

## MEMORANDUM

**TO:** Chris Rozansky  
NAPLES AIRPORT AUTHORITY

**FROM:** KAPLAN KIRSCH & ROCKWELL LLP

**DATE:** January 6, 2023

**SUBJECT:** Implications of Declining Further AIP Grant Funding

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The Naples Airport Authority (the “Authority”) has asked for insight on the implications and consequences for those airports that have decided to decline federal funding for the maintenance and improvement of the their airport under the Airport Improvement Program (“AIP”). We have found, in our experience advising numerous airport proprietors who have considered such a question, that the decision to turn down federal grant funding carries significant legal and financial consequences and warrants careful consideration. *Most importantly, every airport of which we are aware that considered declining federal funding, did so only as part of a long-term effort to close the airport entirely.*

This memorandum summarizes the implications of declining federal grant funds and presents brief case studies regarding several airport proprietors who declined such funding.

### 1. Background: The Authority’s Federal Grant Obligations

An airport proprietor that is eligible to receive federal grants that the Federal Aviation Administration (“FAA”) generally receives annual entitlement grants and often receives discretionary grants for the maintenance and development of the airport. The most common and most important, but not only, federal grant program is the FAA’s AIP, which Congress established in 1982 and which succeeded prior federal airport-grant programs dating back to the 1940s.<sup>1</sup> The FAA annually awards over \$3 billion in AIP funds to airports nationally.<sup>2</sup> For example, between

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<sup>1</sup> *Overview: What is AIP & What is Eligible?*, FAA (last updated Aug. 2, 2022), <https://www.faa.gov/airports/aip/overview> .

<sup>2</sup> Sarah Gimont, *FAA Awards \$766 Million in FY 2021 Airport Improvement Program Grants*, NAT’L ASS’N OF COUNTIES (Sept. 7, 2021), <https://www.naco.org/blog/faa-awards-766-million-fy-2021-airport-improvement-program-grants>.

fiscal years 2005 and 2020, the FAA awarded \$28.2 million in such grants to the Naples Airport Authority for the Airport.<sup>3</sup>

It is crucial to appreciate that receipt of AIP grants carries significant legal and financial consequences for an airport sponsor. Among them, the FAA requires an airport sponsor to agree to 39 specific “grant assurances” in exchange for an AIP grant. (The FAA refers to an airport proprietor that receives an AIP grant for a given airport as that airport’s “sponsor.”)<sup>4</sup> The grant assurances are contractual commitments, enforceable by the FAA, that regulate most aspects of the sponsor’s operations and financial management of its airport. Various grant assurances pertain to everything from financial accounting requirements to veterans’ employment preferences. Most pertinent to this memorandum, the grant assurances also require the airport’s sponsor to keep the airport operating as an airport, to adhere to (potentially costly) airport-maintenance standards set by the FAA, and to provide airport access to a wide range of aircraft operators and aeronautical service providers on a nondiscriminatory basis. While the grant assurances are a contractual commitment by the airport sponsor to the FAA, the specific grant assurance requirements are set by federal law.<sup>5</sup>

Critically, most AIP grant assurances bind the sponsor for 20 years after it accepts each grant, and some grant assurances apply in perpetuity as long as the airport remains open to the public. As the FAA’s standard-form grant-assurance agreement states, the assurances “remain in full force and effect through the useful life of the facilities developed or equipment acquired” for certain airport development and noise-compatibility projects, “but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer” of AIP funds for such project.<sup>6</sup> In practice, the FAA usually finds that such “useful life” coincides with the 20-year applicability cap. Furthermore, as discussed below, three grant assurances run for at least “as long as the airport is used as an airport.”<sup>7</sup> Those three assurances concern the sponsor’s use of airport revenues, the granting of “exclusive rights” regarding aeronautical use of the airport, and civil rights protections.

