.

Here, we find that the City's delay in approving MFC's fuel operation did not constructively grant an exclusive right to SkyTrek Aviation in violation of grant assurance #23 and Federal law. The record does not disclose an express agreement, commitment, understanding, or an apparent intent by the City to exclude MFC. As noted, the presence of only one fuel provider does not on its face constitute a violation of the exclusive rights prohibition.

¹³ FAA Exhibit 1, Item 9, exhibit 17, email dated July 22, 2008 from Roland Stevens to Jerome Thiele and others. Email states in part, "The City could get sued in CEQA by Sky Trek and incur defense costs..."

However, the Director notes that it was plausible for MFC to believe that the Airport did act in some measure to protect Sky Trek and/or avoid the costs of a lawsuit from Sky Trek. Failing for many months to clarify the requirements for an environmental review for the proposed project could be evidence of intent to maintain the exclusive fueling arrangement that Sky Trek has enjoyed for many years.

The City contributed to the delay in processing the application for MFC's project by providing incorrect information to MFC on the need for a CEQA review, leading it to believe that one was not necessary for the project.¹⁴ MFC applied to the City of Modesto for permission to install an aviation fueling facility on December 11, 2007; it was not until June 23, 2008, that the Modesto Economic Development Committee reviewed MFC's proposal and recommended that a lease be negotiated and presented to the City.¹⁵ At this time, the City also stated that a CEQA review was not needed. The City scheduled, then pulled the issue from City Counsel consideration on July 2, 2008. It was not until July 3rd that MFC was notified by the City that a CEQA review would be required.

As noted above, the record shows that while the City appears to have had a role in the delay, the record does not support a finding that this delay was for purpose of limiting competition in fueling on the airport and protecting Sky Trek.

Additionally, the Director is not persuaded that the City was solely responsible for the delay experienced in this process. It is clear from the pleadings that MFC objected to the costs and/or need for the environmental review and delayed providing the money to begin the work. According to the City, *"...much of the delay from December 2007 through May of 2008 was due to the fact that the applicant failed to provide sufficient information to the city to allow it's staff to adequately address all of the project's requirements."*¹⁶

MFC was informed by its legal counsel on July 3, 2008 that an error had been made and that an environmental review would be needed.¹⁷ However, MFC delayed sending a \$5000 deposit check to the City to begin the CEQA study, stating, *"...no one would send a non-refundable check to an entity not knowing the ultimate true cost in the project."* It appears that from July 3, 2008,¹⁸ when MFC was notified by his counsel that a CEQA study was required,¹⁹ until December 5, 2008,²⁰ when it notified the City that the check would be sent, no action was taken by MFC to pursue the CEQA review. During this timeframe, MFC continued to object to the need or costs of the CEQA review.

A complainant making the argument that an airport sponsor's requirements for conducting a particular activity are so unreasonable or burdensome as to deny the complainant access for that particular activity has the responsibility to demonstrate with supporting evidence

¹⁴ FAA Exhibit 1, Item 8, page 2

¹⁵ FAA Exhibit 1, Item 8, page 2

¹⁶ FAA Exhibit 1, Item 8, page 2

¹⁷ FAA Exhibit 1, Item 1, exhibit D

¹⁸ FAA Exhibit 1, Item 9, page 4

¹⁹ FAA Exhibit 1, Item 8, Declaration of Jerome Thiele, exhibit D

²⁰ FAA Exhibit 1, Item 8, exhibit A

that the requirements are, in fact, unreasonable and burdensome. It is not sufficient to show the sponsor's requirements are less convenient or even more costly than the complainant's preferred options. [See Airborne Flying Service, Inc., v. City of Hot Springs, Arkansas, FAA Docket No. 16-07-06 (December 18, 2007) (Director's Determination, p. 16)]

The record shows that the City did attempt to work cooperatively with MFC after it was clear that there was a need for an environmental review, even going to the extent of incurring \$2500 for an outside legal opinion on the need for a CEQA or NEPA review. The Director is unable to sustain Complainant's allegation of a violation by the City of Modesto regarding the prohibition on granting an exclusive right. As discussed above, the Director is not able to sustain an allegation of economic discrimination. The record, by a preponderance of reliable and probative documentation and information, does not support the allegation that the City has granted an exclusive right in violation of 49 USC § 40103(e) or Federal grant assurance 23.²¹

However, the Director again cautions the City to make clear its requirements for future applicants to avoid potential complaints. 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 an airport.

VII. FINDINGS AND CONCLUSIONS

The Director finds the Authority did not violate:

- Grant Assurance 22 Economic Nondiscrimination, because although there were delays in processing MFC's application for the above ground fuel tanks, and the City is responsible for some of those delays, the Director is not persuaded that the actions amounted to an attempt to discriminate against MFC in the establishment of its fuel station.
- Grant Assurance 23 Exclusive Rights, because although the Airport was under pressure by its incumbent FBO to prevent fueling competition on the Airport, the City was moving forward to process MFC's application for a fuel station.

ORDER

ACCORDINGLY, it is ordered that:

1. The Complaint is dismissed.
2. All motions not specifically granted herein are denied.

²¹ The Director recognizes that some of the analysis in this section repeats the allegations of delay as discussed in Issue 1. However, the parties have constructed their pleadings in such a way that is handled in two sections for clarity.

RIGHT TO APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 U.S.C. § 46110.²² A party to this proceeding adversely affected by the Director's Determination may appeal this 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.



Randall S. Fiertz
Director
Airport Compliance & Field Operations

April 5, 2010
Date

²² See also 14 CFR § 16.247