

May 3, 2021

VIA E-MAIL

Kevin Willis, Director
Airport Compliance & Management Analysis
Federal Aviation Administration
800 Independence Avenue, SW
Washington, D.C. 20591

Re: *Forman v. Palm Beach County*, FAA Docket No. 16-17-13

Dear Kevin:

On behalf of Palm Beach County (the “County”), we are writing to request the FAA stay the Associate Administrator’s Final Agency Decision (the “FAD”) in the above-referenced proceeding or, in the alternative, clarify the FAA’s position with respect to its further enforcement of the FAD during the pendency of judicial review.¹ We have discussed this matter informally with you and your counsel, but we believe it is necessary to put our request in writing to ensure that we fully understand the FAA’s position in light of inconsistent feedback.

The FAA ordered the County to submit a Corrective Action Plan within sixty days of the FAD’s issuance that would (1) “permit immediate access by Complainant and other aircraft capable of utilizing LNA’s existing runways, infrastructure, and facilities” and (2) “provide a long-term, formal and legal commitment . . . to rescind or not enforce the restriction.”² The FAD further ordered that, until such a Corrective Action Plan is accepted by the FAA, the FAA will withhold the County’s general aviation entitlement funds and discretionary funds under the Airport Improvement Program and may “consider other appropriate action regarding the County’s non-compliance with ANCA.”³ The County did not submit the required Corrective Action Plan and instead timely filed a petition for review of the FAD in the U.S. Court of Appeals for the Eleventh Circuit.⁴ Through counsel, the County sought to confirm that the FAA would stay the FAD pending such review, as is the FAA’s ordinary practice. The FAA responded by email that the County “must comply with the [FAD]” and the “[f]ailure to do so constitutes both a violation of the FAA’s order and the grant assurances [which] risks a loss of grant eligibility, among other potential remedies.”⁵

¹ Please consider this request a motion for stay pursuant to 14 C.F.R. § 16.19 and Fed. R. App. P. 18(a)(1).

² *Forman v. Palm Beach County*, FAA Docket No. 16-17-13, Final Agency Decision at 15 (Served Jan. 13, 2021).

³ *Id.*

⁴ *Palm Beach County v. FAA*, No. 21-10771 (Filed Mar. 10, 2021).

⁵ Email from C. Barmore to S. Osit dated Apr. 6, 2021, forwarding email from S. Mitchell of the same date.

The County respectfully requests that the FAA reconsider its position and stay the FAD pending judicial review for several reasons. First, the County cannot comply with the FAA's order without prejudicing its right to seek judicial review. The County asserts that the jet restriction has been continuously "in effect" for purposes of ANCA since 1973. We understand the FAA disagrees with that assertion, and the Court will ultimately determine which of the parties is correct. But the County simply cannot "provide a long-term, formal and legal commitment . . . to rescind or not enforce the restriction" until the Court has determined this legal issue.

Second, the County cannot practically "permit immediate access by Complainant and other aircraft capable of utilizing LNA's existing runways, infrastructure, and facilities" because the County is unsure of an acceptable method of determining *which* aircraft are capable (e.g., weight, approach speed, wingspan, airspace clearance) of utilizing LNA's existing runways, infrastructure, and facilities. Indeed, this question goes to the very heart of the dispute between the parties. Shortly before this proceeding was commenced, you will recall that the FAA determined jet aircraft could *not* safely operate from two of LNA's three runways. We presume that remains the agency position. While the parties disagree as to the sufficiency and accuracy of the agency's informal analysis that led to that position, there can be no serious dispute that the Associate Administrator's subsequent, summary conclusion that *all* jet aircraft are capable of using *all* LNA runways is unsupported by *any* analysis (or at the least no such analysis has been shared with the County so it can act prudently and safely in light of contradictory agency findings).

Third, a stay of the FAD is clearly within the public interest. The FAD would require the County to permit jet aircraft immediate access to LNA *for the first time in nearly fifty years*. It is the County's position that that directive was issued without any comprehensive evaluation of the attendant safety, efficiency, and noise impacts typical of FAA decision-making. Again, the Court will ultimately determine whether the FAA adequately considered these issues, but an immediate lifting of the restriction will require the Airport's existing users and surrounding communities to bear all of the risk in the interim. We note that the timing is especially delicate given that the County is in the midst of an FAA-funded Part 150 public outreach program and providing inconsistent or inaccurate information to the public would contravene the policy guidance on such outreach. We appreciate that the FAA, like the County, is confident in its litigation position. However, the FAD demands an immediate change to a status quo that has prevailed for nearly fifty years, seemingly for the sole benefit of the Complainant. Under these circumstances, the County is alarmed that the FAA would order the County to permit immediate access by jet aircraft when there remains a substantial question as to whether the requisite safety analysis was conducted.

