

FAA Finds that Airports Cannot Prohibit the Sale of Leaded AvGas

Aviation is a highly “federalized” industry. That is especially true for airports, which for capital financing are highly-reliant on the Federal Aviation Administration’s (FAA) Airport Improvement Program (AIP)– and thus are subject to the “strings” attached to AIP grants.

The Airport Improvement Program was established in 1982, and is an essential source of funding for safety, capacity, security, and other improvements at airports. The allocation scheme for AIP grants is complex, but few of the more than 3,300 airports included in the National Plan of Integrated Airport Systems (NPIAS) do not routinely apply for and receive AIP grants.

But AIP funding comes with conditions. Airports must comply with 39 “assurances” that are incorporated into the grants. The assurances typically apply not just to improvements that are specifically funded by a grant but to all of an airport’s operations. Likewise, although most of the assurances have a limited term (typically 20 years), others are explicitly perpetual – and because most airports accept new grants on a recurring basis, their obligations are effectively perpetual.

An outlier is Reid-Hillview Airport (RHV) in Santa Clara County, California. The County last accepted an AIP grant in 2011, based on the premise that its AIP-based obligations would expire and the airport could be closed in 2031 (although other federal and state laws may conflict with that plan). In the meantime, the County has endeavored to find means to restrict operations at the airport – including an effective prohibition on the sale of leaded avgas, adopted in 2021.



The firm’s practice encompasses virtually every aspect of aviation law, including advising airports and their tenants and users on compliance with US statutes, agency regulations and other compliance obligations. For further information regarding the matters discussed in this article, please contact any of the following attorneys:

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Despite its phase-out for virtually all other purposes, piston-powered aircraft typically continue to use fuel with lead additives, commonly known as 100LL. Despite years of research, a drop-in replacement that can be used by all aircraft remains elusive. Many but not all piston aircraft can use an alternative developed by Swift Fuels, known as UL94; General Aviation Modifications has made available its own lead-free formulation, G100UL, but the fuel has not achieved wide acceptance, in part due to concerns about possible damage to aircraft.

The FAA has established a set of procedures, commonly known as Part 16, for complaints which allege that an airport is not in compliance with its AIP-based obligations. In 2022, the Aircraft Owners and Pilots Association (AOPA) along with eight individual and corporate airport users filed a complaint alleging that the County's ban on the sale of leaded avgas at RHV (and also at another facility, San Martin Airport (E16)) was inconsistent with its assurances, including #22 (which restricts economic discrimination) and #23 (which restricts exclusive rights).

Although Part 16 is intended to expedite the FAA's review of complaints premised on AIP grants, more than two years elapsed before the agency issued a preliminary decision (officially called a "Director's Determination"). Although the FAA did not agree with every argument advanced by AOPA, it did overall agree that the County was not in compliance with its obligations, and should submit a corrective action plan. Significant elements of the ruling include that:

- Although the FAA generally prohibits "exclusive rights" at airports – *i.e.*, it may not explicitly or constructively authorize only one or a few operators to offer aeronautical services – it does allow an airport itself to be the exclusive provider of aeronautical services (a "proprietary exclusive right"). But that concept only applies to services for which the right is actually exercised. The FAA explained that Santa Clara County could have chosen to be the sole vendor of fuel, including leaded avgas at its airports – but it could not refuse to offer leaded avgas and simultaneously prohibit others from offering it.
- The FAA further ruled that, with the above defense unavailable, the County had created an impermissible exclusive right at the airports, even though AOPA had not specifically made such an argument. The agency explained that the restrictions favored one class of aircraft (*i.e.*, those that can safely use alternative fuels already available) to the detriment of those that cannot, as well as created a monopoly for the manufacturers and suppliers of those alternative fuels (which are discussed further below).
- Additionally, the FAA's prohibition on economic discrimination at AIP-obligated airports has been interpreted to require them to allow users to self-fuel their aircraft. Based on the facts submitted by AOPA and other petitioners, the FAA ruled that the County was clearly prohibiting commercial tenants from self-fueling with leaded avgas – *e.g.*, by requiring them to purchase fuel only from the County, which (as above) did not offer it for sale.
- However, the FAA also concluded that the record did not show that non-commercial users had been denied the opportunity to self-fuel with avgas by the County. According to the FAA, the terms for a non-commercial permit might create

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convenience and cost issues, but they had not been shown to be unreasonable. Likewise, the FAA concluded that any decreases in fuel sales at the County airports had not been sufficient to endanger their self-sustainability, an additional obligation based on grant assurance #24.

Because the decision is preliminary, both parties have the opportunity to request its review by the Associate Administrator for Airports, and subsequently by a federal appeals court. As a result, this ruling is not necessarily the final word on the obligations of Santa Clara County and other U.S. airports – although it is also rare for the Associate Administrator or a court to overturn a Director's Determination. In addition, the FAA's primary (although not its only) enforcement tool in a Part 16 proceeding is the withholding of further AIP grants – a threat which may carry limited weight with the County to the extent it already has a policy of not accepting further grants for RHV.

In the background of this decision are other developments regarding leaded avgas. A section of the FAA Reauthorization Act of 2024 (Public Law 118-63, § 770) generally prohibits recipients of new AIP grants from restricting its sales through 2030 – although that appears to carve out certain airports, such as RHV. In 2024 California also adopted a purported restriction on the sale of leaded avgas after 2030 (S.B. 1193), although the law explicitly exempts airports with AIP obligations, and other provisions may be implicitly preempted by federal law. Certain California FBOs and distributors in 2014 also entered into a consent decree which requires them to offer alternative fuels when they are commercially available; the plaintiffs recently have returned to court, arguing that now has occurred, but the court preliminarily has disagreed (*Center for Environmental Health v. Aerodynamic Aviation, et al.*, Alameda County Superior Court No. RG-11-600721). And research continues on replacement fuels that can be used by all aircraft, but the timeline for their roll-out remains uncertain.

As a result, legal disputes about how/if leaded avgas can continue to be sold at airports are likely to continue, and should be carefully monitored by affected stakeholders.