

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

SKYDIVE SACRAMENTO

COMPLAINANT

V.

CITY OF LINCOLN, CALIFORNIA

RESPONDENT

Docket No. 16-09-09

**DIRECTOR'S DETERMINATION**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint (Complaint) filed by Skydive Sacramento in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), Title 14 Code of Federal Regulations (CFR) Part 16.<sup>1</sup>

Skydive Sacramento (Complainant or Skydive Sacramento) filed a formal complaint pursuant to 14 CFR Part 16 against the City of Lincoln, California, (Respondent or City) owner, sponsor, and operator of Lincoln Regional Airport (LHM or Airport), Lincoln, California.

Complainant alleges the Respondent is engaged in an unreasonable denial of access; economic discrimination; and the constructive granting of an exclusive right to other aeronautical users of the Airport by insisting on specific terms in an offered lease agreement for Skydive Sacramento's proposed parachuting operation (specifically, an on-airport drop zone). The Complainant states that the specific lease terms, along with the City's treatment of the Complainant's proposal, constitute a violation of Title 49 United States Code (U.S.C.) § 47107(a) (1) through (6) and the respective FAA Grant Assurance 22, *Economic Nondiscrimination*. The Complainant also alleges the Respondent has violated 49 U.S.C. § 40103(e). This federal law prohibits an airport sponsor from granting an exclusive right by means of unreasonable and discriminatory treatment.

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<sup>1</sup> Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

Federal grant assurance 23, *Exclusive Rights*, implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4).

During the pendency of this Complaint, the parties resolved many of the issues originally argued in Skydive Sacramento's Complaint. This Director's Determination addresses the remaining issues, as discussed below.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds the City is currently in violation of its Federal obligations with respect to Grant Assurance 22, in that the City failed to make the airport available for public use on reasonable terms to Skydive Sacramento's aeronautical activity. 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. Respondent and Airport**

The Lincoln Regional Airport (LHM or Airport) is a public-use airport owned and operated by the City of Lincoln, California. The Airport comprises about 750 acres. It is located three nautical miles southwest of Lincoln. It is classified as a general aviation airport. LHM has approximately 198 based-aircraft and 74,444 annual operations. The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* The Airport was transferred from the United States to local control for a civilian airport under the War Assets Administration's Regulation 16. [FAA Exhibit 1, Item 13.] It is a designated reliever to Sacramento International Airport.<sup>2</sup> [FAA Exhibit 1, Item 6, p. 10.]

### **B. Complainant**

Skydive Sacramento (aka '80896 LLC') is a commercial aeronautical service provider, providing skydiving services and proposing to operate at LHM by flying aircraft from and to the airport and dropping skydivers on to a drop zone on LHM property. [FAA Exhibit 1, Item 1, p. 1.] As stated by the Complainant, "Skydive Sacramento is in the business of providing skydiving instruction and services for skydivers. It has rented hangar and office space [at LHM] as part of its commercial operation since 2007..." [FAA Exhibit 1, Item 1, p. 4.] In part due to the issues to be addressed in this Complaint, Skydive Sacramento has not yet operated its drop zone on the Airport. Rather, Skydive Sacramento has operated, or contracted for the operation of, aircraft from and to LHM and dropped divers onto property located elsewhere.

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<sup>2</sup> See also the National Plan of Integrated Airport Systems:  
[http://www.faa.gov/airports/planning\\_capacity/npias/reports/media/2011/npias\\_2011\\_appB\\_part1.pdf](http://www.faa.gov/airports/planning_capacity/npias/reports/media/2011/npias_2011_appB_part1.pdf)

### **III. PROCEDURAL HISTORY and BACKGROUND**

#### **A. Procedural History**

On August 3, 2009, FAA received the Complaint. This Complaint included numerous allegations regarding ongoing negotiations over the terms of the lease and operation of a skydive drop-zone on Airport property at LHM. Many of the Complainant's allegations regarded an alleged lack of engagement by the Respondent. Other allegations regarded observations that the Respondent had not provided proof to the Complainant that the Respondent was not discriminating against the Complainant. [FAA Exhibit 1, Item 1.]

On August 7, 2009, FAA docketed the Complaint submitted by Richard J. Durden on behalf of Skydive Sacramento. [FAA Exhibit 1, Item 2.] On August 25, 2009, the Respondent requested additional time to file its Answer. [FAA Exhibit 1, Item 3.] On August 27, 2009, the Complainant opposed the Respondent's request for additional time. [FAA Exhibit 1, Item 4.] On September 2, 2009, the FAA granted the Respondent's request for additional time. [FAA Exhibit 1, Item 5.]

On September 21, 2009, the Respondent filed an Answer, a Motion to Dismiss and Memorandum in Support of Motion to Dismiss with substantial evidentiary materials addressing many of the Complainant's open-ended allegations. [FAA Exhibit 1, Items 6, 7 and 8.]

On September 30, 2009, the Complainant filed its Consolidated Reply. In its Reply the Complainant formally withdraws and dismisses several of its allegations, conceding that the Respondent's Answer and evidentiary materials resolved many of the issues between the parties. [FAA Exhibit 1, Item 9, pp. 8-9.]

On October 13, 2009, the Respondent filed a Rebuttal, acknowledging the Respondent's withdrawal and dismissal of some allegations. [FAA Exhibit 1, Item 10.]

On October 21, 2009, the Complainant moved to strike portions of Respondent's Rebuttal. [FAA Exhibit 1, Item 11.]

On November 3, 2009, the Respondent submitted its Opposition to Complainant's Motion to Strike. [FAA Exhibit 1, Item 12.]

On July 28, 2010, the FAA extended the due date of the Director's Determination to on or before November 30, 2010. [FAA Exhibit 1, Item 14.]

On November 30, 2010, the FAA extended the due date of the Director's Determination to on or before March 12, 2011. [FAA Exhibit 1, Item 15.]

On March 14, 2011 the FAA extended the due date of the Director's Determination to on or before April 26, 2011. [FAA Exhibit 1, Item 18.]

On April 14, 2011 the FAA extended the due date of the Director's Determination to on or before May 6, 2011. [FAA Exhibit 1, Item 19.]

## **B. Background**

The administrative record of this case is extensive. The parties have provided voluminous evidence (33 exhibits each), including 11 executed leases between the City of Lincoln and other parties and several draft leases between the City of Lincoln and Skydive Sacramento. However, the parties settled most of their differences through the pleadings of this Part 16 Complaint process, and as such, the Complainant has dismissed some allegations, effectively withdrawing and abandoning these issues. Generally speaking, and as accepted by the parties, the remaining issues in dispute relate to the City's insistence on certain types of liability insurance to be provided and/or paid for by Skydive Sacramento to cover its skydiving operations and some specific language in the most recent draft lease that are allegedly pejorative against skydiving or mutually confounding.

### *1. The City's prior ordinances, plans and leases associated with LHM*

On May 25, 1993, the City of Lincoln passed and adopted an ordinance amending its Municipal Code to include insurance requirements for all users conducting business at LHM. Title 20 of the Municipal Code required airport-operations liability insurance; or comprehensive general liability insurance and automobile liability insurance, in the minimum amounts of \$1,000,000 combined single limit. [FAA Exhibit 1, Item 8, City exh. 3, p. 5.] The Municipal Code also establishes requirements for the erection of buildings on city property, including LHM. These requirements include basic water and fire suppression systems. [FAA Exhibit 1, Item 8, City exhs. 27-28.] These provisions are responsive to the California Fire Code. [FAA Exhibit 1, Item 8, City exhs. 29.]

The City provides extensive evidence regarding other tenant users of LHM, including nine aeronautical leases entered into by the City between 1978 and 2001. These aeronautical ground leases are reasonably consistent with regard to insurance requirements and are consistent with the Municipal Code effective at the time of the lease signing. [FAA Exhibit 1, Item 8, City exhs. 15-23] As stated by the City, "The City's nine aeronautical tenants at the Airport all have long-term ground leases that anticipate tenant-financed construction of hangars, aircraft manufacture and repair facilities or other permanent improvements." [FAA Exhibit 1, Item 6, p. 30, AF4] The oldest of these nine leases, originally executed on December 1, 1978 shows an initial lower insurance requirement. [FAA Exhibit 1, Item 8, City exh. 23.] None of these aeronautical tenants are skydive operations.

The parties agree that Skydive Sacramento has shown interest in undeveloped parcels on the Westside of LHM. This area, west of runway 15/33, includes the remnants of an abandoned crosswind runway. According the LHM's Airport Layout Plan (ALP), parts of the Westside parcel show future aeronautical development (hangars) and is designated as "Aviation Reserve 66 acres." Another part of the parcel is designated "Non-Aviation Area 90 acres." [FAA Exhibit

1, Item 8, City exh. 12.] The ALP reflects the future plans that the sponsor has for the Airport and is FAA-approved. [FAA Exhibit 1, Item 6, p. 11.]

In addition to the nine aeronautical leases, the City presents two nonaeronautical leases entered into in 2009. These entities make temporary nonaeronautical-use of the Westside parcel. [FAA Exhibit 1, Item 8, City exhs. 24-25.] These are short-term ground leases for temporary highway construction management offices (DeSilva Gates FCI), and occasional automobile crash tests on the abandoned runway (Energy Absorptions Inc.). Currently, these leases are on one-year terms. [FAA Exhibit 1, Item 8, p. 7.]

## *2. Initial discussion of the suitability of LHM for drop zone operations 2007-2008*

In September 2007, Skydive Sacramento contacted the City to discuss establishing a drop zone at LHM. [FAA Exhibit 1, Item 1 p. 2 and Item 6, p. 3.] The City states that it took action with regard to Skydive Sacramento's request:

*The City requested that Skydive submit a written proposal so that the City could evaluate the proposal, and in particular, so that the City could review any potential safety issues. Skydive submitted a written proposal for a parachute landing area to the City during the week of December 10, 2007. The written proposal was for a parachute landing area only, to be located on the west side of the Airport. It did not seek permission to build any buildings on Airport property near the drop zone. [FAA Exhibit 1, Item 6, p. 3.]*

Skydive Sacramento states that it did provide a 60-page application. [FAA Exhibit 1, Item 1, exh. 1, p. 1.]

