Legal Issues in Airport Development

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Today’s Session

- Introduction: practical and legal context
- Planning essentials
- Environmental review requirements
- Legal process for non-aeronautical development
Practical Context

- Historically, airport land not viewed in economic terms
- Land buffers left undeveloped
- Aeronautical revenue and airport-oriented revenue sufficient for airport capital and operating costs
- 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
Legal Context

- Significant federal, state, local requirements for planning and development

- Some 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

- FAA approval = federal action that triggers federal environmental laws
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
Precise Terminology is Important

▪ Approval
  ▪ Environmental
  ▪ Non-aeronautical use

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

▪ Lease vs. sale
  ▪ FAA: long term lease (50+ years) can ≈ sale
Why Do Lawyers Care About Airport Planning?

*In preparing for battle I have always found that plans are useless, but planning is indispensable.*

- Dwight D. Eisenhower
Building Blocks of Airport Planning

1. Aviation Forecast
2. Master Plan
3. Capital Improvement Plan
4. Airport Layout Plan
Forecasts

- **Purpose:** accurately predict future demand
- **Terminal area forecast (TAF):**
- **Local forecasts** that differ more than 10% (5-year) or 15% (10-year) from the FAA Terminal Area Forecast (TAF) must be approved by FAA
- **Forecast will dictate**
  - Development (facility needs)
  - Financial needs
  - Carrier demands
Airport Master Plans

- Identifies the need for modernization, expansion or new construction
- Sponsor’s strategy for the development of the airport
- Usually a 20+ year look ahead
- **Basis for Airport Layout Plan (ALP)**
- Opportunity to address relevant facility issues
- Realistic schedule for project implementation
- Financial plan
- Opportunity to engage public and stakeholders
Capital Improvement Plans

- Outgrowth of Master Plan
- Anticipated development needs for 5 years
- Based upon forecast + master plan
- Predicate to qualify for AIP grant funds
- Input to FAA’s ACIP
  - Basis for prioritizing FAA AIP $$
- Not on CIP?
  - FAA won’t fund
  - May not approve
Airport Layout Plans

- An Airport Layout Plan is a scaled drawing of existing and proposed land and facilities necessary for the operation and development of the airport.
- ALPs must be maintained in accordance with FAA requirements.
- Definition of airport property:
  - Federally obligated
  - Subject to regulation
- Changes trigger FAA review or approval (in many instances).
- Both a hammer and a shield.
- Exhibit A Property Map ≠ ALP

FAA Order 5190.6B, FAA Airport Compliance Manual, Appendix R
Airport Layout Plans – The Law

- Legally binding representation by airport sponsor to the FAA
- Must be accurate
- Exhibit A Property Map $\neq$ ALP
MUST ALWAYS BE ACCURATE
Airport Layout Plans - Approvals

- ALPs may be conditionally or unconditionally approved by the FAA
  - The distinction between these approvals is important

- Need unconditional approval for –
  - FAA funding
  - Implementation
Environmental Review
NEPA Overview

- Declaration of national environmental policy
- Requirement that environmental considerations be infused into federal decision-making
- Mandate that environmental information be made available to the public
NEPA Compliance

- Federal agency responsibility, project proponent interest
- Informs decisions to be made rather than documenting previously completed decision-making
- Pathways:
  - Categorical Exclusions (CEs)
  - Environmental Assessments (EAs)
  - Environmental Impact Statements (EISs)
  - Supplemental EAs, EISs, and related documents
Categorical Exclusions

- Applicable where proposed project falls within previously-identified category of insignificant actions AND no extraordinary circumstances apply

- FAA examples:
  - Some access road construction
  - Leasing
  - Small property acquisitions

- Specific procedures / documents may vary

- Most common method of compliance, government-wide
Environmental Impact Statements

- Required if proposed action may have significant environmental consequences
- Comprehensive analysis of impacts/alternatives
- Discussion of mitigation varies
- Mandatory public involvement (scoping, DEIS, FEIS, ROD)
- Decision memorialized in Record of Decision
Environmental Assessments

- Applicable where impacts of proposed action are less-than-significant or uncertain
- “Brief” analysis of impacts/alternatives
- Mitigation
- Mandatory public involvement (scoping, DEIS, FEIS, ROD)
- Decision memorialized in Record of Decision
Authority

- Authority
- Caselaw
- Guidance
- Agency Procedures (Orders 1050.1F, 5050.4B)
- CEQ Regulations
- Statute
Common Issues (1): Alternatives

