

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

JEFF BODIN and GARLIC CITY SKYDIVING

COMPLAINANT

V.

COUNTY OF SANTA CLARA, CALIFORNIA

RESPONDENT

Docket No. 16-11-06

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a formal complaint filed in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), Title 14 Code of Federal Regulations (CFR) Part 16.¹

Jeff Bodin and Garlic City Skydiving (Complainant) have filed a formal complaint pursuant to Title 14 CFR Part 16 against the County of Santa Clara, California, (Respondent or County) owner, sponsor, and operator of the South County Airport of Santa Clara County (E16 or Airport), San Martin, California.

Complainant alleges the Respondent is engaged in economic discrimination by failing to make the airport available for skydiving in violation of Title 49 United States Code (U.S.C.) § 47107(a) and FAA Grant Assurance 22, *Economic Nondiscrimination*. Complainant also alleges violations of Grant Assurance 5, *Preserving Rights and Powers* and Grant Assurance 23, *Exclusive Rights*.

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

¹ 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.

finds the County is currently in violation of its federal obligations with respect to Grant Assurance 5, *Preserving Rights and Powers* and Grant Assurance 22, *Economic Nondiscrimination*. 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

Airport

The South County Airport of Santa Clara County (E16 or Airport) is a public-use, non-towered airport owned and operated by Santa Clara County, California. The 179-acre facility, located one nautical mile east of San Martin, is classified as a general aviation reliever airport.² [FAA Exhibit 1, Item 5, p. 23, ¶3 and FAA Exhibit 1, Item 14] The Airport has 73 based aircraft, and an estimated 42,861 annual operations occur on the single runway. [FAA Exhibit 1, Item 14] 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.* Since 1982, the County has accepted \$3,863,910 in Airport Improvement Program (AIP) grants for investments at E16. [FAA Exhibit 1, Item 15]

Complainant

Jeff Bodin is the proprietor, owner, and sole shareholder of Garlic City Skydiving, a California corporation. [FAA Exhibit 1, Item 1, p. 1] Bodin proposes to establish a commercial aeronautical activity at E16.³ He seeks “approval to land his customer skydivers on a drop zone/landing area” on E16 and “to select an appropriate site on the Airport for and from which to run his business, do training and repack parachutes.” [FAA Exhibit 1, Item 1, p. 2]

III. BACKGROUND and PROCEDURAL HISTORY

Factual Background

On February 18, 2009, the Complainant e-mails Carl Honaker, Director of Airports for Santa Clara County, to inquire about hangar space at the Airport. [FAA Exhibit 1, Item 5, exhibit 7] Mr. Honaker responds the next day, providing the Complainant with instructions for viewing and renting available hangar space. [FAA Exhibit 1, Item 5, exhibit 8]

On April 3, 2009, the Complainant meets with Carl Honaker, Director of Airports for Santa Clara County, to discuss his proposal to establish a skydiving business at South County Airport. [FAA Exhibit 1, Item 1, p. 2; FAA Exhibit 1, Item 1, exhibit 1; and FAA Exhibit 1, Item 5, p. 5, ¶3 and

² The term “reliever airport” is defined in 49 U.S.C. § 47102(22) as an airport designated to relieve congestion at a commercial service airport and to provide more general aviation access to the community. E16 serves as an important reliever airport to the Norman Y. Mineta San Jose International Airport (SJC).

³ FAA Order 5190.6B, Airport Compliance Handbook, defines “parachute activities” as an aeronautical activity in Appendix Z at 314.

p. 24, ¶5] On April 5, 2009, the Complainant sends Mr. Honaker a follow up e-mail proposing a lease arrangement. [FAA Exhibit 1, Item 5, exhibit 10]

On April 9, 2009, the Complainant meets with Carl Honaker, Director of Airports for Santa Clara County. [FAA Exhibit 1, Item 5, exhibit 11, p. 1] On April 10, 2009, the Complainant sends Mr. Honaker an e-mail thanking him for the meeting and suggesting he contact the Site Manager/Operator of the Chester County Airport in South Carolina to discuss their skydiving operations. [FAA Exhibit 1, Item 1, exhibit 18]

On April 21, 2009, the Complainant e-mails Carl Honaker, Director of Airports for Santa Clara County, summarizing his April 3, 2009 proposal. [FAA Exhibit 1, Item 5, exhibit 13]

On April 30, 2009, the Complainant discusses his proposal with Carl Honaker, Director of Airports for Santa Clara County, and follows up with an e-mail inquiring about the status of his proposal. [FAA Exhibit 1, Item 5, exhibit 15]

On May 7, 2009, the Complainant e-mails Carl Honaker, Director of Airports for Santa Clara County, to follow up on a discussion from the previous day. [FAA Exhibit 1, Item 1, exhibit 19] The Complainant questions several statements made by Mr. Honaker during the discussion and describes them as, “outside the County’s commitments to the federal Airport Improvement Grant’s Compliance Agreement.” [FAA Exhibit 1, Item 1, exhibit 19, p. 1] The Complainant also proposes to lease a building currently used for nonaeronautical purposes at fair market value. [FAA Exhibit 1, Item 1, exhibit 19, p. 1]

On May 11, 2009, the Complainant sends an e-mail to Racior Cavole, Airports Compliance Specialist in the FAA’s San Francisco Airports District Office (ADO), outlining his attempts to establish a skydiving business at the Airport. [FAA Exhibit 1, Item 1, exhibit 20]

On May 19, 2009, the Complainant sends an e-mail to Carl Honaker, Director of Airports for Santa Clara County, inquiring about two possible leasehold areas. [FAA Exhibit 1, Item 5, exhibit 17]

On May 28, 2009, the Complainant initiates an informal complaint under 14 CFR Part 13.1, Investigative Procedures, alleging violations of Grant Assurances 22 and 23. [FAA Exhibit 1, Item 1, exhibit 3] The Complainant’s letter to the San Francisco ADO states:

On 5/6/2009, I stopped by the County’s administrative office without invite while Mr. Honaker was there and met with him, and was told that:

- *The County cannot and will not lease a small portion of land on the proposed landing area, or any other area of the airport property for a building (temporary, self-contained or otherwise) as the County believes it will require modification of their Master Plan, require the County to publish or open-bid RFQs [requests for qualifications] for any potential leases of any airport*

property for business purposes, and interrupt current ongoing Environmental Impact studies, and

- *The County will not lease one or more hangers (sic) for the purpose of Garlic City Skydiving to operate its aeronautical business out of, as this is not allowed and against County policy (the County has stated that allowing a business to be run out of a hanger (sic) might enable competition to the one FBO⁴ on property), and*
- *Although South County Airport has agreed to allow us to use the proposed/identified landing area in our proposal for skydivers, the County recommends 'leasing' of farm land adjacent to the airport for 'through-the-fence' access, and lastly*
- *Any use of a landing area at the airport would be 'temporary' and only be available until the airport implements their 'Master Plan' and the County leases the proposed landing area to a second FBO, at which time our operations would need to cease.*

[FAA Exhibit 1, Item 1, exhibit 3, p. 1]

On June 8, 2009, Racior Cavole, Airports Compliance Specialist in the San Francisco ADO, notifies the Respondent of the informal complaint.⁵ [FAA Exhibit 1, Item 17] The letter advises the Respondent of its responsibilities with regard to Grant Assurance 22, *Economic Nondiscrimination*, and asks the Respondent to reply within ten working days of the receipt of the letter. [FAA Exhibit 1, Item 17]

On July 21, 2009, the Complainant sends a letter to Santa Clara County Supervisor Gage about his attempts to establish a skydiving business at the Airport. [FAA Exhibit 1, Item 1, exhibit 22]

On August 13, 2009, the Complainant sends an e-mail to Racior Cavole, Airports Compliance Specialist in the San Francisco ADO, inquiring about the status of his informal complaint. [FAA Exhibit 1, Item 1, exhibit 23]

On August 17, 2009, Racior Cavole, Airports Compliance Specialist in the San Francisco ADO, sends the Respondent a letter. [FAA Exhibit 1, Item 1, exhibit 4] This letter states that the County has not responded to the allegations in the informal complaint, and the ADO concludes

⁴ A fixed-base operator (FBO) is a commercial entity providing multiple aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. [FAA Order 5190.6B, Appendix Z at 314]

⁵ Although this letter is dated May 8, 2009, the Director believes this letter was sent on June 8, 2009. The footer of the letter describes the file path as, "SFO-627/CAVOLE/X2778/06-08-09/FILE:ca, SANTA CLARACOUNTY/SITE5". In addition, the San Francisco Airports District Office located the file copy in its June 2009 reading files.

it:

...can find no reason for the County to refuse access to Mr. Bodine (sic) to conduct skydiving operations at South County Airport. This determination is conditioned upon an acceptable lease agreement, incorporating all applicable FAA requirements. Failure to adhere to this determination may put the County in noncompliance with its Federal Sponsor Grant Assurances, and jeopardize the receipt of future federal funding.

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

On August 19, 2009, the Complainant sends an e-mail to Santa Clara County Supervisor Gage and a Board of Supervisors employee outlining the FAA's August 17, 2009 letter. [FAA Exhibit 1, Item 1, exhibit 24]

On August 21, 2009, Carl Honaker, Director of Airports for Santa Clara County, sends an e-mail to Raciore Cavole, Airports Compliance Specialist in the San Francisco ADO, with the County's response to the informal complaint attached. [FAA Exhibit 1, Item 5, exhibit 6] The County's letter states:

The County's refusal is based on two concerns. The most important being the potential safety issues that this type of operation could create in the airspace over and around the South County Airport. The second concern is that nowhere in the County's Master Plan or FAA approved Airport Layout Plan does it show any available locations at the airport for future Specialized Aviation Service Organizations such as this type of business.

