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Permissible Uses of Airport Property and Revenue

This digest was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 11-01, this digest was prepared by Peter J. Kirsch and Christian L. Alexander, Kaplan Kirsch & Rockwell LLP, Denver, CO. The opinions and conclusions expressed or implied in this digest are those of the researchers who performed the research and are not necessarily those of the Transportation Research Board; the National Academies of Sciences, Engineering, and Medicine; or the program sponsors. The responsible program officer is Theresia Schatz.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Foreword

Understanding the permissible use of airport revenue is one of the most common legal issues faced by airport management. While there are some clear lines, there are several categories (e.g., utility fees) of potential expenditures of airport revenue that are not as clearly defined. In addition to the legal uncertainty, airport operators often face political pressure to use airport revenue for purposes that are tangentially related or unrelated to the airport.

This legal digest explores the permissible uses of airport revenue and airport property and relies on the background of economic and legal information presented in *ACRP Legal Research Digest 2: Theory and Law of Airport Revenue Diversion*, with updates. It focuses on the application of federal law and policy to specific categories of expenditures and uses and includes discussion of statutory law, policy, case law, and informal and formal guidance from the FAA. This publication is a practical guide for attorneys and non-attorneys, and differentiates between settled areas of the law and unsettled/emerging areas.

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PERMISSIBLE USES OF AIRPORT PROPERTY AND REVENUE

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SUMMARY

This publication explores the boundaries of permissible use of airport revenue and property under federal law and provides legal analysis regarding industry trends and legislative and regulatory changes beyond those covered in previous ACRP research. Through legal research and qualitative interviews with a small number of airport officials representing a diversity of airports, this research seeks to provide practical guidance for determining permitted uses of airport revenue and property in a meaningful and useful way for industry stakeholders.

The permissible use of airport revenue and related permissible uses of property are two of the most common legal issues faced by airport proprietors. They also are two of the most difficult to navigate. While the federal government's clear and longstanding interest in protecting its investment in the nation's airports and air navigation system provides the foundation for the prohibition on so-called "revenue diversion," revenue and related property use restrictions can at times complicate airport management and development.

In a review of available law, guidance, cases and illustrative projects, a number of key principles and concepts emerges. First, while it is simple to state that airport revenue must be used only for airport capital and operating costs, in practice, this maxim in certain cases is susceptible to much complexity, which may make it difficult for airport proprietors to spot potential revenue diversion problems. An equally simplified, but useful, principle is that an airport proprietor must be able to explain the airport nexus for every expenditure of airport dollars and for the use of every acre of airport property.

Second, determining the revenue source and, particularly, whether and in what manner it derives from the federal government, is essential for understanding permissible uses of airport revenue and property. It is equally important to understand the source and legal characterization of each parcel of airport property, which may not be immediately clear by merely observing its current use or description. Inaccurate, outdated or informal historical records on airport property acquisition, use and restrictions have caused considerable headaches for airport proprietors.

Paradoxically, revenue diversion may exist even when no funds change hands. For example, low- or no-rent use of airport property for nonaeronautical purposes could constitute revenue diversion—and could implicate other grant obligations, as well—even if there is no airport revenue being channeled to non-airport use. This point is particularly applicable to noncommercial (e.g., governmental and community) uses of airport property. The loss of revenue or profit is measurable in dollars, which benefit the entity that is not paying reasonable rates. There are exceptions to this principle for certain aeronautical expenditures (e.g., fee waivers under an air service incentive program), but such exceptions remain circumscribed and generally are narrowly construed.

There was a time when airport real estate functioned primarily as a buffer or protection against neighboring land uses. But as the airport industry and its stakeholders have become more cost-sensitive and the need to develop new revenue sources has intensified, airport proprietors increasingly are viewing vacant or underused airport property as a valuable, if unproductive, asset. This research reflects the extent to which airport proprietors are seeking creative means of using airport revenue and property. While these creative endeavors require careful analysis and assessment of applicable revenue use requirements, airport proprietors report that such efforts can be pivotal in helping achieve strategic and financial goals for themselves and other stakeholders. Private entities and non-airport governmental units, in particular, can play a key role in unlocking the value of airport property by generating revenue/income for off-airport use, but only if the airport proprietor receives fair market value for use of the airport or for services rendered to the airport.

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I. INTRODUCTION

Understanding the permissible use of airport revenue is one of the most common legal issues faced by airport proprietors. It is also one of the most difficult to navigate. While some principles of applicable law are clear, other areas continue to present challenges for airport proprietors, either because of ambiguity in the law, complexity of applicable federal restrictions or political and economic pressures on how to spend airport revenue. Although federal government guidance regarding specific areas of airport revenue diversion exists, there is relatively little literature that integrates these resources and applies analysis across different subcategories of airport revenue use and diversion. There are few reported court cases and only a small handful of FAA administrative cases.[1]

[1] Researchers are warned that, at times, there have been delays in updates to the databases containing FAA administrative decisions under 14 C.F.R. Part 16 available on the online legal research portals Lexis and Westlaw. At this writing, those databases are not up to date. Decisions are available on the FAA website, but the site does not purport

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The law governing use of airport property is inextricably tied to the use of airport revenue. While airport property historically was used primarily or exclusively for airport functions (either aeronautical or nonaeronautical ancillary functions that were tied to airport needs and operations), airport proprietors in the last decade have become far more entrepreneurial in their view of airport property. Instead of merely being buffer or open space to shield the airport from nearby property uses, airport property is coming to be viewed as a marketable or revenue-producing asset, the revenue from which can help the proprietor's bottom line and reduce costs to aeronautical users. Airport proprietors are devising creative plans for property use, though these are not well-addressed in legal precedents. As airport proprietors become more creative in use of their property, the linkage between airport property use and airport revenue use becomes tighter and more complex.

In 2008, ACRP published the *ACRP Legal Research Digest 2: Theory and Law of Airport Revenue Diversion* (*ACRP LRD 2*), which covered the historical and theoretical basis for federal restrictions on airport revenue use. This publication updates *ACRP LRD 2* with respect to industry trends and legislative and regulatory changes and takes the research further by exploring the boundaries of permissible use of airport revenue and property under federal law. The ultimate objective of the research is to provide practical guidance for determining permitted uses of airport revenue and property in a meaningful and useful way for industry stakeholders. More important, this research provides a framework and guide for airport proprietors to evaluate the legality of new or creative uses of airport property or revenue.

To deliver on the research's objective and ensure that the analysis is based on actual airport proprietor experiences, researchers interviewed a select group of airport proprietors and surveyed existing legal research and literature to identify new projects and controversies. In the research findings, researchers focus on the application of federal law and policy to specific categories of expenditures and uses. The resulting analysis provides a practical guide to help industry stakeholders navigate the difficult terrain of airport revenue use in some of the thorniest areas. In the process, researchers suggest useful analytical frameworks and strategies for determining permissible uses of airport revenue and property.[2]

This digest begins with a review of the foundations and fundamentals of airport revenue and property use, building on the work in the *ACRP LRD 2* (Chapter II). Chapter II includes a brief review of the history of airport revenue use regulation and more recent legislative and regulatory developments, as well as a review of the theoretical foundation and legal framework underlying airport revenue and related property use. Chapter II also includes a review of the legal mechanisms guiding airport revenue regulation and the established boundaries of permissible revenue and related property use based on existing federal law and guidance.

Chapter III provides an overview of the research methodology, including research purpose, scope, method and techniques used. As Chapter III explains, the legal research conducted for this article was based on analysis of existing law, previously researched case studies and documented projects and controversies regarding airport revenue diversion. The research also included qualitative interviews with a select number of airport officials representing a diversity of types, sizes and locations of airports. The purpose of these interviews was to identify various practical issues and potential strategies related to use of airport revenue and property.[3] Chapter III also explains that we used the collected information to conduct a non-statistical analysis and formulate hypothetical cases to explain legal concepts.

Results of the research are discussed in Chapter IV. Researchers present the research findings primarily through the lens of five categories of topics regarding airport revenue use and related property issues. These categories were selected based on the experience of researchers dealing with the thorniest legal issues and types of issues reported by survey participants. The categories in Chapter IV are (1) nonaeronautical development of airport property; (2) ground access, including intermodal projects; (3) use of revenue and property to promote airline competition and aeronautical service generally; (4) privatization and public-private partnerships; and (5) intergovernmental cost sharing and governmental/community use of airport property. These categories are not intended to be an exhaustive list of ways in which airport property or revenue may be used, but instead a selection of topics that provide fertile ground for wrestling with particularly difficult revenue diversion issues. These topics also cover areas in which researchers believe further practical guidance and examples would be beneficial for airport proprietors, either because of subtle nuances in the law, changing legal landscape or a lack of available formal legal precedent or definitive agency interpretation.

Finally, Chapter V presents conclusions based on the analysis provided in Chapter IV. This chapter includes a summarized set of tips for airport staff and stakeholders in assessing airport revenue use issues.

to provide the robust research, indexing and digesting tools available from Lexis and Westlaw. ACRP also publishes a compilation of DOT and FAA administrative decisions in web format with summaries, available at https://crp.trb.org/acrplrd21/.

[2] The analysis provided in this digest does not necessarily reflect FAA policy and should not be interpreted as an expression of agency policy. FAA may not agree with all analyses or interpretations in this digest. Therefore, readers are encouraged to engage with FAA officials before pursuing strategies discussed herein.

[3] A total of nine airport representatives were interviewed. As discussed in the methodology section, this qualitative research, including the interviews, did not rely on statistical analysis. Since the research relied on a small qualitative study, it is not intended to be read as a representative sample of airports. Readers should be cautioned not to make assumptions regarding the generalizability of the proprietors' experiences.

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II. FOUNDATIONS AND FUNDAMENTALS

A. Brief Historical Review and Review of Recent Updates

1. Historical Review of Restrictions on Airport Revenue and Property Use

The federal government has been instrumental in the development of air commerce since its beginnings in the early 20th century—a role it continues to this day.[4] The underlying principle of federal involvement is as simple as it is comprehensive: to establish and maintain a safe and efficient national air transportation system. The tradeoff for airport proprietors has been financial—in exchange for substantial federal regulatory oversight, airport proprietors receive federal grants to maintain and develop their facilities. A major source of federal support to airport proprietors[5] has been in the form of land grants, funding for land acquisition and funding assistance for airport planning and development projects. In exchange for this assistance, the federal government imposes conditions concerning the use of airport revenue and property. The principle underlying these restrictions is that the federal grants represent a substantial investment in these facilities and, therefore, the federal government has a strong interest in ensuring that airport proprietors use grants and associated funds appropriately on the capital and operating costs of the airport itself. Congress and the FAA each has concluded that use of revenue derived from a federally subsidized airport for non-airport purposes amounts to a hidden tax[6] on travelers (e.g., those who pay taxes that fund federal grant programs) that impermissibly benefits unrelated local municipal services.

Historically, Congress and the FAA have not limited federal interest to those airport facilities that have been financed with federal grants or occupy real property that was donated by the federal government to the airport proprietor. Instead, the philosophical principle underlying regulation of airport revenue use has been far broader: Once there is federal investment in airport facilities, the *entire* airport becomes "grant-obligated"—meaning that with limited, but important, exceptions, revenue generation and revenue use become subject to federal oversight. This broad view of federal interest is grounded in the principle that even where the federal investment is modest, it is made under the assumption that it is instrumental (perhaps crucial) for the entire airport operation and that federal interest, therefore, covers the entire airport. Furthermore, as with federal funding itself, property purchased with federal grants or donated for airport purposes by the federal government generally should not be used for local purposes unrelated to the airport. This principle is not only foundational to the funding of airport infrastructure in the United States, but provides the legal and policy basis for much of federal airport regulation. It also is broad, meaning the FAA regulates not only the use of revenue, but also the location of certain airport facilities, the way contracts are executed (even in certain cases those with no federal involvement), financial recordkeeping of airport proprietors, environmental standards for development and operation of airport facilities, and relationships between airport proprietors and their users and tenants.

Although the federal government has long conditioned federal grants for airport development on provisions that implement federal policies, broad restrictions on use of airport revenue were not expressly included as a condition of grants until the 1980s. However, earlier federal policy did influence airport revenue use indirectly through various conditions tied to grants of land and funding, including promoting the growth of air travel and financial sustainability and stability of airports.[7] Since the founding of the first federal grant in aid program in the 1940s—the Federal Aid to Airport Program (FAAP)—and continuing with its successors—the Airport Development Aid Program (ADAP) and current Airport Improvement Program (AIP)—federal conditions have come in the form of contractual grant assurances.[8] While grant assurances technically are contractual, their terms and substantive provisions are statutorily mandated. One of the earliest grant assurances, which has been in effect continuously, is a requirement to provide for public use of the airport on fair and reasonable terms without unjust discrimination.[9]

For conveyances of land under the Surplus Property Act of 1944 and Section 16 of the Federal Airport Act of 1946, as well as subsequent laws, restrictions appeared in the deeds of conveyance,[10] including especially restrictions requiring use of conveyed property for airport purposes. The documents conveying these properties defined "airport purposes" to mean that the property had to be used for aeronautical uses and, in some instances, non-aviation businesses that could serve as a revenue

[4] Under current federal law, the FAA is required to "encourage the development of civil aeronautics and safety of air commerce in and outside the United States." 49 U.S.C. § 40104 (2019).

[5] Throughout this digest, the term "airport proprietor" generally refers to the owner of an airport (usually a state or political subdivision of a state) who is responsible for oversight of operation of a public-use airport, whether directly as the owner or indirectly as the operator of the airport. This term encompasses the reference to "airport owner or operator" contained under federal airport assistance statute. *See* 49 U.S.C. § 47133(b) (2019). Federal regulations and policies often use the term "airport sponsor" to refer specifically to an airport proprietor who is participating in a federal airport grant assistance program (e.g., Airport Improvement Program). For clarity, this digest uses the term "airport" to refer to the physical area and facilities identified as airport property on an ALP or listed on an Exhibit "A" Property map and not to the entity that owns or operates the facility.

[6] *See* 49 U.S.C. § 47107 note (2019).

[7] *See, e.g.*, Federal Airport Act of 1946, Pub. L. No. 79-377, § 12, 60 Stat. 170, 177 (1946); Surplus Property Act of 1944 Amendment, Pub. L. No. 80-289, 61 Stat. 678 (1947). *See also* 91 CONG. REC. 8430-49 (1945) (discussing motives for establishment of federal airport assistance program).

[8] Federal Airport Act of 1946, § 12, 60 Stat. at 177; Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 18, 84 Stat. 219, 229 (1970).

[9] Federal Airport Act of 1946, § 11(1), 60 Stat. at 176.

[10] Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7717 § II.A (Feb. 16, 1999) [hereinafter *Revenue Use Policy*, Feb. 1999].

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source for airports.[11] Since the earliest of these conveyances, the FAA has developed procedures for the release of deed restrictions to allow airport proprietors more flexibility in the use of the property for nonaeronautical purposes or actual disposal.[12] Today's statutes and the implementing regime[13] retain requirements that airport proprietors use revenue from property use for airport purposes,[14] as well as other restrictions as discussed in subsequent sections of this digest.

Current federal requirements regarding use of airport revenue first appeared as a result of reauthorization of a federal airport assistance program in 1982.[15] The Airport and Airway Improvement Act of 1982 (AAIA) renamed the program the Airport Improvement Program and restated and expanded required conditions attached to all federal airport grants.[16] One of the new conditions provided that "all revenues generated by the airport [proprietor], if it is a public airport, will be expended 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 directly related to the actual transportation of passengers or property."[17] Congress exempted airport proprietors from this new requirement if they had existing debt obligations or statutory financing provisions that stipulated that airport revenue could be used for other purposes.[18]

Subsequent laws and amendments regarding the revenue use requirement in the decade or so after its initial passage in 1982 primarily focused on further tightening of permissible use of airport revenue to broadly prohibit all forms of revenue diversion.[19] In 1987, Congress further amended the revenue use restrictions to limit spending on local non-airport facilities to those costs "substantially," as well as directly related to transportation of passengers or property and to prohibit new local aviation fuel taxes from being spent on non-aviation purposes.[20]

Congressional research in the early 1990s indicating that local public airport proprietors and local governments were skirting airport revenue use restrictions led to the 1994 addition of new airport revenue use reporting and enforcement requirements, as well as statutory provisions expressly outlining penalties for noncompliance.[21] The 1994 legislation clarified that airport proprietors should strive to make airports as self-sustaining as possible[22] and that they were prohibited from creating revenue surpluses beyond those necessary for reasonable reserves, contingencies or financing.[23] It also required the FAA to develop a policy concerning the use of airport revenue,[24] which the FAA published as a final document in 1999.[25]

Notwithstanding these enactments, Congress continued to be concerned that the federal investment in airport infrastructure was being devalued because airport proprietors were diverting revenue to other local purposes. The result was a 1996 law that significantly expanded the scope of federal revenue use requirements.[26] Under the new law, codified at 49 U.S.C. § 47133, airport revenue use restrictions were expanded to cover all public and private airport proprietors who receive federal funding, as well as airport proprietors who accept real-property conveyances from the federal government.[27] Asserting the long-term harm of revenue diversion, and concerned that currently obligated airport proprietors might cease accepting

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[11] *See* Surplus Property Act of 1944 Amendment, Pub. L. No. 80-289, 61 Stat. 678 (1947) (amending § 13 of the Surplus Property Act to allow for transfer of federal property "needed to develop sources of revenue from non-aviation businesses…"). *See also* FAA Order No. 5190.6B, FAA Airport Compliance Manual § 3.5 (2009).

[12] FAA Order no. 5190.6B § 22.4.c.

[13] The FAA almost universally uses policies and orders to implement these statutory requirements, not regulations.

[14] *See* FAA Order no. 5190.6B §§ 22.17.c., 22.13, 22.18.

[15] *See id.* § 16.2.a.; FAA Policies and Procedures Concerning the Use of Airport Revenue, at 1.

[16] *See* Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 505, 96 Stat. 324, 676-77 (1982); *see also* FAA, FAA Historical Chronology, 1926-1996, https://www.faa.gov/about/history/chronolog_history/media/b-chron.pdf.

[17] Airport and Airway Improvement Act of 1982, § 511(a) (12), 96 Stat. at 687. This condition is now codified at 49 U.S.C. § 47107(b) (2019). This language has been subsequently revised. *See infra* Section II.D.5.a.

[18] *Id. See also infra* Section II.D.3. (discussing grandfathering provisions).

[19] The term "revenue diversion" has come to mean, broadly, the use of any airport revenue for purposes unrelated to the capital and operating cost of the airport. FAA Order No. 5190.6B ch. 15.

[20] *See* Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, § 109, 101 Stat. 1486, 1499-1502 (Dec. 30, 1987) (codified at 49 U.S.C. § 47107(b) (1) (2019)).

[21] Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (1994). *See also* U.S. Gov't Accountability Office, GAO/RCED-97-3, Airport Privatization: Issues Related to the Sale or Lease of U.S. Commercial Airports 36 (1996); Paul Stephen Dempsey, Transp. Research Bd., Airport Coop. Research Program, Legal Research Digest 2: Theory and Law of Airport Revenue Diversion 13 (2008), http://nap.edu/23092 (discussing research on revenue use violations).

[22] 49 U.S.C. § 47107(k) (3) (2019).

[23] Federal Aviation Administration Authorization Act of 1994, § 110, 108 Stat. at 1573 (codified at 49 U.S.C. § 47101(a) (13) (2019)).

[24] *See* 49 U.S.C. § 47107(k) (1)-(2).

[25] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696 (Feb. 16, 1999). This policy has been subsequently amended. *See infra* Section II.A.2. The FAA has published the full policy reflecting changes based on court decisions on its website at https://www.faa.gov/airports/airport_compliance/.

[26] *See* Airport Revenue Protection Act of 1996, Pub. L. No. 104-264, Title VIII, § 802, 110 Stat. 3213, 3270 (1996) (codified as amended at 49 U.S.C. § 47107 note (2019)) ("Congress finds that … the Secretary and the Administrator have not enforced airport revenue diversion rules adequately and must have additional regulatory tools to increase enforcement efforts.").

[27] 49 U.S.C. § 47133; *Airport Revenue Diversion: Hearing Before the Subcomm. On Aviation of the S. Comm. On Commerce, Sci., and Transp.*, 104th Cong. (1996); 142 Cong. Rec. S5268-69 (daily ed. May 17, 1996) (statement by Sen. McCain). As discussed further below, there are grandfathering exceptions to the application of revenue use requirements for airports receiving federal property before enactment of this legislation.

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federal assistance to circumvent indefinite revenue use requirements, Congress applied the new requirements to any airport proprietor with an existing grant obligation and made revenue restrictions permanent for the life of the airport.[28] Congress excepted from the new requirements only those airport proprietors not then subject to revenue use conditions, and only as long as they did not accept any further federal assistance.[29]

In 1996, Congress also passed a law authorizing the Airport Privatization Pilot Program (APPP), which sought to promote airport privatization through, among other things, partial exemption from airport revenue use requirements.[30] As discussed below in further detail, although this program was expanded in 2012[31] and again in 2018,[32] there has been limited participation and, to date, only two airports have fully privatized, one of which later reverted.[33]

In the mid-1990s and 2000s, the FAA published a series of guidance documents that elaborated on federal requirements regarding airport revenue use. This included the previously cited policy on airport revenue use in 1999,[34] as well as the updating of its *Airport Compliance Manual*, Order 5910.6B,[35] which covers a range of topics including airport revenue use. More recently, the FAA has moved to respond to additional revenue use concerns, including violations regarding local taxes[36] and ground transportation spending.[37]

Since 1996, the statutory framework for use of airport revenue and related airport property use has remained largely the same, with the exception of some relatively minor changes intended to refine, but not substantially alter, revenue and property use restrictions.[38]

[28] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7699.

[29] 49 U.S.C. § 47133(b).

[30] Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 149, 110 Stat. 3213, 3224-27 (1996) (codified as amended at 49 U.S.C. § 47134 (2019)).

[31] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 156, 126 Stat. 11, 36 (2012) (amending 49 U.S.C. § 47134).

[32] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 160, 132 Stat. 3186, 3221 (2018) (amending 49 U.S.C. § 47134 (2019)).

[33] Rachel Y. Tang, Cong. Research Serv., R43545, Airport Privatization: Issues and Options for Congress 5 (2017).

[34] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7699.

[35] FAA Order No. 5190.6B.

[36] Policy and Procedures Concerning the Use of Airport Revenue; Proceeds from Taxes on Aviation Fuel, 79 Fed. Reg. 66,282 (Nov. 7, 2014) (2014 Amendment to *Revenue Use Policy*) [hereinafter Proceeds from Taxes on Aviation Fuel, Nov. 2014].

[37] FAA, Bulletin 1: Best Practices—Surface Access to Airports (2006) [hereinafter Bulletin 1]; FAA Order No. 5100.38D, Change 1, Airport Improvement Program Handbook app. P (2019).

[38] *See*, *e.g.*, Department of Transportation and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448-49 (1997) (codified at 49 U.S.C. § 47107 note (2019)) (clarifying that payments to Native American tribes from airport revenues under certain circumstances does not constitute illegal revenue diversion); FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 163, 132 Stat. 3186, 3224 (2018) (codified at 49 U.S.C. § 47101 note (2019)) (discussed below).

2. Recent Developments Since Publication of Theory and Law of Airport Revenue Diversion

Although the broad contours of federal policy on the use of airport revenue have remained the same since the 2008 publication of *The Theory and Law of Airport Revenue Diversion*, there have been a number of new developments.

In 2009, the FAA updated its *Airport Compliance Manual*, FAA Order 5190.6B. In 2012, Congress expanded the APPP to include provisions exempting privatized airports from revenue use requirements.[39] However, there has been limited participation in that program, and only two airports have fully privatized, one of which later reverted to public ownership.

Another change in 2012 was Congress's decision to permit revenue derived from mineral extraction at general aviation airports in amounts that exceed the five-year projected maintenance needs of the airport to be allocated to non-airport federal, state or local transportation infrastructure projects within the geographical limits of the airport proprietor's jurisdiction.[40] In addition, Congress expanded the definition of "noise land" (discussed further below) acquirable with federal funding to include developed or undeveloped "buffer" noise land and directed proceeds from the sale of noise land to be applied toward airport reinvestment.[41]

In 2014, the FAA amended its *Policy and Procedures Concerning Use of Airport Revenue* to reflect longstanding federal policy that revenues from state and local government taxes on aviation fuel are subject to airport revenue use requirements and must be spent on aviation-related expenses.[42] The FAA stated it would apply this policy amendment prospectively to new and existing fuel taxes imposed by proprietor and non-proprietor entities alike, providing state and local governments a three-year window in which to achieve compliance. To assist in ensuring compliance, the FAA requested that state and local governments submit action plans detailing what they would do to ensure aviation fuel tax funds were not diverted. The FAA has compiled a status list of jurisdictions regarding action plans.[43] Also in 2014, the FAA published a bulletin on best practices for providing surface access to airports, in which it included guidance on allowable uses of airport property and revenue for building ground transportation access.[44]

In 2016, Congress exempted nominal rate leases of airport proprietors with Air National Guard units entered into before

[39] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 156, 126 Stat. 11, 36 (2012) (amending 49 U.S.C. § 47134).

[40] *Id.* § 813 (codified at 49 U.S.C. § 47133 note (2019)).

[41] *Id.* § 135 (codified at 49 U.S.C. § 47107(c)).

[42] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. at 66,283.

[43] *Aviation Fuel Tax Action Plans and Status*, FAA, https://www.faa.gov/airports/airport_compliance/aviation_fuel_tax/ (last updated Mar. 20, 2019).

[44] Bulletin 1, *supra* note 37. *See also* FAA Order No. 5100.38D, Change 1, Airport Improvement Program Handbook app. P (2019) (guidance on ground transportation issued in 2014).

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Oct. 7, 2016, from grant assurance requirements if the guard unit operated military aircraft at or remotely from the airport.[45]

The latest FAA reauthorization, which was enacted in 2018 and reauthorizes the AIP program until 2023, provides a few changes related to use of airport property. The law expressly provides for "[l]imited regulation of non-federally sponsored property" by prohibiting the Secretary of Transportation—and, by extension, the FAA—from directly or indirectly regulating "(1) the acquisition, use, lease, encumbrance, transfer or disposal of land by an airport owner or operator; (2) any facility upon such land; or (3) any portion of such land or facility," except where necessary for safety; to ensure that airports receive or give fair market value for the purchase, sale or lease of airport property; or concerning regulation of land or facilities purchased with AIP grants or that are subject to the Surplus Property Act or PFC requirements.[46]

Additionally, the 2018 FAA Reauthorization Act directs the Comptroller General to study the implications of repealing the revenue-use grandfathering provisions found at 49 U.S.C. § 47107(b) (2).[47] The legislative history indicates that Congress is concerned about issues of equity between grandfathered and non-grandfathered airports and about the magnitude of revenue generated from grandfathered airports that may not be serving the purposes of promoting air travel.[48] In 2018, the U.S. Department of Transportation (DOT) Office of Inspector General (OIG) published its own report on the FAA's accounting of revenue use by grandfathered airports.[49]

In 2018, Congress further modified and renamed the program to allow for privatization of parts of an airport—such as a rental car facility or parking—rather than an entire airport, and to permit airport proprietors to seek privatization on behalf of multiple airports under its control. The renamed Airport Investment Partnership Program (AIPP) also allows airport proprietors to seek planning grants of up to $750,000. In an important revision to remove agency discretion, the legislation provides that the airport proprietor and new private recipient *shall* be exempt, to the extent necessary, from repayment of federal grants, return of property acquired with federal assistance and the use of proceeds from the airport's sale or lease exclusively for airport purposes. Previously, the FAA had discretion to grant these exemptions.[50] The legislation also removed the previous cap limiting the number of participating airports to 10.[51] A recent Congressional Research Service report suggested that there would be more interest in privatization if there were further relaxation of airport revenue and land-use restrictions.[52]

Among other changes in the 2018 FAA Reauthorization Act was the addition of a provision under the grant assurance statute, 49 U.S.C. § 47107(v), allowing, in limited cases, for the use of airport property by a local government for an interim compatible recreation purpose at below fair market value.[53] The applicability of this provision is limited by a number of important restrictions, including especially that it applies only to leases for such use entered into before Feb. 16, 1999, the subject airport property must have been acquired under a federal airport development grant program and the airport proprietary must certify that it is not responsible for any other costs associated with the recreational purposes.[54]

B. Brief Review of Theoretical Foundation for Regulation of Airport Revenue and Related Property Use

1. Regulatory Theory Tied to Benefits Received from Federal Assistance and Concern over Diversion of Funding from Use for Aeronautical Purposes

Airport proprietors, local communities and governments, and the federal government all have an interest in supporting the economic viability of airports and the aviation industry to facilitate air travel and promote associated economic and social benefits that derive from it.[55] Who ultimately pays the costs of *airport development*—local vs. federal taxpayers, public vs. private entities, users vs. taxpayers generally—as well as who receives the *economic benefits*—local communities vs. the general traveling public, airlines vs. passengers—can complicate how these shared goals are achieved. Ensuring that airport proprietors operate their facilities as self-sufficiently as possible and that federal grants for airports are used directly and exclusively

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[45] FAA, Airport Sponsor Assurances (2014) [hereinafter Grant Assurances], https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip.pdf; Act of Oct. 7, 2016, Pub. L. 114-238, 130 Stat. 972 (2016) (codified at 49 U.S.C. § 47107(t) (2019)). *See also* 162 Cong. Rec. H5698 (daily ed. Sept. 20, 2016) (statement of Rep. Zeldin).

