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Session #8

Airport Finance for Lawyers

Funding Sources, Federal Requirements, Revenue Use, and Diversion

KAPLAN KIRSCH

Speakers

Steven L. Osit

Partner
Kaplan Kirsch LLP

Nicholas M. Clabbers

Partner
Kaplan Kirsch LLP

Presentation overview

Common airport sources of funds.

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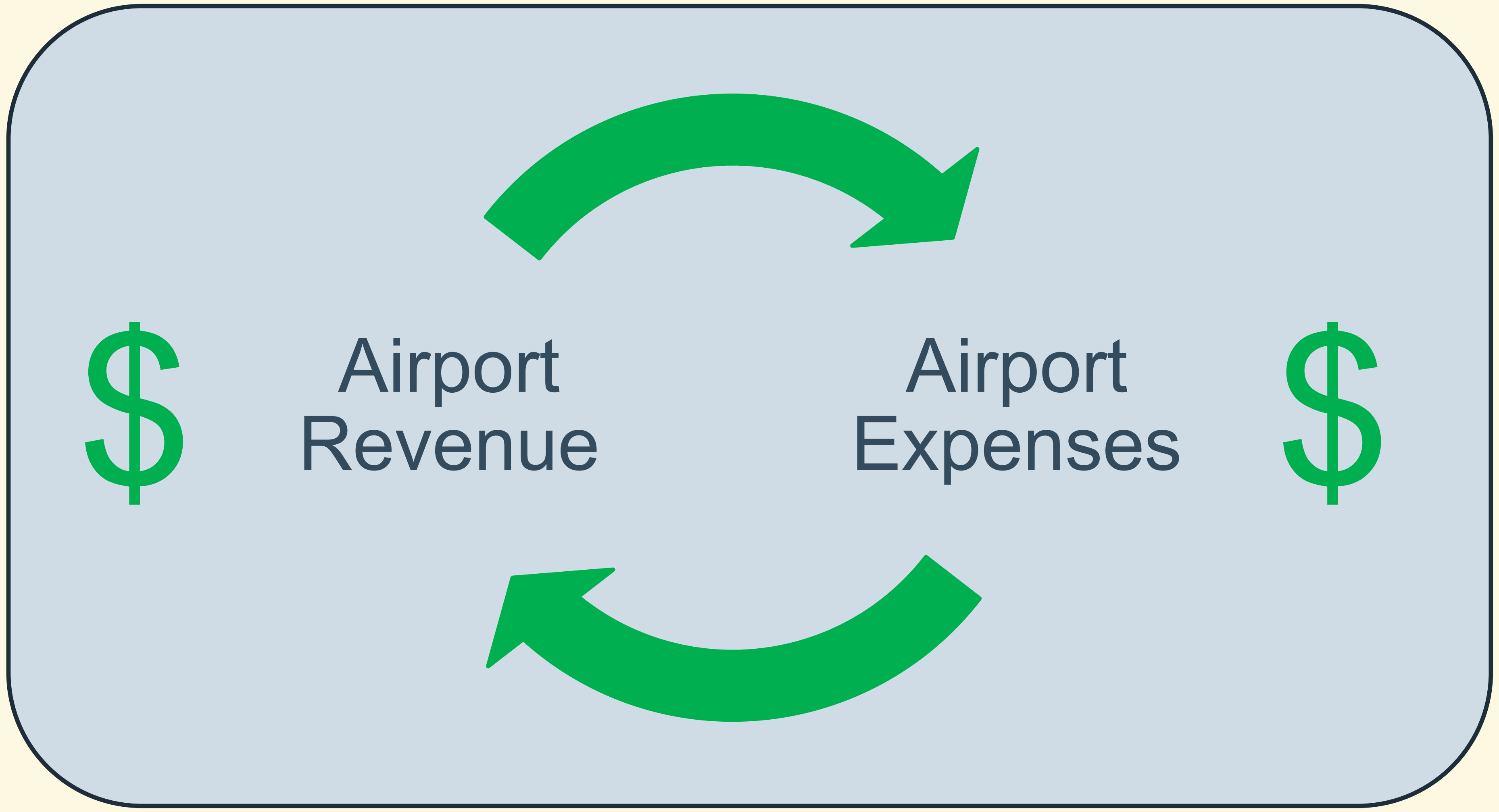
- Airport revenue
- Other revenue
- Airport Improvement Program
- Passenger Facility Charges

Airport revenue

Fundamentally, airports must operate as a closed fiscal system.