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<sup>3</sup> *APF: Naples Municipal*, FAA (last visited Dec. 22, 2022) (visit [https://www.faa.gov/airports/aip/grant\\_histories](https://www.faa.gov/airports/aip/grant_histories), select “AIP Grant History Visualization (FYs 2005-2021),” select “Grants by Individual Airport,” and follow the steps to specify the Airport).

<sup>4</sup> In the past, there has been some debate in the community about the respective role of the Authority and the City of Naples. While the City is the owner of the real property on which the Airport is situated, the Authority, not the City is the airport sponsor for FAA grant purposes.

<sup>5</sup> 49 U.S.C. 47107.

<sup>6</sup> FAA, *Assurances: Airport Sponsors* (2022), at 1, [https://www.faa.gov/sites/faq.gov/files/airports/new\\_england/airport\\_compliance/assurances-airport-sponsors-2022-05.pdf](https://www.faa.gov/sites/faq.gov/files/airports/new_england/airport_compliance/assurances-airport-sponsors-2022-05.pdf) (hereinafter “AIP Grant Assurances”).

<sup>7</sup> *Id.* at 1, 15. While two of those assurances, the Exclusive Rights and Airport Revenues assurances (assurances 23 and 25, respectively), apply “as long as the airport is used as an airport,” the third, Assurance 30 (Civil Rights) applies for the *longer* of the period during which (a) “the airport is used as an airport” or “for another purpose involving the provision of similar services or benefits” or (b) “the sponsor retains ownership or possession of the property.” *Id.* at 15.

Grant assurances apply in perpetuity to airport property that a sponsor purchases with AIP grants. When a sponsor obtains airport property with AIP funds, the grant assurances apply perpetually “with respect to real property acquired with federal funds”<sup>8</sup> unless the FAA formally releases the sponsor from those conditions.

The Authority most recently accepted AIP grant funds in 2022, having been awarded \$5.2 million in AIP funds this year for a combination of runway drainage improvements, taxiway and perimeter road reconfiguration. As a result, as of this writing, the Authority is grant-obligated with respect to the Airport through at least 2042 (not counting those three grant assurances that run for at least the duration of the airport’s operation). The Authority has also received AIP grants to purchase real property in the past. That is important because the Authority is obligated by certain grant assurances tied to that property so long as the Airport is open to the public; there is no 20-year expiration on the grant assurances obligations with respect to use of that property. Airports with real property-related grant obligations have found it especially difficult to become disentangled from grant obligations because FAA has complete discretion whether to waive grant obligations with respect to real property.

## **2. Implications of Declining Future AIP Grant Funds**

If an airport sponsor were to cease accepting further AIP grants, the sponsor would remain subject to all of its existing 39 grant-assurance obligations (a) for at least the next 20 years and (b) with respect to obligations tied to any property acquisitions, so long as the Airport is open. This section briefly discusses some of the most pivotal of the grant assurances to which the sponsor remains subject for at least the next two decades, regardless of whether it accepts further AIP grants.

### *A. Grant Assurance 5: Preserving Rights and Powers*

Grant Assurance 5 essentially prohibits the Authority from delegating or transferring its responsibilities for grant-assurance compliance to another entity. Assurance 5 provides, among other conditions, that the sponsor “will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in this Grant Agreement” without FAA approval.”<sup>9</sup> Assurance 5 further prohibits the sponsor from selling, encumbering, or otherwise transferring or disposing airport property used for aeronautical purposes for the duration of the grant assurances without FAA approval.<sup>10</sup>

Assurance 5 does allow the FAA to release the sponsor from some or all of the assurance obligations. As the FAA’s Airport Compliance Manual explains, with respect to releasing a

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<sup>8</sup> *Id.* at 1.

<sup>9</sup> AIP Grant Assurances at 5.

<sup>10</sup> *Id.* at 6.

sponsor from its grant assurances, “In all cases, the benefit to civil aviation is the FAA’s prime concern.”<sup>11</sup> Thus, as a practical matter, the FAA will typically only release a sponsor from Assurance 5 if doing so will help the sponsor better serve the needs of civil aviation (*e.g.*, if the release will make funds or property available for aeronautical purposes in a more efficient manner or in connection with relocation of an airport).