[46] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 163, 132 Stat. 3186, 3224 (2018) (codified at 49 U.S.C. § 47101 (2019)). The above summarizes the exceptions under Section 163; for the exact provision please see the text of the provision itself. At this writing, the FAA has not promulgated regulations or policy on the application of Section 163, nor is it required to do so under the FAA Reauthorization Act of 2018. As a result, the interpretation of this section is likely to result from precedents established from specific fact-specific application of the section over time. Senior FAA officials have publicly stated that the agency intends to issue guidance or interpretation to assist in implementation of Section 163. *See Program Guidance Letters (PGLs) and Program Information Memorandums (PIMs) for the Airport Improvement Program (AIP)*, FAA, https://www.faa.gov/airports/aip/guidance_letters/#rpgls (last modified Sept. 4, 2019) (demonstrating FAA's commitment to issuing guidance on implementation of the new statute in the form of Program Guidance Letters (PGLS)).

[47] FAA Reauthorization Act of 2018, §143, 132 Stat. at 3212.

[48] 164 Cong. Rec. H3643, H3656 (daily ed. Apr. 26, 2018) (statements of Rep. Sanford).

[49] Office of Inspector Gen., U.S. Dep't of Transp., Report No. AV-2018-041, FAA Needs to More Accurately Account for Airport Sponsors' Grandfathered Payments (2018) [hereinafter OIG Report No. AV-2018-041].

[50] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 160, 132 Stat. 3186, 3221 (2018) (codified at 49 U.S.C. § 47134 (2019)).

[51] *Id.*

[52] *See* Tang, *supra* note 33, at 5.

[53] FAA Reauthorization Act of 2018, § 131(3), 132 Stat. at 3204 (codified at 49 U.S.C. § 47107).

[54] *See id.* at 3204-05 (detailing all eight restrictions).

[55] *See* Dempsey, *supra* note 21, at 10-11.

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to fund airport and air system development underlie much of federal policy regarding airport revenue use. In short, effective control over the use of federal grant funds to support airports necessarily requires the federal government to control the use of almost all funding. Use of revenue derived from a federally subsidized airport for other non-airport local purposes is prohibited to prevent a "hidden tax" from being imposed on air transportation, and because it could result in federal funding being "used to substitute funds diverted to support local non-airport programs."[56] Accordingly, Congress has clearly and consistently sought to protect against the dilution of federal financial assistance through the "diversion" of airport revenue, regardless of the revenue source.

The national airport system has been the focus of sustained and significant federal subsidy, which has been justified through the economic wealth and societal benefit created by growing a safe and efficient national airport system.[57] At the same time, Congress also has expressed its desire that airports be operated as economically self-sustaining as possible[58] and that costs be reasonably allocated to the users of airport services without burdening them with unnecessary taxes to fund unrelated activities.[59] Revenue derived directly from airport operations—such as landing fees, terminal leases, fuel sales, parking concessions and advertising—is particularly appropriate for reinvestment in airport development because payment for airport systems is closely tied to use of those services.[60] Furthermore, reinvestment of airport revenue is necessary because federal funding cannot support the full cost of needed investment in airport development.[61]

Accordingly, Congress and federal regulators have made it federal policy that airport proprietors should seek to collect revenue from airport operation to cover airport costs and make airport operations as self-sustaining as possible.[62] At the same time, the federal government has been attentive to ensure that revenue is not pursued as an end in itself and at the expense of other federal policies, such as efficiency or growth. Here is where a careful balance becomes necessary. Even if justified under the principle of self-sufficiency, unrestricted local charges on aeronautical activities could burden air service providers and hinder growth of air travel.[63] That is, at least in part, the rationale behind federal grants, which should reduce the amount of revenue that must be locally generated for airport capital development. In response to the need for balance between achieving self-sufficiency and keeping airport fees reasonable, Congress has created a framework for airport proprietors that simultaneously (a) requires them to limit charges to airport users to those that are reasonable in light of the costs of providing aeronautical services; (b) in certain cases encourages them to seek nonaeronautical revenue streams that assist the airport in becoming financially self-sustaining;[64] (c) requires them to use all airport-related revenue for airport purposes;[65] (d) focuses federal discretionary grant funds for capital projects deemed especially critical by the federal government; and (e) provides funding assistance for planning of airport development.

The same principles that apply to the use of airport revenue apply in equal force to the use of airport property. The reason is straightforward: the interconnected and inextricable relationship among funding, revenue and use of real property. Federal support in the form of land grants can be monetized through revenue produced by such land. Where airport proprietors use land or facilities acquired with federal support for nonaeronautical purposes without collecting revenues that are put toward airport purposes, the effect is the same as if airport revenues were being diverted to non-airport uses. Accordingly, legal restrictions applicable to airport revenue apply with equal force to the use of airport property.

2. Mechanism for Federal Control: Funding Through AIP Grant Agreements, Conveyances of Real Property, Statutory Prohibitions

Federal control over funding and real property allows the FAA to implement its policies at a local airport level. Federal airport revenue use regulation revolves around statutorily prescribed restrictions on revenue and analogous contractual obligations and land conveyance conditions accompanying receipt of federal assistance or a deed for federal property, respectively. The standardized grant assurances that impose conditions on recipients of federal grants are the principal source of control over use of airport revenue.[66] Grant Assurance 25 specifically addresses use of airport revenue, imposing restrictions limiting the use of airport revenue to airport or aeronautical purposes.[67] Land conveyance documents contain similar restrictions, although the specific conditions vary based on particular circumstances, the date of conveyance and the statutory authority for the conveyance. The FAA's program for assessment, monitoring and enforcement of restrictions on airport revenue generally is

[56] Proceeds from Taxes on Aviation Fuel, 78 Fed. Reg. 69,790 (Nov. 2014). *See also* 49 U.S.C. § 47107 (2019). Note; Dempsey, *supra* note 21, at 10-11.

[57] *See* 49 U.S.C. §§ 47101(a) (5), (b). *See also* Civil Aeronautics Admin., U.S. Dep't. of Commerce, Legislative History of the Federal Airport Act, at 516-518 (1948), https://babel.hathitrust.org/cgi/pt?id=mdp.39015047400950;view=1up;seq=11 (Senate debate on the Federal Aviation Act of 1946 regarding the benefits conferred to local governments from federal support, as well as benefits derived by the federal government and the country from such assistance).

[58] *See* 49 U.S.C. §§ 47101(a) (13), 47107(a) (14) (A) (2019).

[59] *See* 49 U.S.C. § 47107.

[60] U.S. Gov't Accountability Office, GAO/RCED-98-71, Airport Financing: Funding Sources for Airport Development 17 (1998).

[61] Policy and Procedures Concerning the Use of Airport Revenue, 61 Fed. Reg. 7134, 7135 (Feb. 26, 1996) [hereinafter *Revenue Use Policy*, Feb. 1996].

[62] 49 U.S.C. §§47107(a) (13), 47107(l).

[63] *See* 49 U.S.C. §§ 47101(a) (13), 47107(a) (13) (A); Dempsey, *supra* note 21, at 10-11.

[64] 49 U.S.C. § 47107(a) (13).

[65] 49 U.S.C. § 47107(b).

[66] *See* FAA Order No. 5190.6B, FAA Airport Compliance Manual ch. 4 (2009).

[67] *See* Grant Assurances, *supra* note 45, § (C) (25), at 12-13.

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based on these contractual or deed restrictions, even though there are direct statutory obligations underlying agreements for federal grants.[68]

Impermissible use of airport revenue by an airport proprietor constitutes a violation of both an airport proprietor's grant assurances and federal law.[69] Where an airport proprietor has received federal land under the Surplus Property Act or by other statutory conveyance, impermissible revenue use also may be deemed a violation of the condition of the conveyance.[70]

The FAA has a range of mechanisms available to enforce revenue diversion requirements and penalize violations, catalogued under Sections IV and IX(E) of the *Revenue Use Policy*. This includes: withholding of future grants,[71] modification of existing grants[72] or payments under existing grants;[73] withholding of approval of passenger facility charge applications;[74] withholding of other federal transportation funding available to the proprietor;[75] assessing civil penalties of up to three times the amount of airport revenues diverted;[76] and seeking injunctive relief,[77] reimbursement of diverted revenue and any penalties above $50,000 in federal district court.[78] Civil penalties under 49 U.S.C. § 46301 and judicial injunctive relief under 49 U.S.C. § 47111(f)[79] are available against parties who violate airport revenue use requirements, including state or local governments that divert aviation fuel tax revenue.[80]

As part of its responsibilities for overseeing the AIP process and enforcing grant assurances and other conditions on federal grants for airport development, the FAA has developed a number of sources of legal guidance through published policies, manuals and guidelines. Where formal guidance is not available, airport proprietors and other stakeholders have relied on informal guidance through published and unpublished[81] compliance and enforcement letters and agency decisions from the FAA.

3. Review of Prior Research

This digest updates and supplements the Airport Cooperative Research Program's (ACRP) 2008 publication *Theory and Law of Airport Revenue Diversion*, which provides a thorough discussion of the economic theory and legal bases for the prohibition on diversion of airport revenue.[82] In addition, over the course of the past decade, ACRP has published several articles, papers and reports that address use of airport revenue. *ACRP Legal Research Digest 35*: *Legal Considerations in the Funding and Development of Intermodal Facilities at Airports* (2018) provides more specific information on the use of airport revenue for funding intermodal facilities. *ACRP Legal Research Digest 37*: *Legal Issues Relating to Airports Promoting Competition* (2019); *ACRP Synthesis 1: Innovative Finance and Alternative sources of Revenue for Airports*; *ACRP Synthesis 19*: *Airport Revenue Diversification* (2010); and *ACRP Research Report 176: Generating Revenue from Commercial Development On or Adjacent to Airports* (2017) provide information on the revenue generation side of the issue. Other ACRP publications that address airport revenue issues indirectly include *ACRP Report 16*: *Guidebook for Management of Small Airports* (2009), and *ACRP Report 44: A Guidebook for the Preservation of Public-Use Airports* (2016).

With some exceptions,[83] much of the independent research and analysis on airport revenue has focused on revenue more broadly,[84] or revenue generation in particular.[85] Several federal agencies, including the U.S. Department of Transportation's Office of Inspector General, U.S. Government Accountability Office and U.S. Congressional Research Service also have produced reports and documents with research results on various aspects of airport revenue, including revenue use and imper-

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[68] 49 U.S.C. § 47133 (2019).

[69] 49 U.S.C. §§ 47107(l)-(m).

[70] *See* FAA Order 5190.6B §16.3.

[71] 49 U.S.C. §§ 47106(d), 47115(f) (2019); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7723 (Feb. 16, 1999).

[72] 49 U.S.C. § 47111(e) (2019); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7723.

[73] 49 U.S.C. § 47111(d); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7723. Withholding funding for more than 180 days requires an opportunity for a hearing or agreement between the sponsor and FAA. *See id*.

[74] 49 U.S.C. § 40117 (2019); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7723.

[75] 49 U.S.C. § 47107(n) (3) (2019); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7723.

[76] 49 U.S.C. §§ 46301(a), (d) (2019). Penalties above $50,000 must be brought in court. *See id*.; *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7723.

[77] 49 U.S.C. § 47111(f).

[78] 49 U.S.C. § 46301 (2019).

[79] 49 U.S.C. § 47111(f) provides authority for the Secretary of Transportation to pursue violations of the grant assurances in federal district court "to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining any person from further violation." The legislative history regarding this provision reflects that Congress intended "to send a strong message to airport sponsors and local and state governments to discourage and prevent unlawful diversion of airport revenues and to strengthen DOT and FAA[']s ability to enforce the law." H.R. Rep. No. 103-677, pt. 60, at 59 (1994) (Conf. Rep.).

[80] *See* Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. 66,282, 66,284-85.

[81] This reference to "unpublished" guidance and letters is not meant to imply that such documents are confidential or unavailable to the public. The reference to "unpublished" refers to documents that are not widely disseminated by the FAA on a website, in electronic databases or through similar sources for easy access. Such documents, however, generally are available to the public through the Freedom of Information Act or state open records acts.

[82] *See* Dempsey, *supra* note 21.

[83] David Bannard, *Will Ground Access Woes and Federal Revenue Restrictions Choke U.S. Airports?*, 29 Air & Space Law., no. 2, 2016, at 4, https://www.foley.com/en/insights/publications/2016/07/will-ground-access-woes-and-federal-revenue-restri.

[84] Edgar Jimenez et al., *The Airport Business in a Competitive Environment*, 111 Proced-a—Soc. & Behav. Sci. 947 (2014); Andy Carlisle, *Airport Business Resilience: Plan for Uncertainty and Prepare for Change*, 9 Airport Mgmt. 118 (Winter 2014-15).

[85] Webbin Wei & Geoffrey D. Gosling, *Strategies for Collaborative Funding of Intermodal Airport Ground Access Projects*, 32 J. Air Transp. Mgmt. 78 (2013).

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missible revenue diversion.[86] FAA policy, guidance and other documents provide helpful context regarding the legislative and regulatory history of revenue use requirements.[87]

Recent legislation has directed the Comptroller General to study the implications of repealing the revenue use grandfathering provisions found at 49 U.S.C. § 47107(b) (2).[88] A 2018 DOT Office of Inspector General report concluded that the FAA should more accurately account for grandfathered payments by airport proprietors.[89]

C. Nexus Between Airport Property and Airport Revenue Use

The source and character of airport property is important for understanding the limits of airport revenue use for two reasons. First, airport property received from the federal government or acquired with federal funding triggers the application of federal conditions, which include a requirement to use airport revenue for airport purposes.[90] Second, the source and characterization of airport property may limit the use, lease or sale of that property itself, as well as limit the subsequent use of any revenue derived thereby.

1. Use of Land Acquired from the Federal Government or with Federal Assistance

Land received from the federal government or acquired with AIP funds generally must be used for aeronautical purposes; AIP funds are not available to acquire property for nonaeronautical commercial use.[91] Regardless of how it was purchased, airport property that has formally been dedicated for aeronautical purposes cannot be used otherwise without FAA approval, unless the restrictions on use of the property are formally released.[92]

There are two paths for transferring federal property directly to an airport proprietor for airport use. On recommendation from the FAA, the Surplus Property Act permitted the War Assets Administration (now the General Services Administration) to transfer surplus military airport property to civilian public-use airports[93] (most Surplus Property Act transactions occurred in connection with the disposal of surplus military airfields after World War II, though the statute still exists and is occasionally used). Other federal government agencies also may transfer property for local airport use under the airport funding statute.[94] AIP funding also can be used directly to purchase property exclusively for airport use.[95] In cases of federal property transfer and property acquisition with federal funds, the acquiring airport proprietor is subject to conditions through deed conveyance (in the case of federal property transfers) or, in the case of AIP-funded acquisitions, an airport proprietor grant agreement. Limitations on use of airport revenue based on grant assurances are discussed in the following sections.

Even where the federal government has not conveyed property or funded airport property acquisition—i.e., when an airport proprietor has acquired land with its own resources—use of that property may be limited by the grant assurances and FAA oversight if the airport proprietor otherwise is federally obligated because it has received either federal property or federal funding. One condition of AIP funding is that airport proprietors must prepare "layout plans showing the airport's boundaries, location of existing and proposed airport facilities and structures, and location of all existing and proposed non-aviation areas and existing improvements."[96] Known as Airport Layout Plans (ALPs), these depict the airport's boundaries, including all aeronautical facilities, and identify plans for future development.[97] Any property that is "described as part of an airport in an agreement with the United States or defined by an airport layout plan or listed in the Exhibit 'A' property map, is considered to be 'dedicated' or obligated property for airport purposes" and is subject to federal grant assurances covering the airport.[98] This requirement is critically important because

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[86] Office of Inspector Gen., U.S. Dep't of Transp., Report No. AV-2003-030, Oversight of Airport Revenue—Federal Aviation Administration (2003); U.S. Gov't Accountability Office, GAO/RCED-99-109, General Aviation Airports—Unauthorized Land Use Highlights Need for Improved Oversight and Enforcement (1999); U.S. Gov't Accountability Office, GAO/RCED-97-3, Airport Privatization—Issues Related to the Sale or Lease of U.S. Commercial Airports (1996); U.S. Gov't Accountability Office, GAO/T-RCED-99-214, General Aviation Airports—Oversight and Funding (1999); U.S. Gov't Accountability Office, GAO/T-RCED-96-82, Airport Privatization—Issues Related to the Sale or Lease of U.S. Commercial Airports (1996); *see* Tang, *supra* note 33; Robert S. Kirk, Cong. Research Serv., R40608, Airport Improvement Program (AIP): Reauthorization Issues for Congress (2009).

[87] *See* FAA Order No. 5190.6B, FAA Airport Compliance Manual (2009); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7696 (Feb. 16, 1999); FAA Historical Chronology, 1926-1996, *supra* note 16.

[88] *See* FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §143, 132 Stat. 3186, 3212 (2018).

[89] OIG Report No. AV-2018-041, *supra* note 49.

[90] Since 1999, all financial assistance, including donated land, is covered under the revenue use requirements. In addition, deeds for land transferred under the Surplus Property Act prohibited the use of proceeds from non-aviation business on airport land for anything other than aeronautical purposes.

[91] FAA Order No. 5190.6B § 22.5.b.

[92] But see discussion, *infra*, concerning Section 163 of the FAA Reauthorization Act of 2018 and its effect on FAA approvals for use of airport property.

[93] 49 U.S.C. §§ 47151-53 (2019). *See also* FAA Order 5190.6B § 3.2.

[94] 49 U.S.C. § 47125 (2019).

[95] 49 U.S.C. § 47117(a) (2019). *See also* Grant Assurances, *supra* note 45, § (C) (31) (2014) (discussing disposal of property acquired with AIP funding).

[96] 49 U.S.C. § 47107(a) (16) (2019); Grant Assurances, *supra* note 45, § (C) (29); FAA Order No. 5190.6B §7.18.

[97] *See* FAA Order No. 5190.6B §7.18.

[98] *See id.* § 22.1. A common error is to confuse the ALP property map with so-called "Exhibit A." While many airport proprietors use the same map, these are distinct maps with distinct, if overlapping, legal consequences. *See id.* § 7.19; *id.* app. R. An airport proprietor who receives AIP grants is obligated by grant assurance 29 to prepare an ALP. A complete ALP includes a property map which depicts airport

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an ALP is not merely a map. Rather, it has binding legal significance for airport proprietors.

2. Exceptions to Prohibition on Nonaeronautical Use

Historically, FAA policy has permitted two limited, but important, exceptions to prohibition on the use of federally obligated aeronautical property for nonaeronautical purposes: *concurrent use* and *interim use*. With enactment of Section 163 of the FAA Reauthorization Act of 2018, it is unclear how FAA policy will change. Unless the FAA issues additional guidance,[99] which is not required by the new statute, airport proprietors will need to exercise caution and understand the exceptions as they existed prior to the new law. Whether the FAA will continue to use the same distinctions under the new law is an open question.

Concurrent use. One exception to restrictions on use of dedicated airport property occurs with its compatible concurrent use. No formal FAA release is needed if aeronautical property is to be used for a compatible non-aviation purpose, while also serving the primary purpose for which it was acquired.[100] For example, a runway clear zone area (an aeronautical use) can simultaneously be used for cultivation of low-growing crops, or lease of such land, to generate revenue for the airport.[101] Such use is considered concurrent. However, a concurrent use cannot prevent use of the property for the designated aeronautical purpose, and concurrent use of surplus property cannot degrade or potentially degrade the aeronautical utility of the land. For example, use of hangars for residential purposes is considered an incompatible concurrent use, [102] as is use of property for shooting ranges.[103] Furthermore, concurrent use is permissible only when the user pays fair market value for it and revenue generated from such use is designated for airport purposes.[104]

Interim use. The second exception is interim use, or the temporary use of aeronautical property for nonaeronautical purposes, pending the anticipated aeronautical purpose for which the property was acquired. Authority for interim use must be requested from the FAA and should not last more than five years.[105] The FAA will not approve interim uses that are incompatible with airport development or where there is, or likely will be, demonstrated aeronautical demand for the property.[106] In addition, land purchased pursuant to a grant from the federal government will not be approved for interim use unless the property as a whole has ceased to be used or needed for airport purposes.[107]

The FAA discourages or prohibits concurrent or interim uses that might be anticipated to extend beyond a temporary basis or be difficult to remove when an aeronautical need arises. For example, the FAA will scrutinize use of airport property for golf courses "because experience has shown airport proprietors are reluctant to give up the facility later on and return the land to its aeronautical function."[108]

3. FAA Authority Under Section 163

Section 163 of the FAA Reauthorization Act of 2018 circumscribed FAA regulation of airport property or facilities by limiting agency authority to ensure the safety and efficiency of airport operation, payment and receipt of fair market value for land and facilities, and regulation of land acquired from the federal government or with federal funding.[109] Both the significance of the statutory changes and the absence of any definitive FAA implementing policies or guidance mean that any analysis of Section 163 must carry the caveat that the FAA has yet to

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property and land uses within the airport boundary. In addition, each application for AIP grant funding must include, as "Exhibit A" to that application, a current map which "delineates all airport property owned … by the sponsor," *id.* including the *funding source* for each property acquisition. By attaching Exhibit A to a grant application, the airport proprietor attests to the accuracy of the information in Exhibit A and agrees that all property depicted thereon is subject to regulation by the FAA under the grant assurances. Most important, no property shown on Exhibit A may be encumbered or disposed of, except in compliance with applicable FAA regulations. For this reason, Exhibit A has meaningful legal implications, and errors thereon can lead to complex and undesirable legal consequences. For convenience, and to ensure accuracy, many airport proprietors elect to use the same map for Exhibit A and the ALP property map.

[99] *See Program Guidance Letters (PGLs) and Program Information Memorandums (PIMs) for the Airport Improvement Program (AIP)*, FAA, https://www.faa.gov/airports/aip/guidance_letters/#rpgls (last modified Sept. 4, 2019).

[100] *See* FAA Order No. 5190.6B § 22.5.

[101] *Id.*

[102] *Id.* § 21.6.f.(8).

[103] *Id.* § 26.1.f.(9).

[104] *Id.*

[105] *Id.* § 22.6. *See also* Boca Airport, Inc. v. Boca Raton Airport Auth., FAA Docket No. 16-00-10, Final Decision and Order (Mar. 20, 2003) (interim use must be approved, but was allowable because it did not adversely impact the safety, utility or efficiency of the airport).

[106] *See* FAA Order No. 5190.6B, FAA Airport Compliance Manual § 22.6 (2009).

[107] *See id.* § 22.6.

[108] *See id.* § 26.1.f.(9). The FAA also has cautioned airport proprietors about leasing airport property for interim park purposes, since doing so might trigger Section 4(f) of the U.S. Department of Transportation Act of 1966. Office of Airports, FAA, Environmental Desk Reference for Airport Actions ch. 7 (2007). Under Section 4(f) of the U.S. Department of Transportation Act of 1966, land from publicly owned parks, recreation areas, wildlife refuges and historic properties is prohibited unless there is no feasible and prudent alternative and harm to the property is minimized. *See* 23 C.F.R. § 774.3 (2019). The FAA is responsible for making such determinations regarding airport property. For more information, see Office of Airports, FAA, Environmental Desk Reference for Airport Actions ch. 7 (2007). For separate limited community use exceptions subject to agreements that predate publication of the *Revenue Use Policy*, Feb. 1999, *see* 49 U.S.C. § 47107(v) (2019).

[109] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §163, 132 Stat. 3186, 3224 (2018) (codified at 49 U.S.C. § 471077 note (2019)). Earlier versions of the legislation drew a line between aeronautical and nonaeronautical property, rather than defining agency oversight based on safety. While the aeronautical/nonaeronautical distinction did not survive in the final version of the statute, use of property that was designated for nonaeronautical use on an FAA-approved ALP prior to enactment of the statute is less likely than aeronautical property to affect "the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations." Therefore, the aeronautical/nonaeronautical distinction continues to be used as an informal, convenient, if not entirely accurate shorthand.

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opine definitively on the meaning and significance of the statute. But because it has the potential to substantially alter the regulatory relationship between airport proprietors and the FAA (especially with respect to land use that does not affect the safety or efficiency of the airport, is being leased at fair market value, and is not acquired from the government or with government funding), it is essential to understand the statutory language and its potential applicability.

Figure 1 shows the full text of Section 163.

The statute changes the nature of FAA approvals for use of certain airport property that is not federally obligated, i.e., property that was purchased without federal funds or transferred with a federal deed. Congress has directed the FAA not to "directly or indirectly" regulate such property except in a limited manner, i.e., to ensure that any transaction involving such property is at fair market value and to ensure "the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations." It is noteworthy that the statute starts with the presumption that the FAA is not to regulate property, as opposed to the opposite, which has been the practice for decades.

In addition to removing direct or indirect FAA regulation, the statute changes the scope of FAA review of ALPs and limits the agency's approval authority. The statute limits FAA ALP approval to only those portions of the plan that (a) materially impact the safe and efficient operation of aircraft at, to or from the airport; (b) would adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations; or (c) that adversely affect the value of prior federal investments to a significant extent.

Cardinal principles of statutory construction dictate a presumption that Congress uses language precisely to mean what it says. That principle is important in understanding how to read Section 163. The statute is structured to prohibit the FAA from regulating airport land use unless one of the enumerated exceptions applies. This means that one must assume that Congress

SEC. 163. LIMITED REGULATION OF NON-FEDERALLY SPONSORED PROPERTY.

(a) IN GENERAL.— Except as provided in subsection (b), the Secretary of Transportation may not directly or indirectly regulate—

(1) the acquisition, use, lease, encumbrance, transfer or disposal of land by an airport owner or operator

(2) any facility upon such land or

(3) any portion of such land or facility.

(b) EXCEPTIONS. — Subsection (a) does not apply to —

(1) any regulation ensuring —

(A) the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations

(B) that an airport owner or operator receives not less than fair market value in the context of a commercial transaction for the use, lease, encumbrance, transfer or disposal of land, any facilities on such land or any portion of such land or facilities or

(C) that the airport pays not more than fair market value in the context of a commercial transaction for the acquisition of land or facilities on such land.

(2) any regulation imposed with respect to land or a facility acquired or modified using Federal funding or

(3) any authority contained in —

(A) a Surplus Property Act instrument of transfer or

(B) section 40117 of Title 49, United States Code.

(c) RULE OF CONSTRUCTION. — Nothing in this section shall be construed to affect the applicability of *sections* 47107(b) or 47133 of Title 49, United States Code, to revenues generated by the use, lease, encumbrance, transfer or disposal of land under subsection (a), facilities upon such land or any portion of such land or facilities.

(d) AMENDMENTS TO AIRPORT LAYOUT PLANS. — Section 47107(a) (16) of title 49, United States Code, is amended —

(1) by striking subparagraph (B) and inserting the following:

"(B) the Secretary will review and approve or disapprove only those portions of the plan (or any subsequent revision to the plan) that materially impact the safe and efficient operation of aircraft at, to or from the airport or that would adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations, or that adversely affect the value of prior Federal investments to a significant extent;"

(2) in subparagraph (C), by striking "if the alteration" and all that follows through "airport; and" and inserting the following:

"unless the alteration —

"(i) is outside the scope of the Secretary's review and approval authority as set forth in subparagraph (B); or

"(ii) complies with the portions of the plan approved by the Secretary; and" and

(3) in subparagraph (D), in the matter preceding clause (i), by striking "when an alternation" and all that follows through "Secretary, will" and inserting

"when an alteration in the airport or its facility is made that is within the scope of the Secretary's review and approval authority as set forth in subparagraph (B) and does not conform with the portions of the plan approved by the Secretary, and the Secretary decides that the alteration adversely affects the safety, utility or efficiency of aircraft operations or of any property on or off the airport that is owned, leased or financed by the Government, then the owner or operator will, if requested by the Secretary."

Figure 1: Full text of Section 163.

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intended that any FAA regulation of airport land use be an exception from the broad statutory prohibition. While the exceptions undoubtedly are broad and encompass considerable airport property and activities, it important to recognize that Congress used language to provide any land use regulation as an exception to the principle that the FAA has limited airport land use regulatory authority.

The statute does not alter grant assurance obligations or obligations in connection with use of PFC revenue. Among obligations unaffected by the statute are the proprietor's obligation to maintain an up-to-date ALP, to ensure compliance with revenue use policies and statutes, and to protect the airport from activities or development that could interfere with safe and efficient use of the airport. While these exceptions may encompass most applications of the statute for some airports, airport proprietors that hold considerable vacant land that is distant from the airfield or in a location that is not likely to affect airfield operations may find that the statute significantly alters their regulatory relationship with the FAA.

The applicability of Section 163 can best be understood using the chart shown in Figures 2.