Policies and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696 (Feb. 16, 1999)

7696 **Federal Register** / Vol. 64, No. 30 / Tuesday, February 16, 1999 / Notices

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 28472]

Policy and Procedures Concerning the Use of Airport Revenue

AGENCY: Federal Aviation Administration (FAA) DoT

ACTION: Policy statement.

SUMMARY: This document announces the final publication of the Federal Aviation Administration policy on the use of airport revenue and maintenance of a self-sustaining rate structure by Federally-assisted airports. This statement of policy (''Final Policy'') was required by the Federal Aviation Administration Authorization Act of 1994, and incorporates provisions of the Federal Aviation Administration Reauthorization Act of 1996. The Final Policy is also based on consideration of comments received on two notices of proposed policy issued by the FAA in February 1996, and December 1996, which were published in the **Federal Register** for public comment. The Final Policy describes the scope of airport revenue that is subject to the Federal requirements on airport revenue use and lists those requirements. The Final Policy also describes prohibited and permitted uses of airport revenue and outlines the FAA's enforcement policies and procedures. The Final Policy includes an outline of applicable record-keeping and reporting requirements for the use of airport revenue. Finally, the Final Policy includes the FAA's interpretation of the obligation of an airport sponsor to maintain a self-sustaining rate structure to the extent possible under the circumstances existing at each airport.

DATES: This Final Policy is effective February 16, 1999.

FOR FURTHER INFORMATION CONTACT: J.

that makes the airport as self-sustaining as possible. The Final Policy generally represents a continuation of basic FAA policy on airport revenue use that has been in effect since enactment of the Airport and Airway Improvement Act of 1982 (AAIA), currently codified at 49 U.S.C. §47107(b). The FAA issued a comprehensive statement of this policy in the Notice of Proposed Policy dated February 26, 1996 (Proposed Policy), and addressed four particular issues in more detail in the Supplemental Notice of Proposed Policy dated December 18, 1996 (Supplemental Notice). The Final Policy includes provisions required by the Federal Aviation Administration Authorization Act of 1994, Public Law 103–305 (August 23, 1994) (FAA Authorization Act of 1994), and the Airport Revenue Protection Act of 1996, Title VIII of the Federal Aviation Administration Reauthorization Act of 1996, Public Law 104–264 (October 9, 1996), 110 Stat. 3269 (FAA Reauthorization Act of 1996). The Final Policy also includes changes adopted in response to comments on the Proposed Policy and Supplemental Notice.

The Final Policy contains nine sections. Section I is the Introduction, which explains the purpose for issuing the Final Policy and lists the statutory authorities under which the FAA is acting.

Section II, ''Definitions,'' defines federal financial assistance, airport revenue and unlawful revenue diversion.

Section III, ''Applicability of the Policy,'' describes the circumstances that make an airport owner or operator subject to this Final Policy.

Section IV, ''Statutory Requirements for the Use of Airport Revenue,'' discusses the statutes that govern the use of airport revenue.

Section V, ''Permitted Uses of Airport Revenue,'' describes categories and examples of uses of airport revenue that are considered to be permitted under 49

an airport maintain a self-sustaining airport rate structure. This is a new section of the policy, which provides more complete guidance on the subject than appeared in either the Proposed Policy or Supplemental Notice.

Section VIII, ''Reporting and Audit Requirements,'' addresses the requirement for the filing of annual airport financial reports and the requirement for a review and opinion on airport revenue use in a single audit conducted under the Single Audit Act, 31 U.S.C. §§7501–7505.

Section IX, ''Monitoring and Compliance,'' describes the FAA's activities for monitoring airport sponsor compliance with the revenue-use requirements and the requirement for a self-sustaining airport rate structure and the range of actions that the FAA may take to assure compliance with those requirements. Section IX also describes the sanctions available to FAA when a sponsor has failed to take corrective action to cure a violation of the revenue-use requirement.