*B. Grant Assurance 19: Operation and Maintenance*

Grant Assurance 19 obligates a sponsor to continue operating and maintaining the airport according to federal standards, to prevent activities that inhibit its function as an airport, and to obtain FAA approval before temporarily closing the airport for a non-aeronautical purpose. Per Assurance 19, “The airport and all facilities” required to serve the airport’s aeronautical users “shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable federal, state, and local agencies for maintenance and operation.”<sup>12</sup>

This is no small burden. For example, the FAA predicts that the Authority will qualify for \$25.3 million in federal funding for airport improvements over the next five years.<sup>13</sup> While Assurance 19 would not require the sponsor to make all such improvements, it would require the sponsor to expend many tens of millions of dollars to maintain and operate its airport over the 20-year duration of its current grant assurances, *even if the sponsor takes no further grants during that period*. Stated differently, a sponsor’s legal obligations are unchanged for at least the first 20 years following a decision to decline further grants.

*C. Grant Assurance 22: Economic Nondiscrimination*

Grant Assurance 22 requires a sponsor to provide “reasonable” access to aircraft operators and aeronautical service providers who use, or would use, its airport. As Assurance 22 states, in relevant part, the 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, including commercial aeronautical activities offering services to the public at the airport.”<sup>14</sup> What constitutes “reasonable terms” or “unjust discrimination” would merit its own memorandum, and

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<sup>11</sup> FAA, Order 5190.6B Change 2, Airport Compliance Manual (2022), at 22.3, [https://www.faa.gov/documentLibrary/media/Order/Order\\_5190\\_6B\\_Compliance\\_Chg2.pdf](https://www.faa.gov/documentLibrary/media/Order/Order_5190_6B_Compliance_Chg2.pdf) (hereinafter “Compliance Manual”). The Airport Compliance Manual is officially an internal guidance document for FAA staff, and not a regulation. However, in practice, the FAA treats the Compliance Manual as quasi-regulatory and cites to it in adjudications of sponsors’ grant-assurance compliance.

<sup>12</sup> AIP Grant Assurances at 9. This source also includes the airport-function and temporary-closure restrictions stated above.

<sup>13</sup> FAA, National Plan of Integrated Airport Systems (NPIAS) 2023-2027, Appendix A: List of NPIAS Airports (2022), at A-31, <https://www.faa.gov/sites/faa.gov/files/2022-10/ARP-NPIAS-2023-Appendix-A.pdf>.

<sup>14</sup> *Id.*

we do not analyze those terms in detail here. In short, however, Assurance 22 requires the sponsor to make the airport available to aeronautical users—aircraft operators and aeronautical service providers—on terms that are attainable, rational, and uniformly applied, and that treat similar types of aeronautical operators similarly.<sup>15</sup> Grant Assurance 22 prohibits restrictions on use of the Airport (*e.g.*, curfews or other limits on the number or types of operations) without first complying with several federal laws including, especially, the Airport Noise and Capacity Act (see below).

Were an airport sponsor to decline further AIP grants, it would remain subject to Assurance 22—and its strict limitations on the sponsor’s ability to provide advantages or limit access to certain aircraft operators and service providers—for at least the next two decades.

#### *D. Grant Assurance 23: Exclusive Rights*

Grant Assurance 23 prohibits a sponsor from permitting any “exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.” The phrase “exclusive right,” as FAA uses the phrase, means that the sponsor has excluded at least one aeronautical operator from attaining benefits accorded to similarly situated operators.<sup>16</sup> A “right” may be “exclusive” even if the sponsor affords such right to all but one similarly situated operators at the airport. One exception to the prohibition on exclusive rights is that an airport sponsor can, (and the Authority does), provide certain aeronautical services itself and can prohibit other entities from competing with it.

