

38TH ANNUAL

AIRPORT LAW WORKSHOP



 KAPLAN KIRSCH ROCKWELL
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Non-Aeronautical Development
Including Section 163 and Private Investment

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Today's session



- Non-aeronautical development
 - What is “non-aeronautical” development?
 - Why is it important?
- Section 163 of the FAA Reauthorization Act of 2018
 - Effect on non-aeronautical development
- FAA *draft* land use policy (2022)
- Best practices for negotiating development deals



Why is non-aeronautical development important?



- Law has always distinguished aero/ non-aero
- Historically – non-aero is just buffer
- Pressure to reduce aeronautical charges
- Need for new, creative revenue sources
- Unused (potentially valuable) real estate
- Complex and uncertain process to develop land



Setting the stage



- Historically FAA had approval authority over virtually *all non-aero* airport development
- FAA approval meant –
 - Environmental review
 - Federal scrutiny outside agency expertise
 - Complex process
- Effects on private development –
 - Confusion
 - Uncertainty
 - Competitive Disadvantage
 - Cost
 - Time



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



Some traditional legal distinctions



Aeronautical Uses

- Presumption on all airport property
- “Fair and reasonable” fees and charges – not fair market value
- Aeronautical uses generally do need specific FAA approval
- Leases can be up to 50 years

Non-Aeronautical Uses

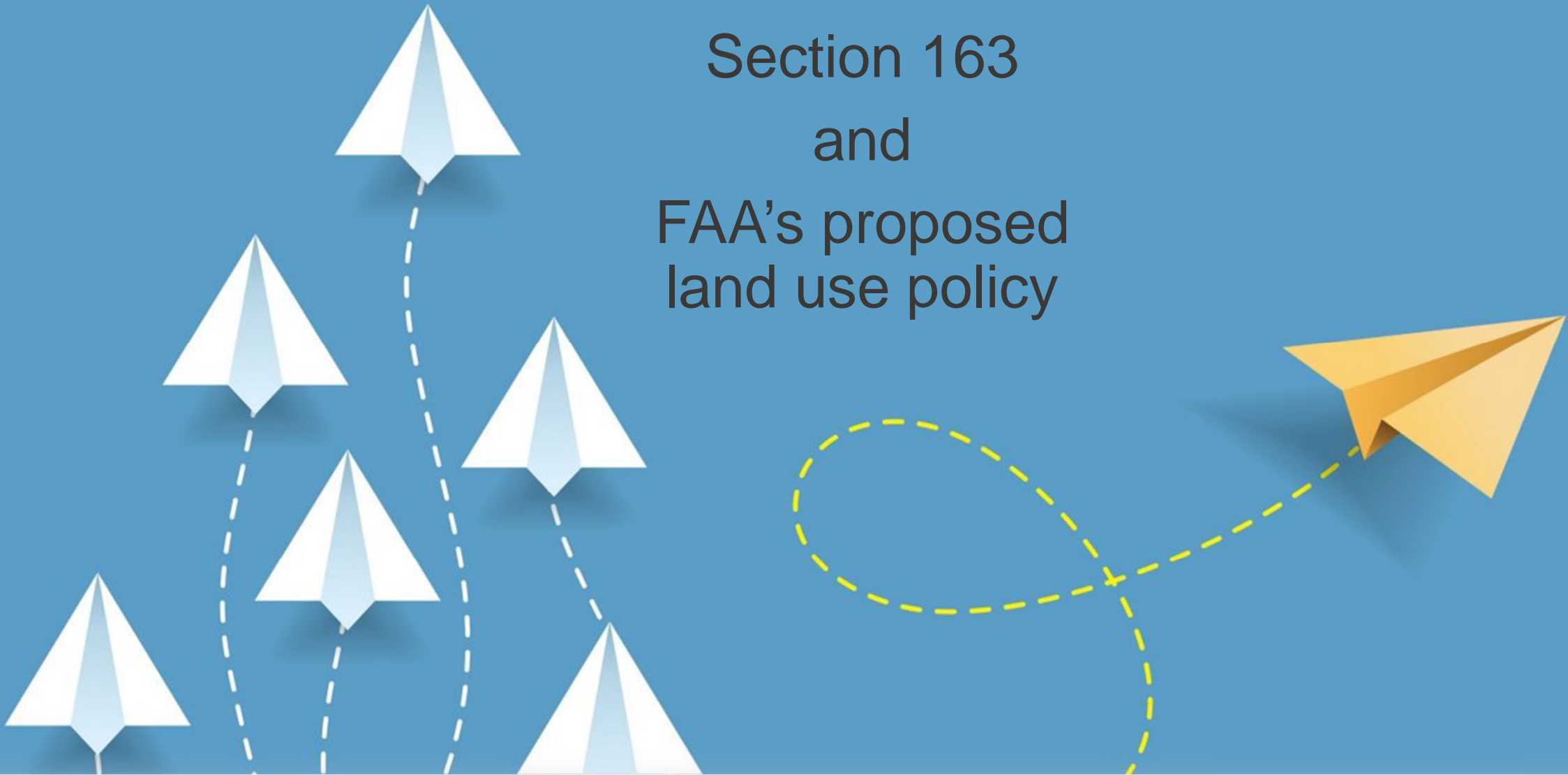
- Sponsor must secure FMV rates
- FAA approval(s) required
- No obligation to lease; no obligation to afford “reasonable access”
- Not covered in Minimum Standards
- Leases over 25 years can be challenging



