

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
ASSOCIATE ADMINISTRATOR FOR AIRPORTS

NATIONAL BUSINESS AIRCRAFT ASSOCIATION, KRUEGER AVIATION, INC., HARRISON FORD, JUSTICE AVIATION, KIM DAVIDSON AVIATION, INC., AERO FILM, YOURI BUJKO, JAMES ROSS, PARAMOUNT CITRUS LLC, AND AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Complainants,

v.

CITY OF SANTA MONICA,

Respondent.

Appeal from the Director's Determination
Issued by Director Byron K. Huffman, Dated December 4, 2015

**BRIEF FOR RESPONDENT CITY OF SANTA MONICA ON APPEAL FROM THE
DIRECTOR'S DETERMINATION**

MARSHA JONES MOUTRIE
JOSEPH LAWRENCE
LANCE S. GAMS
IVAN CAMPBELL
SANTA MONICA CITY ATTORNEY'S
OFFICE
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: (310) 458-8336

G. BRIAN BUSEY
PAUL VARNADO*
JAMES SIGEL*
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 887-1500

ZANE O. GRESHAM
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000

Counsel for Respondent City of Santa Monica

TABLE OF CONTENTS

INTRODUCTORY STATEMENT	1
JURISDICTIONAL STATEMENT	3
PARTIES	3
ISSUES RAISED ON APPEAL.....	4
FACTUAL AND PROCEDURAL BACKGROUND.....	4
A. Factual Background	4
B. Procedural Background.....	8
ARGUMENT	10
I. The Director’s Determination that the 2003 Grant Amendment Extended the City’s Grant Obligations to 2023 is Contrary to Law, Precedent, and Policy and is Arbitrary and Capricious and an Abuse of Discretion.....	10
A. The Plain Language Of The Agreements Makes Clear That The City’s Grant Obligations Expired In 2014.....	100
B. In Rejecting The Plain Meaning Of This Contractual Language, The Director’s Determination Relied On An Erroneous Understanding Of The Consideration Requirement	14
C. The Director’s Determination Further Relied On The Erroneous Conclusion That Contractual Ambiguity Need Not Be Resolved Against The Agency, But That The Agency Is Instead Free To Resolve Any Ambiguity In Its Favor.....	17
1. The contractual language must be construed against the FAA, which drafted the agreements	177
2. The Director erred in concluding that this maxim was inapplicable, and that the FAA should instead receive deference in interpreting these agreements	19
3. The City’s understanding that Amendment No. 2 did not extend its grant assurance obligations was reasonable.....	211

D.	The Director’s Determination Was Premised On Its View That A Grant Modification May Be “Akin To A New Grant,” An Arbitrary Classification Wholly Unsupported By The Relevant Statutes And Regulatory Guidance	23
E.	The Director’s Newfound Rule That Certain Amendments To Grant Offers Will Again Trigger The Grant Assurances Is Ambiguous And Procedurally Improper	26
II.	The Director’s Determination That Any Claim Regarding The City’s Grant Obligations Was Properly Before It Was Contrary To Law, Precedent and Policy	29
A.	Complainants Have Not Been “Directly And Substantially Affected By Any Alleged Noncompliance” And Thus Lack Standing.....	29
B.	Complainants Failed To State A Claim Under Part 16, And Thus Have Failed To Establish Any Basis For The Director’s Jurisdiction	31
C.	Complainants Failed To Satisfy The Pre-Complaint Resolution Requirement.....	32
	CONCLUSION.....	33

INTRODUCTORY STATEMENT

In 1994, the City of Santa Monica (“City”) entered into a Grant Agreement with the Federal Aviation Administration (“FAA”), accepting funds to improve the Santa Monica Airport. At that time, the City agreed to satisfy certain grant assurances. By the plain terms of the Grant Agreement, these assurances would expire no later than June 2014, twenty years after the City’s acceptance of the FAA’s grant offer.

Subsequently, in 2003, the City and the FAA executed an amendment to the 1994 Grant Agreement, reimbursing the City for certain unanticipated costs incurred in completing the project funded by the grant. This 2003 amendment expressly provided that, aside from the grant amount, “[a]ll other terms and conditions of the Grant Agreement remain in full force and effect.” The City therefore understood that the 2014 expiration of the grant obligations remained unchanged.

But in the underlying Director’s Determination, the Director rejected this straightforward interpretation of these plain and unambiguous contractual terms and agreements. The Director instead declared that, whatever its terms might suggest, the 2003 amendment was no mere modification of the 1994 Grant Agreement, but was “akin to a new grant.” The Director held that the Amendment silently (and, indeed, contrary to its express disclaimer) extended the date on which the City’s grant assurance obligations would expire from 2014 to 2023. This conclusion is contrary to law, and it produces absurd and arbitrary results.

Indeed, the Director’s interpretation of the 2003 amendment is premised on a number of legal errors. The Director incorrectly presumed that the City was required to provide some sort of additional and previously undisclosed consideration in exchange for the FAA’s increase in its grant obligation. The Director then failed to recognize that even if consideration were required, it was provided, and did not take the form of the City extending its grant assurances for an

additional nine years. The Director also rejected the standard principle that ambiguous contractual provisions must be construed against the drafter, here the FAA, and instead erroneously declared that the agency's own interpretation even of ordinary contractual terms is entitled to deference. In so doing, the Director ignored precedent establishing that a municipality or state must be clearly advised of the conditions imposed on federal funding so that it can give "informed consent" to such conditions—something that did not occur in this case. Furthermore, the Director contorted what was plainly an amendment to an existing grant into what it deemed something "akin to a new grant"—a concept that has no basis in law, let alone the FAA's own regulations or written guidance as to what constitutes a new grant. And the Director announced an arbitrary new rule that certain modifications to grant agreements will trigger the application of grant assurances even though no such abrupt change in policy had been adopted through the notice-and-comment procedure mandated by statute. Any one of these errors is alone sufficient to justify reversal; all together, they compel it.

And that is not all. The Director also erred in concluding that question of the scope of the City's grant assurance obligations was properly before it in the first place. Even assuming that these grant assurances are still in effect, the City has taken no action that might violate them. The Complainants here seek an advisory opinion regarding what the City's obligations *might* be. They have failed to identify any imminent harm they will suffer that might give them standing to request relief. Nor have they identified any violation of statute or grant assurance as required by the applicable Part 16 regulations—thus causing the Director to issue a purely advisory opinion. Moreover, the Complainants failed even to fulfill their obligation to seek informal resolution before bringing this complaint. For all of these reasons as well, the Director's Determination must be reversed.

JURISDICTIONAL STATEMENT

This appeal arises from the Director's Determination resolving the Part 16 complaint filed by the Complainants. Authority to entertain this appeal vests with the Associate Administrator for Airports pursuant to 14 C.F.R. §16.33(b). Pursuant to 14 C.F.R. § 16.31, 16.109(a), (b), and 16.201(a), on December 23, 2015, the City filed a request for a hearing to address factual and legal issues raised by the Director's Determination. The FAA has not yet acted on that request.

PARTIES

Respondent City of Santa Monica owns and operates the Santa Monica Airport, a general aviation public use airport located in a residential neighborhood within the City.

