



Airport Law Alert
FAA Issues Potentially Sweeping Changes to Airport Land Use Regulation
September 16, 2022

The Federal Aviation Administration (FAA) has published a *Draft FAA Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land* (the “Policy”). The proposed Policy is [available here](#). The Policy addresses how the FAA will review and approve sponsor requests to use certain airport property for non-aeronautical purposes. The proposal has potentially significant implications for airport sponsors’ leasing practices. Because of the open questions presented by the Policy and the apparent nature of the proposed changes, sponsors should strongly consider commenting prior to the October 17, 2022 deadline.

The FAA’s stated purpose in adopting the Policy is to “confirm[] and clarify[y] its prior policy and practice regarding the implementation of its statutory responsibility to review and approve or consent to, or deny, requests for land use changes on federally acquired or federally conveyed land.” However, the Policy has the potential to **significantly change certain elements of the way that the FAA considers and approves sponsor requests for non-aeronautical and mixed use of airport property.**

Applicability. FAA has previously issued guidance to implement Section 163 of the FAA Reauthorization Act of 2018, which generally limits the FAA’s authority to regulate the use of airport property. The FAA’s new land use Policy would apply where Section 163 does not: that is, to land use changes (1) on airport property acquired by the sponsor with federal assistance or through a federal surplus property donation or (2) that impact the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations. The Policy would not apply to changes in the use of airport property that was acquired with non-federal funds unless the change in use would have safety and efficiency implications. The Policy does not appear intended to modify the FAA’s existing process for making the threshold determination of whether it has authority to approve a change of use in the first instance (informally known as the “Section 163 determination”). (The FAA’s guidance for issuing its Section 163 determinations, revised last month, has not yet been published on the FAA website but a summary of that guidance is available at www.section163.com.)

When Approval is Required; Types of Land Uses. The Policy identifies and defines four different types of uses of airport property, and the definitions are critical because they control whether the FAA must approve land use changes. The FAA states that it “must approve or consent to all non-aeronautical and mixed uses of federally acquired and federally conveyed land.” By contrast, the Policy states that “[i]f the FAA determines that the proposed use serves an aeronautical use or airport purpose...then FAA approval or consent is *not* required.” The Policy provides definitions for these four land use categories, and those definitions are briefly summarized in the chart below.

Term	Definition	Examples
Aeronautical	Any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of aircraft	Aircraft movement areas, future development of aeronautical facilities, essential services that support flight operations
Airport purpose	Uses of land that are directly related to the actual operation or the foreseeable aeronautical development of a public airport; where a primary aeronautical facility has some non-aeronautical components that support that facility's core aeronautical function within its operation	Terminal complex, FBO with associated non-aeronautical facility like vehicle parking
Mixed use	A facility that contains both aeronautical and non-aeronautical uses, but the non-aeronautical use is significant and could be located off airport property	Cargo facilities and mail distribution centers with offices or warehouses, aircraft manufacturers with significant non-aeronautical functions (engineering, research, offices)
Non-aeronautical	All other uses that are not considered aeronautical	Car rental facility (standalone), warehouses, hotel

While the FAA has informally used versions of the “airport purpose” and “mixed use” concepts previously, **this is the first time** the agency has proposed to define these two terms in formal agency policy. These definitions, if used in other contexts, may provide considerable clarity throughout the FAA’s regulation of airport land use.

Approval Process. The Policy states that when a sponsor submits a request for a land use change, the FAA will consider the **entire proposal**, not just elements of a proposal. This is generally consistent with the FAA’s most recent update to its Section 163 guidance, though in the past the FAA did consider the scope of its authority on a more piecemeal basis.