Background

Governing Statutes

Four statutes govern the use of airport revenue: the AAIA; the Airport and Airway Safety and Capacity Expansion Act of 1987; the FAA Authorization Act of 1994; and the FAA Reauthorization Act of 1996. These statutes are codified at 49 USC 47101, *et seq.*

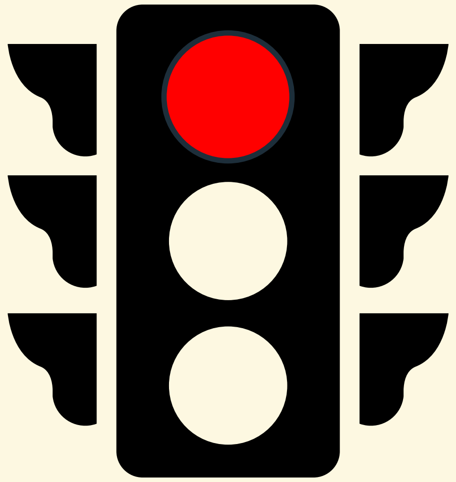
Section 511(a)(12) of the AAIA, part of title V of the Tax Equity and Fiscal Responsibility Act, Public Law 97–248, (now codified at 49 USC 47107(b)) established the general requirement for use of airport revenue. As originally enacted, the revenue-use requirement directed public airport owners and operators to ''use all revenues generated by the airport * * * for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the

Airport revenue

What is airport revenue?

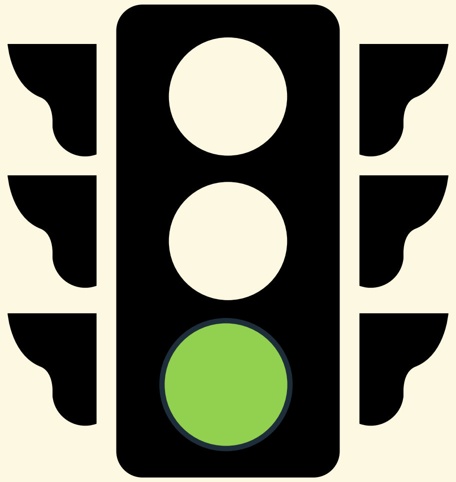
All fees, charges, rents, or other payments received by or accruing to the sponsor for the right to conduct an activity on the airport or use or occupy airport property, for the sale or other transfer of airport property, or from the sponsor's aeronautical activities.

<u>Airport Revenue:</u>



- Airline Charges
- Land/Facility Rent
- Landing Fees
- Concession Fees
- Parking Revenue
- Mineral Rights
- Taxes on Aviation Fuel*

<u>Not Airport Revenue:</u>



- Property Tax
- Other Sales Tax
- Hotel Taxes
- Parking Citations
- Tenants' Revenues

Airport revenue

Establishing aeronautical rates and charges.

- Policy Regarding Rates and Charges,
  78 Fed. Reg. 55330 (updated Sept. 10, 2013)
- Aeronautical charges must be reasonable and not unjustly discriminatory
- Many approaches to (airline) rate-setting:
  - Compensatory
  - Residual
  - Hybrid
- Airfield charges should not exceed costs
- Avoid excessive surplus revenue

Airport revenue

Fair market value is generally required for non-aeronautical use...

- Non-aeronautical uses and permanent disposal of land
- Determined *only* by appraisal
  - *See* Compliance Guidance Letter 2018-03, *Appraisal Standards for the Sale and Disposal of Federally Obligated Airport Property*

Fair Market Value: "The highest price estimated in terms of money that a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser or tenant who buys or rents with knowledge of all the uses to which it is adapted and for which it is capable of being used."

Airport revenue

…but there are some exceptions.

- **Community purposes**
  - Enhances public acceptance
  - Would not otherwise produce revenue
  - Does not preclude airport reuse
  - No capital or operating costs
- **Non-profit aviation organizations**
  - Reasonably justified by the tangible or intangible benefits to airport
- **Public transit projects**

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Airport revenue

Permissible expenditures of airport revenue.