[FAA Exhibit 1, Item 5, exhibit 6, sub. exh. A, p. 1]

On September 2, 2009, the Complainant meets with Santa Clara County Supervisor Gage. [FAA Exhibit 1, Item 1, exhibit 5]

On October 16, 2009, the Complainant sends an e-mail to the FAA's Northern California Terminal Radar Approach Command Facility (TRACON) Traffic Management Officer requesting a short letter in support of Garlic City Skydiving's proposed operations at the Airport. [FAA Exhibit 1, Item 1, exhibit 25]

On December 3, 2009, the FAA's San Jose Flight Standards District Office (FSDO) conducts a safety review of the proposed parachute drop zone at South County Airport. [FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A] The December 9, 2009 memorandum from John R. Howard, Manger, San Jose FSDO to Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, states:

Based upon the results of the December 3, 2009, safety review it has been determined that the proposed drop zone on the South County Airport of Santa

Clara County could be supported from a safety standpoint if the nine (9) conditions stipulated (attached) were agreed to by Mr. Garcia, Mr. Bodine (sic), and Mr. Honaker.

[FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A]

On February 10, 2010, Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, sends e-mail to Carl Honaker, Director of Airports for Santa Clara County, stating that the FAA completed an evaluation of skydiving at South County Airport and determined that skydiving can be safely accommodated by adhering to the conditions contained in the FSDO's memo. [FAA Exhibit 1, Item 1, exhibit 6]

On February 16, 2010, the Complainant e-mails Carl Honaker, Director of Airports for Santa Clara County, to inquire about the status of an agreement with the County. [FAA Exhibit 1, Item 5, exhibit 18] The e-mail states the Complainant is working with the FBO to find space and notes the skydiving operation will only need to use a small portion of a 14-acre parcel. [FAA Exhibit 1, Item 5, exhibit 18]

On February 19, 2010, the Complainant sends a follow up e-mail to Carl Honaker, Director of Airports for Santa Clara County, identifying a three-acre square on the south-west corner of the airport as the proposed landing area. [FAA Exhibit 1, Item 5, exhibit 19]

On March 9, 2010, Lawrence Feldman, a Santa Clara County employee, sends an email to the Complainant outlining the bid process for a lease at the Airport. [FAA Exhibit 1, Item 1, exhibit 28]

On March 10, 2010, the Complainant writes Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, expressing concerns about the County's process for providing a lease. [FAA Exhibit 1, Item 1, exhibit 28]

The Complainant alleges that the County decides to develop a use permit for Garlic City Skydiving and charge a use fee on April 10, 2010. [FAA Exhibit 1, Item 1, exhibit 30, p. 1] The Complainant also claims that Carl Honaker, Director of Airports for Santa Clara County, advises the Complainant that the Board of Supervisors will approve the use permit and fee at their early May, 2010 meeting. [FAA Exhibit 1, Item 1, exhibit 30, p. 1] But later in the month, on April 30, 2010 Mr. Honaker advises the Complainant that the Board of Supervisors only needs to review the fee structure, and that review will be delayed until the late May, 2010 meeting. [FAA Exhibit 1, Item 1, exhibit 30, p. 1]

According to the Complainant, on May 4, 2010, Carl Honaker, Director of Airports for Santa Clara County, advises the Complainant that the Board's review of the fee structure will be delayed until the June 8, 2010 meeting. [FAA Exhibit 1, Item 1, exhibit 30, p. 1]

On June 11, 2010, Carl Honaker, Director of Airports for Santa Clara County, tells the Complainant that the Board of Supervisors must review the use permit, in addition to the fee

structure, and that will be delayed until the mid-August, 2010 meeting due to a six-week summer hiatus. [FAA Exhibit 1, Item 1, exhibit 30, p. 2]

On June 14, 2010, the Complainant sends an e-mail to Santa Clara County Supervisor Gage expressing his frustration with the County's Airports Office. [FAA Exhibit 1, Item 1, exhibit 30]

On June 23, 2010, the Santa Clara County's Deputy Chief Counsel sends a letter to the Complainant stating:

I understand from staff that you are seeking to commence skydiving operations at a proposed drop zone located on County property at South County Airport. County Counsel has recently been advised of this proposed operation and we are currently reviewing and analyzing the legal issues associated with the proposed operation. The Board of Supervisors will consider the proposed operation in August.

[FAA Exhibit 1, Item 1, exhibit 7]

On June 30, 2010, Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, sends an e-mail to Carl Honaker, Director of Airports for Santa Clara County, inquiring about the status of the negotiations between the parties. [FAA Exhibit 1, Item 1, exhibit 31]

On August 3, 2010, Michael Murdter, Director of Roads and Airports Department of Santa Clara County, sends a memorandum to the County Board of Supervisors recommending the Board disapprove Garlic City Skydiving's proposal to conduct skydiving operations with a landing zone on the Airport's property. [FAA Exhibit 1, Item 5, exhibit 20] The memo states:

Staff does not believe the FAA's conditions are sufficient to mitigate the risk of potential conflict between a skydiver and an aircraft. Each of the FAA's nine conditions would have to be executed perfectly for every jump to avoid a mishap.

[FAA Exhibit 1, Item 5, exhibit 20, p. 3]

The FAA's sole condition relating to the risk of landing somewhere other than the LZ is to require jumpers to be briefed to remain clear of the runway and stay within the designated drop zone. We highly doubt that a jumper would intentionally land on the runway, or anywhere else outside the drop zone for that matter. It is inevitable that, sooner or later, a skydiver will miss the LZ.

[FAA Exhibit 1, Item 5, exhibit 20, p. 3]

Staff compared the proposed skydiving operation at the Airport to five other General Aviation airports in Northern California that currently have a LZ on airport property or propose to establish a LZ on airport property. In each case,

the established LZ is much larger than three acres and therefore allows for a larger margin of error on the part of the skydiver.

[FAA Exhibit 1, Item 5, exhibit 20, p. 4]

On August 12, 2010, the Complainant discusses his proposal with legal counsel from Santa Clara County. [FAA Exhibit 1, Item 5, exhibit 21] County staff advise the Complainant that the Roads and Airports Department will recommend the Board of Supervisors deny Garlic City Skydiving's proposal to conduct skydiving at the Airport due to safety concerns. [FAA Exhibit 1, Item 5, exhibit 21, p. 2]

On August 13, 2010, Michael Murdter, Director of Roads and Airports Department of Santa Clara County, sends the Complainant a letter stating that his department objects to the establishment of a landing zone on the airport, but does not object to allowing the Complainant's business to be based at the Airport. This letter also explains that the Board of Supervisors will consider the Complainant's proposal at its August 24, 2010 meeting. [FAA Exhibit 1, Item 1, exhibit 10]

On August 15, 2010, the Complainant sends an e-mail to Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, stating he will receive a written rejection from the County this week. [FAA Exhibit 1, Item 5, exhibit 22, p. 2]

On August 17, 2010, Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, sends an e-mail to Carl Honaker, Director of Airports for Santa Clara County, asking why skydiving cannot occur at the Airport given that the FAA has concluded the Airport is suitable for skydiving. [FAA Exhibit 1, Item 5, exhibit 22, pp 1-2] The next day, Mr. Honaker responds to Mr. Garcia, stating the issue is on the Board's August 24, 2010 agenda, and he attaches the memorandum prepared by the Director of Roads and Airports Department of Santa Clara County. [FAA Exhibit 1, Item 5, exhibit 22, p. 1] On August 19, 2010, Mr. Garcia responds, "you are using a strategy to make it appear that skydiving is not tenable at South County Airport. Strangely, the same strategy could be used to purport that other aeronautical activities are untenable at South County Airport." [FAA Exhibit 1, Item 5, exhibit 24]

On August 24, 2010, the County Board of Supervisors rejects the Complainant's proposal to conduct skydiving operations with a landing zone at the Airport. [FAA Exhibit 1, Item 1, exhibit 32 and FAA Exhibit 1, Item 5, exhibit 38, p. 14]

On August 25, 2010, Anthony Garcia, Airports Compliance Program Manager in the FAA's Western Pacific Region, sends a letter to Carl Honaker, Director of Airports for Santa Clara County. [FAA Exhibit 1, Item 1, exhibit 11] This letter states, "the County is not complying with Grant Assurances 5 and 22" and notes the FAA's expectation for the County to take appropriate corrective action. [FAA Exhibit 1, Item 1, exhibit 11, p. 2]

On August 31, 2010, the Complainant sends Michael Murdter, Director of Roads and Airports Department of Santa Clara County, an e-mail reiterating his desire to renew discussions regarding his skydiving business proposal. [FAA Exhibit 1, Item 1, exhibit 12]

On September 22, 2010, Michael Murdter, Director of Roads and Airports Department of Santa Clara County, writes a letter to Mark McClardy, Manager of the FAA's Western Pacific Airports Division, objecting to the region's August 25, 2010 determination. This letter states:

The grant assurances authorize the County to prohibit or limit an aeronautical activity if necessary for the safe operation of the airport. Here, the County has determined that the proposal to drop skydivers through the middle of the congested V-485 airway (the main approach route to SJC) and expect them to land on a tiny three-acre landing zoning (LZ) at E16 presents significant risks to the safe operation of E16. The County has concluded that these risks cannot be adequately mitigated.

[FAA Exhibit 1, Item 1, exhibit 13, p. 1]

The letter notes that the County will not initiate any corrective action to make the Airport available for skydiving. [FAA Exhibit 1, Item 1, exhibit 13, p. 2]

On December 23, 2010, Mark McClardy, Manager of the FAA's Western Pacific Airports Division, sends a letter to Michael Murdter, Director of Roads and Airports Department of Santa Clara County, stating the FAA is evaluating the County's reasons for prohibiting skydiving at the Airport. [FAA Exhibit 1, Item 5, exhibit 39] The letter states:

...I will ask both our Flight Standards Division and our Air Traffic Organization to assist my organization with conducting a more comprehensive review of the proposed skydiving operations at E16.

[FAA Exhibit 1, Item 5, exhibit 39]

On March 24, 2011, Nicholas Reyes, Manager of FAA's Flight Standards Division for the Western Pacific Region, sends a memorandum to Mark McClardy, Manager of the FAA's Western Pacific Airports Division. [FAA Exhibit 1, Item 1, exhibit 14, sub. exh. A] This memo notes the safety review report provided by the San Jose FSDO on December 3, 2009, is correct, adding :

The proposed drop zone's location relative to a significant amount of [Visual Flight Rules] and [Instrument Flight Rules] traffic will require strict compliance by Garlic City Skydiving with 14 CFR § 91.123 and § 105, and close coordination with Air Traffic Control. Additional safety margins may be secured through a Letter of Agreement between [Northern California Terminal Radar Control

Facility] and Garlic City Skydiving, as outlined in FAA Order 7210.3W.

