



34<sup>th</sup> Annual Basics of Airport Law Workshop and 2018 Legal Update

## Session #15

# A DISCUSSION OF NON-AERONAUTICAL DEVELOPMENT

Elliott Black  
*FAA*

Peter J Kirsch  
*Kaplan Kirsch & Rockwell*

# THIS MORNING'S SESSION

- Real world context
- Legal fundamentals
- Changing FAA role
- FAA Reauthorization Act of 2018

# WHY THE FOCUS ON NON-AERONAUTICAL DEVELOPMENT?

- Historically, airport land not viewed in economic terms
- Airports' land buffers could be left undeveloped
- Aeronautical revenue and airport-oriented revenue could fund operations

# TODAY'S MARKET REALITIES

- Non-aeronautical revenues becoming important at airports – relatively and absolutely
- Users exerting pressure to diversify revenue sources
- Major businesses increasingly want to be on or near major airports

# 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 impeded non-aeronautical development



# LEGAL BASICS

- Significant federal, state, local requirements
- Some airport land cannot be used for non-aeronautical purposes (Surplus Property Act land, deed restrictions, AIP funding requirements)
- Presumption favors *all* airport land being used for aeronautical purposes

# 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

- **Approval**
  - For non-aeronautical use
- **Release** (of what)
  - Of Grant Assurance obligations
  - Of deed restrictions
- **Lease vs. sale**
  - FAA: longterm lease can ≈ sale





# NEW LEGAL FRAMEWORK

- FAA Reauthorization Act of 2018  
Pub. L. 115-254, 131 Stat. 1129

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”.

**SEC. 163. LIMITED REGULATION OF NON-FEDERALLY SPONSORED PROPERTY.**

(a) **IN GENERAL.**—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.

(b) **EXCEPTIONS.**—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 in the context of a commercial transaction for the use, lease, encumbrance, transfer, or disposal of land, any facilities on such land, or any portion of such land or facilities; or

(C) that the airport pays not more than fair market value in the context of a commercial transaction for the acquisition of land or facilities on such land;

(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.

(c) **RULE OF CONSTRUCTION.**—Nothing in this section shall be construed to affect the applicability of sections 47107(b) or 47133 of title 49, United States Code, to revenues generated by the use, lease, encumbrance, transfer, or disposal of land under subsection (a), facilities upon such land, or any portion of such land or facilities.

(d) **AMENDMENTS TO AIRPORT LAYOUT PLANS.**—Section 47107(a)(16) of title 49, United States Code, is amended—

(1) by striking subparagraph (B) and inserting the following:

“(B) the Secretary will review and approve or disapprove only those portions of the plan (or any subsequent revision to the plan) 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;”;

(2) in subparagraph (C), by striking “if the alteration” and all that follows through “airport; and” and inserting the following: “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”;

(3) in subparagraph (D), in the matter preceding clause (i), by striking “when an alternation” and all that follows through “Secretary, will” and inserting “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 with the portions of the plan approved by the Secretary, and 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”.

# TOPIC 1 – WHAT IS FAA’S PROPER ROLE?

# TOPIC 2 – WHAT SHOULD BE SPONSOR'S INTEREST?

# TOPIC 3 – HOW CAN FAA, SPONSORS WORK TOGETHER ON NON-AERO PROJECTS?

# QUESTIONS

Elliott Black

[Elliott.Black@faa.gov](mailto:Elliott.Black@faa.gov)

Peter Kirsch

[pkirsch@kaplankirsch.com](mailto:pkirsch@kaplankirsch.com)