



34th Annual Basics of Airport Law Workshop and 2018 Legal Update

Session #6

UNDERSTANDING GENERAL AVIATION LEASES AND TENANT AGREEMENTS

Eric Pilsk
Kaplan Kirsch & Rockwell LLP

Katie van Heuven
Kaplan Kirsch & Rockwell LLP

INTRODUCTION

aeronautical
Joint FAIR Ground MARKET
FBO Users SOLE
Ventures and Leases
Leases VALUATION
DEVELOPMENT DISCONTINUATION
AGREEMENTS Management
Non-Aeronautical Leases
fuel exclusives sustaining
farms Through THE FENCE
Leases AGREEMENTS

TODAY'S TOPICS

- FAA Grant Assurances
- Business factors
- Types of agreements
- Challenges – where they come from
- Best practices
- Resources – where to look for answers

FAA GRANT ASSURANCES

Assurance 1: General Federal Requirements

- Obligation to comply with general Federal requirements

Assurance 5: Preserving Rights and Powers

- No contracting away authority to meet Assurances
- Subordination clause

Assurance 19: Operations

- Duty to maintain aeronautical facilities, including pavement
- Assign responsibility

FAA GRANT ASSURANCES

Assurance 22: Economic Nondiscrimination

- 22(a) - No unjust discrimination
 - Reasonable access for aeronautical users
- 22(c) - FBOs subject to same rents, rates, and fees
- 22(f) - Cannot limit right to self-service or self-fuel
- 22(g) - Sponsor subject to same terms and conditions
- 22(h) - Reasonable and not unjustly discriminatory terms to provide for safe and efficient operation

FAA GRANT ASSURANCES

Assurance 22(b): Standard Contract Terms

“...the sponsor will insert and enforce provisions requiring the contractor to:

- 1) Furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
- 2) Charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.”

FAA GRANT ASSURANCES

Assurance 23: No Exclusive Rights

- Focus is on Sponsor conduct that excludes some aeronautic users in favor of others
- Can be express or implied
- NOT a per se violation if only one entity provides a service
- VERY limited exception to exclude other FBOs
- Sponsor can exercise “proprietary exclusive right” – but cannot contract this out

FAA GRANT ASSURANCES

Assurance 24: Self-Sustaining Rent and Fee Structure

- Fair Market Value (FMV) is benchmark
 - Not necessary for aeronautical users

Assurance 25: Airport Revenue

- No revenue diversion
- Airport revenue stays on airport
- No below FMV contracts with other divisions of sponsor
- Value for services

FAA GRANT ASSURANCES

Assurance 29: Airport Layout Plan

- Up-to-date map of airport and facilities
- New development may require amending ALP

Assurances 30 & 37: Comply with Civil Rights, DBE, and Other Federal Laws

And don't forget state and local requirements!

BUSINESS FACTORS (SPONSOR'S NEEDS)

- Revenue
- Types of tenants/development
- Size and quality of facilities
- Degree of control
- Degree of risk
- Degree of reward
- Growth needs or fears
- Political factors

BUSINESS FACTORS (TENANTS' NEEDS)

- Return on investment
- Term/duration
- Location
- Access to airfield, infrastructure, utilities
- Financing issues
- Business model

TYPES OF AGREEMENTS

FBO & Fuel Concessions

- Non-exclusive
- Types of services offered
- Hours of operation
- Insurance requirements
- Types of fuel offered and rights attached
- Fuel tanks – above ground vs. below ground
- Public use aircraft parking ramps

TYPES OF AGREEMENTS

Ground Leases (Aeronautical)

- Non-exclusive
- Term <50 Years (Order 5190.6B, ¶ 12.3(b)(3))
- Boilerplate with ability to add additional provisions

BEST PRACTICE:
Incremental steps
in default
enforcement

BEST PRACTICE:
Right to inspect,
including non-
commercial use
hangars

BEST PRACTICE:
Include items
that can vary
(term, rent, etc.)
on first two

BEST PRACTICE:
Include only what
you are
able/willing to
enforce!

TYPES OF AGREEMENTS

Hangar & Aircraft Storage

- FAA, *Policy on the Non-Aeronautical Use of Airport Hangars* (2016)
- Short-term, non-exclusive
- Boilerplate agreement for all users

BEST PRACTICE:
Right to inspect,
including non-
commercial use
hangars

BEST PRACTICE:
Explain what will
happen if they
break the rules

BEST PRACTICE:
Enforce through
City/County
codes

BEST PRACTICE:
Include only what
you are
able/willing to
enforce!

BEST PRACTICE:
Identify allowable
uses per FAA and
fire/building
codes

TYPES OF AGREEMENTS

Through-The-Fence (TTF) Agreements

- Off-airport operators with direct access to airfield
- Neither required or prohibited (but disfavored)
- Congressional conditions for residential TTF agreements
 - FAA Modernization and Reform Act of 2012, P.L. 112-95, §136
- TTF agreements must also comply with all sponsor assurances
- Myriad legal issues:
 - Security, fee structure, control over airfield, competition with incumbents, maintenance, etc.

