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33rd Annual Basics of Airport Law Workshop and 2017 Legal Update

Session #1

AIRCOPRT LAW 101

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THIS AFTERNOON’S PRESENTATION

1. Conference introduction
2. Learning a new language
3. Getting to know your airport
4. Understanding the FAA
5. Recognizing the stakeholders
6. Key themes
Let's get a sense of who is participating in this conference.

I'm a newbie - this is my first time at this conference.

I've been here before, but still have more to learn.

I'm not a lawyer, but don't tell anyone.

I should be teaching this course.
1. Conference Orientation

- Agenda
- Workshop guide, speakers information
- *Airport Law Desk Reference* 2017
- Presentations
  - [www.airportlawconference.com](http://www.airportlawconference.com)
- Attendance roster
- On site staff – AAAE and Kaplan Kirsch & Rockwell
2. Learning a new language
THE PHONE CALL

“Hello, City Attorneys Office. This is the airport calling. We’re extending the RSA consistent with the FARs. We thought about using AIP funds since the land we need lies in the 65 DNL in our NEM, but we decided to use PFCs instead. Anyway, I’m calling because the ADO said that the DEIS presents a bunch of 4(f) and 404 problems that need to be fixed. They also want us to prepare a new ALP. Who is going to help us? The ADO or should I be working with the FSDO?

I need an answer today….”
3. Getting to know your airport

- Review Minimum Standards and Rules/Regs
- Review the leases
- Read the Grant Assurances
- Get the original documents
- Talk to the Airport Director
- Schedule a site visit
- Check the Master Plan
- Review the Airport Design Advisory Circular
- Review the ALP (The whole thing.)
- Understand the surrounding land uses
Critical Airport Terminology

“Airside”
- Airport Operations Area (AOA)
- Security Identification Display Area (SIDA)

“Landside”

Airport Property
- “Aeronautical”
- “Non-Aeronautical”
On a flight into an airport with runways that point directly north, the pilot announces that he will land to the south. Which runway hope he will use?

A. That's not his problem - the air traffic guy will tell him
B. Runway 18
C. The easiest one
D. Runway 36

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CRITICAL AIRPORT TERMINOLOGY

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CRITICAL AIRPORT TERMINOLOGY

Runway 22

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CRITICAL AIRPORT TERMINOLOGY

Runway 22

Runway 4

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CRITICAL AIRPORT TERMINOLOGY

Runway 4/22

Runway 4

Runway 22

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CRITICAL AIRPORT TERMINOLOGY

10L/28R
10C/28C
10R/28L

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CRITICAL AIRPORT TERMINOLOGY

9L/27R

10L/28R

10C/28C

10R/28L

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4. Understanding the FAA

- Who is FAA?
- How do lawyers interact with FAA?
- What are FAA’s sources of authority?
- FAA as regulator / preemption
- FAA as adjudicator / enforcement
WHO IS THE FAA?

Air Traffic (ATO)  Airports  Safety  Space
WHO DOES THE FAA REGULATE?

- Aircraft Operators
- Aircraft
- Pilots
- AIRPORTS
HOW DOES THE FAA REGULATE?

- OPERATES Air Traffic
- CERTIFIES Aircraft
- FUNDS AND REGULATES Airports
- LICENSES Pilots
WHICH FAA WILL I BE WORKING WITH?

- Airport safety, inspections, standards, airport design, construction, and operation.
- Airport Improvement Program (AIP) grants
- Approves passenger facility charges (PFCs)
- National airport planning and environmental requirements
- Establishes policies on rates and charges, compliance with grant assurances, and privatization
WHO IS THE AIRPORTS DIVISION?

Associate Administrator
(vacant)

Deputy Assoc Admin.
Winsome Lenfert

Airport Planning/Programming
Elliott Black

Compliance/Management Analysis
Kevin Willis

Safety/Standards
John Dermody
FAA REGIONS

- Regional office
- Airport district office (ADO)
I have learned that the FAA has lots of silos. What percentage of employees work for the Airports Division?

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THE AIRPORTS OFFICE IN CONTEXT

FAA Employees

46,000 total

600

Airports
Other
DEALING WITH THE FAA

- Agency is huge; airports function is not!
- Airports District Office is first point of contact
- Major policy issues to HQ
- Enforcement (routine) at ADO
- Adjudications of grant violations at HQ
- Don’t be afraid to call!
FAA’S RELATIONSHIPS WITH AIRPORT SPONSORS

- Funder
- Regulator
- Adjudicator
- Advocate
OTHER RELATIONSHIPS WITH FAA
AIRPORT REGULATION — BIG PICTURE

- Statutes
- Federal Aviation Regulations (FAR)
- Adjudications (Part 16s)
- FAA Orders
- Policy Statements
- Guidance Letters
- Advisory Circulars
AIRPORT REGULATION — AS APPLIED

1. Grant Assurances
2. Deeds (Surplus Property Act)
3. Part 139 regulations (commercial airports)
4. Revenue use statute
GRANT ASSURANCES

- Contractual, not regulatory
  - But Congress mandates the grant assurances

- 20-year duration
  - Clock resets at each grant

- FAA gets to enforce
  - Prosecutor, judge, jury, executioner
  - Court review only after FAA decision
Grant Assurances
- 39 separate requirements
- Apply to most non-planning grants
- Legally binding by contract