A paradigm shift in FAA land use regulation



Section 163
and
FAA's proposed
land use policy



Key definitions*



ALL AIRPORT LAND NOW MUST BE:

- **Section 163 land:** Land not subject to FAA land use regulation
- **Aeronautical Use:** Any use that involves, makes possible, or is required for the operation of an aircraft/vehicle, or that contributes to or is required for the safety of such operations.
- **Airport Use:** Uses of land directly related to actual operation or foreseeable aeronautical development (includes terminal use)
- **Non-Aeronautical Use:** All other uses of airport property.
- **Mixed Use:** Combination of both aeronautical and non-aeronautical, but the non-aeronautical use is “significant”

* *Proposed FAA policy*



Part 1 – Section 163



FAA Reauthorization Act of 2018 – Section 163



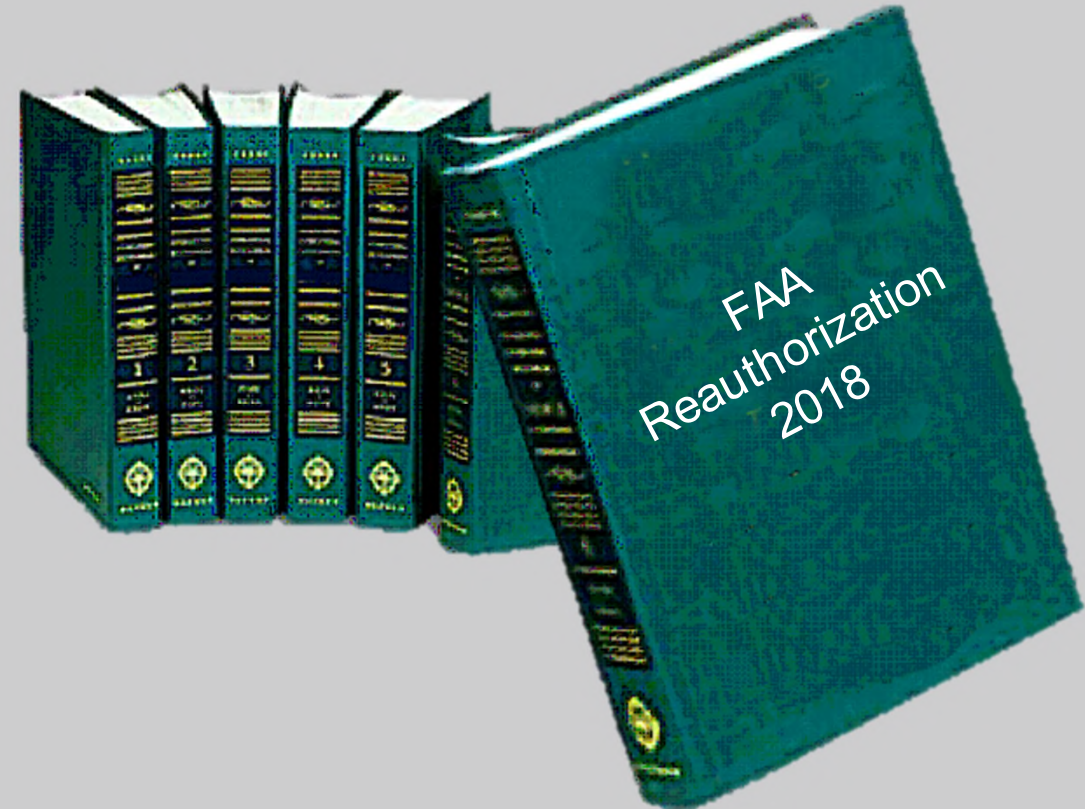
- Congressional purpose :
 - Eliminate FAA review over land use that is not core to its mission
 - Streamline and expedite airport development projects
 - Give airport sponsors increased (*but not unlimited*) autonomy to make land use decisions