On April 9, 2008, the LHM Airport Manager wrote to Skydive Sacramento forwarding an analysis of proposed skydiving activities on LHM. The analysis stated that a drop zone is not appropriate at LHM, concluding:

*A skydiving business, as distinguished from a parachute landing area and drop zone, could be based at the Lincoln Airport and utilize existing office and hangar spaces and existing airfield facilities; however, in relationship to existing left-hand air traffic patterns and other aircraft and helicopter operations, and the levels of aviation activity at the Airport, the Lincoln Regional Airport does not provide for a suitable and functionally safe site for a parachute landing area and drop zone. The Lincoln Regional Airport is substantively unique in its characteristics, its fixed left-hand air traffic patterns, its layout, and its designated aviation and non-aviation use areas. [FAA Exhibit 1, Item 1, exh. 28, p. 6.]*

The April 9, 2008 letter and subsequent pleadings filed by the Respondent do not explain why the site is not suitable and functionally safe for a parachute landing area and drop zone.<sup>3</sup>

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<sup>3</sup> The Digital Airport/Facility Directory ([http://aeronav.faa.gov/pdfs/sw\\_97\\_10MAR2011.pdf](http://aeronav.faa.gov/pdfs/sw_97_10MAR2011.pdf)) effective March 10, 2011 does specify "Parachute Jumping."

The April 9, 2008 letter provided Skydive Sacramento the opportunity to appeal. [FAA Exhibit 1, Item 1, exh. 28, p. 1.] No specific appeal is in the record, but discussions continued later in 2008.

Skydive Sacramento and the City proceeded to engage the FAA in the dispute. Skydive Sacramento and the FAA Northern California Terminal Radar Approach (TRACON) executed an agreement regarding coordination and communication procedures for parachute jumps at LHM on October 18, 2008. [FAA Exhibit 1, Item 1, exh. 4.] By October 28, 2008, the City appeared to concede that a drop zone may be feasible at LHM, stating that:

*The airport (City) indicated a willingness to work further with Skydive Sacramento for a on-airport drop zone that would operate only when Runway 33 was inactive and not in use. It was requested that Skydive Sacramento submit an operational plan subject to review by the Airport and the (FAA) and subject to the processing and approval of a ground lease by the City of Lincoln City Council. [FAA Exhibit 1, Item 8, City exh. 1]*

On November 5, 2008, Skydive Sacramento reiterated its interest in a skydiving business and drop zone at LHM. Skydive Sacramento responded to the City's concerns regarding insurance by describing the insurance that it currently carries. [FAA Exhibit 1, Item 1, exh. 29.]

On November 20, 2008, the City requested an FAA safety review on Skydive Sacramento's specific drop zone proposal. [FAA Exhibit 1, Item 8, City exh. 2.]

On November 21, 2008, the FAA issued a safety review finding, stating, "Based on the results of the safety review it has been determined that the proposed drop zone on the Lincoln Regional Airport could be supported from a safety standpoint if the following conditions were agreed to..." The FAA listed nine operational conditions and procedures specific to drop zone operations at LHM. FAA Exhibit 1, Item 1, exh. 3.]

With this information, the City drafted a draft Ground Lease Agreement for Skydive Sacramento in December 2008. The terms of this Draft Ground Lease, and subsequent drafts, became the bases for Skydive Sacramento's allegations of unreasonable terms and unjust economic discrimination, as discussed below. [FAA Exhibit 1, Item 1, exh. 5.]

### *3. Complaints and Negotiations between Skydive Sacramento and the City-- 2009*

Despite the City's proffered Draft Ground Lease, Skydive Sacramento continued to complain of unfair treatment by the City. As early as January 6, 2009, Skydive Sacramento complained to the City of Lincoln's Mayor and City Council, alleging illegal discrimination by the Airport Manager and threatening a Part 16 complaint. [FAA Exhibit 1, Item 8, City exh. 4] Although it's not clear that Skydive Sacramento intended to file a Part 13 informal complaint, it certainly requested the advocacy of FAA's San Francisco Airports District Office (ADO) on January 16, 2009. [FAA Exhibit 1, Item 1, exh. 2]

In February 2009, Skydive Sacramento communicated its continued interest in negotiating the lease terms of the Draft Ground Lease and acknowledged that the City was preparing a revised Draft Ground Lease. At this time, the question of adequate insurance coverage developed between the parties. [FAA Exhibit 1, Item 1, exhs. 6, 8 & 31]

In March 2009, the City presented Skydive Sacramento with a redlined, amended Draft Ground Lease. [FAA Exhibit 1, Item 1, exh. 9.]

Skydive Sacramento responded to the City's amended Draft Ground Lease on March 18, 2009, offering some suggested changes and alternative language. [FAA Exhibit 1, Item 1, exh. 10] Throughout March and April 2009, Skydive Sacramento continued to press the City for its response to its suggested changes and the City stated that the changes were still under review. [FAA Exhibit 1, Item 1, exhs. 11-18]

For its part, in April and May 2009, the City was also consulting with the FAA, pointing out some faults of Skydive Sacramento's skydiving operation and its proposals. [FAA Exhibit 1, Item 8, City Exhs. 8-11.] However, the City was contacting the FAA Western-Pacific Regional offices in Los Angeles, while Skydive Sacramento continued to engage with the field office in San Francisco (ADO).

On April 30, 2009, the City submitted its Final Draft Ground Lease to Skydive Sacramento.<sup>4</sup> [FAA Exhibit 1, Item 1, exh. 19.] In its transmittal cover letter, the City states:

*Skydive's proposed lease<sup>5</sup> is not reasonable as among other things it provides for Skydive's commercial use of Airport property as a drop zone at no cost, the insurance provisions are woefully inadequate to protect the City from liability exposure and fails to require Skydive to pay the City's additional insurance costs which will result from Skydive's skydiving operations. The City considers the proposal for Skydive to jointly share the drop zone with other users at best as infeasible and not realistic.*

*The City has discussed the City's lease and Skydive's proposed lease with the FAA and it is clear that the City's lease provides reasonable terms to accommodate Skydive's proposed skydiving operation whereas Skydive's proposed lease would require the City to assume burdens and obligations beyond its obligation to accommodate Skydive's requested drop zone.*

*The differences between the City's lease and Skydive's are significant and substantial. Quite frankly, the City will not consider and will not agree to the terms as proposed in Skydive's lease and therefore we do not think a meeting would serve any useful purpose. The City believes its proposed lease is more than reasonable. If you decide to accept the City's lease, please notify the City so that the matter can proceed forward for consideration by the Lincoln City Council. [FAA Exhibit 1, Item 8, City exh. 5.]*

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<sup>4</sup> This document forms the basis for Skydive Sacramento's Complaint.

<sup>5</sup> The record to the Complaint does not contain a draft lease proposal from Skydive Sacramento. Rather, it includes letters that reflect Skydive Sacramento's perspective of its entitlements under the grant assurances. [FAA Exhibit 1, Item 1, exh. 10.]

On May 1, 2009, Skydive Sacramento did not respond with proposed terms, but rather agreed that the parties were far apart and stated its intent to complain to the FAA. [FAA Exhibit 1, Item 1, exh. 20]

#### 4. *Skydiving and Insurance*<sup>6</sup>

As discussed herein, the background of this case revolved almost completely around the negotiations for a lease and use agreement that would allow skydiving operations, including a drop zone, by Skydive Sacramento. These negotiations, unfolding over more than 20 months, involved uncertainty. The parties and the FAA resolved some of that uncertainty prior to and after Skydive Sacramento's filing of its formal complaint. At the time of the filing of the formal Complaint, the City remained uncertain about the availability of insurance for skydiving, and Skydive Sacramento remained uncertain about the City's implementation of insurance requirements across different kinds of aeronautical activity at LHM. Some of these issues were resolved, but the issue of insurance availability remained unclear until the last pleadings in this case. [FAA Exhibit 1, Items 11 & 12.]

Certainly, the Complainant, Skydive Sacramento, has maintained that the type of insurance that the City is requiring for its skydiving operations does not exist in the market and is unavailable, stating, "It has not been possible to obtain commercial general liability insurance for skydiving since the 1980s (Exhibit 30). Commercial general liability insurance for skydiving is not available at any price for any level of coverage." [FAA Exhibit 1, Item 1, p. 14.]

Also, the record reflects that the City initially presumed that skydiving insurance is available. In its Answer, the City states:

*The only policy that the City has been able to locate that would provide the City with Skydiving coverage would be from AIG. The AIG policy excludes Airport Parachuting; however, the policy amends the exclusion on the condition that valid and collectible insurance is available to the named insured (the City). The AIG policy will only take effect in excess of valid and collectible insurance. With regard to all but the automobile liability insurance, AIG will require Skydive to carry \$ 1,000,000 in coverage to meet the "valid and collectible insurance" requirement (See, City Exs. 10, 13). [FAA Exhibit 1, Item 6, p. 19.]*

Skydive Sacramento submits evidence to the record to support its conclusion that skydiving insurance coverage is unavailable. As stated in the Affidavit of Michael Pratt,<sup>7</sup> "...commercial general liability insurance is not available for skydiving business at any level of coverage for any

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<sup>6</sup> The record includes discussion of automobile insurance coverage. The Complainant dropped its allegation regarding automobile insurance in its Reply, stating "The requirement for automobile insurance appears to be applied equally among commercial operators and is attainable." [FAA Exhibit 1, Item 9, p. 8] [See also FAA Exhibit 1, Item 8, City exhs. 13 & 14.]