4. Land Disposal

Disposal of airport property (e.g., through sale) requires the FAA to release the property from restrictions on its use. To release airport property, the FAA must determine that it is not

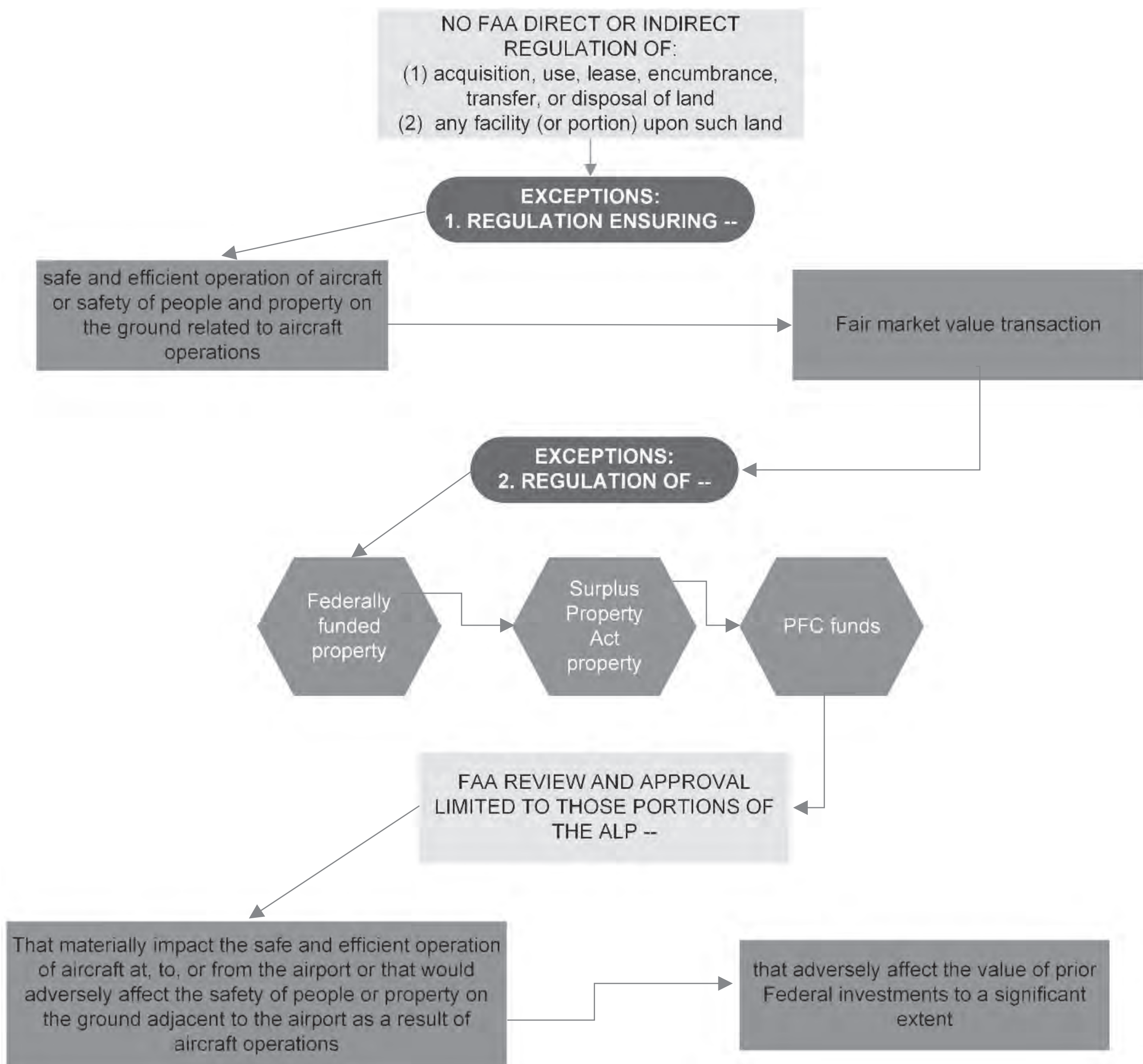

Figure 2: Chart showing applicability of Section 163.

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needed for present or foreseeable public airport purposes.[110] The FAA defines "release" as "the formal, written authorization discharging and relinquishing [of] the FAA's right to enforce an airport's contractual obligations."[111] A release may cover only a particular grant assurance or federal obligation, or all of them, so as to permit disposal (including sale) of the property.[112] While property other than land purchased with FAA grants (e.g., snow removal equipment) is automatically released from federal obligations on the end of its useful life,[113] federal obligations relating to land acquired with AIP funding or conveyed as surplus or nonsurplus property extend in perpetuity.[114] As a matter of policy, the FAA may occasionally add restrictions to any release that it believes are necessary.

Disposal must be considered in the context of the FAA's strong policy disfavoring sale of any airport property. This policy's underlying principle is as simple as it is obvious: It is always difficult for an airport proprietor to acquire land (especially for urbanized airports), and the sale of land almost inevitably leads to its development, which would make future reacquisition costly and difficult. It is equally important to keep in mind the federal government's interest in accounting for all airport revenue, even foregone revenue, when disposing of land to ensure federal money is not used to subsidize local non-airport activities.

Generally speaking, an airport proprietor's account must receive fair market value compensation for removal of any airport property from the airport, even where the proprietor does not sell the property or is authorized to sell it at below fair market value, and all such compensation is considered airport revenue.[115] Where airport land was acquired neither from the federal government nor with federal assistance, it may be sold without reimbursing the federal government.[116] Where the land was acquired as surplus property from the federal government or with federal funding through AIP, additional restrictions apply. Surplus property must be sold for fair market value, and the proceeds must be used "exclusively for developing, improving, operating or maintaining a public airport."[117] This includes a range of airport-related activities, including both AIP and non-AIP-eligible airport development projects and retirement of airport bonds.[118] For land acquired with AIP funding, an amount equal to the government's proportional share of the fair market value from disposal must be made available to the FAA for reinvestment in another AIP-eligible project, as set forth under Section 47107.[119] Land purchased with federal funding should generally be disposed of through sale, with resulting funds being returned to the FAA or used for authorized airport purposes.[120] Land acquired neither from the federal government nor with federal assistance may be sold without reimbursing the federal government. However, the proceeds from any sale of airport property, unless returned to the federal government, are considered airport revenue and must be accounted for as such.[121]

Some limitations on property use may remain as deed restrictions notwithstanding sale to a third party. While unusual, surplus property may be transferred to a third party with FAA approval and without release of deed restrictions on its use, but only if the recipient is eligible to assume the federal obligations and does so.[122] If a sale has been authorized by the FAA (e.g., through release or approval, as applicable), the airport proprietor "is obligated to include in any deed, lease or other conveyance of a property interest to another a reservation assuring the public rights to fly aircraft over the land released and to cause inherent aircraft noise over the land released."[123] The airport proprietor also must include restrictions in any transfer deed that prohibits "the erection of structures or growth of natural

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[110] *See* FAA Order No. 5190.6B § 22.16. It is critically important to distinguish between two terms which often are used interchangeably but have distinct legal significance. An FAA "release" is required for the use of airport property that was acquired for aeronautical purposes but the airport proprietor desires to use for nonaeronautical purposes, or for the sale or long-term lease of property acquired with federal statutory or grant restrictions. An FAA "approval" is needed for many other property transactions involving real property that is depicted on Exhibit A. Among transactions that need approval, rather than a release, are changes in the designation of non-federally funded property from aeronautical to nonaeronautical uses. The source of funds for the original acquisition will be material in determining whether a release or an approval is needed for certain transactions. The legal processes for release and for approval are distinct and implicate different legal requirements. FAA approval is far less complex and requires considerably less documentation than release. It is unclear exactly how Section 163 of the FAA Reauthorization Act of 2018 will affect FAA approval processes, since the new law does not affect releases.

[111] *See id.* § 22.2.

[112] *See id.* Under FAA policy, the term "release" can refer to either releasing a particular property from certain grant assurances so as to allow for a change in the use of the property or releasing a parcel from all federal obligations so as to allow for disposal or "removal from airport dedicated use." *See id.* § 22.4.c. FAA airport district offices are delegated the authority to determine the conditions of release of airport property on a case-by-case basis. *See id.* § 22.3.

[113] The physical useful life of a facility or improvement "extends to the time it is serviceable and useable with ordinary day-to-day maintenance." *Id.* § 22.3.

[114] *Id.* Obligations were not perpetual under FAAP, and there are very few ADAP land grants that did not expire after 20 years.

[115] *Id.* § 22.16. *See* FAA, Compliance Guidance Letter 2018-3, Appraisal Standards for the Sale and Disposal of Federally Obligated Airport Property (2018) (providing internal guidance to FAA offices regarding the appraisal process required for the sale and leasing of federally obligated property).

[116] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 22.16 (2009).

[117] 49 C.F.R. § 155.7 (2019).

[118] FAA Order No. 5190.6B § 22.17.e. Note that under the statute the term "airport development" is defined to include a specific range of activity types of and expenses. 49 U.S.C. § 47102(3) (2019) (defining projects considered "airport development").

[119] 49 U.S.C. §§ 47107(c) (2) (B), 47107(c) (4) (2019).

[120] Whether or not the airport proprietor must reimburse the federal government depends on whether there is another eligible project at the airport or another airport operated by the airport proprietor. If there is no such eligible funding opportunity, the federal government must be reimbursed. FAA Order No. 5190.6B § 20.5.e.

[121] *Id.* § 22.16.

[122] *Id.* § 6.7.b.

[123] *Id.* § 22.16.a.

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objects that would constitute an obstruction to air navigation," as well as "any activity on the land that would interfere with or be a hazard to the flight of aircraft over the land or to and from the airport, or that interferes with air navigation and communication facilities serving the airport."[124]

5. Noise Land

While most airport property is classified as aeronautical or nonaeronautical, and specific legal requirements attach to each characterization, a third category has its own unique legal standing. This property is commonly referred to as noise land. Land that an airport proprietor receives from the federal government or acquires with federal funding in areas around an airport to mitigate noise impacts has its own specific use and disposal requirements. Under the FAA's Noise Compatibility Planning regulations, at 14 C.F.R. Part 150, airport proprietors may be eligible for AIP funding to acquire noise-affected land for conversion to airport-compatible land uses.[125] As an exception to the general rule that airport property must be used for airport-related purposes *indefinitely*, land acquired with AIP funding for a noise compatibility purpose *must* be disposed of "at fair market value at the earliest practicable time after the land no longer is needed for a noise compatibility purpose."[126]

Proceeds from the sale of noise land must be reinvested in eligible airport projects and programs, prioritizing any applicable airport noise program.[127] As an alternative to sale or disposal (e.g., long-term lease), noise land may instead be converted for airport use (i.e., converted to aeronautical and, in rare cases, to nonaeronautical use, including conversion to noise buffer land),[128] subject to FAA review and approval.[129] All noise buffer land, including AIP-funded noise land that is subsequently converted to noise buffer land, may be leased at fair market value, and such a lease, even if long-term (e.g., normally longer than 25 years), will not be considered a disposal of the land.[130] Although such use would not be considered disposal under FAA compatibility guidance,[131] the FAA generally considers certain long-term leases to constitute disposal of property and accordingly require FAA approval.[132] Airport proprietors seeking to lease noise land for non-airport purposes on a long-term basis must carefully review the existing ALP to ensure that its designation and use description are consistent with the proposed leased use. The revenue derived from leases of noise buffer land is considered normal airport revenue subject to standard airport revenue use requirements.[133]

D. Statutory and Regulatory Framework for Controlling Use of Airport Revenue and Related Property Use

1. Forms of Federal Assistance Triggering Airport Revenue Restrictions: AIP, Surplus Property, Nonsurplus Property

All airport proprietors whose airports are considered "federally obligated" are subject to federal regulation on airport revenue use. While an airport most commonly becomes federally obligated because its proprietor has accepted AIP grant funds

[124] *Id. See* 14 C.F.R. Part 77 (2019) for the regulations concerning protection of navigable airspace.

[125] *See* Office of Airport Planning & Programming, FAA, Noise Land Management and Requirements for Disposal of Noise Land or Development Land Funded with AIP 1 (2014) [hereinafter FAA Noise Land Guidance], https://www.faa.gov/airports/environmental/policy_guidance/media/Noise-Land-Management-Disposal-AIP-Funded-Noise-Development-Land.pdf. Although the FAA Noise Land Guidance, which appeared in Program Guidance Letter 14-05, has been cancelled and superseded by the Airport Improvement Program Handbook, FAA Order No. 5100.38D, Change 1 (2019). Order 5100.38D still references it for guidance on the issue. *See* FAA Order No. 5100.38D, at B-1 to B-6 tbl.B-1. For this reason, we refer to it here in our discussion of noise land.

[126] 49 U.S.C. § 47107(c) (2) (A) (i) (2019); *See* Grant Assurances, *supra* note 45, § (C) (31). The FAA Modernization and Reform Act of 2012 amended this provision to state that land acquired for a noise compatibility purpose includes "land serving as a noise buffer either by being undeveloped or developed in a way that is compatible with using the land for noise buffering purposes. FAA Modernization and Reform Act of 2012, Pub. L. 112-95, § 135, 126 Stat. 11, 22-23 (2012).

[127] FAA Noise Land Guidance, *supra* note 125, at 2; FAA Order No. 5100.38D, at 5-64 tbl.5-39. FAA guidance provides for an order or preference in which such revenue must be invested, starting with reinvestment in an approved noise compatibility project, then other AIP-eligible projects, and finally repayment to the FAA. A complete list of order of preference is provided at FAA Order No. 5100.38D, at 5-64 tbl.5-39.

[128] "Noise buffer land," also known as "noise compatibility land," is a broader category than "noise land" under FAA's Part 150 requirements because such property may lie outside of the DNL 65 dB contour and therefore could not have been acquired with AIP noise program grants absent a lower local land use compatibility standard. Noise land also can be converted to noise buffer land. Note that AIP noise grant funding may not be used directly to acquire land to use as a noise buffer or to acquire land for airport development. FAA Noise Land Guidance, *supra* note 125, § 1.B., at 1.

[129] *Id.* at 3, 16.

[130] *See id.* at 16.

[131] *See id.*

[132] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 22.33(d) (2009) ("Long-term leases that are not related to aeronautical activities or airport support services have the effect of a release for all practical purposes and shall be treated the same as a release. Such leases include convenience concessions serving the public such as hotel, ground transportation, food and personal services, and leases that require the FAA's consent for the conversion of aeronautical airport property to revenue-producing nonaeronautical property."). While the Order uses the term "release," FAA policy is to apply the same principle when only FAA approval, not release, is required. *See also* Boston Air Charter v. Norwood Airport Comm'n, FAA Docket No. 16-07-03, Final Agency Decision and Order (Aug. 14, 2008) (long-term nonaeronautical lease is considered to be a deprivation of the proprietor's ability to direct and control the airport).

[133] 49 U.S.C. § 47107(c) (5) (A) (2019) ("A lease at fair market value by an airport owner or operator of land acquired for a noise compatibility purpose using a[n AIP] grant … shall not be considered a disposal."); FAA Noise Land Guidance, *supra* note 125, at 16 ("Fair market rent receipts are airport revenue and are applied to eligible airport uses in compliance with FAA airport revenue requirements.").

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within the last 20 years, the FAA has determined that, based on 49 U.S.C. § 47133, there are several other forms of federal assistance that trigger the need for the airport proprietor to comply with federal airport revenue use restrictions:

- Airport development grants issued under the AIP and predecessor federal grant programs
- Airport planning grants that related to a specific airport
- Airport noise mitigation grants received by an airport proprietor
- The transfer of federal property under the Surplus Property Act (49 U.S.C. § 47151)
- Deeds of conveyance issued under Section 16 of the Federal Airport Act of 1946; Section 23 of the Airport and Airway Development Act of 1970, or Section 516 of the AAIA of 1982.[134]

These categories are based on the FAA's interpretation of "federal assistance" referenced in 49 U.S.C. § 47133, whose scope is broader than 49 U.S.C. § 47107(b), which applies to AIP grants only. The FAA's interpretation of what constitutes federal assistance is based on federal legislation adopting the interpretation provided by the Supreme Court in *Department of Transportation v. Paralyzed Veterans*.[135]

The FAA has provided some additional detail regarding what it considers "federal assistance" as the term is used in 49 U.S.C. § 47133. For instance, it has determined that its installation and operation of navigational aids and operation of control towers are not considered federal assistance, nor is the imposition of passenger facility charges.[136]

While the above forms of assistance may trigger the obligation to comply with airport revenue use restrictions, a more detailed case-by-case analysis of an airport's funding history is necessary to determine whether it is subject to federal airport revenue use requirements, as discussed in the following section.[137]

2. Criteria for Becoming Subject to Federal Revenue Use Oversight

The criteria for determining when airport proprietors are subject to federal airport revenue use restrictions are fairly straightforward: Public or private airport proprietors that receive any form of federal assistance listed in the previous section must conform to federal revenue use requirements.[138] Once any public or private airport proprietor receives AIP assistance, revenue use requirements apply indefinitely for as long as the airport remains in existence.[139] It is important to recognize the difference between grant assurance obligations (which have a duration of 20 years from the date of acceptance of federal funds) and revenue use obligations, which are permanent if an airport proprietor has received a single AIP grant after Oct. 1, 1996.

The criteria for determining the duration of revenue use restrictions is more complicated when an airport is federally obligated through federal assistance *other than* AIP grants or when the proprietor has not received an AIP grant since 1996. This is because the conditions of acceptance of federal airport assistance have changed over time, and because Congress has in some cases not retroactively applied new revenue requirements to pre-existing arrangements.[140] The following provides the criteria for determining airport revenue obligations based on previous non-AIP federal assistance.

Any public or private airport proprietor that obtained assistance through federal development grants, planning grants, aircraft noise mitigation grants or the transfer of federal property (as described in the previous section) after Oct. 1, 1996, is statutorily subject to federal airport revenue use requirements for the life of its airport.[141] All public airport proprietors that have received AIP funding since Sept. 3, 1982 and that had grant obligations regarding use of airport revenue in effect on Oct. 1, 1996, also are subject to airport revenue use requirements for the life of their airport.[142] Practically speaking, it is likely that virtually all airport proprietors receiving AIP funding since 1982 continued to have grant obligations in effect on Oct. 1, 1996, because the standard assumed duration of grant assurance obligations is at least 20 years.[143]

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[134] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7715 § III.A (Feb. 16, 1999); FAA Order No. 5190.6B § 15.8.

[135] Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597 (1986).

[136] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7699. The FAA states that its interpretation of what constitutes federal assistance is based on federal legislation adopting the interpretation provided by the Supreme Court in Department of Transportation v. Paralyzed Veterans, 477 U.S. 597.

[137] Only a few years ago, this section would have been largely theoretical because almost all commercial airports and thousands of general aviation airports were federally obligated, and there was neither practical nor political likelihood that the airports would ever lose that status. *See Airport Improvement Program (AIP) Grant Histories,* FAA, https://www.faa.gov/airports/aip/grant_histories/ (last updated Apr. 9, 2019) (linking to historical annual AIP grant award data). For numerous policy and economic reasons that are beyond the scope of this paper, the prospect of removing the legal and financial restrictions that accompany federal funding has become a practical possibility for some large and small airports. Even some large hub airports have discussed foregoing AIP grants to be in a position to remove the restrictions imposed on grant recipients. Nevertheless, only a small handful of airports have successfully navigated the process for removing federal restrictions that accompany receipt of grant funding (e.g., Blue Ash Airport in Cincinnati).

[138] 49 U.S.C. §§ 47107(b) (1), 47133(a) (2019). However, as discussed further below, there are exceptions to what is considered "airport revenue" that may permit what would otherwise be impermissible use of airport revenue.

[139] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. 66,282, 66,283 (Nov. 7, 2014); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7717. *See also id.* at 7699.

[140] *Id.* at 7699 (*citing* Bennett v. New Jersey, 470 U.S. 632 (1985)).

[141] *See* FAA Order No. 5190.6B, FAA Airport Compliance Manual §§ 15.7-.8 (2009).

[142] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. at 66,283; *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7716; FAA Order No. 5190.6B § 15.7.

[143] More specifically, the federal grant assurances under the AIP last for the useful life of the building, improvement or land built or acquired

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Airports that are federally obligated by virtue of property conveyances are subject to the conditions contained in the conveyance documents.[144] Any proprietor to whom federal property was conveyed after Oct. 1, 1996, would be automatically subject to federal revenue use requirements pursuant to 49 U.S.C. § 47133. The conditions included in older conveyance documents for federal property may be different, as federal policy has evolved. If these conditions included restrictions on airport revenue use, then these airports are subject to standard federal revenue restrictions because any restrictions found in these documents would be considered permanent for the life of the airport. Federally conveyed land also would constitute federal assistance, subjecting the airport proprietor to revenue use restrictions found in 49 U.S.C. § 47133. However, if an airport proprietor received property from the federal government with no such revenue use requirements in the conveyance documents and the airport proprietor was not otherwise obligated through AIP funding and the grant assurances on Oct. 1, 1996, then the airport proprietor is not subject to federal airport revenue restrictions based solely on its prior receipt of federal property.[145] This narrow exception applies to only a few airports in the country.

Public airport proprietors that received federal funding through AIP and its predecessors ADAP and FAAP prior to 1982 would not have had revenue use restrictions included in their grant agreements and, therefore, would not be subject to airport revenue use restrictions so long as they have not received additional AIP funding after 1982 or any form of federal assistance, as defined in the previous section, since Oct. 1, 1996.

Until recently, one additional restriction on airport revenue was not enforced as rigorously, because it affects governments regardless of whether they also are airport proprietors. As discussed further below, restrictions on airport revenue use also extend to any state or local taxing authority that enacted a new tax on aviation fuel after Dec. 30, 1987. Even if such government entities are not obligated under any grant assurance agreement or conveyance document, the FAA has interpreted the scope of the revenue use requirements in 49 U.S.C. §§ 47107(b) and 49133 to apply to these entities as well.[146]

with federal funding. Improvements and facilities built with AIP funding are assumed to have a useful life of 20 years. An exception would be where an entire grant was used for equipment whose useful life was clearly less than 20 years. Because the value of land does not depreciate, AIP grant assurance obligations run with the land for as long as it is used as a public-use airport. FAA Order No. 5190.6B ch. 2.

[144] The FAA has published a partial list of airports obligated through agreements with the federal government. *See* FAA Order No. 5190.2R, List of Public Airports Affected by Agreements with the Federal Government (1990).

[145] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg.at 7699 (An airport that had accepted Surplus Property from the Federal government, but did not have an AIP grant in place on Oct. 1, 1996, would not be subject to the revenue use requirement by operation of [49 U.S.C.] § 47133.").

[146] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. at 66,283.

3. "Grandfathering" Airports from (i) Revenue Use Restrictions and (ii) Fuel Tax Use Restrictions

When federal revenue use restrictions were enacted in 1982, numerous airport proprietors were party to existing financial arrangements under which airport revenue was being allocated in a manner that would violate the new law. In particular, many airport proprietors used revenue derived from their airports for other non-airport purposes or non-airport facilities owned and operated by the same entity. Many of these arrangements involved financing the airport or other local projects or general government funds. These otherwise impermissible uses of airport revenue are "grandfathered," or exempted from statutory revenue use restrictions,[147] and may lawfully continue to use airport revenue in a manner that would otherwise be considered unlawful. Airport proprietors whose financial arrangements are grandfathered, however, cannot extend that exemption to new financial arrangements or expansion of existing ones.[148]

Airport proprietors must satisfactorily demonstrate to the FAA and DOT on a case-by-case basis that existing arrangements are grandfathered. Arrangements established before Sept. 3, 1982, include:

- Debt obligations or financing legislation applicable to an independent authority or state transportation department that owns or operates other transportation facilities in addition to airports under which airport revenue may be used for non-airport purposes
- Bond obligations and city ordinances requiring a 5 percent "gross receipts" fee from airport revenue
- State statutes assessing a 5 percent surcharge on all receipts and deposits in an airport revenue fund to defray central service expenses of the state
- City ordinances authorizing payment of a percentage of airport revenue to the city
- State law allocating revenues from a multimodal authority, including airport revenue, to a state transportation trust fund
- State-enabling acts that specifically permit use of airport revenue for costs of various public entity owners, including servicing debt, maintaining an entity's facilities and allocation for an entity's expenses, reserves and payment in lieu of taxes.[149]

[147] 49 U.S.C. § 47107(b) (2) (2019); 49 U.S.C. § 47133(b) (2019) (Stating that revenue restrictions "shall not apply if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator or a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.").

[148] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 15.10 (2009).

[149] *Id.*

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The FAA published a list of fewer than a dozen airport proprietors that it officially recognizes as grandfathered as of May 2018, but the list may not be exhaustive.[150] The list provides a description of the basis for grandfathering in each instance.[151] It is crucial to note that an airport proprietor may be grandfathered for some, but not all, transactions—i.e., grandfathering is construed narrowly to apply to those arrangements that pre-existed the statutory revenue use requirements and does not apply to every transaction by a grandfathered airport proprietor.

In 1987, Congress extended airport revenue use restrictions to apply to state and local taxes on aviation fuel.[152] However, as it did with the more general revenue use restrictions, Congress exempted state and local aviation taxes enacted on or before Dec. 30, 1987. Accordingly, these taxes also are grandfathered, but only as enacted before Dec. 30, 1987.[153] Any subsequent increases in these aviation fuel tax rates would be subject to the FAA's *Revenue Use Policy*. There has been considerable debate over grandfathering as a result of increased FAA attention on enforcement of the statutory requirement beginning in 2014.[154]

Grandfathering is not an open wallet. A 2018 OIG report found significant unintentional misreporting in amounts of airport revenue paid by several grandfathered airport proprietors to local governments.[155] Out of concern for the potential for widespread, if legal, diversion of airport revenue by grandfathered airports, Congress instructed the FAA to consider limiting awards of discretionary AIP grants in which the amount of airport revenue used for non-airport purposes exceeds the Consumer Price Index-adjusted revenue base of the fiscal year ending after Aug. 23, 1994.[156] Depending on the amount of revenue at stake, the potential loss of discretionary grants may not be much of a disincentive. A new federal law requires review of the financial impact of grandfathered revenue diversion and the potential for future elimination of that exemption.[157]

4. Meaning and Characterization of Airport Revenue

In accordance with Congress's direction, airport revenue is defined through FAA policy, rather than directly by regulation.[158] The FAA has defined airport revenue broadly to include "those revenues paid to or due to the airport proprietor for use of airport property by the aeronautical and nonaeronautical users of the airport. It also includes revenue from the sale of airport property and resources and revenue from state and local taxes on aviation fuel."[159] The FAA's description of this definition reflects exclusions mandated by Congress, as described above in previous sections.

Revenue derived from airport use more specifically includes "fees, charges, rents or other payments received by or accruing to the proprietor from air carriers, tenants, concessionaires, lessees, purchasers of airport properties and airport permit holders making use of the airport property and services."[160] Important, as further detailed later in this digest, airport revenue does not include revenue generated by tenants themselves from their activities or sale of their own goods and services, but rather is limited to tenant payments to the airport proprietor for use of the airport—including, for example, fees, rentals, lease agreements and the like.[161] Airport revenue also includes revenue from activities conducted by the proprietor itself, including aeronautical and nonaeronautical sales or services.[162]

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[150] *See* FAA, Grandfathered Airports: May 1, 2018, https://cats.airports.faa.gov/GrandfatheredAirports.pdf. The FAA has indicated to the authors of this digest that two of the 11 airport proprietors listed at this source no longer are eligible for grandfathering.

[151] There are at least two possible ways the FAA could identify grandfathered airports: (1) through self-reporting data that airports are required to submit through the FAA's Compliance Activity Tracking System (assuming that an airport that qualified for grandfathering would be incentivized to identify itself), and (2) through investigation prompted by either a dispute or inquiry by an airport proprietor or the FAA itself. *See, e.g.*, Letter from David L. Bennett, Dir., Office of Airport Safety and Standards, FAA, to Joseph J. Petrocelli, Comm'r of Transportation, Westchester Cty. (Feb. 14, 1997), https://crp.trb.org/acrplrd21/wp-content/themes/acrp-child/lrd21/documents/1997_Petrocelli.pdf (determining, at the request of an airport proprietor, that a transfer of funds from an airport proprietor to a local county was not "grandfathered.").

[152] Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, § 109(d), 101 Stat. 1486, 1499 (Dec. 30, 1987) (codified at 49 U.S.C. § 47107(b) (1) (2019)).

[153] *See* 49 U.S.C. §§ 47107(b) (1), 47133(a) (2019); FAA Order No. 5190.6B § 15.10.a.6; *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7716 § III.A.2 (Feb. 16, 1999).

[154] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. 66,282, 66,282 (Nov. 7, 2014). *See generally*, *Aviation Fuel Tax Action Plans and Status*, FAA, https://www.faa.gov/airports/airport_compliance/aviation_fuel_tax/ (last updated Mar. 20, 2019).

[155] OIG Report No. AV-2018-041, *supra* note 49.

[156] 49 U.S.C. § 47115(f) (2019).

[157] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §143, 132 Stat. 3186, 3212 (2018).

[158] The term "airport revenue" is defined in FAA regulations regarding PFCs. *See* 14 C.F.R. § 158.3 (2019). However, as discussed further below, the FAA generally doesn't include PFC revenue in the definition of "airport revenue" because PFCs are subject to entirely separate statutory requirements. *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § IV.E. In the Federal Aviation Administration Authorization Act of 1994, Congress instructed the FAA to "establish policies and procedures that will assure the prompt and effective enforcement" or revenue use requirements. Pub. L. No. 103-305, § 112, 108 Stat. 1569, 1574 (1994) (codified at 49 U.S.C. § 47107(k) (1)). Congress instructed the FAA to "establish policies and procedures that will assure the prompt and effective enforcement" of revenue use requirements. The FAA has interpreted this directive to require publication of revenue use restrictions, including the definition of "airport revenue" as a policy, rather than a regulation. *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7714.

