

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

DESERT WINGS JET CENTER, LLC
SPIRIT FLIGHT INC. dba WINGS OF THE
CASCADES,
Mary A. Schu, President and Owner

Docket No. 16-09-07

COMPLAINANT

v.

CITY OF REDMOND
REDMOND, OREGON

RESPONDENT

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), Title 14 Code of Federal Regulations (CFR) Part 16.

Mary A. Schu, President and Owner (Complainant) of Desert Wings Jet Center LLC, and Spirit Flight, Inc. dba Wings of Cascades, has filed a formal complaint pursuant to Title 14 CFR Part 16 against the City of Redmond, Oregon, (Respondent or City) owner, sponsor, and operator of Redmond Roberts Field (Airport), Redmond, Oregon.¹

Complainant alleges Respondent is engaged in economic discrimination and has granted another fixed-base operator² an exclusive right in violation of Title 49 United States Code (U.S.C.) §§ 47107(a) and 40103(e) and the respective FAA grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. Complainant also alleges the Respondent has violated FAA grant assurances 19, *Operation and Maintenance*; 25, *Airport Revenues*; 29, *Airport Layout Plan*; and 30, *Civil Rights*.

¹ The Complaint names the Mayor and the Airport Manager as respondents; the FAA will only recognize the City of Redmond, the airport sponsor and public agency responsible for enforcing the federal grant obligations under Title 14 CFR section 16.3, for the definition of a Respondent of a publicly owned airport. [FAAExhibit 1, Item 8]

² A fixed-base operator (FBO) is a commercial entity, providing multiple aeronautical services, such as maintenance, storage, ground and flight instruction, etc. to the public. [FAA Order 5190.6B.]

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 PARTIES

A. Airport

Redmond Roberts Field (RDM) (Airport) is a commercial service airport. It holds an airport operating certificate under Title 14 CFR Part 139 *Airport Certification*. The planning and development of RDM has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.*³ During the last reported twelve-month period ending December 31, 2009, there were 112-based aircraft and 55,913 annual operations at the Airport.⁴

B. Complainant

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

III. BACKGROUND and PROCEDURAL HISTORY

Since 2005, Complainant has tried unsuccessfully to build tenant-financed improvements at the Airport to support Complainant's commercial aeronautical activities. Complainant states it has been subjected to discriminatory actions and unreasonable standards imposed by Respondent. Complainant entered into three lease agreements with Respondent for tenant-financed improvements. There are two other fixed-base operators on the Airport: Butler Aircraft, and Redmond Air.⁵ [FAA Exhibit 1, Item 3, page 12.]

³ FAA Exhibit 1, Item 2 provides the Airport Sponsor's AIP grant history listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor from 1982 to the date of this decision.

⁴ FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Airport.

⁵ The lease for Redmond Air is listed as KC Aero/Keeton King. [See FAA Exhibit 1, Item 4, exhibit 38.]

A. Complainant's 2005 Wings of Cascade Lease

On July 26, 2005, Complainant, as president and owner of Wings of Cascade, entered into a twenty (20) year ground lease with Respondent to construct a 15,000 square foot hangar and 57,818 square foot ramp on the Airport. The lease included two five (5) year renewal options. [FAA Exhibit 1, Item 7, exhibit 1.] The lease required Complainant to complete substantial improvements within a one (1) year time frame or face lease termination. Respondent indicated the one-year construction requirement is a standard provision in all Airport leases for unimproved property. The lease also required Complainant to submit construction plans and to obtain the City's approval through a site plan review application before commencing construction. The original term of the lease was for a period of twenty years from August 1, 2005, until July 31, 2025.

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

B. Complainant's 2007 Desert Wings Jet Center Lease

On January 12, 2007, Complainant, as president and owner of Desert Wings Jet Center, signed a twenty (20) year lease agreement with the City for 152,899 square foot parcel⁶ to operate a fixed-base operation. The lease included two five (5) year renewal options and the requirement for substantial completion of tenant improvements within a one (1) year time frame or face lease termination. The original term of the lease was for a period of twenty years from January 1, 2007, until December 31, 2027. [FAA Exhibit 1, Item 7, exhibit 3.]

During the implementation of the 2007 leasehold improvements, Complainant claims it was confronted by a number of problems that prevented it from complying with the one-year time frame for substantial completion of tenant improvements. Complainant states these problems were Respondent's responsibility to address. [FAA Exhibit 1, Item 3, pages 24, 27 and 37.]

Complainant alleges Respondent violated its federal obligations under the grant assurances when Respondent (1) failed to correct waste water and drainage problems on the Complainant's leasehold, (2) failed to define Complainant's leasehold boundaries, (3) failed to prevent competitor Redmond Air from unauthorized trespass and from trenching Complainant's leasehold, (4) implemented changes to the City's site plan review requirements, and (5) breached its contract with Complainant. [FAA Exhibit 1, Item 3, pages 8, 24, and 46.]

On December 18, 2007, Respondent's counsel advised Complainant that Complainant's lease would terminate on January 12, 2008, for failure to substantially complete construction within the allotted one-year period. Respondent's counsel reminded Complainant that the required

⁶ Addendum Lease number 1, exhibit C for 18, 870 square feet was prepared November 9, 2006. [FAA Item 7, exhibit 3, *see exhibit A-Leases.*]

building plans had not been submitted for review. Respondent's counsel also requested that Complainant submit the following documents:⁷

- a) A copy of the company business plan for the project;
- b) Copies of contracts or correspondence indicating negotiations with airlines for flight training; and
- c) Copies of correspondence indicating Horizon Airlines' intention to use Complainant's hangar for overnight operations.

Respondent did address Complainant's questions about the leasehold as follows:

- a) Estimated cost of the project and proof of financial ability to construct the project;
- b) Formal request to change lease boundaries;
- c) Waste water removal issue resolution;
- d) Taxiway attachment and expansion project, identified as the tenant's responsibility;
- e) Building height approval; and
- f) Reimbursements of tenant lease payment for properties encumbered by Salmon Avenue. [FAA Exhibit 1, Item 7, exhibit 4.]

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

- Failing to deliver possession of the leased premises, including a fifty-foot strip of the leased property representing the location of a vacated right-of-way for a City street, thus preventing Complainant/plaintiff from being able to use and develop the leased property; and
- Allowing the lessee of adjoining property also owned by the City to trespass upon the leased premises by making a four foot deep trench forty or more feet upon the leased property. [FAA Exhibit 1, Item 3, page 4 and Item 4, Exhibit 8, page 2.]

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

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

⁷ There is no response from Complainant to this request contained in the Record.

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

- Respondent increased the size of Complainant's leasehold;
- Respondent provided a copy of as-built for utility locations for Airport and Salmon Avenues and associated lease properties, which were also requested by Complainant;
- Respondent agreed to work with Complainant to relocate any city utilities such as water and sewer lines, specifying that Complainant is responsible for all design and relocation costs of the public utilities; and
- Respondent also informed Complainant that city personnel and equipment could not be used for a private development project. [FAA Exhibit 1, Item 4, exhibits 6, 7 & 8.]

In a separate letter to Complainant dated May 15, 2008, Respondent's Counsel addressed Complainant's remaining concerns [FAA Exhibit 1, Item 6.] as follows:

- Complainant must submit a site and design review application;
 - Complainant must provide all engineering services and create new documents;
 - Complainant must pay all charges and fees;
 - The lease rate for the property will be \$0.21 per square foot, which is the current rate the Respondent is charging all new tenants;
 - The lease boundaries will not be expanded to include any more property beyond that identified in the lease;
 - Respondent cannot approve a building 70 feet high; the city development code limits building height to 45 feet;
 - Respondent will not build a maintenance/fixed-base operator hangar and lease it back to the Complainant. Respondent was willing to construct a building for the U.S. Forest Service, but not for individuals and corporations;
 - The term of the lease will be 20 years with two five-year extensions, and the hangar rent will commence on the date the new lease is executed;
 - Respondent will not waive rent and utility costs for one year;
 - Respondent will not provide or pay for engineering or construction services for any portion of the Complainant's project, including all trenching and relocation of utilities, sewer, and roadway; and
 - Respondent will not refund rent paid or pay the Complainant's costs or attorney fees.
- [FAA Exhibit 1, Item 4, exhibit 16.]

