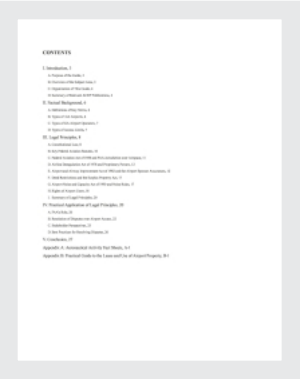

A Guide for Compliance with Grant Agreement Obligations to Provide Reasonable Access to an AIP-Funded Public Use General Aviation Airport

DETAILS

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A GUIDE FOR COMPLIANCE WITH GRANT AGREEMENT OBLIGATIONS TO PROVIDE REASONABLE ACCESS TO AN AIP-FUNDED PUBLIC USE GENERAL AVIATION AIRPORT

By Kaplan Kirsch and Rockwell LLP and Aviation Management Consulting Group, Inc.

I. INTRODUCTION

A. Purpose of the Guide

The purpose of this Guide is to describe how the Airport Sponsor Assurances and other federal obligations apply to limitations on access at general aviation (GA) airports. For purposes of this Guide, a limitation on access is any requirement, action, or practice that restricts an aeronautical user's ability to conduct an aeronautical activity on an airport.

In keeping with the goal of the Airport Cooperative Research Program (ACRP) to conduct applied research, this Guide is intended to be more practical than theoretical. This is accomplished by several means, including: 1) focusing on the practical application of the Airport Sponsor Assurances and the means of resolving disputes, in addition to the legal principles; 2) providing *Aeronautical Activity Fact Sheets* in Appendix A, which contain short summaries concerning the regulation of specific aeronautical activities; and 3) providing a *Practical Guide to Leasing Airport Property* in Appendix B, which contains a "best practices" approach to the lease and use of airport property.

B. Overview of the Subject Area

GA airports host a broad range of aeronautical activities. While the dominant activity at most GA airports is the takeoff and landing of fixed-wing aircraft, GA airports accommodate all manner of aircraft (e.g., helicopters, gliders, etc.) and a wide variety of aeronautical activities (e.g., skydiving, banner towing, air shows, etc.).

GA airport operators may seek to limit access for a variety of reasons. The primary motivation is often to address a conflict or perceived conflict between or among different aeronautical activities. For example, GA airport operators and pilots at some airports have expressed concerns about the safety and efficiency of on-airport parachute drop zones, banner towing activities, and agricultural operations.

GA airport operators also may seek to limit access to address community concerns about the noise and other environmental impacts associated with aeronautical activities. Residents near some airports have complained about the repetitive nature of flight training operations and the days and times such operations occur. At other airports, neighbors have complained about the level of noise and air pollution associated with turbine-powered aircraft operations. Some residents in urban areas complain about noise attributable to news helicopters. In resort communities, some neighbors complain about the noise of helicopter and fixed-wing air tours.

Although the motives may be clear, the solutions often are not. The question of whether a particular aeronautical activity or combination of aeronautical activities are safe or unsafe is complex and does not lend itself to simple "yes" or "no" answers. Risk is often measured in probabilities and dependent on multiple variables (e.g., climatic conditions, airfield configuration, airspace constraints, etc.).

Similarly, there are no simple answers when addressing noise and environmental impacts. While high noise levels, such as those experienced in areas surrounding primary commercial service airports that are large hubs, have been associated with negative health effects, the lower levels of cumulative noise often associated with GA airports are more typically associated with annoyance and other less tangible effects. Like questions of safety, there is a high degree of subjectivity and often no consensus on whether a "noise problem" exists at a GA airport or can be attributed to a specific aeronautical activity.

The regulation of aviation safety and aircraft noise is a shared responsibility among the Federal Aviation Administration (FAA), GA airport operators, and aircraft owners and operators. Courts recognize that the federal government has preempted the field of aviation safety, and FAA acts as the "final arbiter" on questions of safety. However, GA airport operators play an important role

in maintaining airport safety and addressing local noise and environmental issues.

Of the many mechanisms available to GA airport operators to address safety and noise concerns, this Guide will address only two. Specifically, the Guide considers 1) restrictions on aeronautical activities and aircraft operations, and 2) limits on the lease and use of airport property that amount to limits on access.

First, GA airport operators may seek to impose restrictions on aeronautical activities and aircraft operations. Examples of activities that could be restricted include skydiving onto an airport, using the airport for banner towing, and certain flight training activities (e.g., restricting the days of the week and times of day when flight training can occur or restricting specific types of flight training activities such as "touch-and-go"). Restrictions on aircraft operations may include restrictions on certain types of aircraft (e.g., jets) or the time of day when aircraft operations may be conducted.

Second, GA airport operators lease property for aeronautical use, including tie-downs, hangars, offices, shops, and vacant land (for development of improvements). A GA airport operator's leasing and rents and fees policies, and decisions on the lease and use of particular parcels, can have significant effects on the types and level of aeronautical activity occurring at an airport. A GA airport operator's refusal to negotiate with prospective tenants and the imposition of unreasonable, irrelevant, or unattainable conditions can amount to a limit on access and could constitute a violation of the Airport Sponsor Assurances.

C. Organization of This Guide

This Guide is intended to cover the legal and practical application of the Airport Sponsor Assurances and other federal obligations to limits on access at GA airports. Section II provides background information on GA airports and the characteristics of limits on access. Section III provides a detailed examination of relevant legal principles and their application to limits on access. This includes an examination of relevant principles under the U.S. Constitution, federal law, and the Airport Sponsor Assurances. Section IV examines the practical application of these legal principles, including the role of FAA in considering access limits and the process of resolving disputes. Appendix A contains *Aeronautical Activity Fact Sheets*, providing a summary of the legal principles applicable to certain aeronautical activities and references for further research. Appendix B contains a *Practical Guide to the Lease of Airport Property*.

D. Summary of Relevant ACRP Publications

This publication adds to the extensive and growing body of work published as part of the ACRP. Several topics related to the subject of this Guide are addressed in other publications.

The following table identifies, summarizes, and describes the relationship of other ACRP publications and projects. In light of the availability of these resources, this Guide will not attempt to cover the same ground and instead refers readers to these publications for additional information.

Table 1.

Publication	Summary of Content	Relationship to This Guide
ACRP Legal Research Digest 10: Analysis of Federal Laws, Regulations, and Case Law Regarding Airport Proprietary Rights (Sept. 2010)	Legal Research Digest (LRD) 10 details the origin and principles underlying airport proprietary powers, including the power to restrict aeronautical activities.	LRD 10 should be consulted as background on the foundational legal principles of this Guide. These principles will be summarized herein, but the content of LRD 10 will not be repeated.
ACRP Report 58: Airport Industry Familiarization and Training for Part-Time Airport Policy Makers (Feb. 2012)	ACRP 58 provides a summary of the roles and responsibilities of the airport operator in developing, maintaining, and operating airports. ACRP 58 includes	ACRP 58 could be provided to help educate part-time airport policy makers about the subject of this Guide.

Publication	Summary of Content	Relationship to This Guide
	chapters on "What's Expected of Airport Tenants and Users," "Complying with Federal Grant Assurances," and "Alternate Uses and Restrictions of Your Airport."	
ACRP Synthesis 41: Conducting Aeronautical Special Events at Airports (May 2013)	Synthesis 41 provides practical advice on the steps typically undertaken in planning, organizing, conducting, and returning to normal operations after a special event. The appendices include sample indemnification language and a sample use agreement.	Synthesis 41 should be consulted for specific information on planning for and conducting special events.
ACRP Legal Research Digest 11: Survey of Minimum Standards: Commercial Aeronautical Activities at Airports (Apr. 2011)	LRD 11 explains the role of airport minimum standards in regulating commercial aeronautical activities at airports.	LRD 11 should be consulted for further information on the regulation of commercial aeronautical activities.
ACRP Legal Research Digest 8: The Right to Self-Fuel (Dec. 2009)	LRD 8 details the origin and principles underlying the requirement to allow aircraft owners and operators to fuel their own aircraft. The digest provides citations and summaries of prior FAA and judicial decisions on self-fueling. Most relevant, the digest describes the legal principles applicable to the regulation of self-fueling by airport sponsors.	LRD 8 should be consulted for more information on the regulation of self-fueling.
ACRP Report 114: Guidebook for Through-the-Fence (TTF) Operations (Sept. 2014)	ACRP Report 114 provides a guidebook on the subject of TTF operations, including specific resources and tools designed to help assess, structure, and manage TTF operations.	The guidebook can be consulted for more detailed information on the regulation of TTF operations and specific types of associated TTF activities.

II. FACTUAL BACKGROUND

A. Definitions of Key Terms

This Guide focuses on the GA *airports that have a federal obligation to be available for public use on reasonable and not unjustly discriminatory terms*.

At the broadest level, the term "general aviation airport" refers to a landing area that supports aircraft operations other than commercial service. These landing fields may include airports, heliports, and seaplane bases (referred to collectively herein as "airports"). An airport can have some limited level of commercial passenger service and still be considered a GA airport.

Congress and FAA have developed a detailed categorization for the 378 "primary" airports (which accommodate commercial service and have more than 10,000 passenger boardings each year) as large hub, medium hub, small hub, or nonhub. FAA also recognizes "reliever airports," which are airports designated by the Secretary of Transportation to relieve congestion at a commercial service airport and provide more general aviation access to the overall community. But FAA also includes approximately 3,000 airports in an amorphous category of "general aviation airports" without further categorization. As discussed in the next section, FAA has recognized this deficiency and has been working to develop a categorization system for the different types of GA airports.

Another concept that is integral to this Guide is the characterization of a GA airport as "federally obligated," "grant-obligated" or "AIP-obligated." These descriptors refer to the fact that these airports are subject to the requirements of the Airport Sponsor Assurances, which are contractual obligations required by federal law and agreed to by airport operators in exchange for grant funding through the Airport Improvement Program (AIP) or other federal obligations, such as the Surplus Property Act of 1944. As detailed throughout this Guide, the Airport Sponsor Assurances include two critical requirements: 1) to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities," and 2) to "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Federally obligated airports can be distinguished from private, non-federally obligated airports. Many GA airports are owned by private entities and made available only to those aircraft operators that have been given express permission to use the airport. These airports include, for example, fly-in communities where homeowners on or around the airport are the only ones who have the right to use the airport and airports used for specialized aeronautical activities such as skydiving and gliders. Although some of these airports may be available for public use and may have made a commitment along these lines as part of a state or local permit or authorization, these airports are not required by the Airport Sponsor Assurances or other federal obligation to be available to the public.

There are several legal principles addressed in this Guide that are relevant to privately owned, private-use airports, including preemption and the limits on local governments using land-use power to restrict access to conduct aeronautical activities. However, because this Guide is focused on the requirements of the Airport Sponsor Assurances, privately owned, private-use airports are beyond the scope of this Guide.

B. Types of GA Airports

In 2010, FAA initiated a comprehensive review of GA airports, in part to reclassify these airports according to level of activity and functions served. FAA identified 2,952 GA airports and created four categories: national, regional, local, and basic.

In May 2012, FAA published the results of this initiative in a report entitled *General Aviation Airports: A National Asset*. In March 2014, FAA published the results of a follow-up study to categorize the almost 500 airports that did not fit into one of the four airport categories during the first effort.

The *Asset Study* included a detailed examination of the diverse aeronautical activities occurring at GA airports and amply demonstrated the idea expressed in the Introduction to this Guide that GA airports accommodate a wide variety of aeronautical activities. The *Asset Study* also confirmed the variability in the size and activity levels at GA airports. There are, at one end of the spectrum, 852 basic airports with moderate to low levels of activity and an average of 10 propeller-driven-based aircraft. There are, at the other end of the spectrum, 84 national airports with very high activity levels and an average of 200 based aircraft, including 30 or more jets.[1]

[1] The *Asset Study* provides specific examples of each category of airport. For example: Van Nuys Airport outside of Los Angeles, California, is a National Airport;

The vast majority of the GA airports included in the *Asset Study* have received grants under the AIP and are therefore subject to the Airport Sponsor Assurances. Each such GA airport operator, from the smallest basic airport to the largest national airport, is responsible for complying with each of the Assurances, including the obligations that are central to this Guide, to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities" and to refrain from granting an "exclusive right."

Although GA airports may be subject to a uniform set of Airport Sponsor Assurances, they often do not have the internal resources or expertise to dedicate to compliance. As a practical matter, basic airports typically have limited staff and, in some communities, may not have dedicated staff at all. Instead, a local public works or transportation department manager may be responsible for managing the airport. Airport operations and maintenance may be performed as an ancillary function by city or county staff or private contractors. Some airports are managed by a commercial operator, such as a fixed-base operator, or a private airport management company.

Further, GA airports do not have uniform rules, standards, and policies in place that clearly identify the terms and conditions by which aeronautical activities can occur at the airport. FAA recommends but does not require that airport operators develop airport rules and regulations, airport minimum standards, and leasing, rents, and fees policies.

C. Types of GA Airport Operators

In the United States, most public use airports are owned by public entities, including states, counties, cities, special districts, airport authorities, airport commissions, port authorities, and colleges and universities. A 2010 survey of approximately 250 GA airports revealed that nearly three-quarters of GA airports are operated by a general purpose government and one-quarter are operated by special-purpose entities.[2]

Ankeny Regional Airport near Ankeny, Iowa, is a Regional Airport; Eastern Sierra Regional Airport in Inyo County, California, is a Local Airport; and Taylor County Airport near Medford, Wisconsin, is a Basic Airport.

[2] *See* PAUL MEYERS, GUIDEBOOK FOR DEVELOPING GENERAL AVIATION AIRPORT BUSINESS PLANS (Transportation Research Board, Airport Cooperative Research Program Report 77, 2012).

D. Types of Access Limits

Limits on access to GA airports can take many forms and affect a wide variety of aeronautical activities. For purposes of this Guide, limits on access have been divided into three basic categories: 1) limits on aeronautical activities, 2) limits on aircraft operations, and 3) limits on the lease and use of airport property.

Some examples of limits on aeronautical activities include restrictions of on-airport parachute drop zones, flight training, banner towing, experimental aircraft, ultralights and gliders, and scheduled passenger service.

Some examples of limits on aircraft operations include curfews on nighttime aircraft operations, prohibitions on jets or other aircraft producing high noise levels, prohibitions or limits on "touch-and-go" and "stop-and-go" operations, and restrictions based on aircraft weight.

Some examples of limits on the lease and use of airport property include informal policies or practices discouraging the lease of property to additional fixed-base operators (FBOs) or other commercial aeronautical service providers and the imposition of terms and conditions on the lease and use of airport property that are commercially impracticable.

In addition to these general categories of access limits, there are several other important features of limits on access that have practical and legal effect, including the following:

1. *Direct versus indirect restrictions*—An important characteristic of limits on access is whether the limit is direct or indirect. An example of a direct limit would be a rule adopted by the GA airport operator's governing body prohibiting touch-and-go operations between the hours of 10 p.m. and 7 a.m. An example of an indirect limit would be an informal policy or practice of refusing to negotiate with prospective tenants who desire to conduct commercial aeronautical activities at an airport. Both direct and indirect limits implicate the Airport Sponsor Assurances and may constitute a violation.

2. Mandatory restrictions versus voluntary measures—The flight of aircraft is under the exclusive jurisdiction of the United States; airport operators may not require aircraft to follow any particular flight paths or flight procedures. GA airport operators may suggest noise abatement departure procedures and other measures to reduce noise over residential communities surrounding the airport. These procedures are often labeled as "voluntary" or "recommended." GA

airport operators can suggest and recommend that aircraft owners and operators conduct flight operations in particular ways; the Airport Sponsor Assurances are implicated only by mandatory restrictions or actions that have the effect of limiting access.

3. *Fines and penalties*—GA airport operators impose varied fines and penalties for violations of mandatory limits on access. An airport operator may demand that an aircraft immediately depart from the airport, seek to impose monetary fines, or seek to terminate a lease agreement on the basis that a violation of an airport's rules and regulations constitutes a default of the lease agreement. The imposition of any of these consequences could implicate the Airport Sponsor Assurances.

4. *Documentation*—Direct limits on access, whether mandatory or voluntary, can be documented in many different ways. For example, limits may be documented in a local ordinance, in airport rules and regulations or minimum standards, or in the Airport/Facility Directory. A condition on access may be captured in a lease or other written agreement. Limits on access may not be documented and instead may have originated by a verbal directive of airport management (or perhaps were conveyed in written correspondence but not formally adopted by the airport governing body). Informal policies and voluntary measures may evolve over time into mandatory restrictions (or the perception and belief that the limits are mandatory). In some disputes, the first task has been to identify with certainty the origin of a limit on access in order to fully understand its nature and scope.

5. *Frequency of occurrence*—Another characteristic of limits on access is how frequently they occur at GA airports around the country. It is difficult to quantify frequency because restrictions may be documented in different places or may not be documented at all. To help gauge the frequency of certain limits on access, the authors of this Guide have analyzed the only comprehensive source of information on airports: the Airport/Facility Directory published by FAA. The results of this analysis are provided in the *Aeronautical Activity Fact Sheets* contained in Appendix A.