<sup>7</sup> Michael Pratt is an aviation insurance broker and part owner of Maverick Insurance, an insurance agency located at 826 West Main Street, New Albany, Indiana, 47150. [FAA Exhibit 1, Item 1, exh. 30]

price. Further, he has learned that such insurance has not been written for skydiving businesses since the 1980s and has not been available since that time.” [FAA Exhibit 1, Item 1, exh. 30]

By its Rebuttal, the City acknowledged some uncertainty with regard to the availability of insurance coverage, stating, “The City has been investigating the insurance market since receiving Skydive’s Reply and acknowledges that Skydive’s assertion may be correct.” [FAA Exhibit 1, Item 10, p. 6.] The City had contacted its insurance provider, who reported that special skydiving coverage may be denied. [FAA Exhibit 1, Item 10, City exh. 31.]

In extra-procedural pleadings by the parties, both parties acknowledge that Skydive Sacramento carries liability insurance that generally excludes skydive operations. [FAA Exhibit 1, Item 11, p. 2; and Item 12, p. 2.] However, Complainant states, “[A]s Respondent well knows, every single person who jumps with Skydive Sacramento signs a waiver of liability that specifically names the City of Lincoln.” [FAA Exhibit 1, Item 11, p. 4.] The attached waiver also names the City as an included party. [FAA Exhibit 1, Item 11, exh. 32.] Also, Complainant asserts that California law protects public entities and public officials from liability from skydiving activities. California Government Code §831.7 states:

*(a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that a hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk. ..*

*"(b) As used in this section, "hazardous recreational activity" means a recreational activity which creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury to a participant or a spectator.*

*""Hazardous recreational activity" also means:*

*"(3). .. sky diving, sport parachuting... [FAA Exhibit 1, Item 11, p. 5 and Item 11, exh. 33.]*

Finally, the parties acknowledge the existence of limited insurance provided to the individual skydiver through the United States Parachute Association (USPA) along with the associated waiver. The insured party is “The Individual Members of the United States Parachute Association.” The Certificate of Insurance names the City of Lincoln as “Additional Insured only as Respects Operations of the named insured.” The Certificate does not name Skydive Sacramento. [FAA Exhibit 1, Item 12, City exh. 33]

#### **IV. ISSUES RAISED BY THE PARTIES**

Generally, the Complainant alleges that the Respondent is in violation of its Federal grant assurances 22, *Economic Nondiscrimination*; and 23, *Exclusive Rights*. [FAA Exhibit 1, Item 1, p. 11.] The Complainant presents 14 claims with some sub-allegations over ten-pages of the Complaint. [FAA Exhibit 1, Item 1, pp. 11-23.] All claims relate to lease terms in a ten-page draft lease agreement offered to the Complainant by the City in negotiation with the Complainant

for the establishment of a drop zone at the Airport. [FAA Exhibit 1, Item 1, exh. 19.] Some of these claims regarding the City's insurance requirements and alleged preference for non-skydiving aeronautical business are speculative and unsupported.<sup>8</sup> The Complainant abandoned most of these claims. The Complainant specifically retained those claims highlighted in bold. The original 14 claims submitted in the Complaint [FAA Exhibit 1, Item 1.] are the following:

**A. Section 11 of the City's proposed Lease imposes an unreasonable requirement for the Complainant to carry unobtainable liability insurance on skydiving operations. [Id. p. 13]**

**B. Section 11 of the City's proposed Lease imposes an unreasonable requirement for the Complainant's subcontractors to carry unobtainable liability insurance. [Id. p. 15]**

C. Section 11 of the City's proposed Lease allegedly imposes an unreasonable requirement for automobile insurance that might be excessive or unobtainable (withdrawn). [Id. p. 15]

**D. The Complainant generally speculates that Section 11 may require any insurance that turns out to be unobtainable, constituting an unreasonable requirement. [Id. p. 15]**

E. The Complainant speculates that the proposed Lease may impose insurance requirements in excess of those required of other non-skydiving business, and if so, constitutes unjust economic discrimination against the Complainant (withdrawn). [Id. p. 16]

**F. The City's proposed Lease, in Section 11, requires the Complainant to pay for the City's insurance coverage for the aeronautical activity of skydiving, but the City does not require other aeronautical users to pay for the City's coverage of their non-skydiving activities. This allegedly constitutes unjust economic discrimination. [Id. p. 16]**

**G. The City's proposed Lease makes 'gratuitous remarks' that imply that "commercial skydiving operation is a second-class aeronautical citizen," constituting some prohibited 'unequal' treatment of skydiving versus non-skydiving aeronautical activities. [Id. pp. 17-18]**

H. The Complainant speculates that Section 2 of the City's proposed Lease imposes an annual 5% increase in rent on the Complainant, which the City does not impose on non-skydiving aeronautical users. This allegedly constitutes unjust economic discrimination (withdrawn). [Id. p. 18]

I. The City's proposed Lease provides a two-year term, while other commercial aeronautical Leases allow longer terms. This allegedly constitutes unjust economic discrimination (withdrawn). [Id. p. 19]

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<sup>8</sup> The burden of proof lies with the Complainants. Complainants who file under 14 CFR Part 16 shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. [See, 14 CFR § 16.23(b)(3)] [See, M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination), page 55.]

**J. Sections 5 and 8 of the City’s proposed Lease create irreconcilable requirements, constituting an unreasonable restriction on skydiving and unjust economic discrimination. [Id. p. 19]**

K. Section 6 of the City’s proposed Lease restricts the Complainant’s use of its proposed Leasehold as a drop zone and for no other purpose. It restricts the construction of structures or buildings. Allegedly, these restrictions are unreasonable and constitute unjust economic discrimination (withdrawn). [Id. pp. 20-22]

L. Section 13 of the City’s proposed Lease imposes an unreasonable requirement on the Complainant to indemnify the City, but does not provide indemnification for the Complainant from the City. This is allegedly discriminatory (withdrawn). [Id. p. 22]

M. Section 14 of the City’s proposed Lease imposes other, unreasonable indemnification provisions with regard to environmental issues, but is not mutual. This is allegedly discriminatory (withdrawn). [Id. p. 22]

N. Section 25 of the City’s proposed Lease makes time of the essence for the Complainant’s performance, but not the City’s performance (withdrawn). [Id. p. 23]

In the Respondent’s Answer, Memorandum in Support of Motion to Dismiss and evidentiary materials, the Respondent addressed many of the claims presented by the Complainant. [FAA Exhibit 1, Items 6-8] Specifically, in its Memorandum in Support of Motion to Dismiss, the Respondent provides evidence to support the fact that it is treating Skydive Sacramento similarly to other aeronautical and nonaeronautical users at LHM with regard to some insurance requirements. [FAA Exhibit 1, Item 8, pp. 13-15 and City exhs. 15-25] Also, the Respondent provides evidence that it is treating Airport tenants similarly with regard to rents and lease terms. [FAA Exhibit 1, Item 8, pp. 11-13, and City exhs. 15-25.] Finally, the Respondent offers to reword some of the language of the lease that the Complainant found objectionable. [FAA Exhibit 1, Item 8, p. 17.]

In response to the Respondent’s Answer and evidence, the Complainant withdraws many of its claims in its Reply stating:

*As a result of Respondent’s pleadings, Complainant has been provided information it would have been expected to receive had Respondent simply been willing to sit down and negotiate a lease agreement.... Nevertheless, upon reviewing the lease agreements and other documentation provided by the Respondent, Complainant has observed that the City’s proposed lease does treat Complainant equally with other commercial operators in a number of specific areas. As a result, as it promised in the Complaint, Complainant hereby dismisses the following portions and causes of action of its Complaint. [FAA Exhibit 1, Item 9, pp. 7-8]*

The Complainant's Reply effectively withdraws and abandons the following enumerated allegations: Claims C, E, H, I, K, L, M and N. [FAA Exhibit 1, Item 9, pp. 8-9.] Remaining claims are, Claims A, B, D, F, G and J.<sup>9</sup>

The Director construes this presentation in the Complaint, Answer and Reply as an overall allegation that the City has failed to make the airport available for public (the Complainant's) use on reasonable terms, including Skydive Sacramento's use of an on-airport drop zone; has applied unreasonable restrictions upon the Complainant's proposed skydiving operation; has disfavored the Complainant in a manner that unjustly discriminates against the Complainant's interest in skydiving access to the Airport, including a drop zone lease; and that the City's allegedly unreasonable terms and restrictions and unjust economic discrimination has constructively granted an exclusive right upon non-skydiving aeronautical users of the Airport.

Considering the above, the Director has determined that the following issues require analysis in order to provide a complete review of the Respondents' compliance with applicable Federal law and grant obligations:

1. *Whether the City's Proposed Lease with the Complainant includes insurance requirements that are unattainable, creating an unreasonable denial of access in violation of grant assurance 22, Economic Nondiscrimination, 49 U.S. C. § 47107(a) . (Claims A, B and D)*
2. *Whether the City has provided more favorable treatment to other non-skydiving Airport users with regard to insurance requirements in a manner that unjustly discriminates against the Complainant in violation of Federal grant assurance 22, Economic Nondiscrimination, 49 U.S.C. § 47107(a). (Claim F)*
3. *Whether the City's Proposed Lease with the Complainant includes language that disfavors skydiving as an aeronautical activity at the Airport in a manner that unjustly discriminates against the Complainant in violation of Federal grant assurance 22, Economic Nondiscrimination, 49 U.S.C. § 47107(a). (Claim G)*
4. *Whether the City's Proposed Lease with the Complainant includes irreconcilable inconsistencies that create a conundrum for the operations of skydiving at the airport, creating an unreasonable denial of access in violation of grant assurance 22, Economic Nondiscrimination, 49 U.S. C. § 47107(a) . (Claim J)*
5. *Whether the City's actions with regard to the Complainant constitute the constructive granting of an exclusive right by means of an unreasonable denial of access and/or unjust economic discrimination in violation of grant assurance 23, Exclusive Rights, 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4).*

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<sup>9</sup> The Complainant groups the remaining allegations as follows: A. Unattainable Insurance; B. Requirement That No Lessees On the Airport, Other Than Complainant, Pay For the City's Liability Insurance; C. Unequal Lease Recitals; D. Irreconcilable Lease Inconsistencies. [FAA Exhibit 1, Item 9, pp. 9-16.] This Determination will continue to use the original lettering system of the Complainant.