C. Complainant's 2009 Desert Wings Jet Center Lease

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

Key provisions of the new lease included:

- A twenty (20) year lease agreement with the Respondent for 152,899⁸ square foot parcel to operate a fixed-base operation;
- Desert Wings Jet Center must submit a complete application for site and design review of all proposed improvements on the leased premises within 180 days of lease execution;
- After the Respondent has approved the site and design plans, Complainant, on behalf of Desert Wings Jet Center, must submit final plans to the City Building and Engineering Departments; and
- Complainant, on behalf of Desert Wings Jet Center, must begin construction within 180 days after receiving site and design approval. [FAA Exhibit 1, Item 7, exhibit 7.]

Complainant signed the new lease even though Complainant now states the lease provisions are inequitable and discriminatory in (1) lease term and (2) lease recording. Eventually, this lease was also terminated. These lease terms are not at issue here.

(1). Lease Term

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

(2). Lease Recordation

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

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

The City does not consent to recording the lease. For a significant number of years, the City's policy has not been to record leases or memorandum of leases for property subject to the FAA patent. What the City does and continues to do is provide leasehold mortgage protection for tenants who are borrowing money to make improvements on their leasehold interest. The lease agreement between the City and Desert Wings Jet Center provides specifically for leasehold mortgage protection in Section 12B of the lease. Those provisions allow the lender to register with the City and to receive notices of any default, and opportunity to cure the default, and assume the underlying lease.

[FAA Exhibit 1, Item 4, exhibit 10.]

All lease exhibit surveys are stamped "**NOT FOR RECORDING PURPOSES.**"

⁸ See FAA Exhibit 1, Item 7, exhibit 7—While 2009 lease says 152,899 sqft, lease exhibits total 199,082 sqft. exhibit A "Leases" identifies the main lease is 152,125 sqft, (Exhibit B); Addendum Lease number 1, 18,870 sqft (Exhibit C); Addendum Lease number 2A, 18,000sqft (Exhibit D); Addendum Lease number 2B, 10,087 sqft (Exhibit D).

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

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

It has been the City's policy for a number of years not to record any documents against the lease property.⁹ The reason for this policy is that such recordings add additional cost and expense to the City when terminating a lease or at the end of a lease period. It also creates the possibility of a tenant or lender asserting an interest in the real property. By not consenting to the recording, the City is able to avoid those potential disputes and the related significant costs. All of the airport leases contain an extensive provision for mortgage leasehold protection.

... the leasehold protection provides greater rights to the lender than the tenant has under the lease, including a longer period to cure any default or to assume the lease. The City included this provision to facilitate the tenant's ability to finance improvements to the leasehold. The City has successfully used and is using this provision with lenders. The lenders I have talked to about the leasehold protection have been satisfied with its terms. I have not been contacted by any lenders raising any concerns about the inability to record their loans to tenants
[FAA Exhibit 1, Item 7, exhibit 15a.]

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

I am aware that a City staff member did not understand the City's no recording policy and was allowing lease agreements to be recorded. Because the recorded documents were not being returned to the City, the error was not discovered until recently.

[FAA Exhibit 1, Item 7, exhibit 15a.]

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

⁹ The administrative record includes a copy of a recent leasehold mortgage protection agreement used to finance a hangar purchased at the Airport. The agreement is dated May 22, 2009. [FAA Exhibit 1, Item 14.]

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

The Associate Administrator wrote to Complainant:

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

[FAA Exhibit 1, Item 7, exhibit 15.]

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

- Show Complainant's lender the correspondence from the City; and
- Have the lender contact the City to discuss the specific terms of the lender protection clause in the lease.

[FAA Exhibit 1, Item 7, exhibit 15.]

(3). Lease Termination

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

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

D. Procedural History

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

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

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

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

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

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

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

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

IV. ISSUES

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

- Whether Respondent is in violation of Grant Assurance 19, *Operation and Maintenance*, by failing to correct waste water and drainage problems on the Complainant's leasehold, as well as failing to define Complainant's leasehold boundaries properly and permitting a competitor unauthorized trespass and trenching of Complainant's leasehold.
- Whether Respondent violated Grant Assurance 22, *Economic Nondiscrimination*, by denying access for Complainant's ability to expand its leasehold and become a fixed-base operator through the use of unreasonable standards and changing requirements.
- Whether Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to another fixed-base operator while preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of unreasonable standards and changing requirements.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance

instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

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.¹⁰ FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with federal obligations of airport sponsors. 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 FAA grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 19, *Operation and Maintenance*; (2) Grant Assurance 22, *Economic Nondiscrimination*; and (3) Grant Assurance 23, *Exclusive Rights*.

¹⁰ *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). Operation and Maintenance

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

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

(2). Economic Nondiscrimination

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

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

...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)]

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

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such

restrictions when those restrictions deny or limit access to, or use of, the airport. [See FAA Order 5190.6B, ¶14.3.]

FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor of public use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See FAA Order 5190.6B, Chapter 9.]

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

(3). Exclusive Rights

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

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

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

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

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

Therefore, it is FAA’s policy that the sponsor of a federally obligated airport will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public and will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities. FAA Order 5190.6B clarifies the applicability, extent, and duration of the prohibition

against exclusive rights under 49 U.S.C. § 40103(e) with regard to airports developed with FAA-administered grant assistance and federal property conveyances.

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

FAA's policy on exclusive rights broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have 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 5190.6B (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. 8.]

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.

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 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) Wilson Air Center, LLC v FAA, 372 F.3d 807 (6th Cir. 2004).]

D. FAA Enforcement Responsibilities

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

VI. ANALYSIS AND DISCUSSION

Complainant alleges Respondent violated its federal obligations, including grant assurances 19, *Operation and Maintenance*; 22, *Economic Nondiscrimination*; and 23, *Exclusive Rights*, by preventing Complainant from expanding its leasehold and establishing a fixed-based operator business at the Airport. Respondent argues it did enter into agreements with Complainant to expand its leasehold and establish a fixed-base operator business on the Airport, but Complainant did not fulfill the requirements under the agreements. Respondent argues it cannot be held responsible for Complainant's failure to comply with the required timelines for site plan review and construction of Complainant's leasehold improvements. We have identified three issues to review in this matter:

Issue (1): Whether Respondent is in violation of Grant Assurance 19, *Operation and Maintenance*, by failing to correct waste water and drainage problems on Complainant's leasehold, as well as failing to define Complainant's leasehold boundaries properly and permitting a

competitor unauthorized trespass and trenching of Complainant's leasehold.

Issue (2): Whether Respondent violated Grant Assurance 22, *Economic Nondiscrimination*, by denying access for Complainant's ability to expand its leasehold and become a fixed-base operator through the use of unreasonable standards and changing requirements.

Issue (3): Whether Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to another fixed-base operator while preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of unreasonable standards and changing requirements.

Before analyzing and deciding the issues described above, the Director will address four issues pertaining to Complainant's allegations regarding grant assurances 25, *Airport Revenues*; 29, *Airport Layout Plan*; and 30, *Civil Rights*, as well as an allegation that Respondent violated a State obligation.

Grant Assurance 25, Airport Revenues

Complainant alleges the Respondent violated Grant Assurance 25, *Airport Revenue*, when the Respondent held property based on a verbal agreement with an unidentified third party for more than two years. [FAA Exhibit 1, Item 3, pages 50 and 51.] Complainant states it believes this third party to be Air Life and Epic Air, two operators that currently do not lease property on the Airport. Respondent denies it held property for Air Life and Epic Air. [FAA Exhibit 1, Item 7, page 9.] Respondent admits, however, that it did discuss the possibility of leasing space to these two operators. Respondent claims the condition of the site rendered it unsuitable for leasing until the City obtained a grant to improve site conditions for an air cargo ramp and hangars. [FAA Exhibit 1, Item 7, page 9.]

Complainant also alleges Respondent held property for competitor Redmond Air for at least five years at no cost and without a lease, and it suspended Redmond Air's lease payments for six months between November 2006 and May 2007. [FAA Exhibit 1, Item 3, pages 19 and 51, Item 5, exhibit 42, page 11.] The administrative record does not support these allegations.