In light of above, the County respectfully requests the FAD be stayed and that it be permitted to continue enforcement of the jet restriction pending review.

If the FAA is unwilling to stay the FAD pending review, we request further clarification of the FAA's position regarding the County's current compliance with its federal obligations and the prospect of further enforcement action. Specifically, if the County *enforces* the jet restriction pending review, does the FAA intend to continue withholding *only* general aviation entitlement

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and discretionary funding, or would the FAA pursue additional remedies?⁶ Conversely, if the County formally commits to *suspending* its enforcement of the jet restriction pending review, would the FAA consider the County to be temporarily in compliance with its grant obligations pending the outcome of the petition for review?

To be clear, the County understands and has every intention of complying with its obligations under federal law and the terms of its grant agreements with the FAA. The County merely disagrees with the FAA's conclusion that the jet restriction is inconsistent with those obligations and should immediately be lifted while the Court reviews the FAA's decision. Should the Court ultimately affirm the FAD, the County intends to take appropriate corrective action with dispatch. It is critically important, however, that the County understand its immediate obligations *while* it is exercising its right to judicial review.

In light of upcoming deadlines in the U.S. Court of Appeals proceeding, we would appreciate the FAA's written response to this request as soon as practicable.

Sincerely,



Steven L. Osit
Peter J. Kirsch

Counsel to Palm Beach County

cc: Scott Mitchell, *Federal Aviation Administration*
Cynthia Barmore, *Department of Justice*
Alan Armstrong, *Counsel for Complainant*⁷
FAA Docket No. 16-17-13

⁶ We assume that, before taking any further actions, the FAA would first provide an opportunity for hearing, *see* 14 C.F.R. § 16.109(a), and/or comply with ANCA's procedural requirements, *see* 14 C.F.R. § 16.505.

⁷ Because a Director's Determination has already been issued in this case, the Complaint lacks standing to formally oppose the County's request as set forth herein. 14 C.F.R. § 16.109(g). Nevertheless, the County is serving Complainant's counsel with a copy of this letter as a matter of professional courtesy.

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May 6, 2021

Via Email

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Kevin Willis, Director
Airport Compliance & Management Analysis
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Re: *Forman v. Palm Beach County*
FAA Docket No. 16-17-13

Dear Mr. Willis:

The undersigned represents Captain Errol Forman, the Complainant in the matter captioned above. The undersigned is in receipt of a letter from Steven L. Osit, Esq. to you dated May 3, 2021. The letter of Mr. Osit is in direct defiance of the findings made by the Associate Administrator for Airports in the Final Agency Decision of January 10, 2021. In further response to Mr. Osit's letter, we direct your attention to the arguments and assertions of fact appearing hereinbelow.

I.

**PALM BEACH COUNTY IS IN NEED OF NO
CLARIFICATION TO UNDERSTAND THE FAA'S POSITION**

In the first paragraph of Mr. Osit's letter of May 3, 2021, he asserts on behalf of Palm Beach County ("the County") that the County seeks a stay of the Final Agency Decision ("FAD") and seeks clarification of the FAA's position pending judicial review. Both of these arguments lack merit. First of all, the FAD is a model of clarity. It specifically rejected the argument by Palm Beach County that the jet ban was grandfathered and specifically directed the County for the fourth time, the rescind the jet ban. Anyone who can read, speak and understand the English language and who has read the FAD of January 10, 2021, fully understands the FAA's position.

II.