What changed?



- 163(a) – Limits FAA jurisdiction and authority over airport land use
- 163(b) - Exceptions where FAA retains jurisdiction
- 163(c) - Preserves FAA authority over airport revenue
- 163(d) – Limits FAA approval authority over ALPs



The law - sections 163(a) and 163 (b)



(a) The Secretary of Transportation **may not** directly or indirectly regulate—

- the acquisition, use, lease, encumbrance, transfer, or disposal of land by an airport owner or operator; any facility upon such land; or any portion of such land or facility

EXCEPT:

(b) [FAA **may** regulate for the purpose of] 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



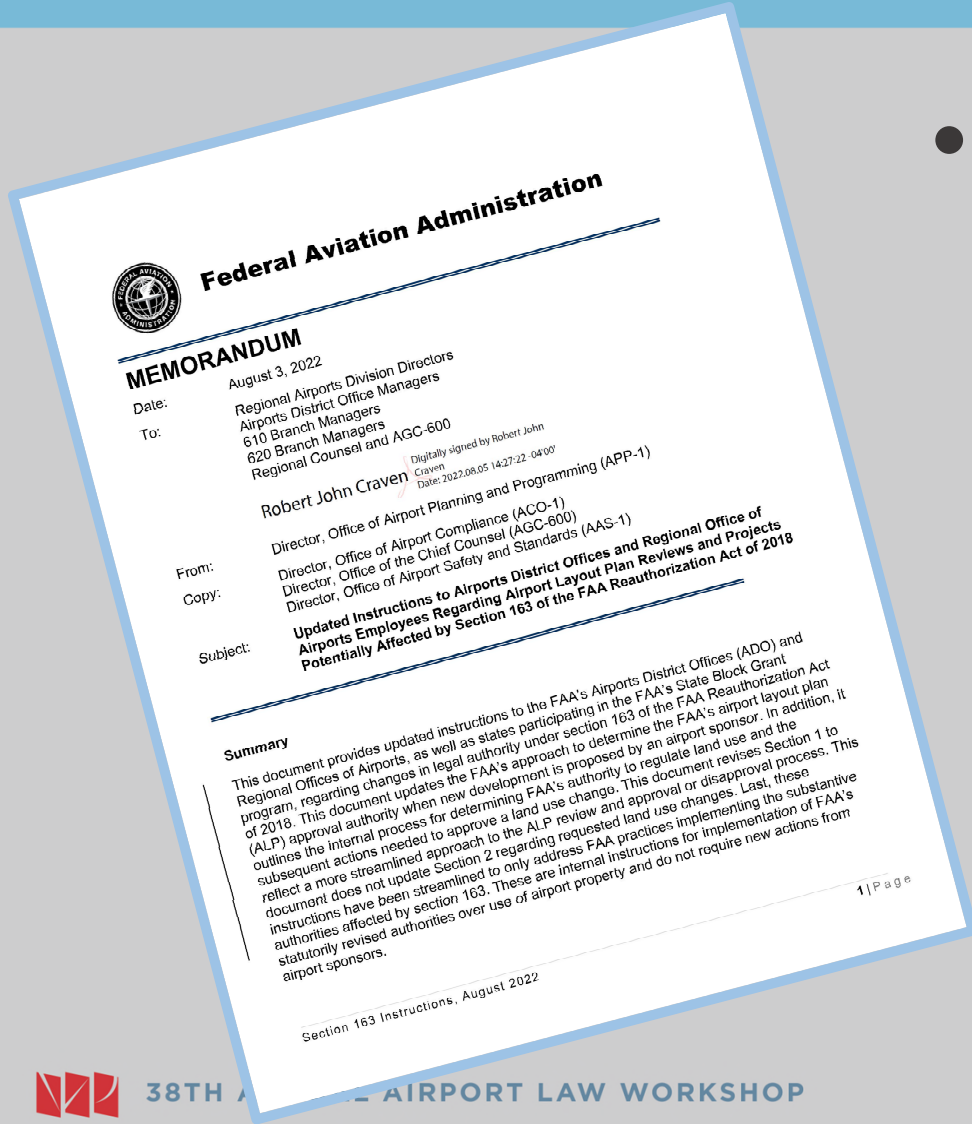
The law - section 163(d)