#### *E. Grant Assurance 24: Fee and Rental Structure*

Grant Assurance 24 requires a sponsor to “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[.]”<sup>17</sup> The FAA has interpreted Assurance 24 to permit a sponsor to charge below-fair-market-value rates and fees to *aeronautical* operators for use of the airport, so long as such fees are “reasonable” and reflect the costs of the services and facilities that the sponsor provides for such fee.<sup>18</sup> However, the FAA generally requires the sponsor to charge fair-market-value rates to *nonaeronautical* airport users, such as concessions providers and even the sponsor itself when

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<sup>15</sup> Assurance 22 does permit the sponsor to “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.” But the FAA—cognizant of the potential loophole that exception creates—interprets the exception narrowly, and will disapprove conditions that it determines are not necessary for the airport’s safe or functional operation.

<sup>16</sup> As the Compliance Manual explains, an exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements or by another means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or right, would be an exclusive right. Compliance Manual at ¶ 8.2.

<sup>17</sup> AIP Grant Assurances at 11.

<sup>18</sup> Compliance Manual at ¶ 17.10.

using airport property for nonaeronautical purposes.<sup>19</sup> Assurance 24 restricts an airport sponsor's flexibility with respect to the fees it charges for use of its airport, and even, in many cases, requires it to charge fair-market-value for use of the airport to public, civic, and charitable entities, even though the sponsor might prefer to waive such charges.

*F. Grant Assurance 25: Airport Revenues*

Grant Assurance 25, an assurance that runs not for 20 years but for the duration of the airport's operation, prohibits a sponsor from using the revenues it obtains from operating the airport for non-airport purposes. With limited exceptions, Assurance 25 provides that "[a]ll revenues generated by the airport and any local taxes on aviation fuel [...] will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to" air transportation or noise mitigation.<sup>20</sup>

*G. Airport Noise and Capacity Act; Revenue Use Obligations*

In addition to grant assurance obligations and the 20-year tail on obligations after receipt of the last federal grant, airport sponsors need to understand that expiration of grant obligations does not affect legal obligations that are applicable to airports generally, regardless of their grant obligation status. Two statutes are particularly relevant this regard. The Airport Noise and Capacity Act<sup>21</sup> and the FAA regulations thereunder<sup>22</sup> prohibit any public use airport from adopting noise or access restrictions without FAA approval. Since that statute was enacted in 1990, no airport has been able to secure such approval.<sup>23</sup>

The second statute is the federal law that prohibits the use of airport revenue for purposes other than the capital and operating cost of the airport.<sup>24</sup> This so-called 'revenue diversion prohibition' is echoed in grant assurance obligations but because it is an independent statutory requirement. The statute continues to apply even after expiration of grant assurance obligations. In practice this means that, so long as a public airport is operating, use of airport revenue is restricted by federal law.

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<sup>19</sup> *Id.* at ¶¶ 15.13(j), 17.12

<sup>20</sup> AIP Grant Assurances at 12.

<sup>21</sup> 49 U.S.C. 47524 et seq.

<sup>22</sup> 14 C.F.R. part 161.

<sup>23</sup> The statute contains an exception that allows adoption of restrictions on stage 2 aircraft without FAA approval. The Authority is the only airport sponsor ever to adopt such a restriction, but no stage 2 aircraft are allowed to operate in the United States so even that one exception no longer has any applicability in practice.

<sup>24</sup> 49 U.S.C. 40116.

#### *H. Analysis of Grant Assurance Obligations*

Three key points should inform any airport sponsor's consideration on the issue of not accepting future AIP grants.

First, it is critical to recognize that each time the sponsor accepts an AIP grant, that decision will reset the 20-year clock on the airport sponsor's grant-assurance obligations. Thus, if any future leadership of the sponsor's governing board were to change course and choose to accept AIP funding, then the grant assurances would govern the airport for another 20 years. In the interim, the sponsor would have sunk funds into the airport in an effort to outlast the grant assurances with nothing to show for it (and no way to retroactively accept AIP grants for which it would have been eligible in the intervening years).