[159] FAA Order No. 5190.6B § 15.6. *See also Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7716 § II.B.1. (defining airport revenue as "[a]ll fees, charges, rents, or other payments received by or accruing to the sponsor" from a wide array of sources, including leases for use of airport property and services, sale or transfer of airport real property or other property rights, and revenue from proprietor activities on the airport).

[160] FAA Order No. 5190.6B § 15.6.a.; *see also Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7716 § II.B.

[161] FAA Order No. 5190.6B § 15.6.a.

[162] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7716 § II.B.1.b.

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Airport revenue extends to the income derived from the sale, transfer or disposition of property, even where that property was not acquired with federal assistance or was acquired through a condemnation proceeding.[163] It also includes revenue from the sale or lease of mineral, natural or agricultural rights or products, or water taken from airport property.[164] Although proceeds from the sale of land donated by the federal government or acquired with federal grants are, strictly speaking, not considered to be airport revenue under the *Revenue Use Policy*, FAA policy imposes the functional equivalent by requiring that such proceeds be used in accordance with the agreement between the FAA and proprietor.[165]

Airport revenue also includes state or local taxes on aviation fuel, except those in effect on Dec. 30, 1987, as discussed above.[166] This specific inclusion of fuel taxes as airport revenue pursuant to federal statute does not apply more broadly to other taxes on airport activities. Airport revenue does not include taxes from surrounding special taxing districts that are dedicated to airport support but not derived from use of the airport[167] or fines assessed using police powers, such as parking tickets and fines from other law enforcement violations (i.e., not derived from an airport proprietor's proprietary powers).[168]

The FAA's *Revenue Use Policy* expressly excludes Passenger Facility Charge (PFC) revenue from the definition of "airport revenue."[169] However, in broader terms, PFC revenue resembles and affects airport revenue, as well as property-use decisions at airports. This is reflected in federal regulations on PFC revenue, which, while separate from those covering other airport revenue, mirror airport revenue restrictions in many respects. These requirements are addressed in the *Revenue Use Policy*.[170]

5. Differences in Legal Requirements for Airport Revenue Use Based on Funding and Acquisition Source

Regardless of its source, airport revenue generally can be used only for expenditures with direct, identifiable benefit to the airport (capital and operating costs of the airport, per statute). Generally, airport revenue also must be spent for expenditures *on* the airport, with a few notable exceptions. Within this general rule, there are a few subtle variations. For comparison, specific requirements for uses of various airport revenue types (and a few types of non-airport revenue) are discussed in the following sections.

a. AIP Funding

Public airport proprietors subject to federal revenue use restrictions based on acceptance of AIP funding must provide written assurances that the revenues generated by their airport "will be expended for the capital or operating costs of (A) the airport; (B) the local airport system; or (C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property."[171] This obligation is included in Grant Assurance 25, which is binding on all airport proprietors who receive AIP grants. Provisions of 49 U.S.C. § 47133(a) detail identical revenue use requirements for all public or private airport proprietors who have received any of the federal assistance types discussed earlier.

Grant Assurance 25 and its statutory equivalent also should be read in conjunction with other obligations requiring proprietors to make airports as self-sustaining as possible (Grant Assurance 24 and its statutory equivalent). Specifically, airport proprietors must charge for use of airport facilities and services in a manner that makes the airport as self-sustaining as possible;[172] however, they may not include the federal government's share of costs for any project in the rate base used.[173] Therefore, airport proprietors must consider not just how airport revenue is spent, but ensure that sufficient airport revenue is raised.

b. Surplus and Nonsurplus Property Conveyances

For use of surplus and nonsurplus property, federal revenue use restrictions[174] are the same as for airports receiving AIP funding: Revenue must be spent on (A) the airport; (B) the local airport system; or (C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to air transportation of passengers or property.[175]

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[163] *Id.* § II.B.1.a.ii.

[164] *See id.* § II.B.1.a.iii.

[165] *Id.* § II.B.3.

[166] *Id.* § II.B.2. However, state and local taxes on aviation fuel may be used to support state aviation programs or noise mitigation programs on or off the airport. *Id.*

[167] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 15.6.b (2009).

[168] *Id.* § 15.6.c.

[169] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § IV.E.1. *But cf.* 14 C.F.R. § 158.3 (2019), in which FAA defines, for the purpose of PFC regulations "airport revenue" to include "revenue generated by a public airport (1) through any lease, rent, fee, PFC or other charge collected, directly or indirectly, in connection with any aeronautical activity conducted on an airport that it controls; or (2) In connection with any activity conducted on airport land acquired with Federal financial assistance or with PFC revenue under this part or conveyed to such public agency under the provisions of any Federal surplus property program or any provision enacted to authorize the conveyance of federal property to a public agency for airport purposes." To be precise, airport revenue can be subject to either the *Revenue Use Policy* or PFC regulations. PFCs still are considered airport revenue for financial reporting purposes, but not federal assistance purposes, under the *Revenue Use Policy*.

[170] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § IV.E.

[171] 49 U.S.C. § 47107(b) (1) (2019).

[172] *Id.* § 47107(a) (13) (A). The self-sustaining requirement is beyond the scope of this digest, but it is important to recognize that failure to charge fair market value for nonaeronautical activities would be a violation of this requirement, in addition to separate requirements applicable to nonaeronautical property.

[173] *Id.* § 47107(a) (13) (B).

[174] *I.e.*, conveyances of federal property after Oct. 1, 1996. *See supra* Section II.C.1-.2.

[175] 49 U.S.C. § 47133(a) (2019).

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Unlike grant assurances, which have been uniformly applied for decades, specific conditions attached to federally conveyed real estate vary based on the circumstances, legal authority and timing of the transaction. For this reason, it is essential to review the individual property transactions (e.g., deeds and related conveyance documents) to determine the restrictions that apply on a parcel-by-parcel basis.

Other conditions of federal land conveyances may affect use of airport property. The Surplus Property Act requires proprietors to use airport property exclusively for airport purposes, except with approval of the Secretary of Transportation.[176] Noncompliance with such restrictions is a serious matter. Most Surplus Property Act deeds contain a reversion, not merely a right to revert, to the federal government.[177] As discussed above, the specific terms of conveyance may vary.[178]

c. Passenger Facility Charges

PFCs are not considered "airport revenue" under the FAA's definition of airport revenue in its *Revenue Use Policy*. For this reason, this digest does not address use of PFC revenue in detail. However, PFC revenue can impact airport revenue decisions at airports, and the authority to levy PFCs is conditioned on compliance with grant assurances applicable to revenue use.[179] PFC revenue may be used only for projects that (1) preserve or enhance safety, security or capacity of the national air transportation system; (2) reduce noise or mitigate noise impacts from an airport; or (3) furnish opportunities for enhanced competition between or among air carriers.[180] PFCs are authorized on a project-by-project basis, and revenues generally cannot be used on unapproved projects without prior FAA approval.[181] On the other hand, broader interpretation of statutory requirements to spend PFCs on "capacity-enhancing" projects means that this source of funding is potentially available for landside projects in a manner for which AIP funding cannot be used.[182] PFCs also may be used to fund financing costs of debt issued to fund eligible costs, unlike AIP grants.[183]

d. Airport Revenue from Aeronautical Functions

Airport revenue derived from aeronautical functions is indistinguishable from other revenue with respect to use requirements. However, federal policies promoting the self-sufficiency of airports and requiring that proprietors levy reasonable rates for aeronautical services, both of which are embodied in grant assurances,[184] converge to impose a practical limitation on the collection of aeronautical revenues.

The FAA defines aeronautical use as "any activity which involves, makes possible or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations."[185] The principle of self-sufficiency dictates that airport proprietors charge for aeronautical use of airport property to cover the costs of maintaining and reinvesting in the airport, but proprietors are not required to charge aeronautical users fair market value rates.[186] In fact, fair market value charges in certain competitive markets could be construed to violate the requirement that charges be reasonable. As a result, the FAA has determined that airport proprietors may charge less than fair market value for aeronautical services, but must charge at least a nominal amount and must strive to charge an amount sufficient to recover its overall capital and operational costs.[187] The FAA has stated that "[a] fee for aeronautical users set pursuant to a residual costing methodology satisfies the requirement for a self-sustaining airport rate structure."[188]

To ensure that the total revenue an airport proprietor collects remains reasonable, proprietors are prohibited from creating revenue surpluses that exceed the amounts to be used for the airport system and other allowable uses.[189] Airport proprietors may save revenues and other funds to maintain reasonable reserves, facilitate financing and cover contingencies.[190]

e. Airport Revenue from Nonaeronautical Functions

As with property use, the aeronautical/nonaeronautical distinction is critical to understanding airport revenue. While there are no restrictions on the use of airport revenue from nonaeronautical functions that differ from other types of airport revenue, the FAA generally requires airport proprietors to

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[176] *See* 49 U.S.C. § 47152(1) (2019).

[177] *See id.* § 47152(8) (providing the government with a statutory right to reversion).

[178] *See* FAA Order No. 5190.6B, FAA Airport Compliance Handbook §§ 3.8.b, 3.17 (2009).

[179] 49 U.S.C. § 40117(e) (2019). *See also Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § IV.E.

[180] 49 U.S.C. § 40117(d) (2); 14 C.F.R. § 158.15(a) (2009). *See generally,* FAA Order No. 5500.1, Passenger Facility Charge Handbook (2001).

[181] FAA Order No. 5500.1 chs. 11, 12.

[182] *See* Tang, *supra* note 33, at 1.

[183] *See* FAA Order No. 5500.1 § 4-6(f). The FAA has proposed potential changes to PFC funding of ground access projects. *See* Passenger Facility Charge (PFC) Program: Eligibility of Ground Access Projects Meeting Certain Criteria, 81 Fed. Reg. 26,611, 26,612-13 (May 3, 2016) [hereinafter PFC Proposed Guidance], *amended by* 81 Fed. Reg. 28,934 (May 10, 2016) (technical amendments only); 49 U.S.C. § 47107(a) (13) (2019). *See also* FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §123, 132 Stat. 3186, 3203 (2018) (requiring the FAA to publish a final policy amendment no later than six months after the Act's enactment date).

[184] *See* 49 U.S.C. § 47107(a) (13).

[185] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7710 (Feb. 16, 1999) (*citing* Policy Statement Regarding Airport Fees, Statement of Applicability, 61 Fed. Reg. 31,994, 32,017).

[186] Clarke v. Alamogordo, FAA Docket No. 16-05-19, Determination of the Director of Airport Safety and Standards, at 24 (Sept. 20, 2006) ("As it is, the statute and grant assurances allow for below fair market value rent in the case of aeronautical leaseholds."). *See also* Bombardier Aerospace Corp. v. City of Santa Monica, FAA Docket No. 16-03-11, Determination of the Director of Airport Safety and Standards, at 16 (Jan. 4, 2005).

[187] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720-21 § VII.B.3., 5. *See also id.* at 7710 (FAA discussion of final rule).

[188] *Id.* at 7721 § VII.B.5.

[189] *Id.*

[190] *Id.*

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charge fair market value commercial rates for nonaeronautical uses of airport property.[191] Violation of this principle could be construed as a violation of the grant assurance obligation that airports be operated as self-sufficiently as possible and could lead to a conclusion that aeronautical rates are not reasonable. The *Revenue Use Policy* states that "airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and other purposes for which airport revenues may be spent under 49 U.S.C. § 47107(b) (1), including reasonable reserves and other funds to facilitate financing and to cover contingencies."[192]

The FAA has made limited exceptions for a few categories of nonaeronautical uses of airport property for which less than fair market value rates may be charged.[193] These types generally concern local community uses of property that are not potentially capable of producing substantial income, are compatible with safe and efficient operation of the airport, and use property not needed for aeronautical use.[194] A guiding principle for the FAA is that such community uses of airport property "should not preclude reuse of the property for airport purposes, if the airport operator determines that such reuse will provide greater benefits to the airport than continued community use."[195] Military and public (or, in limited cases, private) transit uses of airport property at less than fair market value rates also is permissible.[196] Airport proprietors cannot make property available to other units of government for nonaeronautical use (e.g., the local sheriff or roads department) at less than fair market value.

f. State and Local Special and General Taxes

State and local taxes levied specifically on airport services and functions are a form of airport revenue and, as such, their uses are limited in the same manner as other forms of airport revenue, whether such taxes are assessed by the airport proprietor or another government entity.[197] State tax proceeds also may be used to fund a state aviation program.[198] As discussed further above, taxes and surcharges that are grandfathered under the AAIA as of 1982,[199] and aviation fuel taxes that are grandfathered as of 1987,[200] are not subject to federal revenue use restrictions.

In 2014, the FAA issued a clarification of its policy (and federal law) regarding state and local government taxes on aviation fuel, wherein the agency announced its intention to implement additional measures to enforce statutory requirements. The measures included requesting that state and local governments submit action plans detailing what they would do to ensure aviation fuel tax funds are not diverted.[201] While the deadline for FAA compliance certification expired Dec. 8, 2017, a review of the FAA website indicates that many state and local jurisdictions are not yet in full compliance with federal law.[202] Meanwhile, appeal of the new policy clarification in court has failed.[203]

Pursuant to separate federal law, state and local governments many not "levy or collect a tax, fee or charge first taking effect after Aug. 23, 1994, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport, other than a tax, fee or charge wholly utilized for airport or aeronautical purposes."[204]

g. Non-Airport Revenue

The FAA acknowledges that, in some cases, airport proprietors may not be able to generate revenues sufficient to cover airport operating and capital costs. In those cases, fees, leases and other charges for uses of airport property or services may be set at rates below the airport's operating and capital costs.[205] Airport proprietors always can subsidize the airport with non-airport revenue. But in order to comply with the requirement that proprietors operate their airport as financially self-sustaining as possible, an airport proprietor should establish long-term goals and targets to make the airport as financially self-sustaining as possible. [206] These requirements do not directly affect restrictions on use of airport revenue.

h. Airport Investment Partnership Program

Federal law allows a limited exemption from airport revenue requirements for airport proprietors participating in the federal Airport Investment Partnership Program, 49 U.S.C. § 47134. As

[191] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7721 § VII.C. *See also id.* at 7710 (FAA discussion of final rule).

[192] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7721 § VII.B.6.

[193] *Id.* at 7721 § VII.C.-H.

[194] *Id.* at 7710.

[195] *Id.*

[196] *Id.* at 7721 § VII. F-H.

[197] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. 66,282, 66,287 (Nov. 7, 2014). *See also* Letter from Daphne Fuller, Assistant Chief Counsel for Airports and Envtl. Law, FAA, to Ronald S. Depue, Counsel, Hall Cty. Airport Auth. (Dec. 23, 2009), https://crp.trb.org/acrplrd21/wp-content/themes/acrp-child/lrd21/documents/2009_Depue.pdf (statewide tax on aviation fuel constituted airport revenue). Section 159 of the FAA Reauthorization Act of 2018 amended 49 U.S.C. § 40116(d) (2) (A) to add subparagraph (v), which prohibits states or political subdivisions of states, except as otherwise provided under 49 U.S.C. § 47133, from levying or collecting a tax, fee or charge "first taking effect after the date of enactment of this clause, upon any business located at a commercial service airport or operating as a permittee of such an airport that is not generally imposed on sales or services by that state, political subdivision or authority, unless wholly utilized for airport or aeronautical purposes." 49 U.S.C. § 40116(d) (2) (A) (v) (2019).

[198] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. at 66,287.

[199] 49 U.S.C. §§ 47107(b) (2), 47133(b) (1) (2019).

[200] *Id.* §§ 47107(b) (1), 47133(a).

[201] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. at 66,282-83, 66,286.

[202] *Aviation Fuel Tax Action Plans and Status*, FAA, https://www.faa.gov/airports/airport_compliance/aviation_fuel_tax/ (last updated Mar. 20, 2019).

[203] Clayton County v. FAA, 887 F.3d 1262 (11th Cir. 2018) (no jurisdiction to consider merits of petitioner's claim because FAA letter regarding 2014 clarification not final agency action).

[204] 49 U.S.C. § 40116(d) (2) (A) (2019). *See also Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7718 § IV.D.3 (Feb. 16, 1999).

[205] *Id.* at 7720 § VII.B.3.

[206] *Id.* at 7720 § VII.B.2.

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exacted, the law now provides that an airport proprietor may be exempted from the revenue use requirements of Sections 47107(b) and 47133 as a result of sale or lease of all or part of an airport.[207] This program, formerly known as the Airport Privatization Pilot Program, also exempts the purchaser or lessee from revenue use requirements "to the extent necessary to permit the purchaser or lessee to earn compensation from operation of the airport."[208] Other restrictions include protection against interruption of operations in the event of operator insolvency,[209] limits on fee increases,[210] and continuation of collective bargaining agreements covering airport employees.[211] The FAA has not yet updated its application procedures to include the new provisions, which were promulgated in 1997.[212] As of the writing of this digest, only one airport proprietor has applied to participate in the new program, and that application is a conversion from the previous program.[213]

E. Established Boundaries for Permissible Use of Airport Revenue

1. Permitted Uses of Airport Revenue

a. Statutorily Recognized Permitted Revenue Uses

Federal law provides that airport revenue at federally funded airports may be used only for capital or operating costs of the airport, the local airport system or other local facilities owned or operated by the airport proprietor and directly and substantially related to air transportation of passengers or property.[214] Both laws establishing these general categories clarify that state taxes on aviation fuel may be used to support state aviation programs and that airport revenue more generally may be used on or off the airport for noise mitigation purposes.[215] Any use of airport revenue for other purposes is considered impermissible revenue diversion.

Additional statutorily permitted uses of airport revenue cover the grandfathered uses discussed above: state and local taxes, debt obligations or other agreements prior to enactment of the AAIA in 1982 that would otherwise violate the existing prohibition on airport revenue diversion[216] and state and local fuel taxes covering aviation fuel enacted before Dec. 30, 1987.[217] In addition, Congress also has carved out several specific exceptions to the revenue diversion rules, including excess revenue from mineral rights leases at general aviation airports that may go toward other local transportation projects[218] and revenue that may permissibly go toward Native American groups under longstanding agreements.[219]

b. FAA Policies and Guidance on Permitted Uses

Through its guidance documents, the FAA has interpreted federal law to further articulate acceptable uses of airport revenue.[220] Airport proprietor costs and expenses that fall within the statutory boundaries of acceptable revenue use include:

- Costs of activities directed toward promoting competition at an airport, public and industry awareness of airport facilities and services, new air service and competition at the airport (other than by direct subsidy to air carriers), and salary and expenses of employees engaged in efforts to promote air service at the airport.[221] The FAA has promulgated additional guidance in the form of a guidebook on the topic of air carrier incentives.[222]
- A share of promotional expenses (e.g., marketing and advertising) aimed at increasing air travel through the airport.[223]
- Reimbursement to an airport proprietor or associated public entity for funds contributed for airport capital and operating costs. If the airport proprietor or associated public entity does not stipulate that the contribution is to be paid back, then it has six years from the contribution date to request reimbursement. [224] On the other hand, if the airport proprietor or associated public entity stipulates that the contribution is to be paid back, then a loan agreement with reasonable terms and interest rate must be finalized at the time of the contribution. In either case this, this can include interest on the principal contribution at a rate in line with interest received by the sponsor on other investments during that time period. The airport may repay the loan

[207] 49 U.S.C. § 47134(b) (1) (A) (2019).

[208] *Id.* § 47134(b) (3).

[209] *Id.* § 47134(c) (2).

[210] *Id.* § 47134(c) (4)-(5).

[211] *Id.* § 47134(c) (9).

[212] *See* Airport Privatization Pilot Program: Application Procedures, 62 Fed. Reg. 48,693, 48,698 (Sept. 16, 1997).

[213] *See* Airport Investment Partnership Program, 84 Fed. Reg. 42,977, 42,977 (Aug. 19, 2019) (concerning the application of Hendry County and Airglades Airport, LLC for participation of Airglades Airport in the AIPP).

[214] 49 U.S.C. §§ 47107(b) (1), 47133(a) (2019); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7717 § IV.A (Feb. 16, 1999).

[215] 49 U.S.C. §§ 47107(b) (3), 47133(c).

[216] 49 U.S.C. §§ 47107(b) (2), 47113(b) (1). *See also* FAA Order No. 5190.6B, FAA Airport Compliance Manual § 15.10 (2009); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7717 § IV.B.

[217] 49 U.S.C. §§ 47107(b) (1), 47133(a).

[218] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 813, 126 Stat. 11, 124-25 (2012) (codified at 49 U.S.C. § 47133 note).

[219] *See* Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448 (1997) (codified at 49 U.S.C. § 47107 note).

[220] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.1. (mirroring statutory language); FAA Order No. 5190.6B § 15.9. (mirroring statutory language).

[221] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.2.; FAA Order No. 5190.6B § 15.9.b.

[222] *See* FAA, TC10-0034, Air Carrier Incentive Program Guidebook: A Reference for Airport Sponsors (2010) [hereinafter ASIP Guidebook].

[223] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.3.; FAA Order No. 5190.6B § 15.9.b.

[224] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.4.; FAA Order No. 5190.6B § 15.9.c.

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according to its terms.[225] This provision recognizes that a short-term subsidy may be necessary notwithstanding the self-sufficiency requirement and, by allowing reimbursement, encourages short-term subsidies for airport capital and operating costs.

- Lobbying fees and attorney fees, but only to the extent such fees support activities or projects for which airport revenue could be used.[226]
- Costs incurred by government officials to the extent that such costs are for services to the airport and are documented. An example is city council members meeting with FAA officials regarding AIP funding.[227] Such direct or indirect intergovernmental charges can be subjected to intense audit examination by the FAA since they present enormous opportunities for abuse.[228]
- A proportionate share of the general costs of government under a cost allocation plan. This can include costs of executive offices and legislative branches.[229]
- Support for community uses of airport property if they are directly and substantially related to operation of the airport. Examples include: "(a) the purchase of tickets for an annual community luncheon at which the airport director delivers a speech reviewing the state of the airport; and (b) contribution to a golf tournament sponsored by a 'friends of the airport' committee."[230] The FAA has not set a standard dollar value for such community support that passes muster as a legitimate use of airport revenue. Instead, the FAA determines the appropriateness of expenditures for community support based on the unique facts and financial circumstances on a case-by-case basis.
- Capital costs of those portions of an airport ground access project that can be considered an integral part of an airport capital project, or a facility that is owned or operated by an airport proprietor and is directly and substantially related to air transport.[231] For example, the FAA has permitted airport revenue use "for structures and equipment associated with an airport terminal building station and a rail connector between the airport station and the nearest mass transit rail line, where the structures and equipment were (1) located entirely on airport property, and (2) designed and intended exclusively for the use of airport passengers."[232]

As discussed further in Chapter VI of this digest, the FAA has provided additional guidance and discussion regarding a few critical types of airport revenue and property use. Other ACRP publications also have covered aspects of these issues. For more general information on these areas beyond the discussion provided in Chapter IV, readers are encouraged to examine the following:

- *Ground access projects:* FAA's *Bulletin 1: Best Practices—Surface Access to Airports*[233] and *ACRP Legal Research Digest 35: Legal Considerations in the Funding and Development of Intermodal Facilities at Airports* (2018).
- *Marketing and advertising for airports:* FAA's *Revenue Use Policy.*
- *Air Service Incentive Programs:* FAA's *Guidebook on Air Service Incentive Programs* and *ACRP Legal Research Digest 37: Legal Issues Relating to Airports Promoting Competition* (2020).
- *Cost recovery for local governmental services:* FAA's *Revenue Use Policy.*
- *Governmental functions or public/communal activities conducted on airport property:* FAA's *Revenue Use Policy* and Order 5190.6B.
- *Privatization: ACRP Report 66*: *A Guide for Assessing Airport Curbside Operations and Terminal Area Roadways* (2008), and (forthcoming) Project 9-03 (Permitted Airport Involvement in Economic Development Efforts).
- *DOT and FAA Decisions:* ACRP has compiled an online database of DOT and FAA administrative decisions in web format with summaries, available at https://crp.trb.org/acrplrd21/.

2. Prohibited Uses of Airport Revenue

a. Statutorily Prohibited Uses of Airport Revenue

Federal law outlines impermissible revenue diversion in its directive to the Secretary of Transportation to develop policies and procedures prohibiting:

(A) Direct or indirect payments, other than those reflecting the value of services and facilities provided to the airport

(B) Use of airport revenues for general economic development, marketing and promotional activities unrelated to airports or airport systems

(C) Payments in lieu of taxes or other assessments that exceed the value of services provided

(D) Payments to compensate nonsponsoring governmental bodies for lost tax revenues exceeding stated tax rates.[234]

These prohibitions include any form of taxes paid toward a local or state government that are not then allocated to the air-

[225] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.4.; FAA Order No. 5190.6B § 15.9.c.

[226] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.5.; FAA Order No. 5190.6B § 15.9.d.

[227] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.6.; FAA Order No. 5190.6B § 15.9.e.

[228] *See* FAA Order No. 5190.6B ch. 19.

[229] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.7., V.B.3.; FAA Order No. 5190.6B § 15.9.f.

[230] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 § V.A.8.; FAA Order No. 5190.6B § 15.9.h.

[231] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718-19 § V.A.9.; FAA Order No. 5190.6B § 15.9.i.

[232] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718-19 § V.A.9.

[233] *See* Bulletin 1, *supra* note 37. *See also* FAA Order No. 5100.38D, Change 1, Airport Improvement Program Handbook app. P (2019).

[234] 49 U.S.C. § 47107(k) (2) (2019).

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port or aviation system purposes, with the exception of grandfathered payments[235] and certain payments to Native American tribes under pre-existing arrangements.[236]

b. FAA Guidance on Prohibited Uses

As it has done with permissible uses of airport revenue, the FAA has provided guidance restating and elaborating the sorts of revenue uses that constitute unlawful revenue diversion. Under this guidance, impermissible uses of airport revenue include:

- Payments that "exceed the fair and reasonable value of those services and facilities provided to the airport." This includes both direct and indirect payments.[237]
- Payments made without using an acceptable cost allocation formula or that are not calculated consistently with other governmental units.[238]
- Use of airport revenue for general economic development.[239]
- Marketing or promotional activities unrelated to airport operations (e.g., marketing a particular local attraction, region or business that has no connection to promotion of the airport).[240]
- Loans to, or investment of, airport funds in a state or local agency at less than the prevailing rate of interest.[241]
- Use of airport land by an airport proprietor for non-aeronautical purposes where the proprietor charges itself less than fair rental or market value, [242] or for aeronautical purposes (e.g., a proprietor-owned, fixed-base operator) where the proprietor provides rent-free or charges itself a nominal rate.[243] However, a proprietor may use airport property in this manner to the extent required under federal requirements for airports to be self-sustaining.[244]
- Impact fees assessed by a government, other than those that go toward covering a cost necessitated to undertake a covered airport development cost.[245]
- Expenditures to support community activities or participation in community events, except in specific circumstances permitted under FAA guidance (see above). The FAA provides examples of this type of impermissible revenue use: "expenditure of $50,000 to sponsor a local film society's annual film festival and contribution of $6,000 to a community cultural heritage festival."[246]
- Direct subsidies of air carriers are prohibited.[247] However, an airport proprietor may waive or reduce fees during a promotional period not to exceed two years, as long as the proprietor offers it to any similarly situated airport user willing to provide the same type and level of new service consistent with the promotional offering, and as long as the costs of such a promotion are not shifted to other air carriers not participating in the promotional incentive program.[248]

III. METHODOLOGY

A. Research Purpose, Scope and Method

The research undertaken for this digest seeks to understand the boundaries of permissible use of airport revenue and property under federal law. The ultimate objective of the research was to provide practical guidance for determining permitted uses of airport revenue and property based on actual airport proprietor experiences. Accordingly, the research endeavored to answer the question: What are useful analytical frameworks for determining permissible uses of airport revenue and property in arising areas of airport development and spending?

Given the open-ended nature of our inquiry, formulating a single hypothesis regarding successful use of airport revenue and property was inappropriate. Instead, we used a set of testable propositions regarding the use of airport revenue and property: that federal laws regulating revenue use and property on airports are guiding decision-making factors in airport development; that, as a practical matter, airport proprietors face pressures to maximize development and use of airport property consistent with federal restrictions on airport revenue and property use; that sources and uses of airport revenue and property are varied among airports but may share similar characteristics; and that some resulting projects may highlight innovative thinking around airport revenue and property use, as well as industry-wide challenges to airport development.

The research scope was further framed by our prior professional experience regarding recent trends and specific issues concerning the use of airport revenue and property, where the presumptions above have been exhibited or raised. The researchers used their own experience representing airports to develop the specific topics of airport revenue use investigated in the research. At the same time, the research methods and techniques, particularly regarding primary research, were designed in a manner that allowed for identification of unanticipated topics of pertinent or innovative airport revenue and property use.

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[235] *See supra* Section II.C.4.

[236] Department of Transportation and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448-49 (1997) (codified at 49 U.S.C. § 47107 note).

[237] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7720 § VI.B.1. (Feb. 16, 1999).

[238] *Id.* § VI.B.2.

[239] *Id.* § VI.B.3.; FAA Order No. 5190.6B, FAA Airport Compliance Manual, § 15.13.d (2009).

