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M E M O R A N D U M

PRIVILEDGED AND CONFIDENTIAL

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TRUCKEE TAHOE AIRPORT DISTRICT

FROM: KAPLAN KIRSCH & ROCKWELL LLP

DATE: February 15, 2017

SUBJECT: Requirement that Airports be Self-Sustaining

INTRODUCTION

This memorandum summarizes existing statutory provisions, agency guidance, and FAA decisions surrounding Grant Assurance 24, otherwise known as the "self-sustaining requirement."

STATUTORY AUTHORITY

The self-sustaining requirement first appeared in the Airport and Airway Development Act of 1970. The Act requires that as a condition precedent to the approval of any airport development project, the Secretary shall receive a written assurance that "the airport owner or operator will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection."[1] The legislative history of the Act does not appear to provide any background on the Congressional intent of this requirement; it merely states that "[e]xcept for the requirement respecting the establishment of a fee and rental structure for facilities and services provided to airport users, [Section 18] is substantially identical to existing law."[2]

Pursuant to the Airport and Airway Improvement Act of 1982, the earlier self-sustaining requirement was codified at 49 U.S.C. § 47107(a)(13), and now states as follows:

> The Secretary of Transportation may approve a project grant application under this subchapter [49 USCS §§ 47101 et seq.] for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that…the airport owner or operator will maintain a schedule of charges for use of facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the

[1] P.L. No. 91-258, § 18(8) (May 21, 1970).
[2] H.R. Rep. No. 601, 91st Cong., 2nd Sess. 1970.

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> airport, including volume of traffic and economy of collection; and without including in the rate base used for the charges the Government's share of costs for any project for which a grant is made under this subchapter.

The Federal Aviation Administration Authorization Act of 1994 included a provision which required FAA's Revenue Use Policy (discussed below) "to take into account whether sponsors – when entering into new or revised agreements otherwise establishing rates, charges, and fees – have undertaken reasonable efforts to be self-sustaining in accordance with 49 U.S.C. § 47107(a)(13)."[3]

These statutory provisions are reflected in the text of Grant Assurance 24, which currently reads as follows:

> [The airport sponsor] will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.

AGENCY GUIDANCE

The FAA has provided guidance on the self-sustaining requirement primarily in three documents: the *Rates and Charges Policy*,[4] the *Revenue Use Policy*,[5] and Chapter 17 of the *Compliance Manual*.

Rates and Charges Policy

The *Rates and Charges Policy* makes several broad policy statements about the self-sustaining requirement. In the preamble, the *Rates and Charges Policy* states that

> [T]he Department will not consider on the merits a complaint as to the reasonableness of an airport fee based solely on alleged noncompliance with the self-sustainability requirement. A

[3] FAA Order 5190.6B, ¶ 17.2.b. (*Compliance Manual*). *See also* 49 U.S.C. § 47107(*l*).
[4] Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996) (*Rates and Charges Policy*). This policy was later amended, but the amendments did not address the self-sustaining requirement. The most current policy, as amended, was published at 78 Fed. Reg. 55330 (Sept. 10, 2013).
[5] Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696 (Feb. 16, 1999) (*Revenue Use Policy*).

> complaint about compliance with the self-sustainability requirement would be considered by the FAA under its administrative complaint procedures.

In considering public comments, the *Rates and Charges Policy* goes on to state that

> The requirement of a fee and rental structure that will make the airport as self-sustaining as possible does not apply to the setting of a particular fee. Rather, the requirement applies to managing the airport's revenues and establishing a schedule of fees that generates sufficient earnings to meet current expenditures, to offset future deficits, and avoid the necessity of reliance on taxation.

Finally, the *Rates and Charges Policy* restates some of the statutory principles discussed above, that airport proprietors must maintain a fee and rental structure that, considering the circumstances of the airport, makes the airport as financially self-sustaining as possible. The *Rates and Charges Policy* then makes three interpretations of that statute:

1. If the airport cannot be self-sustaining because of market conditions, it should set long-term goals and targets to be as close to self-sustaining as possible.

2. Airport proprietors are encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self-sustaining as possible in the circumstances existing at such airports.

3. The self-sustaining requirement does not permit the airport proprietor to establish fees for the use of the airfield that exceed the airport proprietor's airfield costs.