Complainant also alleges Respondent violated Grant Assurance 25, *Airport Revenue*, when the Respondent paid \$17,400 to a professional consultant to develop conceptual drawings for the proposed airline employee parking lot. Complainant states it is an inappropriate and highly improper use of airport revenue to develop conceptual drawings for property committed to another party under a 30-year lease. [FAA Exhibit 1, Item 3, page 31 and 52.] Respondent denies this was an impermissible expenditure. [FAA Exhibit 1, Item 7, page 9.]

Grant Assurance 25, *Airport Revenue*, states in pertinent part, "All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be

expended by it for the capital or operating costs of the airport....” The FAA considers airport planning costs to be a legitimate use of airport revenue as defined by Title 49 U.S.C. §§ 47107 and 47133 and Grant Assurance 25. Both statutes and Grant Assurance 25 require airport revenue be used for the operating and capital improvement of airport facilities. By statute, 49 U.S.C. § 47102(3)(A)(ii), airport planning is deemed airport development and is eligible for AIP funds. Accordingly, the cost of planning an airline employee parking lot is an appropriate use of airport revenue.

Complainant alleges Respondent fraudulently misused public funds for private gain by leasing facilities to Les Schwab Tire Company. [FAA Exhibit 1, Item 3.] Complainant alleges Respondent intentionally undermined Complainant’s efforts to secure Les Schwab Tire Company as a sub-tenant. Complainant states Les Schwab Tire Company was interested in relocating its flight department and its two jet aircraft to Complainant’s leasehold at the Airport. Complainant signed a letter of interest with Les Schwab to build three large hangars and a self-serve pump and to provide 120,000 gallons of fuel at a discounted rate with a possible addition of 30 percent when a third jet was added. Complainant shared this information with the Respondent in an attempt to get financial assistance. [FAA Exhibit 1, Item 3, page 53.]

Complainant alleges the Respondent intervened in Complainant’s negotiations with Les Schwab and offered the company land to construct its own hangar and facilities. The administrative record indicates that Les Schwab decided to sign a contract with the City for the construction of a hangar. Les Schwab officials stated the company was interested in developing its own hangar complex and was not interested in working with Desert Wings. [FAA Exhibit 1, Item 7, exhibit 16.] Respondent contends that when the “Airport Manager initially met with representatives of Les Schwab, she specifically told them she did not want to interfere with any contract or negotiations between them and Complainant.” [FAA Exhibit 1, Item 7, page 10.]

It is not a violation of Grant Assurance 25, *Airport Revenues*, for an airport sponsor to negotiate agreements that generate revenue for the Airport. This determination speaks only to the impact of invoking a proprietary right with respect to FAA regulations and policies. Tenant contractual obligations affected by invoking such a proprietary right may be enforceable in state court, not under Part 16. Whether this action violated any contractual provision between the parties is a matter for a state court to decide, not Part 16. [See Jet 1 Center, Inc. v. Naples Airport Authority, FAA Docket No. 16-04-03, (January 4, 2005) (Director’s Determination).]

Grant Assurance 29, Airport Layout Plan

Complainant alleges the City violates Grant Assurance 29, *Airport Layout Plan*, by attempting to take Complainant’s leasehold for an airline employee parking lot. [FAA Exhibit 1, Item 3, page 59.] The City states the consultant was instructed to examine possible locations for an employee parking lot. Complainant’s property was not considered the best option. The final location for the parking lot does not displace or encroach on the Complainant’s leasehold. [FAA Exhibit 1, Item 1, page 10.] Respondent also notes that “no plans have been prepared of the employee parking lot at any location.” [FAA Exhibit 1, Item 1, page 10.]

Complainant alleged that in mid-November 2007, the airport manager requested Complainant to relocate its operation to another site on the Airport to accommodate an airline employee parking lot and a staging area for airline terminal expansion. [FAA Exhibit 1, Item 1, pages 30, 31 and 53.] In a December 5, 2007 letter, Complainant rejected the alternate location due to the steep grade and the enormous amount of fill required to raise the grade. [FAA Exhibit 1, Item 4, exhibit 3.]

Respondent states the employee parking lot was needed to support a terminal expansion project. Respondent directed its consultant to consider all undeveloped land around the terminal site. The administrative record indicates Respondent requested its consultant to develop four alternative parking lot layouts for employee parking lots to accommodate an additional 200 or more parking lot stalls. [FAA Exhibit 1, Item 4, exhibit 4.] One of the undeveloped sites was leased to Complainant under the January 2007 lease. Respondent states Complainant's lease for the site was due to expire in several months; once the lease terminated, Respondent was not obligated to enter into any subsequent lease with Complainant for that site. [FAA Exhibit 1, Item 7, page 6.]

Grant Assurance 29. *Airport Layout Plan*, states in pertinent part, the airport sponsor "will keep up to date at all times an airport layout plan of the airport...subject to the approval of the Secretary [of Transportation]" The Airport Layout Plan (ALP) is a planning document for use by the airport sponsor and FAA. The ALP is not a legal contract between the airport sponsor and its airport users and it does not prohibit the sponsor from relocating facilities on the airport.

Grant Assurance 30, Civil Rights

Complainant alleges the City also violated Grant Assurance 30, *Civil Rights*. Grant Assurance 30, states in pertinent part, the airport sponsor "will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from [federal financial assistance] grant. In a November 21, 2007, email to city officials, the airport manager wrote:

I thought to add the things that I would like to see (you also add) so if you both agree she will have over a month to get the documents together. I think we should really spell out what we want and then we can decide on timeliness so she can come up with all these things. But I really think we should be up front with what we want, if you can think of anything else that we would have to have her gather. I think that if we want to add timelines for design and other things I think that is fine, if we want to tell her now that we will not approve an office building there or tell her that based on the other buildings in that area (other than the tower) we will not approve anything higher [than] 40 feet that's what I would like in that area as the other hangars I think that really works. Steve, we absolutely positively have to make sure that from now on that no tenant has the ability or transfer their lease until all improvements are completed in their name. (Underscore added by Complainant for emphasis) [FAA Exhibit 1, Item 3, page 33.]

Complainant alleges that the airport manager's references to "her" and "she" is a direct attack on her civil rights as a minority, a woman, and a small business owner. Complainant asserts the

Respondent violated her civil rights. Federal Grant Assurance 30, *Civil Rights*, prohibits an airport sponsor from excluding an aeronautical user based on the grounds of race, creed, color, national origin, sex, age, or handicap. Respondent asserts that there is “nothing unreasonable, unusual, derogatory in referencing directly the individual City staff are working with. In this case it was Ms. Schu...who is in fact both a ‘she’ and a ‘her.’” [FAA Exhibit 1, Item 7, page 7.]

The statement above is Complainant’s only mention of this alleged violation and she fails to provide any evidence that because of her race, creed, color, national origin, sex, age, or handicap she was treated disparately. Complainant fails to describe similarly situated tenants who were treated more favorably. Complainant fails to state a proper Grant Assurance 30 violation in merely alleging that the sponsor used pronouns when referring to Complainant.

State Obligation for Enterprise Zone Business

Complainant claims its business was approved as an Enterprise Zone Business by the State of Oregon. According to Complainant, this designation eliminates most fees for city permits and provides several years of future tax breaks and benefits. [FAA Exhibit 1, Item 4, exhibit 24.] The City, however, is requiring Complainant to pay for all permits and fees, which Complainant states is in direct conflict with the goals of the State of Oregon program. The administrative record indicates the pre-enterprise zone exemption is available to most authorized business firms for up to two years. [FAA Exhibit 1, Item 4, exhibit 24, page two] Complainant states it lost its eligibility in the program because Complainant was in the program longer than two years. An airport sponsor is not obligated to provide application assistance or incubate business development proposals. [See Atlantic Helicopters Inc./Chesapeake Bay Helicopters v Monroe County, Florida, FAA Docket No. 16-07-12, (December 3, 2008) (Director’s Determination) at 35.] Nonetheless, this allegation is outside the scope of FAA’s role in monitoring grant assurance compliance. Complainant failed to state a claim related to the grant assurances for this issue.