(d) The Secretary will review and approve or disapprove only those portions of the [ALP] that materially impact the safe and efficient operation of aircraft . . . or that would adversely affect the safety of people or property on the ground adjacent to the airport . . . or that adversely affect the value of prior Federal investments to a significant extent



FAA guidance



- First made public in late 2020; updated August 2022
 - Screening process for every land use and ALP approval
 - If the FAA has approval authority over any portion of a project, then the FAA retains approval authority over the entire project.
 - Distinguish project approval and ALP approval

FAA guidance - zones of interest



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

“Zones of interest is not an official term...”



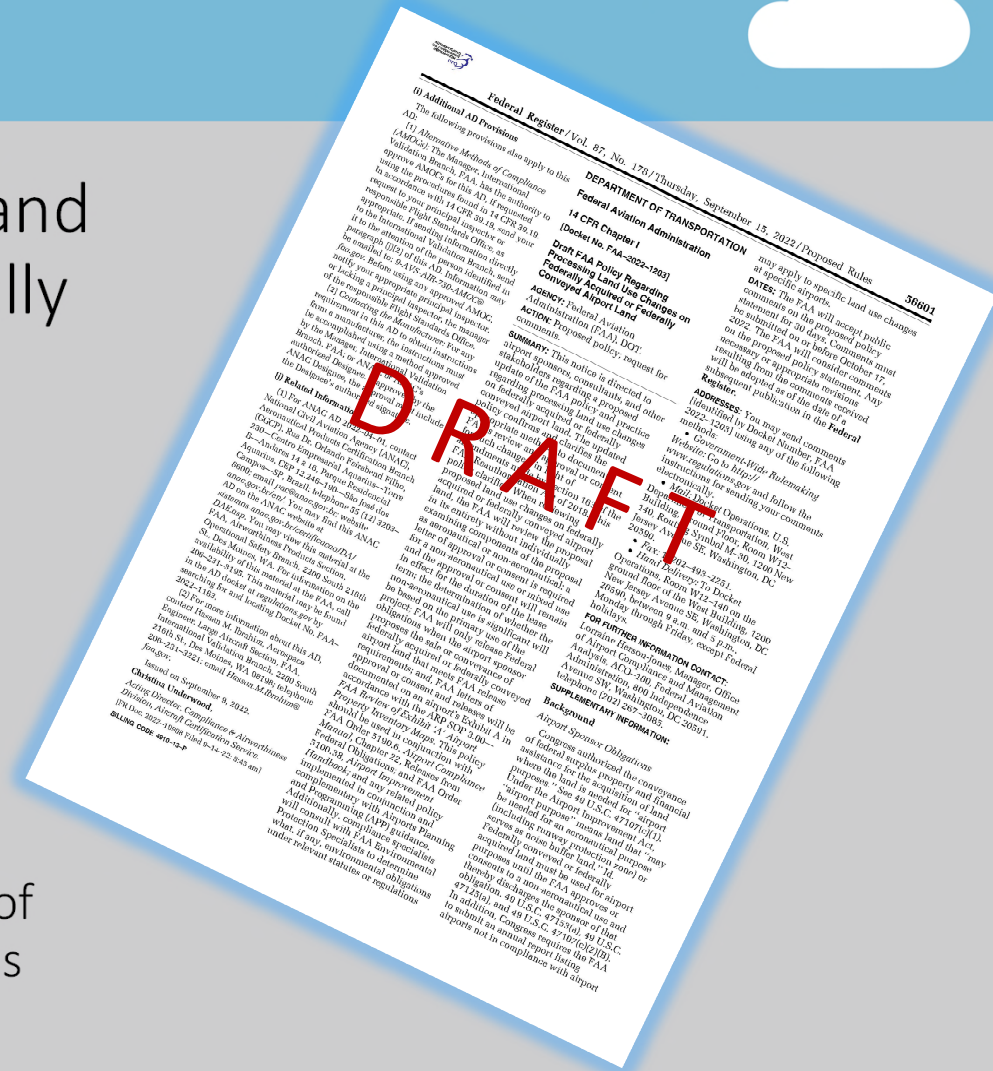
Part 2 – FAA's proposed new land use policy