## 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, enforcement of Airport Sponsor Assurances, and the complaint and appeal process.

### 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.<sup>10</sup> 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.

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<sup>10</sup> 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.

Two FAA grant assurances, as well as obligations arising from the Surplus Property Act, apply to the circumstances set forth in this Complaint: (1) Grant Assurance 22, *Economic Nondiscrimination*; (2) Grant Assurance 23, *Exclusive Rights*.

**(1). Grant Assurance 22, *Economic Nondiscrimination***

The owner of an airport developed with federal assistance is required to operate the airport for the use and benefit of the public. Grant Assurance 22, *Economic Nondiscrimination*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

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

\* \* \*

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

\* \* \*

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

i. *The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport as such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.*

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, at par. 14.3.]

FAA Order 5190.6B describes the responsibilities under 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 at 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 activity on reasonable terms, and without unjust discrimination. [See, FAA Order 5190.6B at Section 9.1.a.]

## **(2). Grant Assurance 23, *Exclusive Rights***

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

*...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.*

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

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

In FAA Order 5190.6B, the FAA explains the exclusive rights policy and provides examples of aeronautical activities that are subject to the statutory prohibition against exclusive rights.<sup>11</sup> While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See, e.g. Pompano Beach v FAA, 774 F2d 1529, 1532 (11<sup>th</sup> Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See, FAA Order 5190.6B, Sec. 11.2.]

## **C. Surplus Property Obligations (Regulation 16)**

Surplus property instruments of disposal are issued under the Surplus Property Act of 1944 (SPA). The Act authorizes conveyance of property surplus to the needs of the federal government. Prior to the establishment of the GSA in 1949, instruments of disposal were issued by the War Assets Administration (WAA). [See, FAA Order 5190.6B, ¶3.2.]

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<sup>11</sup> See, FAA Order 5190.6B, Appendix 1, par. 1.1, definition of Aeronautical Activity.

Surplus property instruments of transfer are one of the means by which the Federal government provides airport development assistance to public airport sponsors. The conveyance of surplus Federal land to public agencies for airport purposes is administered by the FAA, in conjunction with the U.S. Department of Defense (DOD) and the GSA and pursuant to 49 U.S.C. § 47151, 47152, and 47153.

Public Law 81-311 specifically imposes upon the FAA the sole responsibility for determining and enforcing compliance with the terms and conditions of all instruments of transfer by which surplus airport property is or has been conveyed to non-federal public agencies pursuant to the SPA. Furthermore, pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their federal obligations.

All surplus airport property instruments of disposal, except those conveying only personal property, provide that the covenants assumed by the grantee regarding the use, operation and maintenance of the airport and the property transferred shall be deemed to be covenants running with the land. Accordingly, such covenants continue in full force and effect until released under Public Law 81-311 or other applicable federal law.

Today, 49 U.S.C. § 47152 (2) and (3) contain the reasonableness and discriminatory requirements originally stipulated under the Surplus Property Act.

#### **D. The FAA Airport Compliance Program**

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports that airport sponsors operate in a manner consistent with their 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 that airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of federal property to ensure that airport sponsors serve the public interest.

FAA Order 5190.6B, *Airport Compliance Manual*, dated September 30, 2009, sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for receiving federal funds or federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the

assurances in the operation of public-use airports, and facilitates the interpretation of grant assurances by FAA personnel.

The FAA Airport Compliance Program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination of whether an airport sponsor currently is 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 an applicable federal obligation to be grounds for dismissal of such allegation. [*See, e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket 16-99-10 at page 4 (August 30, 2001); *aff'd Wilson Air Center, LLC v. FAA*, 372 F.3d 807 (C.A. 6, June 23, 2004)(Wilson).]

FAA Order 5190.6B outlines the standard for compliance, stating:

*A sponsor meets commitments when: (1) The federal obligations are fully understood; (2) A program (e.g., preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor's commitments; (3) The sponsor satisfactorily demonstrates that such a program is being carried out; and (4) Past compliance issues have been addressed. [FAA Order 5190.6B at Section 2.8.b.]*

#### **E. 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, among other requirements, their federal grant assurances under 49 U.S.C. § 47107(a), and their surplus property covenants under 49 U.S.C. § 47152.

#### **F. The Complaint and Appeal Process**

Pursuant to 14 CFR § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant(s) shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint(s)

shall also describe how the complainant(s) directly and substantially has/have been affected by the things done or omitted by the respondent(s). [See, 14 CFR § 16.23(b)(3-4).]

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

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedures Act (APA) and federal case law. The APA provision [See, 5 U.S.C. § 556(d)] states, “(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” [See also, Director, Office Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994) and Air Canada et al. v. Department of Transportation, 148 F.3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires the Complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that, “(e)ach party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance.”

Title 14 CFR § 16.31(b-d), in pertinent parts, provides that “(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in §16.33.” In accordance with 14 CFR §§ 16.33(b) and (e), upon issuance of a Director’s determination, “a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;” however, “(i)f no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable.”

Title 14 CFR § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator’s final decision and order, as provided in 49 U.S.C. § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C. § 47106(d) and 47111(d).

## VI. ANALYSIS AND DISCUSSION

Prior to analyzing and discussing the pertinent issues in this case, it is relevant to restate that the FAA's Office of Airports reviews matters pertaining to a sponsor's compliance with its federal grant assurance agreements. [See, 14 CFR § 16.1.] The agency does not replace or act on behalf of local law enforcement, civil courts, or other legal forums outside the scope of the FAA's Part 16 purview.

### *Lease Negotiations*

An airport sponsor must provide aeronautical access on reasonable terms, according to the obligations under its grant assurances and surplus property deeds of conveyance. Apart from these Federal obligations, the sponsor retains its own proprietary powers, and an aeronautical business proponent retains rights to pursue a successful business plan. The Compliance program seeks to benefit the public's interest in civil aviation, generally, not specific business advantages to complainants.<sup>12</sup> The Part 16 process is not a substitute for negotiation.

Negotiation is important, because both the proponent of an aeronautical business and the airport sponsor have rights and responsibilities to negotiate a good business arrangement for themselves. A proponent of a business at an airport has a responsibility to engage in negotiations to support a successful business plan that include details of location, standards, qualifications and business issues, including rents and terms. Airport sponsors retain the proprietary right to demand that aeronautical business proposals include appropriate business details, including reasonable protection from risk. Similarly, airport sponsors may negotiate to protect themselves from liability and litigation.<sup>13</sup>

Also, the FAA applies its standard of compliance to a sponsor's actions. The FAA does not judge an airport sponsor simply by the plain language of agreements or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances and interpretations. Rather, the FAA judges compliance by an airport sponsor's actions or inactions with respect to those agreements or minimum standards. [See, Self Serve Pumps v Chicago Executive Airport, FAA Docket No. 16-07-02 (Director's Determination)(March 17, 2008) pp. 31-32, (Self Serve Pumps).]

The matter before the Director reflects negotiations that occurred between two parties regarding skydiving. Given Skydive Sacramento's specific proposal to create a drop zone at LHM and to

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<sup>12</sup>In Penobscot Air Service v. Knox County, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination) (Penobscot), the FAA stated: "*The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws....*" [Penobscot at page 24; decision upheld on appeal, Penobscot Air Service v. FAA, 164 F.3d 713 (1<sup>st</sup> Cir., 1999)]

<sup>13</sup>As stated in JetAway v. Montrose, CO, FAA Docket No. 16-08-01 (Director's Determination) (July 2, 2009) p. 17, "One example of where an airport sponsor may exercise its proprietary rights is to protect itself as a going concern in the face of litigation." See also, Kent J. Ashton, Jacquelin R. Ashton v. City of Concord, NC, FAA Docket No. 16-02-01 (Director's Determination) (August 22, 2003) p. 27.

operate from and to LHM, the parties had to investigate the feasibility of such operations, consult with the FAA, determine locations, and settle on specific business terms. The parties had completed the first three steps before the filing of this Complaint. However, negotiations of business terms bled into the formal complaint procedure. As such, the parties resolved many of the issues through the pleadings of the Part 16 process. However, the following issues remained in dispute.

### Issue 1

*Whether the City's Proposed Lease with the Complainant includes insurance requirements that are unattainable, creating an unreasonable denial of access in violation of grant assurance 22, Economic Nondiscrimination, 49 U.S. C. § 47107(a). (Claims A, B and D)*

Skydive Sacramento alleges that the City has failed to operate the airport in accordance with its obligations under Grant Assurance 22, by demanding an unreasonable term of tenancy with regard to insurance requirements. Specifically, Skydive Sacramento cites FAA policy, stating:

*Placing an unattainable requirement for airport access is a violation of 49 USC §§ 47107, 40103(e) and the grant agreements. Section 3-12, Administration of Policy, of FAA Order 5190.6A, discussing the minimum standards for commercial operators seeking to operate on an airport so that the airport sponsor complies with 49 USC §§ 47107 and 40103(e) states in relevant part:*

*" . . . A prudent airport management should establish minimum standards to be met by all who would engage in a commercial aeronautical enterprise at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be fair, equal and not unjustly discriminatory. That is to say, they must be relevant to the proposed activity, reasonably attainable, and uniformly applied." (Emphasis added)*

*The FAA requires that standards be reasonably attainable. Insurance that is unattainable at any price does not fit any definition of attainable, reasonable or not.*

*By establishing an impossible standard for insurance, the City is preventing Complainant from "participating in an on-airport aeronautical activity" (AC 150/5190-6, Sec. 1.2),<sup>14</sup> a clear violation of 49 USC §§ 47107, 40103(e) and the City's grant obligations.<sup>15</sup> [FAA Exhibit 1, Item 1, p. 14.]*

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<sup>14</sup> We infer that Skydive Sacramento is referring to AC 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities* (August 28, 2006) Sec. 1.2(d)(3), which states that airport sponsors must "Ensure standards are reasonable, not unjustly discriminatory, attainable, uniformly applied..."