The FAA finds Complainant has misinterpreted the definition and application of Grant Assurances 25, 29 and 30, and misconstrued the FAA’s authority as to purported state and local incentive programs for the reasons previously stated. Accordingly, the FAA finds these issues do not warrant further review and the allegations raised in the complaint as to these violations are dismissed.

With regard to the three issues under grant assurances 19, 22 and 23, the Director reviews the facts and allegations as outlined in the Issues Section, above. This requires an examination of the Complainant’s attempts to complete its leasehold improvements under three respective leases: the 2005 Wings of Cascade lease, the 2007 Desert Wings Jet Center lease, and the 2009 Desert Wings Jet Center lease.

2005 Wings of Cascade Lease

As detailed in the background, Complainant originally signed a lease with Respondent for a twenty (20) year term on July 26, 2005. The lease required Complainant to substantially complete the improvements within a one (1) year time frame or face lease termination. According to Respondent, the one-year construction requirement is a standard provision in all Airport leases for unimproved property. This lease was ultimately terminated by Respondent at the end of 2006. Complainant makes no allegations about this lease in the complaint other than to say Complainant has been trying since 2000, to build leasehold improvements on the Airport.

2007 Desert Wings Jet Center Lease

As detailed in the background, Complainant signed a twenty (20) year lease agreement with the Respondent for 152,899 square foot parcel to operate a fixed-base operation. The lease included two five (5) year renewal options and the requirement for substantial completion of tenant improvements within a one (1) year time frame or face lease termination.

On January 10, 2008, Complainant, on behalf of the Desert Wings Jet Center, filed a Breach of Contract action against the City of Redmond in the Circuit Court of the State of Oregon. Complainant charged the City breached the lease by failing to deliver the leased property and failing to defend Complainant's right to quiet enjoyment of the property.

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

2009 Desert Wings Jet Center Lease

As detailed in the background, Complainant signed the new lease with Respondent even though Complainant states the lease provisions are inequitable and discriminatory in lease term and lease recording. In particular, Complainant points out that its lease is for a term of 20 years with two five-year extensions while competitor Redmond Air has 55 years on the full term of its lease. In addition, Complainant objects to Respondent's newly instituted procedure withdrawing the City's consent to record Airport leases with the County Clerk.

This lease was terminated on July 1, 2009, for nonpayment of rent. Complainant alleges it has incurred \$16,000,000 in damages as a result of the Respondent's actions. Complainant estimates it has lost \$56,000,000 over the term of the lease. [FAA Exhibit 1, Item 3, page 60.]

A. Issue (1)

Whether the Respondent is in violation of Grant Assurance 19, *Operation and Maintenance*, by failing to correct waste water and drainage problems on Complainant's leasehold, as well as failing to define Complainant's leasehold

boundaries properly and permitting a competitor unauthorized trespass and trenching of Complainant's leasehold.

Grant Assurance 19, *Operation and Maintenance*, requires the sponsor to operate and maintain the airport's aeronautical facilities – including pavement – in a safe and serviceable condition with the standards set by applicable federal, state, and local agencies.

Complainant alleges Respondent violated Grant Assurance 19, *Operation and Maintenance*, when Respondent (1) failed to correct waste water and drainage problems on Complainant's leasehold, and (2) failed to define Complainant's leasehold boundaries, which enabled competitor Redmond Air to appropriate a portion of Complainant's leasehold for a hangar and to gain unauthorized access to dig a trench on Complainant's leasehold.

(1). Waste Water and Drainage

Complainant argues that a portion of its leasehold tends to flood due to storm water runoff and poor drainage. Complainant states that competitor Redmond Air constructed a new hangar on adjacent property in 2004 and the drainage from the hangar runs directly into Complainant's leasehold. [FAA Exhibit 1, Item 3, pages 20 and 21.] Respondent asserts this condition existed before Complainant leased the property. [FAA Exhibit 1, Item 7.]

Complainant argues Respondent is responsible for addressing this pre-existing condition. Complainant further argues that it could not develop plans for the foundation of its fixed-base operator building until Respondent resolved storm water runoff and poor drainage problems. Complainant claims these problems can be attributed, in part, to the construction management practices of competitor Redmond Air during the construction of the competitor's new hangar in 2004. Complainant claims also states the Respondent failed to exercise proper oversight during competitor Redmond Air's hangar construction:

The lack of [City] oversight on the Redmond Air project , however, has led to serious environmental damage to the airport grounds. Waste water and drainage problems have arisen which have never been resolved. Additionally, a culvert drains directly from the city street and dumps all run-off directly onto properties.
[FAA Exhibit 1, Item 3, pages 20 and 21.]

Respondent argues Complainant expected the City, at its cost, to resolve the site's waste water and drainage problems. Respondent agreed to work with Complainant to address the issue of storm water runoff from the Redmond Air leasehold. However, Respondent states it is ultimately Complainant's responsibility to resolve site conditions of its leasehold. The property was leased to Complainant on an "as is" basis. Respondent argues Complainant was well aware of the site conditions when Complainant asked to lease the property. [FAA Exhibit 1, Item 7, page 4 and Exhibit 4.]

Grant Assurance 19 applies to all airport aviation facilities shown on an Airport Layout Plan. These include common-use areas such as runways, taxiways, and public aprons, as well as their

associated lighting and drainage structures. An airport owner cannot discontinue maintenance of a taxiway or any other part of the airport until formally relieved of the maintenance obligation. The obligation of an airport owner remains in force throughout the useful life of the facility, but not longer than 20 years, except for land, which is obligated for the life of the airport. The obligation to maintain the airport does not extend to major rehabilitation of a facility that has become unusable due to normal and unpreventable deterioration or through acts of God.

The obligation under Grant Assurance 19 applies to aircraft movement areas. Generally, it does not extend to leasehold areas. [Adventure Aviation v. Las Cruces, 16-01-14.] Grant Assurance 19 does not replace a prospective tenant's obligation to conduct the proper due diligence before leasing property on the airport.

The administrative record shows the flooding due to storm water runoff and poor drainage existed before the Complainant leased the property. It is expected that a prospective tenant would examine the property before executing a lease. Any infrastructure improvements that were needed would be the subject of negotiation between the City and the prospective tenant. In this case, it appears those negotiations didn't occur. Consequently, Complainant assumed a certain level of responsibility for correcting the problem when it agreed to lease the property. While Respondent agreed to work with Complainant to address the issue of storm water runoff from the Redmond Air leasehold, Complainant assumes the ultimate responsibility to resolve site conditions of its leasehold if it wants to construct its improvements.

The Director notes Complainant signed a lease for property that it knew – or should have known – had drainage problems. Complainant expected Respondent to correct the problems at Respondent's expense. Respondent does not have an obligation under Grant Assurance 19 to conform a tenant's leasehold property to the tenant's specifications. In addition, the obligations under Grant Assurance 19 do not extend to leasehold property that is not common-use aviation property. As such, the Director finds Respondent is not currently in violation of Grant Assurance 19, *Operation and Maintenance*, as a result of failing to correct a flooding and draining problem on Complainant's leasehold property.

(2). Undefined Lease Boundaries, Trespass and Trenching

Complainant claims that competitor Redmond Air expanded its leasehold to encompass 25,767 feet of Complainant's future leasehold for the construction of the competitor's hangar without Complainant's approval. Complainant states Respondent made a verbal commitment to lease the property to Complainant's Desert Wings Jet Center. [FAA Exhibit 1, Item 3, page 22.]

Respondent acknowledges Redmond Air took control of the property without Respondent's knowledge or consent. Respondent subsequently adjusted Redmond Air's lease to reflect the additional space appropriated by Redmond Air. Respondent offered Complainant comparable space on the east side of Complainant's leasehold. The leasehold boundaries are defined in the lease. Respondent states the property was not under lease to Complainant when Redmond Air took the property and exceeded the bounds of its lease. [FAA Exhibit 1, Item 7, page 5.]

Respondent subsequently adjusted Redmond Air's lease to reflect the additional space. The administrative record shows Complainant was offered – and accepted – comparable space on the east side of its leasehold to compensate for the loss of space to Redmond Air.