THE COUNTY HAS OPENLY AND CONSISTLY DEFIED THE FAA'S ORDER AND HAS REFUSED TO SUBMIT A CORRECTIVE ACTION PLAN AS REQUIRED BY THE FINAL AGENCY DECISION

In the second paragraph of Mr. Osit's letter of May 3, 2021, after quoting, verbatim, from the directives in the FAD that the County permit access to jet aircraft and provide a long term and formal commitment to rescind or not enforce the jet restriction, Mr. Osit notes that the FAA in an email asserted that the County, "must comply with the [FAD] and the "[f]ailure to do so constitutes both a violation of the FAA's Order and Grant Assurances [which] risks a loss of grant eligibility, among other potential remedies." The County now admits it has not fashioned a Corrective Action Plan as required by the FAD. The County stands in open defiance of the directives in the FAD and in the Grant Assurance obligations it provided to the FAA and the Department of Transportation attendant to receiving federal funding for the maintenance and improvement of the Lantana Airport (KLNA) and for improvements to the other three airports managed by the County.¹ The refusal of the County to adopt a Corrective Action Plan and rescind the jet ban marks the fourth time the County has acted in open defiance of the FAA orders and directives and its Grant Assurance obligations. Your attention is directed to page 14 of the FAD which provides, *inter alia*:

A review of the Director's Order by the Associate Administrator does not validate the County's allegations that the Order or CAP "were unclear, inappropriate," or otherwise did "not allow the County to address the alleged noncompliance with any approach other than a complete repeal of the jet restriction." As noted above, the restriction violates the County's Grant Assurance obligations, and its preservation or a *status quo* is not permissible. The record does reflect that the County was given numerous opportunities and time to address the restriction and initiate corrective action in some form. Yet, it has not done so. Even before the Director's Order, the County was asked three times by FAA to develop a Corrective Action Plan (CAP) to repeal the restriction, but it did not.

For the County to posture before the FAA that it does not "fully understand the FAA's position" is misleading. The FAA's position is clear. Follow the rules. Follow the law. Adhere to the promises set forth in your Grant Assurance obligations. In short, Mr. Osit's letter is a disingenuous ploy designed to pretend that Palm Beach County does not "understand" that it **must rescind the jet ban**. The FAA's adoption of the FAD marks the **fourth time** the FAA has directed Palm Beach County to rescind the jet ban.

¹ Palm Beach County (F45); Palm Beach County Glades (PHK), and Palm Beach International (PBI)

III.

PALM BEACH COUNTY'S POSITION THAT IT MUST OBTAIN A STAY TO LITIGATE ITS POSITION TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS NOT CORRECT

The County argues in the first paragraph on page 2 of its letter of May 3, 2021, that it cannot comply with the FAA's Final Agency Decision without prejudicing its rights to seek judicial review. This assertion is incorrect. The County is more than welcome to litigate its position before the United States Court of Appeals for the Eleventh Circuit. However, there is no explicit provision in 14 C.F.R. Part 16 for the Director of Airport Compliance to **stay a Final Agency Decision issued by the Associate Administrator**. If any such authority existed, only the Associate Administrator (who promulgated the FAD) could act, not the Director of Airports. In short, Palm Beach County seeks relief from the wrong person.

In addition to Palm Beach County seeking a stay from the wrong person, Captain Forman reiterates his position there is no basis for the Associate Administrator to issue a stay. Most appeals to the United States Circuit Courts of Appeal of Part 16 decisions have been filed by unsuccessful complainants *City of Naples Airport Authority v. FAA*, 409 F.3d 431 (D.C. Cir. 2005); and *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001) being exceptions. In neither case is there any discussion of an FAA stay of the final agency decision. Accordingly, the claim that the issuance of a stay is "ordinary practice" appears to be dubious. As best we can determine, there is **no authority** for issuing a "stay" of a final agency decision.

The County compounds its deception by pretending the Associate Administrator did not consider "weight, approach speed, wingspan, [and] air space clearance" in rendering the FAD. Once again, these representations made before you in an attempt to obtain a stay are not supported by the record. On pages 9 through 13 of the FAD, the Associate Administrator addressed issues of noise, aircraft performance, aircraft weight, and whether aircraft were engaged in cargo operations, and concluded "the County has imposed unreasonable terms and conditions on aeronautical users at LNA..."² Insofar as Palm Beach County postures that only one runway at Lantana can be employed by jet aircraft, this argument was rejected by the Associate Administrator for Airports in the FAD.³ Further, arguments by the County that operation of jet aircraft at Lantana would necessitate "future airspace modification," those were rejected, as well.⁴

² Final Agency Decision at 13.

³ Final Agency Decision at 13, 14.

⁴ Final Agency Decision at 14.

IV.