<sup>15</sup> Skydive Sacramento also notes that Section 11 applies the same insurance requirements on Skydive Sacramento's subcontractors. However, in its Reply, Skydive Sacramento acknowledges that it can add its subcontractors to its insurance policies, so consolidates its allegation here to the overriding issue of attainability. [FAA Exhibit 1, Item 9, pp.9-10.] Skydive Sacramento states that any portion of the Lease that calls for unobtainable insurance should be stricken. [FAA Exhibit 1, Item 1, p. 15.]

The City states its underlying position on its proprietary rights and the limits of grant assurance 22, stating:

*The City has no federal obligation to allow Skydive to operate a drop zone at the Airport without having adequate insurance protection nor is there any federal obligation for the City to bear the costs of any new policy it must obtain so that the City has coverage for skydiving claims. [FAA Exhibit 1, Item 10. p. 7.]*

This dispute does not involve a disagreement over many facts. Rather, it's a disagreement over the extent of the City's Federal obligations to allow aeronautical access on reasonable terms. This reasonable access is required by grant assurance 22.

***(1). Agreed facts***

The parties had exchanged terms for a lease and use agreement to allow Skydive Sacramento's operation of a drop zone at LHM. The City had drafted and offered its Final Draft Ground Lease that included a liability insurance requirement, at Section 11. Section 11.a-b states:

*11. Insurance:*

*A. Tenant shall obtain and maintain at all times during the term of this Agreement, from a financially solvent insurance carrier(s), commercial general liability insurance for premises use, skydiving and aircraft operations, and automobile liability for licensed vehicles utilized on the Premise or on Airport. The following insurance coverage shall be maintained at Tenant's expense to assure payment of damages occasioned by Tenant's operation in and upon the Airport including aircraft and ramp vehicles. Tenant understands that the following coverage shall be subject to changes in coverage requirements for commercial operators on the Airport as may be enacted by City from time to time, and as deemed necessary by and at the sole discretion of City. Prior to any skydiving operations in the Drop Zone or on the Premise by any independent subcontractor or other skydiving commercial operator, the Tenant shall require that each subcontractor and commercial operator provide a Certificate of Insurance to the City that satisfies the insurance coverage requirements as identified in this section.*

- i. \$1 Million per occurrence - Aggregate limits should be double the per occurrence limit;*
- ii. If using a Commercial General Liability Insurance coverage, any aviation, drop zone, parachute jumping and skydiving activities exclusions must be deleted;*
- iii. Automobile Liability - \$1,000,000 per occurrence for bodily injury and property damage;*
- iv. Fire legal liability coverage will be added to a limit of \$100,000 for damage to Premise in the care, custody and control of the Tenant;*

- v. *A.M. Best Rating Admitted Carrier - A: VII or Better Carriers Admitted in California are preferred;*
- vi. *Tenant shall provide and keep current a Certificate of Insurance indicating the coverage and limits and providing 30 days notice of cancellation;*

B. *Additional Insured Endorsement - The City of Lincoln, its officers, officials, employees, agents and volunteers shall be named as additional insured's for all liability arising out of the operations by or on behalf of the Tenant including bodily injury, deaths and property damage in any respect directly or indirectly in the performance of this lease. [FAA Exhibit 1, Item 1, exh. 19.]*

With regard to insurance coverage for skydiving, the Affidavit of Michael Pratt stated,<sup>16</sup> "...commercial general liability insurance is not available for skydiving business at any level of coverage for any price. Further, ... such insurance has not been written for skydiving businesses since the 1980s and has not been available since that time." [FAA Exhibit 1, Item 1, exh. 30]

In its Answer, the City does not dispute Skydive Sacramento's interpretation of the language of Section 11. The City admits that it has required specific insurance for skydiving, but does not immediately acknowledge that the insurance coverage that it is requiring may not be available. [FAA Exhibit 1, Item 6, p. 20.] However, in its Rebuttal, the City concedes:

*..., Skydive continues to protest that the existing limits of its own coverage are all that Skydive will be able to provide to the City. The City has been investigating the insurance market since receiving Skydive's Reply and acknowledges that Skydive's assertion may be correct. [FAA Exhibit 1, Item 10, p. 6.]*

The record reflects that both parties agree that specific insurance requirements of the City may not be available and therefore, not attainable. Certainly, neither party has identified any source for the insurance coverage the City is requiring. Also, the City does not point to any acceptable substitute to the insurance requirements laid out in Section 11. In the meantime, the City is not allowing Skydive Sacramento to drop onto the identified drop zone at LHM.

## ***(2). Policy and Analysis***

Advisory Circular (AC) 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities* (August 28, 2006) Sec. 1.2(d)(3), states that airport sponsors must "*Ensure standards are reasonable, not unjustly discriminatory, attainable, uniformly applied...*" This same section of the AC at Sec. 1.2(f)(6) specifically mentions insurance as a requirement that is subject to a reasonableness test, including the consideration of attainability. This guidance is relevant to the issue herein and generally supports Skydive Sacramento's position that the City's insurance requirement is unreasonable, if it is unattainable. Also, the FAA Order 5190.6B, *Airport Compliance Manual* (September 30, 2009) in Chapter 10.2 repeats and reaffirms this guidance.

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<sup>16</sup> Michael Pratt is an aviation insurance broker and part owner of Maverick Insurance, an insurance agency located at 826 West Main Street, New Albany, Indiana, 47150. [FAA Exhibit 1, Item 1, exh. 30]

The City supports its argument regarding the reasonableness of its position, by claiming to work with Skydive Sacramento to find the City-required level and type of liability protection, stating:

*When a tenant claims that an insurance requirement is unattainable or prohibitively expensive in the insurance market, no current violation will be found by the FAA where the Airport works with the tenant to identify attainable insurance coverage that will satisfy the Airport. See, Flightline Aviation, Inc. v. City of Shreveport, 2008 WL 5955355 at \*24-25 (March 7, 2008) (Director's Determination). That is precisely what the City has been attempting to do. [FAA Exhibit 1, Item 10, p. 5.]*

The City's citation to Flightline Aviation, Inc., v. City of Shreveport through the Shreveport Airport Authority, FAA Docket No. 16-07-05, (Director's Determination)(March 7, 2008), (Flightline) is inapt. Flightline is about a sponsor's allegedly inequitable enforcement of minimum standards between two operating fixed-base operators at its airport. This is a typical source of complaints from two similarly-situated entities complaining about allegedly unjustly discriminatory enforcement of a sponsor's minimum standards. Also, the record in Flightline did not establish that the insurance coverage was unattainable. As stated in Flightline:

*... based on the Record provided, it does not appear that Respondent's requirement to insert certain language in the insurance policies is unreasonable. ... The Record reflects that Complainant was able to get the language inserted in certain policies... However, Complainant fails to provide proof that it was unable to comply with Respondent's requirement for all the policies and that insurance providers refused to include the specific language in their policies with Complainant.*

*FAA notes that Respondent has made major accommodations to assist its FBOs in complying with the Amended Minimum Standards. First, after being approached by the FBOs regarding the unavailability and cost prohibitiveness of the Environmental Insurance requirements, Respondent researched the problem and made concessions to accept alternative means of compliance; substitute coverage through Pollution Legal Liability insurance. Second, when each of the FBOs failed to comply with provisions of the Amended Minimum Standards, Respondent provided numerous extensions of time to comply. Furthermore, Respondent took legal action against Royal Air after it failed to comply with the Amended Minimum Standards and refused to cease operations. [Flightline, at p. 27.]*

The facts in Flightline include an allegation by the complainant that the respondent was too accommodating to the Complainant's competitor with regard to minimum insurances standards. The Director stated:

*Respondent states that it "experienced great resistance from Royal Air regarding its obtaining certain insurance coverages, particularly Environmental Impairment/Pollution Liability Insurance." [FAA Exhibit 1, Item 5, exhibit 18, #12.] Royal Air claimed the coverage was not available. [FAA Exhibit 1, Item 5, exhibit 18, #13.] Therefore, on October 21, 2004, Respondent "agreed to modify the Environmental Impairment Liability*

*Insurance requirement so that a less expensive coverage was specified, namely, Pollution Legal Liability Insurance.” [Flightline, at p. 3, fn. 11.]*

The FAA has applied this ‘availability-test’ for the reasonableness of insurance requirements in other determinations. The Director dismissed similar environmental liability coverage as Flightline, in Scott Aviation v DuPage Airport, FAA Docket No. 16-00-19 (Director’s Determination)(July 19, 2002) (Scott):

*there is no evidence to suggest this type of insurance coverage, in this amount, is not obtainable. In fact, the record shows that Scott Aviation has obtained the liability insurance in the required amount, as well as posted the bond in the amount of the deductible. The Director cannot find that the level of insurance required is unobtainable, or is so high that it is cost prohibitive. [Scott, at p. 22. ]*

With regard to another example of insurance requirement reasonableness, the Associate Administrator upheld the Director’s Determination in Flamingo Express, Inc v Cincinnati, FAA Docket No. 16-06-04 (Final Decision and Order)(August 9, 2007) (Flamingo). The Associate Administrator recaps the Director’s Determination, stating:

*While the Director made no finding of a violation based on a \$20 million aircraft liability insurance requirement for Complainant’s proposed operation of scheduled service with aircraft of less than 30 seats, the Director cautioned that “a requirement for \$20 million in liability coverage applied to operations using a 9-seat Piper PA-31-350 Chieftain piston twin-engine aircraft may not be attainable, and hence would be unreasonable and inconsistent with Grant Assurance 22...” [Flamingo, Final Decision and Order, p. 15. See also, Flamingo, FAA Docket No. 16-06-04 (Director’s Determination)(February 26, 2007) p. 22.]*

Again, the Director applied a test for the reasonableness of an insurance requirement in Brown v. Holland, FAA Docket No. 16-05-09 (Director’s Determination)(March 1, 2006) (Brown). Here the Director observed, in dismissing an allegation that a specific insurance requirement was not unreasonable, because it was attainable and common industry practice:

*The Director cannot find that the level of insurance required is unobtainable, or is so high that it is cost prohibitive. In researching the matter in this case, the Director has found that the \$1 million contamination or pollution protection is rather common and that the \$5 million liability, albeit not very common, is not unusual, can be found to be offered by insurance companies for self-fueling operations such as that conducted by Complainant. [Brown, at p. 14.]*

The Director went on to find that additional financial protections that the sponsor required of the complainant were unreasonable, in part, because they were outside of standard industry practice. [Brown, at p. 17.]