III. LEGAL PRINCIPLES

A. Constitutional Law

The primary goal of this Guide is to provide a user-friendly resource that describes how the Airport Sponsor Assurances and other federal obligations apply to limitations on access at GA airports. A lengthy dissertation on abstract legal principles is not required to achieve this objective. However, there are two basic principles of constitutional law that are foundational to this subject area. These principles affect the essential balance of power between the federal government and the state and local governments that own and operate GA airports.

1. Federalism and the Tenth Amendment

A bedrock principle in the United States is that the power to govern is shared between the federal government and state governments in the manner prescribed by the U.S. Constitution. The Tenth Amendment to the U.S. Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In general, the ownership, operation, and regulation of GA airports is *not* a power conferred upon or delegated to state and local governments by the federal government but rather a power reserved to state and local governments. Airport operators derive their authority to maintain, operate, and regulate airports by virtue of some combination of: 1) general delegations of authority in a state constitution or state statute; 2) specific delegations of authority in, for example, state and local enabling legislation for airport authorities and other special-purpose entities; and 3) inherent powers attendant to the ownership of real property that constitutes the airport. For additional information on the powers conferred under state law, *see* ACRP Legal Research Digest 15, *Compilation of State Airport Authorizing Legislation*.

2. Supremacy Clause and Preemption

The right grounded in state law to own, operate, and regulate GA airports may be subject to and constrained by the legitimate exercise of power by the federal government as authorized by the Constitution. With regard to airports, the federal government exercises its authority principally pursuant to the Commerce Clause of the U.S. Constitution, which gives Congress the power "to regulate commerce…among the several states…."[3]

In areas subject to federal regulation, federal law is superior to state law. The legal concept of preemption arises principally from the Supremacy

[3] U.S. CONST. art. I, § 8, cl. 3.

Clause of the U.S. Constitution, which provides that the laws of the United States are superior to laws of the several states.[4] There are two basic categories of preemption: 1) express preemption, in which the federal law states explicitly that it displaces state and local regulation of conduct within the scope of the preemption provision, and 2) implied preemption, in which state or local law is displaced by virtue of a conflict with federal law or by evidence of congressional intent to occupy the entire field of a substantive area of law.

Preemption is a significant constraint on the ability of GA airport operators to adopt limitations on access. As examined below, multiple federal laws delegate specific responsibilities to FAA in the areas of airspace, aircraft, and pilots. In an effort to succinctly summarize the preemptive effects of these federal laws, the following general legal principles are offered here and detailed in subsequent sections of the Guide.

First, the United States has complete sovereignty over the navigable airspace.[5] This exclusive jurisdiction over airspace is coupled with comprehensive federal regulation of aviation safety and air traffic control. The combined effect is that state and local governments, including GA airport operators, are preempted from regulating aircraft in flight.[6] Only FAA can impose or approve mandatory flight procedures such as arrival and departure procedures, flight tracks, and noise abatement flight procedures.[7]

Second, courts have stated uniformly that a local government entity that is *not* the airport proprietor is preempted from imposing access restrictions at an airport.[8] Nonproprietors can exercise traditional land use and police powers outside the airport but cannot impose restrictions on airport operations, such as curfews or other noise restrictions.[9]

GA airport operators can adopt limits on access to an airport.[10] This authority—sometimes referred to as the "proprietor's exception"—is subject to several important constraints, including the following:

- The restriction must be "reasonable, nonarbitary and not unjustly discriminatory."
- The restriction is subject to generally applicable constitutional limits, such as Equal Protection, Due Process, and the Commerce Clause.
- The restriction is subject to specific federal statutes, such as the Airport Noise and Capacity Act (ANCA) and 49 United States Code (U.S.C.) § 47107, as well as the Airport Sponsor Assurances.
- The restriction cannot directly regulate aircraft in flight.

Applying these principles, courts have declared that some access restrictions are preempted,[11]

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[4] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[5] *See, e.g.*, 49 U.S.C. § 40103 (2014); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944).

[6] *See, e.g.,* Nat'l Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81 (2d Cir. 1998); Price v. Charter Twp. of Fenton, 909 F. Supp. 498 (E.D. Mich. 1995); United States v. City of Blue Ash, 487 F. Supp. 135 (S.D. Ohio 1978) *aff'd* 621 F.2d 227 (6th Cir. 1980).

[7] *See, e.g.,* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 382 (1992); *Northwest Airlines,* 322 U.S. 292.

[8] *See, e.g.*, *City of Burbank*, 411 U.S. at 649; Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983); San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981). *See also* Letter from Daphne A. Fuller, Assistant Chief Counsel, FAA, to Karl Bohne, Town Attorney, Town Council of Grant-Valkaria, Fla. (Aug. 7, 2009)

> ([T]he Town [of Grant-Valkaria, FL], as a nonproprietor, has no legal authority to use its police powers to regulate the type of aeronautical businesses that may be permitted to lease space at the Airport nor may the Town regulate the types of flight operations that can be conducted at the Airport, including determining whether airport users are based or transient.).

[9] *See, e.g.*, *City of Burbank,* 411 U.S. at 649*; Price*, 909 F. Supp. 498; Command Helicopters, Inc. v. City of Chicago, 691 F. Supp. 1148 (N.D. Ill. 1998); Condor Corp. v. City of St. Paul, 912 F.2d 215, 219 (8th Cir. 1990); Faux-Burhans v. Cnty. Comm'rs of Frederick County, 674 F. Supp. 1172 (D. Md. 1987); *Pirolo*, 711 F.2d at 1009–10; *City of Blue Ash*, 487 F. Supp. 135.

[10] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 635 n.14 (1973); British Airways Bd. v. Port Auth. of N.Y. and N.J., 558 F.2d 75, 84 (2d. Cir. 1977); Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1980); *Pirolo*, 711 F.2d 1006.

[11] *See, e.g.*, Arapahoe Cnty. Pub. Airport Auth. v. FAA, 242 F.3d 1213, 1224 (10th Cir. 2001) ("[T]he Authority unreasonably exercised its proprietary powers to ban scheduled passenger service at Centennial Airport…."); Skydiving Ctr. of Greater Wash. D.C., Inc. v. St. Mary's Cnty. Airport Comm'n, 823 F. Supp. 1273, 1284 (D. Md. 1993) (noting the airport's prohibition on all parachute operations is preempted); United States v. Cnty. of Westchester, 571 F. Supp. 786, 797

while other access restrictions are not preempted.[12] There are limited instances in which different courts looking at the same access restriction have arrived at different conclusions on the issue of preemption.[13]

Finally, state and local laws that purport to regulate the flight of aircraft, including land use permit conditions, are preempted regardless of whether the airport is owned by a public or private entity or whether the airport serves commercial airlines or GA pilots. The Maryland Court of Appeals, in a case challenging a conditional use permit imposing a curfew on, and limiting the frequency of, glider-towing aircraft, explained this issue as follows:

> The City of Burbank holding applies to privately owned airports as well as publicly owned ones. The Supreme Court did not make an exception for small airports that do not involve inter-airport commercial cargo or passenger flights, or for activities not expressly governed by federal statute or regulation. If we were dealing with the sort of preemption that arises from conflict between federal and state enactments, these considerations might be pertinent. But we are dealing with preemption by occupation of the field. Once the field is occupied by the federal government, neither state nor local government may enter it. And occupation of the field does not mean that every blade of grass within it must be subject to express federal control; it means only that Congressional intent demonstrates that the area is subject to exclusive federal control, whether potential or actual.[14]

B. Key Federal Aviation Statutes

Federal airport law has evolved over many decades, beginning with the Air Commerce Act of 1926 and then followed by subsequent legislation over the years. In more recent years, substantive changes in the law have been included in legislation reauthorizing the federal grant program, known as the AIP.

Today, the vast majority of the law that controls and influences the use and development of airports is found in Title 49, Subtitle VII (Aviation Programs) of the U.S.C. More specifically, the most relevant statutory provisions can be found in Part A (Air Commerce and Safety), Part B (Airport Development and Noise), and Part C (Financing). These laws can be reviewed online by visiting the U.S. Government Printing Office Web site (www.gpo.gov) and commercial services such as Westlaw and Lexis.

Although the origin of these statutory provisions is not as critical as understanding where the law now resides and what it says, there is benefit

(S.D.N.Y. 1983) (explaining that "The curfew on all night flight operations at Westchester County Airport…is an…overbroad exercise of power by the County."); United States v. New York, 708 F.2d 92 (2d Cir. 1983) (upholding a preliminary injunction against the State of New York for imposing a nighttime ban on the use of Republic Airport.); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 815 (2d Cir. 1956) (explaining that the Village of Cedarhurst is preempted from regulating airspace less than 1,000 ft above the ground).

[12] *See, e.g.*, Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001) (concluding that the City of Naples Airport Authority Stage 2 jet aircraft ban was not preempted); SeaAir NY, Inc. v. City of N.Y., 250 F.3d 183, 187 (2d Cir. 2001) (explaining that the plaintiff's air tours did not meet the requirements of 49 U.S.C.S. § 40102(a)(25), and therefore, plaintiff could not establish that defendant's regulation of sightseeing flights was preempted); Nat'l Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81, 89 (2d Cir. 1998) (noting that weekday and weekend curfews and the weekend restrictions were of local concern, fit within the proprietor exception, and were not preempted); Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991) (recognizing that the noise control ordinance was not preempted by federal law under the proprietary exemption); Arrow Air, Inc. v. Port Auth. of N.Y. and N.J., 602 F. Supp. 314, 318–19 (S.D.N.Y. 1985) (noting that the airport proprietor's noise level restrictions were not preempted); Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 104 (noting that the power of a municipal proprietor to enact a noise reduction ordinance was not preempted by federal regulation); Nat'l Aviation v. City of Hayward, 418 F. Supp. 417, 425 (N.D. Cal. 1976) (ruling that the noise ordinance was not preempted by federal law); Air Transp. Ass'n of Am. v. Crotti, 389 F. Supp. 58, 64 (N.D. Cal. 1975) (holding that a state code recommending procedures to attain noise reduction standards was not preempted by federal law).

[13] *Compare* Arapahoe Cnty. Pub. Airport Auth. v. FAA, 242 F.3d 1213, 1221 (10th Cir. 2001) *with* Arapahoe Cnty. Pub. Airport Auth. v. Centennial Express Airlines, Inc., 956 P.2d 587, 596 (Colo. 1998).

[14] Harrison v. Schwartz, 572 A.2d 528, 532 (Md. 1990). But *cf.* Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206, 212 (2d Cir. 2011) ("In occupying the field of air safety, Congress did not intend to preempt the operation of state statutes and regulations like the ones [that do not regulate the flight of aircraft] at issue here, especially when applied to small airports over which the FAA has limited direct oversight."). For additional discussion of these legal principles and preemption caselaw, *see* JODI HOWICK, ANALYSIS OF FEDERAL LAWS, REGULATIONS, AND CASE LAW REGARDING AIRPORT PROPRIETARY RIGHTS (Airport Cooperative Research Program, Transportation Research Board, Legal Research Digest No. 10, 2010), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_010.pdf.

in reviewing the origin of certain provisions and Congress's intent in adopting them. The following table provides a short summary of some of the key laws that affect the authority of GA airport operators to regulate aeronautical activities.

Table 2.

Law	Current Codification	Summary
Federal Aviation Act of 1958	49 U.S.C. § 40101 *et seq.*	Created the Federal Aviation Agency (later transferred to Department of Transportation as the Federal Aviation Administration) with power over the regulation of safety involving airspace, aircraft, and pilots
Airline Deregulation Act of 1978	49 U.S.C. § 41713	Eliminated the Civil Aeronautics Board and the federal government's power to regulate airline routes and fares; preempted state and local government regulation of airline rates, routes, and services, subject to an exception for the exercise of airport proprietary rights
Airport and Airway Improvement Act of 1982	49 U.S.C. §§ 47107–47142	Established the AIP, with funding from the Airport and Airway Trust Fund created in 1970, and required assurances from airport sponsors prior to the award of grants
Airport Noise and Capacity Act of 1990	49 U.S.C. § 47521–47533	Required phase-out of heavy Stage 2 aircraft by 2000; prescribed procedures for local restrictions on light Stage 2 aircraft; prescribed procedures and required FAA approval for local restrictions on Stage 3 aircraft

C. Federal Aviation Act of 1958 and FAA Jurisdiction over Airspace

The Federal Aviation Act of 1958 delegated responsibility to FAA to regulate airspace and aircraft in flight.[15] The U.S. Supreme Court and lower courts have determined that this federal law preempts local efforts to regulate the movement of aircraft in flight and broadly preempts the field of aviation safety. The U.S. Court of Ap-

[15] 49 U.S.C. § 40103(b)(2) (2014)

(The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for —(A) navigating, protecting, and identifying aircraft; (B) protecting individuals and property on the ground; (C) using the navigable airspace efficiently; and (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.).

peals for the Third Circuit succinctly stated, "Our finding of implied field preemption here is based on our conclusion that the [Federal Aviation Act of 1958] and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions."[16] The U.S. Court of Appeals for the Ninth Circuit similarly concluded, "The purpose, history, and language of the [Federal Aviation Act of 1958] lead us to conclude that Congress intended to have a single, uniform system for regulating aviation safety."[17]

The courts' holdings that the federal government has preempted the field of aviation safety do not entirely eliminate the rights and responsibilities of local governments.[18] As examined further below, GA airport operators continue to play a role in assuring safety at airports.

D. Airline Deregulation Act of 1978 and Proprietary Powers

Congress deregulated the airline industry in the Airline Deregulation Act of 1978 (ADA). To avoid state and local governments stepping in to reregulate the industry, Congress included an express preemption provision, now codified at 49 U.S.C. § 41713(b)(1), which provides,

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

This provision is relevant to GA airports in part because "air carrier" is not limited to commercial airlines but is defined broadly to include "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[19] Air carriers may include air charter, air taxi, and other entities certified under 14 C.F.R. Part 135 that operate at GA airports.

Although the express preemption provision may seem expansive, there is an important limit relating to the scope of preemption. Specifically, 49 U.S.C. § 41713(b)(3) explains that, "This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights."[20] While the concept of a "proprietor's exception" arguably preceded the ADA, this provision reflected and preserved the proprietor's exception from the express preemption provision of the statute.

E. Airport and Airway Improvement Act of 1982 and the Airport Sponsor Assurances

Since the initial federal aid-to-airports grant program was enacted by Congress in the Federal Airport Act of 1946, Congress has required that federal grants to airport sponsors be provided only with the assurance that the sponsor will satisfy specific obligations concerning the operation and development of the airport receiving funding. Indeed, several assurances, including those most relevant to the availability of GA airports for aeronautical use, were adopted initially in the 1946 legislation.

As set forth in 49 U.S.C. § 47107, the Airport Sponsor Assurances are included as part of each grant agreement executed by FAA and an airport sponsor. Although the language of certain Airport Sponsor Assurances may be identical to or closely track the language of the statute, the Airport Sponsor Assurances are sometimes more expansive and reflect FAA's interpretation and application of the statute and also include additional assurances promulgated by FAA.

The Airport Sponsor Assurances have the following general features:

1. As of April 2014, there are 39 Assurances, several of which have multiple subparts.
2. A number of Assurances require satisfaction of other statutory provisions and/or FAA regulations, policies, and guidance. For example, Assurance 1 requires compliance with "all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project," including 26 distinct laws, such as Title 49, Subtitle VII (Aviation Programs) of the U.S.C. Similarly, Assurance 34 requires that any grant-funded project conform to current FAA policies, standards, and specifications, including current FAA Advisory Circulars.

[16] Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999).

[17] Montalvo v. Spirit Airlines, 508 F.3d 464, 471 (9th Cir. 2007).

[18] *See Abdullah*, 181 F.3d at 367 ("[A]lthough the term 'field preemption' suggests a broad scope, the scope of a field deemed preempted by federal law may be narrowly defined.").

[19] 49 U.S.C. § 40102(a)(2) (2014).

[20] *Id.* § 41713(b)(3).

3. The Assurances generally apply for 20 years. However, the prohibition on granting an exclusive right and the requirement to use airport revenue only for airport purposes apply in perpetuity as a result of separate statutory requirements.[21] Additionally, the Assurances associated with the use and disposal of real property apply in perpetuity when the airport operator has received AIP funds in connection with the acquisition of property.

4. FAA has the initial jurisdiction to adjudicate allegations that an airport operator has violated one or more Airport Sponsor Assurances pursuant to 14 C.F.R. Part 16, as discussed in this Guide. Most courts to consider the issue have held that there is no private right of action to allege a violation of the Assurances in court.[22] Complaints to FAA can be presented informally or formally. Judicial review is available to review final agency decisions and orders resolving those complaints.[23]

5. The penalties for violating the Airport Sponsor Assurances may be severe. FAA may withhold approval of a grant application[24] and may withhold payment under an existing grant agreement.[25] FAA also may seek injunctive relief in U.S. District Court.[26]

Although the Airport Sponsor Assurances are included in a contract between FAA and the airport sponsor, the commitments are more than mere contracts. As the U.S. Court of Appeals for the Ninth Circuit explained,

> San Francisco received grant offers requiring San Francisco to assure the Secretary, in language tracking the statute, that it would operate its Airport on a fair and reasonable basis and without unjust discrimination. A grant agreement based on such an offer is not an ordinary contract, but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will.[27]

The two Assurances that apply most directly to access restrictions are Assurance 22 (Economic Nondiscrimination) and Assurance 23 (Exclusive Rights). This Guide will discuss each of those Assurances in some detail.