Revenue Use Policy

In Section VII of the *Revenue Use Policy*, FAA sets forth six generally applicable policies regarding the self-sustaining requirement, several of which also appear in the *Rates and Charges Policy*:

1. Despite the language of the statute, "[i]n considering whether a particular contract or lease is consistent with this requirement, the FAA and the Office of the Inspector General (OIG) generally evaluate the individual contract or lease to determine whether the fee or rate charged generates sufficient income for the airport

property or service provided, rather than looking at the financial status of the entire airport."[6]

2. If the airport cannot be self-sustaining because of market conditions, it should set long-term goals and targets to be as close to self-sustaining as possible.

3. If economic conditions dictate that an airport proprietor charge a rate less than necessary to create a self-sustaining environment in order to retain commercial aeronautical services, such a decision is not inherently inconsistent with the self-sustaining requirement.

4. Airport proprietors are encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self-sustaining as possible in the circumstances existing at such airports.

5. The self-sustaining requirement does not require airport sponsors to charge fair market value to aeronautical users, but rather rates that reflect the cost to the airport in providing aeronautical services and facilities to those users. A fee for aeronautical users set pursuant to a residual costing methodology satisfies the requirement for a self-sustaining airport rate structure.

6. In setting both aeronautical and non-aeronautical rates, an airport sponsor should not seek to create a revenue surplus beyond reasonable reserves to cover contingencies.

The *Revenue Use Policy* goes on to list other specific interpretations of the self-sustaining requirement, including that the airport sponsor receive fair market value for non-aeronautical property and that the airport sponsor may provide reduced rates for public community purposes, not-for-profit aviation organizations, military units, and transit projects.

Compliance Manual

The *Compliance Manual*, Chapter 17, generally summarizes the policies outlined in the *Rates and Charges Policy* and the *Revenue Use Policy*. The *Compliance Manual* does, however, state that "[t]he purpose of the self-sustaining rule is to maintain the utility of the federal investment in the airport."[7] The *Compliance Manual* also goes into some detail regarding the community use, non-for-profit aviation organizations, military, and transit project exceptions.

[6] This statement stands in contrast with the statement from the *Rates and Charges Policy* that seems to suggest airport sponsors should consider the entire airport system when setting their rates and fees.
[7] *Compliance Manual* at ¶ 17.5.

APPLICATION OF AGENCY INTERPRETATIONS

The FAA has investigated alleged violations of the self-sustaining requirement in a number of Part 16 complaints. However, in issuing decisions on those complaints, the agency has found few actual violations.

Consistent with its guidance, FAA has found in numerous Part 16 decisions that an airport sponsor is not *required* to maximize revenue in order to remain in compliance with Grant Assurance 24. In practice, this means that sponsors may make decisions that are not in its financial self-interest (*e.g.*, declining a lucrative lease) so long as the airport maintains a reasonable rate structure given the circumstances at that particular airport.[8] For example, it is permissible for a sponsor to charge rates "that are below those needed to achieve self-sustainability in order to assure that services are provided to the public" if the circumstances at the particular airport dictate that action.[9] FAA has also agreed with the position that in order to comply with Grant Assurance 24, an airport does not actually need to be self-sustaining; while self-sustainability is the ultimate goal, the *requirement* of Grant Assurance 24 is only that the sponsor have a rate structure in place that makes the airport *as self-sustaining as possible*.[10]

In at least one instance, FAA has stated that an airport's overall financial solvency, while relevant, is not the sole inquiry into whether there is a violation of Grant Assurance 24. In *Sun Valley Aviation, Inc. v. Valley Intl. Airport*, FAA stated:

> In the instant Complaint, the Respondent's action of removing the north GA ramp from the Airport budget does not appear to have created an insolvent airport. The Director notes that the barometer for self-sustainability pivots on numerous variables such as the size of the airport, market conditions, and general economic factors such as demand. While the facts support the Respondent's claim that it maintained solvency with a surplus, those facts are not wholly relevant to this allegation. What is relevant is that the Respondent failed to recognize "*the purpose of the self-sustaining rule is to maintain the utility of the federal investment in the airport*."[11]

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[8] *See Chandler Air Serv., Inc. v. City of Chandler*, FAA Docket No. 16-13-05, Director's Determination at 26 (Feb. 9, 2016) ("The intent of Grant Assurance 24 is that a sponsor will manage its existing facility in a manner that allows the airport to be self-sustaining. As it does not require a fee schedule to maximize an airport's profit potential, neither does it require an airport to develop to the maximum extent possible."); *Valley Aviation Servs., Inc. v. City of Glendale*, FAA Docket No. 16-09-06, Director's Determination at 59 (May 24, 2011) ("The fact that the Respondent might be able to collect additional fees or a higher rate is not sufficient to show the Respondent is in violation of Grant Assurance 24.").