To whatever extent the City could be seen as working with Skydive Sacramento to resolve the insurance issue, it has not provided any forbearance, and it has not identified alternative

insurance or liability protection. The City has not made concessions to accept alternative means of insurance. Skydive Sacramento is not operating a drop zone at LHM, because the City has prevented that operation by insisting on Section 11- *Insurance* of its Final Draft Ground Lease.

Skydive Sacramento, however, has provided an alternative means of providing some liability protection to the City.<sup>17</sup> This includes the California State Code, Section 831.7. It states, in part:

*(a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that a hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.*

*(b) As used in this section, "hazardous recreational activity" means a recreational activity which creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury to a participant or a spectator.*

*"Hazardous recreational activity" also means:*

*(3) .. sky diving, sport parachuting... [FAA Exhibit 1, Item 11, exh. 33.]*

Another source of protection for the City is Skydive Sacramento's required waiver. Skydive Sacramento states, "...every single person who jumps with Skydive Sacramento signs a waiver of liability that specifically names the City of Lincoln. California courts have upheld such recreational activity waivers." [FAA Exhibit 1, Item 11, pp. 4-5.] In fact, the waiver form does name the City of Lincoln as an included party. [FAA Exhibit 1, Item 11, exh. 32.]

### ***(3). Summary of Issue 1***

The City admits that its insurance requirement may not be available and fails to identify a source of such insurance. However, it is barring access to Skydive Sacramento for the use of an identified drop zone at LHM because of Skydive Sacramento's inability to comply with Section 11.c., of the draft lease. This restriction is not reasonable because it is banning an aeronautical activity at LHM by requiring Skydive Sacramento to meet an unattainable requirement. As stated, FAA policy regarding the implementation of rules, terms and minimum standards states that the standards must be attainable.

Skydive Sacramento's approach of notification and waiver is more consistent with the Director's past application of a reasonableness standard to insurance requirements, including a test for availability and broad industry practice. Again, the record reflects that the City has not identified any attainable approach or procedure to implement to its satisfaction, which would provide for alternative liability protections to the City.

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<sup>17</sup> Both parties continued to gain new information in the pleadings, and they each filed one additional pleading. On the part of Skydive Sacramento, it submitted a Motion to Strike with evidence. [FAA Exhibit 1, Item 11, exhs. 32 & 33.] This evidence showed liability protections for the City that had not been explored in prior pleadings.

In consideration of the above, the Director finds the City has unreasonably denied access to Skydive Sacramento in violation of Grant Assurance 22, *Economic Nondiscrimination*, and the City's parallel obligation contained in the surplus property quitclaim deed.

## **Issue 2**

Whether the City has provided more favorable treatment to other non-skydiving Airport users with regard to insurance requirements in a manner that unjustly discriminates against the Complainant in violation of Federal grant assurance 22, *Economic Nondiscrimination*, 49 U.S.C. § 47107(a). (Claim F)

Skydive Sacramento alleges that the Final Draft Ground Lease as Section 11.c Insurance:

*... requires that Complainant pay for the City's insurance coverage for the aeronautical activity of skydiving. This establishes a condition on Complainant placed on no other aeronautical user or commercial aeronautical enterprise on the airport....*

*Placing a requirement on only Complainant to pay for the City's insurance is not only a condition that is not equal to the conditions placed on the other commercial operators, a violation of 49 USC §§ 47107 and 40103(e) (Section 3-12, Administration of Policy, of FAA Order 5190.6A), it is also a violation of the prohibition against unjust discrimination in the statutes and that Order. [FAA Exhibit 1, Item 1, pp. 16-17.]*

The City answers:

*Consistent with past [insurance] policies, the City's current Airport policy... excludes Airport Parachuting risks and offers no skydiver bodily injury or property damage coverage....*

*There is no other tenant at the Airport whose activities have caused the City to incur additional insurance costs as the result of their on-Airport activities. [FAA Exhibit 1, Item 6, p. 22.]*

### **(1). Agreed Facts**

Section 11.c of the Final Draft Ground Lease states:

*c. Change and Increase to City Premium for Airport Insurance Policy - Prior to execution of this Agreement by the City, and prior to any skydiving operations in the Drop Zone or on the Parachute Landing Area: (1) Tenant shall pay the City \$7,046.00 for the increase in cost for the premium for a City Airport Insurance Policy that provides insurance coverage to the City for parachuting operations on the Airport ('Parachute Premium'), and (2) City shall have obtained a City Airport Insurance Policy providing insurance coverage to the City for parachuting operations on the Airport ('Parachute Operations Coverage'). Upon receiving the Parachute Premium from Tenant, City will obtain the Parachute Operations Coverage as soon as is reasonably possible. Tenant shall not commence any parachuting operations on the*

*Premise until it is notified in writing by the City that the Parachute Operations Coverage has been obtained. Tenant shall pay an amount to City equal to the annual insurance premium for parachuting operations, and any increase in said premium, on an annual basis by no later than June 1, of each year during the term of this lease. City shall notify Tenant regarding the amount of premium that is due to City no sooner than 20 days prior to said annual premium due date. [FAA Exhibit 1, Item 1, exh. 19.]*

Again, here, the parties do not dispute facts, rather they argue over the applicability of the grant assurances and FAA precedent. The City acknowledges that it is requiring Skydive Sacramento to make a payment to the City that it is not requiring of other, non-skydiving, aeronautical service providers at LHM. Skydive Sacramento does not dispute that the City is requesting that Skydive Sacramento compensate the City for additional coverage that the City must acquire, if available, precisely because Skydive Sacramento cannot provide coverage similar to other leaseholders for its activities on LHM. Skydive Sacramento states:

*As Complainant has pointed out repeatedly, it has \$1,000,000 in commercial general liability insurance coverage, \$1,000,000 in automobile liability insurance coverage and \$300,000 in aircraft liability coverage; however, each of these policies excludes coverage for claims arising from skydiving operations. Complainant is covered for virtually all risks except for the actual skydive itself. Such coverage does not exist. [FAA Exhibit 1, Item 11, pp. 2-3.]*

Skydive Sacramento points to no other tenant or user at LHM that conducts an uninsurable activity. The City, for its part, points to multiple leases, the most recent of which (since the '80s) carry liability maximums no less than \$1,000,000 for comprehensive public liability and/or aircraft liability that increases from \$1,000,000 for single-engine piston aircraft up to \$20,000,000 for turbine-engine aircraft. [FAA Exhibit 1 Item 8, exh. 15, para. 9.3; exh. 16, para. 9.3; exh. 17, paras. 9.3 & 9.4; exh. 18, para. 9.3.] The insurance coverage demanded by the City of other aeronautical users is consistent with the insurance coverage it is requiring of Skydive Sacramento—the same level that it now acknowledges is not attainable for skydiving operations of any party.

## ***(2). Policy and Analysis***

Skydive Sacramento relies heavily on the concept of “equal” treatment that it cites from the Compliance Order.<sup>18</sup> Skydive Sacramento states:

*As previously pointed out, Section 3-12, Administration of Policy, of FAA Order 5190.6A establishes requirement for standards that are established for commercial operators for aeronautical activity on an airport so as to avoid unjust discrimination:*

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<sup>18</sup> FAA Order 5190.6B, September 30, 2009, replaced FAA Order 5190.6A, October 2, 1989. Although the violations complained of occurred before the issuance of FAA Order 5190.6B, it is the Director’s mandate to determine “current” compliance with the applicable statutes and regulations. *See, Wilson*. Therefore, the citations to FAA Order 5190.6B in this Determination are appropriate. Further, the Complainant’s citation to section 3-12 of FAA Order 5190.6A can be found in FAA Order 5190.6B at Chapter 9, and paragraphs 13.13 and 18.21.

*"Such conditions must, however, be fair, equal and not unjustly discriminatory."* [FAA Exhibit 1, Item 1, p. 17.]

The City counters:

*Skydive badly misconceives the controlling legal principles. It is well established that to make out a claim under Assurance 22, Skydive must show that the City is engaged in unjust economic discrimination. It is not enough to show that the City is treating Skydive differently than other airport tenants. To prevail on this claim, Skydive must establish both (a) that the City has given more favorable treatment to other airport tenants that are similarly-situated to Skydive, and (b) that the City has no legitimate reason, as the Airport proprietor, for the difference in treatment.* [FAA Exhibit 1, Item 8, pp. 4-5.]

With regard to unjust economic discrimination, Skydive Sacramento's interpretation is incorrect; while the City's argument is correct. Skydive Sacramento does not acknowledge the concept of similarly-situated. This is a long-standing and well-established concept applied when determining unjust economic discrimination. This precedent has its roots in the language of the grant assurance and the underlying law. Grant assurance 22(c) states, *"Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities."* (Emphasis added) Title 49 U.S.C. §47107(a)(5) states, "fixed-base operators similarly using the airport will be subject to the same charges."

The FAA's analysis and application of similarly-situated principles to allegations of unjust economic discrimination are too numerous to list. However, we address precedent cited by the City, National Airlift Support Corp. v Fremont County, FAA Docket, No. 16-98-18 (Final Decision and Order)(September 20, 1999) (National Airlift); and Royal Air v. City of Shreveport, FAA Docket No. 16-02-16-06 (Director's Determination)(January 9, 2004)(Royal Air). In National Airlift, the Associate Administrator upheld the Director's analysis of 'similarly situated,' noting that a complaining skydive operation is similarly situated to other skydiving operations and not similarly situated to United Parcel Service. [National Airlift, at p. 9] In Royal Air, the Director found that the sponsor was unjustly discriminating in violation of grant assurance 22 with regard to the enforcement of insurance requirements. In Royal Air, the Director conducted a detailed analysis of activities to determine that two entities were, in fact, similarly situated because of each party's actual aeronautical activities. The Complainant, Royal Air, alleged that a competitor, Pronto Delivery Service, was actually offering flight training as a sidelight to its aircraft rental business, without meeting the sponsor's insurance requirements for a flight training operation. [Royal Air, at p. 52.] So, the Director found unjust economic discrimination where two entities offering the same aeronautical service were treated differently with regard to insurance coverage. In fact, the difference in treatment was significant: flight training operations requires \$1,000,000 of coverage, while Pronto was only providing \$100,000 of coverage. [Royal Air, at p. 52.]