Second, during the first 20 years following a decision not to accept AIP grants, the airport sponsor would be subject to the same operational and financial restrictions as though it had accepted grants. Stated differently, any perceived or actual benefits of not accepting AIP grants would not begin to be realized until after the 20-year clock has expired. In the meantime, the sponsor would need to find funding sources to replace the lost FAA grants (*e.g.*, local municipal funds or other external sources of funding). While a financial analysis of the costs of complying with its grant assurance obligations for 20 years is beyond the scope of this memorandum, it is unlikely that the airport rates and charges alone could cover these expenses.

Third, if any of an airport's real property was obtained with AIP funding, that property would remain grant-obligated in perpetuity, meaning the airport sponsor must operate the airport according to grant obligations until the FAA releases those grant obligations. Whether the FAA would ever agree to release of grant obligations is highly fact-specific and is likely to be a function of the Authority's long-term operational and governance decisions.

### **3. Case Studies: Airport Sponsors Who Declined AIP Grants**

#### *A. Blue Ash Airport – City of Cincinnati*

The City of Cincinnati, Ohio owned and operated two general aviation airports, the small Blue Ash Airport and the larger Cincinnati Municipal Airport – Lunken Field. Blue Ash Airport was a small airport with minimal operations or based aircraft. While Lunken was, and is, a financially successful airport subject to high aeronautical demand, Blue Ash enjoyed only a fraction of Lunken's operations and consistently had to be subsidized by Lunken revenue. To focus its airport efforts on Lunken, Cincinnati entered into a contract to sell Blue Ash Airport to the Town of Blue Ash. While Cincinnati had hoped to use the sales proceeds for other municipal purposes, the grant assurance obligations required that any revenue from the sale be used for airport purposes, *i.e.*, for Lunken operations or development.

In order to divert the revenue from the sale of Blue Ash Airport to other municipal purposes, Cincinnati had to first close Blue Ash Airport, which it lawfully could do only once the 20-year

clock on its grant obligations had expired. Only then could it consummate the sale of Blue Ash Airport to the Town.

*B. East Hampton Airport – Town of East Hampton*

The Town of East Hampton, New York, the sponsor of the East Hampton Airport (“HTO”), has sought for decades to close HTO or to seriously restrict its operations. East Hampton is a small general aviation airport with only a small number of based aircraft, a single FBO and modest number of fixed-wing operations. The particular issue at East Hampton for decades has been the impact of helicopter operations in this resort community. There are times when there are dozens of helicopter operations during a single hour. While the details of East Hampton’s efforts to rid itself of the grant assurance obligations are complex—and involved much litigation in federal and state court—East Hampton’s grant assurance obligations expired in 2021.

Prior to 2021, East Hampton’s Town Board vacillated for years over whether to accept additional AIP grants. Over various election cycles, voters elected certain Town Board members who either supported or opposed keeping HTO open and accepting AIP grants. The on-again-off-again nature of East Hampton’s debate about the future of HTO inspired heated local political battles and litigation between pro- and anti-airport forces. One of the most significant cases concerned whether East Hampton would remain subject to the Airport Noise and Capacity Act after its grant assurance obligations expired. While the FAA took the position that that statute applied only to grant-obligated airports, the U.S. Court of Appeals disagreed and, in a 2016 decision, held that the statute prohibited any public airport from restricting operations without FAA approval, regardless of the status of its grant obligations.<sup>25</sup>

East Hampton’s response to that court decision was to debate closing the airport entirely or, at least, closing it as a *public* airport and potentially reopening it as a *private* airport. In 2022, after most of HTO’s grant assurances expired, the FAA agreed to allow East Hampton to close HTO as a public airport and then reopen it days later as a *private*, non-public, not-grant-obligated airport. By closing HTO, East Hampton was able to terminate its remaining grant assurances—those that run as long as the airport remains an airport and the other obligations that attach to public airports. The FAA agreed that, since grant obligations had expired in 2021, once East Hampton closed its airport as a public use facility, the Town would be free to do as it wished with the HTO land, including reopening it as a “new,” private airport on the site. The close-then-reopen strategy was implemented but was immediately challenged in state court; litigation remains pending and the future of the airport remains uncertain.