Complainant also alleges competitor Redmond Air trespassed and dug a forty-foot trench for a natural gas line on Complainant's leasehold without Complainant's approval. [FAA Exhibit 1, Item 3, page 26.] Respondent said Redmond Air, on two occasions, attempted to trench through property leased by Complainant. Respondent states Redmond Air's actions were done without its knowledge or consent. Respondent claims it directed Redmond Air to cease trespassing. [FAA Exhibit 1, Item 7, page 4.] Complainant disputes this and says the trenching was performed with the full knowledge and approval of the City.

The administrative record shows the airport manager instructed the contractor to use the common-use utility corridor off Salmon Avenue that runs along the fence. This utility corridor provides power, phone, and water to hangar development on the Airport. Respondent instructed Redmond Air that work must be performed in the common-use utility corridor or on Redmond Air's leased property. The airport manager did not authorize Redmond Air to enter the Complainant's leased property. [FAA Exhibit 1, Item 12.]

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

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. [See Wilson Air Center v. Memphis-Shelby County Airport Authority, Docket No. 16-99-10.] Consequently, the FAA will consider the successful action by the airport sponsor to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. Respondent took appropriate corrective action, which was accepted by the Complainant. The Director finds Respondent is not currently in violation of Grant Assurance 19, *Operation and Maintenance*, as a result of another tenant's actions to appropriate a portion of Complainant's leasehold or to trespass and trench on Complainant's leasehold.

Director's Conclusion on Issue 1:

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

B. Issue (2)

Determine whether Respondent violated Grant Assurance 22, *Economic Nondiscrimination*, by denying access to Complainant to expand its leasehold and become a fixed-base operator through the use of unreasonable standards and changing requirements.

Grant Assurance 22, *Economic Nondiscrimination*, requires the airport 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 offering services to the public at the airport. Assurance 22(c) requires each fixed-base operator at the airport to be subjected 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 using the same or similar facilities.

Complainant alleges Respondent effectively denied it access to expand its leasehold and establish a fixed-base operator business on the Airport through Respondent's actions by (1) failing to identify and protect leasehold boundaries; (2) establishing different lease rates and different lease terms; (3) permitting other fixed-base operators to offer fewer services than those required by Complainant; (4) enforcing unreasonable building height restrictions; (5) changing its site plan review requirements and unequally enforcing its requirement for substantial completion; and (6) refusing the record Complainant's lease. Complainant argues Respondent's actions caused Complainant to incur financial damages and lost income. [FAA Exhibit 1, Item 3.]

(1). Leasehold Boundaries

Complainant alleges Respondent gave competitor Redmond Air 26,000 square feet of property that was promised to Complainant. Respondent states the property was not under lease to Complainant when Redmond Air took the property and exceeded the bounds of its lease. Respondent states Complainant was compensated with additional property. This situation is discussed above under Issue (1). The corrective action proffered by Respondent was accepted by Complainant. Any potential compliance matter with that disputed element was resolved when the parties agreed to a negotiated settlement. The Director will not interfere with the negotiated settlement between Complainant and Respondent when federal issues are not involved.

(2). Lease Rates and Lease Terms

Complainant alleges competitor Redmond Air has a rate of \$.15 per square foot while Complainant's rate is \$.21 per square foot. In addition, Redmond Air was given a 55-year lease while Complainant was given a 30-year lease. [FAA Exhibit 1, Item 3, page 40.]

Grant Assurance 22, *Economic Nondiscrimination*, requires an airport sponsor to impose the same rates, fees, rentals, and other charges for similarly situated fixed-base operators that use the airport and its facilities in the same or similar manner. At the same time, FAA policy recognizes changes in rental rates and terms over time may be reasonable.

The administrative record shows Redmond Air's lease – with a rate of \$.15 per square foot – was executed in 2002. Complainant's lease – with a rate of \$.21 per square foot – was executed five years later in 2007. As part of the negotiated settlement under the breach of contract action taken by Complainant when this lease was terminated, Respondent advised Complainant in a May 15, 2008, letter that the lease rate for the property would be \$0.21 per square foot, which is the current rate Respondent is charging all new tenants. [FAA Exhibit 1, Item 4, exhibit 16.]

An airport sponsor is not assumed to have engaged in unjust discrimination simply by adjusting its rates or terms over time, even when that adjustment results in imposing different lease rates and terms at different points to otherwise similarly situated tenants. The FAA recognizes that tenants negotiating leases years apart may not be similarly situated for the purpose of the negotiations. Rather, FAA would look to see whether tenants negotiating agreements within the same period of time and operating under the same conditions and circumstances are granted the same rates and terms. It is reasonable to expect future operators coming onto the airport to pay standard rates and charges based on then-current values at the time of their negotiated lease agreement.

The FAA does encourage airport sponsors to include in their lease agreements an escalation clause to permit all leases to be adjusted as rates change over time. Such a clause could have prevented the current dispute regarding the different rental rates for Complainant and Redmond Air. However, failure to include such a clause is not a violation of the grant assurances. Nonetheless, the Director notes Complainant agreed to the negotiated terms of the new agreement, which included the accepted lease rate. The Director will not interfere with the negotiated settlement between the Complainant and Respondent when federal issues are not involved.

Respondent agreed that it granted Redmond Air a lease extension of 55 years (if all extensions are exercised) in 2003. The administrative record also indicates that Respondent awarded a number of leases with 40-year terms.¹¹ All of these 40-year term leases were signed more than five years prior to Complainant's earliest lease in 2005. The Redmond Air extension was executed just two years prior to Complainant's 2005 lease. This extension was negotiated specifically to limit the Redmond Air lease term, which had not contained a term limit prior to this renegotiated extension. Communication between Respondent and Complainant indicates that Redmond Air received the 55-year term specifically to cap the lease term of land controlled by Redmond Air.

In an email to the Complainant dated June 26, 2008, the Mayor stated:

“...The Redmond Air situation was unique in that they had a lease without a limited term. The City negotiated a lease with a term, thus the longer timeline for them. Their lease caused us to rethink how we offer property for lease on the

¹¹ These leases include: 1989 Vance lease, 1991 Tognoli lease, and 1999 Boddum lease. [FAA Exhibit 1, Item 5, exhibits 42A, 42B, 42C, and 43.]

airport. This is our standard lease (20 years with two five year options with the first right to renew) that we offer for all users of the airport now.”

[FAA Exhibit1, Item 5, exhibit 42, page 6.]

Respondent has since determined that a 55-year lease term is too long. FAA agrees that a 55-year lease term is excessive.¹² Subsequent to awarding the extended lease term to Redmond Air, Respondent changed its policy; new leases now (including Complainant's) are granted for no more than twenty years with two five-year extensions for a full term of thirty years only. All new leases are limited to this new standard term limit.

The Director finds Respondent's new policy of offering leases for a term not longer than 30 years is consistent with FAA policy. This practice is not discriminatory if it is applied to all new entrants interested in making a capital investment on the Airport. The administrative record does not contain any evidence to show new leases entered into for tenants willing to make a capital investment in the Airport at the same time or after Complainant's lease are for a longer period of time than Complainant's lease term. The FAA recognizes that differences in lease terms that result from an airport sponsor improving its business practice (i.e. increasing its standards) does not result in a *per se* violation of Assurance 22. A sponsor does not have an obligation to equalize the terms of use, but can pursue agreements with the more recent leaseholders that more nearly serve the interests of the public and provide for more professional business practices. [See Wilson Air Center v. Memphis-Shelby County Airport Authority, Docket No. 16-99-10.]

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

(3). Fixed-Base Operator Services

Complainant alleges it is required to meet standards for operating as a fixed-base operator on the Airport that two other fixed-base operators are not required to meet.

Complainant claims Redmond Air and Butler Aircraft, the other two fixed-base operators on the Airport, do not provide the same level of service as required of Complainant. On August 22, 2006, Respondent approved Desert Wings Jet Center as a fixed-base operator in accordance with the City Airport Code, Section 2.550, which identifies a fixed-base operator as:

¹² FAA, for a number of years, discouraged airport sponsors from entering into long-term agreements that exceed a reasonable term sufficient for the tenant to amortize its investment. In FAA Order 5190.6B, Airport Compliance Handbook, issued September 2009, FAA advises FAA offices that leases that exceed 50 years may be considered a disposal of property and FAA personnel should not consent to proposed lease terms that exceed 50 years.