The Director applies a ‘similarly situated’ analysis that is supported by precedent. Specifically, in this situation, skydiving operations are similarly situated to other skydiving operations because skydiving is treated as a unique aeronautical activity by the insurance industry. Skydiving is not similarly situated to aeronautical activities that are not singled out by the insurance industry as incorporating an essential, uninsurable activity - the skydive itself. Generally speaking, the FAA addresses questions of inequity between dissimilar aeronautical activities as a question of reasonableness of aeronautical use. Significantly inequitable treatment can be unreasonable, but unjust economic discrimination can only occur between similarly situated parties.

Finally, Skydive Sacramento’s unjust economic discrimination argument under Issue 2 is inconsistent with its unreasonable denial of access argument under Issue 1. Skydive Sacramento argues that it is unreasonable for the City to treat Skydive Sacramento the same as other tenants (by requiring insurance minimums that start at \$1,000,000), because the insurance industry treats Skydive Sacramento differently (by refusing to insure skydiving, at all). The City is not inventing this distinction and, of course, other distinctions exist between the other tenants at LHM and Skydive Sacramento, including the presence of personnel on the airfield during aeronautical operations. As Skydive Sacramento has shown, skydiving operations are different in that the insurance industry treats skydiving differently. [FAA Exhibit 1, Item 1, exh. 30.] Skydive Sacramento points to no other skydiving operation at LHM that the City treats more favorably.

### *(3). Summary of Issue 2*

Skydive Sacramento points to no LHM leaseholder that cannot or does not provide liability insurance for its main operation. In fact, the record evidence shows that other tenants at LHM provide insurance coverage that meets the City’s general requirements, all of which are above that which Skydive Sacramento offers and are similar to the City’s requirement on Skydive Sacramento. Skydive Sacramento admits, and argues forcefully, that it cannot meet these requirements, making Skydive Sacramento dissimilar. Consequently, since Skydive Sacramento is not similarly situated to any other party that must provide proof of insurance to the City, Skydive Sacramento’s allegation of unjust economic discrimination is inapt and unpersuasive.

The Director found, above, that it is unreasonable to require unattainable insurance. However, here, we state that the admittedly different treatment of skydiving versus other aeronautical activities with regard to insurance is not inequitable, because the difference in class is clear: those activities that are insurable and those that are uninsurable. Just because the application of a requirement is not discriminatory, does not mean that it is not unreasonable. To be clear, requiring unattainable insurance is unreasonable because it does not exist, but it is not unjustly discriminatory to treat dissimilar aeronautical activities dissimilarly.

In consideration of the above, the Director finds the City has not unjustly discriminated against Skydive Sacramento in violation of Grant Assurance 22, *Economic Nondiscrimination*, and its obligations contained in the surplus property quitclaim deed.

### Issue 3

*Whether the City's Proposed Lease with the Complainant includes language that disfavors skydiving as an aeronautical activity at the Airport in a manner that unjustly discriminates against the Complainant in violation of Federal grant assurance 22, Economic Nondiscrimination, 49 U.S.C. § 47107(a). (Claim G)*

Skydive Sacramento complains about the Recitals in the Final Draft Ground Lease, stating:

*Such comments making the implication that commercial skydiving operation is a second-class aeronautical citizen, a less than desired user of the airport, that better watch its step among its betters, are absolutely inappropriate and in violation of the statutory requirement that the City must treat all aeronautical users equally, see Section 3-12, Administration of Policy, of FAA Order 5190.6A. [FAA Exhibit 1, Item 1, p. 18]*

The City responds:

*Skydive also complains that some of the Recitals at the beginning of the Lease are "insulting" to Skydive and, according to Skydive, unfairly impugn skydiving.... Skydive has not shown, however, how any of these non-binding recitals might actually affect its operations or impair any right protected by federal law. The City is prepared, however, to consider rewording the recitals to eliminate this problem if it would resolve the present dispute. [FAA Exhibit 1, Item 8, p. 17.]*

In its Reply, Sacramento Skydive adds that these recitals, once signed, will cause potential skydiving customers to make certain assumptions about Skydive Sacramento's relative safety and choose to dive with its competitors. [FAA Exhibit 1, Item 9, p. 15.]

#### **(1). Agreed Facts**

In the Final Draft Ground Lease, Recitals C through H state:

- C. City and the Federal Aviation Administration have determined that the level of air traffic activity at the Airport is significant and is expected to annually increase into the foreseeable future.*
- D. City initially concluded that operation of a Drop Zone may be incompatible with the level of air-traffic activity at the Airport and may pose a risk of accident or incident.*
- E. The Federal Aviation Administration, Sacramento Flight Standards District Office, has determined that under specific operating requirements that a Drop Zone could be safely operated by Tenant.*
- F. City desires that Tenant take the necessary steps to operate the Drop Zone in compliance with all safety precautions as required by the Federal Aviation Administration and to conduct related on-airport Landing Area activities to the safest extent possible.*

- G. *Tenant recognizes and acknowledges that the level of future air-traffic activity at the Airport may pose a risk of accident or incident and a potential hazard to flight safety and could restrict or terminate future operation of Drop Zone and Landing Area.*
- H. *Tenant desires to assume all responsibility and liability for the operation of the Drop Zone and Landing Area.* [FAA Exhibit 1, Item 1, exh. 19, p. 1.]

**(2). Policy and Analysis**

Again, the parties do not dispute facts, except to the extent to which the language above has any measurable effect on Skydive Sacramento's business. Skydive Sacramento argues that potential customers will shy away from Skydive Sacramento because:

*Once signed, the lease between the parties here will become a public document. Potential customers of Skydive Sacramento will see that the City has placed recitals on this lease that it has with no other lessee; recitals that strongly imply that Complainant is unsafe and unwelcome on airport and might be kicked off at any time. Complainant faces strong competition from other skydiving operations in the area. To place such recitals in the lease would obviously have an adverse competitive effect Complainant.* [FAA Exhibit 1, Item 9, p. 15.]

For the FAA's part, we are un-persuaded that the Recitals, as drafted, will have an adverse competitive effect on Skydive Sacramento. As such, it is not an unreasonable denial of access. Lease Recitals, by definition, are a formal statement or setting forth some matter of fact in order to explain the reasons upon which the transaction is founded. The Recitals acknowledge that skydive operations are currently safe as determined by the FAA. This is certainly not a competitive disadvantage for Skydive Sacramento.

As stated by the Associate Administrator in Thermco Aviation, Inc. v. City of Los Angeles, FAA Docket No. 16-06-07, (June 21, 2007) (Final Decision and Order) (Thermco), the airport proprietor retains the ability to make changes to its airport over time, including changes that affect a lease, such as the Final Draft Ground Lease, upon its expiration:

*Thermco (the complainant) incorrectly elevates the relevancy of its current short-term tenancy as a protection from change, including demolition of structures. The very nature of lease agreements is that they are for a definite term, so that both parties may change plans and arrangements to suit their respective interests. Federal obligations do not prevent this sponsor from exercising such change, even if it results in the demolition of a hangar currently occupied by a short-term subtenant. In fact, the terms of the lease agreement are the primary protection of tenants for continued occupancy of a leasehold, not the grant assurances. As discussed throughout the Director's Determination and this Final Decision, Thermco has failed to show that the City is acting unreasonably in its plan for change at the Airport.* [Thermco, at p. 27.]

So, the City may preserve its ability to plan for alternative uses for the drop zone site, including preserving that right in its leases and/or allowing for alternative uses at the expiration of a lease.

Furthermore, for the reasons stated above in Issue 2, the Recitals do not constitute unjust economic discrimination, because Skydive Sacramento is not similarly situated to other planned for, or hoped for, aeronautical activities contemplated by the elected officials of the City of Lincoln, CA.

### ***(3). Summary of Issue 3***

The Recitals re-emphasize the parties' interests in continual safe operations of LHM in the future, even if circumstance and activity change. In the FAA's experience, airport circumstances can change over time. Skydive Sacramento holds the opinion that the circumstance of the current recession make the City's plans for the future of LHM unrealistic. [FAA Exhibit 1, Item 1, p. 17.] Skydive Sacramento has not proven that the City's expectations for LHM are so unrealistic as to require the City to give up on its plans and hopes for growth and to cede its planning prerogative to Skydive Sacramento. The City does not have to provide access to its airport on the specific terms of any one proponent.<sup>19</sup> Furthermore, the City remains the proprietor of LHM and retains the right and responsibility to plan for the future of the airport in the civil aviation interests of the public.<sup>20</sup> It is prudent for the City to expect change. In changed future circumstances, that prudent planning may require changing the operation contemplated under the Final Draft Ground Lease with Sacramento Skydive.<sup>21</sup>

With regard to the Recitals of the Final Draft Ground Lease, the Director finds the City has not unjustly discriminated against Skydive Sacramento, nor unreasonably denied aeronautical access, in violation of Grant Assurance 22, *Economic Nondiscrimination*, and its obligations contained in the surplus property quitclaim deed.