*C. Reid-Hillview Airport – Santa Clara County*

Santa Clara County, California operates Reid-Hillview Airport (“Reid-Hillview”), a small general aviation airport in eastern San Jose. Reid-Hillview is one of several general aviation airports in the County in addition to the large commercial San Jose International Airport. Reid-Hillview lies

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<sup>25</sup> *Friends of East Hampton Airport v. Town of East Hampton*, 841 F.3d 133 (2d Cir. 2016).

in a largely residential area where population growth has increasingly encroached closer and closer to the airport. In 2011, Santa Clara stopped accepting AIP grants for Reid-Hillview, arguing that it “would like to exercise more control over future operations of the airport.”<sup>26</sup> As such, most of Reid-Hillview’s grant assurance obligations persist into 2031. (Making the situation even more complex, Santa Clara recently passed a resolution calling for Reid-Hillview’s closure *prior to* 2031.<sup>27</sup>) Santa Clara’s ability to control the airport without federal oversight after 2031, however, is unclear because FAA grants were used to purchase Reid-Hillview’s property in the 1960s.<sup>28</sup> At the time, grant obligations did not permanently obligate airport real estate, but the FAA has argued that Santa Clara’s subsequent acceptance of AIP grants retroactively encumbered the earlier-purchased airport property. Santa Clara has opaquely stated that “[t]his is a complex legal issue that will be decided sometime in the future.”<sup>29</sup>

As a result of Santa Clara’s plans to rid itself of federal oversight, the relationship in recent years between Santa Clara and the FAA has been tense. The FAA has accused Santa Clara of shirking its responsibilities to adequately maintain the airport.<sup>30</sup>

#### D. *Richards-Gebaur Airport – Kansas City*

Kansas City, Missouri owned and operated Richards-Gebaur Airport, a small general aviation airport serving mostly small private aircraft. Kansas City also owned Kansas City International Airport and Charles B. Wheeler Downtown Airport, a general aviation airport larger and more centrally located than Richards-Gebaur. After last accepting AIP grant funds for Richards-Gebaur in 1994, Kansas City applied to the FAA in 1997 for release from its grant obligations and for permission to close that airport in order to convert the property into an intermodal freight-distribution facility. Around that time, Kansas City projected that Richards-Gebaur would lose more than \$1.5 million annually, a deficit that the city’s other two airports would have to subsidize it.<sup>31</sup> In 1998, the FAA agreed to release Kansas City from its grant obligations for Richards-Gebaur, provided that the city deposit \$5 million into an escrow account for the FAA to use for

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<sup>26</sup> *Frequently Asked Questions Reid-Hillview Site*, Santa Clara County (last visited Dec. 23, 2022), <https://ffd.sccgov.org/sites/g/files/exjcpb1051/files/rh-faqs-english.pdf>.

<sup>27</sup> Meg Godlewski, *FAA Investigates Alleged Safety and Grant Violations at Reid-Hillview Airport*, FLYING MAGAZINE (Dec. 28, 2021), <https://www.flyingmag.com/faa-investigates-alleged-safety-and-grant-violations-at-reid-hillview-airport>.

<sup>28</sup> *Frequently Asked Questions Reid-Hillview Site*, Santa Clara County (last visited Dec. 23, 2022), <https://ffd.sccgov.org/sites/g/files/exjcpb1051/files/rh-faqs-english.pdf>.