1. Assurance 22 (Economic Nondiscrimination)

While Assurance 22 has nine subparts, the most relevant provisions include the following:

> a. [The airport sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.
>
> ….
>
> f. It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including but not limited to maintenance, repair, and fueling] that it may choose to perform.
>
> h. The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.
>
> i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

Assurance 22 only applies to the accommodation and use of an airport for "aeronautical activities." This phrase is defined by FAA as follows:

> Any activity that involves, makes possible, or is required for the operation of aircraft or that contributes to or is required for the safety of such operations. It includes, but is not limited to: air taxi and charter operations, scheduled or nonscheduled air carrier services, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, aircraft sales and service, aircraft storage, sale of aviation petroleum products, repair and maintenance of aircraft, sale of aircraft parts, parachute activities, ultralight activities, sport pilot activities, and military flight operations.[28]

Conversely, airport proprietors are under no federal obligation to accommodate nonaeronautical users. The distinction between aeronautical and nonaeronautical users may be subtle. For example, FAA may consider an activity that is closely associated with an airport or aircraft, such as an aircraft salvage and demolition business, not to be an aeronautical use.[29]

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[21] *See id.* §§ 40103(e), 47133.

[22] *See, e.g.*, Four T's, Inc. v. Little Rock Mun. Airport Comm'n, 108 F.3d 909, 915 (8th Cir. 1997); Interface Group, Inc. v. Mass. Port Auth., 816 F.2d 9 (1st Cir. 1987); Arrow Airways, Inc. v. Dade Cnty., 749 F.2d 1489, 1491 (11th Cir. 1985).

[23] 49 U.S.C. § 46110 (2014); *see also* 14 C.F.R. § 16.247 (2014).

[24] 49 U.S.C. § 47106(d) (2014).

[25] *Id.* § 47111(d).

[26] *Id.* § 47111(f). Other federal obligations may carry additional potential penalties. For example, violation of the revenue use statute may result in treble damages. *See id.* § 46301(a)(3).

[27] City & Cnty. of S.F. v. FAA, 942 F.2d 1391, 1396 (9th Cir. 1991).

[28] Airport Compliance Manual, FAA Order No. 5190.6B, App. Z (Definitions and Acronyms) (Sept. 2009) (hereinafter *Order 5190.6B*).

[29] *See* Final Decision and Order on Remand, BMI Salvage Corp. v. Miami-Dade Cnty., FAA Docket No. 16-05-16 (Apr. 15, 2011), *aff'd*, BMI Salvage Corp. v.

There are two separate requirements of Assurance 22: 1) terms of use must be "reasonable," and 2) access must be provided without "unjust discrimination." Access restrictions implicate both requirements.

When a restriction is based on safety, FAA will apply Assurances 22(h) and 22(i) and require that the airport sponsor demonstrate that the restriction is necessary for the safe and efficient operation of the airport or necessary to serve the civil aviation needs of the public. A restriction on access will be considered reasonable only if necessary to serve these purposes. FAA acts as the final arbiter on all questions of aviation safety and will substitute its own judgment for that of the airport operator as to whether a safety problem exists and whether the airport operator's solution is appropriate.[30]

In addressing claims of unjust discrimination involving conditions on the lease and use of airport property, FAA will consider first whether the entities in question are similarly situated and, if so, whether the disparate treatment is unjust.[31] With respect to limits on access, FAA will consider whether the restriction applies evenhandedly to address the source of the problem or perceived problem.

FAA has issued numerous decisions on whether a particular access restriction satisfies Assurance 22. A sampling of those decisions is set forth in the following to illustrate how FAA approaches access cases under Assurance 22. A more complete explanation of prior FAA decisions on access restrictions is included in the *Aeronautical Activity Fact Sheets* in Appendix A.

- FAA found that certain restrictions on flight training, including stop-and-go operations, intersection take-offs, touch-and-go operations, taxiback activity, and prolonged running of aircraft engines, were not supported on the basis of protecting safety or efficiency or on the basis of promoting land use compatibility.[32]
- FAA found that a ban on Stage 2 aircraft was unreasonable because "[t]he evidence does not show that there was a noncompatible land use problem in the DNL 60 dB contour that would justify a Stage 2 ban on that threshold."[33] However, the U.S. Court of Appeals reversed FAA's decision upon finding that FAA's conclusions were not supported by substantial evidence.[34]
- FAA found that it was unreasonable and unjustly discriminatory for a GA airport operator to ban Category C and Category D aircraft, even though the airport runway safety areas did not meet then-current FAA standards.[35] The U.S. Court of Appeals affirmed this decision.[36]
- FAA found that it was unreasonable for a GA airport operator to ban all scheduled passenger service.[37] The U.S. Court of Appeals affirmed this decision.[38]

FAA, No. 11-12583, 2012 U.S. App. LEXIS 14753, at *5 (11th Cir. July 19, 2012) (holding that the airport operator had no obligation under Assurance 22 to lease land to the operator of an aircraft salvage and demolition business to provide access to the airport because aircraft demolition and salvage did not constitute an aeronautical activity).

[30] *Order 5190.6B*, *supra* note 28, § 14.3.

[31] *See* Director's Determination, Sterling Aviation, LLC v. Milwaukee Cnty., FAA Docket No. 16-09-03 (Apr. 13, 2010).

[32] Director's Determination, Aircraft Owners & Pilots Assoc. v. City of Pompano Beach, FAA Docket No. 16-04-01, at 25 (Dec. 15, 2005).

[33] Final Agency Decision and Order, In the Matter of Compliance with Fed. Obligations by the Naples Airport Auth., FAA Docket No. 16-01-15, at 45 (Aug. 25, 2003).

[34] City of Naples Airport Auth. v. FAA, 409 F.3d 431, 436 (D.C. Cir. 2005)

> (The Airport Authority and the City of Naples introduced ample evidence—much of which went unrebutted—demonstrating that the Stage 2 ban was justified. Because the FAA's conclusion to the contrary is not supported by substantial evidence, the petition for review is granted, the FAA's order is vacated, and the case is remanded to the FAA.).

[35] Final Decision and Agency Order, In the Matter of Santa Monica, FAA Docket No. 16-02-08, at 46 (July 8, 2009) ("It is unreasonable to discriminate against aircraft in Categories C and D that are capable of landing safely at SMO and have the better safety record, and Grant Assurance 22 prohibits such an unjust discriminatory measure.").

[36] City of Santa Monica v. FAA, 631 F.3d 550, 559 (D.C. Cir. 2011) ("Applying the Administrative Procedure Act's highly deferential standard of review, we conclude that the FAA did not act arbitrarily or capriciously when it concluded that 'the discriminatory restriction against operators of Categories C and D aircraft is unjust and not necessary for the safe operation of [SMO].'") (citation omitted).

[37] Final Agency Decision and Order, Centennial Express Airlines v. Arapahoe Cnty. Pub. Airport Auth., FAA Docket Nos. 16-98-05, 13-94-03, 13-94-25 (Feb. 18, 1999).

[38] Arapahoe County Pub. Airport Auth. v. FAA, 242 F.3d 1213, 1216 (10th Cir. 2001).

• FAA found that a restriction purportedly designed to reduce aircraft noise was unjustly discriminatory when the airport operator banned certain aircraft but allowed equally noisy or noisier aircraft to continue to use the airport.[39]

• FAA found that it was unreasonable under the circumstances for a GA airport operator to prohibit the establishment of an on-airport drop zone for skydivers.[40]

• FAA found that it was reasonable for a GA airport operator to preclude use of active runways for the launch of ultralight aircraft by ground vehicles, after FAA had advised that such operations were high risk and should occur away from active runways.[41]

While not a complete list, the consistency of FAA's decisions in these cases reflects the high standards set by FAA with respect to blanket prohibitions on aeronautical activities and aircraft operations. This Guide will examine the legal and practical consequences of these high standards in Section IV.

2. Assurance 23 (Exclusive Rights)

Assurance 23 applies primarily to limits on the lease and use of airport property that amount to limits on access. Assurance 23 provides in relevant part, "[The airport sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."[42]

An exclusive right is "a power, privilege, or other right excluding or debarring another or others from enjoying or exercising a like power, privilege or right."[43] In short, an exclusive right is a monopoly or oligopoly conferred on one or more parties.[44]

FAA has adopted this judicial definition and added, "An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right."[45]

FAA and reviewing courts have considered the extent to which a restriction on aeronautical activities or aircraft operations implicates the prohibition on exclusive rights. FAA determined that an airport sponsor's prohibition on Category C and Category D aircraft did *not* constitute the prohibited grant of an exclusive right because the prohibition did not have an anticompetitive effect on any commercial enterprise at the airport.[46] This decision suggests that restrictions on aeronautical activities are not likely to constitute the impermissible grant of an exclusive right unless challengers can demonstrate that the restriction will have an anticompetitive effect on commercial enterprises.

The prohibition on granting exclusive rights may be implicated when a GA airport operator is unwilling or unable to enter into an agreement to permit the use of the airport. There are several important limits on the exclusive rights prohibition.

• Permitting a single aeronautical service provider access to the airport will not be considered an exclusive right if, as provided in Assurance 23, *both* of the following conditions are met:

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[39] City & Cnty. of S.F. v. FAA, 942 F.2d 1391, 1396–98 (9th Cir. 1991). *See also* Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

[40] Final Agency Decision and Order, Bodin v. Cnty. of Santa Clara, FAA Docket No. 16-11-06, at 38 (Aug. 12, 2013)

> (While the Associate Administrator agrees with the County that skydiving is not without its safety concerns, this is true of any aeronautical activity. The FAA's two separate safety studies show that on-airport skydiving can be safely conducted at E16, and that the County and skydivers wishing to operate on the airport can take specific concrete steps to mitigate potential safety issues.).

[41] Director's Determination, Jones v. Lawrence Cnty. Comm'n, FAA Docket No. 16-11-07 (Sept. 19, 2013).

[42] In addition to Assurance 23, a separate statute prohibits any person from having an exclusive right to use an air navigation facility on which federal funds have been spent. 49 U.S.C. § 40103(e) (2014).

[43] City of Pompano Beach v. FAA, 774 F.2d 1529, 1540 (11th Cir. 1985) (quoting Use of Airports, 40 Op. Att'y Gen. 71, 72 (1942)).

[44] City of Pompano*,* at 1542 ("The type of exclusive right prohibited by section 1349(a) has been described as 'one of the sort noxious to the anti-trust laws.'") (citing Aircraft Owners & Pilots Assoc. v. Port Auth. of N.Y., 305 F. Supp. 93, 105 (E.D.N.Y. 1969)).

[45] Exclusive Rights at Federally-Obligated Airports, FAA Advisory Circular 150/5190-6, App. 1 (Jan. 4, 2007), http://www.faa.gov/documentLibrary/media/advisory_circular/150-5190-6/150_5190_6.pdf.

[46] Final Agency Decision and Order, In the Matter of Santa Monica, FAA Docket No. 16-02-08, at 46–53 (July 8, 2009), *aff'd* City of Santa Monica v. FAA, 631 F.3d 550, 551 (D.C. Cir. 2011). *But see* Bardin v. Cnty. of Sacramento, FAA Docket No. 16-00-11 (Aug. 9, 2001).

> It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.[47]

• The prohibition on granting an exclusive right does *not* apply to the airport sponsor, which can conduct aeronautical activities on an exclusive basis using its own employees and equipment.[48] This is referred to as the exercise of a "proprietary exclusive right."

The prohibition on exclusive rights has been in place for many decades. Typically, GA airport operators do not state publicly or provide in a lease agreement that an aeronautical service provider has been granted an exclusive right. More likely, a prospective tenant may argue that a GA airport operator's policies, practices, or conduct have resulted in a denial of access and constructively granted an exclusive right to an incumbent commercial aeronautical operator.

FAA has made the following determinations in response to allegations that an airport operator has granted an exclusive right:

• FAA found, and a reviewing court affirmed, that the imposition of unreasonable standards on a prospective tenant can constitute the impermissible grant of an exclusive right.[49]

• FAA has determined that an unreasonably long delay in negotiating for the lease and use of airport property may constitute the grant of an exclusive right.[50]

• FAA found that the failure to negotiate in good faith for the lease and use of airport property to conduct commercial aeronautical activities may constitute the grant of an exclusive right.[51]

• FAA found that an airport operator may protect the legal and financial interests of the airport, but may not deny access based on an assessment of insufficient market demand.[52]

• Although it is possible to confer an exclusive right on more than a single entity, FAA also has advised that the presence of multiple commercial operators will make it difficult for a complainant to demonstrate that the airport operator granted an exclusive right.[53]

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[47] 49 U.S.C. § 47107(a)(4)(A) (2014); *see also* Airport Sponsors, AIP Grant Assurance 23 (a)–(b) (Mar. 2014).

[48] Final Agency Decision, Jet 1 Center, Inc. v. Naples Airport Auth., FAA Docket No. 16-04-03, at 8 (July 15, 2005). *See also* Rectrix Aerodrome Ctrs. v. Barnstable Mun. Airport Comm'n, 610 F.3d 8 (1st Cir. 2010).

[49] *City of Pompano Beach*, 774 F.2d at 1542. *See also* Director's Determination, Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Auth., FAA Docket No. 16-02-02, at 33 (Mar. 7, 2003) ("Providing long-term lease opportunities for one set of commercial operators constructing hangars while denying the same to another commercial operator desiring to invest in hangar construction results in the constructive grant of an exclusive right to those operators given the preferential long-term leases.").

[50] *City of Pompano Beach*, 774 F.2d at 1544; Director's Determination, Sun Valley Aviation, Inc. v. Valley Int'l Airport, FAA Docket No. 16-10-02, at 59 (Dec. 11, 2012); Director's Determination, Corbett v. City of Modesto, FAA Docket No. 16-08-10 (Apr. 5, 2010); Director's Determination, Martyn v. Port of Anacortes, FAA Docket No. 16-02-03 (Apr. 14, 2003); Director's Determination, U.S. Constr. Co. v. City of Pompano Beach, FAA Docket No. 16-00-14, at 19 (Aug. 16, 2001); Director's Determination, Centennial Express Airlines v. Arapahoe Cnty. Pub. Airport Auth., FAA Docket No. 16-98-05, at 27 (Aug. 21, 1998).

[51] Director's Determination, *Sun Valley Aviation, Inc.*, FAA Docket No. 16-10-02.

[52] Director's Determination, JetAway Aviation v. Montrose County, FAA Docket No. 16-08-01, at 37 (July 2, 2009) ("The County's proprietary rights allow it to provide a competitive FBO opportunity in a manner that protects the County from legal liability and cost, and that protects its ability to continue as a going concern."); *Order 5190.6B*, *supra* note 28, § 9.7(c)

> (The FAA interprets the willingness of a prospective provider to lease space and invest in facilities as sufficient evidence of a public need for those services. In such instances, the FAA does not accept a sponsor's claim of insufficient business activity as a valid reason to restrict the prospective provider access to the airport.)

Director's Determination, *Sun Valley Aviation, Inc.*, FAA Docket No. 16-10-02, at 62 ("The theory that FBO competition may decrease one FBO's bottom line is not relevant to the grant assurances. The fact that an airport sponsor denied an eligible and qualified entity from engaging in an aeronautical activity is relevant as it demonstrates disregard of [Assurance 23].").

[53] *See, e.g.,* Director's Determination, Bisti Aviation, Inc. v. City of Farmington, FAA Docket No. 16-07-01, at 13 (Dec. 4, 2007)

> (Here, the Record reflects that at least two businesses on the Airport have the ability and right to provide fixed-base operator services on the Airport; Complainant and Seven Bar Aviation and [sic] both lease ramp and hangar space on the Airport. Based on Federal law, past Part 16 findings in related cases, and FAA policy and guidance, Respondent has not created a direct granting of an exclusive right on the Airport for providing fixed-base operator services.).