### **Issue 4**

*Whether the City's Proposed Lease with the Complainant includes irreconcilable inconsistencies that create a conundrum for the operations of skydiving at the airport, creating an unreasonable denial of access in violation of grant assurance 22, Economic Nondiscrimination, 49 U.S. C. § 47107(a) . (Claim J)*

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<sup>19</sup> "A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the airport's land in a manner consistent with the public's interest." [Thermco, at p. 2. See also, *Santa Monica Airport Association v. Santa Monica*, FAA Docket No. 16-99-21 (February 4, 2003) (Final Decision and Order)]

<sup>20</sup> The FAA recognizes an airport sponsor's proprietary rights with regard to future planning. Airport sponsors retain the prerogative to develop their airports in any manner that meets their federal obligations and is consistent with the approved Airport Master Plan and Airport Layout Plan for that airport. [See, *Thermco*.]

<sup>21</sup> Although Skydive Sacramento withdrew the allegations under its initial Claim K, the FAA's reasoning under Issue 3 applies to Skydive Sacramento's withdrawn Claim K(3). Claim K(3) complained about the language in the Final Draft Ground Lease in Section 6(g), which states that Skydive Sacramento's rights to operate a drop zone in the Final Draft Ground Lease will terminate "in the event the FAA determines that the Drop Zone and Parachute Landing Area can no longer be operated safely." [FAA Exhibit 1, Item 1, exh. 19, section 6.]

Skydive Sacramento states:

*Section 5 of the Lease (Exhibit 19) Operation of Drop Zone sets up an irreconcilable inconsistency in the Lease, creating unjust discrimination by establishing a condition in which Complainant can be unable to comply with the Lease terms no matter what it does. The Section restates the terms of the findings of the FAA as to the procedure to safely operate a drop zone on the airport (Exhibit 3) and the Letter of Agreement between Skydive Sacramento and Northern California TRACON (4). At first glance that seems innocuous, just a routine section requiring compliance with specific guidelines from the FAA, even if it is redundant when the terms of Section 8 of the Lease requiring compliance with FAA rules. However, upon inspection it becomes an extremely clever time bomb to prevent Complainant from having access to the Airport. [FAA Exhibit 1, Item 1, p. 19.]*

The City Answers:

*In calling out Skydive's obligation to comply with both (a) the specific FAA and TRACON safety requirements that are currently in effect and (b) applicable law as it may be amended from time to time, it was never the City's intent (as insinuated by Skydive) to trap Skydive by making it impossible for Skydive to comply with its Lease. To avoid doubt, the City would be happy to insert wording in the Lease to make explicit that it is Skydive's obligation to comply with applicable FAA and TRACON safety requirements "as they may be amended from time to time" during the term of the Lease. [FAA Exhibit 1, Item 8, pp. 16-17.]*

As it did with Issue 3, above, Skydive Sacramento responds to the City's willingness to make lease changes by claiming that the language is egregious and insulting. Skydive Sacramento replies:

*Because Section 5 of the Lease is another example of blatantly unequal and discriminatory treatment of Complainant, and because it appears in no other Lease on the Airport, the appropriate response for an Order declaring it to be in violation... and striking it from the Lease. [FAA Exhibit 1, Item 9, p. 16.]*

**(1). Agreed Facts**

Section 5 of the Final Draft Ground Lease states:

*5. Operation of Drop Zone:*

*Skydiving in the drop zone or parachute landing on the Airport is allowed only when in strict compliance with the following conditions as required by the FAA Sacramento Flight Standards District Office and FAA Northern California TRACON:*

*a. Weather must meet Visual Flight Rules (VFR) standards, and present no hazard to skydivers, or present visibility conditions which would preclude pilots from maintaining visual contact with skydiving jump participants.*

- b. A Notice to Airmen (NOTAM) must be established with the FAA by Tenant advising al users of the Lincoln Regional Airport of parachute activities and the location of such activities.*
- c. Radio contact between the jump aircraft pilot and NORCAL TRACON must be established and maintained throughout the aircraft climb, jump and decent activities.*
- d. The jump aircraft pilot shall communicate with NORCAL TRACON and visually scan the Drop Zone area to ensure that aircraft are not arriving, departing or maneuvering within the vicinity of the Lincoln Regional Airport air traffic pattern prior to authorizing skydivers to depart the aircraft.*
- e. Radio transmissions will be conducted by the jump aircraft pilot on the Common Traffic Advisory Frequency (CTAF) for the Lincoln Regional Airport to alert other aircraft pilots in the area that skydiving jump activities are in progress.*
- f. All skydivers will be briefed by Tenant, and maintain control at all times, and remain clear at all times of the runway for the Lincoln Regional Airport, and to stay within the designated Drop Zone area.*
- g. Tenant shall ensure that pilots in their employ are familiar with and comply with the procedures and provisions of the FAA Northern California TRACON.*
- h. Tenant shall ensure that the jump aircraft is equipped with an operable coded radar beacon transponder having Mode 3/A 4096 code capability.*
- i. Prior to the beginning of each day's parachute activity, Tenant shall notify FAA Northern California TRACON of the scheduled beginning time of jump activity and advise of type aircraft(s) and tail number(s).*
- j. Prior to the beginning of each day's parachute activity, Tenant shall notify the Prescott Flight Service Station and file a NOTAM for the time of jump activity. Jump aircraft shall climb to altitude three to five miles west of the Airport. [FAA Exhibit 1, Item 1, exh. 19, §5.]*

Section 8a of the Final Draft Ground Lease states:

*In utilizing the Premise during the term of this Agreement, Tenant agrees to and shall comply with regulations established from time to time by City as well as all applicable ordinances, rules and regulations established by any federal, state or local government agency exercising jurisdiction over the premise and the Airport. [FAA Exhibit 1, Item 1, exh. 19, §8a.]*

***(2). Policy and Analysis***

Again, the parties do not dispute the facts of Section 5, or its allegedly confounding Section 8a. Rather, Skydive Sacramento points out that, together, they are potentially contradictory. And the City agrees in its Answer. But, Skydive Sacramento does not simply ‘agree to agree’ on the subject. In its Reply, Skydive cites section 5 as blatantly unequal and discriminatory. Upon review of section 5, the Director finds that the language is not unequal, nor discriminatory, nor unreasonable. Rather, Section 5 appears to be the prudent operating procedures applicable to skydiving, but not to other, non-skydiving activities at LHM. As stated above, skydiving is not similarly situated to other aeronautical activities currently conducted by leaseholders at LHM.

As stated above, the FAA's standard of compliance addresses what a sponsor actually does, not what specific lease language states.<sup>22</sup> Here, the City has agreed to modify the language to prevent the possibility that the specific language of Section 5 could ever conflict with the conditional language of Section 8a of the Final Draft Ground Lease.

In any case, the City has met its standard of compliance by recognizing the potential contradiction if future FAA rules should change from those stated in Section 5 and by agreeing to correct such potentially confounding language in these sections.

### ***(3). Summary of Issue 4***

The Director finds that the City recognizes the potential contradiction between Sections 5 and 8 of the Final Draft Ground Lease and meets the standard of compliance by offering to resolve the language to prevent such contradiction. In any case, the FAA knows that unforeseen contradictions often appear in leases without any malice. The City has demonstrated a compliant attitude with regard to this example. Also, we find that the language of Section 5 is prudent and reasonable. We have no objections to the parties removing the language from the lease and/or including such operational language in the airport's minimum standards or in further memorandum of agreement among the parties.

With regard to the Sections 5 and 8 of the Final Draft Ground Lease, the Director finds the City has not unjustly discriminated against Skydive Sacramento, nor unreasonably denied aeronautical access, in violation of Grant Assurance 22, *Economic Nondiscrimination*, and its obligations contained in the surplus property quitclaim deed.

### **Issue 5**

*Whether the City's actions with regard to the Complainant constitute the constructive granting of an exclusive right by means of an unreasonable denial of access and/or unjust economic discrimination in violation of grant assurance 23, Exclusive Rights, 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4).*

In view of the Analysis and Discussion above and the Findings and Conclusions below on the City's unreasonable denial of aeronautical access, it is unnecessary to consider the related allegation regarding exclusive rights, because the remedies are the same. [Skydive Paris v Henry County, FAA Docket No. 16-05-06 (Director's Determination)(January 20, 2006), at p.19.]

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<sup>22</sup> See, Self Serve Pumps, at pp. 31-32.

## 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:

- The City's denial of access to the identified drop zone at LHM to Skydive Sacramento because of the City's requirement of an unattainable, non-existent insurance provision constitutes an unreasonable denial of access to the Complainant, Skydive Sacramento, in violation of grant assurance 22 and the City's obligations contained in the surplus property quitclaim deed.
- The City's requirement that Skydive Sacramento compensate the City for Skydive Sacramento's lack of required insurance is not unjustly discriminatory because Skydive Sacramento is not similarly situated to other aeronautical service providers at LHM; and therefore, the City is not in violation of grant assurance 22 nor the City's obligations contained in the surplus property quitclaim deed with regard to unjust economic discrimination.
- The City's inclusion of certain recital language in its Final Draft Ground Lease for Sacramento Skydive does not constitute unjust economic discrimination against Skydive Sacramento, nor does it unreasonably deny aeronautical access; and therefore, does not violate grant assurance 22, *Economic Nondiscrimination*, nor the City's parallel obligations contained in the surplus property quitclaim deed.
- The City's inclusion of Sections 5 and 8 of the Final Draft Ground Lease does not constitute unjust economic discrimination against Skydive Sacramento, nor does it unreasonably deny aeronautical access; and therefore, does not violate grant assurance 22, *Economic Nondiscrimination*, nor the City's parallel obligations contained in the surplus property quitclaim deed.

### ORDER

**ACCORDINGLY**, the Director finds that the City of Lincoln is in violation of Federal grant assurance 22. The County has 30 days to submit a corrective action plan that includes allowing Skydive Sacramento reasonable access to LHM for the purposes of operating its skydiving business upon the previously established drop zone.

Failure to submit a corrective action plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or failure to complete the corrective action plan as specified therein, may lead to suspension of future grant applications for AIP discretionary grants under 49 U.S.C. § 47115 and general aviation airport grants under 49 U.S.C. § 47114(d). Further, failure of the City to comply with the terms of its surplus property deed could result in reversion of the affected airport property.

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

**MAY - 4 2011**

\_\_\_\_\_  
Date