The Complainants consist of various airport tenants, individuals who use the airport, and organizations of such users. The National Business Aviation Association, Inc. is a District of Columbia corporation that represents companies operating aircraft. Krueger Aviation, Inc., is a California corporation and a tenant of the airport. Harrison Ford is an actor, businessman, and a tenant of the airport. Justice Aviation is a California corporation and a tenant of the airport. Kim Davidson Aviation is a California corporation and a tenant of the airport. Aero Film is a California limited liability company and a tenant of the airport. Youro Bujko is the owner and pilot of two aircraft and a tenant of the airport. James Ross is a recreational flyer and a tenant of the airport. Paramount Citrus LLC is a California limited liability corporation and uses the airport in its business operations. The Aircraft Owners and Pilots Association, Inc., is a New Jersey non-profit corporation that represents its pilot members.

ISSUES RAISED ON APPEAL

1. Whether, by entering into a 2003 Amendment that increased the funds provided pursuant to a 1994 grant agreement, the City agreed to extend the expiration date of its grant assurance obligations from 2014 to 2023.
2. Whether the Complainants have demonstrated that they were “directly and substantially affected,” 14 C.F.R § 16.23(a), by the speculative possibility that the City might in the future violate its grant assurances.
3. Whether, given the Complaints’ failure to allege the violation of any specific statute or grant assurance as required by 14 C.F.R. § 16.23(b)(1), the Director issued an advisory opinion outside the jurisdiction conferred by Part 16.
4. Whether the Complainants satisfied their duty to engage in good faith efforts to resolve their complaint.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The City purchased the land on which the airport sits between 1926 and 1941. At that time, land surrounding the airport was largely rural. The airport went on to become the home and manufacturing center for Douglas Aircraft. During the ensuing decades, the adjacent land in the cities of Santa Monica and Los Angeles was transformed. What was once farm land became home to thousands of Douglas workers who lived in the nearby residential neighborhoods that developed during this period, which lie adjacent to the airport’s runway.

In 1941, the City leased the airport to the United States in order to aid in the war effort. Together with the City, the federal government expanded and reconfigured the airport. In 1948, with the war over, the federal government officially surrendered its leasehold interest to the City.

The City has continued to operate the airport since that date. It has, however, been unable to do so without serious adverse consequences for residents of the densely populated surrounding neighborhood, who are subject to the airport's noise, pollution and safety hazards. The City has undertaken a number of efforts to alleviate these effects, including imposing noise limits, curfews, and banning certain types of aircraft.

The City's attempts to ameliorate the effects of airport operations on local residents have generated substantial litigation. In 1984, the FAA and the City entered into a Settlement Agreement that resolved "all existing legal disputes among the parties." [Part 16 Complaint Ex. 5 at 5-6]. Pursuant to the Agreement, the City was required to "operate and maintain the Airport as a viable functioning facility . . . until July 1, 2015." [Part 16 Complaint Ex. 5 at 9]. The Agreement further provided that "any future grant agreements between the City and the FAA which are designed to implement the programs covered by this Agreement, defined as those agreements for the federal funding of programs or improvements intended to further this agreement executed prior to July 1, 1995, shall be consistent with this agreement and shall not extend or alter the obligation of the City to operate Airport under this Agreement, except as may be required by federal statute." [Part 16 Complaint Ex. 5 at 8-9].

On June 29, 1994, the City accepted an FAA Airport Improvement Program grant to fund certain airport enhancements including construction of certain blast walls. This grant was for Project Number 3-06-0239-06, conferred by Contract Number DTFA08-94-C-20857. The Grant Agreement described the work to be conducted with the grant funds, and calculated the federal government's maximum obligation to be \$1,604,700. [Santa Monica Answer Ex. A at 2]. The Agreement provided, however, that the "[f]inal determination of the United States share [of the project] will be based upon the final audit of the total amount of the allowable project costs and

settlement will be made for any upward or downward adjustments to the Federal share of costs.” [Santa Monica Answer Ex. A at 2]. The Agreement further “incorporated” the “Assurances” attached to the contract, making them “a part” of the agreement. [Santa Monica Answer Ex. A at 15]. One such provision, Assurance (B)(1), set forth a 20-year limit on any City obligations. It provided:

The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, *but in any event not to exceed (20) years from the date of the acceptance of a grant offer of Federal funds for the project.*

[Santa Monica Answer Ex. A at 15 (emphasis added)].

When the City accepted this grant offer, it thus understood that any obligations entailed with its acceptance would expire in twenty years at most. This 2014 expiration date was critical to the City. So long as the grant obligations did not extend beyond that time, the City would not find itself forced to operate the airport beyond the July 1, 2015 date set forth in the 1984 Settlement Agreement.

The City and the FAA amended the 1994 Grant Agreement on two separate occasions. First, in 1999, the City and the FAA executed “Amendment No. 1,” which modified the description of the “airport development” instituted under the 1994 Grant Agreement. [Santa Monica Answer Ex. B at 1]. This amendment used the same contract and project numbers (3-06-0239-06 and DTFA08-94-C-20857, respectively) as the original grant. [Santa Monica Answer Ex. B at 1].

Subsequently, in 2003, the City and the FAA executed “Amendment No. 2” to the 1994 Grant Agreement. This amendment increased the grant amount by \$240,600. [Santa Monica

Answer Ex. B at 3]. That sum reflected the FAA’s reimbursement to the City of certain cost overruns it had experienced in completing the project covered by the Grant Agreement. It was also just below 15% of the original grant amount—the cap that Congress has prescribed for amendments to existing grants. *See* 49 U.S.C. § 47108(b)(3)(A). No substantive changes were made to the grant or the projects it covered. Like Amendment No. 1, Amendment No. 2 used the same contract and project numbers as the original grant. Amendment No. 2 also recognized that the City had “accepted” the “Grant Agreement” on June 29, 1994. And Amendment No. 2 specifically provided that “[a]ll other terms and conditions of the Grant Agreement remain in full force and effect.” [Santa Monica Answer Ex. B at 3]. As one of the “terms and conditions” of the 1994 Grant Agreement had been the 2014 expiration of any grant assurance obligations, the 2003 Amendment thus expressly preserved this 2014 sunset provision.

The City signed Amendment No. 2 with exactly that understanding, as the declaration of Susan McCarthy, the former Santa Monica City Manager, confirms. McCarthy, who executed Amendment No. 2, explains that it was the City’s policy “to take all precautions to preserve the City Council’s flexibility to make operational changes at the Airport once the 1984 Agreement expired.” [McCarthy Declaration ¶ 6]. She further states that she has no recollection “that the FAA ever communicated to City Staff its current position on the implications of the 2003 Amendment,” and that she “did not understand that the grant assurances accepted in the 1994 grant agreement were being extended nine years.” [McCarthy Declaration ¶¶ 6, 8].

In the years since, the airport has remained controversial. The City has not, however, made any definitive plans to close the airport. The City has conducted a “Visioning Process,” pursuant to which it issued a report identifying ways in which the airport’s impacts might be mitigated. It has also initiated a federal lawsuit against the FAA seeking to clarify its rights to

control portions of the land on which the airport sits. In addition, the City Council directed staff to explore the *possible* closure of the airport, but it has publicly and expressly confirmed that it was not yet making any final decisions regarding closure. At this time, the City continues to evaluate its options for the future of the airport.