[FAA Exhibit 1, Item 1, exhibit 14, sub. exh. A]

On March 29, 2011, Ronald G. Beckerdite, Director of FAA's Western Service Center, sends a memorandum to Mark McClardy, Manager of the FAA's Western Pacific Airports Division. [FAA Exhibit 1, Item 1, exhibit 14, sub. exh. B] Although the memo notes that moving the landing zone several miles away from the airspace corridor over the airport would be preferable, the memo concludes:

Based on the analysis of air traffic operations over E16, the conclusion of the [Western Service Center] is the operation can be conducted as proposed with appropriate mitigations to ensure safety.

[FAA Exhibit 1, Item 1, exhibit 14, sub. exh. B, p. 1]

On April 4, 2011, Mark McClardy, Manager of the FAA's Western Pacific Airports Division, writes a letter to Michael Murdter, Director of Roads and Airports Department of Santa Clara County, to discuss the findings of the Region's second safety analysis of skydiving at E16. [FAA Exhibit 1, Item 1, exhibit 14] This letter states, "FAA has concluded that the proposed skydiving operation would be operated in the safest manner if relocated to an area several miles away from airspace corridors similar to those existing over E16." [FAA Exhibit 1, Item 1, exhibit 14, p. 1] However, the letter concludes that skydiving can be safely accommodated at E16 if specific conditions are met, and asks the County "to end its skydiving prohibition at E16." [FAA Exhibit 1, Item 1, exhibit 14, p. 2]

On April 5, 2011, the Complainant writes a letter to Mark McClardy, Manager of the FAA's Western Pacific Airports Division, outlining actions Garlic City Skydiving will take to comply with the FAA's conditions for skydiving at the Airport. [FAA Exhibit 1, Item 5, exhibit 3, sub. exh. A]

On April 25, 2011, the Complainant contacts a Board of Supervisors employee to inquire about Garlic City Skydiving's use permit. [FAA Exhibit 1, Item 5, exhibits 4 and 5] The employee advises the Complainant to work directly with Carl Honaker, Director of Airports for Santa Clara County. [FAA Exhibit 1, Item 5, exhibit 4] On April 26, 2011, the Complainant contacts Mr. Honaker regarding the use permit. [FAA Exhibit 1, Item 5, exhibit 4]

On May 2, 2011, Michael Murdter, Director of Roads and Airports Department of Santa Clara County, writes a letter to Mark McClardy, Manager of the FAA's Western Pacific Airports Division, requesting clarification on statements made in the April 4 determination and opposing FAA's decision to allow skydiving operations that are not conducted in the safest manner.⁶ [FAA Exhibit 1, Item 1, exhibit 15]

⁶ The Director will respond to the specific questions raised by the Respondent in Section IV of this Determination below.

Procedural History

On June 14, 2011, FAA received the Complaint. [FAA Exhibit 1, Item 1]

On July 1, 2011, FAA docketed Jeff Bodin and Garlic City Skydiving v. County of Santa Clara, California. [FAA Exhibit 1, Item 2]

On July 1, 2011, the Complainant filed a motion to expedite the handling of the Complaint and requested an order to deny the Respondent any extensions of time to file its pleadings. [FAA Exhibit 1, Item 3]

On July 6, 2011, the Respondent opposed the Complainant's motion to expedite the handling of the Complaint. [FAA Exhibit 1, Item 4]

On July 20, 2011, the Respondent filed an Answer, Statement of Facts, and Affirmative Defenses; a Motion to Dismiss; and a Memorandum in Support of Respondent's Motion to Dismiss. [FAA Exhibit 1, Items 5, 7, and 8]

On July 30, 2011, the Complainant filed its Reply. [FAA Exhibit 1, Item 10]

On August 9, 2011, the Respondent filed a Rebuttal. [FAA Exhibit 1, Item 11]

On August 25, 2011, the FAA denies the Complainant's motion filed on July 1. [FAA Exhibit 1, Item 13]

On December 1, 2011, the FAA extended the due date of the Director's Determination to on or before December 22, 2011. [FAA Exhibit 1, Item 20]

IV. ISSUES

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

- Whether the Respondent is in violation of Grant Assurance 22, *Economic Nondiscrimination* by refusing the Complainant's request to establish a drop zone at the South County Airport.
- Whether the Respondent's refusal to allow an on-airport drop zone at South County Airport constitutes a violation of Grant Assurance 5, *Preserving Rights and Powers*.
- Whether the Respondent's refusal to allow an on-airport drop zone at the South County Airport results in a constructive granting of an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*, 49 U.S.C. §40103(e) and 49 U.S.C. § 47107(a)(4).

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

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

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.

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.⁷ 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.

⁷ *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.

Three FAA grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 5, *Preserving Rights and Powers*; (2) Grant Assurance 22, *Economic Nondiscrimination*; and (3) Grant Assurance 23, *Exclusive Rights*.

Grant Assurance 5, Preserving Rights and Powers

Grant Assurance 5, *Preserving Rights and Powers*, (Assurance 5) requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its federal obligations. This assurance implements the provisions of the AAIA, 49 U.S.C. § 47107(a), et seq., and requires, in pertinent part, that the owner or sponsor of a federally obligated airport “...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.”

Assurance 5 requires, in pertinent part, that the sponsor of a federally obligated airport:

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

[Assurance 5]

Grant Assurance 22, Economic Nondiscrimination

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

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

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

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

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [See FAA Order 5190.6B, ¶14.3]

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

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

Grant Assurance 23, *Exclusive Rights*

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, *FAA Airport Compliance Manual*, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application

of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See e.g. *Pompano Beach v FAA*, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See Order, Sec.11.2.]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [See Order, Sec. 8.9.d *Space Limitation*.]

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

The FAA Airport Compliance Program

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

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program. The Order establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of federal funds or the conveyance of federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-

administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (8/30/01) *Wilson Air Center, LLC v FAA*, 372 F.3d 807 (6th Cir. 2004)]

FAA Enforcement Responsibilities

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

VI. ANALYSIS AND DISCUSSION

Dismissal of Motions

During the time for submission of pleadings, both parties filed motions asking the FAA to take specific actions.

Complainant's Motion

On July 1, 2011, the Complainant filed a motion requesting the FAA expedite its handling of the Complaint and deny the Respondent any request for additional time to respond. [FAA Exhibit 1, Item 3] The Respondent opposed this motion. [FAA Exhibit 1, Item 4] On August 25, 2011, the FAA denied motion. [FAA Exhibit 1, Item 13] In this case, the Director was not able to expedite the handling of the complaint due to limited resources; there are other formal complaints and investigations that are ongoing as well, in addition to other compliance work. The motion is denied.

Respondent's Motion

On July 20, 2011, the Respondent filed a motion to dismiss the Complaint. [FAA Exhibit 1, Item 7] Among the five reasons listed by the Respondent in support its motion, the Respondent asserted, "Complainant's evidence is insufficient to warrant an investigation" by the FAA. [FAA Exhibit 1, Item 7, p. 1] The Director disagrees. The FAA accepted this Complaint under both 14

CFR Part 13.1 and Part 16 because the Complainant raised colorable issues related to the County's obligations under its federal grant agreements. Specifically, the Complainant alleges the unlawful denial of access. As is noted in the Respondent's motion to dismiss and discussed at length below, the Respondent claims it can deny access because of the plain language contained in the grant assurances. [FAA Exhibit 1, Item 7, p. 2] The Director will thoroughly respond to the other four reasons below.

Informal Investigation and Findings

The Complaint makes several statements regarding the FAA's informal investigation (which predated the filing of this formal complaint) that require clarification.

The Complainant submitted an informal Complaint to the San Francisco Airports District Office (ADO) on May 28, 2009. [FAA Exhibit 1, Item 1, exhibit 3] The ADO advised the Respondent of the Complaint on June 8, 2009, and the record indicates the ADO and the Respondent had a conversation about the matter.⁸ [FAA Exhibit 1, Item 17 and FAA Exhibit 1, Item 5, exhibit 6, p. 1] However, the record does not describe what further steps the ADO took to actually investigate the Complaint. As such, the Director is unclear as to why the ADO would make an informal determination regarding the sponsor's compliance with its grant assurances in the matter. [FAA Exhibit 1, Item 1, exhibit 4] The Director believes the San Francisco ADO erred, and disregards the Complainant's statement that the FAA's August 17, 2009 letter to the Respondent represents the "First FAA Directive to County to Allow Airport Access" as stated in the Complaint. [FAA Exhibit 1, Item 1, p. 4]

On December 3, 2009, the San Jose Flight Standards District Office (FSDO) conducted a safety review of the proposed parachute drop zone at South County Airport. [FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A] The Airports Compliance Program Manager in the FAA's Western Pacific Region warns the Respondent that, "a prohibition of skydiving would not be a reasonable condition and would unjustly discriminate against an aeronautical activity." [FAA Exhibit 1, Item 1, exhibit 6] However, this e-mail does not constitute a formal determination regarding the sponsor's compliance with its grant assurances.

The FAA inquired about the status of the ongoing negotiations between the parties on June 30, 2010, and advised the Complainant of the FAA's communication with the sponsor on July 13, 2010. [FAA Exhibit 1, Item 1, exhibit 31 and FAA Exhibit 1, Item 1, exhibit 8] However, the FAA's July 13, 2010 e-mail to the Complainant, stating, "I contacted Carl Honaker [Airport Manager] and informed him that the delay reviewing the skydiving proposal amounts to a denial of access if a decision cannot be reached because the review process has no end" does not constitute a formal FAA determination regarding the sponsor's compliance with its grant assurances. [FAA Exhibit 1, Item 1, exhibit 8]

⁸ See Footnote 5.

