

Minimum Standards Exemptions

Part one of a six part series on airport tenant relations and aviation legal matters

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Can an airport tenant ever really be exempt from an airport's minimum standards and regulations? This is a pressing and timely issue for all airport tenants, whether the tenant is the beneficiary of an exemption or whether its competitor has or is seeking an exemption.

The necessity for an exemption may arise due to a myriad of conditions. There is no question that the economic climate of late has resulted in substantial losses to FBO operators and other airport tenants, particularly with the widespread loss of general aviation aircraft hours flown. In response, airport tenants may look to non-aviation subtenants to make up some of their lost revenue, begging the questions:

1. Can an airport tenant ever really obtain an "exemption" from the airport minimum standards to accommodate non-aviation subtenants?

2. If an airport tenant does obtain such an "exemption", how does an airport tenant protect and enforce its "exemption"?

The recent Part 16 decision in *Valley Aviation Services, LLP v. City of Glendale, AZ*, FAA Docket 16-09-06 (May 24, 2011) is particularly illuminating with respect to these issues.

If you read this article no further, at least note the following with respect to "exemptions" from airport minimum standards at airports funded with federal monies and subject to the Federal Grant Assurances:

1. An airport tenant can never have a valid and enforceable "exemption" to

accommodate non-aviation subtenants upon designated aeronautical property unless the airport sponsor obtains explicit permission from the FAA with respect to same; and

2. One airport tenant's "exemption" is the foundation for another airport tenant's Part 16 claim for a violation of Federal Grant Assurance 22 (Economic Non-Discrimination).

The Fleeting Exemption

Valley Aviation Services, complainant, is a tenant of Glendale Municipal Airport (GEU) in Glendale, Arizona, and operator of the Glendale Airport Hangars on the southern end of the airport, inclusive of large hangars, T-hangars, T-shades, office, and ramp space. The complainant was assigned the relevant leasehold interests for the Glendale Airport Hangars on January 1, 1999, though several of the issues raised in the context of this Part 16 action arose prior to that date.

Respondent, City of Glendale, owns and operates the airport; GEU is a federally funded airport.

The complainant was authorized to sublet its premises to non-aviation tenants through informal arrangements with various airport directors, until the respondent reversed its position and imposed strict enforcement of the airport minimum standards as to complainant, while allowing other airport tenants to continue the practice of subleasing to non-aviation tenants.

By way of specific example, the complainant was forced to evict its non-aviation tenants, including the

Glendale Police Department (which stored police vehicles in the complainant's hangars), while another tenant on the airport was permitted to sublease its hangar space to the Maricopa County Police Department for vehicle storage. Likewise, the complainant was forced to evict all of its tenants storing non-airworthy and/or disabled aircraft, while other tenants were allowed to continue the subleasing of space for the storage of such aircraft.

While traditionally, such disparate treatment between airport tenants is the subject of Part 16 actions on the grounds of economic discrimination in violation of Federal Grant Assurance 22, Valley Aviation Services examines the interplay of Federal Grant Assurances 22, 29, and 19 with respect to these issues.

Federal Grant Assurance 22

Federal Grant Assurance 22, governing economic non-discrimination, requires airport sponsors to make federally funded airports available "for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. Federal Grant Assurance 22 further requires airport sponsors "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.

Valley Aviation Services presents the traditional Part 16 claim of economic



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discrimination between airport tenants in violation of Federal Grant Assurance 22. The complainant alleged that the respondent subjected it to disparate treatment and economic discrimination through strict enforcement of the minimum standards and airport regulations as to it, while the respondent simultaneously failed to enforce these same minimum standards and regulations with respect to other airport tenants.

In its defense, the respondent argued that the complainant and other airport tenants were “not similarly situated” by virtue of the fact that the complainant’s lease and the leases of other airport tenants were negotiated at different times.

As noted by the Director, (FAA office of airport compliance and management analysis) however, the negotiation of leases at different points in time is irrelevant to the enforcement of airport minimum standards and regulations with respect to all such tenants at a particular point in time. Essentially, the airport director’s determination is that, while shifts in airport minimum standards and regulations may account for differences in enforcement with respect to all tenants over the course of time, the only issue for evaluation with respect to Federal Grant Assurance 22 is whether all tenants are subject to enforcement of the same airport minimum standards and regulations at any given time.