A person who engages in all of the following aeronautical activities on the airport pursuant to an agreement with, and the consent of, the City, and furnishes the following described services to the public on the airport:

- 1. Aircraft repair facility employing one or more FAA-certified A&P mechanics.*
- 2. Aircraft flight instruction.*
- 3. Aircraft rental.*
- 4. Aircraft charter service.*
- 5. Sale of aviation petroleum products.*

[FAA Exhibit 1, Item 4, exhibit 15.]

Complainant states that neither Butler Aircraft nor Redmond Air meet all of these service requirements. Complainant contends that Butler Aircraft is a long-standing aviation company that primarily provides air tankers for fire fighting and operates as a fixed-base operator to support its own operation. According to Complainant, Butler sells fuel, provides limited outside maintenance, and some flight instruction. Complainant indicates that only recently did Butler obtain a charter certificate for a Part 135 operation. [FAA Exhibit 1, Item 3, page 13.]

In 2006, neither of the other two fixed-base operators, Redmond Air or Butler Aircraft, provided an FAA Part 135 charter service. Redmond Air does not provide flight training. Both Redmond Air and Butler Aircraft provide aircraft fueling and maintenance services. [FAA Exhibit 1, Item 3, page 12.] Complainant claims Respondent tried to take away Complainant's ability to sell fuel in the July 29, 2008, draft lease.

Respondent states there are three fixed-base operators authorized to conduct business on the Airport, including Complainant.

The administrative record does reflect that Redmond Air did not provide air charter service or flight training, but in fact that Redmond Air referred customers seeking these services to the Complainant (Wings of Cascade) when Complainant was a subtenant of Redmond Air. [FAA Exhibit 1, Item 4, exhibit 18.]

It is not clear whether the Airport code providing a definition of fixed-base operator and naming the authorized services under the fixed-base operator classification lists the services as informational or mandatory. In any event, as a result of Complainant's history on the Airport, Complainant was aware of the capabilities and services of the other two fixed-base operators at the time Complainant negotiated its lease. Complainant signed a lease knowing the service requirements for Complainant's fixed-base operation would be more extensive than the services provided by the other fixed-base operators. To claim discrimination after entering into negotiations with full knowledge and failing to address such apparent discrepancies during negotiations prior to signing a lease is disingenuous. The Director notes Complainant had an opportunity to renegotiate the level of services in its 2009 Desert Wings lease if some of the services were too burdensome. There is no record evidence to show Complainant pursued such an opportunity.

When an airport sponsor develops minimum standards for aeronautical activities that are unreasonable, the FAA will review those standards. In addition, published minimum standards applied in an unjustly discriminatory manner could constitute a violation of the sponsor's federal obligations. In this case, however, Complainant does not allege that any minimum standards for fixed-base operators are unreasonable. Moreover, the administrative record does not include a copy of minimum standards for fixed-based operators.¹³ The Director does not even know if such standards exist. Rather, Complainant objects that it is required to meet service level requirements that other fixed-base operators are not required to meet. These requirements appear to be contractual, agreed to by Complainant and Respondent in a lease agreement, as opposed to published minimum standards. As noted previously, the Director will not interfere with the negotiated settlement between Complainant and Respondent when federal issues are not involved.

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

(4). Height Restrictions

Complainant alleges Respondent unjustly discriminated against Complainant when Respondent imposed a height restriction of 45 feet for new building construction. Complainant points out the FAA's obstruction evaluation and airport airspace analysis of the proposed buildings approved a height of 50 feet on the airside building and 70 feet on the backside building.¹⁴ [FAA Exhibit 1, Item 3.] Respondent will not approve construction exceeding 45 feet. Complainant argues Redmond city code does not preclude constructing a building of this height.

Respondent disagrees and references its December 18, 2007, letter to Complainant in explanation:

The City, as the property owner, will not approve any structure, other than those in support of Airport operations, to exceed a height of 45 feet. As landlord, the City will not approve a building above 45 feet in height, regardless of the status of FAA approval. [FAA Exhibit 1, Item 7, exhibit 4.]

¹³ The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. [See FAA Order 5190.6B, ¶10.4]

¹⁴ FAA Form 7460-1 *Notice of Proposed Construction or Alteration* requires an airport owner to notify the FAA of any construction or alteration on a public-use airport. Title 14 CFR Part 77, *Objects Affecting navigable Airspace*, sets standards for (1) determining obstructions to air navigation, (2) notifying the FAA of proposed obstructions, and (3) obtaining FAA aeronautical studies of proposed obstructions.

Respondent stated new airport height restrictions are the result of a planning commission recommendation and adoption by the city council and approved by the mayor on February 12, 2008. [FAA Exhibit 1, Item 7, exhibit 14.] Respondent explains that the change in the city code was due to recognition by city staff that no height restriction existed for the airport zone. The height restriction applies to new structures only; existing structures and pending applications are not subject to this new requirement.

Respondent states Complainant is subject to this requirement because it did not have a pending application at the time the new height restriction was adopted. [FAA Exhibit 1, Item 7, page 8.]

The FAA airspace analysis designates the maximum height permissible. The airport sponsor may not approve a height above the FAA maximum permitted in the airspace analysis. It remains within the airport sponsor's proprietary rights, however, to establish a lower maximum height for construction at its Airport. The airport sponsor may be more restrictive, but not less restrictive in height limitations. In this case, Respondent has exercised its right to establish a lower maximum height for structures on the Airport. There is nothing in the administrative record to suggest Respondent acted maliciously in establishing this lower maximum height. Complainant has failed to demonstrate that the sponsor acted in an unreasonable manner by imposing the height restriction.

The Director finds Respondent is not currently in violation of its federal obligations as a result of imposing height restrictions that are more stringent than those approved by the FAA.

(5). Site Plan Review and Substantial Completion

Complainant alleges Respondent unjustly discriminated against Complainant when Respondent imposed site plan review requirements on Complainant but not on its competitor. In addition, Complainant alleges Respondent unjustly discriminated against Complainant when Respondent permitted a competitor to have additional time to meet the substantial completion requirement while holding Complainant to a strict timeline. [FAA Exhibit 1, Item 3, pages 24 and 44.]

Complainant states Respondent's procedures for site plan review have been applied in a discriminatory manner against Complainant in an effort to prevent Complainant from developing its leasehold. First, Complainant argues Respondent's requirement for project completion within one year of site plan review and approval is an unreasonable standard. Complainant states the site's problems with undefined lease boundaries and the need for City action to address waste water and drainage problems makes the deadline impossible to attain. Second, Complainant states that the City Attorney has redefined the City Ordinance about site plan review to apply exclusively to Complainant's project. [FAA Exhibit 1, Item 3, pages 24 and 25.]

Complainant argues hangar construction on the airport is normally exempt from site plan review, and the City normally issues a building permit to the tenant upon application. Complainant states the rules were changed exclusively for Complainant's project. Complainant states it is being treated unfairly because Redmond Air, the adjacent fixed-base operator, received a building

permit while Complainant was subjected to a full site plan review. [FAA Exhibit 1, Item 3, pages 25 and 26.]

The City Attorney informed Complainant that the exemption from site plan review does not apply to Complainant's project. City Code 8.3010, *Exemptions from Site Plan Review*, states in part that hangars developed entirely on and interior to the airport property and not fronting on any public or private street are exempt from site plan review. Respondent states that because the Complainant's hangar is not interior to the airport property, it is not exempt from the site plan review. [FAA Exhibit 1, Item 4, exhibit 16.]

Respondent further clarified the obligations for reviewing and approving plans even when the construction falls within the exemption. The City Counsel wrote:

All buildings constructed at the airport go through a site and design review process. If the building is a hangar, is inside the security fence, and is not adjacent to a public or private street, then site plan review is not required. However, the plans must still be reviewed and approved by city staff, including the fire department, airport staff, and the building department, to ensure that the building meets all local, state, and federal building requirements. The process is not difficult, but is initiated by the property owner or tenant by submitting an application for review and all required documents to the City of Redmond.

[FAA Exhibit 1, Item 7, page 5.]

Respondent argues Complainant submitted a tentative building design to the Community Development Department, but has never submitted an application for site and design review. [FAA Exhibit 1, Item 7, page 5, and Item 16.]