Under the Policy, if the FAA determines that any component of the project is non-aeronautical, it will determine whether the non-aeronautical use is “significant.” Its determination of whether the non-aeronautical use of the property is significant will be based on the “primary” use of the property. The Policy does not indicate how the FAA will determine the “primary” use or how the primary use concept fits into the principle that FAA will examine an entire proposal including those portions that do not affect the property at issue. If the FAA determines that the proposal involves a non-aeronautical or mixed use, it will consider whether to approve the request based on

“the reasonableness and practicality of the sponsor's request, the effect of the request on needed aeronautical facilities, and compatibility of the proposal with the needs of civil aviation.” The FAA acknowledges that this will be subject to some agency discretion, but that “[t]he proposal must benefit the airport and its functions in support of aeronautical uses and not adversely affect the value of the Federal investment in the airport and its facilities.” The Policy does not define the timetable for agency review.

Time-Limited Approvals; NEPA Implications. Very importantly, an FAA approval of, or consent to, a non-aeronautical or mixed-use land use will be effective *only* for duration of the lease term of the project for which approval or consent is sought. The Policy states that the FAA’s approval or consent “must provide that the land will be returned to aeronautical use at the end of the term.” The Policy further states that “[a]ll land use changes should be shown on the Exhibit A...includ[ing] depicting in a table format the type of use for a facility...and the approval and expiration dates.” This suggests that the sponsor will need to seek a new FAA approval or consent to renew the lease each time it expires, even without a change in physical use.

In effect, the Policy appears to **eliminate the previous concept** of designating certain property on an Airport Layout Plan or Exhibit A as “non-aeronautical.” Instead, it seems that the FAA is taking the position that *all* property subject to the Policy is, by default, aeronautical, and can only be used for specific, non-aeronautical projects subject to the FAA’s time-limited approval. The Policy states that this approach will “supersede” the existing process for concurrent and interim land uses. This appears to be a **significant change from previous practice**, in which the FAA sometimes approved more open-ended concurrent or interim land uses and did not always require any reassessment of its approval actions for renewals of leases.

Relatedly, the Policy indicates that the FAA will only issue a formal “release” (as that term is defined and used in FAA Order 5190.6B) when the sponsor proposes a disposal or conveyance of the property – and not also when the sponsor simply requests a change in use. This would appear to **eliminate the prior process** where a sponsor could request a permanent “release” of certain grant or deed obligations requiring the sponsor to use the property only for aeronautical or airport purposes (and therefore allowing the sponsor to designate the property as “non-aeronautical” on its ALP).

FAA approval or consent, where required, appears to be a federal action that would be subject to the National Environmental Policy Act (NEPA) environmental review process, but it is not clear what level of NEPA review would be required. For obvious reasons, any environmental documentation is likely to require considerable time. This could be exacerbated by the apparent need to return to the FAA for repeated approvals each time a lease is renewed.

Open Questions and Issues. The Policy leaves many questions unanswered and, if adopted, the discretion it affords the agency means that its full effect will likely not be understood until there is a more robust body of FAA decisions thereunder. The Policy’s explicit statement that sponsors’ requests for land use changes will be considered in their entirety means sponsors must be strategic about how to structure their submissions. This consideration is even more acute in light of the Policy’s somewhat opaque focus on the “primary” use of the property as being dispositive as to whether FAA’s approval is required. In addition, the requirement to secure a new FAA approval

each time a lease expires appears to be a substantial and burdensome new requirement – particularly for recurring short-term leases (e.g., agricultural) that previously could have been authorized under an interim or concurrent use approach. The NEPA implications of repeated approvals could add time and complexity to any efforts to use property for non-aeronautical and mixed-use purposes, though sponsors securing longer-term leases could mitigate this concern to a certain extent. While a departure from prior practice, the elimination of the partial release and limitation of the formal release process to only a conveyance or disposal of airport property could bring welcome clarity to a previously confusing topic. Finally, it is not clear how the Policy will dovetail (if at all) with the FAA’s existing Section 163 determination process – the Policy makes no specific mention of that existing process, and it remains to be seen whether the FAA will seek to combine the consideration of its approval authority and its actual approval into one streamlined application.

The FAA is accepting comments on the Policy until October 17, 2022, and information about how to submit comments is available in the initial sections of the Policy. For more information on the Policy, please contact [Peter J. Kirsch](#), [Catherine M. van Heuven](#), or [Nicholas M. Clabbers](#).