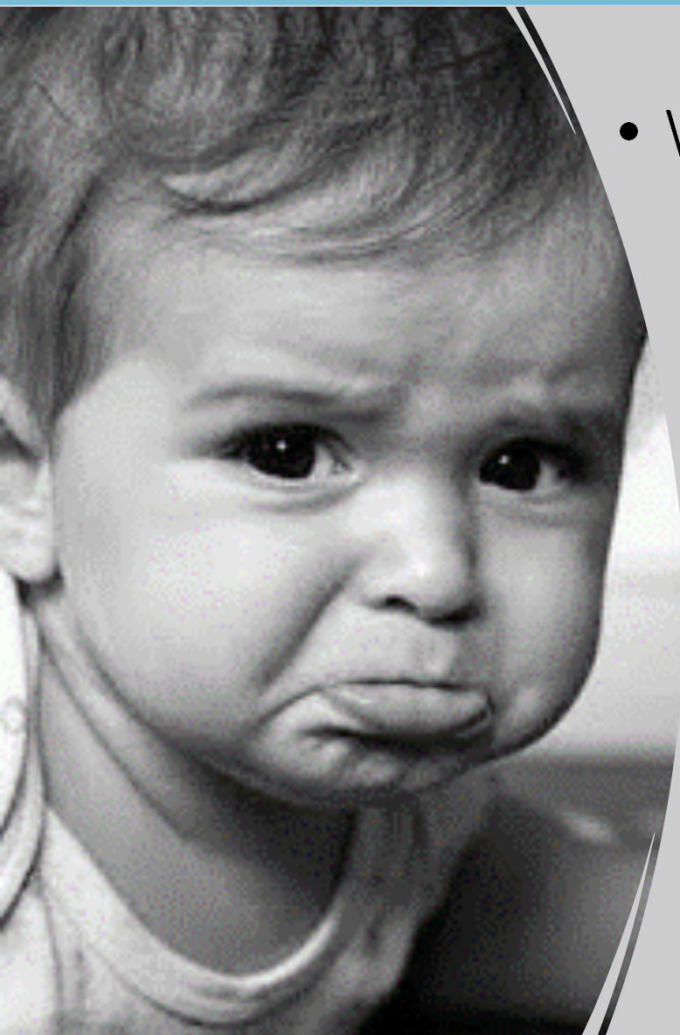
FAA proposed land use policy



- “Confirms and clarifies its prior policy” on land use changes on federally acquired or federally land
 - Four types of land use
 - o Aeronautical use
 - o Airport purpose
 - o Non-aeronautical use
 - o Mixed use
 - Distinguish “release” and “approval”
 - o Formal written authorization discharging all or part of FAA’s right to enforce contractual or deed obligations



Proposed land use policy, cont.