Aside from the site plan review process, Complainant states Respondent's requirement for substantial completion of construction projects within one year of site plan approval is unreasonable. Additionally, Complainant indicates that it has financed at least five sets of architectural drawings to accommodate each new change in a code, rule, or change in location of property. [FAA Exhibit 1, Item 3, page 29.] Respondent asserts that it has not seen any of those plans. [FAA Exhibit 1, Item 7, page 5, footnote 2.]

Respondent acknowledges it requires substantial completion of construction improvements within one year of site plan review and approval. Respondent states this requirement is a standard provision in all Airport leases for unimproved property. [FAA Exhibit 1, Item 7, Exhibit 4.]

Complainant points out that Respondent granted competitor Redmond Air a 15-month extension beyond its one-year time limit to complete a new hangar. Complainant states it was required to attain substantial completion of leasehold improvements within one year. When it did not meet that obligation, the lease was terminated. [FAA Exhibit 1, Item 3, pages 31, 34, and 37.]

Respondent states it also granted Complainant extensions when it failed to meet the one-year requirement for substantial completion of leasehold improvements. The administrative record

shows Respondent granted an extension on Complainant's 2005 Wings of Cascade lease to delay the *start* of construction to more than one year after the agreement was executed. [FAA Exhibit 1, Item 7, exhibit 2.] Nonetheless, Respondent states Complainant did not submit construction plans nor begin construction on the hangar as required. As a result, the City terminated Complainant's Wings of Cascade lease at the end of 2006. [FAA Exhibit 1, Item 7.] In addition, Respondent points out that it granted Complainant multiple leases to conduct business on the Airport. Complainant failed to fulfill the requirements on those leases.

Respondent asserts in its rebuttal that each of the "three leases prepared for Complainant contained drawings showing the location of the lease property and a legal description of the lease property" to rebut Complainant's claim that she never received the lease line boundaries. [FAA Exhibit 1, Item 12 page 3.]

The administrative record supports Respondent's position that the site plan review is a standard process, and the one-year substantial completion requirement is standard in Airport leases for unimproved property. The record also supports Respondent's position that the exemption did not apply to Complainant's project, and that Complainant did not meet the requirements for either the site plan review or for substantial completion.

The airport sponsor is not obligated to waive the requirements for meeting reasonable standards or fulfilling the terms of a lease agreement. Complainant has not demonstrated that Respondent's standards are unreasonable. In this case, Complainant argues that a competitor was not required to meet the site review plan standards Complainant was required to meet. However, the administrative record shows the competitor's project fell within an established exemption that did not apply to Complainant's project. For that exemption, the two entities are not similarly situated. The administrative record also shows the competitor received a time extension for its hangar construction. At the same time, Complainant received multiple opportunities to proceed with its own construction project. Both entities were granted some leeway in proceeding with their individual investments. The evidence does not support Complainant's contention that it was unjustly denied the opportunity to operate on the Airport when, in fact, Complainant failed to fulfill the terms of its lease agreement.

The Director finds Respondent is not currently in violation of its federal obligations as a result of implementing a site review plan that includes exemptions for projects that meet specific criteria. The competitor's project met the criteria; Complainant's project did not. The Director also finds Respondent is not currently in violation of its federal obligations as a result of establishing a timeline for substantial completion or for allowing additional time to meet the substantial completion requirement based on individual circumstances. Nothing in the administrative record shows the requirement is unreasonable. Both the competitor and Complainant received additional time to achieve their goals – the competitor through a direct extension of time, Complainant through additional lease opportunities.

(6). Recording the Lease

Complainant alleges Respondent unjustly discriminated against the Complainant when Respondent revised its policy of recording tenant leases with the County Clerk. Respondent refused to record the Complainant's 2009 Desert Wings Jet Center lease with the County Clerk even though it had previously recorded the lease for competitor Redmond Air. In fact, Complainant provides a list of 15 lease agreements that Respondent recorded with the County Clerk between January 25, 1999, and July 14, 2008. [FAA Exhibit 1, Item 5, exhibit 49.] Redmond Air's lease was recorded by the Respondent on July 14, 2008. [FAA Exhibit 1, Item 5, exhibit 42.]

Complainant states that without a recorded lease, it cannot obtain title insurance and without title insurance it cannot obtain a loan. [FAA Exhibit 1, Item 15.] Respondent argues that the mortgage protection clause in the lease is a suitable substitute for recording the lease. [FAA Exhibit 1, Item 7, Exhibit 15(a).] Respondent also argues that it has not received any letters, email or other correspondence from lenders concerning the leasehold mortgage protection provision in its airport leases. [FAA Exhibit 1, Item 14.]

Complainant claims that the leasehold mortgage protection clause existing in airport leases, and provided by Respondent as an alternative to recordation, is not adequate protection for the lender. [FAA Exhibit 1, Item 15.] Respondent indicated its willingness to address any questions the Complainant's lender might have about the leasehold mortgage protection clause. [FAA Exhibit 1, Item 7, page 8.]

As stated in the background, the Complainant initially contacted the local FAA Airports District Office (ADO) in Seattle, and later, FAA Washington Headquarters Office to clarify the City's position on recordation. The City Counsel clarified the City's policy and the Associate Administrator advised Complainant that recorded leases may not be consistent with the Airport's federal obligations under Grant Assurance 5, *Preserving Rights and Powers*. The Associate Administrator determined that, based upon the information the City and Complainant provided, the problem could be attributed to a misunderstanding, and offered recommendations to the Complainant to clear up the misunderstanding. The Associate Administrator recommended the Complainant:

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

The Director notes that the administrative record contains no evidence to indicate that Complainant followed the FAA Associate Administrator's suggestion to have the lender discuss with the City the specific terms of the lender protection clause in the lease. Equally important, Complainant provided no evidence to indicate that its loan had been rejected because the lease could not be recorded.

In an effort to further clarify the Complainant's position, the Director requested both parties to provide further information. Complainant was requested to provide the following information:

- Copies of the Complainant's original letters of denial of credit from the three major lending banks in the area indicating that funding is not available without a recorded lease.
- Status of the City Counsel's communication with the Complainant's lender about the leasehold mortgage protection clauses.

Respondent was requested to provide the following information:

- Copies of the City's letters from lenders indicating that the leasehold mortgage protections provisions in the Airport lease are acceptable to support leasehold financing of tenant improvements;
- Status of the City Counsel's communication with the Complainant's lender about the leasehold mortgage protection clauses. [FAA Exhibit 1, Item 13.]

In response to FAA's request for additional information, Complainant offered to provide contact information on request and cited unnamed "leading title companies in our area." [FAA Exhibit 1, Item 3, page 47.] Complainant did not substantiate its claim; Complainant did not provide evidence to support its inability to obtain financing because the lease was not recorded.

Respondent, on the other hand, provided a copy of a leasehold mortgage protection agreement for a Mr. Gary Roberts dated May 22, 2009, supporting its contention that the leasehold mortgage protection agreement was sufficient for obtaining a loan. [FAA Exhibit 1, Item 14.] Both parties confirmed there have been no communications between the City's Counsel and Complainant's lender about the use of the leasehold mortgage protection agreement to support Complainant's leasehold financing. [FAA Exhibit 1, Items 14 and 15.]

The Director notes that Recording Acts in real property law afford a means of giving constructive notice of ownership respecting estates or interests in land by providing for recording the existence of that estate or interest. These statutes generally provide for recording deeds, mortgages, executory contracts of sale, and leases of specified duration. When one's interest or ownership in land is recorded, the recording prevents a subsequent purchaser or mortgagee of the land from qualifying as a bona fide purchaser for value without notice, because the instrument recorded would provide at least constructive notice of another's prior ownership or interest in the land. Usually recording acts apply to derivative titles and not to original titles. [Barron's Law Dictionary, 1996.] Oregon has a race notice recording law and under this type of recording act, the person who records first takes in preference to other persons who receive an interest from the same source, but only if the first recorder had no notice of the prior unrecorded conveyance.

To further clarify the use of the recorded lease in airport leasehold financing and the impact of Oregon's race notice status, the FAA contacted the Oregon Banker's Association (OBA). The Association agreed to ask members of the OBA Lending Committee the following question:

Does your bank offer financing to individuals for improvements on municipal properties, such as for a hangar at a local airport, without a county-recorded lease?

