STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 1, 2021

Opinion No. 21-11

Validity of Minimum Standards that Prohibit the Sale of Fuel by Tenants at Federally Obligated Airports

Question

Does a municipal airport authority operating a federally obligated airport have the authority to enact "Minimum Standards" that prohibit an airport tenant from engaging in fuel sales on airport premises to aircraft that are not owned by the airport tenant?

Opinion

A municipal airport authority operating a federally obligated airport has the authority to enact reasonable "Minimum Standards," including standards that may prohibit an airport tenant from engaging in fuel sales on airport premises to aircraft that are not owned by the airport tenant, but the validity of such a standard in any given case would depend on the reasonableness of, and the justification for, the prohibition evaluated in light of the specific facts and circumstances at the particular airport.

ANALYSIS

Municipal Airport Authorities

Municipalities may establish, operate, regulate, and maintain airports. *See* 1957 Tenn. Pub. Acts, chs. 375, 376. Municipalities may perform these functions themselves (Municipal Airport Act, Tenn. Code Ann. §§ 42-5-101 to -205) or they may establish municipal or regional airport authorities to perform these functions (Airport Authorities Act, Tenn. Code Ann. §§ 42-3-101 to -205). *See* Tenn. Att'y Gen. Op. 16-14 (Apr. 5, 2016).

A municipal airport authority established under the Airport Authorities Act has "all the powers necessary or convenient" to operate airport facilities except the power to levy and collect taxes or special assessments. Tenn. Code Ann. § 42-3-108(a). Such airport authorities have the broad power to

> [p]lan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, and protect airports and air navigation facilities, within this state and within any adjoining state, including the acquisition, construction, installation, equipment, maintenance, and operation of such airports or buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air

> travelers, and the purchase and sale of supplies, goods, and commodities as are incident to the operation of its airport properties. . . .

Id. § 42-3-108(a)(3).

A municipal airport authority generally also has the power to enter into agreements that grant others the privilege of using the airport, as well as agreements that confer the privilege of "supplying goods, commodities, things, services or facilities" at the airport. *Id*. § 42-3-112(a)(1). A municipal airport authority's grant of such privileges, though, must accord with the terms and conditions of any government grant, loan, or agreement that the airport authority has accepted. *Id*.

Federally Obligated Municipal Airport Authorities

When a municipal airport authority accepts federal funds to develop or improve its airport, it must comply with certain federally mandated obligations, some of which relate to tenants and businesses operating at the airport. The primary source of these obligations is the grant agreement that contains the continuing commitments the airport authority must make to the United States as a condition for the grant of federal funds.

The most recent airport development grant program is the Airport Improvement Program (AIP), which is authorized by 49 U.S.C. §§ 47101 to -47144. Any municipal airport authority that applies for an AIP grant must give "assurances"[1] that then become binding obligations on the parties when they enter into the AIP grant agreement.[2] *Rick Aviation, Inc. v. Peninsula Airport Comm'n*, FAA Docket No. 16-05-18, 2007 WL 4109715, at *4, Final Decision and Order (Nov. 6, 2007); *Roberts v. Daviess Cnty, Ind. Bd. of Aviation Comm'rs*, FFA Docket No. 16-00-06, 2001 WL 1683273, at *5, Final Decision and Order (Dec. 13, 2001); *see Flamingo Express, Inc. v. Federal Aviation Admin.*, 536 F.3d 561, 563 (6th Cir. 2008).

Two of those required assurances are pertinent here: (1) An airport authority must make its airport "available for public use on reasonable conditions and without unjust discrimination," and (2) it must not grant any person providing aeronautical services to the public "an exclusive right to use the airport."[3] 49 U.S.C. § 47107(a).

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[1] Available at https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip-2020.pdf.

[2] The "assurance" requirement is imposed on every "airport sponsor," which means any public agency or private owner that submits an application for financial assistance for a public-use airport. 49 U.S.C. § 47102(26). A municipal airport authority that submits an application comes within that definition.