[240] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720 § VI.B.4.; FAA Order No. 5190.6B § 15.13.e.; ASIP Guidebook, *supra* note 222, at 3.

[241] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720 § VI.B.7.

[242] *Id.* § VI.B.8; FAA Order No. 5190.6B § 15.13.j.

[243] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720 § VI.B.9.; FAA Order No. 5190.6B § 15.13.i.

[244] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720 § VII.B.3.; FAA Order No. 5190.6B §15.13.i.

[245] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720 § VI.B.10.

[246] *Id.* § VI.B.11.

[247] *Id.* § VI.B.12.; FAA Order No. 5190.6B § 15.13.m.

[248] FAA Order No. 5190.6B § 15.13.n.

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The research subject, purpose and scope lent themselves to a qualitative mixed-methods research approach integrating systematic review[249] and analysis of legal frameworks and existing legal case study research, as well as primary data collection of case studies in the form of qualitative interviews. The emphasis on case studies reflected the strengths of the case study method, in which a single or small number of cases are investigated to better understand and explain how airport proprietors are confronting and solving problems involving revenue and property use.[250] Case studies "aim to produce an invaluable and deep understanding … resulting in new learning about real-world behavior and its meaning"[251] and, were appropriate here, where "examining the context and other complex conditions related to the case(s) being studied are integral to understanding the case(s)."[252]

To clarify boundaries of the research, our review of existing materials and collection of new data were framed by the research question and priorities in research purpose. Accordingly, we generally defined cases as particular development projects or activities in which airport proprietors potentially had the opportunity to use airport revenue or use airport property. Review of existing research focused on cases which represented key issues or innovations useful to addressing the research purpose. To verify and triangulate issues and innovations raised in the case studies and develop potential new cases, interviews with a more representative sample of airport proprietors also were conducted.

Based on the research purpose and scope, as well as the selected method of investigation, the research team developed a protocol with high-level input from the research review panel. Details of the research protocol—including design, data collection techniques, analysis and reporting—are provided below.

B. Data Collection Method and Techniques

Data collection techniques included desktop research of statutes, regulations, guidance, contracts and other legal documents; publicly available information regarding particular airport development projects; and interviews with airport proprietor representatives. Including multiple sources of data provided further opportunity to triangulate the information collected.

Legal research was conducted using standard legal research techniques and included reference to codes, regulations and official guidance, as well as journals, legal databases and online resources. Review of traditional sources of legal authority (i.e., United States Code, Code of Federal Regulations, FAA Order 5190.6B, Part 16 decisions and case law using standard databases such as Westlaw and Lexis) were supplemented by sources of *airport* law such as FAA Advisory Circulars, FAA Policy Statements and FAA Standard Operating Procedures; informal guidance documents published on the FAA website; and FAA correspondence from its headquarters to local offices and from the FAA to airport proprietors. Where such sources are available primarily on the internet, sources were cited to the URL.

Review of existing research involved a review of prior articles and papers published by various entities, including the federal government, Transportation Research Board and academic journals and publications. We also reviewed our own previous internal research and analysis conducted at the behest of our clients, synthesizing and presenting such research strictly in accordance with our legal ethical duties, including attorney-client privilege.

We collected primary research data through nine semi-structured interviews with officials representing airport proprietors operating large, medium and small airports. The number of interviews conducted was determined by balancing the need for obtaining a sufficiently wide and representative sampling of different types of airport proprietor experiences with limitations on resources and the thoroughness required to adequately understand and analyze the selected cases. The sample of airports was selected to reflect a diversity in airport size, geographic location, governance, administration and other factors to reflect varied experiences with the use of airport revenue and property that would provide useful insights for other airport proprietors. We selected interview participants based on the researchers' (and their firm's) extensive experience representing airport proprietors in development projects and their knowledge of, and contacts in, the airport industry. The selection structure and criteria were discussed with and approved by the research oversight panel ahead of data collection.

To standardize the data collected through interviews, we provided a consistent set of questions to each interviewee in advance. However, to capture the unique and qualitative nature of our inquiry, we used a semi-structured interview format that permitted interview participants to deviate from the questions to address topics relevant to the scope and goals of the research. A copy of the questions used is attached at Appendix A.

To help ensure participation and accurate information, all interviewees were guaranteed confidentiality and informed that all proprietor or interviewee information would be de-identified.

C. Discussion of Method of Analysis and Presentation of Results

Analysis of the resulting research and data required following airport proprietor strategies and steps for airport revenue and property use and comparing them with legal prescriptions and examples provided in federal statutes, regulations and FAA guidance. The analysis focused on understanding the nexus between airport revenue and property and legal mechanisms providing opportunities to use these resources for airport development, operation and maintenance.

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[249] *See* Jens Newig & Oliver Fritsch, Paper Presentation at the American Political Science Association 2009 Annual Meeting in Toronto: The Case Survey Method and Applications in Political Science (Sept. 3-6, 2009), https://www.researchgate.net/publication/228162937_The_Case_Survey_Method_and_Applications_in_Political_Science (providing background on the systematic review method of analysis).

[250] Robert K. Yin, Applications of Case Study Research 5 (3d ed. 2012).

[251] *Id.* at 4.

[252] *Id.*

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The results of our research are presented in the following chapter (Chapter IV). To present these results in a useful manner, we organized them according to themes and topics that framed our scope of inquiry and, especially, areas of airport revenue and property use that we identified as particularly representative of the challenges in using these sources of revenue. In each section, we review identified major trends or issues, as well as means and methods of facing and addressing these challenges. Where useful, we incorporate examples from our interviews and publicly available secondary legal research.

Following an overview for each selected topic, we provide a hypothetical case study constructed from one or more reviewed cases to illustrate the analysis to be conducted and resulting outcomes. In constructing hypothetical scenarios using our case study methodology, we intend to reproduce a logical process airport proprietors should use for making revenue and property use decisions.[253] However, the hypotheticals are not purely hypothetical—each was designed to reproduce real-world problems we discovered in our interviews (with any identifying information removed or changed).

We recognized early in the research that asking airport proprietors about creative or precedent-setting revenue or property use approaches could be sensitive, because failure to comply with federal requirements carries serious legal and financial consequences. We anticipated that participation in the research likely would be limited unless we could provide participants a level of anonymity and confidentiality. Indeed, two of the 13 airport representatives contacted to participate in the research declined because of the sensitive nature of airport revenue use issues. Accordingly, interview participants, while identified as sources for information provided in our findings, were anonymized. The list of anonymized interview participants, all of whom are responsible for airport revenue and property use, is provided at Appendix B. Similarly, examples used to construct the hypotheticals, while based on real cases, also were anonymized. The list of these anonymized airports and a brief description are available at Appendix C. In some cases, minor details in the hypotheticals were changed to preserve anonymity or assumed where information was not expressly provided. In some instances, the hypotheticals discussed are based on case studies examined through secondary research, not interviews. These sources also were anonymized where used for creating the hypotheticals to preserve the identity of interview participants and confidential privileged information.

Airports named in the findings were identified separately through prior and secondary research of publicly available documents. While particular airports are identified in the research based on publicly available documents, they were not necessarily interviewed anonymously.

Readers should be aware that the projects and experiences recounted from interviews and used in hypotheticals are illustrative of some challenges encountered in this field and not intended to indicate any particular dominant trend or generalizability. Just as important, all facts and circumstances set forth in this digest are based on interviews and reports from airport proprietors. None has been independently verified with third parties or the FAA, as necessitated by the project's need to maintain anonymity. It is possible that some practices discussed in interviews and hypotheticals may not be consistent with FAA practice or policy or even federal law. Readers are reminded that the hypotheticals and experiences of other airport proprietors should not be adopted without careful analysis of the individual airport's situation. Nevertheless, the researchers selected examples and experiences that, based on supporting research, shed light on important and relevant issues and discussion, while making efforts to confirm participant experiences through desktop research.

IV. FINDINGS AND DISCUSSION

A. Recent Developments in Airport Proprietor Activities to Expand Sources or Pursue Creative Strategies for Airport Revenue Use

Airport proprietors must address the challenges of compliance with airport revenue use restrictions within the context of broader trends, such as growing infrastructural needs, increasing uncertainty regarding federal financial support, shifting business models and disruptive technologies. Current uncertainty about airport revenue streams makes it all the more important that airport proprietors understand the limits of their authority and opportunities for using airport property for revenue generation.

While there are considerable differences within the airport community and Congress regarding appropriate or necessary levels of federal airport funding, many airport proprietors are concerned about the continuity and flat-line of federal support from AIP funding and the cap on PFCs, which are relied on heavily.[254] These concerns have translated into a perception among airport proprietors that their funding sources must be diversified.

Airport proprietors also face pressure to reduce costs to retain and attract airline service. Airline mergers, consolidation of hub airports under the legacy hub-and-spoke carrier model and the low margin, bare-bones business models of ultra-low-cost carriers (ULCCs) mean that airport proprietors have to live within tighter air carrier tenant budget demands, while adapting to the needs among different service categories. The introduction of ULCC service also has provided airport proprietors opportunities to drive passenger growth and, with it, pressure to increase terminal capacity and airport facilities.

At the same time, there are positive economic trends providing revenue opportunities. Steady growth during the latest economic cycle means that more people are flying, providing some airport proprietors—particularly those in areas with growing populations—opportunities to seek additional revenue and use

[253] *See* Yin, *supra* note 250, at 18 (discussing the concept of "analytic generalizations").

[254] While PFC charges are not considered airport revenue, they can impact airport revenue spending and, therefore, are a factor airports consider in contemplating airport revenue matters.

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it to promote competition at airports. A number of interview participants noted growth in passenger counts and the demand for airport expansion.[255]

In the general aviation community, there are pressures from stakeholders to control costs and changes to airport economic dynamics caused by consolidation of fixed-base operators (FBOs). And with respect to ground transportation access, the expansion of public transportation and disruptive innovations such as transportation networking companies offer potential solutions to airport congestion but may cause their own issues with respect to revenue streams in the future.

B. Key Factors, Issues, Strategies and Examples of Permitted and Prohibited Airport Revenue Use and Related Property Use

To navigate external trends affecting airport revenue, comply with federal requirements and serve their communities, airport proprietors are looking for means of legally leveraging their resources to bridge the financial gaps they face. This section reports the results of our research into the analysis of particularly noteworthy areas of airport revenue use and legal strategies implemented by airport proprietors within these contexts.

Our primary research interviews with airport proprietors and secondary and meta-research from publicly available data have identified five general topics of airport revenue use (and associated property use) that reflect some of the most important revenue use issues facing airport proprietors and illustrate some of the strategies and tips that can help them confront these issues:

- Nonaeronautical development of airport property
- Ground access (including intermodal) and "collateral" airport development projects—i.e., nonaeronautical projects that provide support to the airport's aeronautical functions
- Revenue and property use for activities directed at promoting competition at airports and aeronautical service generally
- Privatization and public-private partnerships (P3s)
- Intergovernmental cost sharing, payment for services and tax revenue sharing.

This is not an exhaustive list, but rather a selection of topics for considering revenue use and diversion issues. These topics also cover areas in which we believe further practical guidance and examples would benefit airport proprietors.

For each of these topics, we discuss some of the key factors, issues and strategies that our research uncovered. Where appropriate, we integrated discussion of our interview research results within these sections to illustrate concepts and strategies. Following this discussion for each topic, we provide a hypothetical example illustrating some of the important points from the previous discussion. As detailed in the methodology chapter, the factual and bases for the hypotheticals largely are based on the content of our airport proprietor interviews, combined with secondary research. In a few cases, we relied entirely on publicly available information to construct hypotheticals to illustrate issues that are important to the topic but for which no appropriate example arose in the interviews. While we relied on interview content to contextualize and supply legal analysis for the hypotheticals, we also independently assessed each case based on the existing legal framework.

All sources for the hypothetical examples were anonymized to protect research participant confidentiality and encourage participation in the interview process. Publicly available sources also have been anonymized where used in hypotheticals. In some instances, details regarding the fact pattern for included examples were altered to maintain confidentiality. A brief description of each hypothetical source appears in Appendix C and is referenced in this chapter as appropriate.

In analyzing the hypotheticals, it is important to remember that every airport environment is unique, particularly with respect to the issues addressed in this digest.[256] Therefore, we urge caution in drawing draw exact comparisons from one airport to another. Every transaction involves many (sometimes competing) considerations and requires careful planning and understanding of directly applicable circumstances. However, we believe that hypothetical examples can play an important role in helping readers work through the implications of key issues and strategies for each topic investigated in this research.

1. Nonaeronautical Development of Airport Property

a. Key Factors, Issues and Strategies

For many airport proprietors, nonaeronautical development of airport property and nonaeronautical commercial activity are important, if not critical, revenue generators. Accordingly, airport proprietors increasingly are turning to business models in which the proprietor makes capital investment to enhance revenue streams. Airports large and small are turning to this business model. Indeed, one interview participant from a general aviation airport cited capital investment projects as *the* means it uses to maintain its financial self-sufficiency.[257] Notwithstanding its importance, however, there are many legal grey areas when it comes to aeronautical development as the result of overlapping and embedded regulatory frameworks and case-specific circumstances.

[255] Telephone interview with Interview Participant No. 1, Interview Participant No. 2. *See infra* App. B.

[256] One widespread perception that is not addressed in this digest is the view that different FAA district and regional offices apply divergent levels of scrutiny and adopt different interpretations of FAA regulatory requirements. In industries like those dealing with airports, such perceptions of bureaucracy are inevitable, but it is a particular issue that arose frequently in our research—i.e., that airport proprietors did not have certainty that they could rely on precedents from another district or region. The researchers are told that field and regional offices are directed to elevate novel issues of first impression concerning national policy to headquarters for resolution. Proprietors often elevate controversial matters to headquarters and Congress, as well.

[257] Telephone interview with Interview Participant No. 3. *See infra* App. B.

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The following common themes emerged as areas where proprietors must exercise particular caution.

(1) Investments to enhance value of nonaeronautical property. The value and developability of greenfield airport property can be considerably affected by whether the property has access to horizontal infrastructure. Infrastructure developed to service airport functions often is not designed, or located in a manner, to provide service to vacant airport property. It is common in real estate development for the developer to bring horizontal infrastructure such as roads, utilities, water, sewerage and communications to the site prior to sale to enhance its marketability. While the FAA has allowed airport proprietors to make such investments when a direct connection between infrastructure investment and property marketability can be shown, proprietors should not assume that they have *carte blanche* to engage in speculative or uncertain investments in their nonaeronautical property, even if such investments are made in connection with marketing efforts. The FAA has repeatedly made clear that it does not intend to second-guess business decisions of airport proprietors,[258] but there is a fine line between scrutinizing business decisions and allowing use of airport revenue in a risky or speculative venture. Airport proprietors should expect that the FAA will carefully scrutinize investments of airport revenue designed to enhance the marketability of nonaeronautical property.

(2) Consult the ALP and Exhibit "A" maps to determine a property's legal designation. In determining permissible uses of airport property and the role the FAA plays in the development process, three pivotal issues arise. First, an airport proprietor must consult its ALP to determine the property's designation as aeronautical or nonaeronautical. Second, an airport proprietor must determine how the property was acquired—e.g., from the federal government as military surplus, another nonsurplus federal property or otherwise. Finally, the airport proprietor must identify the funding source used to acquire the property—e.g., federal grant funds, airport aeronautical or nonaeronautical revenue, or other unrelated source.

The ALP, and particularly the property map component, depicts the legal status of airport property as designated for either aeronautical or nonaeronautical uses. Because it must accurately reflect all uses of airport property, and because it requires FAA approval, the ALP has significant legal importance for proposed development. It is critical to note that the extent of FAA's authority to approve changes to an ALP is specifically addressed in Section 163 of the FAA Reauthorization Act of 2018. Section 163 limits the FAA's role in such approvals, but the agency has not issued any guidance and, at this writing, has not indicated how it will implement the statutory limitations on agency approval authority for ALPs. The following sections are based on the state of the law and FAA policies as they existed prior to enactment of Section 163 and should be read in that light (all interviews were conducted before FAA had issued even informal guidance or made any decisions concerning the applicability of that new statute). The FAA website on Reauthorization Act guidance is a valuable source for the latest information on implementation of that law.

Unless specified otherwise, airport land must be designated on an ALP map for aeronautical purposes. To use aeronautical property for nonaeronautical development, the FAA must determine that the property is not needed for present or foreseeable aeronautical purposes; that determination is reflected in approval of the ALP property map. Likewise, if there are any deed restrictions on property use (which should be indicated in the Exhibit "A" map, and best practice is also to show such restrictions on the ALP property map), the airport proprietor must generally seek formal written release of those restrictions before the property can be used for nonaeronautical purposes.

Airport proprietors who understand the history of their property and existence of deed restrictions can actively integrate those constraints into their planning processes. One interview participant cited that the local government's planning department already was familiar with the deed restrictions affecting airport property. The result was that when the airport department submitted plans for approval by the planning department, the approval process was smoother than if the airport staff had to educate planners on the constraints that affect airport development.[259] The planning department's preparation and understanding of planning documents—including detailed maps indicating the origin and federal status of portions of the airport property—provided a clear understanding of the expected federal processes and predicates to development of the airport.

If airport staff members are unaware of the contents or inattentive to the importance of the ALP, they and the development approval agencies may be surprised during consideration for approval. The narrower FAA review and approval of ALPs as a result of Section 163 of the FAA Reauthorization Act of 2018 reduces the risk of surprises. An ALP is a long-term planning document that often sets out development and land uses for a 20-year time horizon. Regrettably, it is not uncommon for ALPs to be inaccurate, incomplete and dated. As a result, the FAA may require the airport proprietor to submit a revised ALP. The FAA also may need to complete an environmental review for revisions that require ALP approval and any other federal action, such as a release. One interview participant noted that, because its ALP was outdated, there were unexpected delays due to the FAA's need to approve the ALP revisions.[260] The interview participant's experience predated passage of Section 163, which, as

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[258] See, e.g., *FAA Part 13 Informal Complaint Determination, Wyoming Jet Center LLC against Jackson Hole Airport Board* (Jul. 31, 2019). Note that this discussion was determined under the FAA's informal complaint procedures pursuant to 14 C.F.R. Part 13. Such decisions are not precedential or binding.

[259] Telephone interview with Interview Participant No. 4. *See infra* App. B.

[260] Telephone interview with Interview Participant No. 4, *infra* App. B. *See also* Timothy R. Karaskiewicz, Transp. Research Bd., Airport Coop. Research Program, Legal Research Digest 35: Legal Considerations in the Funding and Development of Intermodal Facilities at Airports 16 (2018).

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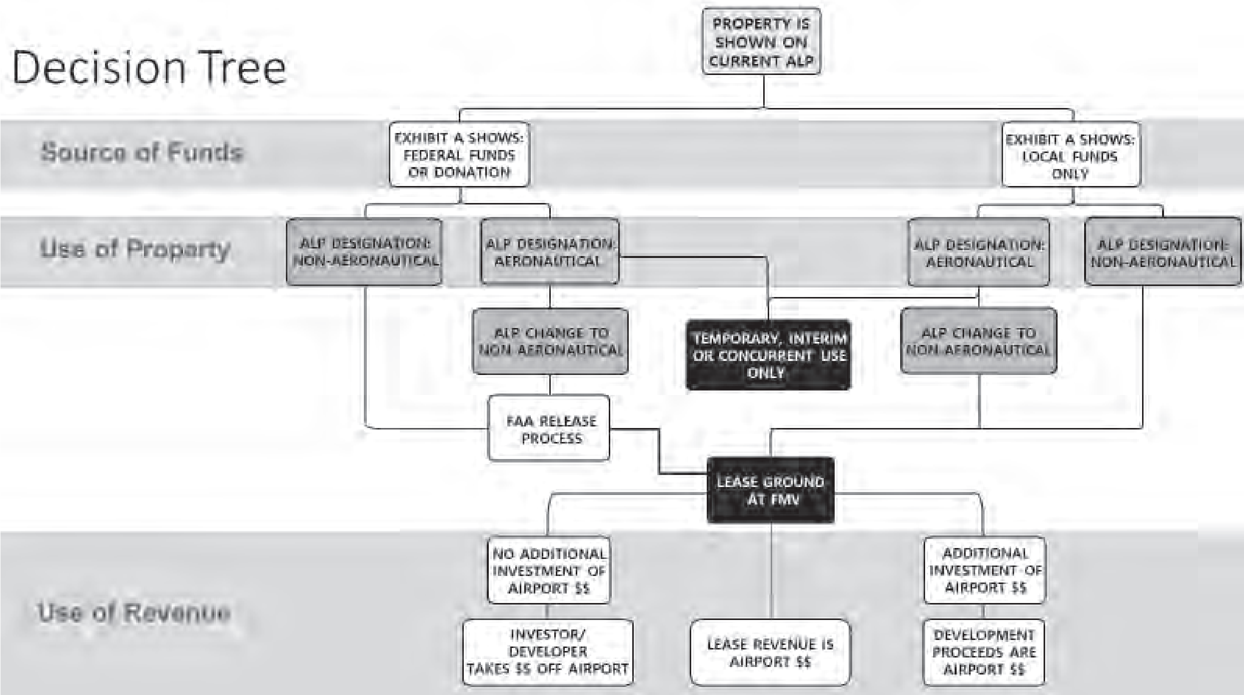

Figure 3: Decision tree showing process to determine if project requires FAA approval.

discussed elsewhere in this digest, impacts the FAA's authority to review and approve ALPs.

In Figure 3, the decision tree provides a simplified explanation of the process that an airport proprietor must follow when considering whether a proposed revenue-generating development project requires FAA approval of an ALP revision.

(3) Distinctions between legal and practical definitions of aeronautical and nonaeronautical property and uses. Distinctions between aeronautical and nonaeronautical property and uses are legally important, but, from a practical or operational standpoint, it is not always easy to identify them. As a practical matter, ALP labels often do not use this clear dichotomous distinction and instead carry nuanced descriptions that make it difficult to determine from the ALP alone whether particular projects are permissible in a certain location.

For instance, while some property and facilities—runways, taxiways, hangars and terminals—clearly are aeronautical in use and purpose and need no further explanation, others are less clear. ALP designations such as "commercial airport development," "future airport development," "airport support development," "terminal area" or "collateral development" may have different meanings depending on context. In particular, such designations may not reflect restrictions on the underlying property that would permit some, but not all, nonaeronautical development.[261] Noise land may prove particularly confusing, as its function mitigating airport noise may permissibly coincide with nonaeronautical uses that otherwise might suggest the land is serving no discernable airport purpose.

In a few areas, the FAA has sought to clarify what constitutes an aeronautical use. For instance, in 2016, the FAA published its *Policy on the Nonaeronautical Use of Airport Hangars* to bring additional clarity to what uses of airport hangars, which are aeronautical facilities, are permitted under the law.[262] This document provides additional analysis to help determine nonaeronautical use in the context of public-use hangars, but also illustrates how nuanced and interwoven such uses can be. For example, the policy allows limited nonaeronautical use of aircraft hangars as long as such use does not interfere with their primary aeronautical purpose.

The gap between aeronautical/nonaeronautical and collateral/noncollateral can be confusing and may lead airport proprietors to misunderstand what level of FAA approval is needed for a proposed development or land use change. In one case, an airport proprietor was frustrated to learn that relocation of a road required significant (and time-consuming) FAA review because the project affected a runway, even though the relocation was ini-

[261] For example, one airport in the western United States has property that is subject to unique Surplus Property Act deed restrictions that allow aeronautical or commercial development in support of the airport's aeronautical function. The resulting designation on the ALP of land as "airport support" and ambiguity of this term create uncertainty regarding what FAA approvals are required.

[262] Policy on the Non-Aeronautical Use of Airport Hangars, 81 Fed. Reg. 38,906 (June 15, 2016).

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tiated to improve road user and air traffic safety.[263] Therefore, it is important for airport proprietors to understand which distinctions in business character are legally important from the standpoint of federal restrictions and which are not.

(4) Navigate the FAA's role in development of nonaeronautical property. In the context of nonaeronautical development, one of the most difficult issues for airport proprietors is not understanding the role and legal authority of the FAA with regard to nonaeronautical development of airport property. More than one interview participant recounted surprise or skepticism at learning the extent of the role that their particular FAA district office intended to exercise with regard to one or more of their airports' nonaeronautical projects.[264]

In the airport community, there is a perception of inconsistency between FAA district offices regarding the approval process for development of nonaeronautical land. It is important to note that, as enacted, Section 163 does not explicitly refer to nonaeronautical property, but the legislative history of earlier versions of this section, and that the intent of the key sponsors (Sens. Gardner of Colorado and Sullivan of Alaska and Reps. DeGette of Colorado and Simpson of Idaho) suggest that Section 163 primarily was intended to address FAA regulation of nonaeronautical property.

With respect to safety, developments planned for airport property that are completely unrelated to aeronautical uses may be inconsistent with, or otherwise conflict with, airport operations, creating unforeseen challenges. Airport proprietors may need to be prepared to undergo more rigorous FAA review for these projects and, potentially, find ways of mitigating or eliminating inconsistent uses. For example, one interviewed airport proprietor, whose development of an emergency response training center included a firing range, had to design the range so as to mitigate any potential danger to aircraft.[265]

The FAA also may seek to investigate a lease of nonaeronautical property to ensure the airport proprietor receives fair market value. The FAA has stated that it "may verify compliance with these requirements through a financial compliance review, the enforcement of grant assurances or other enforcement mechanisms at a later date."[266] One interview participant noted strategic success in involving FAA staff in projects early on in the development process and addressing common FAA concerns up front.[267]

Even where property clearly has been designated and approved for nonaeronautical use on the ALP, further FAA review may be required. Some FAA offices also have objected to, or at least required that they approve, long-term nonaeronautical leases on nonaeronautical property. What constitutes a long-term lease is somewhat subjective, but for aeronautical leases, it generally is considered those longer than 25 years.[268] FAA headquarters has advised agency staff members to treat aeronautical leases longer than 50 years to be a *de facto* alienation of property requiring FAA approval for disposal of the property.[269] However, the extent of the FAA's role in review and approval of long-term nonaeronautical leases always has been subject to varying interpretations within different FAA divisions. The agency has not opined how this new statute will affect agency review or approval for long-term nonaeronautical leases.

In one of the first interpretations of its authority under Section 163, the FAA asserted that it can require airport proprietors to provide documentation indicating compliance with the FAA's authority to regulate airport safety and receipt of fair market value, as well as other generally applicable requirements, such as maintenance of an up-to-date ALP (Grant Assurances 29 and 49 U.S.C. § 47107(a) (16) (A)).

More broadly, some interview participants opined that it is beyond the FAA's role to review receipt of economic value for nonaeronautical transactions.[270] In particular, they identified the restriction on leasehold duration to be unworkable in many cases.[271] For example, one interview participant recounted how he or she believed a potentially high value nonaeronautical tenant was lost after the FAA told the airport proprietor that the lease term, which was to be 50 years, was too long for that type of commercial lease and should instead be 25 years. The prospective tenant disagreed and terminated negotiations. When the airport proprietor informed the FAA that there was no indication in the guidance governing the length of nonaeronautical leases, the airport proprietor was told that the applicable guidance, FAA Order 5190.6B, was to be updated.[272]

Similarly, another interview participant noted that the FAA had pushed back on the airport proprietor's practice of basing fair market value on the lesser of the average price index or the appraised value of the property (which the airport appraised every three years). Although FAA guidance states that either can be used to determine fair market value and that the airport proprietor was not required to appraise the property every three

[263] Telephone interview with Interview Participant No. 4. *See infra* App. B.

[264] Telephone interview with Interview Participant No. 4 and Interview Participant No. 5. *See infra* App. B.

[265] Telephone interview with Interview Participant No. 3. *See infra* App. B (verified and elaborated with supporting public documentation).

[266] Letter from Steven Hicks, Dir., S. Region, Office of Airports, FAA, to Michael Landguth, President & CEO, Raleigh-Durham Airport Auth. (Apr. 29, 2019) (regarding "Lease Agreement between RDUAA and Wake Stone Corp.")

[267] Telephone interview with Interview Participant No. 6. *See infra* App. B.

[268] FAA Order No. 5190.6B, FAA Airport Compliance Manual, § 22.33(d) (2009).

[269] *Id.* § 12.3(b) (3).

[270] Telephone interview with Interview Participant No. 2, Interview Participant No. 6, Interview Participant No. 7. *See infra* App. B.

[271] *Id.*

[272] Telephone interview with Interview Participant No. 2. *See infra* App. B. Readers need to be aware that the projects and experiences recounted from interviews and used in hypotheticals are illustrative of some challenges encountered in this field and not intended to indicate any particular dominant trend or generalizability. Just as important, all facts and circumstances set forth in this digest are based on the interviews and reports from airport proprietors. None has been independently verified with third parties or the FAA.

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years, the FAA still questioned the practice.[273] In the interview participant's experience, escalation clauses that the FAA suggested airport proprietors include in leases were unrealistic.[274] To deal with these issues, the interview participant suggested that airport proprietors be open and direct with FAA officials about their intended leases and legal justification for why the FAA should approve or not withhold approval for the deal.[275]

While the nine interview participants acknowledged and agreed with the logic of the statutory prohibition on revenue diversion, they generally did not agree that current FAA oversight, in the context of nonaeronautical development, was effectively furthering this goal, and instead opined that it hampered legitimate and legal efforts toward financial self-sufficiency.[276] Participants may not have fully understood the extent to which FAA oversight is discretionary and statutorily mandated, and they may have perceived greater agency discretion in the law than exists.