Director's Determination, Roadhouse Aviation v. City of Tulsa, FAA Docket No. 16-05-08, at 27 (Dec. 14, 2006) ("[F]ive FBOs operating on the Airport make it

F. Deed Restrictions and the Surplus Property Act

Although the U.S. Constitution and the Airport Sponsor Assurances provide the principal constraints on a GA airport operator's ability to limit access, there is a third constraint in place at several GA airports: restrictions contained in deeds by which airport property was conveyed by the federal government. Since World War II, the federal government has transferred hundreds of airfields formerly used for military purposes to local governments for civil use pursuant to the Surplus Property Act of 1944 and subsequent legislative enactments. The deed of transfer includes restrictions on use that are very similar to Assurance 22 and Assurance 23. Currently, federal law explicitly requires that airports conveyed by the federal government "be used and maintained for public use and benefit without unreasonable discrimination."[54] Federal law further requires that a

> right may not be vested in a person, excluding others in the same class from using the airport at which the property is located–(A) to conduct an aeronautical activity requiring the operation of aircraft; or (B) to engage in selling or supplying aircraft, aircraft accessories, equipment, or supplies (except gasoline and oil), or aircraft services necessary to operate aircraft (including maintaining and repairing aircraft, aircraft engines, propellers, and appliances).[55]

There are only a few GA airports that are subject to these types of deed restrictions but not to the Airport Sponsor Assurances. As a result, most challenges to limits on access are presented as alleged violations of the Airport Sponsor Assurances. In limited instances, access restrictions have been challenged as violations of deed restrictions and, in those cases, FAA used the same basic tests as it would in considering claims for violation of the Airport Sponsor Assurances.[56]

G. Airport Noise and Capacity Act of 1990 and Noise Rules

In 1990, Congress significantly altered the law on aircraft noise and limited the power of airport operators to adopt access restrictions. The ANCA has three main elements: 1) the law required that all aircraft weighing more than 75,000 lbs meet Stage 3 noise levels by 2000; 2) the law recognizes the right of airport operators to restrict Stage 2 aircraft and imposed procedural requirements prior to adoption; and 3) the law requires satisfaction of extensive procedural requirements and FAA approval prior to the implementation of local restrictions on Stage 3 aircraft. The FAA approval criteria incorporate Airport Sponsor Assurance obligations and other requirements under existing federal law.[57]

ANCA applies to "noise or access restrictions," which are defined in ANCA's implementing regulations at 14 C.F.R. Part 161 as follows:

> Restrictions (including but not limited to provisions of ordinances and leases) affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such as limits on the noise generated on either a single-event or cumulative basis; a limit, direct or indirect, on the total number of Stage 2 or Stage 3 aircraft operations; a noise budget or noise allocation program that includes Stage 2 or Stage 3 aircraft; a restriction imposing limits on hours of operations; a program of airport-use charges that has the direct or indirect effect of controlling airport noise; and any other limit on Stage 2 or Stage 3 aircraft that has the effect of controlling airport noise. This definition does not include peak-period pricing programs where the objective is to align the number of aircraft operations with airport capacity.[58]

This definition appears expansive and might be interpreted to cover access restrictions that are motivated by considerations other than noise. However, FAA does not consider safety-based restrictions to be subject to ANCA and has specifically advised that weight-based restrictions may be considered unreasonable if there is no showing of need to protect pavement life, or if the restriction appears motivated by an interest in mitigating noise without first complying with ANCA.[59]

Only one airport operator has adopted an access restriction using the ANCA process. In 2000, the City of Naples Airport Authority implemented a ban on Stage 2 aircraft after completing the study required by ANCA. The Stage 2 ban was challenged on numerous grounds by FAA and airport user groups but was ultimately upheld. In addition to discussing ANCA itself, the cases cited in this Guide concerning the Naples Stage 2 ban are instructive on issues such as preemption, the application of the Airport Sponsor Assurances to noise-based restrictions, and the rights of airport

somewhat improbable that Respondent has granted an exclusive right to anyone.").

[54] *See* 49 U.S.C. § 47152(2) (2014).

[55] 49 U.S.C. § 47152(3).

[56] *See, e.g.*, Director's Determination, Aircraft Owners & Pilots Ass'n v. City of Pompano Beach, FAA Docket No. 16-04-01 (Dec. 15, 2005).

[57] 49 U.S.C. §§ 47524(b)–(c), 47534(a) (2014).

[58] *See* 14 C.F.R. § 161.5 (2014).

[59] Weight-Based Restrictions at Airports: Proposed Policy, 68 Fed. Reg. 39,176 (FAA July 1, 2003).

tenants conveyed through lease agreements with airport operators.[60]

ANCA's scope, and its application to GA airports, is limited by several factors. First, ANCA applies only to restrictions on aircraft certificated by FAA, under 14 C.F.R. Part 36, as Stage 2 or Stage 3. Many piston-powered aircraft, which constitute the majority of aircraft at many GA airports, are not stage rated and therefore restrictions on such aircraft are beyond ANCA's scope. Although ANCA may not apply to noise-based restrictions on non-stage-rated aircraft, the constitutional limits and Airport Sponsor Assurances do apply.

Second, in 2012, Congress required that aircraft weighing 75,000 lbs or less meet Stage 3 noise levels by 2016, phasing out the Stage 2 fleet.[61] This requirement eliminated the uncertainty that had existed since 1990 about the future of the Stage 2 aircraft excepted from ANCA's Stage 2 phase out, which were mostly business jets. In light of the required phase out of the remaining Stage 2 aircraft, it is unlikely that a GA airport operator will pursue a local ban on Stage 2 aircraft in the future.

Third, ANCA has effectively eliminated the imposition of new restrictions on Stage 3 aircraft. Very few airport operators have submitted initial applications under ANCA to restrict Stage 3 aircraft, and only one airport operator, the Burbank–Glendale–Pasadena Airport Authority, has submitted a complete application. FAA rejected the application on the basis that the statutory criteria had not been satisfied.[62] Most airport operators that considered possible Stage 3 restrictions have determined that the statutory criteria cannot be satisfied and have declined to initiate or abandoned studies under ANCA and Part 161.

There are three additional features of ANCA that have caused some confusion as to its scope, applicability, and relationship to other laws. First, ANCA does not apply retroactively. As a result, noise and access limits on Stage 2 and Stage 3 aircraft that were in effect in 1990 are considered grandfathered.[63] Advocates for an access restriction at an airport often point to restrictions at other airports as evidence that a restriction would be appropriate and permissible, but may fail to realize that such a restriction, if enacted today, would be subject to ANCA's substantial procedural and substantive requirements.

Second, ANCA is ambiguous as to whether it applies to airport operators that are not subject to the Airport Sponsor Assurances or passenger facility charge obligations. ANCA does not clearly identify which airport operators are subject to ANCA's requirements but does provide that noncompliance with ANCA will result in the loss of eligibility for AIP funding or passenger facility charge approval.[64] FAA has not formally taken a position on this issue.[65]

Third, Sponsor Grant Assurance 22 continues to apply to restrictions proposed on Stage 2 aircraft operations, even when the airport operator complies with ANCA's requirements for adopting that restriction.

H. Rights of Airport Users

The discussion to this point has focused on the respective rights and balance of power between the federal government and airport operators. Airport users, who may be impacted by the limits on access imposed by airport operators, have rights and responsibilities as well. These include constitutional protections and contractual rights.

1. The Right to Travel

The "right to travel" derives principally from the Privileges and Immunities Clause of the U.S.

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[60] *See* Final Agency Decision and Order, In the Matter of Compliance with Fed. Obligations by the Naples Airport Auth., FAA Docket No. 16-01-15, at 45 (Aug. 25, 2003); *see also* City of Naples Airport Auth. v. FAA, 409 F.3d 431, 436 (D.C. Cir. 2005).

[61] 49 U.S.C. § 47534 (2014).

[62] As of the date of this publication, the FAA is reviewing a pending application by the City of Los Angeles. The FAA deemed the City's initial submission to be incomplete, in part, because the applicant effectively failed to specify a unified airport noise study area but included benefits from a larger sleep disturbance area.

[63] *See, e.g.,* Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981).

[64] 49 U.S.C. §§ 47524(e), 47526 (2014).

[65] *See* FAA Responses to Questions from Rep. Tim Bishop, East Hampton Airport 1 (Feb. 2012), http://www.quietskiescoalition.org/files/Responses_to_Rep._Tim_Bishop_re_East_Hampton_Airport_-_2.24.2012.pdf

> ([U]nless the town wishes to remain eligible to receive future grants of Federal funding, it is not required to comply with the requirements under the Airport Noise and Capacity Act of 1990 (ANCA), as implemented by title 14 C.F.R. part 161, in proposing new airport noise and access restrictions. *See* title 49 United States Code (U.S.C.), 47524(e)).

That informal determination turned on unique facts and circumstances, particularly the terms of the 2005 settlement agreement between FAA and the Town, and it is unclear if it would have broader applicability.

Constitution.[66] The U.S. Supreme Court has found that the right to travel

> protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[67]

The right to travel is not a generalized right to move from one state to another free from any restriction or regulation. As a result, challenges to restrictions on use of airports on the basis of infringement on the right to travel generally have been rejected.[68] One court specifically rejected as frivolous the claim that an aircraft weight restriction violated the right to travel.

> Tutor claimed that defendants' ban on dual-wheel aircraft with a maximum take-off weight in excess of 95,000 pounds denied him his right to travel as guaranteed by the Fourteenth Amendment to the United States Constitution. We have previously held, however, that "burdens on a single mode of transportation do not implicate the right to interstate travel." [citations omitted] Here, Tutor's right to travel was not violated because he was able to use a different private jet to access his vacation home. In addition, Tutor could have flown into a different airport, flown on a commercial airliner, or used another mode of transportation.[69]

2. Equal Protection, Due Process, and Dormant Commerce Clause

In a very short summary, the Equal Protection Clause prohibits states from denying any person equal protection of the laws.[70] This generally prohibits a state and its subdivisions from discriminating against similarly situated individuals, entities, and classes. In most instances of economic regulation, however, distinctions among classes will be upheld as long as a rational basis exists for the regulation. For this reason, most challenges to airport access restrictions based on the Equal Protection Clause have failed.[71]

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving "any person of life, liberty, or property, without due process of law."[72] Like the Equal Protection Clause, the Due Process Clause typically will be deemed satisfied where the state or local action has a rational basis. Here again, challenges to access limits based on the Due Process Clause typically fail.[73]

Finally, the Commerce Clause, which authorizes the federal government to regulate interstate commerce, has a "dormant" aspect that prohibits state and local governments from imposing undue burdens on interstate commerce. This too has been used as a basis for challenges to access limits, but it routinely has been rejected, principally because the courts found that local access restrictions did not discriminate against interstate commerce.[74]

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[66] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States…."). *See also* 49 U.S.C. § 40103(a)(2) (2014) ("A citizen of the United States has a public right of transit through the navigable airspace.").

[67] Saenz v. Roe, 526 U.S. 489, 500 (1999).

[68] *See, e.g.,* City of Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982)

> (Neither Houston nor American suggests, nor could they, that the perimeter rule operates as a residency requirement to deny persons their constitutional right to travel. At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in [*Shapiro v. Thompson*, 394 U.S. 618 (1969)] or in the airlines' own schedules.).

[69] Tutor-Saliba v. City of Hailey, 452 F.3d 1055, 1062 (9th Cir. 2006).

[70] U.S. CONST. amend. XIV, § 1 ("[N]or shall any state…deny to any person within its jurisdiction the equal protection of the laws.").

[71] *See, e.g.*, *Tutor-Saliba Corp.*, 452 F.3d 1055; SeaAir NY, Inc. v. City of N.Y., 250 F.3d 183 (2d Cir. 2001); Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996); Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977 (9th Cir. 1991). *But see* Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981) (finding that a jet ban violated equal protection).

[72] U.S. CONST. amend. XIV, § 1.

[73] *See, e.g.*, *Tutor-Saliba Corp.*, 452 F.3d 1055; *SeaAir NY, Inc.*, 250 F.3d 183; *Gustafson*, 76 F.3d 778; *Alaska Airlines, Inc.*, 951 F.2d 977; Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990); Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983). *But see* Skydiving Ctr. of Greater Wash. D.C., Inc. v. St. Mary's Cnty. Airport Comm'n, 823 F. Supp. 1273 (D. Md. 1993).

[74] *See, e.g.*, *Tutor-Saliba Corp.*, 452 F.3d at 1062; Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343, 1354 (M.D. Fla. 2001); Nat'l Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81, 92 (2d Cir. 1998); *Alaska Airlines, Inc.*, 951 F.2d at 983–84; Arrow Air, Inc. v. Port Auth. of N.Y. & N.J., 602 F. Supp. 314 (S.D.N.Y. 1985); Nat'l Aviation v. City of Hayward, 418 F. Supp. 417, 427–28 (N.D. Cal. 1976). *But see* N.Y. Airlines, Inc. v. Dukes Cnty., 623 F. Supp. 1435, 1443 (D. Mass. 1985); United States v. Cnty. of Westchester, 571 F. Supp. 786, 797 (S.D.N.Y. 1983).

3. Contractual Rights

Airport users leasing airport property also enjoy the rights and obligations prescribed by a lease or other agreement. However, since most leases explicitly require compliance with airport rules and regulations, it may be difficult for a lessee to establish that an access restriction violates a lease or unconstitutionally impairs a contract.[75]

Because these constitutional and contractual protections have not been considered a check on airport operator power to restrict access, airport users often turn to the Airport Sponsor Assurances as the basis for challenging a restriction or limit on access.

I. Summary of Legal Principles

The legal principles examined in this section can be summarized as follows:

- FAA has exclusive jurisdiction over the regulation of airspace and aircraft. As a result, GA airport operators cannot restrict the movement of aircraft in flight.
- The federal government occupies the field of aviation safety. Although airport operators can enact safety-related restrictions affecting aeronautical activities and aircraft operations, such restrictions are subject to FAA review and a determination as to whether a restriction is consistent with the Airport Sponsor Assurances.
- GA airport operators can enact noise-related access restrictions on aeronautical activities and aircraft operations, subject to the ANCA, constitutional protections, and the Airport Sponsor Assurances. Noise-based restrictions must be reasonable, nonarbitrary, and not unjustly discriminatory.
- Local governments other than the airport proprietor cannot regulate aircraft operations for safety or noise, but do retain traditional land use and zoning authority over the siting and expansion of airports and surrounding areas.
- GA airport operators cannot grant an exclusive right to conduct commercial aeronautical activities and must negotiate in good faith for the lease of suitable areas or space on reasonable terms to those willing and qualified to conduct aeronautical activities or provide commercial aeronautical services.
- The imposition of irrelevant, unreasonable, inappropriate, or unattainable terms and conditions; unreasonable delay; or the failure to objectively and uniformly apply terms and conditions to all similarly situated on-airport aeronautical service providers may constitute the constructive grant of an exclusive right or constitute unjust economic discrimination.

IV. PRACTICAL APPLICATION OF LEGAL PRINCIPLES

Airport access issues implicate areas of shared responsibility among airport operators, FAA, airport users, and often other stakeholders. In general, restrictions on access to GA airports are initiated by the airport operator and subject to review by FAA, typically in the context of a Part 16 complaint, whether initiated by FAA or brought by an airport user. Airport users may also challenge aspects of a restriction to access in court, typically on constitutional grounds. In addition to the substantive legal standards previously discussed, a practical understanding of how FAA reviews limits on airport access will inform GA airport operators and others of what is involved in seeking to adopt a limit on access and how to effectively resolve disputes over access.

A. FAA's Role

FAA serves two primary roles with respect to limits on access to GA airports: 1) safeguarding the federal government's exclusive jurisdiction over airspace and aviation safety, and 2) ensuring compliance with the Airport Sponsor Assurances. With the exception of noise or access restrictions on Stage 3 aircraft subject to ANCA, FAA does not formally preapprove restrictions on aeronautical activities or aircraft operations. Noise or access restrictions on Stage 2 aircraft, however, are subject to a public notice, comment, and review process under ANCA. In addition, FAA does not preapprove leases or other agreements to conduct aeronautical activities.[76] Rather, FAA will respond to requests for assistance from GA airport operators or complaints from airport users and other interested parties concerning limits on access. With respect to its review of safety-related restrictions, FAA has stated,

> In all cases, the FAA is the final arbiter regarding aviation safety and will make the determination regarding

[75] *See* Cont'l Aviation Servs., Inc. v. City of Naples Airport Auth., 873 So. 2d 567, 569 (Fla. Dist. Ct. App. 2004) (affirming state circuit court grant of summary judgment regarding a challenge to a Stage 2 ban at the Naples Municipal Airport).

[76] *Order 5190.6B*, *supra* note 28, § 12.3(a) ("The FAA does not review all leases, and there is no requirement for a sponsor to obtain FAA approval before entering into a lease.").

> the reasonableness of the sponsor's proposed measures that restrict, limit, or deny access to the airport. The FAA, not the sponsor, is the authority to approve or disapprove aeronautical restrictions based on safety and/or efficiency at federally obligated airports.[77]

In acting as the final arbiter on issues of safety, FAA cautions both GA airport operators and airport users from attempting to substitute their judgment for FAA's.[78] Moreover, FAA advises that GA airport operators must accept some level of risk in connection with their operation of a GA airport.

> Operating an airport is not, nor will it ever be, a risk-free endeavor. An airport sponsor accepts the responsibilities and obligations of running an airport for all aeronautical users when it accepts Federal grants.
>
> While the Associate Administrator agrees with the County that skydiving is not without its safety concerns, this is true of any aeronautical activity.…In operating an airport and accepting Federal funds, the County has accepted the responsibility for compliance with Federal obligations tied to those funds, as well as the authority of FAA as the final arbiter of aviation safety.[79]

FAA begins with the presumption that aeronautical activities are safe.[80] From this, FAA determines whether there is some particular situation or circumstance involving the airport or surrounding airspace that would render the aeronautical activity or aircraft operation to be unsafe or to unduly compromise airport and airspace efficiency. For example, FAA determined that safety and efficiency would be compromised to an unacceptably high level if banner towing was allowed at a busy commercial service airport.[81]

FAA looks to GA airport operators to make "reasonable accommodations" in crafting access limits in order to assure that the least restrictive measure possible is adopted. FAA has advised:

> The purpose of any investigation regarding a safety-based or efficiency-based restriction of an aeronautical use is to determine whether or not the restricted activity can be safely accommodated on less restrictive terms than the terms proposed by the airport sponsor without adversely affecting the efficiency and utility of the airport. If so, the sponsor will need to revise or eliminate the restriction in order to remain in compliance with its grant assurance and federal surplus property obligations.
>
> A complete prohibition on all aeronautical operations of one type, such as ultralights, gliders, parachute jumping, balloon and airship operations, acrobatic flying, or banner towing should be approved only if the FAA concludes that such operations cannot be mixed with other traffic without an unacceptable impact on safety or the efficiency and utility of the airport.[82]

FAA takes a similar position with respect to noise-based restrictions.