- Airfield pavement projects
- Construction of facilities on airport property
- Airport employee salaries and benefits
- Utilities for the terminal building
- Marketing expenses related to the airport
- Portions of ground access projects
- Structured air carrier incentive programs
- Lobbying and attorney fees

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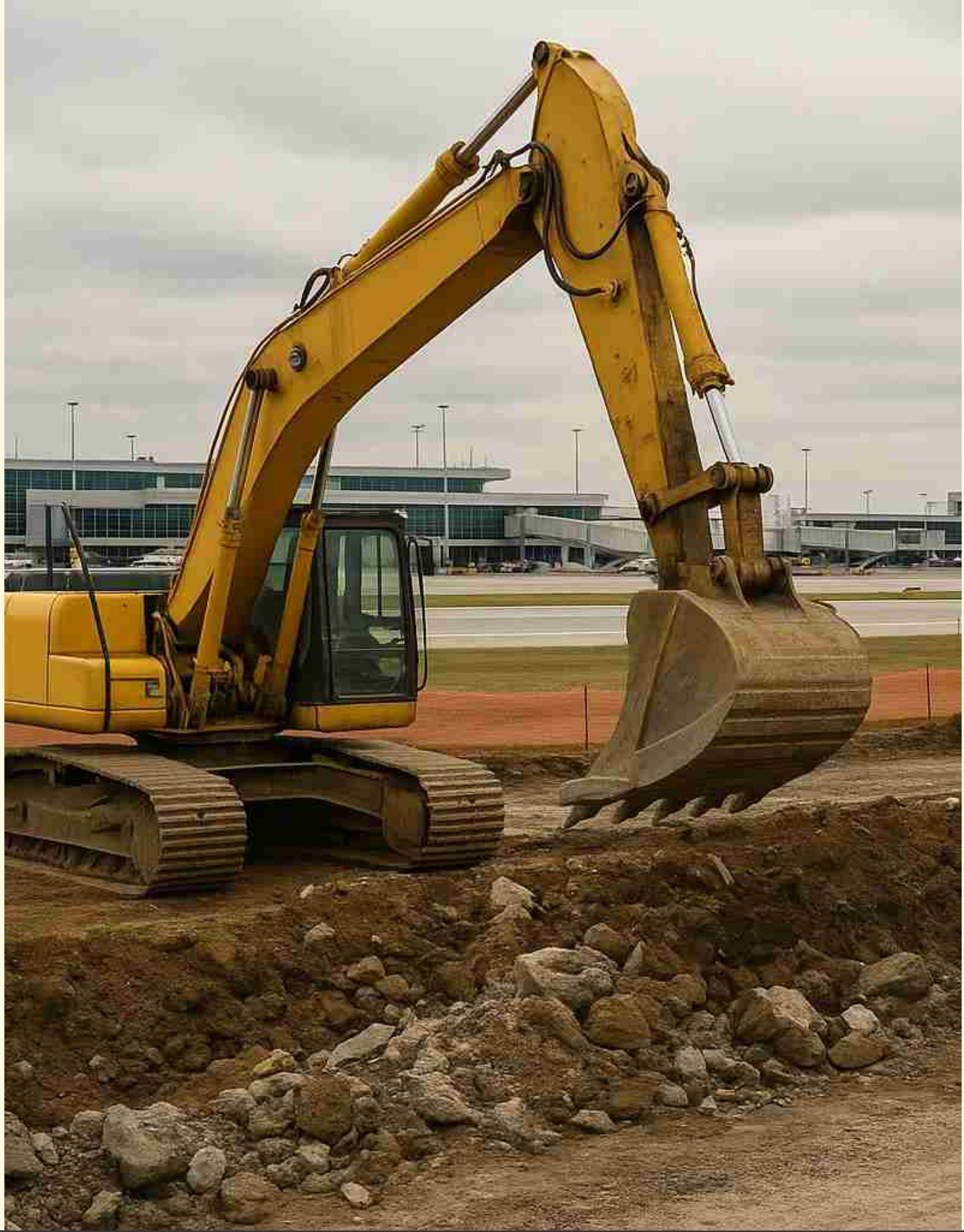