[3] There is also a required grant assurance that a municipal airport authority will not prevent any person from self-fueling or self-servicing his or her own aircraft with his or her own employees. *See* 49 U.S.C. §47107(a)(6); 14 C.F.R., pt. 152, app. D at §A(20)(c). But that assurance is not at issue here since the question presented to this Office concerns the authority of a municipal airport authority to prohibit an airport tenant from engaging in fuel sales to "other aircraft," i.e., aircraft not owned by the airport tenant.

1. Assurance That Airport Will Be Made Available for Public Use without Unjust Discrimination

A municipal airport authority must assure that its airport will be made available for the use and benefit of the public and that it will be open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without unjust discrimination. *See id*.; 14 C.F.R., pt. 152, app. D at §§A(18), (20).[4] In sum and substance, these provisions prohibit the airport authority from adopting unjust discriminatory conditions that would limit reasonable airport access while still permitting the airport authority to exercise control necessary to preclude unsafe and inefficient conditions—conditions that would be detrimental to the civil aviation needs of the public. *See Rick Aviation, Inc.*, 2007 WL 4109715, at *5; *Roberts*, 2001 WL 1683273, at *5.

2. Assurance That No "Exclusive Right" Will Be Granted

The municipal airport authority must also assure, subject to the limited exceptions discussed below, that it will not permit any "exclusive right" for the use of the airport by any person that provides or intends to provide aeronautical services to the public. *See* 49 U.S.C. §47107(a)(4); 14 C.F.R., pt. 152, app. D at §A(19); Federal Grant Assurance 23, *Exclusive Rights*;[5] *see also* 49 U.S.C. §§ 47103(e) (providing independently of the grant assurance requirement in §47107(a)(4) that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended").

"Exclusive right" describes "a power, privilege, or other right excluding or debarring another or others from enjoying or exercising a like power, privilege, or right." *City of Pompano Beach v. Federal Aviation Admin.*, 774 F.2d 1529, 1541 (11th Cir. 1985) (citing 40 Op. U.S. Att'y Gen. 71, 72 (1941)). An exclusive right may be conferred by express agreement, by imposition of unreasonable standards, or other means.

Conferring a particular right on one or more aeronautical service providers while excluding others from having a similar right could be a violation of the exclusive-rights assurance. FAA Advisory Circular 150/5190-6, app. at §1.1(f). For example, an exclusive-rights violation occurs

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[4] Federal Grant Assurance 22, *Economic Nondiscrimination*, which implements this requirement, provides in pertinent part that:

> [The airport sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities,[4] including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a)]
>
> The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)]
>
> The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i)].

[5] *See* note 1, *supra*.

when the airport sponsor fails to afford other qualified parties the opportunity to be an aeronautical service provider. *Id.*

At the same time, the rendering of most—or even all—aeronautical services by a single provider is not, in and of itself, evidence of an exclusive-rights violation. FAA Advisory Circular 150/5190-6, §1.3(b)(2). For example, an airport authority may issue a competitive offering for all qualified parties to compete for the right to be an aeronautical service provider, and, if it does so, it "is not required to accept all qualified service providers without limitation." FAA Advisory Circular 150/5190-6, §1.3(b)(2). And "[t]he fact that only one qualified party pursued an opportunity in a comprehensive offering would not subject the airport to an exclusive-rights violation." *Id*. However, the airport authority may not, "as a matter of convenience, choose to have only one [aeronautical service provider] provide services at the airport regardless of the circumstances at the airport." *Id.*

An airport authority does not impermissibly grant an exclusive right to a single provider of aeronautical services at its airport when *both* of the following conditions exist: (1) It would be unreasonably costly, burdensome, or impractical for more than one entity to provide the service, *and* (2) the airport authority would have to reduce the space leased under an existing agreement with the entity providing the aeronautical services in order to accommodate a second provider. *See* 49 U.S.C. §47107(a)(4); Federal Grant Assurance 23.

