ALAN ARMSTRONG'S
FLIGHTWATCH
VOLUME 315 July 26, 2023

WHEN AN AIRPORT SPONSOR ASSUMES THE FUNCTION OF PROTECTING THE FINANCIAL INVESTMENT OF A STARTUP FBO, IT RUNS THE RISK OF VIOLATING FAA SPONSOR GRANT ASSURANCE 22(c)

By: Alan Armstrong*

I.

A BRIEF OVERVIEW OF STATUTORY AND REGULATORY PROVISIONS THAT FORBID ECONOMIC DISCRIMINATION AT PUBLIC USE AIRPORTS

When an airport operator receives financial assistance from the United States Government to create or render improvements to a public use airport, the Airport Sponsor is required to execute grant assurances. To that end, 49 U.S.C. §47107(a) provides:

> 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 – … (5) fixed-based operators similarly using the airport will be subject to the same charges.

Not only is there statutory authority for the proposition that there must not be economic discrimination amongst fixed-based operators functioning on a public use airport, but FAA Sponsor Grant Assurance No. 22(c) provides:

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

In addition to the foregoing, FAA Order 5190.6B provides:

> The sponsor must impose the same rates, fees, rentals, and other charges on similarly situated fixed-based operators (FBOs) that use the airport and its

*Alan Armstrong is an aviation lawyer who practices in Atlanta, Georgia. He appears in the Bar Register of Preeminent Lawyers published by Martindale-Hubbell and recognized in the 2023 Edition of Super Lawyers. An Airline Transport Pilot, he flies a replica Nakajima Type 97 "Kate" Bomber on the airshow circuit and appears in television interviews concerning flight operations, air disasters and aviation accidents.

> facilities in the same or similar manner. However, FBOs under different types of sponsor agreements may have different fees and rentals. For example, an FBO leasing a sponsor-owned aeronautical facility may pay more in rent to the sponsor than an FBO that bills or finances its own facility. In the first case, the FBO is not servicing debt while in the second case the FBO is servicing debt.[1]

Airport operators anxious to improve the quantity of economic activity at an airport may, in fact, engage in economic discrimination against an existing FBO by inducing a second FBO to construct facilities on the airport as we shall see in the case which is the subject of this article.

II.

THE DILEMMA OF SANTA ROSA COUNTY

For the remainder of this article, we will analyze the facts and legal findings in *Aircraft Management Services, Inc. v. Santa Rosa County, Florida,* FAA Docket No. 16-12-02 (2015). At the inception, Santa Rosa County Airport with FAA Identifier 2R4 was a small airport on the panhandle of Florida in or near Milton, Florida. It had a single FBO. The single FBO was Aircraft Management Services, Inc. (AMS), and AMS signed a lease agreement with Santa Rosa County on March 8, 2001. The lease was for a term of fifteen years with an option to extend the lease by term of an additional fifteen years. The terms of the lease required AMS to build a 3,000 square foot terminal and pay rent at the rate of $1.00 per square foot and $0.45 per square foot for aircraft maintenance space, and pay a fuel flowage fee that varied from $0.01 per gallon to $0.20 per gallon. Of significant importance is the fact that the lease between AMS and Santa Rosa County provided that there would be no lease between Santa Rosa County and a third party operator that contained "terms more favorable to said third party than to those offered to the operator (AMS)." AMS established a full service FBO which offered flight training, maintenance, fuel services, tie down, and aircraft rental services. It provided flight instruction for

[1] FAA Order 5190.6B, §9.2(c).

the private pilot, airline transport, instrument and instructor ratings in both single engine and multi-engine Piper and Cessna aircraft.

On December 14, 2009, Milton Aviation Partners (MAP) asked the County Commission to issue a request for proposal for a second FBO on the Airport. Also on that date, a County Commissioner emailed the County Administrator suggesting that the County Commission issue a request for proposal for a new FBO on the airport to attract more operations.

On August 21, 2010, the County issued a request for proposal against recommendations of the County's Airport Advisory Committee. The minimum standards called for in the Request for Proposal were those contained in the County's lease with AMS. On September 4, 2010, the Chairman of the Airport Advisory Committee questioned the Commissioner's issuance of the Request for Proposal without consulting the Airport Advisory Committee. On September 21, 2010, MAP submitted its proposal.

On October 20, 2010, at a meeting of the Airport Advisory Committee, concerns were raised about the establishment of a second FBO. On October 22, 2010, members of the Airport Advisory Committee emailed the County Administrator with a list of questions about the candidate FBO and the ability of the Airport to support two FBO's.

In early 2011, the County accepted MAP's proposal and negotiated a Lease with MAP for a full service FBO. On February 10, 2011, Santa Rosa County's engineer raised concerns based upon the Airport Layout Plan calling for the space to be used for hangars in relation to the establishment of a second FBO. On March 11, 2011, difficulties arose as to how to calculate fuel flowage fees between the two FBOs with a single fuel farm. On March 15, 2011, MAP protested saying fuel sales were valuable, MAP suggesting that be relieved of charging a fuel-flowage fee.

