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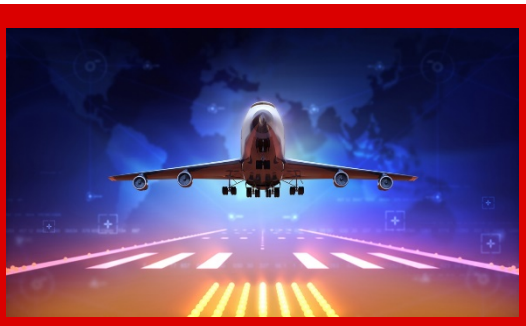
All Aeronautical Activities Are Equal … But Some Are More Equal Than Others? (November 2020)

In his 1945 novel *Animal Farm*, George Orwell postulated that a principle of equality could be corrupted, if entrusted to the wrong guardians. Unfortunately, a similar standard that is intended to ensure access to airports for all of their aeronautical users now may be under threat.

For airports that accept federal Airport Improvement Program (AIP) grants from the Federal Aviation Administration (FAA), a well-established requirement is that the airports be made "available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination."[1] But the FAA, most visibly in actions taken recently in response to the COVID-19 pandemic, has suggested that some aeronautical activities are more deserving than others of access– for example, if quarantines or other local restrictions are in effect.

The AIP was established by Congress in 1982, significantly expanding the federal funds available for capital improvements. More than 3,300 airports are eligible, and the vast majority of those airports routinely accept AIP grants. In a typical year, more than $3 billion is disbursed – typically sourced to aviation taxes and fees paid into the Airport and Airway Trust Fund. During the pandemic, additional funding has been made available through the AIP,[2] and President-Elect Biden has proposed to double the funding for the AIP.

But AIP grants come with strings attached. As a condition of federal funding, recipients must agree to operate consistent with 39 "assurances." These assurances typically are



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with DOT, FAA and other agency requirements related to the ongoing COVID-19 pandemic.

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effective for 20 years – but because most airports accept AIP grants on a recurring basis, in practice the obligations are typically perpetual. One of the most important of them is #22, which prohibits "unjust discrimination" and requires "reasonable terms" for all types of aeronautical activities.[3]

Strictly speaking, assurance #22 does not require "equality," and certain exceptions are incorporated into the obligation – for example, the right of access presumes that an aeronautical activity can be conducted safely. But the FAA also has emphasized that it is the agency, not an airport, which decides if an activity is safe. For example, in administrative decisions reviewing whether airports are in compliance with their obligations,[4] the FAA routinely has rejected local assertions that skydiving or larger aircraft are incompatible with an airport's facilities.[5]

Likewise, the FAA has adopted a broad definition of an "aeronautical activity" that must be allowed access – i.e., it encompasses all activities directly related to the operation of aircraft, such as air carrier services, general aviation, pilot training, crop dusting, aerial advertising, and parachuting.[6] These activities can require significantly different accommodations – but a basic premise has been that they are all protected by the assurances, and by other applicable law.[7]

But in guidance issued in the wake of the COVID-19 pandemic, the FAA unexpectedly indicated that air carrier services should be prioritized – and implied that at least some other aeronautical activities were second-class citizens. Initially, in its information for airport sponsors, the agency warned that AIP obligations did not allow an airport to close, or to restrict operations based on their origin, aircraft, or type of operation. So far, so good. But the guidance also authorized local restrictions on "recreational" activities – citing flight training and skydiving as examples, "[w]ith the goal of keeping airports open to ensure access for the traveling public, emergency and medical equipment and supplies, and emergency transportation."[8]

This guidance from the Office of Airports is not only at odds with precedent but also internally inconsistent, and even mischaracterizes the activities that it specifies can be restricted. Notably, the FAA's stated premise for prioritizing air carrier access to airports was to ensure emergency passenger and cargo movements – but by that reasoning, airports should have been allowed to restrict air carriers from enabling recreational travel and transporting non-essential freight. The FAA did not do so – nor should it have. But it also should not have judged whether other activities were worthy of protection based on their assumed purposes. The guidance also was facially incomplete – for example, not specifically defending general aviation, which can be essential in emergencies (including in response to COVID-19),[9] as well as for supporting critical business activity. Nor should there be any debate that flight training is not merely "recreational" – it is essential for maintaining the skillset of pilots, as other FAA offices have recognized.[10]

These issues are not merely theoretical. In apparent reliance upon FAA guidance during the initial stages of the pandemic certain local authorities purported to restrict flight training, skydiving, and other aeronautical operations.[11] Because those

restrictions since have been lifted or at least modified,[12] it may be that there will be no opportunity for them to be reviewed by the FAA or a court. But the mere fact that they existed in 2020 – with the FAA's apparent endorsement – may encourage state and municipal efforts in the future to try to impose local restrictions on aeronautical activities that the localities deem to be of lesser importance (and calculate to be less likely to be vigorously defended by the FAA).

Additionally, the pandemic guidance is regrettably not the first time that the FAA has suggested that air carrier services are "more equal" than other aeronautical activities. For example, the rules for the privatization of U.S. airports provide that the airport's sponsor may utilize any revenues obtained from that sale or lease (an issue implicating the assurances) for non-airport purposes only with the consent of the air carriers operating at the airport. No consultation is required with other type of airport users – even if the airport is a general aviation facility at which there are few or no air carriers.[13] The FAA also previously opined that model aircraft do not comprise an aeronautical activity[14] – an assertion now difficult to reconcile with its current position that unmanned aerial vehicles are "aircraft" within its jurisdiction,[15] and thus creating uncertainty as to how – or if – such operations should be accommodated at airports.