THE PUBLIC INTEREST IN MAINTAINING A UNIFORM, PREDICTABLE AND NONDISCRIMINATORY NATIONAL AIRSPACE SYSTEM OPERATE AGAINST PALM BEACH COUNTY'S REQUEST FOR A STAY

In the third full paragraph on page 2 of Mr. Osit's letter of May 3, 2021, the County asserts that "a stay of the FAD is clearly within public interest." Once again, this statement rings hollow. "It is the policy of the United States – that the safe operation of the airport and airway system is the highest aviation priority."⁵ Furthermore, "[i]t is the policy of the United States – that artificial restrictions on airport capacity – are not in the public interest; should be imposed to alleviate air traffic delays only after other reasonably available and less burdensome alternatives have been tried; and should not discriminate unjustly between categories and classes of aircraft."⁶ The County, in posturing that the equities of public interest are on its side clearly is dwelling in an alternative universe, since 49 U.S.C. §47107 provides, *inter alia*:

- (a) the Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the secretary, that –
 - (1) the airport will be available for public use on reasonable conditions and without unjust discrimination...

Once again, in the third paragraph on page 2 of Mr. Osit's letter he notes: "...an immediate lifting of the restriction will require the airport's existing users and surrounding communities to bear all of the risk in the interim." Mr. Osit ignores several significant points. First of all, Captain Forman has relocated his Cessna Citation aircraft to Lantana Airport and has based his jet aircraft at that airport. Secondly, in the very near future, a second jet aircraft will be arriving at Lantana to be permanently based at the Lantana Airport. To grant the County a "stay" will either displace Captain Forman's jet aircraft and the soon to arrive second jet aircraft or require that Captain Forman and the other owner risk going to jail in Palm Beach County and/or being fined for violating the supposed County ordinance against jets operating at the Lantana Airport.

In *Arapahoe County Public Airport Authority v. FAA, supra*, the United States Court of Appeals for the Tenth Circuit affirmed a FAA final decision even though the Supreme Court of Colorado had declared the airport authority had not violated the Federal Grant Assurances, the Tenth Circuit Court of Appeals noting:

⁵ 49 U.S.C. §47101(a)(1).

⁶ 49 U.S.C. §47101(a)(9).

As to the potential impact of the Colorado Supreme Court's ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* on federal regulation of the Airport Grant Program, we perceive a direct and significant conflict inasmuch as this and similar state court rulings, if deemed preclusive, would frustrate the FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances. *See* 49 U.S.C. §47122. If given preclusive effect, state court rulings favoring local airport authorities in actions tangentially involving federal grant assurances would further lead to inconsistent enforcement of the federally mandated assurances, potentially jeopardizing the efficiency and equality of access to our Nation's air transportation system. For these reasons, we hold the strong policy of federal supremacy in the field of aviation prevails over full faith and credit principles in this case. The Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* therefore has no bearing on the FAA decision before us.⁷

V.

**PALM BEACH COUNTY IS ATTEMPTING TO RENEGOTIATE ITS POSITION
WITH THE FAA AFTER LOSING ON THREE PREVIOUS OCCASIONS**

The County failed to prevail in the informal complaint filed by Captain Forman under Part 13. The County failed to prevail in the Director for Airport's Decision of February 22, 2019. The County failed to prevail in the Associate Administrator's Final Agency Decision of January 10, 2021. And now, in light of this stellar performance, it wants to renegotiate its position with the FAA asking as follows:

If the FAA is unwilling to stay the FAD pending review, we request further clarification of the FAA's position regarding the County's current compliance with its federal obligations and the prospect of further enforcement action. Specifically, if the County enforces the jet restriction pending review, does the FAA continue withholding *only* general aviation entitlement and discretionary funding, or would the FAA pursue additional remedies? Conversely, if the County formally commits to *suspending* its enforcement of the jet restriction pending review, would the FAA consider the County to be temporarily in compliance with its Grant Obligations pending the outcome of the Petition for Review?

⁷ 242 F.3d at 1221.