The majority of the members indicated they do require a recorded lease. Nonetheless, several members indicated they do not require a recorded lease and stated it is possible for an individual to obtain financing without recording a lease depending on their credit worthiness. A committee representative stated they were aware of two airports in Eugene and Salem, Oregon, that no longer use recorded leases for tenant improvements. [FAA Exhibit 1, Item 16.]

In a Transportation Research Board study on airport leasing practices, researchers reported:

In traditional real estate development, the developer has the luxury of encumbering the title of the property for the purpose of lender security, and the lender has the ability to place a lien on the real estate to secure its financial position. Airports – specifically publicly owned airports – are typically precluded from clouding the title of airport property, and unable to offer that security to the lender for a specific development. The lender is therefore left with the improvements on the property, the length of the lease term, and the strength of any sublease or pledged revenue stream to collateralize the debt.¹⁵

The FAA expects airports sponsors to preserve their rights and powers. Respondent's policy to refrain from recording leases with the County Clerk is consistent with this obligation. Respondent has provided an alternative in the mortgage protection clause, which Respondent argues is a suitable substitute to recording the lease. Respondent provides supporting evidence to show a tenant was able to use the mortgage protection clause to obtain financing even though the individual's lease was not recorded. While the Complainant argues the mortgage protection clause is not sufficient for obtaining financing, Complainant provides no evidence to demonstrate it was denied financing *because* the lease could not be recorded.

Although Complainant shows other leases were recorded while its lease was not, the Respondent points out that those leases were recorded in error and in violation of its own policies. It is unfortunate that the error occurred. This does place Complainant in a different position from the other tenants whose leases were recorded. However, the grant assurances do not require an airport sponsor to perpetuate a mistake in order to make the tenants equal. Respondent has offered to discuss the lease mortgage protection clause directly with the Complainant's lender. Complainant has not accepted that offer. Respondent is not obligated to do more.

The Director finds Respondent is not currently in violation of its federal obligations as a result of enforcing a policy not to record Complainant's lease even though leases were previously recorded for other tenants in error.

¹⁵ *Guidebook on Best Management Practices for Leasing and Developing Airport Property*, September 2010 Final Guidebook, Airport Cooperative Research Panel 01-08, Transportation Research Board.

(7). Damages and Lost Income

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

The purpose of this proceeding is to determine whether or not Respondent is currently in violation of its federal obligations under the grant assurances. The Part 16 process does not provide Complainant a private right of action and affords no mechanism for awarding damages.

Director's Conclusion on Issue 2:

The Director finds Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by allegedly denying access to Complainant to expand its leasehold to establish a fixed-base operator business on the Airport through the use of standards and requirements Complainant finds to be unreasonable or inconsistent.

However, the Director does want to advise Respondent that, in other specific circumstance, the FAA has raised concerns when a sponsor has failed to accommodate a potential tenant's proposed aeronautical business plan or plans to such an extent as to be unjustly discriminatory and unreasonably deny aeronautical access to the airport. [See Atlantic Helicopters v. Monroe County, 16-07-12.] Additionally, the Director has found an airport sponsor in noncompliance when it denied a potential tenant the right to lease land and develop hangar facilities in order to offer aeronautical services to the public at an obligated airport. The finding was based on a violation of Federal Grant Assurance No. 22, *Economic Nondiscrimination*, regarding the sponsor's obligation to make the airport available for public use on reasonable terms and without unjust economic discrimination to any person, firm, or corporation to conduct or engage in any aeronautical activity for furnishing services to the public at that airport. [See Martyn v. Port of Anacortes, 16-02-03.]

The Director is aware of Complainant's representation that it has financed at least five sets of architectural drawings to accommodate each new change in a code, rule, or change in location of property, and that Respondent disputes this. The Director also notes a lack of communication between both parties on the implementation of new height restrictions imposed by the City Planning Commission, the confusion over the review of the Complainant's site plans, and the commencement of the Respondent's practice to no longer record leases. The Director cautions Respondent that it has found an unreasonable denial of access when an airport sponsor has continually moved the "ball" for a prospective tenant to gain access to an airport leasehold. [See Martyn.]

C. Issue 3

Determine whether Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, by granting an exclusive right to another fixed-base operator while

preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of unreasonable standards and changing requirements.

Grant Assurance 23, *Exclusive Rights*, prohibits the airport sponsor from granting an exclusive right to any persons providing, or intending to provide, aeronautical services to the public. While an airport sponsor may impose qualifications and minimum standards upon those who engage in aeronautical activities, the FAA has taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right.

Complainant alleges the Respondent granted competitor Redmond Air an exclusive right through the imposition of unreasonable standards and requirements applied to the Complainant. [FAA Exhibit 1, Item 3, page 28.] Complainant alleges Respondent subjected Complainant to discriminatory practices that effectively denied Complainant access to the Airport to expand its leasehold and establish a fixed-base operator business, by (1) failing to identify and protect leasehold boundaries; (2) establishing different lease rates and different lease terms; (3) permitting other fixed-base operators to offer fewer services than those required by the Complainant; (4) enforcing unreasonable building height restrictions; (5) changing its site plan review requirements and unequally enforcing its requirement for substantial completion; and (6) refusing the record the Complainant's lease. [FAA Exhibit 1, Item 3, pages 8, 24, and 46.]

These six areas argued by Complainant to be discriminatory practices were discussed in detail under Issue 2 above. Under that issue, the Director determined Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*. As such, Respondent cannot be found to have constructively granted an exclusive right to a competitor fixed-base operator through these alleged discriminatory practices.

The Director notes that Complainant did, in fact, sign three separate leases with Respondent to develop a fixed-base operator business on the Airport: (1) the 2005 Wings of Cascade lease, (2) the 2007 Desert Wings Jet Center lease, and (3) the 2009 Desert Wings Jet Center lease. All three of these leases were eventually terminated. Nonetheless, the fact that Complainant was able to negotiate three separate leases with Respondent demonstrates Respondent was willing to negotiate an agreement for Complainant to develop a fixed-base operator business on the Airport. In addition, the Director notes there are currently two other fixed-base operators conducting business on the Airport, including Redmond Air and Butler Aircraft. There is no evidence to show Respondent was unwilling to allow Complainant to develop a fixed-base operator business on the Airport.

Director's Conclusion on Issue 3:

The Director finds Respondent is not currently in violation of Grant Assurance 23, *Exclusive Rights*, by allegedly granting an exclusive right to another fixed-base operator while preventing Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of standards and requirements Complainant finds to be unreasonable or inconsistent.

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, Airport Compliance and Field Operations, finds and concludes Respondent is not currently in violation of its federal obligations.

- Respondent's failure to correct waste water and drainage problems on the Complainant's leasehold, as well as its failure to define Complainant's leasehold boundaries properly, thus permitting a competitor unauthorized trespass and trenching of Complainant's leasehold, does not constitute a violation of Grant Assurance 19, *Operation and Maintenance*.
- Respondent is not currently in violation of Grant Assurance 22, *Economic Nondiscrimination*, by allegedly denying access to the Complainant to expand its leasehold to establish a fixed-base operator business on the Airport through the use of standards and requirements the Complainant finds to be unreasonable or inconsistent. Respondent's actions to terminate one or more lease agreements as a result of Complainant's failure to meet standards and requirements of those leases does not constitute denial of access under Grant Assurance 22, *Economic Nondiscrimination*.
- Respondent has not granted an exclusive right by preventing the Complainant from expanding its leasehold and becoming a fixed-base operator on the Airport through the implementation of standards and requirements the Complainant finds to be unreasonable or inconsistent. Failure to conclude a negotiated agreement successfully does not constitute a violation of 49 U.S.C. § 47107(a)(4) or Grant Assurance 23, *Exclusive Rights*.

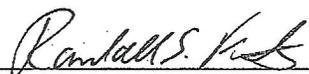
ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed; and
2. All motions not expressly granted in this Determination are denied.

RIGHT OF APPEAL

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



Randall Fiertz
Director, Office of Airport Compliance
and Field Operations

NOV 10 2010

Date