Going forward, the FAA should be clear in its guidance. Although the diverse categories of aeronautical activities at airports may not be literally "equal" in practice, they should be equal in the protection that they are afforded. Any exceptions should be justified based on specific circumstances, and not because an entire type of operation is deemed less important. Indeed, the FAA itself previously emphasized that airports should not be allowed to "pick and choose" the obligations with which they will comply.[16] Assurance #22 protects "all" aeronautical activities, "not simply the ones [that an airport] prefers."[17] If an airport has accepted AIP grants (as have the vast majority of eligible airports), FAA should proactively ensure that their commitment to enable access by "all" aeronautical activity is honored.

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[1] Airport Compliance Manual, FAA Order 5190.6B, § 14.2 (September 30, 2009).

[2] Although $10 billion in grants for airports was authorized by Title XII of the CARES Act (Pub. L. 116-136), the vast majority of that amount was allocated without being subject to the standard requirements of the AIP; however, $500 million was specifically made available to enable the FAA to provide 100% funding for AIP projects, instead of the usual requirement that 5-25% be paid out of local funds.

[3] Airport Sponsor Assurances, https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip-2020.pdf (last updated February 2020).

[4] 14 C.F.R. Part 16.

[5] *See, e.g.*, Pegasus Parachuting Services v. State of Michigan, docket no. 16-16-05, Director's Determination (May 16, 2018); Forman v. Palm Beach County, docket no. 16-17-13, Director's Determination (February 22, 2019).

[6] Exclusive Rights at Federally-Obligated Airports, Advisory Circular 150/5190.6, Appendix § 1.1 (January 4, 2007).

[7] In addition to the assurances, the courts generally hold that any municipal or state regulation of matters within the FAA's jurisdiction are preempted. See, e.g., Letter from Rebecca B. MacPherson, Assistant Chief Counsel, FAA, to Don Marcostica, Executive Director, Colorado Office of Economic Development, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2010/marcostica%20-%20(2010)%20legal%20interpretation.pdf (July 9, 2010) ("[l]ocal jurisdictions do not have authority to regulate the use of the navigable airspace or the safety of flight operations").

[8] Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations, https://www.faa.gov/airports/airport_compliance/media/Information-for-Airport-Sponsors-COVID-19-Updated-29May2020.pdf (May 29, 2020) (revising earlier guidance dated April 4, 2020).

[9] *See. e.g.,* Second Limited Extension of Relief for Certain Persons and Operations During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency, 85 Fed. Reg. 62951, 62956 (October 6, 2020).

[10] *See, e.g.*, Letter from Robert C. Carty, Deputy Executive Director, Flight Standards Service, FAA, to John McGraw, Vice President of Regulatory Affairs, National Air Transportation Association, https://www.faa.gov/coronavirus/regulatory_updates/media/NATA_Extension_18510C.pdf (September 30, 2020) (extension of recurrent training deadlines through March 31, 2021).

[11] *See, e.g.*, Virginia Department of Aviation, Flight Training and Flight Operations under Executive Orders 53 & 55, https://doav.virginia.gov/globalassets/pdfs/policy/flight-operations-guidance.pdf (April 17, 2020). See also AOPA, Interpretations vary on Flight Training During Pandemic, https://www.aopa.org/news-and-media/all-news/2020/march/25/fight-schools-considered-critical-infrastructure-in-some-cases (March 25, 2020).

[12] *See, e.g.,* Amendment to Honolulu's COVID-19 Recovery Framework: Order Implementing Tier 1, Emergency Order no. 2020-28, § 15 (October 12, 2020) (limiting skydiving operations to 50% of aircraft capacity).

[13] Airport Privatization Pilot Program: Application Procedures, 62 Fed. Reg. 48693 (September 16, 1997), *modified* 62 Fed. Reg. 63211 (November 26, 1997). The program, authorized by 49 U.S.C. § 47134, since has been renamed as the Airport Investment Partnership Program, but the rules have not been updated. In approving the privatization of Airglades Airport, FAA apparently concluded that an exemption from the default revenue-use requirements could be granted without any consultation with its general aviation user base. *See* 84 Fed. Reg. 53808 (October 8, 2019).

[14] FAA Order 5190.6B, Appendix § 1.1(a).

[15] *See, e.g.,* Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78594, 78599 (December 16, 2015) (noting that 49 U.S.C. § 40102(a)(6) defines an "aircraft" as "any contrivance invented, used, or designed to navigate or fly in the air").

[16] Centennial Express Airlines v. Arapahoe County Public Airport Authority, docket no 16-98-05, Director's Determination, at 22 (August 21, 1998), *affirmed* 242 F.3d 1213 (10th Cir. 2001).

[17] Garlic City Skydiving v. County of Santa Clara, no. 16-11-06, Director's Determination, at 32 (December 19, 2011). *See also* Final Agency Decision, at 30 (August 12, 2013) ("skydiving is an aeronautical activity, no less than any other aeronautical activity that the County may find more acceptable").