



35<sup>th</sup> Annual AAEE Airport Law Workshop

Session #21

# AIRPORT SPONSORS AS REAL ESTATE DEVELOPERS



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# 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



# HOWEVER...

- 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.



**If you build it, they will come**

# 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  $\approx$  sale



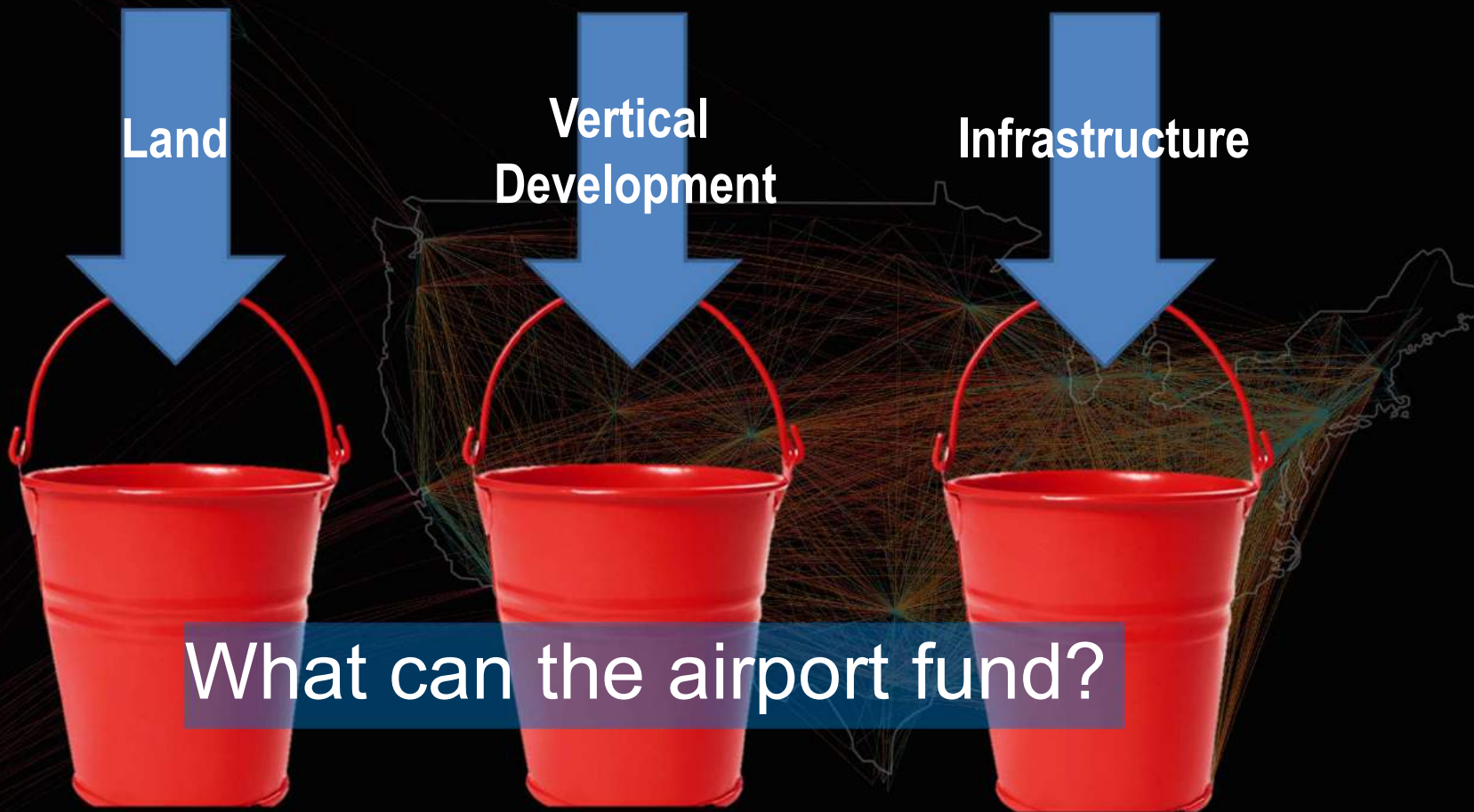
# DEVELOPMENT MUST BE COMPATIBLE

- Land use (current and future)
- Height
- Interference





# STRUCTURING THE DEAL



# 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”.



# 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**]

# SECTION 163(c): RULES OF CONSTRUCTION

## (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 ...

# SECTION 163(d): ALP AMENDMENTS

## 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)



# QUESTIONS?



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