<sup>29</sup> *Id.*

<sup>30</sup> See Amelia Walsh, *FAA Pressures Santa Clara County to Abide by Grant Obligations*, AOPA (Mar. 2, 2021), <https://www.aopa.org/news-and-media/all-news/2021/march/02/faa-pressure-santa-clara-county-to-abide-by-grant-obligations>.

<sup>31</sup> *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1183 (8th Cir. 2001).

local aviation grants, and to use all net proceeds from lease of the property for specified general aviation purposes.<sup>32</sup>

In approving the release, the FAA emphasized the “highly unusual circumstances” at Richards-Gebaur “that would support a finding that the release and closure of the [airport] would result in a net benefit to aviation.”<sup>33</sup> Specifically, the FAA noted the number of other readily accessible general aviation airports in the area, the ability to reinvest Richards-Gebaur’s AIP grants in other local airports, and the financial benefits the city’s proposal would yield for the region’s airport development.<sup>34</sup>

Two organizations sued to block the FAA from releasing Kansas City from its grant obligations. One group argued that the FAA had not adequately reviewed the environmental impacts of converting the airport to a freight facility before approving the release, while the other claimed that the FAA lacked statutory authority to release the city and, in any event, had failed to follow statutory standards when doing so.<sup>35</sup> The court rejected both challenges. Nonetheless, the Richards-Gebaur case shows that, even in the “highly unusual circumstance[]” that the FAA does release an airport from its grant obligations to permit its closure prior to the expiration of the grant assurance obligations, interest groups may litigate to prevent a release or closure of the airport.

*E. Santa Monica Airport – City of Santa Monica*

The case of Santa Monica Airport (“SMO”) indicates the lengths the FAA will go to keep an airport open, even in the face of a sponsor’s concerted efforts to close it. The fate of SMO has been the subject of policy debate and litigation for many decades. It is a busy general aviation airport with considerable on-airport business enterprises and significant corporate jet activity serving the affluent west side of the Los Angeles metropolitan area. The City of Santa Monica, California is SMO’s sponsor. For decades, Santa Monica has sought to limit aircraft operations at SMO or to close the airport entirely, largely because of the impacts of SMO on the densely populated adjacent residential neighborhoods. In an effort to close the airport, Santa Monica accepted no AIP grants after 1994, with the expectation that it could close SMO in 2014. However, in 2003, the FAA and Santa Monica signed an additional agreement, one that involved no new additional federal grant funds but rather was intended to “true up” outstanding grant payments. FAA subsequently asserted that the 2003 agreement constituted a new grant agreement that extended Santa Monica’s grant assurances by a further 20 years, leading to litigation between the FAA and Santa Monica. In addition, after the FAA agreed to Santa Monica’s request to terminate a federal lease of part of SMO several months early, the FAA argued that it had yielded property

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1193.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1182, 1193–94.

to Santa Monica pursuant to the Surplus Property Act, such that the property, and therefore at least much of SMO, were thereafter grant obligated in perpetuity.

Ultimately, following considerable litigation, the FAA and Santa Monica reached a consent decree that permitted Santa Monica to substantially shorten SMO's runway, which it has done (preventing certain larger aircraft from using the airport), and to close SMO entirely after December 31, 2028.<sup>36</sup>

*F. St. Clair Regional Airport – City of St. Clair*

For over a decade, the City of St. Clair, Missouri sought to close its small, underutilized general aviation airport, the St. Clair Regional Airport (the “Regional Airport”) to use the airport's land for commercial development. St. Clair last accepted AIP grants for the Regional Airport in 2006, the same year it began seeking to close the airport.<sup>37</sup> St. Clair repeatedly asked the FAA for permission to authorize the Regional Airport's closure, asserting that, with the airport closed, federal and state agencies could more effectively invest their grant funding in better-performing airports nearby.