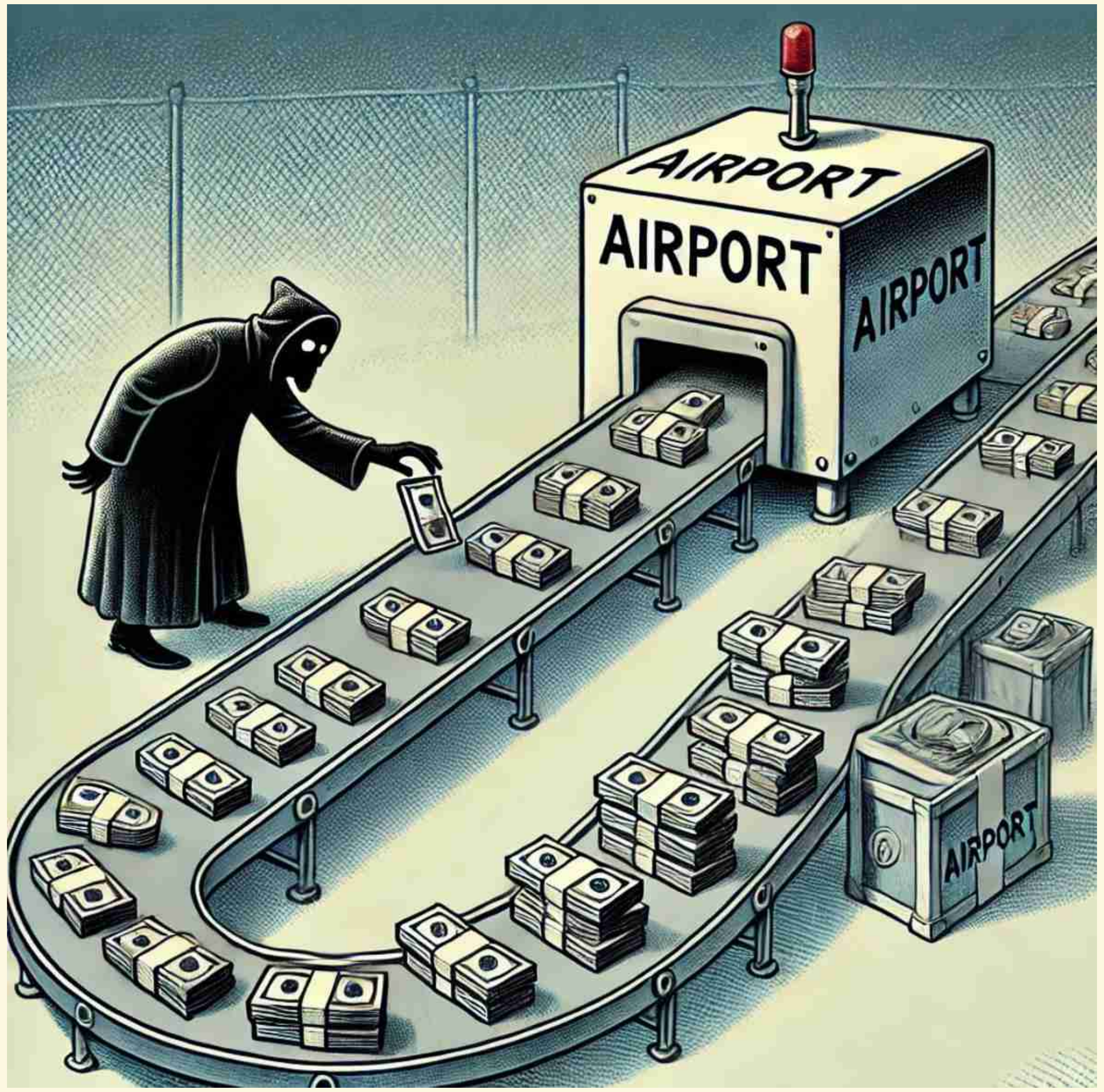
Airport revenue

Unlawful revenue diversion.