On August 25, 2010, the FAA's Western Pacific Airports Division provides an informal determination regarding the sponsor's noncompliance with Grant Assurances 5 and 22.⁹ [FAA Exhibit 1, Item 1, exhibit 11] The sponsor appeals this decision to the Manager of the FAA's Western Pacific Airports Division who agrees to coordinate "a more comprehensive review of the proposed skydiving operations" at the Airport. [FAA Exhibit 1, Item 1, exhibit 13 and FAA Exhibit 1, Item 5, exhibit 39] On April 4, 2011, the Manager of the FAA's Western Pacific Airports Division advises the sponsor of the Region's safety assessment and directs the sponsor to take corrective action. [FAA Exhibit 1, Item 1, exhibit 14] However, the Director notes the Region's guidance lacked clarity and misstated the FAA's findings with regard to skydiving on the Airport.

Formal Complaint

The Respondent's Answer states:

The complaint fails to provide a clear and concise statement of the facts that Complainant relies upon, as required by 14 CFR § 16.23(b)(3). Instead, the complaint is a medley of sensationalized factual allegations and legal arguments, presented in a story-like fashion, rather than consecutively numbered paragraphs. Admittedly, this has made it difficult for the County to fully understand and prepare a response to the Complainant's factual allegations.

[FAA Exhibit 1, Item 5, p. 4]

In support of its claim, the Respondent cites 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) at 55 (Carey, DD, 16-06-06). [FAA Exhibit 1, Item 5, p. 4, fn 2] The Director disagrees with this comparison, and notes that the extant Complaint can be distinguished from Carey, DD, 16-06-06. In Carey, DD, 16-06-06, the Director found that the Complainant misplaced the burden of proof. In fact, the Director stated:

Throughout the administrative record, Complainants argue that Respondent's failure to refute Complainants' claims with evidentiary support is proof of the allegation. This is not correct. 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).] For many of the issues raised, Complainants did not meet this burden. Although Complainants submitted over 300 pages in exhibits, they consistently failed to explain how the individual exhibits supported specific allegations. Nonetheless, FAA reviewed all documents submitted in this Complaint to determine whether allegations could be supported by the

⁹ This is consistent with 14 CFR Part 13.1(b) which states, "Each report made under this section, together with any other information the FAA may have that is relevant to the matter reported, will be reviewed by FAA personnel to determine the nature and type of any additional investigation or enforcement action the FAA will take."

administrative record.

[Carey, 16-06-05, at 55]

Unlike in Carey, DD, 16-06-05, the extant Complaint does not attempt to shift the burden of proof. The evidentiary support provided by the Complainant is substantial. The Complainant's statement of facts and evidentiary support raise serious allegations that merit the Director's review.

Terminology

The Respondent seeks to imply that the term "landing zone" is different from the term "drop zone." The term "drop zone" is defined in 14 CFR Part 105.3 as:

Drop Zone means any pre-determined area upon which parachutists or objects land after making an intentional parachute jump or drop...

Title 14 CFR Part 105, Parachute Operations, does not define "landing zone." Therefore, the Director will not recognize any distinctions between the terms "landing zone" and "drop zone" and may use these terms interchangeably.

Complainant's Prayer for Relief

The Complaint includes a prayer for relief asking the Director to issue an order requiring:

That Santa Clara County, California issue all necessary permits under reasonable terms to allow Complainant to begin operation of his commercial skydiving business, identifying and allow use of a landing area on South County Airport within thirty days;
That Santa Clara County, California take no action to prevent Complainant from beginning operation of his commercial skydiving business onto a landing area on South County Airport within thirty days; and
That Santa Clara County, California take no retaliatory action against Complainant for filing this Complaint;
That Santa Clara County be immediately deemed ineligible to receive any federal Grants for any of its three airports because, at the time this Complaint was made, it had been found to be in violation of its Grant Assurances, the violation is continuing and has not been corrected by the County (the request for Relief Desired includes denying the request for \$400,000 for the Airport the County is about to submit to the FAA);
And, if Santa Clara County, California has not complied fully with the above within thirty days that, Santa Clara County, California repay all Federal grant money it has received for all its County airports.

[FAA Exhibit 1, Item 1, pp 23-24]

In its Reply, the Complainant amends this prayer for relief to include:

...an Order requiring Respondent to provide or otherwise approve the rental of space on the Airport to Bodin, from which to run his business, at the going rental rate for office and/or hangar space.

[FAA Exhibit 1, Item 10, p. 9, ¶E]

The FAA's Office of Airport Compliance (ACO) does not mediate or arbitrate negotiation disputes between airport sponsors and potential business proponents concerning issues outside the scope of the Part 16 process and a sponsor's federal Grant Assurances. Rather, ACO enforces contracts between an airport sponsor and the federal government. [*See, AmAv v. Maryland Aviation Administration*, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination), at 23]

Although the FAA has asked the Respondent to take corrective actions to ensure its compliance with its grant obligations, to date, the FAA has not made a formal finding with regard to the Respondent's compliance status. Such a decision is not made lightly. The Director relies on *Drake Aerial Enterprises, LLC d/b/a Air America Aerial Ads and James Miller v. City of Cleveland*, FAA Docket No. 16-09-02, at 16 (February 22, 2010) (Director's Determination), (*Drake Aerial Enterprises*, DD, 16-09-02) to stress the purpose of the FAA's Compliance Program:

The grant assurances serve to protect the public's interest in civil aviation and achieve compliance with Federal law. Therefore, the goal of the FAA's Compliance Program is to benefit aviation users through the voluntary compliance of airport sponsors. These concepts are central to the FAA's Compliance Program. However, the Complainant ultimately misinterprets this mission in its request for relief. The Complaint requests that the FAA not only compel the Respondent to provide immediate access to the Airport for the purpose of banner towing, but also seeks to terminate the sponsor's eligibility for Federal investment. [FAA Exhibit 1, Item 2, ¶46] The Director believes this misconception should be clarified to assist the Complainant in its understanding of the FAA Compliance Program as well as relief available through the Part 16 complaint process. The FAA generally takes punitive compliance actions, such as withholding funds under 49 U.S.C. § 47114, when reasonable efforts have failed to achieve voluntary compliance. [*See* FAA Order 5190.6B ¶2.4.(a.)] This is because aviation users receive direct benefits from the Federal investments made at public use airports via grants from the FAA to airport sponsors. The FAA's decision to withhold these funds can potentially deprive aeronautical users of the benefit of capital improvements which may enhance safety or expand capacity.

Consistent with the goals of the FAA's Compliance Program, any Orders issued by the Director are written to ensure the airport sponsor becomes compliant with its assurances. This may not necessarily provide the relief requested by the complainant.

Issue (1)

Whether the Respondent is in violation of Grant Assurance 22, *Economic Nondiscrimination* by refusing the Complainant’s request to establish a drop zone at the South County Airport.

The Complaint states:

The County has ignored five directives from the FAA to allow Complainant Airport access.

[FAA Exhibit 1, Item 1, p. 17]

The Respondent answers:

The County denies the Complainant has applied to become a commercial aeronautical user of the South County Airport (“Airport”).

[FAA Exhibit 1, Item 5, p. 5, ¶1]

Complainant portrays the County as unwilling to permit his skydiving business to operate at the Airport. This is not accurate. The County Board of Supervisors [the “Board”] has publicly supported Complainant’s, or any other skydiving operation’s, use of the Airport for take-off and landing of jump aircraft. The County, however, objects to a landing zone located on Airport property because the safety risks cannot be mitigated. The County is unwilling to accede Complainant’s relentless demands to operate a landing zone on Airport property. The County has reasonably exercised its authority under 14 CFR § 105.23(b), in accordance with 14 CFR § 105.5, and the Airport Rules and Regulations (the “Airport Rules”) to not grant Complainant to operate a landing zone on Airport property because of the hazards it will create to air traffic or persons or property on the surface.^{10,11} The County has a duty to ensure safety to persons and property in the air and on the ground.

[FAA Exhibit 1, Item 5, pp 22-23, ¶2]

Grant Assurance 22 requires an airport sponsor to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. FAA Order 5190.6B clearly defines

¹⁰ Title 14, CFR Part 105.23(b) requires individuals proposing to conduct parachute operations at non-towered airports, like E16, to obtain prior approval from the airport’s management.

¹¹ Title 14 CFR Part 105.5 states, “No person may conduct a parachute operation, and no pilot in command of an aircraft may allow a parachute operation to be conducted from an aircraft, if that operation creates a hazard to air traffic or to persons or property on the surface.”

parachute activities as an aeronautical activity. [FAA Order 5190.6B, Appendix Z at 314] Therefore, the Director must determine if the Complainant has indeed been unlawfully denied access.

The evidence of record clearly indicates an ongoing pattern in which the Respondent either objects to the Complainant's entire proposal or key elements of it. E-mails from the Complainant to the Respondent and the FAA describe numerous objections. From approximately May 2009 through mid-August 2010, the Respondent conveyed the following objections to the Complainant:

- Skydiving is not allowed at the Airport. [FAA Exhibit 1, Item 1, exhibit 20, p. 1]
- There is no room to house a base of operations for skydiving at the Airport. [FAA Exhibit 1, Item 1, exhibit 20, p. 1]
- Leasing land to the Complainant could require the Respondent to modify its Master Plan. [FAA Exhibit 1, Item 1, exhibit 3, p. 1; FAA Exhibit 1, Item 1, exhibit 19, p. 1; FAA Exhibit 1, Item 1, exhibit 21; and FAA Exhibit 1, Item 5, exhibit 6, p. 1]
- The County intends to use the 14 acres identified by the Complainant for a skydiving landing area to add an additional FBO. [FAA Exhibit 1, Item 1, exhibit 20, p. 1]
- Leasing land to the Complainant could require the Respondent to publish an open-bid request for qualifications.¹² [FAA Exhibit 1, Item 1, exhibit 3, p. 1; FAA Exhibit 1, Item 1, exhibit 19, p. 1; and FAA Exhibit 1, Item 1, exhibit 21]
- Leasing land to the Complainant could interrupt current ongoing environmental studies. [FAA Exhibit 1, Item 1, exhibit 3, p. 1 and FAA Exhibit 1, Item 1, exhibit 19, p. 1]
- General concerns related to the airspace over the Airport. [FAA Exhibit 1, Item 1, exhibit 20, p. 1; FAA Exhibit 1, Item 5, exhibit 6, p. 1; and FAA Exhibit 1, Item 5, exhibit 21, p. 2]
- The Respondent's informal conversations with FAA Air Traffic Organization and Flight Standards Division employees. [FAA Exhibit 1, Item 5, exhibit 6, p. 1 and FAA Exhibit 1, Item 5, exhibit 15]
- Potential conflict between skydivers and aircraft. [FAA Exhibit 1, Item 5, exhibit 20, p. 1]
- The proposed landing area's proximity to the airport's traffic pattern, and the potential to disrupt that pattern. [FAA Exhibit 1, Item 5, exhibit 21, p. 2]
- The proximity of development near the Airport. [FAA Exhibit 1, Item 5, exhibit 21, p. 2]
- Communications to other aircraft could fail. [FAA Exhibit 1, Item 5, exhibit 21, p. 2]