B. Procedural Background

The Complainants initiated the instant proceeding by filing a Part 16 formal complaint alleging that, were the City to close the airport prior to 2023, it would violate its grant assurances and 49 U.S.C. § 47107(a). The City filed a motion to dismiss, observing that the complaint suffered from a number of procedural deficiencies: the Complainants could not possibly have been “directly and substantially affected by any alleged noncompliance” that had not, and might not ever, occur, and therefore they did not possess the standing required by 14 C.F.R. § 16.23(a); the Complainants had failed to identify a violation of any statute or grant assurance, as required by 14 C.F.R. § 16.23(b)(1); the complaint sought an advisory opinion as to possible future conduct, and was therefore outside the FAA’s Part 16 jurisdiction; and the complaint was filed without the good-faith efforts toward informal resolution required by 14 C.F.R. § 16.21. In its answer, the City reiterated these jurisdictional and procedural defects. It also noted that Complainants’ contentions failed on the merits, as the plain language of both the Grant Agreement and Amendment No. 2 precluded any argument that the City’s grant obligations extended beyond 2014.

The Director brushed aside all of these barriers to Complainants’ requested relief, declaring that the City “remains obligated by the grant assurances until August 27, 2023.” [Director’s Determination at 19]. Beginning with the jurisdictional and procedural issues, the Director first asserted that, although the “Complaint is not clear in terms of the specific Act violated,” and although the City continued to operate the airport in compliance with whatever

obligations it might have, certain statements made by City officials might be understood as a repudiation of those obligations. [Director's Determination at 8]. As for how the Complainants were "directly and substantially affected by any alleged noncompliance" resulting from the City's so-called repudiation, the Director declared that they were harmed by the mere "*uncertainty* involving the grants." [Director's Determination at 10 (emphasis added)]. Defending its jurisdiction to issue such a wholly advisory opinion, the Director stated that "[a]ll potential grant assurance violations are within the scope of FAA [jurisdiction] to review and address"—even though, again, the City continues to operate the airport in accordance with whatever grant assurances might be applicable. [Director's Determination at 10]. And, the Director concluded, because the City's "position on the expiration date" of its grant obligations was "longstanding and fixed," the Complainants' obligation to engage in good faith efforts to resolve the dispute was satisfied notwithstanding their failure to send anything more than a perfunctory letter to the City prior to filing their complaint. [Director's Determination at 11].

Turning to the merits of the complaint, the Director concluded that the City had extended its grant obligations by an additional 9 years simply by receiving a modest increase of \$240,600 in funding provided by Amendment No. 2 to the 1994 Grant Agreement. Apparently believing that principles of contract law required the City to provide separate and additional consideration to support this modification to the prior agreement, the Director reasoned that, absent the extension of the grant assurances, the City would have provided "no new consideration to support the additional funds provided." [Director's Determination at 16]. Rejecting the City's assertion that there was "nothing to indicate that [Amendment No. 2] would have the effect of extending the expiration date of these assurances," the Director declared that the amendment was "in essence the award of a new grant" that itself triggered application of the grant assurances.

[Director's Determination at 16-17]. Significantly, the Director did not determine that the amendment was actually a new grant—only that it was “akin to a new grant.” [Director's Determination at 16]. The Director cited nothing in the statutes governing federal airport grants, FAA regulations, or in the grant assurances themselves to support this “akin to a new grant” assertion. Nevertheless, the Director concluded that the City “knew or should have known that acceptance of these new funds would restart the date that these assurances would apply.” [Director's Determination at 18]. The Director also rejected the City's invocation of the ordinary rule of contractual interpretation that any ambiguity should be construed against the drafter—here, the FAA. The Director reasoned that federal grants may be “partly a creature of statute,” and that therefore the FAA is “entitled to deference in interpreting the grant assurance obligations.” [Director's Determination at 18]. The Director failed to acknowledge that *none* of the contractual language at issue here is, in fact, embodied in any statute.

ARGUMENT

Neither the Director's conclusion that Amendment No. 2 imposed new grant assurances on the City, nor its conclusion that this question was properly before it in the first place, was supported or supportable. The Determination is contrary to law, precedent, and policy, and will produce arbitrary results. It must be reversed.

I. THE DIRECTOR'S DETERMINATION THAT THE 2003 GRANT AMENDMENT EXTENDED THE CITY'S GRANT OBLIGATIONS TO 2023 IS CONTRARY TO LAW, PRECEDENT, AND POLICY AND IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

A. The Plain Language Of The Agreements Makes Clear That The City's Grant Obligations Expired In 2014

This proceeding should begin and end with the plain language of the agreements the City signed with the FAA. Under “ordinary principles of contract law, . . . ‘[w]here the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance

with its plainly expressed intent.” *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (quoting 11 R. Lord, *Williston on Contracts* § 30:6, p. 108 (4th ed. 2012)); *see also United States v. Seckinger*, 397 U.S. 203, 209 (1970) (federal law governs interpretation of contract made by the United States pursuant to federal law). Here, the contractual language provides in no uncertain terms that any obligations the City incurred by executing the relevant grant agreements expired in 2014.

The 1994 Grant Agreement itself unambiguously sets forth a 2014 expiration date. The City accepted the FAA’s offer of funding for the project in question in June 1994. At that time, Assurance B(1), which was expressly incorporated into the agreement, provided that the City’s obligations under the grant would not “exceed (20) years from the date of the acceptance of a grant offer of Federal funds for the project.” [Santa Monica Answer Ex. A at 15]. Because the City accepted this grant offer in June 1994, its obligations under that agreement were therefore limited to the period prior to June 2014—as the Director’s Determination itself acknowledged. [Director’s Determination at 15].

In this respect, the 1994 Grant Agreement was consistent with the 1984 Settlement Agreement the FAA and the City had entered a decade previously. That Agreement specifically provided that “[t]he City will operate and maintain the Airport as a viable functioning facility . . . until July 1, 2015.” [Part 16 Complaint Ex. 5 at 9]. It further specified that “*any* future grant agreements between the City and the FAA which are designed to implement programs covered by this Agreement, defined as those agreements for the federal funding of program improvements intended to further this Agreement, executed prior to July 1, 1995, shall be consistent with this Agreement and *shall not extend or alter the obligation of the City to operate*

the Airport under this Agreement, except as may be required by federal law.” [Part 16 Complaint Ex. 5 at 8-9] (emphasis added).

In accordance with this Settlement Agreement, the 1994 Grant Agreement did not “extend or alter the obligation of the City to operate the Airport.” Rather, by providing that any grant obligations incurred would expire in twenty years at most (*i.e.*, in 2014), it continued to permit the City to discontinue or otherwise modify operation of the airport as of July 1, 2015 to serve the best interests of its residents.

Amendment No. 2, executed in 2003, did not change matters. To the contrary, it expressly left the expiration date in place. Amendment No. 2 modified the 1994 Grant Agreement in only one respect, providing that the “maximum obligation stated on page 2, condition 1 [of the 1994 Grant Agreement] is hereby increased by \$240,600.00, from \$1,604,700.00 to \$1,845,300.00.” [Santa Monica Answer Ex. B at 3]. Such a modification had been contemplated in the 1994 Grant Agreement itself, which, in recognition of the possibility of cost overruns of the sort that in fact occurred, provided that “[f]inal determination of the United States share [of the project] will be based upon the final audit of the total amount of the allowable project costs and settlement will be made for any upward or downward adjustments to the Federal share of costs.” [Santa Monica Answer Ex. A at 2].