> The FAA has encouraged a balanced approach to address noise problems and has discouraged unreasonable airport use restrictions. It is FAA policy that airport use restrictions should be considered only as a measure of last resort when other mitigation measures are inadequate to satisfactorily address a noise problem and a restriction is the only remaining option that could provide noise relief.[83]

These policies with respect to safety-related and noise-related restrictions are manifest in the

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[77] *Id.* § 14.3.

[78] Director's Preliminary Determination, Jones v. Lawrence Cnty. Comm'n, FAA Docket No. 16-11-07, at 23 (July 16, 2012)

> (In pursuing its mission to provide the safest, most efficient aerospace system in the world, the FAA must balance the needs of various aeronautical users competing for use of the nation's skies. However, the FAA has no obligation to consider the local needs of nonaeronautical neighbors or local economic concerns.).

Director's Determination, *Lawrence Cnty. Comm'n*., FAA Docket No. 16-11-07, at 19 ("Typically, the Director cautions a party against substituting its judgment for the expertise of FAA, as FAA safety determinations take precedence over the views of a party with regard to safety."); *id.* at 22 ("The Complainant simply substitutes its judgment for the expertise of FAA, and the Director finds that unacceptable.").

[79] Final Agency Decision and Order, Bodin v. County of Santa Clara, FAA Docket No. 16-11-06, at 37–38 (Aug. 12, 2013).

[80] *Order 5190.6B*, *supra* note 28, § 8.8(a) ("An aeronautical operator holding an FAA certificate is presumed to be a safe operator…."); *id.* § 14.6

> ([C]ertain operators may already possess a "Certificate of Waiver or Authorization" from Flight Standards to conduct the aeronautical activity the airport is attempting to restrict, such as banner towing. Such a document would allow certain operations to remain in compliance with Part 91, *General Operating and Flight Rules*. These "waivers" or "authorizations" are de facto safety determinations; their issuance implies that the activity in question can be safely accommodated provided specified conditions are followed.)

Director's Determination, Aircraft Owners & Pilots Assoc. v. City of Pompano Beach, FAA Docket No. 16-04-01, at 11 (Dec. 15, 2005)

> ([Aeronautical] activities…include stop-and-go operations, intersection take-offs, operation of gliders, touch-and-go operations, taxi-back activities, operation of helicopters (rotorcraft) and in some cases, engine run-ups. These activities are considered aeronautical activities and, as such, must generally be accommodated on airports developed with federal assistance unless adequate justification acceptable to the FAA indicates the activity should not be accommodated on a particular airport.).

[81] Director's Determination, Florida Aerial Adver. v. St. Petersburg-Clearwater Int'l Airport, FAA Docket No. 16-03-01, at 15–16 (Dec. 18, 2003).

[82] *Order 5190.6B*, *supra* note 28, § 14.7.

[83] *Id.* § 13.8(e).

prior adjudications over access restrictions. In virtually every instance in which an airport operator adopted a blanket prohibition on an aeronautical activity or type of aircraft operation, FAA found that the restriction was preempted or inconsistent with the Airport Sponsor Assurances. In contrast, FAA has shown greater deference to airport operators seeking to impose conditions on the manner in which certain aeronautical activities take place.[84]

FAA safety determinations can be a source of frustration. In many of the cases cited herein, FAA found that an access restriction was unreasonable or unjustly discriminatory because the aeronautical activity could be conducted safely or is not "inherently unsafe."[85] GA airport operators and local governments, in contrast, typically are not focused on whether it is possible to conduct an aeronautical activity safely. Instead, GA airport operators are concerned about whether the risk of an incident or accident causing injury, death, or property damage is sufficiently high to warrant limiting the activity. In many respects, this represents one of the most significant sources of conflict between FAA (on the federal level) and GA airport operators (on the local level), because FAA and GA airport operators view the problem so differently.

FAA determinations on whether a GA airport operator is complying with the Airport Sponsor Assurances can be frustrating to a GA airport operator as well. Again, GA airport operators may base a decision to restrict an aeronautical activity or aircraft type on an assessment of risk, a desire to mitigate liability exposure, and an attempt to respond to airport neighbors or pilots. Some GA airport operators may seek to deny an aeronautical service provider the opportunity to lease airport property based upon the determination that there is insufficient demand for a particular product, service, or facility. FAA has stated, however, that it has no obligation to consider the local needs of nonaeronautical neighbors when considering whether an airport operator's actions comply with the Airport Sponsor Assurances. This statement, however, stands in stark contrast to an airport operator's need to consider those factors for its own local, legal, or other reasons.[86] That general position and FAA's willingness to make an independent assessment of local conditions, such as regarding demand for aeronautical services, can be frustrating to airport operators, who may feel that FAA is substituting its judgment for that of the airport operator on a "local" issue. Nonetheless, as discussed above, FAA acts as the final arbiter on safety issues and FAA's authority to overrule an airport operator's assessment of local conditions has been affirmed.

B. Resolution of Disputes over Airport Access

There is no single mechanism by which disputes over aeronautical activities, aircraft operations, and the use and lease of airport property are resolved. The following is a description of some of the common features of disputes and the procedural mechanisms available to resolve access-related disputes.

Disputes may begin when an action is taken by the GA airport operator to limit or restrict access. Triggering events may include the adoption of a rule restricting a certain type of aeronautical activity or aircraft operation, a breakdown in lease negotiations, or the failure to reach an agreement over a prolonged period.

Arguably, the key to successful resolution of disputes is to educate all parties prior to the triggering event. Although many GA airports have a professional and skilled staff, some smaller GA airports may not have staff with detailed knowledge of the Airport Sponsor Assurances or the other subjects covered in this Guide.[87]

The same or similar problems may exist on the other side of the dispute. Airport users may have insufficient knowledge of the Airport Sponsor Assurances. This may result in overstatements of the requirements of the Assurances in general and Assurance 22 and Assurance 23 in particular. Assurance 22 requires that access to GA airports

[84] *See id.* §§ 14.4(d), 14.7(b). *See also* Director's Determination, Jones v. Lawrence Cnty. Comm'n, FAA Docket No. 16-11-07 (Sept. 19, 2013); Director's Determination, Johnson v. Yazoo Cnty., FAA Docket No. 16-04-06 (Feb. 9, 2006).

[85] *See, e.g.*, Director's Determination, Skydive Paris, Inc. v. Henry Cnty., FAA Docket No. 16-05-06, at 18 (Jan. 20, 2006).

[86] *See* Director's Preliminary Determination, Jones v. Lawrence Cnty. Comm'n., FAA Docket No. 16-11-07, at 23 ("However, the FAA has no obligation to consider the local needs of nonaeronautical neighbors or local economic concerns.").

[87] Although beyond the scope of this Guide, continuing legal education, training, and certification courses and programs are offered by the American Association of Airport Executives, Airports Council International–North America, and others, which provide many opportunities for airport personnel and elected officials to become better informed on the requirements and application of the Airport Sponsor Assurances.

be provided for aeronautical activities, and Assurance 23 requires that GA airport operators avoid granting exclusive rights. These requirements are not absolute. For example, airport operators can restrict or condition access, if necessary, for the safe and efficient operation of the airport or to serve civil aviation. Similarly, elected and appointed officials and nearby residents may have an incorrect understanding of what the airport or community can do to address a perceived problem, leading to unrealistic demands for action. FAA recommends that GA airport operators considering whether to restrict access consult with FAA prior to taking final action, in part to assist with the education of interested parties, and obtain the position of FAA on whether the restriction is permissible.[88]

At the preliminary stage of a dispute, the parties typically will try to negotiate directly over a limit or perceived limit on access. Lawyers may or may not be involved at this stage. Written correspondence may be useful in clearly describing the positions of the parties and documenting efforts to resolve the dispute. However, written correspondence may escalate negative feelings and emotions over the issues at hand and harden the positions of the parties.

If the parties are unable to resolve the dispute through these types of informal discussions, the dispute may branch out into many different directions, some of which may be more productive than others.

In many instances, the GA airport operator, airport user, or both will turn to FAA, particularly when the parties believe that a limit on access implicates the Airport Sponsor Assurances. Often, parties will engage the FAA Airports District Office (ADO) Manager or a compliance specialist in the ADO or regional office. Complaining parties may specifically request that a review be conducted under one of two FAA procedures for addressing disputes regarding the Airport Sponsor Assurances.

1. Informal Complaints Pursuant to 14 C.F.R. Part 13

Section 13.1(a) provides, "Any person who knows of a violation of…the Airport and Airway Improvement Act of 1982…or any rule, regulation, or order issued thereunder, should report it to appropriate personnel of any FAA regional or district office." The reference to "any person" in Section 13.1 means that "standing" is not required to file an informal complaint. Further, even if the complaining party does not refer explicitly to Part 13, FAA may treat the matter as an informal proceeding under Part 13. In practice, FAA will typically share an informal complaint with the GA airport operator and ask for a response, often within a 30-day time frame.

FAA's policy on informal review of alleged violations of the Airport Sponsor Assurances is provided in FAA Order 5190.6B, *Airport Compliance Manual*, Chapter 5 (Complaint Resolution). The policy will not be restated in its entirety herein; readers are advised to consult Chapter 5 for more information. In general, the policy reflects FAA's interest in helping the parties resolve the dispute informally. Failing informal resolution, FAA may issue a preliminary determination signed by the ADO manager or regional compliance officer and setting forth his or her findings based on a review of the facts and allegations of the parties.

During informal and formal dispute resolution concerning safety-related limits on access, FAA personnel may consult with FAA offices such as Flight Standards or Air Traffic to evaluate a restriction.

> [W]hen an informal Part 13.1 report or formal Part 16 complaint is filed regarding an access restriction based on safety or efficiency, the FAA Office of the Associate Administrator for Airport should obtain assistance from the appropriate FAA office, usually Flight Standards for safety issues and Air Traffic for efficiency and utility issues. While Flight Standards has jurisdiction for safety determinations, coordination with Air Traffic or other FAA offices might be required in cases where the aeronautical activity being denied has an impact on the efficient use of airspace and the utility of the airport.[89]

As a practical matter, FAA's preliminary determination can end a dispute. In many instances, the ADO or regional personnel are already familiar with the airport, the parties, and the dispute leading to the informal complaint. FAA personnel can provide relevant information and advice, including how similar disputes have been resolved at other airports. Often, the advice

[88] *Order 5190.6B*, *supra* note 28, § 8.8(a)

> ([A]n airport sponsor that is contemplating the denial of a proposed on-airport aeronautical activity or access is encouraged to contact the local ADO or regional airports division. Those offices will then seek assistance from FAA Flight Standards (FS) and Air Traffic (AT) to assess the reasonableness of the proposed action because of safety and efficiency, and to determine whether unjust discrimination or an exclusive rights violation results from the proposed restrictions.).

[89] *Id.* § 14.5.

of FAA personnel is credible, practical, and constructive.

Rather than simply instructing parties on the interpretation and application of the Airport Sponsor Assurances, FAA may look for a compromise that allows the parties to obtain their respective goals, in whole or in part. FAA sets a high bar for access restrictions that prevent the opportunity to conduct an aeronautical activity or operate a particular type of aircraft. Again, FAA encourages GA airport operators to instead provide a "reasonable accommodation," such as limitations on hours of operation, specific safety procedures, or other measures to protect the safety and efficiency of the airport while accommodating the aeronautical activity.[90] This concept of reasonable accommodation is integral to the successful resolution of disputes or the avoidance of a dispute altogether. It often will be most useful for GA airport operators to identify and consider a range of alternatives to address a particular issue or concern. While a blanket prohibition may seem to be the most efficient and effective means to address the issue, a more nuanced approach may avoid a dispute.

There may be other individuals in the community (e.g., professional mediators, retired judges, etc.) who may be called upon to help resolve disputes over airport access. Airport leases and other agreements may require mediation or arbitration to resolve alleged defaults. One significant problem that affects the ability of some individuals to help resolve disputes is the highly technical nature of aviation and airports and the complexities of the Airport Sponsor Assurances and other federal obligations.

2. Formal Complaints Pursuant to 14 C.F.R. Part 16

If the informal dispute resolution process is not effective, the parties do not agree with FAA's preliminary determination, or the parties do not choose to take advantage of the Part 13 process, a party who is directly and substantially affected by alleged noncompliance may file a formal complaint with FAA. In addition, FAA itself may initiate a Part 16 proceeding against an airport sponsor, a procedure FAA has followed in previous access restriction cases in Naples, Florida, and Santa Monica, California, among others.

Complaints for alleged violations of the Airport Sponsor Assurances must be filed in accordance with 14 C.F.R. Part 16. Although Part 16 has many specific requirements and should be consulted carefully to determine a litigant's obligations, the key features of Part 16 can be summarized as follows:

- FAA's jurisdiction under Part 16 is limited to consideration of whether an airport sponsor is complying with the Airport Sponsor Assurances and a number of other specified federal laws and obligations.[91] Review under Part 16 is *not* available to adjudicate claims arising under unrelated provisions of federal law or under state law.
- Only a person "directly and substantially affected by any alleged noncompliance" may file a complaint under Part 16 alleging noncompliance with the Airport Sponsor Assurances.[92] Certain other federal obligations, such as the revenue use rules and disadvantaged business enterprise rules, have different standing requirements. Again, FAA may initiate an investigation on its own.[93]
- A complainant must certify in writing that it made "substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint."[94] This may involve informal dispute resolution under Part 13 or direct discussions or negotiations with airport personnel or other officials of the entity that owns the airport, which may be sufficient to satisfy this certification requirement.
- Part 16 provides for a three-step adjudicative process: 1) an investigation by the Director of the Office of Airport Compliance and Management Analysis, resulting in issuance of a Director's Determination; 2) a hearing, in limited circumstances discussed in the following; and 3) review and issuance of a final decision and order by the FAA Associate Administrator for Airports.
- A hearing is available only in the limited circumstance when the Director's Determination is adverse to the airport sponsor and proposes the issuance of a compliance order. A respondent airport sponsor receiving such a decision may seek a hearing or appeal to the Associate Administrator for Airports. A complainant receiving an adverse Director's Determination is *not* entitled to a hearing and instead may appeal to the Associate Administrator for Airports.
- Part 16 contains deadlines for the submission of pleadings by the parties and issuance of the

[90] *Id.* § 14.7.

[91] *See* 14 C.F.R. § 16.1 (2014).

[92] *Id.* § 16.23(a).

[93] *Id.* § 16.101.

[94] *Id.* § 16.21(b).

Director's Determination. By rule, the investigation phase is designed to take 6 months (from the filing of a complaint to issuance of the Director's Determination). In practice, the investigation phase takes longer, often a year or more.

- FAA amended Part 16, effective November 2013. The amended rule includes a new mechanism by which a respondent airport operator can file a motion to dismiss or a motion for summary judgment on discrete issues before having to file its substantive response.[95]
- The final agency decision and order issued by the Associate Administrator for Airports can be appealed to the U.S. Court of Appeals.[96]
- If the Director makes a finding of noncompliance, the Director typically will request that the respondent airport sponsor submit a "corrective action plan." The plan may be coordinated with the ADO or regional office and, if satisfactory, may end the Part 16 proceeding.[97]
- FAA publishes its decisions under Part 16 at the following Web site: http://part16.airports.faa.gov/.[98]

In addition to these key points about the Part 16 process, it is important to understand that FAA's review under Part 16 is limited to consideration of whether the respondent airport sponsor is in compliance with the Airport Sponsor Assurances and related federal obligations *at the time of the investigation*. FAA does not seek to penalize airport sponsors for prior violations of the Airport Sponsor Assurances where the airport sponsor has taken corrective action to remedy the violation, but this occurred prior to the issuance of the Director's Determination.

It is also important to understand that FAA approaches access restriction cases differently than other types of Part 16 cases. The majority of Director's Determinations and Final Orders arise from complaints filed by airport users, are favorable to the respondent airport sponsor, and find no violation of an Airport Sponsor Assurance. In cases involving a blanket prohibition on an aeronautical activity or type of aircraft operation, however, FAA is likely to initiate the complaint itself and find a violation of Airport Sponsor Assurance 22 or other Assurances.[99] Airport operators should be aware that adopting a broad restriction on access is likely to invite close scrutiny by FAA.

3. Judicial Remedies

Some parties may pursue judicial remedies in addition to, or as an alternative to, filing a complaint under Part 16. These include state court actions alleging breach of contract, federal court actions alleging preemption and/or a constitutional deprivation, and various other judicial actions on more novel theories (e.g., takings, antitrust, Racketeer Influenced and Corrupt Organizations Act (RICO), etc.). Highly controversial restrictions on access, such as the Naples Stage 2 ban, were challenged in multiple forums on different legal theories. Because this Guide is focused on the application of the Airport Sponsor Assurances, these cases are not examined in detail.