In mid-August 2010, the Respondent clarified its objections to the Complainant: *"the Department has no objection to allowing your business to be based at the airport; our concerns relate solely to the safety implications on airport operations of the proposed LZ [landing zone]."* [FAA Exhibit 1, Item 1, exhibit 10, p. 1] The Respondent maintains its objection to the Complainant establishing a landing zone on the Airport in its Answer and Rebuttal. [FAA Exhibit 1, Item 5, p. 22, ¶2 and FAA Exhibit 1, Item 11, p. 7, ¶15]

¹² FAA Exhibit 1, Item 1, exhibit 28 notes the Respondent began developing a bid for rental of the property at \$0.193 per square foot.

In its Memorandum in Support of Respondent's Motion to Dismiss, the Respondent asserts the Complainant has not met its burden of proof to establish a violation of Grant Assurance 22 because:

It is Complainant's Burden To Establish That: (1) The County Has Given More Favorable Treatment to Other Airport Users That Are Similarly Situated to Complainant and (2) The County Has No Legitimate Reason For the Difference in Treatment.

[FAA Exhibit 1, Item 8, p.4]

However, the Respondent ignores its more than two-year history of denying the Complainant's request to establish a drop zone on the airport. The Complainant cannot demonstrate that it is similarly situated to other users when the Respondent is objecting to the aeronautical activity the Complainant seeks to conduct.

The Complainant's Reply better captures its allegation:

Respondent is in violation of Grant Assurance 22 for unjust discrimination because it has banned a particular aeronautical activity from the Airport... not because Complainant has been charged a lease rate that is different from other commercial users at the Airport.

[FAA Exhibit 1, Item 10, p. 12]

Ultimately, the Respondent acknowledges that it has prohibited the Complainant from establishing a drop zone on the Airport. The Respondent justifies its decision based on the plain language of Grant Assurance 22(i). The Respondent states:

Therefore, the County has a legitimate reason to deny Complainant's request to operate a landing zone on Airport property.

[FAA Exhibit 1, item 8, p. 6]

The evidence of record persuasively supports the Complainant's allegation with regard to denial of access. The Director will now analyze the Respondent's reasons for prohibiting the establishment of a skydiving drop zone on the Airport to determine whether they are unreasonable or unjustly discriminatory.

Safety

Throughout the pleadings and various exhibits provided, the Respondent repeatedly states that the safety risks of establishing a skydiving landing zone on the Airport cannot be mitigated.

[FAA Exhibit 1, Item 1, exhibit 10, p. 1; FAA Exhibit 1, Item 1, exhibit 13, p. 1; FAA Exhibit 1,

Item 5, p. 2 and p. 22, ¶2; FAA Exhibit 1, Item 5, exhibit 20, p. 1; FAA Exhibit 1, Item 5, exhibit 21, p. 2; FAA Exhibit 1, Item 5, exhibit 22, sub. exh. A, p. 2; and FAA Exhibit 1, Item 11, p. 7] The Respondent further asserts that Grant Assurance 22(i) and 14 CFR Part 105.23(b) allow the Respondent to prohibit the establishment of a drop zone on the Airport.¹³ [FAA Exhibit 1, Item 8, p. 6 and FAA Exhibit 1, Item 5, p. 22, ¶2]

Although Grant Assurance 22 obligates an airport sponsor to make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, paragraph 22(i) provides for an exception to this requirement. As noted by the Respondent, paragraph 22(i) states that a sponsor may prohibit or limit any given type, kind or class of aeronautical use at the airport if such action is necessary on the grounds of safety or efficiency. The Respondent argues paragraph 22(i) “*permits the County to exercise control of the Airport sufficient to preclude unsafe and inefficient conditions, which interferes with the safe use of the Airport.*” [FAA Exhibit 1, Item 8, p. 6]

However, this Director’s Determination is guided by federal law, the grant assurances, and FAA Order 5190.6B which states:

The Associate Administrator for Airports, working in conjunction with Flight Standards and/or the Air Traffic Organization, will carefully analyze supporting data and documentation and make the final call on whether a particular activity can be conducted safely and efficiently at an airport. In all cases, the FAA is the final arbiter regarding aviation safety and will make the determination regarding the reasonableness of the sponsor’s proposed measures that restrict, limit, or deny access to the airport.

[FAA Order 5190.6B, ¶14.3.] (Emphasis added).

The FAA’s Western Pacific Region coordinated an airspace safety study with both Flight Standards and the Air Traffic Organization. On December 3, 2009, FAA employees from the San Jose Flight Standards District Office (FSDO) visited the Airport to conduct “a safety review of the proposed parachute drop zone.” [FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A, p. 1]

The memorandum from the San Jose FSDO to the FAA’s Western Pacific Region states:

Based upon the results of the December 3, 2009, safety review it has been determined that the proposed drop zone on the South County Airport of Santa Clara County could be supported from a safety standpoint if the nine (9) conditions stipulated (attached) were agreed to by Mr. Garcia, Mr. Bodine (sic), and Mr. Honaker.

[FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A, p. 1]

¹³ See Footnote 10.

The nine required conditions stipulated are:

1. *All jumps must be conducted in full compliance with 14 CFR Part 105.*
2. *A [notice to airmen] must be established and published through the appropriate aeronautical entity to advise all airport users of the parachute jump activities.*
3. *Radio contact between the jump aircraft and [Northern California] or Oakland [Air Route Traffic Control Center] must be established and maintained through the jump activity.*
4. *The jump aircraft pilot will communicate with [Northern California] or Oakland [Air Route Traffic Control Center] and visually scan the area to ensure aircraft are not entering or maneuvering within the traffic pattern prior to authorizing jumpers to depart the aircraft.*
5. *Radio transmissions will be conducted by the jump aircraft on the South County Airport of Santa Clara County advisory frequency 122.70 (CTAF/UNICOM)¹⁴ to alert anyone in the area that jump activities are in progress.*
6. *Jumpers will be briefed to maintain directional control at all times and remain clear of the runway and stay within the designated drop zone area.*
7. *Airport management will ensure the Airport Facility Directory and San Francisco Sectional charts are updated to indicate (by parachute symbol depiction) that a designated Parachute Drop Zone has been established at the South County Airport of Santa Clara County.*
8. *Airport management will ensure the advisory information is updated to advise all who utilize South County Airport of Santa Clara County that a Parachute Drop Zone has been established and its location on the airport.*
9. *Airport management will advise all aircraft operators based at South County Airport of Santa Clara County of the establishment and location of a Parachute Drop Zone at the airport.*

[FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A, p. 2]

The San Jose FSDO also recommends the Complainant notify all flight schools, flying clubs, and FBOs within a 30-nautical mile radius of the Airport at least 14 days prior to commencing skydiving activities. [FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A, p. 2]

The Respondent rejects the San Jose FSDO's determination stating:

... the FSDO determination is not supported by any written study or analysis justifying the nine conditions in light of the location of the airport, the commercial and general aviation activity in and around the airport, and how

¹⁴ The term "CTAF/UNICOM" refers to the common traffic advisory frequency/universal communications used at uncontrolled airports. UNICOM is a nongovernment air/ground radio communication station. It may provide airport information at public use airports where there is neither a tower nor a Flight Service Station. [FAA Order 5190.6B, ¶8.10.]

skydiving can be safely accommodated at the airport. The County has engaged in a robust, thoughtful, and comprehensive analysis of how skydiving with an LZ [landing zone] at E16 will impact the safe operations of the airport. To the County's knowledge, the FAA has not.

[FAA Exhibit 1, Item 1, exhibit 13, p. 2]

Although not required, the Manager of the FAA's Airports Division for the Western Pacific Region agreed to conduct "a more comprehensive review of the proposed skydiving operations at E16." [FAA Exhibit 1, Item 5, exhibit 39] As part of this review, Airports Division for the Western Pacific Region engaged both Flight Standards and the Air Traffic Organization.¹⁵

The Manager of the FAA's Western Pacific Flight Standards Division performed a review of all documents related to the Complainant's proposal for skydiving at the Airport. [FAA Exhibit 1, Item 1, exhibit 14, sub. exh. A] On March 24, 2011, the Manager of the FAA's Western Pacific Flight Standards Division confirmed that the safety review report provided by the San Jose FSDO was correct. [FAA Exhibit 1, Item 1, exhibit 14, sub. exh. A]

The Air Traffic Organization's Western Service Center conducted a review and analysis of the Complainant's proposal. On March 29, 2011, the Director of the Western Service Center provided a memorandum which states:

To ensure and enhance the safety of air traffic flying above E16 the preferable option would be for the proponent to offset their landing zone several miles away from the airspace corridor over the airport. This airspace is an active air traffic corridor with a mix of [instrument flight rules] and [visual flight rules] aircraft transiting to and from both San Jose International Airport and Reid-Hillview Airport. However, the analysis of flight data over E16 does not indicate there are constant or predictable levels of high volume traffic during the times the proponent wishes to conduct jump operations.