(5) Understand revenue use requirements concerning revenue from nonaeronautical development. An airport proprietor must receive fair market value for the use of nonaeronautical property, and all revenue it receives from such use is considered to be airport revenue subject to use and diversion restrictions. With limited exceptions, this rule applies regardless of whether the nonaeronautical activity is collateral or noncollateral development. It also applies not just to the ground lease for the property, but any additional airport proprietor investment in the development. Therefore, airport proprietors must be aware of revenue restrictions even where the connection between development activities and airport operations is tenuous and a proprietor's investment in an airport development is unrelated to provision of aeronautical services.

In limited cases, the requirement to receive fair market value may not necessarily require monetary payment. For example, as discussed further below in the section on ground access, an airport proprietor may be able to lease property for nonaeronautical purposes at less than fair market value or for no rent if it can demonstrate that the development results in transfer of property, improvements or some other tangible and quantifiable benefit to the airport proprietor that equals or exceeds fair market value of the property.

In addition, governmental units that own or control an airport proprietor may be able to structure a development project to allow for its investment in the project to generate revenue that is not considered airport revenue. This might be the case where a local government subdivision unconnected to its airport proprietor function invests in an on-airport development. Assuming that no airport revenue is at risk (e.g., no airport revenue is used to finance development of nonaeronautical activity), and the airport proprietor unit receives fair market value (or its equivalent) and is not involved in the development other than as lessor, any additional revenues generated by the new enterprise could belong to the local government as non-airport revenue.[277]

b. Hypothetical Examples

(1) Proposal A: Nonaeronautical development on aeronautical airport property.[278] A county government in which an airport is located approaches an airport proprietor to lease property on the airport for creation of an emergency response training center run by a local technical college ("Proposal A"). The proposed site, Lot A, is airport land located on steep elevated terrain currently used for agriculture. Lot A was acquired primarily with local funds, with a small portion acquired with AIP grant funding. Lot A is designated as aeronautical property on the ALP.

Development of Lot A under Proposal A:

- Because the airport proprietor has accepted AIP funding, it is obligated to comply with federal requirements concerning use of airport property, revenue diversion, safety and airport planning, and future development of the airport.
- The airport proprietor's grant assurances (Grant Assurance 29) prohibit it from allowing any airport property to be used for nonaeronautical purposes unless approved by the FAA. Here, Lot A is designated by the ALP as aeronautical property, and the county and private developer proposals involve nonaeronautical activities. Accordingly, to proceed, the airport proprietor would need to seek FAA approval to modify its ALP. Whether formal FAA review and approval are needed would be a function of the applicability of Section 163.
- A small portion of the property also was acquired using AIP funds. Accordingly, the airport proprietor must also seek a formal release of the restrictions that limit use of this property to aeronautical use. Here, the FAA might release

[273] Telephone interview with Interview Participant No. 7. *See infra* App. B.

[274] *Id.*

[275] *Id.*

[276] Telephone interview with Interview Participant No. 1, Interview Participant No. 2, Interview Participant No. 6. *See infra* App.B.

[277] While this approach has not, to our knowledge, been tested at any airport, this scenario follows logically from property and revenue use rules. For instance, a commercial development on airport property that is financed by the airport proprietor, using airport revenue and operated by a private-sector entity through a management or concession agreement, would result in profits from such a business being treated as airport revenue. If, however, the same development was financed by a private entity, constructed on airport property leased to that entity by the airport proprietor and operated by the lessee, the lessee's net revenue would not be considered airport revenue. This distinction suggests that a separate unit of government itself—even if part of the same government entity that is the airport proprietor—could generate non-airport revenue from nonaeronautical airport property assuming that: (a) the proprietor unit responsible for the airport receives fair market value for the real estate; (b) the revenue is generated from nonaeronautical activities; (c) the activity is not on land acquired from the federal government or with federal grant funds; (d) the proprietor makes no investment in the enterprise with airport funds; and (e) the activity is not directly related to the sponsorship of the airport.

[278] Hypothetical example based on Airport Proprietor A. *See infra* App. C. This hypothetical did not consider the circumstances as set forth in Section 163(d) since Section 163 was new and largely untested.

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Lot A based on a determination that the property's terrain prohibits it from being used for aeronautical activities.

- A formal ALP update and/or release requires FAA approval and thus constitutes a federal action that triggers environmental evaluation of the proposed action pursuant to the National Environmental Policy Act (NEPA).[279] Because at least a portion of the property is encumbered by AIP grant obligations, the FAA would retain approval authority (even after enactment of Section 163 of the FAA Reauthorization Act of 2018).
- Furthermore, if the lease is longer than 50 years, FAA approval also would be required since the FAA considers leases of at least 50 years to be the equivalent of a disposal.
- The rental rate for lease must reflect fair market value of the property with improvements, since the proposed use is nonaeronautical. The airport proprietor may not lease the property to the county or technical college for free or at reduced rates, or in lieu of taxes.
- Revenue generated from lease of the property is considered airport revenue and must be used for airport purposes.

(2) Proposal B: Mixed aeronautical/nonaeronautical development on surplus property.[280] A private developer approaches an airport proprietor with an interest in developing a mixed aeronautical and nonaeronautical development on airport property under a 30-year lease ("Proposal B"). The proposed site is Lot B, which is land on the airport's edge containing the former corporate headquarters of a bankrupt airline. The property is held subject to the Surplus Property Act and designated as aeronautical property on the airport's ALP. The deed for the property requires approval of any change to the ALP.

Development of Lot B under Proposal B:

- Because the airport proprietor has accepted AIP funding, it is obligated to comply with federal requirements concerning use of airport property, revenue diversion, safety and airport planning, and future development of the airport.
- Lot B is designated as aeronautical property on the ALP. However, a portion of the proposed development will be commercial (i.e., nonaeronautical). Because the property is encumbered by Surplus Property Act deed restrictions, the FAA would retain authority to approve use of the property. FAA review and approval of the ALP amendment would be necessary if use of the property triggers the criteria set forth in Section 163 for FAA review and approval of an ALP change.[281]
- Lot B also is surplus property. Accordingly, the property carries a deed restriction that mandates its use for aeronautical purposes. The airport proprietor must seek a release of the surplus property deed restrictions. Whether the proprietor also needs FAA review and approval of the ALP change is a function of how the FAA interprets the criteria for review and approval in Section 163.
- The need for approval to update the ALP and the property's status as subject to the Surplus Property Act means that the airport proprietor must seek formal release from the deed conditions. Both of these activities constitute federal actions that trigger environmental review pursuant to NEPA.[282]
- Lease terms for the nonaeronautical portion of the property would require a fair market value rental rate, and all revenue collected by the airport proprietor would be considered airport revenue that must be used at or in support of the airport.
- The airport proprietor need not charge the tenant fair market value rent for aeronautical uses on the property, but must charge rates that are fair and reasonable. All revenue collected from the aeronautical lease would be considered airport revenue and must be spent on aeronautical activities at or in support of the airport.

2. Ground Access, Intermodal Projects

a. Key factors, Issues and Strategies

Notwithstanding the importance and benefit of establishing intermodal connections between airports and various modes of ground transportation, "the process of developing intermodal facilities at airports has lagged behind the capacity of airports to put passengers in the air."[283] Meanwhile, congestion and delays in ground access have become a major policy concern.[284] The historical lack of focus on ground access may be traced to federal policy priorities and, until relatively recently, a lack of sustained programs for federal funding.[285] In recent years, however, the perceived environmental and public health benefits of public transportation have resulted in a gradual shift in federal policies to allow, and even encourage, funding for intermodal facilities at airports.[286] With this policy support, airport proprietors increasingly are seeking better integration of intermodal and public transportation facilities.[287]

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[279] *See* FAA Order No. 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions § 202.b. (2006).

[280] Hypothetical example based on Airport Proprietor B. This hypothetical did not consider the circumstances as set forth in Section 163(d), since Section 163 was new and largely untested.

See infra App. C.

[281] *See* 49 U.S.C. § 47107(a) (16) (B) (2019).

[282] *See* FAA Order No. 5050.4B § 202.b.

[283] *See* Karaskiewicz, *supra* note 260, at 3 n.1.

[284] *See* Bannard, *supra* note 83, at 1.

[285] *See* Karaskiewicz, *supra* note 260, at 4-5 (discussing the legislative history of intermodal airport funding).

[286] *See id.*

[287] FAA guidance indicates that the term "ground access" generally refers to "rail lines, bus-ways, light rail lines, ferry terminals, transportation centers and connections to interstate or interstate-type highways or other major surface arterials that provide access to an airport." Bulletin 1, *supra* note 37; *See also* Notice of Policy Regarding the Eligibility of Airport Ground Access Transportation Projects for Funding Under the Passenger Facility Charge Program, 69 Fed. Reg. 6366 (Feb. 10, 2004) [hereinafter Ground Access Eligibility Guidance]

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Notwithstanding these policy shifts, restrictions on airport revenue use continue to make ground access project funding at airports a complicated endeavor. While both airport revenue and PFCs may be used in some instances for ground access projects, federal requirements on airport revenue use limit spending on these types of projects, particularly components that are located off-airport or serve off-airport functions. These limitations have led airport proprietors to seek innovative forms of funding, including through the private sector.

The FAA has provided more detailed guidance regarding ground access projects in *Bulletin 1: Best Practices—Surface Access to Airports*.[288] ACRP also recently published *ACRP Legal Research Digest 35: Legal Considerations in the Funding and Development of Intermodal Facilities at Airports* (2018), which covers the subject in considerable detail. Readers are referred to these resources. Discussion here is limited to noting that airport revenue use for ground access projects, just like airport revenue use for any other purposes, is limited to "capital and operating costs of the (A) airport; (B) local airport system; or (C) other local facilities owned or operated by the airport proprietor and substantially related to the air transportation of passengers or property."[289] In the case of ground access, the FAA has elaborated on this statutory requirement, stating that it is permissible for airport revenue to be used "for the capital or operating costs of those portions of an airport ground access project that can be considered an airport capital project or of that part of a local facility that is owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, including use by airport visitors and employees."[290]

Although PFC revenue is not considered airport revenue under the *Revenue Use Policy*, such revenue can play a significant role in airport ground access projects. The FAA has provided specific guidance with respect to use of PFCs to fund ground access projects.[291] Briefly, PFC revenue may be used for ground access projects, but it carries restrictions that are greater than those applicable to use of other airport revenue. PFC use for ground access projects must be approved by the FAA, be otherwise eligible for AIP funding, meet at least one of the PFC program objectives and be adequately justified pursuant to 49 U.S.C.§40117(d) (3).[292] Airport proprietors must demonstrate that the ground access project satisfies PFC qualifying objectives independently of any associated terminal or airside project.[293]

(1) Use of general airport revenue for ground access projects. Airport proprietors need not *necessarily* secure FAA approval to use airport revenue for ground transportation projects. However, use of airport revenue for ground access projects, like use of airport revenue for any other purposes, is limited to the operating and capital costs of the airport. The portion of ground access projects that occur on airport property and serve airport passengers and employees is relatively easy to justify as eligible for airport revenue use. The more difficult case often involves what is eligible for off-airport spending.

In practice, the FAA has shown willingness to be flexible in allowing use of airport revenue for airport-related portions of ground access projects. For example, when the FAA approved use of airport revenue funding for on-airport portions of a rail transit project that connected Minneapolis-St. Paul International Airport on a rail line to downtown Minneapolis and the Mall of America, the agency allowed airport revenue to fund 100 percent of the cost of two on-airport stations for exclusive use by airport passengers. It further allowed proportionate use of airport revenue for connecting right-of-way infrastructure on airport property even where less than a majority of that infrastructure was to be used by airport passengers.[294] However, for other segments whose use would include non-airport passengers, airport revenue could cover only the percentage of costs equal to the percentage of anticipated airport passengers using the facilities.[295]

Likewise, the FAA also has allowed for a relatively broad spectrum of project costs, as long as they are prorated according to the portion allocable to the airport component. When the FAA authorized use of San Francisco International Airport revenue to fund an extension of Bay Area Rapid Transit (BART) passenger rail service to the airport, the FAA noted the eligibility of the above-mentioned costs along with those for automatic train control equipment, system cable network, communica-

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(describing ground access as covering all technologies, including road, heavy or light rail, water, etc.). The FAA's use of the term "intermodal project" indicates that it refers to "connections on airport property between aeronautical and other transportation modes and systems." FAA Order No. 5190.6B, FAA Airport Compliance Manual, § 15.9.i (2009). While nothing in this terminology suggests that road projects are excluded from intermodal projects, the FAA often uses the term "intermodal project" in the context of rail and fixed guideway systems. *See*, *e.g.*, Ground Access Eligibility Guidance, 69 Fed. Reg. at 6369. Because of the substantial similarity between "ground access" and "intermodal facility," this digest generally defers to "ground access" when referring to projects and facilities covered by these terms.

[288] *See* Bulletin 1, *supra* note 37. *See also* FAA Order No. 5100.38D, Change 1, Airport Improvement Program Handbook app. P (2019).

[289] 49 U.S.C. §§ 47107, 47133(a) (2019).

[290] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7718-19 (Feb. 16, 1999).

[291] Ground Access Eligibility Policy, 69 Fed. Reg. at 6366. The FAA has proposed potential changes to PFC funding of ground access projects. *See* PFC Proposed Guidance, 81 Fed. Reg. 26,611 (May 3, 2016).

[292] *Id.*

[293] FAA Order No. 5500.1, Passenger Facility Charge Handbook § 4-6(e) (2001).

[294] *See* Bannard, *supra* note 83, at 2 (*citing* Letter from Nancy Nistler, Manager, Minneapolis Airports Dist. Office, FAA, to Nigel D. Finney, Deputy Exec. Dir., Metropolitan Airports Comm'n (Apr. 25, 2000)). The FAA's response indicates that in certain circumstances, small portions of off-airport sections of an airport intermodal facility may be funded with airport revenue if the project is (1) primarily located on airport property, and (2) the off-airport portion is an inseparable part of the system. *See* Karaskiewicz, *supra* note 260, at 27.

[295] *Id.*

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tions, infrastructure relocation, guideway systems installation and transition approaches, and fire, life and safety elements.[296]

(2) Value capture and P3s in delivering ground access projects. Use of airport property may be leveraged to fund ground access projects that might not otherwise be eligible for airport revenue use. One such strategy is through value capture, which allows airport proprietors to exchange the value of access to their passenger traffic for privately funded public infrastructure.[297] Private developers may be willing to fund such projects if they can monetize the rights to use and control airport property through activities such as co-located commercial development.

For surface access projects, any project that is located on airport property will be considered a capital cost of the airport and, therefore, a permissible use of airport revenue where it is designed and constructed exclusively for airport use and integrated into the airport terminal complex.[298] Incidental use of such facilities by non-airport passengers is permissible as long as the project is *designed* exclusively for airport users and "does not have a general transportation function."[299]

Other than airport capital projects, on- or off-airport "local facilities" may be funded with airport revenue where such projects or project components are (1) owned or operated[300] by the airport owner or operator, and (2) directly and substantially related to air transportation of passengers or property.[301] Subsidy of the local transit system is not considered 'operation' of the system by the airport." A project or project component is "directly and substantially related to air transportation of passengers" if it is both *intended* primarily for airport passenger use (including airport employees and airport visitors) and projected to be *used* primarily by airport passengers.[302]

While a project primarily must be intended for and used by airport passengers, airport revenue may be used for local facility projects that serve airport and non-airport passengers, provided: (1) "Airport funds cannot be used for portions of the project that are not necessary for the purpose of serving airport passengers," and (2) "[a]irport funds must be prorated to airport use, [i.e.], for portions of the project used by both airport and non-airport passengers, airport funds to be used for the project cannot exceed a portion of total project funding greater than the projected percentage of total use of the project by airport passengers."[303] For instance, where an off-airport transit station is built to accommodate airport passengers traveling to and from an airport and where the percentage of airport users compared to overall users of the station is expected to be 80 percent, an airport proprietor could use airport revenue to pay 80 percent of the costs of that station. It is important to recognize that if the local facility was not intended primarily for airport passenger use—i.e., was not designed and constructed for ground transportation to the airport—then no percentage of costs may be covered with airport revenue, even if airport passengers use it.

Costs that may be incorporated into capital projects or, on a prorated basis, eligible local facilities, include: maintenance facilities and equipment, general operating and maintenance expenses, planning and design, operating system equipment, fare collection equipment, rolling stock, shared-use agreements with existing rail carriers, and debt service on eligible project costs.

b. Hypothetical Example

(1) Airport passenger rail access P3.[304] A federally obligated airport proprietor, facing ground congestion issues, is considering how to use airport revenue to fund a proposed passenger rail connection between the airport and a nearby rail line that makes up part of the neighboring city's urban passenger rail system. The urban passenger rail is owned and operated by a separate public entity, but the new infrastructure and facilities on the airport are to be owned by the airport proprietor. As shown in Figure 4, the project would require construction of a new station at the airport terminal (Terminal Station) and another on-airport station serving new commercial development on nonaeronautical airport property (Commercial Station). The project also includes new rail trackage and associated infrastructure between the existing rail line and Commercial Station (Segment A) and between the Commercial Station and Terminal Station (Segment B).

Funding for Segment A:

- Because of its location, the portion of Segment A that is not on airport property cannot be considered an airport capital project. Furthermore, the off-airport portion of Segment A would not otherwise be eligible for airport revenue funding because the airport proprietor does not own or operate this segment. (Note that if it acquired this segment of right-of-way, the airport proprietor could potentially make it an eligible facility.[305]) The airport proprietor cannot merely subsidize the local transit system.

[296] Letter from Susan L. Kurland, Assoc. Adm'r for Airports, FAA, to John L. Martin, Dir. of Airports, S.F. Int'l Airport (Oct. 18, 1996). Note that a subsequent U.S. DOT Office of Inspector General audit concluded that some of these costs were not eligible for airport revenue funding because they were not on airport property or owned by the airport proprietor. *See* Office of Inspector Gen., U.S. Dep't of Transp., Report No. AV-1999-056, Use of Airport Revenue for the Bay Area Rapid Transit District Extension to the San Francisco International Airport (1999).

[297] *See* Karaskiewicz, *supra* note 260, at 9.

[298] Bulletin 1, *supra* note 37, at 4.

[299] *Id.* at 5.

[300] "Owned" means that "the airport owner or operator holds legal title to the facilities for which airport revenue is used," and "operated" means that "the local or state government or authority that owns or operates the airport is legally responsible for the operation of the ground access facility (e.g., transit system) and operates the facility with its own employees or through a management contract with a private firm or other public agency." *Id.* at 4.

[301] *Id.* at 4.

[302] *Id.*

[303] *Id.* at 4-5.

[304] Hypothetical example based on Airport Proprietor C. *See infra* App. C.

[305] In addition, the FAA has indicated that in certain circumstances, small portions of off-airport sections of an airport intermodal facility

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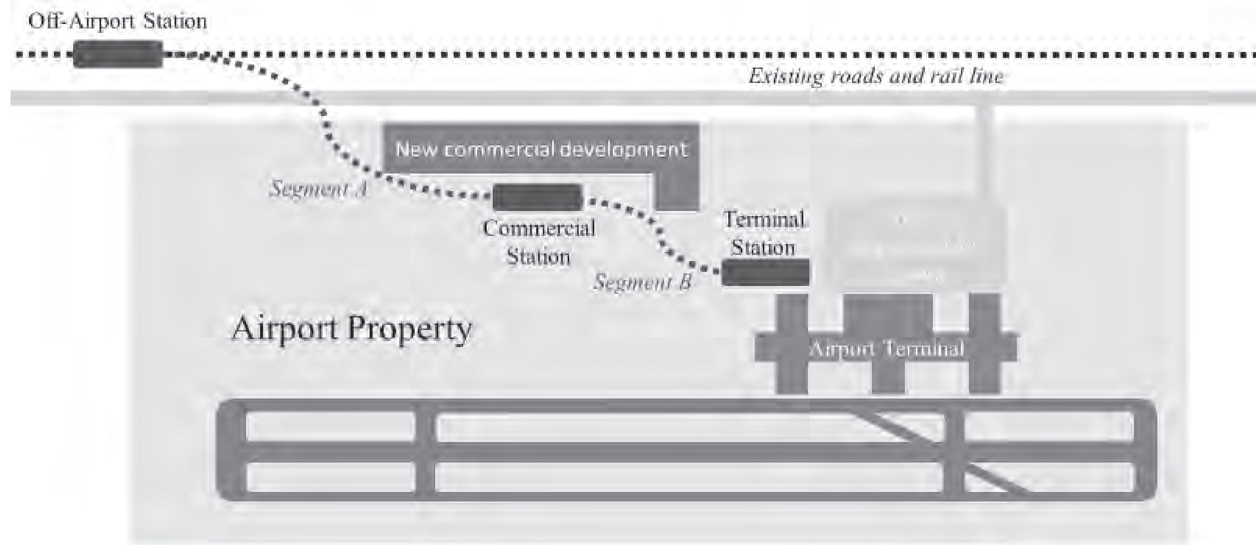

Figure 4: Hypothetical example showing proposed passenger rail connections.

- The portion of Segment A that is on airport property is owned by the airport proprietor and thus may be eligible for funding if it is intended for and primarily used by airport users (e.g., passengers and airport workers). However, because this trackage will serve the Commercial Station and Terminal Station, not all passengers using it necessarily will be airport users. Accordingly, airport revenue could be used only for a prorated amount of this segment based on the percentage of expected passengers who would be airport users.

Funding for Segment B

- Segment B, which would be owned by the airport proprietor on airport property and serve only people traveling to and from the airport terminal, would meet the standard for constituting a capital project and therefore could be fully funded using airport revenue.

Funding for the Off-Airport Station

- The Off-Airport Station is not on airport property and not owned or operated by the airport proprietor. Therefore, airport revenue could not be used to fund any costs associated with that station's construction.

Funding for the Commercial Station

- The Commercial Station, although on airport property, is intended to provide access to nonaeronautical commercial activities. Accordingly, it is not intended primarily for airport passenger use and could not be paid for with airport revenue.[306]

Funding for the Airport Terminal Station

- The Airport Terminal Station would be considered an airport capital project, since it would be located on the airport, designed and constructed exclusively for airport use, and integrated into the airport terminal complex. Accordingly, its entire costs could be covered using airport revenue.

3. Revenue and Property Use to Promote Airline Competition and Aeronautical Service Generally

a. Key Factors, Issues and Strategies

Airport proprietor interest in promoting more air service at airports is nothing new,[307] but the growing importance of airports to local economies and strong competition for lower-cost air travel have increased the perceived need to promote competitive air service at many airports. Moreover, federal obligations to promote activities directed toward competition[308] and airport

may be funded with airport revenue if the project is (1) located primarily on airport property, and (2) the off-airport portion is an inseparable part of the system. *See* KARASKIEWICZ, *supra* note 260, at 27.

[306] An argument could be made for airport revenue funding of a pro-rata share of Commercial Station costs if the airport proprietor could demonstrate use (e.g., re-boarding) of the station by airport passengers and the station construction was part of a larger project that primarily was intended for airport passenger use. *See* KARASKIEWICZ, *supra* note 260, at 27.

[307] Megan S. Ryerson, *Incentivize It and They Will Come? How Some of the Busiest U.S. Airports Are Building Air Service with Incentive Programs*, 82 J. AM. PLAN. ASS'N 303, 305-06 (2016).

[308] *See* GRANT ASSURANCES, *supra* note 45, §§ (C) (23), (C) (39).

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self-sustainability[309] effectively encourage airport proprietors to prioritize competitive access. At the same time, federal restrictions on airport revenue and property use limit the availability of these resources for promotional activities. Within the existing regulatory framework, airport revenue and airport property can play an important role in promoting growth and competition at airports, but regulatory restrictions confine how these resources are leveraged.

(1) Use of airport revenue for marketing and advertising. The legislative and regulatory tightening of restrictions on airport revenue in the 1990s resulted in refinement and clarification from the FAA on how airport revenue may be used for activities directed toward promoting competition at airports.[310] At the time, the FAA determined a critical distinction centers on the statutory prohibition on airport revenue use for "general economic development, marketing and promotional activities unrelated to airports or airport systems."[311] The FAA has interpreted this language to permit "the use of airport revenues for promotion of the airport," while prohibiting airport revenue spending on activities broader than airport promotion—e.g., general regional economic development.[312]

The *Revenue Use Policy* permits airport revenue to be used for "[t]he full costs of activities directed toward promoting competition at an airport, public and industry awareness of airport facilities and services, new air service and competition at the airport (other than direct subsidy of air carrier operations…), and salary and expenses of employees engaged in efforts to promote air service at the airport."[313] However, the *Revenue Use Policy* also establishes that airport proprietors cannot spend airport revenue on promotional expenditures that are unrelated to the airport or airport system.

Charitable giving also can be characterized as a form of promotion. Airport revenue cannot be spent on community or charity efforts unless such spending is directly and substantially related to airport operation.[314] One important indicium provided through examples in the *Revenue Use Policy* appears to be a relationship between the nature of the event and the airport by expressly highlighting the nexus to the airport in some way—e.g., through an invitation for an airport official to speak at a public event.[315] Another is the opportunity to expressly promote the airport to a relevant audience at an off-airport event.[316] While the relevant audience for general airport advertising or marketing could be expected to be potential airport customers, the relevant audience for community efforts also could include a broader local audience targeted to "enhance community acceptance." [317] Airport proprietors must recognize that while the FAA allows airport revenue to be used for promotional activities, such expenditures must be "reasonable in relation to the airport's specific financial situation."[318] There is no highlight in the determination of reasonableness—as in other similar situations, FAA makes such judgments based on the unique facts and circumstances.

The line between what constitutes airport promotion versus general economic development can be tricky. For instance, marketing and advertising costs for promoting an airport and its services are permitted, but only insofar as those efforts can be connected back to the airport in a tangible way. Spending is permitted where a local attraction or event, such as a sports game or music festival, clearly promotes air travel, but only if there is a clear and expressed link between those efforts and promotion of the airport and its services. Available guidance and investigations suggest that promoting an event merely because it is high-profile and, therefore, could attract additional air passengers by itself likely is not sufficient to justify use of airport revenue.[319] The onus for justifying a sufficient connection is on the airport proprietor.

One means of establishing such a link is holding promotional activities on airport premises. An example of permitted use from the *Revenue Use Policy* is spending for an on-airport promotional event aligned with a large sports event in a nearby city.[320] Another real-world example: Building on the popularity of the Austin, Texas, music scene, including major annual music/media festivals such as South by Southwest and Austin City Limits, the Austin-Bergstrom International Airport permissibly spends $50,000 per year on marketing efforts that include live music within the airport terminal.[321] Of course, such events still must be tied in some way to air travel or other services provided by the airport. Using airport revenue to stage an on-site event that was completely unrelated to the airport or air travel likely would not be permissible under federal airport revenue restrictions.[322] From a practical standpoint, many airports

[309] *See id.* § (C) (24).

[310] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7718 (Feb. 16, 1999); Policy and Procedures Concerning the Use of Airport Revenue, Supplemental Notice of Proposed Policy, 61 Fed. Reg. 66,735 (Dec. 18, 1996) [hereinafter FAA Supplemental Notice, Dec. 1996].

[311] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7703; FAA Supplemental Notice, Dec. 1996, 61 Fed. Reg. at 66,738.

[312] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7703.

[313] *Id.* at 7718.

[314] *Id.* Where a contribution to a community event is very small (e.g., $250), "the value of the benefit will not be questioned as long as there is a reasonable connection between the recipient organization and the benefit of local community acceptance to the airport." *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] *Id.* at 7703-04.

[319] *Cf. id.* at 7718 (discussing an on-airport event related to the Super Bowl); Office of Inspector Gen., U.S. Dep't of Transp., Report No. R4-FA-7-035, Diversion of Airport Revenue: Dade county Aviation Department (1997) (highlighting a number of prohibited or only partially allowed sponsorships of both small and large local entertainment events).

[320] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718.

[321] Airport Compliance Div., FAA, ACO-100, Compliance Review of the Austin-Bergstrom International Airport 2 (2014) [hereinafter AUS Compliance Review], https://www.faa.gov/airports/airport_compliance/media/austin-final-report.pdf.

[322] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7720.