TYPES OF AGREEMENTS

Through-The-Fence

- Off-airport operations
- Neither required by statute
- Congressional action
 - FAA Modernization and Airport Construction Act of 2002
- TTF agreements
- Myriad legal issues
 - Security, fence maintenance, etc.

*BEST PRACTICE:
ACRP Report 114:
Guidebook for Through-
the-Fence Operations
(2014)*

d

Agreements
2-95, §136

ponsor assurances

tion with incumbents,

TYPES OF AGREEMENTS

Non-Aeronautical Uses

- FMV rent
- Term >25 Years (FAA Order 5190.6, ¶22.33(d))
- Cannot interfere with aeronautical operations
- Only on FAA-approved non-aeronautical parcels
 - Interim use of aeronautical land (> 5 years)
 - Concurrent use (compatible revenue-producing non-aeronautical purpose)
- May need ALP amendment or release

*BEST PRACTICE:
Understand what
the ALP says ...
and what it does
not!*

OTHER TYPES OF AGREEMENTS

- Joint ventures
- Development agreements
- Flight schools and skydiving
- Management agreements
- FAA letter of agreements

CHALLENGES

WHERE THEY COME FROM

- Airport Users
 - Different treatment
 - Different terms and conditions
 - Different fees and charges
 - Demands for special treatment
 - Bad actors
- FAA
 - Questions about compliance
 - Questions about safety
 - Termination of grant eligibility
- Airport Sponsor Leadership
 - Changing policy direction
 - Changing goals for airport
 - Community opposition
 - Economic

BEST PRACTICES

1. *General*

- Advance planning and preparation – It's a chess game!
- Use published standards
- Be prepared to explain and justify deviations from past practice
- Monitor changes in FAA policies
- Update and revise policies, procedures, and documents

BEST PRACTICES

2. *Informed Approach to Contracting*

- Sponsor – not FAA – dictates the process
 - First-come / first-served
 - Solicitation / RFP
 - Hybrid
- Defined process reduces risk of challenges
- Defined process reduces flexibility
- Keep people informed

BEST PRACTICES

3. *Minimum Standards*

- Provides vehicle to memorialize development policies
 - Square footage, services, license and certification, qualifications, hours of operation, personnel, etc.
- Uniform standards for commercial aeronautical users
 - Fixed-base Operators (FBOs)
 - Specialized Aviation Service Operations (SASOs)
- FAA encourages, but does not require, Minimum Standards

BEST PRACTICES

3. *Minimum Standards, cont.*

- Minimum Standards serve the following purposes:
 - Assure *nondiscriminatory* treatment
 - Protect airport users from *unlicensed and unauthorized* products and services
 - Maintain/enhance availability of *adequate services* for all airport users
 - Promote the *orderly development* of airport land
 - Ensure *efficiency* of operations
 - Reduce questions and uncertainty

BEST PRACTICES

3. *Minimum Standards, cont.*

Minimum Standards should:

- Provide clear direction to prospective tenants
- Ensure high quality products and services
- Support airport growth and development
- Supply best evidence in the event of a dispute

Minimum Standards should not:

- Guarantee equal rates or tenant operating costs
- Identify maximum standards
- Reflect “cut and paste” approach from other airports

BEST PRACTICES

4. *Rules and Regulations*

- Standards to protect health, safety, and welfare and to promote operational efficiency
 - Apply to all airport tenants and users
 - Apply across the airport
 - Enforceable by penalties, suspension of privileges
- Contracts need to incorporate Rules and Regulations and allow for changes

BEST PRACTICES

5. *Rents and Charges*

- Have a solid capital improvement program to maintain acceptable fund balance / avoid revenue surplus
- Use a transparent methodology
- Prepare a standard table of rents, fees, and charges
 - Reduces risk of discrimination claims
 - But, reduces flexibility
 - Include methodology for revision over time
- Variations must be justified and documented

BEST PRACTICES

6. *Standard Form Agreements*

- Reduces legal risks
 - Assures similar terms
 - Eliminates scrivener's errors and omissions
 - Limits areas of negotiation
 - Assures required terms
- But – Reduces Flexibility
 - Deviations require justification and invite challenges
 - Change to one form may have ripple effect to other forms

BEST PRACTICES

7. *Subordination Clause*

- Preserve authority to comply with Assurances
- Not required, but recommended (Order 5190.6B, ¶6.6)

“This agreement shall be subordinate to the provisions of any existing or future agreement between the [Sponsor] and the United States, In the event that the [Designated Official] of the [Sponsor] reasonably determines that this Agreement or any provision contained herein causes or may cause a violation of any agreement between the [Sponsor] and the United States, the [Sponsor] shall have the unilateral right to modify or terminate this Agreement to ensure the [Sponsor]’s compliance with all such agreements with the United States.”

RESOURCES

- ORDER 5190.6B, *Airport Compliance Handbook*
- ADVISORY CIRCULAR 150/5190-5, Change 1, *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*
- Part 16 Decisions
- ACRP publications

QUESTIONS?

Eric Pilsk

epilsk@kaplankirsch.com

Kaplan Kirsch & Rockwell LLP

Katie van Heuven

cvanheuven@kaplankirsch.com

Kaplan Kirsch & Rockwell LLP