Based on the analysis of air traffic operations over E16, the conclusion of the [Western Service Center] is the operation can be conducted as proposed with appropriate mitigation to ensure safety. Therefore, the WSC makes the following recommendations for the proposal:

- *Garlic City Skydiving be permitted to conduct parachuting operations within a one mile radius of E16 at or below 15,000 feet [mean sea level].*

¹⁵ The first FAA safety study was conducted by the San Jose Flight Standards District Office (FSDO) on December 9, 2009. The San Jose FSDO stipulated nine conditions related to safety at the South County Airport. [FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A] The second FAA safety study was conducted by the Western Pacific Flight Standards Division and the Air Traffic Organization's Western Service Center. The second study confirmed the San Jose FSDO's recommendations and made two additional recommendations. [FAA Exhibit 1, Item 1, exhibit 14, sub. exh. A and B]

- *As specified in FAA Order 7210.3, Chapter 18, Section 4, Parachute Jump Operations, the Northern California [terminal radar approach control facility] (NCT) should negotiate a letter of agreement with Garlic City Skydiving.*

[FAA Exhibit 1, Item 1, exhibit 14, sub. exh. B]

These conclusions are also included in a presentation prepared by the Western Service Center Operations Support Group. [FAA Exhibit 1, Item 18, slide 29]

On April 4, 2011, the Manager of the FAA's Airports Division for the Western Pacific Region communicated these findings to the Respondent. [FAA Exhibit 1, Item 1, exhibit 14] However, the Director notes that this letter is unclear about the FAA's findings: "FAA has concluded that the proposed skydiving operation would be operated in the safest manner if relocated to an area several miles away from airspace corridors similar to those existing over E16." [FAA Exhibit 1, Item 1, exhibit 14, p. 1] This letter goes on to explain that the Complainant's proposal to conduct skydiving operations at E16 can be accommodated in a manner that is safe.

The memoranda provided by Flight Standards and the Air Traffic Organization state that skydiving can be conducted safely as the Complainant proposes, if certain conditions are met. The Complainant does not object to these conditions and has communicated his willingness to adhere to those conditions to both the FAA and the Respondent. [FAA Exhibit 1, Item 1, exhibit 3, sub. exh. A]

Since receiving the FAA's April 4, 2011 determination, the Respondent has continued to express the view that it cannot accommodate the Complainant:

First, we strongly concur with the FAA's conclusion 'that the proposed skydiving operation would be operated in the safest manner if relocated to an area several miles away from airspace corridors similar to those existing over E16', and believe this conclusion is in perfect alignment with the FAA's mission to 'provide the safest, most efficient aerospace system in the world.' However, your letter also indicated that Garlic City Skydiving may, at its discretion, conduct parachute jumping operations within a one mile radius of E16 at or below 15,000 feet [mean sea level]. This leads to the clear conclusion that if parachute jumping operations are in fact conducted within a one nautical mile radius of E16 at or below 15,000 feet [mean sea level], the skydiving operation would be operated in a manner that is less safe than the safest manner. Although we recognize the FAA's jurisdiction over the airspace above E16, we wish to be on the record as being opposed to the FAA's decision to allow a skydiving operation at E16 that would, by definition, not be operated in the safest manner.

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

The Respondent maintains that skydiving must be conducted in the safest manner possible in order for it to be conducted safely. [FAA Exhibit 1, Item 7, p. 2, ¶4; FAA Exhibit 1, Item 8, pp 2

and 7-9; and FAA Exhibit 1, Item 11, p. 3, ¶3] The Respondent also argues that the FAA has not thoroughly studied the Complainant's proposal:

However, the FAA has not definitively concluded that skydiving in the airspace above the Airport is safe. Furthermore, the FAA has not included any analyses regarding the safety aspects of locating the landing zone on Airport property or expressly stated its position on this issue.

[FAA Exhibit 1, Item 11, p. 5, ¶10]

These claims are not supported by the record. The evaluations conducted by the FAA were specific to the Complainant's proposal, including the proposal to establish an on-airport drop zone and prescribed specific mitigations as discussed above.

The December 9, 2009 memorandum from the San Jose FSDO states:

On December 3, 2009, personnel from the San Jose FSDO accomplished a safety review of the proposed parachute drop zone at the South County Airport of Santa Clara County.

[FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A]

The March 24, 2011 memorandum from the Western Pacific Flight Standards Division states:

Western-Pacific Region, NextGen Branch (AWP-220) performed a review of all the documents associated with the Skydiving Proposal at South County Airport (E16) of Santa Clara County (California).

[FAA Exhibit 1, Item 1, exhibit 14, sub. exh. A]

The March 29, 2011 memorandum from the Air Traffic Organization's Western Service Center states:

At the request of your office the Western Service Center (WSC) conducted a review and analysis of the proposal submitted by Garlic City Skydiving to conduct non-emergency parachute jumping over South County Airport (E16) in San Martin, CA.¹⁶

[FAA Exhibit 1, Item 1, exhibit 14, sub. exh. B]

Both Flight Standards and the Air Traffic Organization reviewed the Complainant's proposal to establish a drop zone at the Airport. Both Flight Standards and the Air Traffic Organization

¹⁶ The parameters of this analysis are described in FAA Exhibit 1, Item 18.

conclude that the Complainant's proposed operation, including the establishment of a drop zone on the Airport, can be conducted safely with the prescribed mitigations.

When making 14 CFR Part 16 findings regarding matters of aviation safety, the Director may rely on other offices within the FAA for their safety expertise and experience. In this case, the Director relies on the conclusions made by Flight Standards and the Air Traffic Organization.

The Respondent's affirmative defense attempts to substitute its judgment for the expertise of the FAA. Numerous federal courts have found that Congress intended for the federal government to occupy the entire field and thereby preempt state or local regulation of air safety. Air Transport Ass'n of America, Inc. v. Cuomo, 520 F.3d 218, 224 -225 (2d Cir. 2008); Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007) (“[T]he FAA preempts the entire field of aviation safety through implied field preemption. The FAA and regulations promulgated pursuant to it establish complete and thorough safety standards for air travel, which are not subject to supplementation by ... state laws.”). See also Abdullah v. American Airlines, Inc., 181 F.3d 363, 367-68 (3d Cir.1999), and French v. Pan Am Express, Inc., 869 F.2d 1, 5 (1st Cir.1989). The Federal Aviation Act of 1958, as amended and recodified, was enacted to create a “uniform and exclusive system of federal regulation” in the field of air safety. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). The FAA Act was passed by Congress for the purpose of centralizing in a single authority-indeed, in one administrator-the power to frame rules for the safe and efficient use of the nation's airspace.” Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960); see also British Airways Bd. v. Port Auth. of N.Y. & N.J., 558 F.2d 75, 83 (2d Cir. 1977) (“[The FAA] requires that exclusive control of airspace management be concentrated at the national level.”). Congress and the FAA have used this authority to enact rules addressing virtually all areas of air safety. These regulations range from a general standard of care for operating requirements, see 14 C.F.R. § 91.13(a) (“No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”), to the details of the contents of mandatory onboard first-aid kits. [14 C.F.R. Part 121, App. A]

For the purpose of making a final determination on reasonableness when aviation safety is at issue, FAA safety determinations pursuant to the Federal Aviation Regulations take precedence over any airport sponsor views or local ordinances pertaining to safety. [See Drake Aerial Enterprises, DD, 16-09-02 at 14; In the Matter of Compliance with Federal Obligations by the City of Santa Monica, California, FAA Docket No. 16-02-08, (July 8, 2009) (Final Agency Decision) at 9 *aff'd* City of Santa Monica v. F.A.A., 631 F.3d 550 (DC Cir) (2011); Skydive Paris Inc. v Henry County, Tennessee, FAA Docket No. 16-05-06, (January 20, 2006) (Director's Determination) at 15 (Skydive Paris, DD, 16-05-06); and Florida Aerial Advertising v St. Petersburg-Clearwater International Airport, FAA Docket No. 16-03-01, (December 18, 2003) (Director's Determination) at 11 (Florida Aerial Advertising, DD, 16-03-01)] This is especially true when the Director is asked to make a determination regarding a sponsor's compliance with its federal obligations in cases where restrictions or limitations are instituted in the interest of safety. Under 49 U.S.C. § 40103(b), the FAA develops plans and policy for the use of the navigable airspace and assigns by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.

Second, as discussed by the Complainant in its Reply, the Respondent attempts to hold the FAA to a standard which does not exist. The Complainant accurately notes:

Despite Respondent's assertions, at no place in the Grant Assurances, Statutes, Federal Aviation Regulations or FAA Orders applicable to airport grants, is it written that an aeronautical user may only be allowed on an airport if the aeronautical activity can be performed in the 'safest' manner.

[FAA Exhibit 1, Item 10, p. 6]

The FAA will not entertain the Respondent's argument that skydiving must be conducted in the safest manner possible in order for it to be conducted safely. Prohibiting aeronautical activities because they cannot be conducted in the safest manner possible has the potential to limit the utility of federally-funded airports. Taken to its extreme, this theory suggests never permitting an airplane to take-off would ensure the safest airspace system.

In pursuing its mission to provide the safest, most efficient aerospace system in the world, the FAA must balance the needs of various aeronautical users competing for use of the nation's skies. Actions which serve to prohibit classes of aeronautical users intrude into the FAA's field in a manner directly contrary to this national approach. As the United States Supreme Court stated, the FAA "requires a delicate balance between safety and efficiency . . . and the protection of persons on the ground. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." [*City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638-639 (1973)]

FAA Order 5190.6B describes the purpose for reviewing safety-based restrictions:

The purpose of any investigation regarding a safety-based or efficiency-based restriction of an aeronautical use is to determine whether or not the restricted activity can be accommodated on less restrictive terms than the terms proposed by the airport sponsor without adversely affecting the efficiency and utility of the airport. If so, the sponsor will need to revise or eliminate the restriction in order to remain in compliance with its grant assurances and federal surplus property obligations.

A complete prohibition on all aeronautical operations of one type, such as ultralights, gliders, parachute jumping, balloon and airship operations, acrobatic flying, or banner towing should be approved only if the FAA concludes that such operations cannot be mixed with other traffic without an unacceptable impact on safety or the efficiency and utility of the airport.

[FAA Order 5190.6B, ¶ 14.7.]

