35th Annual AAAE Airport Law Workshop

Session #21

AIRPORT SPONSORS AS REAL ESTATE DEVELOPERS

Elliott Black
Lem Thomas
FAA

Peter Kirsch
Kaplan Kirsch & Rockwell
TODAY’S SESSION

- Historical context and stakeholder perspectives
- Legal fundamentals
- Changing FAA role
- FAA Reauthorization Act of 2018
HISTORICAL CONTEXT

- Historically, airport land not viewed in economic terms
- Airports’ land buffers left undeveloped
- Aeronautical revenue and airport-oriented revenue sufficient for airport capital and operating costs
TODAY’S MARKET REALITIES

- Non-aeronautical revenues becoming increasingly important at airports of all sizes
- Users exerting pressure to diversify revenue sources
- Major businesses increasingly want to be on or near major airports
Just because you have land doesn’t mean there’s a market;
Just because there’s a market doesn’t mean there’s a development opportunity;
Just because there’s a development opportunity doesn’t mean cash will start flowing; and
The aviation industry is notoriously hard to predict.
LEGAL BASICS

- Significant federal, state, local requirements
- Some airport land cannot be used for non-aeronautical purposes (restrictions from Surplus Property Act, deeds, AIP requirements)
- Presumption favors all airport land being used for aeronautical purposes
PRECISE TERMINOLOGY IS IMPORTANT

- Approval (ALP)
  - For non-aeronautical use

- Release (of what)
  - Of Grant Assurance obligations (contracts)
  - Of Surplus Property Act restrictions (deeds)

- Lease vs. sale
  - FAA: long term lease can ≈ sale
DEVELOPMENT MUST BE COMPATIBLE

- Land use (current and future)
- Height
- Interference
STRUCTURING THE DEAL

- Land
- Vertical Development
- Infrastructure

What can the airport fund?
WATCH OUT FOR LEAKY BUCKETS

Revenue diversion is a serious risk!
AN INHERENT TENSION

- Need and obligation to generate revenue
- Aeronautical revenue difficult to grow – desire to keep airline costs down
- Historical interaction of statutory requirements has sometimes slowed the process and jeopardized the deal
RELEVANT GRANT ASSURANCES

19 – Operation and Maintenance
20 – Hazard Removal and Mitigation
21 – Compatible Land Use
22 – Economic Nondiscrimination
24 – Fee and Rental Structure
25 – Airport Revenues
29 – Airport Layout Plan
31 – Disposal of Land
THREE PIVOTAL QUESTIONS

1. What does the current/future ALP show?

2. What type of facility or operation is being proposed, and how might it affect current/future operations?

3. How was the property acquired?
   - From the federal government (Surplus Property Act)
   - AIP funds (including noise mitigation funding)
   - Local (non federal) funds (e.g., airport revenue, PFCs, non-airport revenue)
NON-AERONAUTICAL DEVELOPMENT ON AERONAUTICAL LAND

- No, no, no! Can’t do that!
- Well...
AUTHORIZATION FOR NON-AERONAUTICAL DEVELOPMENT

- FAA role
- Process for FAA approval
- Terminology is important
  - Review
  - Approval
  - Release
  - Environmental review
  - ALP
  - Exhibit A Property Map
NEW LEGAL FRAMEWORK

- FAA Reauthorization Act of 2018


One Hundred Fifteenth Congress
of the
United States of America

AT THE SECOND SESSION
Begun and held at the City of Washington on Wednesday,
the third day of January, two thousand and eighteen

An Act

To provide protections for certain sports medicine professionals, to reauthorize Federal aviation programs, to improve aircraft safety certification processes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.
(a) Short Title.—This Act may be cited as the “FAA Reauthorization Act of 2018”.

35TH ANNUAL AAAE AIRPORT LAW WORKSHOP
SECTION 163(a): NEW PROHIBITION ON REGULATING AIRPORT PROPERTY

(a) … 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.
SECTION 163(b): EXCEPTIONS

(b) ... 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 ...; or
   (C) that the airport pays not more than fair market value ... .

(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 [PFCs]
(c) Rule of Construction –

Nothing in this section shall be construed to affect the applicability of [revenue use restrictions in] sections 47107(b) and 47133 …
Changes to 49 U.S.C. 47107(a)(16)

(B) the Secretary will review and approve or disapprove only those portions of the plan and (or any subsequent revision or modification before to the plan, revision, or modification takes) 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;
SECTION 163(d): ALP AMENDMENTS

Changes to 49 U.S.C. 47107(a)(16)

(C) the owner or operator will not make or allow any alteration in the airport or any of its facilities if the alteration does not comply with the plan the Secretary approves, and the Secretary is of the opinion that the alteration may affect adversely the safety, utility, or efficiency of the airport; and 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

(D) 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 to with the approved portions of the plan approved by the Secretary, and that 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,

(i) [eliminate the adverse effects]; or

(ii) [bear the costs of replacement/mitigation]
SECTION 163(d) – ALP APPROVAL AUTHORITY

- The FAA will review and approve or disapprove portions of ALPs
- Requires examination of the impact on the 3 statutory exceptions. Does the change:
  - materially impact the safe and efficient operation of aircraft at, to, or from the airport?
  - adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations?
  - adversely affect the value of prior Federal investments to a significant extent?
- FAA required to review and approve ALPs that implicate any of these.
SECTION 163(d) – SPONSOR’S DUTY

- Sponsor cannot alter airport facilities unless:
  - The alteration is consistent with the approved ALP (where FAA retains approval authority)
  - FAA does not have ALP approval authority
WHAT SECTION 163 DOES NOT CHANGE

- Obligation to maintain a current ALP at all times
- Other FAA approvals or actions as required
- FAA still decides what must be depicted on the ALP
WHAT SECTION 163 DOES NOT CHANGE (CONT’D)

- Revenues use requirements (Grant Assurance 25)
- Airspace review for any proposed development
- Environmental reviews if proposed development subject to FAA approval
WHAT SECTION 163 DOES NOT CHANGE (CONT’D)

- Duty to maintain a current Exhibit A property map
- Obligation to operate the airport for the use and benefit of the aeronautical-using public
EARLY ILLUSTRATIVE EXAMPLES

- Dallas-Fort Worth (DFW)
- Fayette County, OH (I23)
- Kansas City, MO (MCI)
- Raleigh-Durham, NC (RDU)