- What really is new?
 - Approvals/consents
 - needed for non-aero or mixed use
 - *only* for duration of the lease.
 - must be documented on Exhibit A.
 - Release only for a sale.
 - NEPA should be coordinated with the FAA environmental protection specialists
 - Applies not only to federally obligated land but also to land not subject to section 163 – *everything else*



Comments due October 17

Is NEPA triggered for a lease extension?

What if land is already shown on ALP as non-aero

What happened to interim/concurrent uses?

What about noise land?

What if an aero tenant subleases to a non-aero tenant?

Are there time limits for non-aero leases?

Does the Policy apply to a use that will affect safety but is not on federally-acquired land?

What's the difference between consent and approval?

Will prior releases for non-aero uses be grandfathered?

How long will the consent/approval process take?

So you are ready to do a non-aero deal...

PRIVATE INVESTMENT AGREEMENT

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Considerations before drafting



- Sponsor goals
 - Sponsor as airport
 - Sponsor as local government
 - Sponsor as economic development driver
- Control - sponsor / investor
- Collateral financial impacts and benefits
- Understand counter party goals



Initial questions for structuring deal

1. Is property on Exhibit “A” Property Map?
2. What are the regulatory hurdles?
 - A. Is planned use aeronautical or non-aeronautical?
 - B. Was land acquired with AIP grant funds or donated by the federal government?
 - C. How is land depicted on ALP?
3. Is this a sale or lease or concession?
4. How is compensation to be structured?



A few parting thoughts



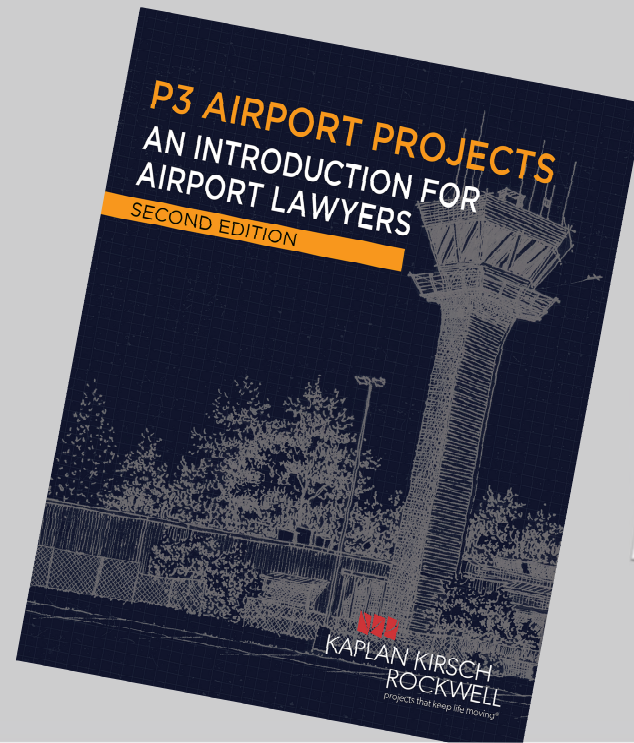
- You are competing with private sector for real estate – understand your unique attractions
- Your counterparty will not understand airports, public procurement, regulatory requirements (the list goes on)
- We are accustomed to regulatory uncertainty – counterparty is *not*
- Be prepared to justify transaction to *all* airport stakeholders and sponsor's electeds



Resources



- Source document tab at www.airportlawworkshop.com
- www.Section163.com
- P3 Introduction for Airport Lawyers (2d Ed.)





Questions?

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