With regard to the Complainant's proposal, the FAA has identified mitigation measures that would ensure safety without unnecessarily limiting the utility of the Airport. Part 16 precedent is consistent with this approach. One federal court noted that

[t]he FAA's preference for a risk mitigation strategy that has no impact on utility over one that reduces [Santa Monica Municipal Airport's] utility is both logically sound and consistent with the agreements between the Petitioner and the FAA.

[Santa Monica, 631 F.3d at 17]

The Complainant correctly states that the FAA is the ultimate arbiter as to whether a ban is necessary for the safe operation of an airport, citing Florida Aerial Advertising, DD, 16-03-01 to support its statement. [FAA Exhibit 1, Item 10, p. 6] The Respondent counters:

Complainant states that the 'ultimate arbiter as to whether a ban is necessary for the safe operation of an airport is the FAA' and cites Florida Aerial Advertising v. St. Petersburg-Clearwater International Airport, FAA Docket No. 16-03-01, Director's Determination (December 18, 2003), to support this proposition. Florida Aerial Advertising provides that 'the FAA will make the final determination of the reasonableness of the restriction that denied or restricted use of the airport' and cites to FAA Order 5190.6A, Restrictions on Aeronautical Use of Airport, 4-8(a)(1). (Florida Aerial Advertising v. St. Petersburg-Clearwater International Airport, FAA Docket No. 16-03-01, Director's Determination (December 18, 2003), pg. 6) The County noted in its Answer that FAA Order 5190.6A, which has been superseded by FAA Order 5190.6B, is not regulatory and not controlling with regard to airport sponsor conduct.

[FAA Exhibit 1, Item 11, p. 3, ¶4]

The Respondent's statement that an FAA order is not regulatory is correct. FAA Order 5190.6B is not directly controlling with regard to airport sponsor conduct. [FAA Exhibit 1, Item 5, p. 19, FN 7] In fact ¶1.1 of the Order states, "[t]he Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance."

However, the Respondent is bound to the FAA by the commitments it made when it accepted federal assistance in the form of AIP grants. Among other things, the Order assists FAA personnel in interpreting the grant assurance requirements. The fact that the Respondent is not directly controlled or regulated by the Order's process for evaluating an aeronautical safety restriction does not negate the Respondent's grant assurance obligations or discount federal preemption in the realm of aviation safety.

While the County may prefer the Complainant conduct its skydiving activities further away from E16 and not utilize an on-airport drop zone, the FAA has determined that neither safety nor efficiency will be compromised by the skydiving operations as proposed by the Complainant and

conducted in accordance with Federal Aviation Regulations and mitigation measures specific to the proposed operation. The Respondent's restriction is unreasonable and constitutes a denial of access in violation of its obligations under Grant Assurance 22(a).

Respondent's Liability

After the FAA issued its April 4, 2011 determination, the Respondent raised concerns with regard to its liability under California law. [FAA Exhibit 1, Item 1, exhibit 15, p. 2] The Respondent identifies this issue in its Memorandum in Support of Respondent's Motion to Dismiss:

If the County were to approve skydiving at the Airport, it would be exposed to potential liability arising out of injuries to persons or damage to property. Even though immunity under Section 831.7 [of California's Government Code] applies to skydivers, those who assist skydivers, and spectators of skydivers, it does not apply to an individual who may be injured as a result of the skydiving activity, such as an airline passenger who is injured if a collision occurred, an adjacent property owner who experiences property damage caused by a skydiver landing on his or her property, or a driver or vehicle passenger on Highway 101. And, if the County fails to warn of a known dangerous condition that was not assumed by the participants as inherently part of the activity (for example, failing to disclose the drop zone conditions), the immunity may similarly not apply.

[FAA Exhibit 1, Item 8, pp 10-11]

The Respondent continues:

[a] substantial burden could be placed on the County's revenues if a skydiver, airline passenger, freeway user, or adjacent property owner is injured and this will, in turn, impose an impediment on the County's ability to safely operate the airport.

[FAA Exhibit 1, Item 8, pp 10-11]

The Director does not agree that the County may use the potential of increased liability exposure under state law as a means to justify excluding an aeronautical user from a federally-obligated airport. Under the County's thinking, any aeronautical activity that involved greater risk or liability than another could be legitimately banned. Under this approach, one could argue that other aeronautical activities, such as student flight training, or touch and go landings, expose the Respondent to greater liability than 'normal' flight operations conducted by pilots with greater flight experience. This approach is not consistent with the Respondent's obligations under Grant Assurance 22, *Economic Nondiscrimination*. This assurance applies to "all types, kinds and classes of aeronautical activities..." not simply the ones the Respondent prefers based on its perceived level of risk or potential liability.

In addition, the Director notes that airport sponsors can pass the costs associated with insuring skydiving on an airport on to the entities offering skydiving activities. This practice is consistent with Grant Assurance 24, *Fee and Rental Structure* and past precedent.¹⁷ In Skydive Sacramento v. City of Lincoln, CA, FAA Docket No. 16-09-09, (May 4, 2011) (Director's Determination) (Skydive Sacramento, DD, 16-09-09), the ground lease offered by the City of Lincoln to Skydive Sacramento required Skydive Sacramento to pay for the City's insurance coverage for the aeronautical activity of skydiving. The Director found this did not result in unjust economic discrimination because the insurance industry treats skydiving differently and skydiving could be distinguished from other aeronautical uses at the airport.¹⁸ [Skydive Sacramento, DD, 16-09-09 at 29]

Grant Assurance 22(a) requires the Respondent to make the Airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities. It does not permit the sponsor to pick and chose among the aeronautical activities it believes present the least amount of liability. The Director finds that prohibiting an on-airport drop zone, because it may expose the Respondent to additional liability, is unreasonable.

Respondent's Responsibilities with Regard to Skydiving at E16

On April 4, 2011, the Manager of the FAA's Western Pacific Airports Division provided the FAA's informal determination regarding the Complainant's proposal to conduct skydiving operations at E16.¹⁹ [FAA Exhibit 1, Item 1, exhibit 14] This letter summarized the mitigation measures proposed by the Western Pacific Flight Standards Division and the Air Traffic Organization's Western Service Center. In addition to the misstatement about the safety of the proposed on-airport drop zone, this letter lacks clarity about the Respondent's responsibilities ("To ensure safe operations at E16 we suggest the County review the training and safety practices required for skydiving and ensure Garlic City abides by them." [FAA Exhibit 1, Item 1, exhibit 14, p. 2]).

The Respondent's May 2, 2011 letter to the Manager of the FAA's Airports Division for the Western Pacific Region raised concerns about FAA expectations about oversight of skydiving at the Airport. The Respondent refers to the statement above:

This language implies that the County is responsible for ensuring the safe conduct of skydiving operations at the airport. The County does not have authority over, or responsibility for, the conduct of any aeronautical operation at any airport. The FAA is responsible for ensuring that aeronautical activities are conducted in

¹⁷ Grant Assurance 24, *Fee and Rental Structure*, requires an airport sponsor to maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

¹⁸ In this determination, the Director also found that City's insurance requirement for Skydive Sacramento was unreasonable because it did not exist. [See Skydive Sacramento, DD, 16-09-09 at p. 25]

¹⁹ See Footnote 9.

compliance with the Federal Aviation Regulations (FAR).

[FAA Exhibit 1, Item 1, exhibit 15, p. 2]

Similarly, the Respondent's Answer states:

The County has no professional expertise to review training and safety practices for skydiving and has no authority to enforce such practices.

[FAA Exhibit 1, Item 5, p. 26, ¶10]

On August 12, 2011, the Manager of the FAA's Airports Division for the Western Pacific Region responded to the County's May 2, 2011 letter:

Please be advised that Garlic City Skydiving must conduct its operations in accordance with applicable Federal law, such as 14 CFR § 91.23 and 14 CFR Part 105, as well as all applicable conditions listed in the safety review report provided by the San Jose Flight Standards District Office. As specified in FAA Order 7210.3W, Chapter 18, Section 4, Parachute Jump Operations, the Northern California [Terminal Radar Approach Control Facility] (NCT) should negotiate a letter of agreement with Garlic City Skydiving. The April 4, 2011 letter suggested that, as part of Garlic City Skydiving's use agreement or as terms of its tenancy, the County might also wish to require Garlic City Skydiving to comply with the conditions required by FAA; however, the County is under no obligation to do so.

Additionally, because Garlic City Skydiving seeks to offer an aeronautical service to the public, the County's grant obligations require the County to ensure this service be offered on a reasonable and not unjustly discriminatory basis to all users [see Grant Assurance 22(b)]. The County may wish to review Chapters 10 and 12 of FAA Order 5190.6B, Airport Compliance Handbook and Advisory Circular 150/5190-7, Minimum Standards for Commercial Aeronautical Activities, to better understand its oversight responsibilities with regard to aeronautical services offered at E16.

[FAA Exhibit 1, Item 16, p. 2]

The Director has reviewed the guidance provided by the Manager of the FAA's Airports Division for the Western Pacific Region in the August 12, 2011 letter and believes it clearly articulates FAA expectations with regard to the Respondent's responsibilities for skydiving at the Airport. The Director will add that the safety assessment conducted by the San Jose FSDO stipulated actions the Respondent must take to ensure skydiving is conducted in a safe manner. FAA

expects the Respondent to take these actions:

2. *A [notice to airmen] must be established and published through the appropriate aeronautical entity to advise all airport users of the parachute jump activities...*
7. *Airport management will ensure the Airport Facility Directory and San Francisco Sectional charts are updated to indicate (by parachute symbol depiction) that a designated Parachute Drop Zone has been established at the South County Airport of Santa Clara County.*
8. *Airport management will ensure the advisory information is updated to advise all who utilize South County Airport of Santa Clara County that a Parachute Drop Zone has been established and its location on the airport.*
9. *Airport management will advise all aircraft operators based at South County Airport of Santa Clara County of the establishment and location of a Parachute Drop Zone at the airport.*

[FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A, p. 2]

The FAA also expects the Respondent to meet its obligations under Grant Assurance 19, *Operation and Maintenance*.²⁰ This includes the actions stipulated by the San Jose FSDO as noted above. Although the Respondent may wish to require the Complainant to take the actions stipulated by the FAA in its safety assessment as part of its use agreement or lease, the Respondent is under no obligation to do so.