One of the suggestions of MAP was that the County build a second fuel farm, an option the County declined.

At this point in the sequence of events, the County undertook to protect MAP's investment which was a mistake, as we shall see later. The County agreed to increase MAP's rental every five years as opposed to every three years with the competing FBO, to give MAP fifteen free parking spaces, to reduce the square footage of MAP's facility from 3,000 square feet to 1,200 square feet, and to eliminate the requirement that MAP build a 2,000 foot aviation related facility. On or about March 23, 2011, a new lease was signed between the County and MAP, and the requirement that MAP pay a fuel flowage fee was removed and MAP's rental was reduced from $1.00 per square foot to $0.50 per square foot for office space, and from $0.45 per square foot for maintenance space to $0.25 per square foot. Also, MAP was not required to provide computerized testing for pilots, nor was it required to man the telephones twenty-four hours per day, nor sell fuel.

On June 28, 2011, AMS (the legacy FBO) filed a Part 13 Complaint with the FAA alleging a violation of FAA Sponsor Grant Assurance No. 22 arguing that MAP was not subject to the same standards as AMS and further maintaining that MAP was receiving preferential treatment that constituted economic discrimination. The net result of the Part 13 Complaint was for the Airport District Office (ADO) to find that the FBOs were not similarly situated and to find that there was no violation of FAA Sponsor Grant Assurance No. 22. On January 17, 2012, MAP filed a formal Complaint under Part 16 of the Federal Aviation Regulations with the FAA in Washington, DC. In the Director's Determination, the outcome of the Part 16 litigation was diametrically opposed to the findings made in the Part 13 Complaint. The Director noted: "…MAP is selling fuel now and thus the conclusion in the Part 13 Determination, that there was

no violation, is no longer relevant due to changed circumstances."[2] The Director, in making a finding of a violation of Grant Assurance No. 22(c) contrary to the Airport District Office rendered the following findings and conclusions:

> In this case, the two FBOs were, without adequate justification, not subject to the same lease rates, fees (flowage fee), rentals and other requirements such as difference in the required leasehold square footage, and operating hours/schedule. However, both make the same or very similar use of the same airport. Both FBOs are engaged in direct competitive activities, provide very similar commercial activities, and serve the same aeronautical customer base. Both have similarly-sized acreage, administrative, maintenance, parking facilities, and fuel tanks. Their relative position (comparable e.g., in terms of distance) in relation to the runway and the airport's taxiway system is also similar. The County stated that the minimum standards would be applied to any new entrant, however, this did not occur. The record shows that the new entrant was provided favorable terms and conditions which resulted in unjust economic discrimination against the incumbent FBO.
>
> > Against this background, the Director finds that the County's actions concerning the lease terms and conditions provided to MAP, including the lack of a fuel flowage fee, the differences in operating hours, and its significantly lower rental rates, collectively and individually, have resulted in economic discrimination in violation of Grant Assurance 22 and warrants corrective action.
> >
> > Thus, upon consideration of the submission of the parties, the entire record herein, the applicable law and policy and for the reason's stated above, the Director, Airport Compliance, and Management Analysis finds and concludes that:
> >
> > The Director finds that by (1) not considering AMS and MAP as similarly situated, (2) by failing to adhere to its own stated minimum standards, and (3) agreeing to unjustly discriminatory terms and conditions in the MAP Lease, the County is in violation of Grant Assurance 22, Economic Non-Discrimination.
> >
> > ACCORDINGLY, the Director finds Santa Rosa County, Florida in violation of applicable federal law and its federal grant obligations.
> >
> > Santa Rosa shall present a corrective action plan to the Orlando Airport District Office (ADO) within thirty days from the date of this Order, detailing how the County intends to return to compliance with its federal grant obligations concerning economic discrimination between AMS and MAP. [14 C.F.R. 16.109(c)].

[2] *Santa Rosa* Director's Determination at 29.

> In the event that the County fails to submit a corrective action plan acceptable to the FAA within the time provided, or fails to complete the corrective action plan as specified, the Director may initiate action to revoke and/or deny applications for AIP discretionary grants under 49 U.S.C. §47115 and general aviation airport grants under 49 U.S.C. §47114(d). [14 C.F.R. 16.109(d)].[3]

CONCLUSION

The case involving Santa Rosa County illustrates how ambitions to improve the economic circumstances at an airport can lead uninformed politicians down the path to governmental sanctions. The initial ambition was to increase the traffic count of the airport and economic activity. Questions were raised by the Airport Advisory Committee that were rejected. The County then made economic concessions to MAP that worked to the economic disadvantage of AMS. The end result was the finding of a grant assurance violation by the FAA and directives for corrective action to put an end to the grant assurance violation.

[3] *Id.* at 32, 33.