The Director found the respondent in violation of Federal Grant Assurance 22 by virtue of the respondent’s intermittent and inconsistent enforcement of the airport rules and regulations as to all airport tenants over the sixteen years preceding the decision in Valley Aviation Services, particularly with respect to the storage of non-aeronautical vehicles and equipment, and the storage of disabled aircraft at the airport.

Of note, the Director’s decision seems only to except “incidental violations” by airport tenants, with respect to which the airport sponsor has no complicity. Therefore, to the extent that an airport tenant seeks an “exemption” from enforcement of the applicable air-

port minimum standards and/or rules and regulations that otherwise apply to all airport tenants, such an “exemption” will likely always substantiate another airport tenant’s claim of a violation of Federal Grant Assurance 22 in the event that said “exemption” is not likewise afforded to all airport tenants.

Federal Grant Assurance 29

Federal Grant Assurance 29 (implementing 49 U.S.C. § 47107(a) (16)), governs airport layout plans and prohibits airport sponsors from using designated aeronautical areas for non-aeronautical purposes. To the extent that an airport sponsor allows the use of designated aeronautical areas for non-aeronautical purposes, the airport sponsor must actually obtain explicit approval from the FAA for the non-aviation use on an interim basis.

Relying on *Boca Airport, Inc. d/b/a Boca Aviation v. Boca Raton Airport Authority*, FAA Docket No. 16-00-10 (March 20, 2003), the Director in *Valley Aviation Services* held that the respondent, City of Glendale, violated Federal Grant Assurance 29 in failing to ensure that all designated aeronautical areas were used only for aeronautical purposes.

Federal Grant Assurance 19

In accordance with Federal Grant Assurance 19 (implementing 49 U.S.C. § 47107(a)(7)), an airport sponsor must “not cause or permit any activity or action [on the airport] which would interfere with its use for airport purposes.”

The most common improper and noncompliant land uses are situations where nonaeronautical leaseholds are located on designated aeronautical use land without FAA approval or on property not released by FAA, and permitting dedicated aeronautical property to be used for nonaeronautical uses. Examples of typical uses include using hangars to store vehicles or other unrelated items. Other improper land uses found in the past have included using aeronautical land

for nonaeronautical purposes such as animal control facilities, non-airport vehicle and maintenance equipment storage, aircraft museums, and municipal administrative offices.

In *Valley Aviation Services*, the complainant alleges that the respondent is in violation of Federal Grant Assurance 19 by virtue of the respondent’s (1) allowing the operation of non-aeronautical activities in airport hangars; (2) allowing the storage of non-aeronautical items (police vehicles, classic cars, carpet, RVs, etc.) in airport hangars; and (3) allowing extended and/or unlimited storage of non-airworthy and/or disabled aircraft on the airport.

The respondent’s position that non-aeronautical use of designated aeronautical land is permissible so long as it does not unreasonably interfere with the aeronautical use of the airport was expressly rejected by the Director. In his decision, the Director takes the categorical view that “allowing non-aeronautical usage of aeronautical land is interfering with its intended use.”

Therefore, as with Federal Grant Assurance 29, if an airport tenant seeks an exemption allowing the use of designated aeronautical areas for non-aeronautical uses, the tenant should recognize that such an exemption, as a matter of Federal Grant Assurance 19, is impermissible unless explicit authorization is sought and obtained from the FAA.

Conclusion

Airport tenants should be cautious if afforded an “exemption” from the applicable minimum standards and airport rules and regulations by an airport sponsor. Such “exemptions” are fleeting, unreliable, and almost never a source of competitive advantage.

To ensure enforceability of such an “exemption” pertaining to non-aeronautical uses of designated aeronautical properties, an airport tenant should always request that the airport sponsor obtain explicit authorization from the FAA and, the airport tenant should always presume that any “exemption” afforded it will likely be afforded to all other airport tenants.

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