Otherwise, Amendment No. 2 did not make, and actually disclaimed making, any substantive change to the 1994 Grant Agreement. In particular, Amendment No. 2 did not again invoke and incorporate the FAA’s general grant assurances. Unlike the original Grant Agreement, it did not provide that the grant assurances were “incorporated hereto,” and “made a part hereof.” Instead, Amendment No. 2 stated: “*All* other terms and conditions of the Grant Agreement remain in full force and effect.” [Santa Monica Answer Ex. B at 3 (emphasis

added)]. Given the June 30, 2015 termination date of the 1984 Agreement, the City considered one of the 1994 Grant Agreement's most important "terms and conditions" to be that any obligation imposed by the Agreement would expire in 2014. Amendment No. 2 made clear that this 2014 expiration date remained "in full force and effect."

These limitations on the scope of Amendment No. 2 reflected its status as an *amendment* to a preexisting grant agreement, and not a *new* grant agreement. It was, after all, entitled "Amendment No. 2 to Grant Agreement for Project No. No. [sic] 3-06-0239-06"—a name given to it by the FAA. [Santa Monica Answer Ex. B at 3 (emphasis added)]. It reiterated that the "Grant Agreement" was "accepted" on June 29, 1994, and it did not set forth any new or different date of "acceptance" of a grant offer. And not only did it employ the same project number as the 1994 Grant Agreement, it also used the same contract number (DTFA08-94-C-20857). [Santa Monica Answer Ex. B at 3]. As this title, grant acceptance date, and numbering all confirm, Amendment No. 2 was intended to modify only the limited portion of the 1994 Grant Agreement it claimed to modify: the provision "on page 2, condition 1" setting the amount the United States might pay to complete the project. [Santa Monica Answer Ex. B at 3]. Even the amount of this modification made clear that Amendment No. 2 would in fact be an *amendment*, and not a new grant: the \$240,600 figure was 14.99 % of the original grant amount, just below the 15% threshold that Congress has established for amendments to existing grants. *See* 49 U.S.C. § 47108(b)(3)(A). By accepting this amendment to the existing agreement, the City did not also thereby agree—sub silentio, and indeed contrary to the plain terms of Amendment No. 2's express disclaimer of additional substantive changes—to modify any other key terms of the agreement.

B. In Rejecting The Plain Meaning Of This Contractual Language, The Director’s Determination Relied On An Erroneous Understanding Of The Consideration Requirement

The Director’s contrary interpretation of Amendment No. 2 was based on the entirely unbriefed premise that the City was required to provide something extra in exchange for the additional funds the FAA provided, and that “[t]he only consideration for the amendment provided by the City . . . would be the continued applicability of the grant assurances using the date of the signed second amendment as the starting date.” [Director’s Determination at 16]. But the Director’s understanding and application of the consideration requirement involved at least two fundamental errors.

First, and most important, the Director erred in presuming that in 2003 consideration was necessary or even relevant. Even assuming that the general requirement of consideration applies to this type of modification to an existing contract,¹ the absence of consideration would mean only that the FAA’s promise was not *enforceable*, not that its promise could never be made or carried out. That is, an exchange of promises might be necessary to make the FAA’s contemplated payment enforceable in a court. If, for example, the FAA promised to grant the City a million dollars as a gift, the City could not (absent reliance or some other substitute for consideration) sue to force the FAA to fulfill that promise. *See, e.g., Dougherty v. Salt*, 227 N.Y. 200, 202 (1919) (a simple donative promise is “unenforceable”). But not all grants need be

¹ This is a questionable assumption in its own right. “The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise during the course of the performance of a contract, even though there is no consideration for the modification, as long as the parties agree voluntarily.” *Angel v. Murray*, 113 R.I. 482, 492 (1974). Thus, the Uniform Commercial Code, for example, provides that “[a]n agreement modifying a contract within this Article needs no consideration to be binding.” U.C.C. § 2-209(1). In essence, the consideration promised in the initial exchange can be said to support future modifications in performance—especially where, as here, the original agreement contemplates future amendments. The Director failed to consider the possibility that, under general principles of contract law, a modification to a preexisting contract of this sort may be affected without consideration.

enforceable in this fashion, and nothing precludes the FAA from making such an unenforceable grant.

The question here is what conditions, if any, the FAA attached to Amendment No. 2. That question must be answered by examining the terms of that agreement—which, again, actually refute the possibility that the 1994 agreement’s grant assurances would be extended until 2023. The question cannot be answered simply by presuming, as the Director did, that any increase in grant funding necessarily exacts a corresponding promise for additional performance. There is no reason to assume that the City need have been able to sue to enforce Amendment No. 2 against the FAA. Indeed, the City is not seeking to compel the FAA to pay out the funds that it said it would pay; the FAA has already made the relevant payments. *See Angel v. Murray*, 113 R.I. 482, 489 (1974) (“Since consideration is only a test of the enforceability of executory promises, the presence or absence of consideration for the first payment is unimportant because the city council’s agreement to make the first payment was fully executed at the time of the commencement of this action.”).

In reaching a contrary conclusion, the Director cited two Supreme Court decisions: *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). [Director’s Determination at 16]. These decisions do not, however, stand for the proposition that each and every payment of federal funds must be supported by consideration. Far from it. They instead describe the *limits* of the federal government’s power to impose conditions on the recipients of federal funds. They hold that the federal government may utilize the power derived from the Spending Clause to effectively legislate or dictate the actions of fund recipients only if the government makes the conditions of its funding exceedingly clear. *See Pennhurst*, 451 U.S. at 17 (while “Congress

may fix the terms on which it shall disburse” funds, “*if* Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously”) (emphasis added); *accord Jackson*, 544 U.S. at 183; *cf. also National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (controlling opinion of Roberts, C.J.) (while the federal government can use “financial inducement” to offer “relatively mild encouragement,” it cannot wield this power as a “gun to the head”). Nothing in *Jackson*, *Pennhurst*, or any other similar decision would *compel* the FAA, when amending grant funds within the limits set by Congress, to extract new return promises from the recipient. Certainly, none of these decisions would preclude the FAA, or any other agency, from providing additional funding to cover cost overruns incurred in a previously contracted-for project. That, as its plain terms reveal, is all that Amendment No. 2 accomplished.

Second, and in any event, even if the City were required to provide consideration in exchange for the FAA’s increase in funding, the Director erred in concluding that this consideration must have been the City’s acceptance of an additional nine years of grant assurance obligations. In fact, the parties’ course of dealing suggests a far more plausible candidate: the City’s commitment to use the granted funds (or the local funds thereby freed up) for airport maintenance. The City’s request for additional funds to cover the 1994 Grant Agreement’s cost overruns (which the Director introduced and cited as Exhibit 11) made this benefit plain. The City expressly noted that the “requested reimbursement funds represent a substantial amount of revenue that could be utilized for much-needed and differed airfield maintenance projects.” The City’s promise to, as the same letter put it, use the reimbursement funds to “enhance and maintain the Santa Monica Airport” was itself beneficial to the FAA. After all, the agency is charged with ensuring that “the airport and facilities on or connected with

the airport will be operated and maintained suitably.” 49 U.S.C. § 47107(a)(7). The benefits associated with airport improvements were what Amendment No. 2 referred to in mentioning the “benefits to accrue to the parties.” [Santa Monica Answer Ex. B at 3]. Given the FAA’s receipt of these benefits, the Director’s conclusion that Amendment No. 2 did not mean what it said in providing that “all other terms and conditions of the [1994] Grant Agreement remain in full force and effect” cannot be supported even under the erroneous assumption that some sort of consideration was required.