The FAA expects the Respondent to meet its obligations under Grant Assurance 22(b) as well.²¹ If the Respondent does not require the Complainant to offer its aeronautical service in a manner that is consistent with Grant Assurance 22(b), the Respondent may expose itself to future allegations of noncompliance.

Recognizing that the two parties may engage in future negotiations, the Director offers the following observations based on statements from the record:

- An airport's prime obligation is to serve the interest of the aeronautical using public. [See United States Construction Corporation v. City of Pompano Beach, Florida, FAA Docket

²⁰ Grant Assurance 19, *Operation and Maintenance* requires, in pertinent part, "[t]he airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned and controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation."

²¹ Grant Assurance 22(b) states, "[i]n any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to (1) furnish said services on a reasonable, and not unjustly discriminatory basis to all users thereof, and (2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers."

No. 16-00-14, (July 10, 2002) (Final Agency Decision) at 21] Documents in the record reference the use of Airport property for nonaeronautical tenants (the Lions Club, an animal shelter, and a spay clinic). [FAA Exhibit 1, Item 1, exhibit 19; FAA Exhibit 1, Item 1, exhibit 28, sub. exh. A, p. 2; and FAA Exhibit 1, Item 5, exhibit 17] Leasing airport land to nonaeronautical users, and refusing to accommodate potential aeronautical service providers, does not serve the interest of the aeronautical using public and is not consistent with Grant Assurance 19. [See FAA Order 5190.6B ¶21.6.f.(5). and Valley Aviation Services, LLP v. City of Glendale, AZ, FAA Docket No. 16-09-06, (May 24, 2011) (Director’s Determination) at 37]

- FAA Advisory Circular 150/5070-6B, Airport Master Plans, explains that an airport master plan is a comprehensive study of an airport which usually describes the short-, medium-, and long-term development plans to meet future aviation demand. [FAA Advisory Circular 150/5070-6B, Airport Master Plans, Chapter 1, 101] The FAA reviews master plans, but does not approve them.²² [FAA Advisory Circular 150/5070-6B, Airport Master Plans Chapter 2, 205.a] Establishing a drop zone on an airport does not require the airport sponsor to amend its master plan or seek FAA approval of a new master plan. However, Grant Assurance 29, *Airport Layout Plan*, would require the sponsor to update its airport layout plan (ALP).²³ Minor improvements to an airport can be added to the ALP through a “pen and ink” change. [FAA Advisory Circular 150/5070-6B, Airport Master Plans, Chapter 10, 1001.h]
- FAA Order 5190.6B describes an exclusive right as “a special privilege or a monopoly to anyone providing aeronautical services on the airport or engaging in an aeronautical use.” [FAA Order 5190.6B, ¶8.1] The FAA has taken the position that the existence of an exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the public of the benefits of competitive enterprise. [FAA Order 5190.6B, ¶8.4.c.] Executing a lease which provides only one entity with exclusive use of land for a parachute drop zone could raise a compliance issue with Grant Assurance 23, *Exclusive Rights*.

Summary of Issue (1)

The Respondent admits it is prohibiting the Complainant from establishing a parachute drop zone on the Airport, claiming that doing so is necessary for the safe operation of the Airport. Again, under these circumstances, this restriction is unreasonable because the FAA’s safety evaluations found the Complainant’s proposal to conduct parachute activities, including the establishment of a drop zone on the Airport, to be safe. The expertise of the FAA holds greater weight than the opinion of the airport sponsor. The Respondent’s other reasons for objecting to the Complainant’s proposal are not sufficient to overcome the Director’s concerns regarding the

²² The FAA does, however, approve two items that may or may not be included in an airport’s master plan. These items are forecasts of demand and the Airport Layout Plan. [See FAA Advisory Circular, Airport Master Plans Chapter 2, 205.a]

²³ Grant Assurance 29, *Airport Layout Plan*, requires an airport sponsor to keep its airport layout plan up to date at all times.

denial of access. The Director finds the Respondent to be in violation of Grant Assurance 22, *Economic Nondiscrimination*.

Issue (2)

Whether the Respondent's refusal to allow an on-airport drop zone at South County Airport constitutes a violation of Grant Assurance 5, *Preserving Rights and Powers*.

The Complainant alleges the Respondent violated Grant Assurance 5:

Grant assurance 5, Rights and Powers, obligates an airport sponsor to refrain from any action that will deprive it of rights and powers to perform in accordance with the requirements of the Grant Assurances. Among the responsibilities of an airport sponsor is to make the airport available for all types and classes of aeronautical activities.

[FAA Exhibit 1, Item 1, p. 19]

The Complainant does not explain exactly how the Respondent has violated Grant Assurance 5. The Complainant relies on statements made by the FAA during the informal investigation process:

There is no issue as to the existence of a violation by the County, only the appropriate sanctions for its repeated defiance of the FAA and its willingness to sign agreements and then take massive sums of money from the federal government without complying with the obligations it freely entered to allow Airport access.

[FAA Exhibit 1, Item 1, p. 17]

The Respondent denies this allegation in its Answer. [FAA Exhibit 1, Item 5, p. 3] The Respondent adds:

Complainant has not shown that the County is in violation of any applicable grant assurance or federal statute.

[FAA Exhibit 1, Item 7, p. 1, ¶2]

As noted, the FAA did not make a formal finding with regard to the Respondent's compliance posture during the informal investigation. Therefore, the Complainant fails to effectively argue its allegation of Grant Assurance 5, *Preserving Rights and Powers*, in its Complaint. With that said, the Director's investigation relies on the entirety of the record and includes a thorough examination of the documents submitted in support of each pleading. Given the evidence, the Director believes this allegation is of merit.

Grant Assurance 5, *Preserving Rights and Powers*, requires airport sponsors to refrain from taking or permitting actions which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary.

On August 24, 2010, the Santa Clara County Board of Supervisors voted to reject the Respondent's proposal to conduct a skydiving operation with a drop zone on the Airport. [FAA Exhibit 1, Item 1, exhibit 32, p. 2 and FAA Exhibit 1, Item 5, exhibit 38, p. 14] This vote was taken after the FAA had made the County aware of its first safety assessment, which stated that the Complainant's proposal could be supported from a safety standpoint. [FAA Exhibit 1, Item 1, exhibit 6 and FAA Exhibit 1, Item 1, exhibit 6, sub. exh. A] In the weeks prior to this vote, the FAA had requested the County provide an update on the negotiations between the two parties and inquired about the delay in reaching an agreement. [FAA Exhibit 1, Item 1, exhibit 8; FAA Exhibit 1, Item 1, exhibit 31; FAA Exhibit 1, Item 5, exhibit 22, pp 1-2] The Respondent advised the FAA of the agenda item only six days prior to the meeting, and the FAA cautioned the County from using this approach. [FAA Exhibit 1, Item 5, exhibit 24, pp 1-2 and FAA Exhibit 1, Item 5, exhibit 24, p. 1] At no time, based on the evidence of record, did the County attempt to consider the FAA's safety expertise and authority in this arena. Given these facts, the Director finds that the Respondent fails to meet the standard of compliance.

FAA Order 5190.6B explains:

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, ¶2.8.b.]

If the Respondent fully understood its commitments, it would have further engaged the FAA's expertise in evaluating the on-airport drop zone before voting to deny the Complainant's proposal. The Director finds the Respondent is in violation of Grant Assurance 5, *Preserving Rights and Powers*.

Issue (3)

Whether the Respondent's refusal to allow an on-airport drop zone at the South County Airport results in a constructive granting of an exclusive right 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 Conclusion below on the Respondent's unreasonable denial of aeronautical access, it is unnecessary to consider the related

allegation regarding exclusive rights, because the remedies are the same. [*See Skydive Paris*, DD, 16-05-06 at 19]

VII. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions of the parties, and the entire record herein, and the applicable law and policy and for the reasons stated above, the Director, Airport Compliance and Management Analysis, finds and concludes:

- The Respondent's reasons for prohibiting the establishment of an on-airport drop zone are not supported by the record. The FAA finds the Airport can safely accommodate an on-airport drop zone.
- By refusing the Complainant's request to establish a drop zone at the South County Airport, the Respondent has unreasonably denied access to the Airport in violation of Grant Assurance 22, *Economic Nondiscrimination* and 49 U.S.C. § 47107(a).
- The Respondent's vote to deny the Complainant's proposal to conduct a skydiving operation with a drop zone on the Airport shows the airport sponsor does not meet the standard of compliance and constitutes a violation of Grant Assurance 5, *Preserving Rights and Powers*.

ORDER

ACCORDINGLY, the Director finds that Santa Clara County is in violation of federal law and the federal grant obligations. The County is directed to take immediate steps to (1) permit the establishment of an on-airport parachute drop zone; (2) negotiate in good faith with those entities desiring to provide parachute-related commercial aeronautical services; (3) adopt the stipulations required by the FAA to conduct parachute operations at the Airport safely; and (4) provide any required "pen and ink" changes to the Airport's ALP. The County is directed to notify the Director that it has taken the actions described above within 30 days of receipt of this decision.

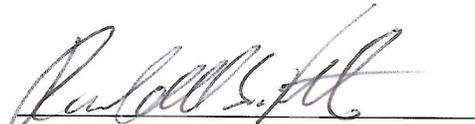
Future grant applications for AIP discretionary grants under 49 U.S.C. § 47115 and general aviation airport grants under 49 U.S.C. § 47114(d) requested by the County of Santa Clara are hereby suspended until further notice.

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 Management Analysis

DEC 19 2011

Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Dec. 19, 2011, I caused to be placed in the United States mail (first class mail, postage paid), a true copy of the foregoing document addressed to:

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FAA Part 16 Airport Proceedings Docket

Airports Compliance Division, Office of Airport Safety and Standards, ACO-100

Western Pacific Region Airports Division, AWP-600

San Francisco Airports District Office


Anne Torgerson
Office of Airport Compliance and
Management Analysis