C. Stakeholder Perspectives

Positions vary widely about limits on access to GA airports. This Guide has detailed the positions and policies of FAA, primarily because FAA adjudicates compliance with the Airport Sponsor Assurances, subject to review by the U.S. Court of Appeals. This Guide also has described views of some GA airport operators, users, and neighbors.

To better understand both the airport access issues at GA airports and stakeholder perspectives on those issues, the authors of this Guide conducted interviews with representatives from the following entities: 1) Aircraft Owners and Pilots Association, 2) Airports Council International–North America, 3) American Association of Airport Executives, 4) Experimental Aircraft Association, 5) FAA, 6) National Air Transportation Association, 7) National Association of State Aviation Officials, 8) National Business Aviation Association, 9) Association for Unmanned Vehicle Systems International, 10) Flight School Association of North America; 11) Soaring Society of America, and 12) United States Parachute Association.

Each respondent was asked to discuss the top access issues faced by the organization, best prac-

[95] *Id.* § 16.26.

[96] *See* 49 U.S.C. § 46110 (2014); 14 C.F.R. § 16.247(a).

[97] *See* 14 C.F.R. § 16.109(f).

[98] *See also* COMPILATION OF DOT AND FAA AIRPORT LEGAL DETERMINATIONS AND OPINION LETTERS THROUGH DECEMBER 2012 (Airport Cooperative Research Program, Transportation Research Board, Legal Research Digest No. 21, 2013).

[99] *See* Final Agency Decision and Order, In the Matter of Compliance with Fed. Obligations by the Naples Airport Auth., FAA Docket No. 16-01-15, at 45 (Aug. 25, 2003); Final Decision and Agency Order, In the Matter of Santa Monica, FAA Docket No. 16-02-08, at 46 (July 8, 2009). *See also* City of Naples Airport Auth. v. FAA, 409 F.3d 431, 436 (D.C. Cir. 2005).

tices for working to resolve airport access issues, and recommended guidance for resolving conflicts related to airport access. Their responses informed the organization, content, and approach to this Guide.

Perhaps predictably, the respondents listed issues that most closely identified with their respective organizations. The top airport access issues included residential through-the-fence, skydiving, airport closures, airport noise, and flight schools.

A number of respondents recommended that stakeholders should resolve conflicts related to airport access by distributing FAA guidance material to airport sponsors and local officials in order to facilitate constructive and professional dialogue. Where this approach is not successful, stakeholders should contact the FAA Airport District Office, followed by the Regional Office, and finally FAA headquarters.

Each respondent identified a similar list of resources, including Title 14 of the U.S. Code of Federal Regulations, FAA Order 5190.6B, the Airport Compliance Manual (2009), the Airport Sponsor Assurances, FAA Advisory Circular Series 150, Program Guidance Letters, and FAA Director's Determinations and Final Agency Decisions.

D. Best Practices for Resolving Disputes

While each situation concerning access at a GA airport will be different and warrant its own approach, the following are offered as a best practices approach to the resolution of access-related disputes:

- *Get educated.* The requirements of the Airport Sponsor Assurances and federal law are complex and reflect a shared responsibility for airport safety and noise and the lease and use of airport property. All parties are at risk of overstating their case, which seldom contributes to the successful resolution of a dispute. Accordingly, all parties are encouraged to educate themselves about the relevant requirements. Often, this will require consulting original source documents, including laws, regulations, policies, guidance, and case law. This Guide and the sources cited herein will hopefully contribute to the education process.
- *Respect different perspectives.* It may be difficult to remember and respect that parties to a dispute may come to the issue with very different backgrounds and perspectives, in addition to an imbalance in factual and legal information. There is a tendency to minimize or dismiss the views and perspectives of those on the other side of a dispute. Respecting different perspectives is particularly important for GA airport operators, who may hear competing arguments from airport users and the industry groups representing them, airport neighbors, and FAA. In many cases, the GA airport operator has the singular motive of doing what is in the best interests of the airport, which may be different than the interests of individual stakeholders and reflect an attempt to balance the competing demands of airport stakeholders. It may be useful to acknowledge early in the process that the perspectives of other parties are legitimate and worth consideration or acknowledgment.
- *Clearly identify goals and alternatives.* As stressed in this Guide, blanket prohibitions on aeronautical activities and aircraft operations are disfavored by FAA, although they may have a role in limited circumstances. GA airport operators would be wise to carefully consider early in the process the key objectives and the alternatives to achieve those objectives. Although a complicated set of safety procedures, voluntary noise abatement measures, and detailed lease terms may be more difficult to design and administer, these may be advantageous in potentially avoiding a dispute and the risk of an adverse decision by FAA on Airport Sponsor Assurance compliance.
- *Have a meeting.* Part 16 requires that the parties engage in good faith efforts to resolve the dispute before filing a complaint. As reflected in many of the Part 16 cases cited herein, those efforts sometimes take place over an extended period of time. Plainly, there are more and less helpful ways to resolve disputes informally. Emails and written correspondence may be helpful in clearly describing the positions of the parties and may serve as a record of minor and major points of agreement and disagreement. However, face-to-face meetings early in the process have the potential to promote civility and build consensus. GA airport operators should carefully coordinate such meetings and be aware that airport users, airport neighbors, and others may be particularly sensitive to matters such as who is being asked to attend the meetings and when and where the meetings are to take place.
- *Get help from FAA.* Although FAA does not approve safety-related and noise-related access restrictions (except restrictions on Stage 3 aircraft), FAA encourages GA airport operators to consult with the agency prior to the adoption of restrictions and is available to advise all parties

about the requirements and application of the Airport Sponsor Assurances and other federal obligations. In addition, FAA is available to comment on draft lease agreements. This guidance early in the process can provide needed support for the efforts of a GA airport operator or point the GA airport operator in a different direction.

- *Get help from others.* While it may feel to a GA airport operator, airport users, airport neighbors, and local elected officials that the dispute at a particular GA airport is unique, the same or similar issues have likely been debated at another GA airport in the country. Industry groups, consultants, lawyers, and other individuals are available to provide a broader perspective on particular disputes and offer constructive suggestions to resolve any disputes.

V. CONCLUSION

This Guide was designed and intended to detail the application of the Airport Sponsor Assurances to the use of GA airports for aeronautical activities. The Guide explains the nature and scope of the Airport Sponsor Assurances, summarizes prior decisions by FAA and reviewing courts concerning limits on access, and offers practical information on the roles of the parties and resolution of disputes.

The authors hope that this Guide will contribute to the body of available literature and better equip interested stakeholders with valuable information to help resolve or avoid disputes over access to GA airports.

Appendix A

AERONAUTICAL ACTIVITY FACT SHEETS

CONTENTS

AIR SHOWS, STATIC DISPLAYS & EXHIBITIONS

What is it?

Airport operators host a variety of special aeronautical events to engage local communities, promote aviation and demonstrate the value and benefit of the airport. Special aeronautical events include air shows, fly-ins, static aircraft displays, flying exhibitions, open houses and other community events requiring access to the airfield.

How is it regulated by the FAA?

Aviation events require a *Certificate of Waiver or Authorization* (FAA Form 7711-2) that has been approved and issued by the appropriate FAA Flight Standards District Office. *See* FAA, Advisory Circular 91-45C, *Waivers: Aviation Events* (1990). The FAA may issue a Notice to Airmen (NOTAM) and establish a temporary flight restriction (TFR) in connection with aerial demonstrations. *See* 14 C.F.R. § 91.145.

How is it regulated by airport operators?

Airport operators may have policies requiring a written agreement with the event sponsor and/or negotiate agreements for individual events. Standard conditions may include insurance, indemnification, safety, security, parking and emergency response.

How common are local regulations and what are some examples?

The August 22 – October 17, 2013 edition of the Airport/Facility Directory does not contain any limitations or restrictions on "air shows".

Where can I look for additional information?

FAA, *Waivers and Authorizations*, available at http://www.faa.gov/about/initiatives/airshow/waiver/media/waiver_auth_info.pdf;
FAA, FAA Form 7711-2: *Application For Certificate of Waiver or Authorization*, available at http://www.faa.gov/documentlibrary/media/form/faa7711-2.pdf;
FAA, *Ground Operations Plans*, available at http://www.faa.gov/airports/airport_safety/airshows/;
FAA, Advisory Circular 91-63C, *Temporary Flight Restrictions* (2004)
FAA, Order 5190-6B, *Airport Compliance Manual*, § 7.21 (*Temporary Closing of an Airport*) (2009)
Transportation Research Board, Airport Cooperative Research Program, *Synthesis 41: Conducting Aeronautical Special Events at Airports* (2013)
Aircraft Owners and Pilots Association, *Airport Open House: The Complete Guide to Holding an Airport Open House*, available at http://www.aopa.org/-/media/Files/AOPA/Home/News/All%20News/2001/2000%20Annual%20Report%20of%20the%20Aircraft%20Owners%20and%20Pilots%20Association/open_house.pdf

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BANNER TOWING

What is it?

Banner towing, sometimes known as aerial advertising, involves attaching a banner to an aircraft and flying the aircraft over populated areas or congregations of people, typically at low altitude.

How is it regulated by the FAA?

Operators may be required to submit FAA Form 7711-2, *Application for Certificate of Waiver or Authorization*, to the FAA Flight Standards District Office to obtain a waiver from minimum altitude and other requirements of 14 C.F.R. Part 91.

How is it regulated by airport operators?

An airport operator may determine that banner towing should be restricted or prohibited when the airport serves a high volume of commercial passenger aircraft and/or high-speed general aviation jet aircraft. *See* Director's Determination, *Florida Aerial Advertising v. St. Petersburg – Clearwater International Airport,* FAA Docket No. 16-03-01 (2003).

Banner towing is subject to complying with airport minimum standards and paying the fees established by the airport operator for conducting the activity. *See* Director's Determination, *Drake Aerial Enterprise v. City of Cleveland*, FAA Docket No. 16-09-02 (2010).

Local governments may restrict banner towing in the interest of protecting the visual landscape. *See Center for Bio-Ethical Reform v. City and County of Honolulu*, 455 F.3d 910 (9th Cir. 2006); *Skysign International, Inc. v. City and County of Honolulu,* 276 F.3d 1109 (9th Cir. 2002).

How common are local regulations and what are some examples?

The search term "banner towing" appears in the August 22 – October 17, 2013 edition of Airport/Facility Directory 47 times, and 8 airports (or 17%) have limited or restricted this activity in some way. Examples of notifications concerning limitations and/or restrictions on banner towing include the following:

- "Banner towing prohibited within 2 NM of the airport."
- "Banner towing on weekends from May–Sep."
- "Arpt CLOSED to banner towing ops."

Where can I look for additional information?

- *FAA/FS-I-8700-1, Information for Banner Tow Operations* (2003)
- Director's Determination, *United Aerial Advertising v. County of Suffolk*, FAA Docket No. 16-99-18 (May 8, 2000)
- Record of Decision, *Gary's Banners Aerial Advertising v. Capital Region Airport Auth.,* FAA Docket No. 13-96-17 (1999)

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CARGO OPERATIONS

What is it?

The transportation of material and goods, including hazardous substances and hazardous wastes, by aircraft between two points for compensation or hire.

How is it regulated by the FAA?

Depending on the size of aircraft used to haul cargo, cargo operators may have to be certificated by the FAA in accordance with 14 C.F.R. Part 119 or Part 125. Airports that serve all-cargo operations are not required to maintain an airport operating certificate pursuant to 14 C.F.R. Part 139.

How is it regulated by airport operators?

Cargo operations may be affected directly by weight-based restrictions and/or by limits on the nature of the cargo (e.g., hazardous or explosive materials). Cargo operations may also be affected by land use plans and requirements imposed by the local government that may limit the availability of land for distribution and warehousing facilities.

An airport operator may establish performance milestones in a lease for an air cargo development project and may terminate that lease in the event that lessee fails to meet those required milestones. *See* Director's Determination, *RDM, LLC v. Ted Stevens Anchorage International Airport*, FAA Docket No. 16-09-14 (2011).

How common are local regulations and what are some examples?

The search term “cargo” appears in the August 22 – October 17, 2013 edition of Airport Facility Directory 65 times, and 37 airports (or 57%) have limited or restricted this activity in some way. Examples of notifications concerning limitations and/or restrictions on cargo operations include the following:

- “Cargo operations over 100,000 lbs call (phone number).”
- “PPR 48 hrs for acft carrying hazardous or explosive cargo.”
- “Haz cargo ops unavbl.”

Where can I look for additional information?

- FAA, Advisory Circular 150/5230-4B, *Aircraft Fuel Storage, Handling, Training, and Dispensing on Airports* (2012)

FLIGHT TRAINING

What is it?

Flight training includes instruction received from a flight school in an aircraft or aircraft simulator.

How is it regulated by the FAA?

Flight schools are subject to 14 C.F.R. Part 141 (*Pilot Schools*). Flight schools also are subject to regulation by the Transportation Security Administration (TSA), including the TSA Alien Flight Student Program (49 C.F.R. Part 1552).

How is it regulated by airport operators?

Often, flight training is recognized by airport operators as a commercial aeronautical activity and addressed in airport minimum standards. Airport operators may prescribe standards for leased space, personnel, number and type of aircraft, hours of operation and insurance.

Pursuant to the Airport Sponsor Assurances, airport operators may limit flight training activities if necessary for the safe operation of the airport (or to serve the civil aviation needs of the public). In one case, the FAA found that an airport operator lacked sufficient justification to impose restrictions on flight training. *See* Director's Determination, *Aircraft Owners and Pilots Association v. City of Pompano Beach*, FAA Docket No. 16-04-01 (2005).

How common are local regulations and what are some examples?

The search term "flight training" appears in the August 22 – October 17, 2013 edition of Airport Facility Directory 107 times, and 15 airports (or 14%) have limited or restricted this activity in some way. Examples of notifications concerning limitations and/or restrictions on flight training include the following:

- "Flight training prohibited 0400-1200Z."
- "Multiengine flight training prohibited SS to SR Sun and holiday."
- "Helicopter flight training ops prohibited."

Where can I look for additional information?

- 14 C.F.R. Part 61 (*Certification: Pilots, Flight Instructors, and Ground Instructors*)
- 14 C.F.R. Part 141 (*Pilot Schools*)
- 49 C.F.R. Part 1552 (*Flight Schools*)
- FAA, Advisory Circular 150/5190-7, *Minimum Standards For Commercial Aeronautical Activities*, Paragraph 2.1 (2006)
- *Santa Monica Airport Association v. City of Santa Monica*, 481 F.Supp. 927 (C.D. Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981)
- Opinion Letter from Daphne Fuller, FAA, to K. Bohne re: Approved Town of Grant-Valkaria Ordinance (Aug. 7, 2009)

HELICOPTERS

What is it?

Helicopters are a type of aircraft that derives both lift and propulsion from one or two sets of horizontally revolving overhead rotors. It is capable of moving vertically and horizontally, the direction of motion being controlled by the pitch of the rotor blades.

How is it regulated by the FAA?

The FAA regulates several aspects of helicopter manufacturing and operations, including helicopter noise (14 C.F.R. Part 36, Subpart H), external load operations (14 C.F.R. Part 133), and heliports (14 C.F.R. Part 157). The FAA also prescribes routes for helicopter operations and publishes helicopter route charts.

How is it regulated by aircraft operators?

Airport sponsors may adopt restrictions on helicopter operations to protect nearby residents from significant noise intrusion. However, the adopted regulations may not discriminate in regards to either aircraft size or routes flown. *See National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2d Cir. 1998).

Local regulation of external load operations may be preempted by federal law. *See Command Helicopters, Inc. v. City of Chicago*, 691 F.Supp. 1148 (N.D. Ill. 1988).

How common are local regulations and what are some examples?

The search term "helicopter" appears in the August 22 – October 17, 2013 edition of the Airport/Facility Directory 518 times and there are 117 (23%) limitations or restrictions on helicopter operations noted. Examples include the following:

- "Helicopters landing and departing avoid overflying fuel farm"
- "Arpt CLOSED to helicopter ops."
- "All helicopter ops are prohibited unless a current letter of authorization is on file at the arpt office which includes an FAA approval and an FAA endorsed flight pattern as well as a written approval from the arpt management."

Where can I look for additional information?

- FAA, Advisory Circular 150/5390-2C, *Heliport Design* (2012)
- *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990)
- *Santa Monica Airport Association v. City of Santa Monica*, 481 F.Supp. 927 (C.D. Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981)

JETS

What is it?

Some airport operators may seek to restrict operations based on aircraft type. Aircraft can be differentiated by propulsion (propeller-driven versus turbine-powered) or by other criteria, such as approach speed or wingspan. Airport operators may be motivated by noise, safety or a combination of considerations.

How is it regulated by the FAA?

The FAA requires airport operators to consider the size of aircraft using an airport in order to design runways and other airfield improvements. *See* FAA, Advisory Circular 150/5300-13A, *Airport Design* (2012). The FAA is responsible for aircraft certification, but does not regulate aircraft based on type.

How is it regulated by airport operators?

Airport operators have sought to adopt rules banning, for example, all jet aircraft or certain types and categories of aircraft.