C. The Director’s Determination Further Relied On The Erroneous Conclusion That Contractual Ambiguity Need Not Be Resolved Against The Agency, But That The Agency Is Instead Free To Resolve Any Ambiguity In Its Favor

The Director’s Determination was also premised on a separate misapplication of basic contractual principles. As noted above, the relevant contractual language is not ambiguous; instead, the 1994 Grant Agreement and Amendment No. 2 to that agreement together make plain that City’s grant obligations expired in 2014. But even if the terms of these documents left some room for doubt, general principles of contract law and the law governing federal grants require that this doubt be resolved in the City’s favor. The Director, however, applied the opposite presumption, and instead twisted the contractual language to favor the FAA’s interpretation. But contrary to the Director’s assertion, the City did not agree to the terms fashioned by the Director. The City certainly was not put on fair and reasonable notice that such reinterpretations of the Grant Agreement and Amendment No. 2 were possible.

1. The contractual language must be construed against the FAA, which drafted the agreements

Pursuant to what is sometimes known as the rule of *contra proferentem*, when there are multiple “reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a

writing otherwise proceeds.” Restatement (Second) of Contracts § 206 (1981). The federal government, like any other contracting party, is subject to this “general maxim” of contract law. *Seckinger*, 397 U.S. at 210; *see id.* (“a contract should be construed most strongly against the drafter, which in this case was the United States”). Here, the FAA drafted both the 1994 Grant Agreement and Amendment No. 2. Thus, to the extent that these agreements create ambiguity as to the duration of the City’s grant obligations, the City’s reasonable interpretation must prevail over that of the FAA.

Indeed, this principle of contract construction carries particular force where, as here, the agreement in question imposes conditions on a governmental recipient of federal grant money and compels the performance of duties. That is because such grant conditions reflect the exercise of federal power under the Spending Clause. And, as the Supreme Court has held, “[j]ust as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’” *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (some internal quotation marks omitted, alterations in original). Accordingly, when the federal government “intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Id.* This clear-statement requirement “enable[s] [recipients] to exercise their choice knowingly, cognizant of the consequences of their participation.” *Pennhurst*, 451 U.S. at 17; *see also id.* at 25 (“The crucial inquiry, however, is not whether a [recipient] would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the [recipient] could make an informed choice.”). It also ensures that the federal government is not simply directing state and local officials to do as it commands, in violation of

the Constitution’s anti-commandeering mandate. *See National Federation of Independent Businesses*, 132 S. Ct. at 2602; *Printz v. United States*, 521 U.S. 898, 933 (1997).

Airport Improvement Program grants are no exception to this rule. In fact, the principle that grant recipients must be given clear notice of any grant conditions is embodied in 49 U.S.C. § 47107(h), which requires the FAA to provide notice and an opportunity for comment on any proposed modification of grant assurances—particularly, an abrupt and substantial change in their duration. As the agency has previously concluded, this provision confirms that obligations not previously made clear to grant recipients cannot be retroactively imposed. *Air Trans. Ass’n. of America v. City of Los Angeles*, FAA Final Decision and Order, Docket No.13-95-05, at *91 (2009) (“In light of FAA’s obligations under section 47107(h), the Director properly concluded that the agency itself was ‘bound’ by the terms of its orders, in the sense that the agency could not compel the City to comply with new policy expanding its grant obligations adopted after it requested advice.”).

2. *The Director erred in concluding that this maxim was inapplicable, and that the FAA should instead receive deference in interpreting these agreements*

In rejecting the application of *contra proferentem* and refusing to construe the relevant agreements in the City’s favor, the Director relied upon inapposite precedent governing the interpretation of *statutory*, rather than contractual, provisions. Citing *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), the Director declared that because “grants originate in and are governed by Federal statutes, the rules governing statutory interpretation apply,” and thus the “FAA is entitled to deference in interpreting the grant assurance obligations.” [Director’s Determination at 18].

Bennett, however, addresses a different issue. It reflects the general principle that grant agreements incorporating statutory directives may be subject to the ordinary rules of statutory

interpretation, and that the implementing agency may therefore receive some measure of deference. *See id.* at 669-70; *see also City and County of San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991) (accorded deference to FAA in its interpretation of the “statutory condition imposed by [49 U.S.C. §] 2110(a)(1) and incorporated in the grant contract”). In *Bennett*, the Court confronted a grant agreement dispute involving the implementation of a statutory mandate: Congress itself had provided that the federal funds received could not “supplant such funds from non-Federal sources.” *Bennett*, 470 U.S. at 660 (quoting 20 U.S.C. § 241e(a)(3)(B) (1970 ed.)). Enforcing this provision required the agency, as in other cases of statutory interpretation, to resolve certain ambiguities contained in the statute. *Id.* at 669. The Court therefore concluded that the agency’s implementation of that directive “cannot be viewed in the same manner as a bilateral contract governing a discrete transaction.” *Id.* at 657.²

The circumstances are entirely different where, as here, no statutory grant condition is at issue. None of the relevant terms in either the 1994 Grant Agreement or Amendment No. 2 directly incorporate or implement any statutory provision. Assurance (B)(1), invoked by the 1994 agreement, imposes a 20-year limit on grant assurances that is found nowhere in the governing statute. Likewise, and even more important, Amendment No. 2’s provision that “[a]ll other terms and conditions of the Grant Agreement remain in full force and effect” is a straightforward, commonly used and understood contractual term that derives from no statute. This dispute thus centers on the interpretation of the terms of what is, in essence, “a bilateral contract governing a discrete transaction.” *Bennett*, 470 U.S. at 669. The FAA has no particular

² Even in such a case of statutory interpretation, the Court was unwilling to go so far as to hold—as the Director apparently would—that the grant recipients in that case “guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary, so long as that interpretation is not ‘arbitrary, capricious, or manifestly contrary to [the statute].’” *Bennett*, 470 U.S. at 670 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

expertise in interpreting contractual language of this sort, or any specially delegated authority to do so. In such a case, no deference to the agency is warranted. *See Clay Tower Apartments v. Kemp*, 978 F.2d 478, 480 (9th Cir. 1992) (“[T]he parties executed a contract, and our inquiry focuses on the contractual requirements. This focus does not demand deference to HUD’s statutory interpretation.”).

In any event, even assuming that the FAA were entitled to deference, that would not render the principle of *contra proferentem* inapplicable. Instead, that rule continues to govern the FAA’s interpretation of the relevant agreements even if the agency’s reading might warrant some deference. *Cf. INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (“Because a statute that is ambiguous with respect to a retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.”) (internal citation omitted). That the FAA may be entitled to deference does not mean, as the Director apparently believed, that it is free to adopt whatever interpretation of a contract it believes to be most favorable to it. Consistent with general principles of contract law and the law governing federal grants, the terms of the City’s agreements with the FAA, even when construed *by* the FAA, must still be construed *against* the FAA. *See Barnes*, 536 U.S. at 186; *Seckinger*, 397 U.S. at 210.