Nonetheless, St. Clair faced resistance from airport users, a national general aviation association, and the FAA. The FAA opposition to St. Clair's request to close the Regional Airport was grounded in the City's grant obligations.<sup>38</sup> The FAA also rejected multiple St. Clair-commissioned appraisals of the Regional Airport's fair market value, which the city needed to provide so that the FAA could determine how much money the city would be expected to return to the federal government in proceeds from the airport's sale.<sup>39</sup>

Ultimately, Congress intervened. In 2014, Congress passed a standalone bill releasing St. Clair from its grant obligations regarding the Regional Airport, subject to certain conditions.<sup>40</sup> In urging

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<sup>36</sup> *Consent Decree to Close Santa Monica Airport Affirmed in Recent Decisions*, CITY OF SANTA MONICA (Oct. 20, 2020), <https://www.santamonica.gov/press/2020/10/20/consent-decree-to-close-santa-monica-airport-affirmed-in-recent-decisions>.

<sup>37</sup> Elizabeth Barmeier, *St. Clair Regional Airport Officially Closed*, EMISSOURIAN.COM (last updated Nov. 16, 2017), [https://www.emissourian.com/local\\_news/saint\\_clair/st-clair-regional-airport-officially-closed/article\\_e8775f33-d0f3-5adc-b996-823210a30b91.html](https://www.emissourian.com/local_news/saint_clair/st-clair-regional-airport-officially-closed/article_e8775f33-d0f3-5adc-b996-823210a30b91.html); Robert Nordstrom, *St. Clair Regional Closes Up Shop After 10-Year Struggle*, AIRPORT IMPROVEMENT (Mar. 2018), <https://airportimprovement.com/article/st-clair-regional-closes-shop-after-10-year-struggle>.

<sup>38</sup> Nordstrom, *supra* note 35 (quoting a St. Clair airport consultant who paraphrased the FAA's reaction to a request to close to the Regional Airport as, “Why are you here; didn't you read your grant obligations? Why are we having this meeting?”)

<sup>39</sup> Ultimately, as a condition of allowing St. Clair to close the Regional Airport and sell its land despite the city's grant obligations, the FAA required the city to reimburse the federal government for the Regional Airport property's anticipated sale.

<sup>40</sup> Pub. L. 113-285.

passage of the bill, St. Clair’s congressman complained that “the FAA keeps moving the goalposts, giving itself multiple extensions and leaving this small town confused and frustrated, with no end in sight.”<sup>41</sup> Another congressman expressed concern about the precedent of Congress intervening to override the grant assurances, observing that “[e]ach of the Nation’s federally-assisted airports is part of a system[,]” and that “the general rule is that we invest in airports, not close them”; nonetheless, he acknowledged the “unique situation” at the Regional Airport.<sup>42</sup>

Three years after the law’s passage, the FAA ultimately released St. Clair from its grant assurances for the Regional Airport in 2017, following St. Clair’s completion of various procedural requirements. St. Clair’s efforts to close the small Regional Airport took over a decade—and then only with the extraordinary direct intervention of Congress.

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Several important lessons can be taken from these six case studies. First, FAA is willing and able to enforce its strong policy to retain the legal authority that it has over grant obligated airports and is willing to take seemingly extraordinary actions to ensure that a sponsor keeps its airport open so long as it is subject to the grant assurances. Second, almost every airport sponsor that has considered not taking FAA grants has done so as part of a strategy – not always successful – of closing the airport. We are not aware of any airport sponsor who has discussed not taking federal grants merely to assert greater control over the airport. Finally, even if an airport sponsor were successful in disentangling from the grant assurance obligations, the airport sponsor would still be subject to several federal laws concerning airport operations (Airport Noise and Capacity Act) and airport finances (revenue diversion statute) which would allow continued (and substantial) federal oversight.

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<sup>41</sup> 160 Cong. Reg. H8898 (daily ed. Dec. 9, 2014) (statement of Rep. Blaine Leutkemeyer).

<sup>42</sup> *Id.* at H8897 (statement of Rep. Tim Bishop).