- **Statutory / regulatory requirements:**
  - EA must briefly address alternative courses of action for proposals involving unresolved resource conflicts
  - EIS must fully address reasonable alternatives

- **Requirements derived from case law:**
  - Rule of reason governs breadth and depth
  - Failure to meet purpose → unreasonable
  - EIS need only allow a “reasoned choice”
  - Scope of EA can be narrower than EIS

- **Common issues:**
  - Alternatives outside applicant’s control
Common Issues (2): Purpose/Need

- Regulatory requirements:
  - EA must “briefly describe” the need for the proposal
  - EIS must address the purpose and need to which the agency is responding

- Requirements derived from case law
  - Must address both agency and private purposes
  - Cannot be framed so as to preclude reasonable alternatives

- Common issues:
  - Framing the “need” for economic development
Regulatory requirements
- Must be addressed in EISs
- ROD must discuss whether adopted

Requirements derived from case law
- Mitigated FONSIIs permitted, mitigation enforceable
- No substantive obligation to mitigate effects in EIS
- EIS need not specify final form; hard look is sufficient

Common issues
- Deferred plans
- Enforceability
Common Issues (4): Coordination

- NEPA’s coordinating function
- Additional statutory frameworks that may be relevant to airport development:
  - National Historic Preservation Act
  - Section 4(f)
  - Endangered Species Act
  - Clean Air Act
  - Clean Water Act
  - State environmental review requirements
- Potential inconsistency between NEPA and other requirements
Practical Advice (1): Coordination

- Coordinated approach to permitting and environmental review requirements
  - Feasibility of alternatives, mitigation
  - Environmental analysis / significance determinations
  - Public notice / comment
- Coordination between planning and environmental review/permitting
  - Stable project description / purposes
  - Defensible cost estimates
- Importance of project proponent’s role
Practical Advice (2): The Record

- Importance of litigation in shaping administrative and project outcomes
- Litigation under environmental review statutes
  - Generally confined to the administrative record
  - *Post hoc* rationalization generally improper
  - Parties normally entitled to make use of “the whole record”
Practical Advice (3): CEQ Regulations

- Significant changes
  - Scope of alternatives/mitigation to be considered
  - Scope of environmental impacts to be considered
  - Small federal handle projects
  - Presumptive time and page limitations
  - Role of project proponents in EIS process
- Strategic considerations
  - Potential application to ongoing projects
  - Ongoing (and future) litigation
  - Absence of clarity re: agency procedures and guidance
Put the Pieces Together: Land Development
Competing Obligations

- Need and obligation to generate revenue
- Aeronautical land use takes precedence
- Federal requirements historically have slowed approvals and jeopardized private sector interest
- Vacant real estate:
  - Buffer
  - Future aeronautical needs
  - Revenue generation
Before Pursuing Development: Four Foundational Questions

1. What does the current/future ALP show?

2. What type of facility is being proposed; how might it affect current/future aeronautical functions?

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)

4. What is the nature of the transaction?
Authorization for non-aeronautical development

- Until Oct. 2018, almost all airport development required FAA approval
- FAA role – historical ambivalence
- Process for FAA approval
- Transactional details are pivotal
- Terminology is important
  - Review
  - Approval
  - Release
  - Environmental review
  - ALP
  - Exhibit A Property Map
New Legal Framework – Section 163

- FAA Reauthorization Act of 2018

One Hundred Fifteenth Congress
of the
United States of America

AT THE SECOND SESSION
Began 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”.

36TH ANNUAL VIRTUAL AIRPORT LAW WORKSHOP
Section 163: New Limit on FAA Regulation of Airport Property

- FAA may not directly or indirectly regulate land use and facilities, *except to ensure* –
  - the *safe and efficient operation of aircraft or safety*;
  - that the airport receives (or pays) not less than *fair market value*
- FAA may regulate land purchased with federal funds
- FAA may regulate under the Surplus Property Act and PFC statute
Nothing in this section shall be construed to affect the applicability of [revenue use restrictions in] sections 47107(b) and 47133 …
Section 163: 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: ALP Approval Authority

- The FAA will review and approve or disapprove only portions of ALPs.
- FAA approval needed if the change will:
  - 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?
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
- Revenues use requirements (Grant Assurance 25)
- Airspace review for any proposed development
- Environmental reviews if proposed development subject to FAA approval
- Exhibit A property map requirements
Conclusions - Focus on Legal Processes
Key Messages

- Understand approvals needed before starting project
- Analyze property history of affected parcels
- Develop purpose and need with alternatives analysis in mind
- Construct timeline for approvals
- What federal action is needed (or desired)
- Coordinate planning and environmental review