Principal issues
- Assurance 5 – rights and powers
- Assurance 22 – economic nondiscrimination
- Assurance 23 – exclusive rights
- Assurance 24 – fee and rental structure
- Assurance 25 – airport revenue
Surplus Property Act deeds
- Many of same principal restrictions as grant assurances
- Perpetual (not 20-year limitation)
- Real estate sale even more difficult than most airport land
PART 139 REGULATIONS (COMMERCIAL AIRPORTS)

- Requires airport operating certificates for airports that:
  - Scheduled and unscheduled operations; aircraft with more than 30 seats
  - Scheduled operations; more than 9 seats but less than 31 seats

- Part 139 Inspection
  - Administrative inspection of airport files, paperwork, etc.
  - Facilities inspection Aircraft rescue and fire fighting inspection
  - Post inspection briefing with airport management

- Far less regulation of general aviation airports
Federal statute prohibits “diversion” of revenue at airport that has been grant obligated since 1996

FAA – detailed policy that greatly amplifies statute

FAA position – requirement is *perpetual*

Very complex definitions
Incentives, off-airport mitigation; collateral development; intermodal transit

General economic development

Capital and operating costs of airport

REVENUE USE
FAA REGULATION AND PREEMPTION
Counsel to an independent airport authority. City Council is irri-
tated by the impact of the airport on local roads. They have proposed an order that would impose an impact fee on airlines based on their contribution to airport-related traffic. Is this lawful?

Yes, it is a fee directly related to the airport  
No, because the fee is not imposed by the authority.  
No, because it revenue diversion

D, local taxes are permissible if lawful under state law.
FEDERAL PREEMPTION - I

- Types of preemption
  - Field (everything)
  - Conflict (where in conflict with federal law)

- Sources of preemption
  - Express (federal statutes)
  - Implied (from Congressional intent or case law)

- Most – but not all – issues concerning land use and operational restrictions fall within conflict and implied preemption
FEDERAL PREEMPTION - II

- Operation of national aviation system is a “cooperative scheme”
  - FAA (aircraft and airspace)
  - Airports (ground operations; airport operations)
  - Congress has preserved “proprietary powers and rights” of airport operators (not police powers)

- Jurisprudence has evolved in the last 100 years
  - Few bright lines
THE CONTINUUM OF PREEMPTION

Express preemption

Implied / conflict preemption

No preemption

Aircraft in flight
Aircraft certification
Pilot certification

Operational restrictions
Airfield regulations
Certain financial matters

Non operational matters
Off airport land use
Local health/safety
FAA AS **ADJUDICATOR**

- **Enforcement**
  - Focus is on current compliance, not generally punitive action
  - Generally ADO or Region

- **Adjudication of grievances**
  - FAR Part 16 for grant assurances
  - Occasionally, rarely, court

- **Penalties; corrective action**
  - Negotiated

- **Exclusive jurisdiction in US Ct. Appeals (49 USC § 46110)**
5. Stakeholders
NEIGHBORS

- Encroachment and land uses affecting airports
  - Grant Assurances 20 & 21
  - State land use / aeronautics laws
  - Local zoning
  - IGAs
  - Part 77
REALLY UPSET NEIGHBORS

- Noise / nuisance liability
  - Grant Assurances 20 & 21
  - Airports liable, not airlines or FAA
  - Varies state/federal and state/state
    - Impact to use
    - Height
    - Direct overflights
    - Number of operations
    - Noise level
ACCESS PROVIDERS

- State and local DOTs
- Metropolitan Planning Organizations
- FHWA / FTA
- Uber/Lyft
- Ground access providers
- Local transit

MANY EMERGING ISSUES!
CONCESSIONAIRES

- Concessionaires
  - A special kind of tenant
  - Subject to federal DBE provisions
  - Contentious because of the stakes

- Vendors/Suppliers
TENANTS

- Aeronautical
  - Grant Assurance 22
  - Minimum Standards
- Non-Aeronautical
  - Grant Assurance 24
  - Releases from Grant Assurances
ECONOMIC INTERESTS

- Local governments
- Chambers of Commerce
- Specific local businesses
- Special purpose entity to promote airport
INVESTORS

- Private equity investors
- Private debt investors
- Rating agencies
6. Key themes for airport lawyers
1. IT MATTERS WHO OWNS THE AIRPORT
2. KNOW THE SOURCE OF YOUR AUTHORITY
3. PREEMPTION IS PERVERSIVE
4. KEEP TRACK OF SOURCES AND USES OF FUNDS
5. WHICH FAA IS IT?
6. KNOW THE GRANT ASSURANCES

KEEP CALM AND READ GRANT ASSURANCES
7. RECOGNIZE COMMON MISUNDERSTANDINGS

- Airports have an unlimited supply of money.
- Airports are just like other local government functions.
- The Federal Government only regulates money and aircraft.
- We can do whatever we want with our airport.
- Airports only exist to serve ________.
Homework

- Review Minimum Standards and Rules/Regs
- Read the Grant Assurances
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- Talk to the Airport Director
- Schedule a site visit
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- Review the Airport Design Advisory Circular
- Check the Master Plan
- Understand the surrounding land uses
Network with airport lawyers
QUESTIONS

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