3. *The City’s understanding that Amendment No. 2 did not extend its grant assurance obligations was reasonable and therefore must prevail*

Under a proper application of the principle that contractual ambiguity is construed in the City’s favor, the City’s understanding of Amendment No. 2 must prevail. That interpretation, as discussed above, reflects a straightforward reading of Amendment No. 2’s terms: by preserving “[a]ll other terms and conditions of the Grant Agreement” in “full force and effect,” the amendment necessarily retained the 2014 expiration date set forth in the 1994 Grant Agreement.

That interpretation is “reasonable,” and thus should be accepted here. Restatement (Second) of Contracts § 206 (1981).

The Director pointed to nothing that would render this interpretation unreasonable. The Director observed only that under Assurance B(1) “the not-to-exceed date is linked to ‘*a* offer’ and not limited to the *original* offer.” [Director’s Determination at 18]. But the Director’s ungrammatical paraphrasing of Assurance B(1) omits its key language: the not-to-exceed date begins “the date of the acceptance of a *grant* offer of Federal funds.” [Santa Monica Answer Ex. A at 15 (emphasis added)]. Amendment No. 2 may have increased the original grant amount, but it was not itself a new “grant offer.” It was, instead, an *amendment* to a prior grant offer. That was why it was styled an “Amendment,” why it used the same contract and project number as the 1994 Grant Agreement, why it stated that the grant was accepted on June 29, 1994, why it did not attempt to specify a new grant acceptance date, and why it failed to specifically incorporate the grant assurances as the Grant Agreement itself had. That is also why Amendment No. 2 expressly retained all other “terms and conditions” of the 1994 grant offer itself—language that the Director’s Determination did not even attempt to reconcile with its strained reading of Assurance B(1). For all these reasons, Amendment No. 2 did not trigger application of Assurance B(1).

At the very least, nothing in Assurance B(1) or Amendment No. 2 provided the City with the requisite clear notice that acceptance of these additional funds would subject it to the grant assurances for an additional nine years. *See Pennhurst*, 451 U.S. at 17 (“There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions or is unable to ascertain what is expected of it.”). Consistent with the terms of the 1984 Settlement Agreement and the City’s long-expressed policy to seek closure of the airport, the City had taken care to ensure that all

grant obligations would expire prior to the July 1, 2015 date on which the Settlement Agreement would no longer compel the City to operate the airport. The City did not, and never would have, accepted the small amount of additional funds the FAA offered in 2003 had it understood that it thereby committed itself to operating the airport into 2023.

Indeed, as the declaration of former City Manager Susan McCarthy makes clear, the City was never put on notice of the FAA's newly advanced interpretation of Amendment No. 2. McCarthy, who in fact signed Amendment No. 2 as the City's designated official representative, has no memory of the FAA *ever* communicating "to City Staff its current position on the implications of the 2003 Amendment." [McCarthy Declaration ¶ 8]. She thus had no understanding that "the grant assurances accepted in the 1994 grant agreement were being extended nine years." [McCarthy Declaration ¶ 6].

D. The Director's Determination Was Premised On Its View That A Grant Modification May Be "Akin To A New Grant," An Arbitrary Classification Wholly Unsupported By The Relevant Statutes And Regulatory Guidance

The Director's conclusion that Amendment No. 2 reset the grant assurances' expiration date was also premised on his determination that Amendment No. 2 was "akin to a new grant," rather than a mere modification of the existing grant agreement. [Director's Determination at 16]. But an examination of the panoply of laws, policies, practices, precedent, and guidance regarding FAA grant assurances reveals no category of modification "akin to a new grant." Nothing in the grant assurances themselves, or in any agency guidance materials, refer to such a concept. *See, e.g.*, FAA, Airport Compliance Manual, Order 5190.6B (2009) at Sec. 4.3 (advising airport operators on the duration of federal grant obligations and releases from federal obligations, but making no mention of their duration being extended by grant amendments that are "akin to a new grant").

Instead, the relevant guidance materials demonstrate that the agency has recognized a sharp distinction between new grants and modifications to existing grants. They also make clear that Amendment No. 2 falls on the “modification” side of this line.

Had Amendment No. 2 in fact been a “new grant,” it would have been subjected to a very different process than the simple grant amendment the FAA and the City entered into in 2003. The FAA’s AIP Handbook effective in 2003 detailed the specific procedures for the offer and acceptance of a new airport grant. *See* FAA, Airport Improvement Handbook, Order 5100.38B (2002) at §§ 11:1 & 11:4. Similarly, the current version of the Handbook continues to provide detailed requirements for such new grants. *See* FAA, Airport Improvement Handbook, Order 5100.38D (2014) at § 5:4 (“Grant Application, Offer and Acceptance”). The FAA did not require the City to submit a new grant application or anything “akin to” a new application before approving Amendment No. 2 in 2003.

Instead, the FAA followed its routine procedure for increasing the funding under an existing grant. That process was described in a *separate* section of the FAA’s AIP Handbook. *See* FAA, Airport Improvement Handbook, Order 5100.38B (2002) at § 11:5 (“Grant Amendments”). This section of the Handbook specifically recognizes that a grant agreement may be modified by increasing the grant amount. *Id.* Nowhere does it indicate that, by simply increasing funding for an existing grant, such an amendment may in fact be “akin to a new grant.”

That even the FAA understood Amendment No. 2 to be an amendment, and not a new grant, is demonstrated by its report to Congress submitted that year. In this report, the FAA stated that it had disbursed \$123 million for “increases in *existing* grant agreements,” a category it reported separately from “new grant agreements.” FAA, Report to Congress: Twentieth

Annual Report of Accomplishments (May 2004) at 11, *available at*: http://www.faa.gov/airports/aip/grant_histories/media/annual-report-2001-03.pdf (emphasis added) (“2003 Report to Congress”). Notably, the FAA did not report the City in its separate list of recipients of new “AIP Grants Awarded in FY 2003.” *Id.* at Figure C-9. Likewise, the FAA failed to include the City in its Grant Histories database for 2003. *See* FAA, Fiscal Year 2003 Approved Grants, *available at*: http://www.faa.gov/airports/aip/grant_histories/media/grants-2003.pdf. These omissions confirm that the agency did not consider the City to have been awarded a new grant or anything “akin to” a new grant in 2003, when the parties executed Amendment No. 2.

The FAA’s distinction between new grants and amendments to existing grants reflects the line that Congress itself has drawn. Congress has expressly recognized that an existing grant for an airport project may be augmented to provide for additional funding, specifying that the maximum federal grant obligation “for an airport development project” may be increased by “not more than 15 percent.” 49 U.S.C. § 47108(b)(3)(A). Moreover, in the context of authorizing the FAA to take corrective action for violations of grant assurances, Congress has separately listed “new grant application[s]” and “proposed modification[s] to an existing grant that would increase the amount of funds made available.” 49 U.S.C. § 47111(e). These provisions demonstrate that Congress views new grants to be distinct from modifications to existing grants. Never has Congress suggested that, notwithstanding this distinction, grant amendments may be deemed “akin to new grants” for the purposes of extending grant assurances.