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could (and do) justify hosting a range of activities and events, such as live music in airport terminals, on the basis that they serve a benefit to the traveling public or raise community awareness of the airport.[323] However, when it comes to on-airport activities or events that do not serve the traveling public, such as on-airport car shows and charity walks/runs, the FAA generally requires airport proprietors to seek means of cost recovery and fair market value for use of airport property.[324]

The lesson from Austin is not that any airport can spend $50,000 to promote a local cultural event. Instead, it is far more nuanced and fact-specific. Austin's music events generate considerable regional and national attention, attract air travelers, and contribute not only to the general economic health of the region, but specifically to economic activity at the airport. Such may not necessarily be the case at other airports or in other cities, at least to the extent that justifies airport revenue or property use for nonaeronautical activities or events. While the FAA has not been asked to opine on other special regional events, it seems likely that the agency would find it acceptable for airports to promote unique local events such as the Kentucky Derby (Louisville Muhammed Ali Airport), the Super Bowl (various airports), Jazz Fest (New Orleans Louis Armstrong Airport) or Art Basel Miami (Miami International Airport), which themselves generate considerable air travel. While there generally are no highlights in FAA policy, promotion of events *at* the airport are easier for a proprietor to justify than events and activities off-airport. Airport revenue could be used for promotion of off-airport events, but the connection between the event and promotion of the airport must be clear. For instance, a golf tournament put on by a group expressly affiliated with the airport may be an allowable airport revenue expense, but sponsorship of a golf tournament unattached to the airport in any way likely would not be allowed.[325] The *Revenue Use Policy* suggests that an airport proprietor would need to clearly indicate, through labeling or otherwise, the airport's involvement, participation or sponsorship in a manner at least proportionate to the financial contribution.[326]

Just as with promotional materials, spending on advertising must bear a connection to the airport. At a minimum, any advertising using airport revenue should display the airport's logo and promote the airport to a relevant audience. Returning to the example from Austin, the airport's promotional activities also include spending on print advertising promoting Austin as a national music event destination.[327] The FAA has found this to be acceptable expenditures of airport revenue.[328]

During the notice and comment period for the *Revenue Use Policy*, the FAA considered, but ultimately rejected, establishing a maximum amount that airport proprietors could spend on marketing and promotion expenses without attracting FAA scrutiny.[329] In explaining the final policy, the FAA instead stated it would expect expenditures of airport proprietors to comply with *Revenue Use Policy* restrictions. While it did not provide a limit on the amount of airport revenue that could be used for these purposes, the agency stated it could review spending on an *ad-hoc* basis to ensure it was reasonable in relation to the airport's specific financial situation.[330]

These examples illustrate that the federal policy objective is to avoid the temptation by local governments, particularly those that own airports, to divert airport revenue to promotion of local economic engines that have no direct relationship to the airport. Ultimately, this is the lens through which airport proprietors must analyze each marketing opportunity. One interview participant discussed struggling over an airport proprietor's sponsorship of a golf tournament but ultimately decided that the spending was justifiable given the sponsorship cost, size and prominence of the event, marketing opportunity for the airport, and ongoing commercial relationship between the airport and event sponsors.[331] Other events, even those similar in nature or substance, might not meet the standard when viewed through the same analytical lens. Either way, walking through the analysis is a good first step to flagging potential issues.

(2) Air service incentive programs and promoting airline competition. Another form of airport and air service promotion is financial incentives to airlines. While the *Revenue Use Policy* determined that direct financial subsidies to airlines are impermissible uses of airport revenue,[332] it also deems use of indirect incentives, such as fee waivers and discounts, to promote new service do not constitute revenue diversion as long as they

[323] *See* Lois S. Kramer & Mike Moore, Transp. Research Bd., Airport Coop. Research Program, ACRP Synthesis 57: Airport Responses to Special Events ch. 9 (2014).

[324] *See, e.g.,* E-mail from Richard Pur, Chi. Airports Dist. Office, FAA, to Tom Cleveland, Manager, DeKalb Taylor Mun. Airport (June 8, 2011, 2:47 PM), https://dekalbcountyonline.com/2011/06/city-of-dekalb-responds-to-faa-cornfest-letter/ (discussing the need for parking and sales taxes to cover the cost of a nonaeronautical festival on airport property); Megan Gaillard, Internal Audit Dep't, Collier Cty. Airport Auth., Report 2014-4: Drag Strip and Go Cart Track (2014), https://www.collierclerk.com/images/resource-library/pdf/internal-audit-pdf/2014-4%20CCAA%20Drag%20Strip%20and%20Go%20Cart%20Track.pdf (detailing letter from FAA requiring fair market value for use of an inactive airstrip for drag racing). Use of airport revenue is just one aspect of nonaeronautical events the FAA will review; for instance, use of an airport that will result in partial or full closure requires FAA approval. FAA Order No. 5190.6B, FAA Airport Compliance Manual § 7.21(b) (2009).

[325] *Compare Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718 (golf tournament sponsored by a "friends of the airport" committee permissible) *with* Office of Inspector Gen., U.S. Dep't of Transp., Report No. AV-1999-052, Use of airport revenue, Denver international airport 16 (1999) (local chamber of commerce golf tournament sponsorship not permissible with airport revenue).

[326] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7718.

[327] AUS Compliance Review, *supra* note 325, at 10.

[328] *Id.*

[329] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7703-04. Several airport proprietors submitted comments suggesting that the FAA adopt such a "safe harbor" provision. *Id.*

[330] *Id.* at 7704.

[331] Telephone interview with Interview Participant No. 1. *See infra* App. B.

[332] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7709-10.

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are not used in a discriminatory manner and are short-term.[333] The FAA allows direct subsidies of airline service only as long as payments come from non-airport revenue or a non-proprietor entity.[334]

To provide further guidance in support of the *Revenue Use Policy*, the FAA published its *Guidebook on Air Service Incentive Programs* to assist airports in understanding the legal parameters of permissible air service incentive programs (ASIPs). The *Guidebook* was republished in 2010, after which a number of ASIPs were created.[335] The ACRP also recently published *ACRP Legal Research Digest 37*: *Legal Issues Relating to Airports Promoting Competition* (2019), which comprehensively covers ASIPs.

ASIPs provide opportunities to use airport revenue for promoting air service without directly, and impermissibly, subsidizing airlines. However, one interview participant noted that it believed the incentive/subsidy distinction made it difficult to assemble a sufficiently attractive monetary incentive, especially where airport charges and fees were relatively modest compared to other costs of operating at the airport.[336] As an example, under the rationale provided in the *Revenue Use Policy*, an airport proprietor could in most cases not pay for construction, equipment or other moving costs associated with introducing new service, because such costs would not normally be imposed on other airlines as a fee or charge.[337]

Airport proprietors that are party to a residual airport use agreement with signatory air carriers may face particular challenges establishing an ASIP, since in such a case it may not cover the cost of providing incentives with charges levied on other aeronautical users without their express permission.[338] An airport proprietor needs to identify revenues outside the residual agreement to cover the cost of waived fees. In contrast, airport proprietors that are party to a compensatory or hybrid airport use agreement with signatory air carriers may have additional flexibility to fund incentive programs. One interviewed participant described how, during their renegotiation of their compensatory agreement with airlines, they decided to incorporate incentives to promote increased air service at the airport. This was accomplished by including a revenue-sharing provision that was triggered by demonstrated increase in service by any signatory airline. Because this provision was part of the use and lease agreement and not an air service incentive program, the revenue use restrictions covering ASIPs did not apply. As such, there was no limit on duration of the incentive. Several years later, the airport has seen significant growth, attributed at least in part to this innovative incentive program.[339]

One interview participant expressed regret that there was not more flexibility in the FAA's regulation of ASIPs.[340] The requirements can be especially challenging, and tricky, for "destination" airports that rely on tourism. For airports that have friendly relationships with local economic development proponents, one alternative is to find a local partner, such as a tourism board, that is willing to devote its own non-airport revenue funding toward destination advertising, as one interview participant did.[341]

(3) Use of airport property to promote activities directed toward competition. Airport property also may be used to promote activities directed toward airline competition at airports, particularly through development of additional facilities. Use of airport property to develop additional gates and facilities to enable more air carrier service is one example of using airport property to promote competition. [342]

Decisions regarding use or expansion of airport terminal space and similar aeronautical facilities can create tension among airlines serving an airport. An example is when an incumbent airline objects to allocation of space for a new entrant. In this case, incumbent carriers may argue that airport revenue or property is being impermissibly used to unjustly and discriminately benefit particular airlines, among other grievances.

One interview participant described such a situation in which an incumbent carrier objected to the airport proprietor's plans for a private entity to develop and operate ULCC terminal on airport property.[343] The incumbent airline believed that the airport proprietor's conduct violated its federal obligations, including revenue use requirements. The airport proprietor opined that an additional terminal was necessary based on a number of factors, including what it asserted was extensive documentation of existing gate constraints and actual and projected passenger growth.[344] To address the concern that it was incentivizing ULCCs at the expense of legacy carriers, the air-

[333] *Id.* at 7709.

[334] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7710, 7718.

[335] *See* Ryerson, *supra* note 307, at 307.

[336] Telephone interview with Interview Participant No. 8. *See infra* App. B.

[337] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7709 (discussing rationale for permitting indirect subsidies and prohibiting direct subsidies).

[338] ASIP Guidebook, *supra* note 222, at 23.

[339] Telephone interview with Interview Participant No. 5. *See infra* App. B.

[340] Telephone interview with Interview Participant No. 7. *See infra* App. B.

[341] *Id.*

[342] In some cases, development of additional gate and terminal space may be required under an airport proprietor's Grant Assurance obligation to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination." Grant Assurances, *supra* note 45, § (C) (22). A detailed discussion of this requirement is beyond the scope of this report. *See, e.g.,* Letter from Carol Key, Manager, Seattle Airports Dist. Office, FAA, to David Waggoner, Airport Dir., Paine Field, Snohomish Cty. (Nov. 15, 2005) (on file with author) (concerning obligation of the proprietor of Paine Field in Everett, Washington, to make space available for a commercial carrier even though the airport did not have any airline terminal facilities).

[343] Telephone interview with Interview Participant No. 2. *See infra* App. B.

[344] *Id.*

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port proprietor expressly provided in the ground lease for the new terminal that any carrier could request use of the new facility.[345] The airport proprietor also notified the FAA ahead of time about its plans and offered the agency an opportunity to comment. Later in the process, the airport proprietor relied on these measures to convince local officials of the propriety of its decision to expand.[346]

b. Hypothetical Examples

(1) Promoting competition through ASIPs and gate/terminal development.[347] A federally obligated airport proprietor seeks to promote targeted growth in air travel and competitive air service at its airport, which is facing rapid passenger growth and constrained gate access. To do so, the airport proprietor (a) establishes an ASIP and (b) engages with a developer to build and operate a new terminal for air service. The features of both activities are provided below.

The ASIP provides for waiver of all applicable facility and landing fees for (i) any new entrant carrier (but not incumbent carriers) that initiates and maintains a threshold amount of service to any destination for at least 12 months, and (ii) any new entrant or incumbent carrier that initiates and maintains a threshold amount of service to three specified unserved destinations for at least 24 consecutive months. In addition, the ASIP provides that the airport proprietor will offer all qualifying new service or new routes $30,000 in advertising and marketing costs to promote the new service for the duration of the eligible incentive period. The ASIP provides that any airline defaulting on new service or new routes before the applicable incentive program ends must reimburse the airport proprietor for incentives received.

- The ASIP's promotions for new entrant and new route service are permitted under federal law. An airport proprietor may exclude incumbent carriers from incentive programs for new entrants at the airport for up to one year. Incentive programs for new service may not exceed two years. New route service incentive programs may be limited to defined unserved routes.
- The waiver of fees, including applicable facility and landing fees, is a permissible incentive.[348] The airport proprietor may not recoup these fees from other carriers.[349]
- The ASIP marketing incentives are permitted under federal law. Airport revenue may be used to advertise the new service provided that the airport is featured prominently in the advertising. The air carriers may be mentioned in any advertising as well.[350] The FAA advises that it is preferable for an airport proprietor to pay marketing and advertising costs directly, rather than paying the airline to cover such costs to avoid the appearance or risk of a direct subsidy to the carrier.[351]

(2) Terminal development. The airport proprietor enters a 25-year ground lease (with a possible 10-year extension) with a private developer to build and operate a new terminal on unused aeronautical property at the airport. The terminal will feature low-cost facilities catering to ultra-low-cost carriers, although any airline may seek to use gates at the new terminal. Terms of the ground lease provide that the private operator will build the terminal, assume rights and responsibilities for its operation, and pay the airport proprietor an annual fee in return for being granted authority to enter into subleases with aeronautical and nonaeronautical subtenants (including airlines) for use of the new terminal. To incentivize the private operator to assume risk of the project, the airport proprietor guarantees the private operator the right to terminate the agreement and recover its capital investment if passenger enplanements fall below a certain threshold for any two consecutive 12 periods within the first five years of operation. On expiration of the lease term or earlier termination, the facility and improvements will revert to the airport proprietor.

- The lease of unused aeronautical property for construction and operation of a new terminal by a private developer is a permissible use of aeronautical property.
- The lease duration (25 years, with a possible 10-year extension) is short enough to not constitute disposal of airport property requiring FAA approval.
- The airport proprietor can use airport revenue to cover payments to the private operator for cost recovery of its capital investment, provided the private operator properly terminates because of insufficient passenger enplanements within the first five years. This payment would constitute compensation for the improved facilities provided by the private developer, which would vest to the airport proprietor and be considered an eligible airport capital cost. While the new terminal facilities will be designed to appeal to a particular type of air carrier (e.g., ultra-low-cost), there is no prohibition on use of airport revenue to build facilities that are more attractive to one business model than another, as long as any carrier could be allowed to use such facilities.[352]

[345] *Id.*

[346] *Id.*

[347] Entire hypothetical based on Airport Proprietor D. *See infra* App. C.

[348] *See* ASIP Guidebook, *supra* note 222, at 19.

[349] *Id.*

[350] *Id.* at 17.

[351] *Id.* at 20.

[352] While other federal obligations of airports—such as the obligation to provide airport access without unjust discrimination, as highlighted in Grant Assurance 22, and the prohibition on granting of exclusive rights, as outlined in Grant Assurance 23—generally are beyond the scope of this digest, reference is included here to illustrate how these obligations can intersect with airport revenue and property use. *See* Grant Assurances, *supra* note 45, §§ (C) (22), (C) (23).

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4. Privatization and P3s[353]

a. Key Factors and Specific Issues

Although it has attracted the attention of policymakers for some time, and despite legislation intended to facilitate experimentation in this realm, full airport privatization has yet to become an attractive option for U.S. airports. Recent changes to the FAA's airport privatization program are intended to generate more interest among airport proprietors and investors.

While full privatization has not been successful in the United States, the private sector has a robust and longstanding presence in the U.S. airport market. There are a number of innovative examples of private sector involvement in development and operation of airports through subcontracts, management contracts, joint development agreements and many other forms of cooperation.

(1) Full privatization. Full airport privatization has not lived up to expectations of federal policymakers. Virtually all commercial service airports are publicly owned and operated, a legacy of the manner in which the aviation industry has developed in the United States. The federal Airport Privatization Pilot Program, first established in 1997, was intended to remove some of the regulatory barriers, particularly those restricting the use of airport revenue, to provide more incentive for airport proprietors to sell their airports.[354]

Only two airports have been privatized under the APPP, and one of those reverted to public control.[355] Several factors have been suggested as causes of the lack of interest in full privatization, and of the APPP specifically, including higher financing costs for private versus public debt, lack of state and local property tax exemptions, and high costs of transitioning from public to private.[356] Moreover, many airports interested in privatization are seeking to leverage the economic potential of their airports to cover other local financial shortfalls, such as outstanding debt service or underfunded pension plans. [357] Prospective public purchasers also expected a portion of revenue generated from the operation of a purchased airport to be profit.

However, limitations on airport revenue use remained a possibility under the APPP. An airport proprietor's revenue from privatization still would be considered airport revenue unless at least 65 percent of tenant airlines agreed to waive the requirement.[358] Furthermore, under the APPP, airport proprietors still needed to repay the federal government for funding and property received, unless the Secretary of Transportation decided to waive this requirement.[359] Similarly, the Secretary had discretion to waive (or not waive) federal airport revenue restrictions regarding revenue generated by the airport's private purchaser/operator.[360]

The FAA Reauthorization Act of 2018 amended the APPP, addressing some of these challenges in an effort to make the program potentially more enticing for airport proprietors to utilize. The Secretary no longer has discretion to require an airport proprietor to repay the federal government for federal funding and property received and, likewise, does not have discretion to designate the private purchaser/operator's revenue to be subject to federal airport revenue restrictions.[361] The changes also allow for plans for partial privatization[362] of an airport to qualify under the program, now known as the Airport Investment Partnership Program. However, airport proprietors of primary airports still must consult and obtain at least 65 percent approval from tenant airlines for their revenue generated from lease of the airport to be free from federal restrictions on airport revenue.[363]

It is yet to be seen whether changes to the AIPP will generate significant new interest in participation. Certainly, the removal of the Secretary's discretionary approval regarding airport revenue designations should help add some certainty for airport proprietors and prospective private purchasers whose interest in privatization is generation of non-airport revenue. However, even with further loosening of airport revenue restrictions under the AIPP, full privatization may not be the silver bullet for an airport proprietor's problems. Previous research conducted by the ACRP and federal government has indicated that for many airport proprietors and private investors, the extra layer of bureaucracy included in the APPP was too burdensome.[364] Other airport proprietors prefer to retain more control over their airports for political reasons.[365]

Continued reticence regarding full privatization was reflected in the interviews conducted with airport proprietors. When asked about the recent changes to federal law generally and airport privatization in particular, some airport proprietors generally were hesitant to say that such changes immediately would impact their outlook on privatization, at least without more guidance from the FAA on the meaning and interpreta-

[353] This digest is not intended to provide a comprehensive evaluation of privatization or public-private partnerships. For a more detailed analysis of those issues, see William J. Estes, Transp. research Bd., Airport Coop. Research Program, Permitted Airport Involvement in Economic Development Efforts (forthcoming); Sheri Ernico et al., Transp. Research Bd., Airport Coop. Research Program, ACRP Report 66: Considering and Evaluating Airport Privatization (2012).

[354] *See* U.S. Gov't Accountability Office, GAO-15-42, Airport Privatization: Limited Interest Despite FAA's Pilot Program 10 (2014).

[355] *Id.* at 14.

[356] *Id.* at 7-8, 21-22.

[357] Sheri Ernico et al., *supra* note 353, at 51.

[358] *See id.* at 15 tbl.2.2.

[359] *Id.* at 47.

[360] *Id.*

[361] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §160, 132 Stat. 3186, 3220 (2018) (amending 49 U.S.C. § 47134 (2019)).

[362] Partial privatization contemplated under the new statutory provisions would require that the airport proprietor be an equity partner with the private sector. Many state constitutions do not allow a public entity to hold an equity interest in a private-sector entity, so this revision may have limited applicability.

[363] *Id.*

[364] Sheri Ernico et al., *supra* note 353, at 56; GAO-15-42, *supra* note 354, at 23, 42.

[365] Sheri Ernico et al., *supra* note 353, at 9.

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tion of such changes.[366] Another interview participant believed that neither the program nor the changes addressed the real obstacle, which was political reticence to cede control of airports to a private entity, because many local governments perceive the airport to be their "crown jewel."[367] On the other hand, one interview participant said that the changes to the AIPP had convinced their airport proprietor to consider participation, but only now that partial privatization was available.[368]

These results reinforce the conclusions reached from secondary research, which suggest that airport proprietors need to consider full privatization with eyes wide open. This means conducting adequate due diligence and setting clear goals for privatization, establishing a transparent process for privatization, and including stakeholders in the process.[369]

(2) Partial privatization: Public-private partnerships and joint development. A key lesson learned over the past number of years is that airport proprietors may not need to pursue full privatization to receive its benefits. As one recent federal report stated, "[p]ublic-sector airport owners have found ways to raise private-sector investment in their airports and attract expertise without ceding control of their airports."[370] Indeed, many airports are turning to various forms of P3 models new and old—from management contracts to developer-financed and -operated facilities and long-term leases of properties—in an effort to reduce costs and promote airport development.[371] This is in addition to the wide swath of more modest or traditional forms of partial privatization, such as service contracts and outsourcing for various airport duties and functions, as well as private tenancy of aeronautical and nonaeronautical businesses on airports. Critically, these partial privatization strategies depend on the fact that revenue generated by private entities is *not* considered airport revenue (although the airport proprietor still must receive fair market value for nonaeronautical airport use).

While there are many definitions, P3s in their broadest sense constitute a contractual relationship between public and private entities that allocates responsibility for service delivery, capital investment and risk assumption.[372] In the context of airport development, the term "P3" often specifically refers to projects through which "services or investments that traditionally have been provided by an airport proprietor are instead provided by a private-sector entity."[373] P3s are attractive because of their potential to leverage the respective strengths of the public and private sectors, such as expertise, flexibility and access to financing.[374] Importantly, P3s also can help reduce financial risk for public entities by allowing private entities to assume additional risk (and reward) for airport development. As with full privatization, however, P3 implementation success should not be taken for granted and instead should result from clear goals, careful planning and diligent execution.[375]

In the context of restrictions on airport revenue use, P3s provide promising opportunities to leverage airport resources—particularly airport property and access to air passengers—to improve facilities, services and airport revenue. Airport proprietors also can rely on private partners to tap financing and assume some or all of the financial risk involved in airport development projects. However, successful P3 arrangements require an understanding of respective interests and intended goals to ensure interests are aligned contractually and operationally. One interview participant noted how important it was to bring in experienced in-house and outside counsel early in projects to avoid missing important legal implications that can stall or block deals.[376]

One critically important legal distinction in the context of P3s is the longstanding differentiation between revenue generated by airport proprietors, which is considered airport revenue and subject to requirements to reinvest in the airport, and revenue generated by private airport tenants, which is not subject to federal airport revenue restrictions.[377] This differentiation makes it possible to attract private participation and investment, since potential profits derived from such an investment are not restricted and limited as they would be for an airport proprietor.

Privatization of service delivery already is standard procedure at many airports, particularly with respect to services such as cleaning, maintenance, bus operations, etc.[378] These are performed in service to the airport, and airport revenue may be used to pay for them as an airport proprietor would pay if it conducted these services itself. Management contracts—in which a private party manages one or more existing airport facilities or, in some cases, the entire airport—similarly may be paid with airport revenue, as would any other airport operating cost, assuming the airport proprietor is paying a reasonable price for services offered.[379]

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[366] Telephone interview with Interview Participant No. 4, Interview Participant No.7. *See infra* App. B.

[367] Telephone interview with Interview Participant No. 6. *See infra* App. B.

[368] Telephone interview with Interview Participant No. 5. *See infra* App. B.

[369] *See* GAO-15-42, *supra* note 354, at 38-40.

[370] *Id.* at 28.

[371] *See* GAO-15-42, *supra* note 354, at 4; Sheri Ernico et al., *supra* note 353, at 11 fig.2.1.

[372] Peter J. Kirsch, Stephen H. Kaplan & Adam M. Giuliano, Kaplan Kirsch & Rockwell LLP, P3 Airport Projects: An Introduction for Airport Lawyers 1 (2017) [hereinafter P3 Introduction], https://www.kaplankirsch.com/portalresource/P3_Airport_Projects_An_Introduction_for_Airport_Lawyers.pdf.

[373] *Id.*

[374] *Id.* at 1-2.

[375] *See id.* at 2.

[376] Telephone interview with Interview Participant No. 6. *See infra* App. B.

[377] FAA Order No. 5190.6B, FAA Airport Compliance manual § 15.6.a (2009); *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7716 (Feb. 16, 1999). This excludes private parties who take full control of an airport and assume the role of airport proprietor (e.g. full privatization). Other federal obligations also apply to private entities doing business at the airport.

[378] P3 Introduction, *supra* note 377, at 3.

[379] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7700; *Delbert Johnson d/b/a Two Dogs* Aviation v. Goldsboro-Wayne Airport Auth.,

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Likewise, airports traditionally have availed themselves of privatized project delivery mechanisms, most commonly design-build or design-bid-build contracts.[380] Increasingly, airport proprietors also are using the public/private airport revenue distinction in combined service/project delivery projects, providing more opportunities to leverage private-sector efficiencies while allowing airport proprietors contractual control over various elements of the project. Airport project development, operation and/or management through a special-purpose business entity formed by a group of airlines, known as an airline consortium, is one longstanding form of private development on public airports, but increasingly non-airline developers or consortia also are participating in such endeavors. [381] Once again, it is permissible for an airport proprietor to use airport revenue to pay private entities for delivering, maintaining and operating airport facilities, as long as these are considered the airport's capital or operating costs and of reasonable amounts.[382]

For those airport proprietors who are less risk-averse and more interested in pursuing financial self-sufficiency, there are further opportunities to become more actively involved in airport development beyond "dirt sales" of airport property, which offer low risk but also low reward. Of course, proprietors always must be sensitive to ensure their financial investments are prudent and reasonable. For example, one interview participant explained how in one instance, an airport proprietor offered to finance development of a renewable-energy generation project on the airport. Not only was the airport proprietor able to negotiate reduced energy rates—which reduced airport operating costs—but, more significant, it was able to loan capital to the developers at a rate of return far higher than what that money otherwise would earn for the airport proprietor, using the on-airport infrastructure as collateral.[383] And because the capital was going toward financing a project covering operating costs of the airport, the transaction did not violate airport revenue restrictions. In a similar example, an airport proprietor put airport money to work by purchasing and leasing equipment for operation of a new airport facilities development, in doing so earning a far higher rate of return on equipment rental than the average cost of capital.[384] The airport proprietor arranged this transaction as an alternative to jointly developing the project with the private developer, which it was prevented from doing based on state and federal legal restrictions.[385]

The examples above demonstrate that airport proprietors with sufficient cash flow can deploy capital in ways that offer far higher rates of return, while maintaining a comfortable risk level for the airport proprietor. Indeed, one interview participant suggested that airports can do a more effective job at identifying projects or elements of projects that are well within the airport proprietor's comfort zone, allowing the proprietor to accept more risk in those areas while relying on private partners to shoulder the risks of development that are outside the proprietor's scope of responsibility or expertise.[386]

Another critical element of federal airport and property legal framework is the FAA's acceptance of facilities and other property improvements in lieu of monetary exchange for the fair market value of nonaeronautical property (see also discussion above concerning ground access projects, value capture and P3s).[387] This interpretation has massive implications for P3s, as it provides private parties an opportunity to bundle profit-making commercial facilities and activities with delivery of co-constructed facilities and infrastructure that can be used to repay airport proprietors for use of airport property, as required under federal law. Airport proprietors and local governments see the benefit in this arrangement through privately subsidized construction of useful facilities and infrastructure requiring no or reduced capital contribution from the airport proprietor. This opportunity expresses itself most fully in P3s involving development rights in exchange for infrastructure investment, although it also may play a role in various forms of P3 design-build-finance-operate-maintain arrangements.

This avenue has been used successfully to spur development and encourage private funding of public transportation facilities that serve airports. One such project was the Port of Portland's development of an extension of the existing Metropolitan Area Express (MAX) light rail system to the Portland International Airport, which the Port owns.[388] There, the Port entered a rent-

FAA Docket No. 16-08-11, Determination of the Director of Airport Compliance and Field Operations 48-49 (Oct. 9, 2009). For a discussion of scenarios in which airport proprietors may use airport revenue to pay another public entity for service rendered, see the following subsection.

[380] *See* P3 Introduction, *supra* note 372, at 4.

[381] *See* Sheri Ernico et al., *supra* note 353, at 29, 45. Airline consortia are a specific and particular form of airport privatization, a discussion of which is beyond the scope of this digest. For more general information on airline consortia, see Paul B. Demkovich et al., Transp. Research Bd., Airport Coop. Research Program, Airport Cooperative Research Program Report 111: A Guidebook for Airport-Airline Consortia (2014).

[382] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7700.

[383] Telephone interview with Interview Participant No. 6. *See infra* App. B.

[384] *Id.* Readers should note that states generally have laws and regulations that limit the type and amount of risk that local governments can assume when investing public funds. In addition, under Grant Assurance 5, Preserving Rights and Powers, an airport proprietor cannot encumber airport property or cede its ability to be an airport unless the subject property is nonaeronautical property bought with proprietor funds.

[385] *Id.*

[386] *Id.*

[387] Boca Airport, Inc. v. Boca Raton Airport Auth., FAA Docket No. 16-00-10, Determination of the Director of Airport Safety and Standards 39 (Apr. 26, 2001) (airport proprietors "may consider the value of assets that will eventually become lease fee improvements (improvements upon which rent will be assessed) in lieu of rent"); Wilson Air Center, LLC v. Memphis and Shelby Cty. Airport Auth., FAA Docket No. 16-99-01, Determination of the Director of Airport Safety and Standards 28 (Aug. 2, 2000) ("[T]he sponsor may accept capital investments in lieu of rent, once it has determined that such improvements benefit the sponsor and aeronautical users of the airport.").

[388] Recall from the previous discussion regarding ground access projects that the FAA permits an airport proprietor to make airport

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free, long-term (85-year) lease with a private developer for a 120-acre portion of on-airport property that was designated for nonaeronautical development. In exchange, the developer's parent company agreed to fund the construction of a 1.4-mile segment of a light rail line across the leased area, including two stations, continuing on to the airport, thereby connecting it with the existing MAX light trail system.[389] Once completed, the light rail line was owned by the Port, but leased at no cost to TriMet, the public owner and operator of the MAX light rail system. The arrangement resulted in a deal in which the Port received a light rail line valued at above the fair market value of the land leased to the private development ($23 million vs. $14 million), thereby avoiding any issues regarding compliance with the FAA's *Revenue Use Policy*.[390] Furthermore, revenue the private developer received from its commercial development of the leased area was not considered airport revenue.[391]

As discussed above regarding full privatization, there still are many limitations on use of airport revenue in the P3 arena. One interview participant noted the limitations that airport revenue use restrictions placed on airport proprietors that prevented them from partnering with public-private consortiums to develop airport projects outside the U.S.[392] While other private and parastatal international airport proprietors have been able to use their expertise and capacity in participating in airport development projects globally, this is largely off-limits for U.S. airport proprietors. Nevertheless, there still are many good opportunities for domestics P3 projects that allow airport proprietors to leverage their strengths.

b. Hypothetical Examples

(1) Airport passenger rail access P3. [393] Taking the same facts in the hypothetical example for ground access described earlier, the airport proprietor is considering partnering with a private organization to develop intermodal rail access between its airport and a nearby passenger rail service to provide access to the neighboring metropolitan area. The airport proprietor will seek to enter into a 70-year lease with the private developer for 100 acres of on-airport, nonaeronautical property. The lease allows the private entity to develop the property for commercial use consistent with other airport development. Under the lease, compensation to the airport proprietor is not monetary, but rather the private developer's construction of the rail connection, whose value is in excess of the fair market value of the lease. On completion, the improved facilities will be owned by the airport proprietor.