A reviewing court found that a ban on jet aircraft violates the Equal Protection Clause of the U.S. Constitution and imposes an impermissible burden on interstate commerce. *Santa Monica Airport Association v. City of Santa Monica*, 481 F.Supp. 927, 943-944 (C.D. Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981).

The FAA and a reviewing court found that a ban on Category C and D aircraft is unreasonable and unjustly discriminatory. *City of Santa Monica v. FAA*, 631 F.3d 550 (D.C. Cir. 2011) (on review of *In re Compliance With Federal Obligations by the City of Santa Monica*, FAA Docket No. 16-02-08).

How common are local regulations and what are some examples?

The search terms "jet", "Category C", and "Category D" appear in the August 22 – October 17, 2013 edition of the Airport Facility Directory 225 times, and 94 airports (or 42%) have either limited or restricted aircraft (in some way) on the basis of these distinctions. Examples include the following:

- "Arpt closed to jet acft except PPR call arpt manager."
- "Category C and D acft ops prohibited."
- "Arpt closed to jet acft over 12,500 lbs."

Where can I look for additional information?

- FAA, Advisory Circular 150/5325-4B, *Runway Length Requirements For Airport Design* (2005)

NOISE RULES

What is it?

While airport operators can take a variety of actions that may affect aircraft noise, typically, "noise rules" are specifically designed and intended to reduce aircraft noise and the corresponding impact on communities surrounding the airport.

How is it regulated by the FAA?

The FAA regulates aircraft noise by, for example, prescribing noise standards for aircraft manufacturing (14 C.F.R. Part 36), prescribing noise limits for aircraft in operation (14 C.F.R. Part 91, Subpart I), supporting noise analysis and land use compatibility planning (14 C.F.R. Part 150), and prescribing procedural and substantive requirements for local noise and access restrictions (14 C.F.R. Part 161).

How is it regulated by airport operators?

Airport operators have enacted a variety of limitations and/or restrictions on aircraft noise, including nighttime curfews and limits on aircraft generating high noise levels.

The FAA and reviewing courts have established the following legal principles with respect to noise rules:

- Government bodies, other than the airport proprietor, are expressly preempted from imposing airport noise rules. *See Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); *see also City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).
- Airport proprietors may enact reasonable, non-arbitrary, and non-discriminatory noise rules. *See National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2d. Cir. 1998).

How common are local regulations and what are some examples?

The search term "noise" appears in the August 22 – October 17, 2013 edition of the Airport Facility Directory 618 times and 392 (or 63%) limitations or restrictions on noise are noted. Examples include the following:

- "Noise abatement procedures in effect, call arpt manager."
- "Noise abatement restrictions: No touch and go ldgs or repeated tkf and ldgs 0400-1200Z‡ daily."
- "Rwy 24 noise critical rwy maximum noise limit of 80 db between 0300-1200Z‡ and 90 db all other hrs."

Where can I look for additional information?

- 49 U.S.C. §§ 47521 – 47534
- FAA, Order 5190.6B, *Airport Compliance Manual,* Chap. 13 (*Noise and Access Restrictions*) (2009)
- *City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005) (on review of *In re: Compliance with Federal Obligations by the Naples Airport Authority*, FAA Docket No. 16-01-15)
- *United States v. City of Blue Ash*, 621 F.2d 227 (6th Cir. 1980)
- *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976)

SCHEDULED PASSENGER SERVICE

What is it?

Scheduled passenger service includes the scheduled transportation of passengers on board an aircraft between two points for compensation or hire.

How is it regulated by the FAA?

While airport operators are not required to seek an airport operating certificate, if an airport accommodates scheduled passenger operations in aircraft designed for more than 9 passenger seats and unscheduled passenger operations in aircraft designed for more than 30 seats, federal law requires that the airport operators maintain an airport operating certificate. 49 U.S.C. § 44706. Air carriers and pilots are prohibited from operating at airports that do not have an airport operating certificate and are not classified to serve the type of aircraft and operation. 14 C.F.R. § 121.590.

How is it regulated by airport operators?

Airport operators without an airport operating certificate may impose rules explicitly prohibiting scheduled and unscheduled passenger operations that would require a certificate. Additionally, airport governing bodies have adopted resolutions and other expressions of intent not to seek an airport operating certificate. These expressions of policy typically cannot bind a future governing body from changing the policy and pursuing a certificate.

The FAA found and a reviewing court affirmed that it is unreasonable and unjustly discriminatory for an airport operator to ban all scheduled passenger service without demonstration of a valid safety justification. *Arapahoe County Public Airport Authority v. FAA,* 242 F.3d 1213 (10th Cir. 2001) (on review of *Centennial Express Airlines v. Arapahoe County Public Airport Authority,* FAA Docket Nos. 16-98-05, 13-94-03 and 12-94-25).

How common are local regulations and what are some examples?

The search terms “airline” and “air carrier” appear in the August 22 – October 17, 2013 edition of Airport Facility Directory 608 times, and 97 airports (or 16%) have limited or restricted this activity in some way. Examples of notifications concerning limitations and/or restrictions on scheduled passenger service include:

- "CLOSED to air carrier ops with more than 30 passenger seats except PPR."
- "Unscheduled air carrier ops greater than 30 passenger seats require 12 hr prior permission."
- "24 hr PPR for air carrier acft operating under FAR Part 121 or Part 380, ctc arpt manager."

Where can I look for additional information?

- FAA, *Order 5190.6B, Airport Compliance Manual*, §9.8(b) (2009)
- *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998)
- *Flamingo Express, Inc. v. FAA,* 536 F.3d 561 (6th Cir. 2008) (on review of *Flamingo Express, Inc. v. City of Cincinnati*, FAA Docket No. 16-06-04)

SELF-SERVICE

What is it?

Self-service refers to the servicing of an aircraft by the aircraft owner. Self-service includes tying-down, adjusting, repairing, refueling, cleaning, and other types of service. Self-service is distinguished from commercial self-service fueling, which involves the fueling of aircraft by the owner or operator at a fuel-dispensing facility installed and maintained by a commercial aeronautical operator.

How is it regulated by the FAA?

The FAA prescribes requirements for the maintenance and repair of aircraft. *See* 14 C.F.R. Part 43 (*Maintenance, Preventive Maintenance, Rebuilding, and Alteration*). Airport Sponsor Assurance 22(d) and (f) prohibit airport operators from preventing aircraft owners and operators from self-servicing.

When is it subject to local regulation?

Airport sponsors may impose reasonable conditions on self-fueling. *See* Director's Determination, *Scott Aviation, Inc. v. DuPage Airport Auth*., FAA Docket No. 16-00-19 (2002); Director's Determination, *Maxim United, LLC v. Bd. of County Comm'rs of Jefferson County*, FAA Docket No. 16-01-10 (2002).

An airport sponsor is only obligated to provide an opportunity for self-fueling in a manner that is in the best interest of the public users, not unjustly discriminatory, and without creating an exclusive right. *See* Final Agency Decision, *Monaco Coach Corp. v. Eugene Airport,* FAA Docket No. 16-03-17 (2005); *see also* Director's Determination, *Airborne Flying Serv. Inc. v. City of Hot Springs, Ark.,* FAA Docket No. 16-07-06 (2007).

It is not unreasonable for an airport sponsor to require an air charter and ambulance service to locate its fuel tank in the airport fuel farm rather than adjacent to its hangar location. *See* Directors Determination, *Airborne Flying Services, Inc. v. City of Hot Springs*, FAA Docket No. 16-07-06 (2008).

How common are local regulations and what are some examples?

The search term "self-service" appears in the August 22 – October 17, 2013 edition of the Airport Facility Directory 665 times; however, many references pertain solely to the availability of commercial self-service fueling.

SELF-SERVICE (Cont.)

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Where can I look for additional information?

- FAA, *Order 5190.6B, Airport Compliance Manual*, Chap. 11 (*Self-Service*) (2009)
- FAA, *Advisory Circular 150/5230-4B, Aircraft Fuel Storage, Handling, Training, and Dispensing on Airports* (Sept. 28, 2012)
- Transportation Research Board, Airport Cooperative Research Program, *Legal Research Digest 8: The Right to Self-Fuel* (Dec. 2009)
- Director's Determination, *AmAv, Inc. v. Maryland Aviation Administration*, FAA Docket No. 16-05-12, (2006)
- *Jet 1 Ctr., Inc. v. Naples Airport Auth*., FAA Docket No. 16-04-03 (2005)
- Director's Determination, *Cedarhurst Air Charter, Inc. v. County of Waukesha, Wisconsin*, FAA Docket No. 16-99-14 (2000)

SKYDIVING

What is it?

Skydiving is jumping from an aircraft at a moderate or high altitude and deploying a parachute to create drag or lift for descent to the ground. Parachutes typically come in two shapes (round and square) and may be of multiple varieties, including ram-air parachutes that provide greater control over speed and direction. Commercial skydiving services are provided for compensation or hire, including training, equipment and air transportation.

How is it regulated by the FAA?

Skydiving is subject to 14 C.F.R. Part 105 (*Parachute Operations*). Pursuant to Part 105, FAA approval is required for skydiving over or into congested areas and open-air assemblies of people and in designated airspace.

How is it regulated by airport operators?

Pursuant to Part 105, skydiving over or onto an airport requires approval of airport management.

Skydiving is recognized by the FAA to be an aeronautical activity. Consequently, commercial skydiving operators and skydivers are entitled to protection under the Airport Sponsor Assurances.

The FAA has issued the following decisions on the regulation of commercial skydiving by airport operators:

- An airport sponsor's prohibition against establishment of an on-airport drop zone is unreasonable where FAA finds that it is safe to conduct on-airport parachute activities. Final Decision, *Bodin v. County of Santa Clara*, FAA Docket No. 16-11-06 (2013).
- An airport sponsor may prohibit access to the airport where the skydiving operator has a record of multiple infractions of minimum standards and potential violations of federal regulations. Director's Determination, *Johnson v. Yazoo County*, FAA Docket No. 16-04-06 (2006).
- Denial of access to the airport through imposition of unobtainable insurance requirements constitutes an unreasonable denial of access by an airport sponsor. Director's Determination, *Skydive Sacramento v. City of Lincoln*, FAA Docket No. 16-09-09 (2011).

How common are local regulations and what are some examples?

The search term "commercial skydiving" appears in the August 22 – October 17, 2013 edition of Airport Facility Directory 33 times, and 5 airports (15%) have limited or restricted this activity in some way. Examples of notifications concerning limitations and/or restrictions on commercial skydiving include the following:

- "Local skydiving ops Fri-Sun."
- "Skydiving activities daily dawn to dusk."
- "Skydiving on arpt north of Rwy 25 approach end."

SKYDIVING (Cont.)

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Where can I look for additional information?

- 14 C.F.R. Part 105 (*Parachute Operations*)
- 14 C.F.R. § 91.307 (*Parachutes and Parachuting*)
- FAA, **Draft** Change 19 to Advisory Circular 150/5300-13, *Airport Design Parachute Landing Area Standards* (2012)
- FAA, Advisory Circular 105-2D, *Sport Parachute Jumping* (2011)
- FAA, Advisory Circular 150/5190-7, *Minimum Standards For Commercial Aeronautical Activities*, Paragraph 2.1 (2006)
- FAA, Advisory Circular 90-66A, *Recommended Standard Traffic Patterns and Practices for Aeronautical Operations at Airports Without Operating Control Towers*, Paragraph 9(e) (1983)
- *Skydiving Center of Greater Washington D.C. v. St. Mary's County Airport Comm'n*, 823 F.Supp. 1273 (D. Md. 1993)
- *Blue Sky Entertainment, Inc. v. Town of Gardner*, 711 F.Supp. 678 (1989)
- Director's Determination, *Skydive Paris, Inc. v. Henry County*, FAA Docket No. 16-05-06 (2006)
- Final Decision and Order, *Nat'l Airlift Support Corp. v. Fremont County Bd. of Comm'rs*, FAA Docket No. 16-98-18 (1999)
- Record of Preliminary Findings, *Kelly v. City of Coolidge*, FAA Docket No. 13-94-11 (1998)

THROUGH-THE-FENCE OPERATIONS

What is it?

Those activities permitted by an airport sponsor through an agreement that permits access to the airport (public landing area) by independent entities or operators offering an aeronautical activity or to owners of aircraft based on land adjacent to, but not part of, the airport property.

How is it regulated by the FAA?

When TTF operations are occurring on an AIP-funded public use general aviation airport, the FAA requires that airport sponsors maintain compliance with Airport Sponsor Assurances (generally) and 49 U.S.C. § 47107(t) (in particular).

How is it regulated by airport sponsors?

The movement of aircraft between airport property and adjacent property is not in itself an aeronautical activity and, as a result, entities wishing to access an airport (public landing area) through-the-fence are not protected by the Airport Sponsor Assurances. Further, airport sponsors are under no obligation to permit aircraft access to the airport (public landing area) from adjacent property.

TTF entities are subject to all applicable policies, standards, rules, regulations and agreements of the airport sponsor when operating on the airport. Airport sponsors may also require TTF entities to comply with the same requirements on the adjacent property, in exchange for the privilege of TTF access and engaging in associated TTF activities.

Where can I look for additional information?

- 49 U.S.C. § 47107(t)
- FAA, Airport Improvement Program (AIP): *Policy Regarding Access to Airports From Residential Property*, 79 F.R. 42,419 (2013)
- FAA, *Compliance Guidance Letter 2013-01, FAA Review of Existing and Proposed Through-the-Fence Agreements* (2013)
- FAA, *Order 5190.6B, Airport Compliance Manual*, § 12.7 *(Agreements Granting "Through-the-Fence" Access)* (2009), 20.3 (*Residential Use of Land on or Near Airport Property*), and 20.4 (*Residential Airparks Adjacent to Federally Obligated Airports*)
- FAA, *Advisory Circular 150/5190-7, Minimum Standards For Commercial Aeronautical Activities*, Paragraph 1.4 (2006)
- *ACRP Report 114: Guidebook for Through-the-Fence (TTF) Operations* (September 2014), which contains resources and citations.

ULTRALIGHTS, GLIDERS, AND EXPERIMENTAL AIRCRAFT

What is it?

Ultralights, gliders and experimental aircraft may be smaller, lighter and slower than many general aviation and commercial aircraft. The FAA has specific definitions for "glider", "light sport aircraft", "light-than-air aircraft", and "ultralight vehicles". *See* 14 C.F.R. § 1.1 and § 103.1.

How is it regulated by the FAA?

The FAA regulates the certification (*see e.g.* 14 C.F.R. § 21.191 (*Experimental Certificates*)) and the operation of these types of aircraft (*see e.g.* 14 C.F.R. Part 103 (*Ultralight Vehicles*); 14 C.F.R. § 91.319 (*Aircraft having experimental certificates: Operating limitations*)).

How is it regulated by airport operators?

Airport sponsors may not enforce a ban on ultralight operations if such operations can be safely accommodated at the airport. *See* Director's Determination, *Ultralight of Sacramento v. County of Sacramento,* FAA Docket No. 16-00-11 (2001).

Airport operators may restrict the way in which ultralight operations are performed at an airport, if justified on the basis of safety. *See* Director's Determination, *Jones v. Lawrence County Commission*, FAA Docket No. 16-11-07 (2013).

How common are local regulations and what are some examples?

The search terms "ultralight", "glider", and "experimental" appear in the August 22 – October 17, 2013 edition of Airport Facility Directory 816 times and 166 airports (20%) have limited or restricted these activities in some way. Examples of notifications concerning limitations and/or restrictions on these activities include the following:

- "Arpt CLOSED to ultralight acft except by prior permission from arpt manager."
- "Glider ops May–Nov 1400Z–Sunset."
- "Acft with experimental or limited certification having over 1,000 horsepower or 4,000 pounds are restricted to Rwy 11–29."

Where can I look for additional information?

- 14 C.F.R. §§ 21.191 – 21.195
- 14 C.F.R. Part 91, Subpart D (*Special Flight Operations*)
- 14 C.F.R. Part 103 (*Ultralight Vehicles*)
- FAA, Advisory Circular 90-66A, *Recommended Standard Traffic Patterns and Practices for Aeronautical Operations at Airports Without operating Control Towers* (1993)
- FAA, Advisory Circular 103-6, *Ultralight Vehicle Operations, Airports, Air Traffic Control, and Weather* (1986)
- *Harrison v. Schwartz*, 572 A.2d 528 (Md. 1990)
- Director's Determination, *Orange County Soaring Association Inc. v. County of Riverside*, FAA Docket No. 16-09-13 (2011)
- Director's Determination, *Dart v. City of Corona*, FAA Docket No. 16-99-20 (2000)

WEIGHT-BASED RESTRICTIONS

What is it?

Airport operators design pavement to accommodate the loads and frequencies of the aircraft expected to use the airport over the expected life of the pavement. In order to preserve the life of airport pavement, some airport sponsors impose weight based restrictions or fees.

How is it regulated by the FAA?

The FAA prescribes specifications for the design of airfield pavements and further requires airport operators to implement an effective pavement maintenance and management program to keep pavement in a safe and serviceable condition.

How is it regulated by airport operators?

Airport sponsors may prohibit aircraft from using the airport when the maximum weight of the aircraft exceeds the capacity of the pavement at the airport. *See Tutor v. City of Hailey*, 2004 WL 344437 (D. Idaho Jan. 20, 2004).