These questions posited by the County are absolutely ludicrous. In the Final Agency Decision, the Associate Administrator declared:

ACCORDINGLY, it is hereby ORDERED that:

- (1) the County is afforded 60 days to submit a detailed Correction Action Plan (CAP) consistent with this Final Agency Decision and acceptable to the FAA, which would
 - (a) subject to FAA approval, permit immediate access by Complainant and other aircraft capable of utilizing LNA existing runways, infrastructure, and facilities, AND
 - (b) within 180 days, subject to FAA approval provide a long term, formal and legal commitment by the County to rescind or not enforce the restriction, AND
- (2) pending the FAA's approval of the CAP's two elements, any approval application submitted by the County for amounts apportioned under 49 U.S.C. 47114(d) and authorized by 49 U.S.C. §47115 will be withheld in accordance with 49 U.S.C. §47106(d), AND
- (3) the FAA will consider appropriate action regarding the County's noncompliance with ANCA and 49 U.S.C. §47524, AND
- (4) the appeal is dismissed, pursuant to 14 C.F.R. §16.33.

With all due respect, the County is wasting the FAA's time seeking to renegotiate a position that has been lost on three separate occasions. Finally, in the second full paragraph on page 3 of Mr. Osit's letter of May 3, 2021, he postures: "...the County understands and has every intention of complying with its obligations under federal law and the terms of its grant agreements with the FAA." **Actions speak louder than words.** The County stands in open defiance of the Final Agency Decision of January 10, 2021. To pretend it has "every intention of complying with its obligations" after it has repeatedly refused to comply with FAA orders and directives is unbelievable.

VI.

PALM BEACH COUNTY IS NOT ENTITLED TO A HEARING AND CAPTAIN FORMAN HAS A DIRECT INTEREST IN THE FAD

In footnote 6 on page 3 of Mr. Osit's letter, counsel asserts:

We assume that, before taking any further actions, the FAA would first provide an opportunity for hearing, see 14 C.F.R. §16.109(a), and/or comply with ANCA's procedural requirements, *see* 14 C.F.R. §16.505.

Neither of the regulations cited by counsel support the proposition that Palm Beach County is entitled to a hearing. The regulations are clear. An evidentiary hearing is only authorized at the Director's level, there being no authority for an evidentiary hearing before the FAA after the issuance of a final agency decision. 14 C.F.R. §16.109 allows a request for a hearing to be made if a Director's determination proposes limits on grant eligibility, not if a final agency decision proposes them. Moreover, reliance on 14 C.F.R. §16.505 appears to be misplaced, since it is premised on the FAA taking action under 14 C.F.R. Part 161, not Part 16. Next, in footnote 7 of counsel's letter, Palm Beach County maintains that Captain Forman "lacks standing to formally oppose the County's request..." Although the FAA does seem, by virtue of its conduct, to have taken the position that Captain Forman has no right to participate in the corrective action discussions, the law is well settled that Captain Forman has a direct interest in preserving the victory he achieved by the issuance of the FAD. *See, e.g., Boca Airport, Inc. v. FAA*, 389 F.3d 185 (D.C. Cir. 2004); *Wilson Air Ctr. LLC. v. FAA*, 372 F.3d 807 (6th Cir. 2004); *Arapahoe City Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001); *41 N. 73 W., Inc. v. U.S. Dep't of Transp.*, 408 Fed.Appx. 393 (2d Cir. 2010).

VII.

CONCLUSION

To summarize, the arguments set forth above confirm there is no authority for the FAA issuing a stay. Even if such authority existed, any motion for stay should be directed to the Associate Administrator, not to the Director of Airports. There is no ambiguity in the FAD. Palm Beach County has been told on **four separate occasions** to rescind the jet ban. *It has steadfastly refused.* Palm Beach County is **not entitled to a hearing** before the FAA imposes sanctions for violations of the Sponsor Grant Assurances. Palm Beach County's claim that it does not "understand" the FAD is disingenuous. To summarize, Palm Beach County has been told by the FAA on **four separate occasions** to rescind the ban on jet aircraft operating at the Lantana Airport. **It has steadfastly refused.** The time to impose sanctions has come. Palm Beach County's request for a stay is not supported by the law. In light of the foregoing, Captain

Kevin Willis, Director
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Forman, the Complainant in this action, respectfully prays that the relief sought by Mr. Osit in his letter of May 3, 2021, on behalf of Palm Beach County be DENIED.

Respectfully submitted,


Alan Armstrong
Counsel for Captain Errol Forman

AA/kjw

cc: Scott Mitchell, Federal Aviation Administration
Cynthia Barmore, Department of Justice
Steven Osit, Counsel for Respondent
Peter J. Kirsch, Counsel for Respondent