In seeking to find support for its novel interpretation that a modification of an existing grant agreement may be “akin to a new grant,” the Director’s Determination cited only to a pair of decades-old Comptroller General opinions. [Director’s Determination at 17]. Tellingly, the

FAA has never before cited these Comptroller General opinions. And they provide no support for the Director's conclusion here. These decisions stand for a far more limited proposition: under appropriations law, an increased grant award is chargeable to appropriations in the current fiscal year when the change is made. *See* 41 Comp. Gen. 134 (1961); 39 Comp. Gen. 296, 298 (1959); U.S. Gen. Accounting Office, *Principles of Federal Appropriations Law*, 2d ed., at 10-71. No one disputes that the Amendment No. 2's increase in the grant amounts should be charged to the fiscal year in which it was made. Indeed, the FAA does just that whenever it increases a grant award. *See* 2003 Report to Congress at 11. That such modifications might, for accounting purposes, be charged to the year in which they were made has nothing to do with whether they represent a "new grant" that triggers renewed application of the grant assurances and extension of their duration.

Accordingly, there is no support for the Director's view that a subsequent increase and funding may be "akin to a new grant." Absent any basis in the extensive legal and agency policy framework for the FAA's grant assurance program, it was arbitrary and capricious for the Director to declare as much.

E. The Director's Newfound Rule That Certain Amendments To Grant Offers Will Again Trigger The Grant Assurances Is Ambiguous And Procedurally Improper

The Director's conclusion that the City remains bound by the 1994 grant assurances through 2023 is all the more problematic given the uncertain scope of the rule adopted. The Director's Determination states that Amendment No. 2, at least, is "akin to a new grant," and purports to restart the running of the 20-year clock for grant assurances. Otherwise, the Determination fails to clearly delineate why, exactly, Amendment No. 2 is such a "new grant," or how this conclusion will be confined in future cases. But any understanding of the Director's interpretation of grant modifications would have a broad possible scope. This newly declared

rule thus represents a far-reaching change in the FAA’s policy guidance regarding grant assurances—one that may be adopted only pursuant to the notice-and-comment procedure mandated by 49 U.S.C. § 47107(h), allowing grant recipients to be put on fair and clear notice of the ramifications of any grant assurance.

The ambiguity inherent in the Director Determination’s attempt to shoehorn Amendment No. 2 into the category of “new grants” is illustrated by its differing treatment of Amendment No. 1. Pursuant to that amendment, the City and the FAA in 1999 modified the description of the project covered by the 1994 Grant Agreement. In the Determination, the Director suggested that Amendment No. 1, unlike Amendment No. 2, would not have restarted the Assurance B(1)’s 20-year clock. [Director’s Determination 16]; *see also SMAA v. City of Santa Monica*, Docket No. 16-99-21, Director’s Determination at 23 (Nov. 22, 2000) (concluding, after the execution of Amendment No. 1, that the City’s grant assurances expire in 2014). But it cited two separate and not necessarily congruent rationales for this distinction: (1) Amendment No. 1 continued to provide that there would be “additional work performed”; and (2) Amendment No. 1 “add[ed] no funds.” [Director’s Determination at 16].

The first rationale appears to be a reference to the “consideration” requirement that the Director deemed to be lacking under the City’s interpretation of Amendment No. 2. *See supra*, at pp. 14-17. But such a ground of distinction raises a host of questions. Would Amendment No. 1 have triggered Assurance B(1) if it, like Amendment No. 2, had been adopted after the work was completed, or at least after the FAA had paid its designated share? What if Amendment No. 1 had narrowed the description of the work the City had performed without correspondingly reducing the FAA’s grant obligation? What if Amendment No. 2 had been executed in 1999? In this respect, unless it is reversed, the Director’s Determination will sow

substantial uncertainty regarding grantees' obligations that may take years of litigation to resolve.

The Director's second proffered rationale suggests a more categorical rule: modifications that increase the FAA's grant obligation in any amount will restart Assurance B(1)'s 20-year clock; modifications that do not, will not. That the Determination adopted such a categorical rule is suggested by its later reasoning that Assurance B(1)'s "not-to-exceed date is linked to 'a offer' and not limited to the original offer." [Director's Determination at 18]. But as discussed above, the Director is actually mischaracterizing the terms of Assurance B(1), which applies to "the acceptance of a *grant* offer" and not just to "a offer." *See supra*, at p. 22. And the Director identified no other support for the proposition that Assurance B(1) is triggered any time additional funds are extended under a preexisting grant agreement. Such a conclusion, which would apply to all of innumerable grants subject to the language of Assurance B(1), would be arbitrary and unsupported.

Amounts in original grants are normally estimates, regularly subject to potential adjustment for cost overruns and variations. In fact, the additional \$240,600 paid out pursuant to Amendment No. 2 was only a very small fraction of the \$123 *million* in grant disbursement increases that the FAA approved in 2003. 2003 Report to Congress at 11. But nonetheless, the FAA has never before held that the grant of such additional funds will result in a new set of grant obligations or extension of the duration of existing grant assurances. And for good reason: such a conclusion would make superfluous 49 U.S.C. § 47108(b)(3)(A)'s provision allowing for amendments to grant amounts, as it would render all amendments that increase funds substantively equivalent to "new grants."

Whatever the precise limits of the holding of the Director’s Determination, one thing is clear: the Determination announced an abrupt and arbitrary change in the FAA’s treatment of grant obligations. The FAA had never previously suggested that mere modifications to grant agreements—amendments permitted by the terms of the grant and by federal law—may themselves later be deemed to be “new” grants triggering extension of the duration of the grant assurances previously accepted with the original grant. In order to give grantees proper notice of this sort of new and far-reaching requirement, 49 U.S.C. § 47107(h) prohibits such a change in policy from being accomplished in a Part 16 proceeding. As the FAA has previously recognized, § 47107(h) instead requires the “agency to provide notice and comment before making an abrupt change in grant assurance obligations and grant compliance policy.” *Air Trans. Ass’n of America*, FAA Final Decision and Order, Docket No.13-95-05, at *112 (2009). The agency’s failure previously to adopt the Director’s newly declared rule via the statutorily-mandated procedure is yet another, independent reason that the Determination must be reversed.

II. THE DIRECTOR’S DETERMINATION THAT ANY CLAIM REGARDING THE CITY’S GRANT OBLIGATIONS WAS PROPERLY BEFORE IT WAS CONTRARY TO LAW, PRECEDENT AND POLICY

A. Complainants Have Not Been “Directly And Substantially Affected By Any Alleged Noncompliance” And Thus Lack Standing

In order for the complaint to be properly before the Director, the Complainants were required to establish that they are “directly and substantially affected by any alleged noncompliance” on the part of the City. 14 C.F.R § 16.23(a). But because the City has not engaged in any “noncompliance” at all—alleged or otherwise—the Complainants cannot satisfy this standing requirement.