Finally, there is no exclusive-right violation when the airport authority invokes its own proprietary exclusive right to provide any or all of the aeronautical services needed by the public at the airport. FAA Advisory Circular 150/5190-6, §1.3(b)(1). But if the airport authority opts to itself provide an aeronautical service exclusively it may not exercise that proprietary right through a management contract but must use its own employees and resources. *Id.*

Minimum Standards for Federally Obligated Airport Authorities

To help federally obligated airport authorities avoid violations of their grant assurances, the FAA "highly recommends" that they adopt "reasonable minimum standards that are relevant to the proposed aeronautical activity with the goal of protecting the level and quality of services offered to the public." FAA Advisory Circular 150/5190-7, §§1, -1.1. The minimum standards are intended to establish the reasonable and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. Tennessee municipal airport authorities have the power to adopt such minimum standards because they are authorized by statute to adopt rules and regulations they deem necessary for the management, government, and use of airports under their control. Tenn. Code Ann. § 42-3-113.

When an airport authority adopts such minimum standards, the FAA generally will not find the airport sponsor in violation of its contractual "assurance" obligations if—among other considerations—those particular minimum standards:

> (1) apply to all providers of aeronautical services, from full service FBOs to single service providers; [6]
>
> (2) impose conditions that ensure safe and efficient operation of the airport in accordance with FAA rules, regulations and guidance;
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> (3) . . . are reasonable, not unjustly discriminatory, attainable, uniformly applied and reasonably protect the investment by providers of aeronautical services to meet minimum standards from competition not making a similar investment;
>
> (4) . . . are relevant to the activity to which they apply; and
>
> (5) . . . provide the opportunity for newcomers who meet the minimum standards to offer their aeronautical services within the market demand for such services.

FAA Advisory Circular 150/5190-7, § 1.2(d). In short, although an airport authority's complete denial of an aeronautical activity at a federally obligated airport is inherently antithetical to the purpose of minimum standards, an airport authority is permitted "to restrict the commercial use of the Airport based on nondiscriminatory standards and may insist that the person, firm or corporation using the Airport meet certain standards regarding the quality and level of services offered to the public so long as those standards are reasonable, relevant to the proposed activity, and applied objectively and uniformly." *International Flight Ctr. v. City of Murfreesboro*, 45 S.W.3d 565, 571 n. 7 (Tenn. Ct. App. 2000).

Thus, there are some circumstances in which an airport authority may prohibit certain aeronautical activities at its airport. For instance, it may prohibit airport users from conducting certain aeronautical activities for reasons of safety or efficiency.[7] *See* Federal Grant Assurance 22; FAA Advisory Circular 150/5190-7, §1.2(b). To deny an aeronautical activity on these grounds, the airport authority must provide evidence that safety will be compromised if the applicant is allowed to engage in the proposed aeronautical activity.[8] FAA Advisory Circular 150/5190-7, §1.2(b). As discussed earlier, an airport sponsor may also preclude airport users from

[6] A fixed-base operator (FBO) is "[a] commercial business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc." FAA Advisory Circular 150/5190-7, app. at §1.1(i). Single-service providers differ from full-service FBOs in that they typically offer "only a specialized aeronautical service such as aircraft sales, flight training, aircraft maintenance, or avionics service for example." *See id*. at §1.1(n).

[7] "Efficiency" in this context refers to "the efficient use of navigable airspace," and "FAA Air Traffic (AT) is to be consulted in such cases." FAA Advisory Circular 150/5190-7, §1.2(b) n. 2. "Efficiency" in this context should not "be construed as protecting the 'efficient' operation of an existing aeronautical service provider for example." *Id.*

[8] The FAA encourages an airport authority contemplating the denial of an aeronautical activity to contact the local airports district office or the regional airports division for a reasonableness assessment. *Id*. at §1.2(b).

engaging in certain aeronautical activities when the statutory exclusive-right exception relating to single aeronautical service providers exists, *see* 49 U.S.C. §47107(a)(4), Federal Grant Assurance 23, or when the sponsor elects to exercise its proprietary exclusive right to provide an aeronautical service with its own employees and resources, *see* FAA Advisory Circular 150/5190-6, §1.3(b)(1).

Accordingly, a municipal airport authority operating a federally obligated airport has the authority to enact reasonable "Minimum Standards," including standards that may prohibit an airport tenant from engaging in fuel sales on airport premises to aircraft that are not owned by the airport tenant. The validity of such a standard in any given case would depend on the reasonableness of and the justification for the prohibition evaluated in light of the specific facts and circumstances at the particular airport.

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