[9] *Flightline Ground, Inc. v. Louisiana Dept. of Transportation*, FAA Docket No. 16-11-01, Director's Determination at 34 (Oct. 24, 2012).

[10] *See Rudy J. Clarke v. City of Alamogordo*, FAA Docket No. 15-05-19, Director's Determination at 20-21 (Sept. 20, 2009).

[11] FAA Docket No. 16-10-02, Director's Determination at 67 (Dec. 11, 2012) (emphasis in original).

The FAA went on to find that, in that case, the sponsor's decision to expand the facilities for an existing FBO instead of constructing new facilities for a new FBO was a "*deliberate* action to avoid developing infrastructure in support of its prime obligation," and that the actions "conflict with the purpose of the self-sustainability obligation."[12] Nonetheless, the FAA found that the sponsor was *not* in violation of Grant Assurance 24 because there was insufficient documentation regarding the potential lease opportunities for the possible new FBO.[13]

The *Sun Valley* decision, in which FAA scrutinized the sponsor's decision to avoid development, seems to be an exception to the broader rule that the FAA generally defers to a sponsor's business decisions under Grant Assurance 24, particularly those decisions that deal with financial matters and infrastructure development. For example, FAA has found that an airport sponsor's decision to sell existing improvements as part of the overall development plan for the airport, rather than lease them to an aeronautical user, did not violate Grant Assurance 24.[14] In another instance, a sponsors' decision about extending runway length was also found not to be a violation of Grant Assurance 24, even when the extended runway could theoretically have produced additional revenue.[15] Nor is it a violation of Grant Assurance 24 to offer only short-term, one-year leases to tenants in anticipation of future development.[16] Sponsor decisions of this nature are judged through the lens of an airport sponsor's *current* compliance, not possible future noncompliance, and so FAA does not speculate on potential consequences of a sponsor's decision.[17]

There is, however, at least one Part 16 case in which the airport sponsor was found to be in violation of Grant Assurance 24. In *M. Daniel Cary v. Afton-Lincoln Cty. Mun. Airport Joint Powers Bd.*, the airport sponsor set rental fees for its FBO, but then failed to collect those fees.[18] The FAA found that this practice violated Grant Assurance 24.[19] In another case, although the sponsor was not found to be in violation of Grant Assurance 24, FAA stated that, "[a]n airport sponsor may be found in noncompliance with Grant Assurance 24…when it fails to establish a reasonable fee and rental structure for through-the-fence activities. An annual access fee that is

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[12] *Id*. at 67-68 (emphasis added).
[13] *Id*. at 68.
[14] *See Thermco Aviation, Inc. v. Cty. of Los Angeles*, FAA Docket No. 16-06-07, Director's Determination at 17 (June 21, 2007) ("While Complainants may disagree with the financial business decisions of the Respondents regarding the development of Van Nuys Airport, the Respondents retain the proprietary right to make such decisions.").
[15] *Chandler Air Serv., supra* n. 8, at 26 ("The Complainant's characterizations of the Respondent's airport business decisions, related to development, as undermining the self-sustainability of the Airport are misplaced. The Complainant's allegations concerning business decisions related to the length of the Airport's runway are not appropriately addressed under Grant Assurance 24.").
[16] *McDonough Props., LLC v. City of Wetumpka*, FAA Docket No. 16-12-11, Director's Determination at 27 (Oct. 10, 2013) ("It may be appropriate for the Respondent to decline to enter into a long term lease with a tenant for an area slated for redevelopment. The Respondent offered a business decision as support for the lease term.").
[17] *See Northern Air, Inc. v. Cty. of Kent*, FAA Docket No. 16-11-10, Director's Determination at 53, 59 (Mar. 28, 2013) ("The fact that the east side development may not be benefiting any aeronautical users at this time does not prove that the Respondent violated Grant Assurance 24 by making the investment.").
[18] FAA Docket No. 16-06-06, Director's Determination at 27 (Jan. 19, 2007).
[19] *Id*.

too low in proportion to the level of through-the-fence opportunity will not meet the obligations under Grant Assurance 24."[20]

SUMMARY

The guidance and FAA decisions on the self-sustaining requirement indicate that the agency is willing to give airport sponsors considerable leeway and does not often find violations of Grant Assurance 24. FAA has primarily deferred to the airport sponsor's judgment and decision-making unless there is a clear failure on the part of the sponsor to collect fees or a failure to protect the federal investment in the airport.

[20] *William Alfred Hicks Jr. v. City of Mount Airy*, FAA Docket No. 16-15-07, Director's Determination at 22 (Apr. 29, 2016).