- The airport proprietor is permitted to lease the property rent-free in exchange for facilities valued at or above fair market value of the leased property.
- The income earned by the private developer for development of the leased nonaeronautical property is not considered airport revenue.

(2) DBFOM terminal P3.[394] An airport proprietor and a private developer enter a design-build-finance-operate-maintain (DBFOM) arrangement under which the airport proprietor leases a portion of its airport property under a long-term (35-year) lease in return for fair market value rent of the property and a percentage of the private developer's gross revenue. Under the arrangement, the private operator is responsible for negotiating with commercial service airlines for use of the new terminal and granted exclusive concession rights for passenger-related amenities, as well as an option for terminal expansion. The airport proprietor retains oversight of the terminal design and received reimbursement for additional outside operating costs (e.g., police, firefighters, etc.).

- The airport proprietor is permitted to lease the property for terminal development.
- The lease rent and percentage of gross income provided to the airport proprietor under the lease are considered airport revenue and subject to revenue diversion restrictions.
- The income earned by the private developer from operation of the terminal is not considered airport revenue.[395]

5. Intergovernmental Cost Sharing, Payment for Services and Tax Revenue Sharing

a. Key Factors and Specific Issues

For the vast majority of airports that are owned or have close relationships with local governments, the allocation of revenue derived from airports always has been a fraught issue, and the line between permissible payments to cover costs of the airport and impermissible revenue diversion sometimes can be tricky. Understanding why and how revenue use restrictions also apply to these relationships is critical, although not always easy.

(1) Use of airport revenue to pay for local governmental services and programs. In the past few years, there have been chal-

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property available at less than fair market value for ground access projects such as transit rights of way and facilities as long as (1) the transit system is publicly owned and operated (or operated by contract on behalf of the public owner), and (2) the facilities are directly and substantially related to air transportation of passengers or property. *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7721.

[389] U.S. Gov't Accountability Office, GAO-05-727, Intermodal Transportation: Potential strategies would redefine Federal Role in Developing Airport Intermodal Capabilities 13 (2005); Letter from John Brockley, Dir. of Aviation, Port of Portland, to Susan L. Kurland, Assoc. Administrator for Airports, FAA, and Lowell Johnson, Manager, Airports Div., FAA, at 7 (Dec. 16, 1998) (on file with author).

[390] GAO-05-727, *supra* note 389, at 13.

[391] *Id.*

[392] Telephone interview with Interview Participant No. 6. *See infra* App. B.

[393] Hypothetical example based on Airport Proprietor C. *See infra* App. C.

[394] Hypothetical example based on Airport Proprietor E. *See infra* App. C.

[395] Other federal obligations that are beyond the scope of this digest, including nondiscrimination and airport concession disadvantaged business enterprise requirements, remain in effect.

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lenges to the manner in which utility and public service costs have been allocated between airport proprietors and local governments.[396] Central to these issues is whether airport proprietors are diverting airport revenue by overpaying for services shared with or offered by host or neighboring governmental bodies, which at times ultimately can be controlled by the political body that oversees the airport.

Pursuant to federal law, airport revenue may be used to cover operating costs of the airport.[397] This includes "reimbursements to a state or local agency for the costs of services actually received and documented, subject to terms of the *Revenue Use Policy*."[398] One such example includes air travel costs of local government officials conducting business on the airport's behalf.[399] It also includes off-airport expenses incurred by a controlling local governmental body charged to the airport using cost-sharing formulas "calculated consistently for the airport and other comparable units or cost centers of government."[400] Operating costs attributed to an airport calculated according to a cost-sharing methodology that is "reasonable, transparent and not unjustly discriminatory" may be paid with airport revenue.[401] Critically, an airport cannot be charged for the same services differently from other units of government or ratepayers.

More broadly, the FAA permits indirect costs of airport proprietor services to be covered by airport revenue only if they are part of a cost allocation plan in which those services are attributed to costs that would otherwise be included as a cost or expense for which airport revenue could be used.[402] Indirect costs also may include a proportionate share of central service costs (e.g., accounting, budgeting, data processing, procurement, legal, disbursing and payroll services), although such costs will come under higher FAA scrutiny to ensure revenue is not being diverted.[403] Indirect costs must be billed similarly to other comparable units of the airport proprietor and may not be billed directly to the airport proprietor.[404] Proper documentation is required to show these uses do not constitute revenue diversion.[405]

Impact fees assessed by a governmental body that are used to cover the costs of actions necessary for airport development, such as environmental mitigation measures, are permissible, but all costs covered must actually be attributable to airport needs and properly documented.[406]

In one recent example, the FAA determined that the Port of Portland, owner of Portland International Airport (PDX), did not divert airport revenue by paying the City of Portland to cover the costs of off-airport stormwater and superfund programs that were included as part of the City's water bill charges to the port. PDX airline tenants filed a complaint with the FAA, arguing that since the airport had its own stormwater management system and the off-airport programs had nothing to do with the airport, use of airport revenue to pay for them violated federal law and the *Revenue Use Policy*. The FAA determined that the costs were allocated by a reasonable, transparent and not unjustly discriminatory methodology.[407]

In contrast, a 2014 audit conducted by the U.S. DOT OIG found that Los Angeles World Airports (LAWA), proprietor of Los Angeles International Airport (LAX), failed to adequately document spending nearly $8 million in airport revenue over six years for services ostensibly provided to LAX by the Los Angeles Police Department.[408] In some cases, the OIG and FAA found that actual revenue diversion occurred, as when police assigned to LAX provided security at off-airport special events without credit or reimbursement to LAWA, and when the city charged LAWA for a K-9 bomb squad unit that was deployed for a number of off-airport events unrelated to the airport.[409]

Some interview participants flagged their relationship with local governments as a consistent challenge in the context of airport revenue use.[410] One interview participant noted some reluctance to share airport revenue details with local municipal political officials, even though those officials had no direct con-

[396] *See* Air Transp. Ass'n of Am., Inc. et al. v. Port of Portland, Oregon, FAA Docket No. 16-16-04, Final Agency Decision (May 18, 2018), https://www.regulations.gov/document?D=FAA-2016-4972-0024; Letter from Calvin L. Scovel III, Inspector Gen., Office of Inspector Gen., U.S. Dep't of Transp., to Tom Latham, Representative, U.S. House of Representatives (Apr. 9, 2014), https://www.oig.dot.gov/sites/default/files/LAWA%20Letter.pdf.

[397] 49 U.S.C. §§ 47107(b) (1) (A), 47133(a) (2019); Boca Airport, Inc. v. Boca Raton Airport Auth., FAA Docket No. 16-00-10, Final Decision and Order (Mar. 20, 2003) (explaining that a governmental unit may recoup the costs of services provided to an airport but not make a profit from those services); Letter from Charles Erhard, Manager, Airport Compliance Div., FAA, to Timothy Edwards, Acting Exec. Dir., Susquehanna Area Reg'l Airport Auth., Harrisburg Int'l Airport (Mar. 20, 2007), https://crp.trb.org/acrplrd21/wp-content/themes/acrp-child/lrd21/documents/2007_Edwards.pdf (payment to local county school district in lieu of taxes was for more than a permissible amount).

[398] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 15.9.a. (2009).

[399] *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7718 (Feb. 16, 1999). The *Revenue Use Policy* provides an example of "the costs of travel for city council members to meet with FAA officials regarding AIP funding." *Id.*

[400] *Id.* at 7720.

[401] Air Transp. Ass'n of Am., Inc. et al. v. Port of Portland, Oregon, FAA Docket No. 16-16-04, Final Agency Decision 7 (May 18, 2018), https://www.regulations.gov/document?D=FAA-2016-4972-0024.

[402] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7719.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.* at 7720.

[407] Air Transp. Ass'n of Am., Inc. et al. v. Port of Portland, Oregon, FAA Docket No. 16-16-04, Final Agency Decision 7 (May 18, 2018), https://www.regulations.gov/document?D=FAA-2016-4972-0024.

[408] Office of Inspector Gen., U.S. Dep't of Transp., Report No. AV-2014-035, FAA Oversight is Inadequate to Ensure Proper Use of Los Angeles International Airport Revenue for Police Services and Maximization of Resources 2 (2014).

[409] Letter from Calvin L. Scovel III to Tom Latham, *supra* note 396, at 3.

[410] Telephone interview with Interview Participant No. 1, Interview Participant No. 7. *See infra* App. B.

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trol over the airport's budget.[411] This was in large part because these officials, particularly those newly elected, were at times unaware of federal revenue use restrictions and would suggest reallocation of airport funds for impermissible purposes. The interview participant had found that working closely with the political official's advisors and experts, in their case the city council audit department, was an effective means of ensuring that political officials avoided misunderstanding how airport revenue could be used.[412] In this context, interview participants noted that it was very helpful to have FAA revenue use restrictions and written guidance in hand to justify protecting airport revenue for airport purposes.[413]

While a local government providing a service to an airport is entitled to charge for services rendered attributable toward costs of airport operation, it cannot retain revenue from taxes on aviation fuel, even where aviation fuel is taxed as part of a broader fuel tax. Although this has been the law for some time, it has been only in the past few years that the FAA has aggressively pursued enforcement against non-airport proprietors.[414] The FAA also has clarified that this law applies to all taxing local governments, not just airport proprietors, and that the agency by law is charged with enforcement with regard to all taxing governments.

There is some consternation among airport proprietors regarding their responsibility for charges assigned to them or taxes assessed by local governments.[415] In some cases, such as tax assessments, airport proprietors have no apparent authority over local or state governments that assess and allocate taxes.[416] In other cases, such as charges or indirect costs that a local government allocates to an airport, airport proprietors may, practically speaking, lack the access, capacity or resources to be able to determine whether they are being fairly charged. One interview participant voiced concern about the level of detail and amount of resources necessary for an airport proprietor to satisfactorily confirm it is being correctly charged. This participant felt that an in-depth analysis of a local government's cost allocation structure was beyond the capacity and scope of an airport proprietor, particularly since municipalities already have external audits conducted on their finances.[417]

As discussed previously regarding use of airport revenue for promotional activities, airport revenue may be spent in support of community activities or uses, but only if such expenditures are directly and substantially related to operation of the airport. Off-airport activities do not necessarily satisfy this standard if they merely increase efficiency or are more expedient; there must be a unique justification for the use of airport revenue.[418] There also are grounds upon which an airport proprietor could justify spending based on a desire to "enhance community acceptance" of an airport, but this type of spending generally is limited to minimal contributions.[419] More broadly, revenue used for charitable or community purposes must be "reasonable in relation to the airport's specific financial situation."[420] Airport proprietors also may not use airport revenue to pay for capital or operating costs associated with community use of airport property (discussed further below).[421] The FAA also has determined that local hiring programs, including those supporting low-income-worker and minority-owned firms, cannot be paid for with airport revenue.[422] As with advertising and promotional expenditures, the FAA has declined to establish a specific ceiling on spending on community or charitable activities.[423]

In discussing pressures from local officials and community members to subsidize nonaeronautical governmental activities—such as paying for local bus service for nonaeronautical commercial/industrial development or locating a fire station on airport property free of charge—one interview participant noted that the FAA's guidance on revenue diversion was helpful in providing airport management a legal basis for its decision to decline the charges.[424] Familiarity with the basic principle of revenue diversion allowed the interview participant to flag these issues when they came up and seek clarification and support found in the *Revenue Use Policy*.

(2) Use of airport property for nonaeronautical local governmental functions or public/communal activities. Implications of revenue diversion for use of airport property for public or community purposes long have been an issue at airports. The basic analysis of such uses is fairly straightforward but may not always be clear to local officials who may view publicly owned airport property like any other municipal property or funds and property of sister governmental units as interchangeable. They are not when it comes to airport revenue and property.

Use of aeronautical property by another governmental subunit for nonaeronautical public purposes—such as public vehi-

[411] Telephone interview with Interview Participant No. 7. *See infra* App. B.

[412] Telephone interview with Interview Participant No. 7. *See infra* App. B.

[413] Telephone interviews with Interview Participant No. 1, Interview Participant No. 5, Interview Participant No. 7. *See infra* App. B.

[414] Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. 66,282, 66,283 (Nov. 7, 2014).

[415] Telephone interview with Airport Proprietor No. 5 representative. *See infra* App. B.

[416] FAA Proceeds from Taxes on Aviation Fuel, Nov. 2014, 79 Fed. Reg. at 66,284.

[417] Telephone interview with Airport Proprietor No. 3 representative. *See infra* App. B.

[418] Letter from David L. Bennett to Joseph J. Petrocelli, *supra* note 151.

[419] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. 7696, 7718 (Feb. 16, 1999).

[420] *Id.* at 7703-04.

[421] *Id*, at 7,721.

[422] *See* Steve Vockrodt & Bill Turque, *FAA Rejects Use of Revenues from New KCI Terminal for Community Programs*, Kan. City Star, https://www.kansascity.com/news/local/article217247750.html (last updated Aug. 24, 2018).

[423] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7704-05. One commenter proposed to the FAA during the *Revenue Use Policy* rulemaking process to create a "safe harbor" for such expenditures.

[424] Telephone interview with Airport Proprietor No. 5 representative. *See infra* App. B.

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cle storage, police or firefighting—generally is not permissible, unless they are concurrent or interim uses for which the governmental subunit pays fair market value.[425] More broadly, public and community uses of aeronautical property not directly tied to activities of an airport proprietor's parent or sister governmental units must be considered one of the following "not-for-profit aviation organizations": aviation museum, accredited aeronautical secondary or post-secondary school, or civil air patrol unit.[426] Use of nonaeronautical land for governmental purposes is permissible, but the public entity using the land must pay the airport fair market value, and those payments will be considered airport revenue subject to revenue diversion restrictions.[427] One means of making these situations work for the airport and local governmental entity is to locate services both entities can use, such as firefighting, police services, etc. However, as noted above in the LAX example, the parties need to be able to clearly allocate costs according to usage. One interview participant discussed how the airport proprietor and a local first responder unit negotiated for use of nonaeronautical property to ensure the airport paid for only those services it used, but that the first responder unit also was permitted to serve the local surrounding community if it had additional capacity.[428]

Property use by nonprofits or for community purposes, such as for a park or a recreational facility, follows the same standards, generally requiring fair market value compensation.[429] Land that is "not potentially capable of producing substantial income and not needed for aeronautical use" may be leased for such purposes at below fair market value rental rates or even possibly for no charge, as long as the function is related directly to operation of the airport.[430] Examples of such community uses include interfaith chapels and USO facilities.[431] For property that is capable of generating more than a minimal amount of revenue, however, the income generated from community use must approximate the revenue that could otherwise be generated, and some amount of rent must be paid.[432] Uses for other governmental purposes, such as municipal vehicle parking, do not qualify as a community purpose.[433]

b. Hypothetical Examples and Explanations

(1) Charitable giving.[434] In an effort to generate good will with the community, a council member of a city that owns an airport inquires with the city airport department about the possibility of establishing charitable giving booths in an airport. The city airport department considers contributing the resulting donations to the following charities: (1) the city's local campaign to fight the local opioid addiction crisis; or (2) an on-airport nonprofit providing layover comforts to military service members. The donation booths are expected to generate $50,000 per year.

With respect to both options:

- If the funds are collected directly through the airport, it would be considered airport revenue, because such funds would be "payments received by or accruing to the proprietor" or "revenue from proprietor activities on the airport."[435] Accordingly, it is subject to the same limitations as all other airport revenue, namely that it must be used only for capital or operating costs of the airport, the local system or other local facilities owned or operated by the airport proprietor and directly and substantially related to air transportation of passengers or property.[436]
- If the funds were collected by a third-party entity, such as a nonprofit, on airport property, it likely would not be considered airport revenue, since income or funds generated by tenants are not considered airport revenue.[437] The charitable nature of the activities also likely means that the airport proprietor could provide space for the third party at the airport at less than fair market value, or even for free, if the third-party entity were a nonprofit or governmental entity. However, providing space for free would require a determination that its use is expected to produce only *de minimis* revenue[438] and not reasonably expected to be needed by an aeronautical tenant or "for airport operations in the foreseeable future."[439] If the location for donation collection were in an area that could otherwise be used to generate significant revenue, the airport proprietor also would have to

[425] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 21.6.f.5. (2009).

[426] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7721.

[427] *Id.* at 7710, 7712; Memorandum from Stephen H. Kaplan, Gen. Counsel, Office of the Sec'y of Transp., U.S. Dep't of Transp., to Patricia D. Parrish, Dir. of Mgmt. Planning, U.S. Dep't of Transp. (Sept. 26, 1994), https://crp.trb.org/acrplrd21/wp-content/themes/acrp-child/lrd21/documents/1994_Parrish.pdf (regarding: Request for Legal Opinion for Resolution of Office Inspector General (OIG) Audit R9-FA-3-061).

[428] Telephone interview with Interview Participant No. 1. *See infra* App. B.

[429] *See, e.g.*, Office of Inspector Gen., U.S. Dep't of Transp., Report No. AV-1998-011, Airport Revenues—Galveston municipal airport, Scholes Field, Galveston, Texas (1997), https://rosap.ntl.bts.gov/view/dot/13010 (determining that failure to charge local department of parks and recreation for use of airport property constituted illegal revenue diversion).

[430] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7710-11. The *Revenue Use Policy* specifically allows for use of airport property for nonprofit aviation museums and aeronautical higher education programs. *See id.*

[431] *See* Kelly Yamanouchi, *Hartsfield-Jackson to Strike Agreement with Airport Chaplaincy*, Atlanta J.Const. (Jan. 31, 2019), https://www.ajc.com/business/hartsfield-jackson-strike-agreement-with-airport-chaplaincy/YOQGmzNER6Q4tvnvZ6ujRJ/ (quoting FAA statement).

[432] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7721, 7711.

[433] *Id.* at 7711.

[434] Hypothetical example based on Airport Proprietor F. *See infra* App. C.

[435] *Revenue Use Policy*, Feb. 1999, 64 Fed. Reg. at 7716.

[436] *Id.* at 7717.

[437] FAA Order No. 5190.6B, FAA Airport Compliance Manual § 15.6.a. (2009).

[438] As discussed above, the FAA has declined to establish a specific ceiling on what constitutes a *de minimis* expense. *See Revenue Use Policy*, Feb. 1999, 64 Fed. Reg.at 7704-05.

[439] *Id.* at 7721.

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determine whether the donations received will approximate that amount. Here, it appears likely that this would be the case. If the donations were collected by a private for-profit business, the airport proprietor likely would be required to seek rent at fair market value. All rents paid by a nonprofit or for-profit third-party entity would be considered airport revenue and subject to applicable federal restrictions.

With respect to option (1):

- Assuming the donations are collected directly by the airport proprietor and thus considered airport revenue, the airport proprietor must justify their use for the donated purpose. While the substance of the activity (local campaign to fight the opioid crisis) is not clearly "directly and substantially related to operation of the airport or air transportation system,"[440] it could potentially be justified as a means of promoting the airport in the broader community and "enhancing community acceptance."[441] While spending to promote community acceptance generally must be minimal to be justified—e.g., several hundred dollars or less [442]—there is a case to be made, although unsupported by any law or precedent, that the amount is reasonable in relation to the specific financial situation, because the airport proprietor would not otherwise be able to receive income through charitable contributions of its passengers. The airport proprietor's argument based on airport promotion also would require prominent display of the airport's logo in connection with the charitable activities to make clear the connection between the charitable program and airport.

With respect to option (2):

- As with option (1), assuming the donations are collected directly by the airport proprietor and thus considered airport revenue, the airport proprietor must justify their use for the donated purpose. There is a much stronger connection between the charitable activity and the airport because the revenues will be used on the airport property and serve a deserving subset of the flying public. However, the airport proprietor generally cannot pay for the capital or operating costs of a community purpose that is using airport property at a rate less than fair market value.[443] To reconcile this issue, the airport proprietor should require the nonprofit to pay fair market value for the space it uses to serve military service members, toward which the airport proprietor may direct the revenues (and donate the remaining amount, if any, to the nonprofit). The airport proprietor also should require prominent display of the airport's logo in connection with the charitable activities to make clear the connection between the charitable program and airport.

[440] *See id.* at 7718, 7720.
[441] *See id.* at 7718.
[442] *See id.*
[443] *Id.* at 7721.

V. CONCLUSIONS

As the overview of Chapter II and analysis in Chapter IV explain, assessing the permissible use of airport revenue can be challenging. The number of variables, overlapping interests and unique legal and factual circumstances of each airport make generalizing difficult. In fact, too much generalizing can create the misimpression that the particular factual circumstances of the airport are unimportant or that analogies to other airports are especially instructive. Notwithstanding that caution, the task of providing some guideposts or bracket around permissible revenue and property use becomes easier once equipped with a basic understanding of the underlying theory of revenue diversion and examples that test the boundaries under federal law. To that end, it is helpful to keep the following in mind:

- To know the permissible uses of airport revenue and property, it is essential to know the source of revenue and particularly whether (and in what manner) it derives from the federal government. Federally required documentation—primarily the ALP, Exhibit "A" to AIP grant applications and annual revenue reports—can be vital sources of information for making these determinations. Airport proprietors who do not know the source of their revenue with accountant precision face serious legal risks if they engage in any creative property or revenue transaction.
- Airport proprietors cannot always assume that a particular use of property clearly reflects whether it is considered aeronautical property (i.e., required to be used for aeronautical purposes). Outside of core aeronautical functions (e.g., runways, taxiways and other airfield functions), there are many collateral uses of airport property that may not fit neatly into either category, and the aeronautical classification may depend on facts and circumstances. Property uses that may seem crucial for the modern airport (e.g., concessions, parking, aircraft cabin supplies) are not considered aeronautical, while other functions that could today be carried out off-airport (e.g., drone use, flight training, engine repair) often are treated as aeronautical.
- While it is slight oversimplification to say that airport revenue must "stay on the airport," this maxim can serve as a helpful rule for airport proprietors in spotting potential revenue diversion problems. An equally simplified, but useful, principle is that an airport proprietor must be able to explain the airport nexus for every expenditure of airport dollars and use of every acre of airport property. A similar simplifying corollary for analyzing nonaeronautical use or off-airport payments is to ask whether the airport proprietor is receiving fair market value for nonaeronautical use of property or services rendered to operate the airport. Calculating fair market value may not be straightforward in every instance, but the principle provides a guide for analysis.
- Paradoxically, revenue diversion may exist even when no funds change hands. This is particularly the case for low- or no-rent uses of airport property for nonaeronautical pur-

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poses. This point is especially applicable to noncommercial (e.g., governmental and community) uses of airport property. There are exceptions to this principle for certain aeronautical expenditures (e.g., fee waivers under an air service incentive program), but the exceptions remain circumscribed and generally are narrowly construed.

- Enactment of Section 163 of the FAA Reauthorization Act of 2018 has the potential to change substantially the relationship between the FAA and airport proprietors with regard to agency oversight of airport land uses. The principles of revenue use discussed in this report—such as prohibitions on revenue diversion, limitations on use of airport revenue or grant obligations for airports to use money in the best interest of the airport—all remain unchanged, but the FAA's plenary regulation over use of all airport property undoubtedly will change. Whether this removal of FAA regulatory authority will cause a paradigm shift in the relationship or prove to be a mere procedural change remains to be seen. In any event, pending definitive FAA policy of how it intends to implement Section 163, airport proprietors will necessarily need to act with discretion.

Our research also reflects the extent to which airport proprietors are seeking creative means of using airport revenue and property. While these creative endeavors require careful analysis and assessment of applicable revenue use requirements, airport proprietors report that such efforts can be pivotal in helping the proprietor achieve its and other stakeholders' strategic and financial goals. Private entities and non-airport governmental units in particular can play a key role in unlocking the value of airport property by generating revenue/income they can use off-airport, but only if the airport proprietor receives fair market value for airport use or services rendered to the airport. From a practical standpoint, success of these types of projects, most commonly in the form of public-private partnerships, is setting clear goals and aligning interests.

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LIST OF ACRONYMS

AAIA—Airport and Airway Improvement of 1970
ACIP—Air Carrier Incentive Program. *See also ASIP*.
ACRP—Airport Cooperative Research Program
ADAP—Airport Development Aid Program
AIP—Airport Improvement Program
AIPP—Airport Investment Partnership Program
ALP—Airport Layout Plan
APPP—Airport Privatization Pilot Program
ASIP—Air Service Incentive Program. *See also ACIP*.
C.F.R.—Code of Federal Regulations
DBFOM—Design-Build-Finance-Operate-Maintain
DOT or U.S. DOT—U.S. Department of Transportation
FAA—Federal Aviation Administration
FAAP—Federal Aid to Airport Program
FBO—Fixed-Base Operator
GA—General Aviation
GAO—Government Accountability Office
LRD—Legal Research Digest
NEPA—National Environmental Policy Act
NPIAS—National Plan of Integrated Airport Systems
OIG—U.S. Department of Transportation Office of Inspector General
P3—Public-Private Partnership
PFC—Passenger Facility Charge
TCRP—Transportation Cooperative Research Program
ULCC—Ultra-low-cost carrier
U.S.C.—United States Code

APPENDIX A

Template Interview Questionnaire

1. Please briefly introduce yourself and your involvement with use of airport revenue and property.

2. What are the primary sources of airport revenue for your airport(s)? In what manner have you acquired property for the airport(s)?

3. Have federal statutory and regulatory restrictions regarding the use of airport revenue presented any challenges? If so, why; if not, why not?

4. What have you found to be the biggest impediment to the development of airport property and the permissible use of airport revenue?

5. How do you assess whether a particular use of airport revenue or property is permissible?
    a. Are there any guidance materials, resources or tools that you find particularly helpful in assessing whether the use of airport revenue or property is permitted or prohibited?

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b. Are there topics about which you wish there was more guidance?
c. Do you rely on experts or colleagues for advice? (What kinds—Agency staff? Other airport professionals? Consultants?)

6. How much do you rely on informal guidance from the FAA Airports District Office (or other FAA staff) in deciding the limits on airport revenue or property use?

7. Can you provide and discuss any examples of creative or innovative uses of airport revenue or property that you have implemented that you believe are good examples of how you have navigated the rules on revenue and property use?

8. Are you aware of recent changes and clarifications to federal restrictions on use of airport revenue (e.g., PFC eligibility) or airport property (e.g., FAA authorization for nonaeronautical development)?
   a. Have you had an opportunity to take advantage of any of these changes?
   b. Are additional changes needed?

APPENDIX B

Anonymized Interview Participants

Interview Participant No. 1 represents an airport proprietor that owns a medium-hub airport.

Interview Participant No. 2 represents an airport proprietor that owns a medium-hub commercial service airport located near a major metropolitan area in a competitive regional market.

Interview Participant No. 3 represents an airport proprietor that owns a joint civil-military general aviation airport located outside a small city, as well as several other facilities and municipal services.

Interview Participant No. 4 represents an airport proprietor that owns a non-hub primary airport located outside a small city.

Interview Participant No. 5 represents an airport proprietor that owns one commercial service airport and two other airports near a regional metropolitan hub.

Interview Participant No. 6 represents an airport proprietor that owns a large-hub commercial airport and several general aviation airports in a major metropolitan area. This airport proprietor has engaged in significant nonaeronautical development, including P3 projects.

Interview Participant No. 7 represents an airport proprietor that owns a large-hub commercial airport with significant commercial development and additional commercial space available.

Interview Participant No. 8 represents an airport proprietor that owns a medium-hub airport along with several general aviation airports in a destination area.

Interview Participants No. 9 represents an airport proprietor that owns two airports located in a major metropolitan area, one a medium-hub and the other a general aviation airport.

APPENDIX C

Anonymized Airport Proprietors for Hypotheticals

Airport Proprietor A owns a non-hub primary airport located outside a small city.

Airport Proprietor B owns two airports located in a major metropolitan area. The first airport is a medium-hub commercial service airport that is highly land-constrained due to surrounding land uses. The other airport is a smaller general service airport located in a less economically active area and unconstrained by surrounding land uses.

Airport Proprietor C owns several airports and other transportation infrastructure and facilities in and around a large metropolitan area, including a busy primary commercial service airport. This airport proprietor engaged a private developer to develop a light rail line and associated commercial development of airport property to connect the airport with the light rail system serving the metropolitan area.

Airport Proprietor D owns a medium-hub commercial service airport located near a major metropolitan area in a competitive regional market that has undertaken and continues to undertake development projects to meet increasing air travel demand and limited existing capacity.

Airport Proprietor E owns a large, formerly general aviation airport that recently added a privately built, financed and operated commercial service terminal.

Airport Proprietor F owns a large-hub commercial airport and several general aviation airports in a major metropolitan area. This airport proprietor has engaged in significant nonaeronautical development projects, including P3 projects, and has implemented an ASIP.

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