Indeed, the Complainants have failed to allege any concrete harm whatsoever. Instead, they have offered vague and conclusory allegations that their “business and operations already

have been, currently are, and will continue to be adversely affected by the City's repeated public announcements" concerning the airport's future. The closest Complainants came to identifying any concrete harm was to complain of the City's planned decision to offer three-year extensions on leases that were set to expire in 2015. But the FAA has already rejected any argument that the City is required to extend long-term leases to airport tenants. *See SMAA v. City of Santa Monica*, Docket No. 16-99-21, Director's Determination at 22-23 (Nov. 22, 2000) ("It would likely be unreasonable for the Airport to be required to enter into a lease agreement with an FBO or any aeronautical user that would provide for the Airport to be operated as an airport beyond July 1, 2015."), affirmed by *SMAA v. City of Santa Monica*, Docket No. 16-99-21, Final Decision and Order at 19 (Feb. 4, 2003) (holding that no tenant at Santa Monica Airport is "'entitled' to a long term lease at the location of its choosing.").

In nevertheless concluding that the Complainants had adequately established their standing, the Director reasoned that the City had "repudiated" the Grant Agreement, thus causing "uncertainty" that harmed the Complainants. [Director's Determination 8, 10]. But whatever the City might have previously said regarding the expiration of its airport obligations, it cannot have repudiated those obligations unless it also specifically indicated its intent to commit an act breaching them. *See* Restatement (Second) of Contracts § 250 (1981) ("[A] repudiation a) is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would be a material breach or b) a voluntary affirmative act rendering the obligor unable or apparently unable to perform without such a breach."). That the City has not done.

In any event, even if the City had somehow repudiated the Grant Agreement, the Complainants are not themselves parties to that contract, and may complain of such a breach only if it somehow injures them. Declaring, as the Director did, that they had satisfied this

requirement by pointing to mere “uncertainty” vitiates 14 C.F.R. § 16.23(a)’s standing requirement. Uncertainty is nearly always present; any airport might at any time violate its grant obligations. Unless and until the City indicates that it plans to breach these obligations in a manner that would cause Complainants imminent harm, they cannot establish that they are “directly and substantially affected by any alleged noncompliance.” 14 C.F.R. § 16.23(a).

B. Complainants Failed To State A Claim Under Part 16, And Thus Have Failed To Establish Any Basis For The Director’s Jurisdiction

For similar reasons, the Complainants have failed to fulfill their obligation to identify “the specific provisions of each Act that the[y] believe[] were violated,” as required by 14 C.F.R. § 16.23(b)(1). As the FAA has held, this requirement ensures that the agency can “make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal regulations.” *Larry L. Davis v. Jackson Municipal Airport Authority*, Docket No. 16-10-01, Director’s Determination at 16-17 (Jan. 18, 2011) (emphasis in original).

Here, however, it is undisputed that the City is currently in compliance with all federal regulations. It has taken no actions that would violate its grant assurances, nor has it indicated any immediate intent to do as much. Thus, as even the Director acknowledged, the “[c]omplaint is not clear in terms of the specific Act violated.” [Director’s Determination at 8].

In nevertheless disregarding the Complainants’ failure to state a claim, the Director again (incorrectly) relied on the theory that, even if the City had not violated its grant assurance obligations or indicated any intent to do so, it had somehow “repudiated” these obligations. [Director’s Determination 8; *see supra*, at p. 30]. The Director further reasoned that issuing a determination in this proceeding would “assure[] both current *and future* compliance.” [Director’s Determination at 9].

But the defects in the complaint cannot be so easily overlooked. Because the Complainants identified no current violation, they were, in effect, asking the Director to render an advisory opinion. The Complainants were not seeking to have the Director resolve a live dispute; rather, they were requesting the Director to opine on the legal consequences of the purely hypothetical situation in which the City departed from its grant assurances at some point prior to 2023. Indeed, the wholly advisory nature of the Director's Determination is revealed by the fact that, even in ruling for the Complainants, it failed to order the City to take any particular corrective action to comply with any specific Acts or grant assurances.

That the Director entertained this request, and in fact resolved that hypothetical controversy, was directly contrary to FAA precedent. As prior agency determinations have made clear, "Part 16 is not the proper venue to adjudicate contract disputes when no action has yet to be taken to implement the contract terms that are in a manner contrary to the grant assurances," because the "Director will not speculate regarding the future" actions parties may take. *Northwest Airlines Inc., et al. v. Indianapolis Airport Authority, et al.*, Docket No. 16-07-04, Director's Determination at 29, 44 (Aug. 19, 2008); *see also SMAA v. City of Santa Monica*, Docket No. 16-99-21, Final Decision and Order at 22 (Feb. 4, 2003) (reminding complainants that "the purpose of a Part 16 investigation process is to determine whether or not an airport sponsor is in compliance with its Federal obligations in the current factual situation."). By disregarding this precedent, the Director issued an advisory opinion, one that was outside the jurisdiction conferred in Part 16.

C. Complainants Failed To Satisfy The Pre-Complaint Resolution Requirement

The Director also erroneously overlooked a third procedural defect: the Complainants' failure to satisfy their obligation to "engage in good faith efforts to resolve the disputed matter" prior to filing their complaint. 14 C.F.R. § 16.21(a). As the Director acknowledged, the

Complainants filed their complaint following only one exchange of letters with the City, and never responded to the City's invitation that they contact the City Attorney's office should they wish to engage in further discussions. [Director's Determination at 11]. But the Director deemed these minimal efforts sufficient, declaring that the "Complainants are not required to conduct continued informal resolution efforts when it appears clear that the City's position on the expiration date is longstanding and fixed." [Director's Determination at 11].

The cursory letters the Complainants sent the City cannot have constituted the requisite "substantial and reasonable effort" to achieve resolution. 14 C.F.R. §16.21(b)(1). The Complainants gave the City no opportunity to provide Complainants with assurances that might have obviated the need for these proceedings. This is true however "fixed" the City's "position on the expiration date" might have been. Again, that position does not, on its own, harm Complainants. What the Complainants are actually concerned about are future actions the City might take, not its current views regarding obligations it has not violated even if they remain applicable. The Complainants engaged in no real efforts to negotiate with the City regarding its plans for the airport. Their complaint therefore should have been dismissed.

CONCLUSION

For the foregoing reasons, the Director's determination must be reversed.

Dated: January 8, 2016

Respectfully submitted,

MARSHA JONES MOUTRIE
JOSEPH LAWRENCE
LANCE S. GAMS
IVAN CAMPBELL
SANTA MONICA CITY ATTORNEY'S
OFFICE
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: (310) 458-8336

ZANE O. GRESHAM
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000

/s/ G. Brian Busey

G. BRIAN BUSEY
PAUL VARNADO*
JAMES SIGEL*
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 887-1500

** Application to the District of Columbia Bar pending. Practice supervised by principals of firm admitted to District of Columbia Bar.*

Counsel for Respondent City of Santa Monica

CERTIFICATE OF SERVICE

I, G. Brian Busey, counsel for the City of Santa Monica, herby certify that pursuant to 14 C.F.R. § 16.33 I have this day served the foregoing Brief on Appeal from the Director's Determination on the following persons by first class mail, postage prepaid:

Richard K. Simon, Esq.
1700 Decker School Lane
Malibu, CA 90265
rsimon3@verizon.net

Office of the Chief Counsel
Attention: FAA Part 16 Docket Clerk
AGC-600
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591
9-AWA-AGC-Part-16@faa.gov

Byron K. Huffman, Acting Director
Office of Airport Compliance and Management Analysis
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591

Dated: January 8, 2016

/s/ G. Brian Busey