

Airport Law Alert – FAA Issues Final Policy on Use of Hangars

06.16.16

FAA Issues Revised Final Policy Regarding Non-Aeronautical Use of Airport Hangars

Federally obligated airport sponsors are required to make their airports available for aviation use, and may not permit airport property designated for aeronautical purposes, including aircraft hangars, to be used for non-aeronautical purposes without prior FAA approval. *See* FAA Order 5190.6B, Ch. 22 (Sept. 20, 2009). On June 15, 2016, the FAA published a notice of final policy on the non-aeronautical use of airport hangars (Final Policy). *See* 81 Fed. Reg. 38906 (June 15, 2016). The Final Policy, whose purpose is to “provide a clear and standardized guide for airport sponsors and FAA compliance staff,” 81 Fed. Reg. at 38907, amends a proposed policy statement that the FAA published in July 2014 clarifying the FAA’s position regarding permitted and prohibited use of airport hangars (Proposed Policy). *See* 79 Fed. Reg. 42483 (July 22, 2014).

The Final Policy comes after there was considerable industry criticism of the Proposed Policy as being insensitive to the role of airport sponsors and placing airports in the role as policemen of airport tenants. Among the most significant changes, the Final Policy no longer relies on the terms “incidental”, “de minimis”, or “insignificant” to describe the limitations on permissible non-aeronautical uses of airport hangars. Instead, the FAA simply describes the standard for permissible non-aeronautical use as any use that does not interfere with aeronautical activities. The Final Policy contains a list of impermissible activities, which include non-aeronautical uses that impede the movement of aircraft movement or access, or displace aeronautical contents of the hangar. Final Policy at 38910. Non-aeronautical business or municipal agency functions in hangars are also prohibited without FAA permission, as are storage of items that are in violation of airport rules and regulations, lease provisions, building codes, or local ordinances. Final Policy at 38910. Vehicles are permitted to be parked in hangars, but only while the owner is using stored aircraft. Final Policy at 38910. The Final Policy does not expressly designate kitchens or lounge areas as *per se* prohibited, but does state that hangars may not be used as residences.

In recognition that temporary non-aeronautical use of hangars may sometimes be appropriate, the Final Policy allows airport sponsors to seek prior blanket approval from the sponsor’s local FAA Office of Airports for month-to-month non-aeronautical leases where there is no aeronautical demand for hangars. In order to obtain such blanket approval, an airport sponsor must submit a month-to-month hangar leasing plan under which such leases require tenants to vacate hangars upon a 30-day notice from the airport sponsor that the hangar is needed for aeronautical purposes. Airport sponsors must also provide the FAA with “(1) an inventory of aeronautical and non-aeronautical land/uses; (2) information on vacancy rates; (3) the sponsor’s procedures for accepting new requests for aeronautical use; and (4) assurance that facilities can be returned to aeronautical use when there is renewed aeronautical demand for hangar space.” Final Policy at 38910. In addition to blanket approval, the Final Policy also notes that airport sponsors may seek individual prior approval for three-to-five-year interim non-aeronautical leases. Final Policy at 38910. In every case where the lease involves non-aeronautical uses, the airport sponsor is required to charge non-aeronautical fair market rates. Final Policy at 38910. The Final Policy also suggests that airport sponsors include provisions in hangar leases that require an automatic increase in rates to fair market value in the event that a tenant uses its hangar for non-aeronautical purposes. Final Policy at 38911. While all of these provisions provide sponsors with some flexibility, the agency has not established a formal procedure (or, importantly, a timeline) for securing approvals.



KAPLAN KIRSCH ROCKWELL

In response to criticism from experimental aircraft organizations, the Final Policy clarifies that the FAA considers construction of amateur-built and kit-built aircraft to be an aeronautical use of hangar space. The majority of the 2,400 comments received on the Proposed Policy concerned tenants' ability to lease hangars for these types of aircraft construction. While the Final Policy clarifies that this type of use is generally permitted, it urges airport sponsors to enter into leases whose terms require construction benchmarks in order to ensure timely completion. Final Policy at 38911. The Final Policy also states that airport sponsors are not required to construct special facilities or to upgrade existing facilities for aircraft construction needs. Final Policy at 38911.

The Final Policy retains provisions from the Proposed Policy establishing that the FAA's hangar policy "neither creates nor constitutes a right to store non-aeronautical items in hangars" and that "[a]irport sponsors may restrict or prohibit storage of non-aeronautical items." Final Policy at 38911. The Final Policy retains language that continues to place airport sponsors in the role of enforcer of the Policy: it states that airport sponsors "should have a program to routinely monitor use of hangars and take measures to eliminate and prevent unapproved non-aeronautical use of hangars." Final Policy at 38911. The Final Policy also states that "[t]he FAA may disapprove an AIP grant for hangar construction if there are existing hangars at the airport being used for non-aeronautical purposes." Final Policy at 38911. Although airport sponsors commented on some of the compliance, enforcement, and liability issues raised by these statements in the Proposed Policy, the FAA has left them largely unaltered.

Responding to other comments, the FAA reiterates in the notice and in the Final Policy itself that the prohibition regarding non-aeronautical use of airport hangars applies regardless of the type of leasehold. Final Policy at 38908, 38910. Even hangars that are privately owned and constructed are subject to the Final Policy.

Perhaps in recognition of the uncertainty and additional responsibilities created by the Policy, the FAA commits to posting frequently asked questions and answers regarding the Final Policy on its website. The Final Policy becomes effective July 1, 2017.