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FAA Releases Guidance on Section 163 and Limited Federal Control Over Airport Property

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Since it became law in October 2018, Section 163 of the FAA Reauthorization of 2018 ("Section 163") has been a hot topic of conversation amongst airport sponsors, prospective developers, and FAA officials. Section 163 was intended to remove previous FAA authority to regulate certain real property and related transactions at federally-obligated airports. We have explained some of these specific changes in previous *Airport Law Digests* (see here and here) as well as articles in industry publications. For more than two years, FAA has largely been assessing the scope of its authority on a case-by-case basis and considering particular Section 163 issues as they were raised by sponsors in the context of Airport Layout Plan revisions or requests for releases. At the same time, FAA has been developing guidance on a framework for more proactive and structured decision-making under Section 163. We are informed that late last week, FAA completed a nationwide training of its field staff on how the new law affects FAA authority.

This week, FAA released its internal guidance in the form of a memorandum dated October 27, 2020, titled "*Instructions to Airports District Offices and Regional Office of Airports Employees Regarding Airport Layout Plan Reviews and Projects Potentially Affected by Section 163 of the FAA Reauthorization Act of 2018*." A copy of the memorandum is available for download here. Although styled as a strictly internal memorandum, it provides important information for airport sponsors about how FAA interprets Section 163 and how the agency will apply the law to future ALP reviews/revisions and airport projects. Sponsors should become familiar with this document so they can anticipate when and to what extent FAA review or approval will be required – and the more time-consuming NEPA process – that may or may not be applicable when a new project is under consideration. Remember that, prior to Section 163, FAA approval was needed for all ALP approvals but Section 163 significantly limited FAA's ALP approval authority.

While the new guidance has more detail than can be accurately captured in this *Alert*, several important points are worth highlighting.

First, confirming what the agency has said informally for months, FAA explicitly acknowledges that its ALP *approval* authority (versus simply acceptance) is now limited to revisions that affect three specific "zones of interest:" those land uses that: (i) materially impact the safe and efficient operation of aircraft at, to, or from the airport; (ii) adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations; or (iii) adversely affect the value of prior federal investments to a significant extent. Importantly, FAA includes written detail on what types of projects or ALP revisions might fall under each of these zones of interest. While zones of interest (i) and (ii) are somewhat intuitive, FAA provides criteria for what qualifies as a project that would "adversely affect the value of prior federal investment to a significant extent," including whether "the proposed project would adversely impact aeronautical infrastructure that is critical to the ability of the airport to accommodate existing or future aviation demand." *If FAA determines that none of the zones of interest is affected, it has no authority to approve the ALP change*.

Second, FAA outlines circumstances in which FAA retains authority over airport property because a release of federal obligations is necessary for a proposed project. In brief, the guidance tracks the language of Section 163 and states that FAA retains authority and *can* require releases of grant assurance obligations for a change in use where (a) the project will have an effect of safety or efficiency of aircraft operations, or (b) the land or facilities were acquired or improved with federal assistance. FAA indicates that it does not intend to require a release for most aeronautical projects, regardless of how the property was acquired. Projects categorized as non-aeronautical land use would be subject to a release

of obligations if the land was acquired with federal funds or was pledged as part of a federally funded project.

Third and perhaps most importantly, FAA provides flowcharts, details, and specific scenarios regarding agency actions that trigger the NEPA environmental review process. Environmental review is only needed if ALP approval is required (for a project within the three zones of interest) or the agency must release a property acquired with federal funds. Where FAA lacks authority over an ALP approval and cannot require a release, there is no federal action and no environmental review is required. The upshot is that in most circumstances, a non-aeronautical project on a parcel of property (a) designated for non-aeronautical use and (b) acquired without federal funds is not subject to NEPA. If *portions* of a project require an ALP approval or a release of federal obligations, FAA opines that environmental review is limited to those portions subject to FAA approval.

Finally, as FAA has stated numerous times in the past, this guidance reiterates that Section 163 does not affect an airport sponsor's obligations to maintain an updated ALP, submit projects for airspace and obstruction review, and comply with rules regarding airport revenue use.

This guidance brings some welcome clarity to the interpretation of Section 163, but it is important to understand that application of the law is still complex. Each proposed project will need to be carefully assessed (or strategically designed) to determine the level of FAA approvals. For more details on the new guidance or to discuss its applicability to a specific project, please contact Peter J. Kirsch, Catherine M. van Heuven, or Nicholas M. Clabbers.