Use of airport revenue for purposes *other* than the **capital or operating costs** of an airport (where no grandfathering exception applies).

Common Examples

- Payments exceeding reasonable value to the airport
- General economic development
- Inconsistent cost allocation formulae
- Nonaeronautical uses at less that fair market value
- Minimum revenue guarantee programs



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Airport revenue

Unlawful revenue diversion can carry unique consequences.

- Six-year statute of limitations
- Corrective Action Plans require reimbursement to airport account
- Administrative penalties:
  - Withhold new grants
  - Suspend existing grants
  - Suspend PFC authority
  - Suspend other Title 49 grants
- Civil penalties:
  - Up to three times the amount of unlawfully diverted revenue

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Other revenues

Not subject to the Revenue Use Policy, although other obligations apply.

- Federal and state grant programs
- Property taxes
- Sales taxes (other than aviation fuel)

<u>Consider</u>:

1. Anti-Head Tax Act
2. No unjust discrimination!
3. Airport Noise and Capacity Act(?)

Airport Improvement Program

What is the AIP?

- Federal grant program administered by the FAA
- Annual funding comes from the Airport and Airway Trust Fund
- Discretionary grants
- Entitlement grants
  - Primary, cargo, general aviation
- Generally, only for capital expenditures
- Local matching funds:
  - 75-80 percent of eligible costs for medium and large hub airports
  - 90-95 percent of eligible costs of other primary or general aviation airports

Airport Improvement Program

Who can receive an AIP grant?

- Airport must be on the National Plan of Integrated Airport Systems (NPIAS)
- Eligible sponsors include:
  - Public owners (state, local, and tribal governments)
  - Private owner of reliever airport
  - Private owner of airport with more than 2,500 enplanements
  - Public non-owners (for planning and noise mitigation)

Airport Improvement Program

What types of projects are eligible for AIP grants?

- Safety and standards
- Airfield/airport security
- Airport planning
- Airport development
- Environmental mitigation
- Public use facilities
- Things that communicate with pilots

Airport Improvement Program

What are the eligibility requirements for an AIP-funded project?

1. Justified by current or forecasted needs
2. Meet FAA design/safety standards
3. On airport property
4. Shown on Airport Layout Plan (Consider Section 743!)
5. Environmental review completed
6. Result in usable unit of work (or permissible phasing)

(And many others – see AIP Handbook)

New AIP Handbook coming soon!

Airport Improvement Program

Are there restrictions on how AIP-funded projects are procured?

- Uniform Grant Rule – 2 CFR 200
- Full and open competition
- Costs incurred after grant obligation
  - Limited reimbursement opportunities
- Numerous federal provisions:
  - Brooks Act (professional services)
  - Disadvantaged Business Enterprise (DBE) Program
  - Veterans' preference
  - Buy America / Buy American

Passenger Facility Charges

What is a Passenger Facility Charge (PFC)?

- The Anti-Head Tax Act (49 U.S.C. 40116)
- \$1, \$2, \$3, \$4, or \$4.50 per eligible passenger (49 U.S.C. 40117)
- FAA oversight of PFC collection and use
- Limitations on use of PFCs
  - Enhance safety, security, or capacity
  - Reduce noise
  - Increase air carrier competition
  - Not for “exclusive use” facilities

Passenger Facility Charges

How can PFCs be collected?

- Airline consultation (no approval rights)
- FAA approves:
  - Individual projects
  - Total amount to be collected
- Streamlined process for non-hub/other airports
- PFCs collected by airline *in trust for* airport sponsor

Passenger Facility Charges

How may PFCs be used?

- Eligibility similar but not same as AIP
  - Terminals primarily for movement of passengers and baggage in non-revenue producing areas
  - Excludes revenue-producing areas
- Can be used on a pay-as-you-go basis or leveraged (i.e., PFC-backed debt)

Passenger Facility Charges

What restrictions are attached to PFC-funded facilities?

- No long-term exclusive use
- No restrictions on assigning available facilities
- No rights of first refusal / carryover
- PFC-funded portion cannot be included in rate base

Questions?