Airport sponsors may not allocate 100% of pavement maintenance costs to a small minority of airport users as distinguished by aircraft weight. This constitutes unjust discrimination. *See* Directors Determination, *Bombardier Aerospace Corp. v. City of Santa Monica*, FAA Docket No. 16-03-11 (2005).

How common are local regulations and what are some examples?

Together, the search terms “pounds” and “lbs” appear in the August 22 – October 17, 2013 edition of Airport/Facility Directory 631 times, and 568 airports (or 90%) have limited or restricted aircraft on the basis of weight. Examples of weight limitations and/or restrictions include the following:

- “Ldg fee for acft over 12,500 pounds.”
- “Rwy 12-30 limited by arpt manager to 155,000 lbs dual wheel gear.”
- “All rwys for loads over 100,000 lbs prior permission required.”

Where can I look for additional information?

- FAA, Advisory Circular 150/5320 – 6E, *Airport Pavement Design and Evaluation* (2009)
- FAA, Proposed Policy, *Weight Based Restrictions at Airports*, 68 Fed. Reg. 39176 (2003)
- FAA, Order 5190-6B, Chap. 7 (*Airport Operations*)
- *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055 (9th Cir. 2006)
- *Millard Refrigerated Services, Inc. v. FAA*, 98 F.3d 1361 (D.C. Cir. 1996) (on review of *Millard Refrigerated Services, Inc. v. Omaha Airport Authority*, FAA Docket No. 13-93-19)

Appendix B

PRACTICAL GUIDE TO THE LEASE AND USE OF AIRPORT PROPERTY

Introduction

When it comes to airport sponsors providing reasonable access to AIP-funded public use general aviation airports, it is not so much about determining whether or not certain aeronautical activities should be permitted at the airport, it is more about ascertaining how (and often time, where) certain aeronautical activities can be accommodated while simultaneously maintaining the safety, utility, and efficiency (and the security and compatibility) of the airport for the benefit of the public.[1]

While most sponsors refrain from prohibiting aeronautical activities outright, the imposition of irrelevant, unreasonable, inappropriate, or unattainable requirements (or unreasonable delays in negotiations) may be tantamount to denying access to a general aviation airport.[2]

For this reason, the lease and use of airport property for conducting aeronautical activities will be addressed in this appendix to the Guide. While a variety of entities may seek access to general aviation airports to engage in a diverse array of aeronautical activities, this appendix will focus primarily on the lease and use of airport property for commercial aeronautical purposes.[3]

It is beyond the intended scope of this Guide to discuss every term or condition that may be imposed by an airport sponsor relating to leasing airport property for conducting commercial aeronautical activities at a general aviation airport.

Therefore, this appendix will focus primarily on the policies, standards, and/or rules that airport sponsors may enact relating to leasing airport property (in general) and granting access for conducting commercial aeronautical activities (in particular) at a general aviation airport.

The Art and Science of Leasing Airport Property

In many ways, art is about being creative. While this can be an important element when it comes to leasing airport property at a general aviation airport, within the context of this Guide, it refers to the art of: (1) understanding the interests, perspectives, and expectations of people; (2) negotiating key terms and conditions; and, (3) ultimately, reaching mutually beneficial agreements.

Science, on the other hand, as it relates to leasing airport property, is about complying with laws, regulations, obligations, and guidelines, working within a complicated framework of parameters (e.g., planning, development, operation, management, financial, legal, etc.), and

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[1] For purposes of brevity and consistency with the FAA, throughout this appendix, when “safety, utility, and efficiency” are used, this shall imply security and compatibility as well.

[2] For purposes of brevity, throughout this appendix, when “general aviation airport” is used, it shall mean an AIP-funded public use general aviation airport.

[3] For purposes of brevity, throughout this appendix, when “lease” or “leasing” is used, it shall imply the “use” or “using” of airport property as well.

operating and managing an airport (or a business) in such a manner as to maintain the safety, utility, and efficiency of the airport (or the business) for the benefit of the public.

The development and implementation of a best practices approach, which combines art and science, is, perhaps, the best way to achieve a successful outcome. As such, in this appendix, the leasing of airport property will be discussed from a sponsor **and** a business perspective and a best practices approach (for leasing airport property) will be discussed.

Airport Perspective

Managing an airport is a complex, and often challenging and demanding, task. Airport management is a fusion of many roles and responsibilities including: administration, human resources, procurement, contracting, planning, engineering, maintenance, safety, security, marketing, public relations, and finance.

Airport managers must work within existing ownership, governance, and management structures (and the powers, limitations, and/or restrictions associated with the existing structures). Airport managers must also work with a wide variety of customers and stakeholders – public and private – including governing bodies, advisory bodies, businesses (fixed base operations or FBOs and specialized aviation service operators or SASOs), tenants, consumers, users, communities, and government agencies.

Airport Laws, Regulations, Obligations, and Guidelines

Sponsors need to understand the key laws, regulations, obligations, and guidelines pertaining to airport development, operations, and management. This includes federal and state law, regulations, and guidance and the Airport Sponsor Assurances.

Federal law includes constitutional and legislative law as conveyed in United States Code (U.S.C.). Federal regulations are conveyed in Code of Federal Regulations (CFR). Other key regulations for airports include executive orders/proclamations which are ancillary or subordinate to laws and Office of Management and Budget (OMB) Circulars.

State law includes constitutional and legislative law or statutes. For the most part, state regulations are promulgated by state agencies. Many states have statutes pertaining to leasing public (including airport) property. Local laws and regulations are typically conveyed in municipal ordinances or codes which address such areas as zoning, fire, electrical, building, safety, and procurement. Case law includes federal, state, and local judicial decisions or precedent.

In order to secure funding through the Airport Improvement Program (AIP), a sponsor is required to give certain assurances to the Federal Aviation Administration (FAA). In essence, sponsors must agree to comply with the assurances as a condition of receiving AIP funds.

Additionally, airports conveyed by the federal government under the Surplus Property Act have deed restrictions, which are similar to the assurances, and the sponsors of such airports must comply with the deed restrictions – even if AIP funds have not been secured.

Key Airport Assurances and Guidance

From an airport perspective, an understanding of the assurances and related guidance is essential. Within this context, a discussion of some of the most relevant assurances and guidance – as it pertains specifically to leasing airport property for conducting commercial aeronautical activities – follows.

Assurance 23. Exclusive Rights

This assurance states that the sponsor "will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

This assurance is subject to misinterpretation – it does not mean that a sponsor is violating this assurance if there is only one FBO at an airport. Order 5190.6B, FAA Compliance Manual/Handbook, September 30, 2009 (Order 6B) states:

> *"… the FAA does not consider the presence of only one provider engaged in an aeronautical activity as a violation of the exclusive rights prohibition." [Order 6B, 8.6.] and "A single enterprise may expand as needed, even if its growth ultimately results in the occupancy of all available space." [Order 6B, 8.9.d.]*

However, a sponsor cannot allow a business to "bank" land and/or facilities. A business must be able to put the land and/or facilities (that the business can demonstrate that it needs) to gainful aeronautical use within a reasonable period of time (or immediate productive use). [Order 6B, 8.7.b. and 8.9.d.]

There are a number of additional provisions in Order 6B relating to leasing airport property including:

> *"The grant assurances do not prohibit an airport sponsor from entering into long-term leases with commercial entities, by negotiation, solicitation, or other means. An airport sponsor **may** choose to select… FBOs… or other aeronautical service providers through a request for proposals (RFP) process. If it chooses to do so, the airport sponsor **may** use this process each time a **new** applicant is considered." [Order 6B, 8.9.d.] Bold added for emphasis.*

As such, a sponsor is not obligated to use an RFP process to select an FBO. If a sponsor chooses to use an RFP process, this method may be used each time new (or prospective) applicants are being considered.

If a sponsor chooses to select an FBO through an RFP process, the sponsor can choose one FBO (even if multiple qualified parties respond to the RFP) and if only one qualified FBO responds, the sponsor could select that entity. [Order 6B, 8.9.d.]
Also, the sponsor can, but is not required to, exclude an incumbent FBO from participating in the process. [Order 6B, 8.9.d.]

More information on exclusive rights is provided in AC-6.

Airport Assurance 22. Economic Nondiscrimination

This assurance states that the sponsor *"will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport."*

Assurance 22 requires that *"Each FBO at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other FBOs making the same or similar uses of such airport and utilizing the same or similar facilities."*

Order 6B states that *"The sponsor must impose the same rates, fees, rentals, and other charges on similarly situated… FBOs… that use the airport and its facilities in the same or similar manner. However, FBOs under different types of sponsor agreements may have different fees and rentals." [Order 6B, 9.2.c.]*

The development and implementation of an airport leasing/rents and fees policy is one of the best ways to maintain compliance with this assurance. A well-written policy sets forth the parameters for leasing airport land and/or improvements and outlines the process for setting and adjusting rents and fees for conducting aeronautical activities. Such a policy can help ensure that airport property is leased in a consistent (objective, uniform, and not unjustly discriminatory) manner and that rents and fees are established and adjusted in a timely fashion without undue influence.

A leasing/rents and fees policy should include, but not necessarily be limited to, the following key sections: leasing land and/or improvements, agreements (key terms and conditions), and rents and fees (establishing and adjusting). If a business (or any other entity – for that matter) fails or refuses to comply with an airport's leasing/rents and fees policy (e.g., the business or entity does not pay rents for the land and/or improvements being occupied at the airport and/or does not pay the fees for the activities being conducted at the airport), a sponsor should deny access to the airport (i.e., prohibit the business or entity from gaining access to the airport to engage in aeronautical activities).

Additionally, this assurance states that *"The sponsor will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair, and fueling) that it may choose to perform."* However, as indicated in Order 6B, the service must be performed by the aircraft owner/operator or his/her employees with resources supplied by the aircraft owner/operator and conducted in accordance with reasonable rules, regulations or standards established by the airport sponsor. [Order 6B, 8.8.b.]

In addition to stipulating the rules and regulations for engaging in self-service activities, a sponsor can adopt rules and regulations for the safe, orderly, and efficient use of the airport. Beyond helping maintain compliance with the Airport Sponsor Assurances, well-written rules and regulations protect the public's health, safety, and welfare at an airport.

Rules and regulations should include, but not necessarily be limited, to the following key sections: general, aircraft, vehicle, tenants, and fueling. If a business (or any other entity – for that matter) fails or refuses to comply with the airport rules and regulations, a sponsor should deny access to the airport (i.e., prohibit the business or entity from gaining access to the airport to engage in aeronautical activities).

In the event a sponsor engages in commercial aeronautical activities, the sponsor would need to meet the same conditions that would apply to commercial aeronautical service providers.

Further, assurance 22 states that *"The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport."*

Order 6B states, *"The airport owner may establish reasonable standards... However, unless the airport owner is providing such services itself on an exclusive basis, it may not refuse to negotiate for the space and facilities needed to meet such standards by an activity willing and qualified to provide aeronautical services to the public." [Order 6B, 9.6.h.(2)]* and *"The assurance federally obligates the sponsor to make available suitable areas or space on reasonable terms to those willing and qualified to offer aeronautical services to the public..." and "This means that unless it undertakes to provide these services itself, the sponsor has a duty to negotiate in good faith for the lease of premises available to conduct aeronautical activities." [Order 6B, 9.7.]*

Therefore, while a sponsor is required to make suitable areas or space available to willing and qualified entities, this needs to be accomplished on reasonable and not unjustly discriminatory terms and conditions.

The development and implementation of airport minimum standards can help maintain compliance with this assurance. Beyond "leveling the playing field" and "promoting fair competition", minimum standards help maintain compliance with the Airport Sponsor Assurances while also ensuring that businesses provide quality products, services, and facilities to airport customers in a safe, secure, and efficient manner.

With regard to minimum standards, Order 6B states:

> *"The FAA strongly recommends developing minimum standards because these standards typically: a. Promote safety in all airport activities and maintain a higher quality of service for airport users, b. Protect airport users from unlicensed and unauthorized products and services, c. Enhance the availability of adequate services for all airport users, d. Promote the orderly development of airport land, and e. Provide a clear and objective distinction between service providers that will provide a satisfactory level of service and those that will not. f. Prevent disputes between aeronautical providers and reduce potential complaints." [Order 6B, 10.4.]*

Well-written minimum standards provide a fair and reasonable opportunity for applicants to qualify to occupy available property for conducting commercial aeronautical activities at an airport. By providing consistent threshold requirements for engaging in commercial aeronautical activities, minimum standards provide the basis for the fair, equitable, and uniform

treatment of businesses (existing and new). As such, once adopted, minimum standards need to be consistently (objectively and uniformly) applied and enforced.

Minimum standards should include, but not necessarily be limited to, the following key sections: general requirements, FBO requirements, SASO requirements, temporary activities, and permit. If a business fails or refuses to comply with the airport's minimum standards, a sponsor should deny access to the airport (i.e., prohibit the business from gaining access to the airport to engage in aeronautical activities). It is important to note that such action would not violate the assurances. [Order 6B, 10.2.]

Advisory Circular 150/5190-7, Minimum Standards for Commercial Aeronautical Activities (AC-7) provides more information on the development and implementation of minimum standards. In this AC, the concept of protecting existing businesses from unreasonable competition is addressed. It states that considerations (for applying minimum standards) may include:

> *"Ensure (that) standards… reasonably protect the investment of providers of aeronautical services to meet minimum standards from competition not making a similar investment." [AC-7, 1.2. d (3)]*

Assurance 24. Fee and Rental Structure

This assurance states that the sponsor *"will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport (and that AIP funding shall not be included in the rate basis when establishing fees, rates, and charges)…"*

However, Order 6B states *"Federal law… requires that the rates, rentals, landing fees, and other charges that airports impose on aeronautical users for aeronautical use be fair and reasonable." [Order 6B, 18.5.a.]*

A sponsor can adopt a leasing/rents and fees policy to help maintain compliance with this assurance. A well-written policy can help ensure that an airport is as self-sustaining as possible given the circumstances that exist.

Airport Fiduciary and Customer Service Responsibilities

Beyond complying with laws, regulations, obligations, and guidance and working within a complicated framework of planning, development, operation, management, financial, and legal parameters, there is an expectation that an airport will be developed, operated, and managed as a public enterprise and that sponsors will demonstrate good stewardship by:

- identifying the assets (including land and/or improvements) that are/will be required to meet the needs of the public;
- obtaining and investing capital in the assets identified;
- making the highest and best use of the assets; and,
- meeting the needs of the public by providing quality airport infrastructure and improvements and ensuring (often times, by relying on businesses) that quality aviation products, services, and facilities are provided to the public.

There is also an expectation (better yet, a given) that an airport (and the businesses located at the airport – for that matter) will be operated and managed in a safe, secure, and efficient manner.

As such, when it comes to leasing airport property for conducting commercial aeronautical activities at a general aviation airport, it is important for airport sponsors to keep these two key "underlying" responsibilities – fiduciary and customer service – in mind.

Aviation Business Perspective

When it comes to leasing airport property for conducting commercial aeronautical activities, ideally, sponsors and businesses are working towards the same goal – both parties are trying to achieve a "win-win" by reaching a mutually-beneficial agreement through which, the parties can meet the needs and hopefully, exceed the expectations of the public (i.e., airport customers and stakeholders).

Generally, sponsors are responsible for providing quality airport infrastructure and improvements (and a safe, secure, and efficient airport environment) and businesses are responsible for delivering quality aviation products, services, and facilities in a safe, secure, and efficient manner.

To increase the potential for success, it is essential for a business to thoroughly understand the circumstances and conditions (past and present) and the current situation at the airport. The following questions can help achieve this objective.

Present

- Is airport property currently available (and ready) for lease?
- Is airport property expected to become available in the future (e.g., is a lease agreement with an existing business scheduled to expire in the future)?
- Is the "demand" for aviation products, services, or facilities (in the market) greater than the "capacity" (at an airport)?
- Are the range, level, and quality of products, services, and facilities being provided reasonable and appropriate (for the airport and the market)?
- Are products, services, and facilities currently being provided in a safe, secure, efficient, and prompt manner for a fair price?
- Does the sponsor have procurement laws and/or regulations governing the lease of airport property for conducting commercial aeronautical activities?
- Does the sponsor have primary management and compliance documents (PMCDs) that set forth the parameters and outline the process for leasing airport property for conducting commercial aeronautical activities?

It is important to note that sponsors may not have procurement laws and/or regulations (that govern) or PMCDs (that provide guidance) for leasing airport property for conducting commercial aeronautical activities. If this is the case, it can be helpful to consider the past.

Past

- If a prospective business was interested in leasing airport property, how was it handled?
  - Was an application completed (and/or a proposal or business plan submitted) or did the parties negotiate a lease without an application, proposal, or business plan?
  - Was a competitive process (Request for Interest or RFI, Request for Qualifications or RFQ, or Request for Proposals or RFP) utilized?
- If a lease agreement with an existing business was expiring, how was it handled?
  - Was the agreement automatically extended or renewed and if so, for how long?
  - Did the parties negotiate an extension or renewal of the existing agreement and if so, for how long?
  - Did the parties negotiate a new agreement and if so, what were the key terms and conditions of the agreement?
  - What was the "standing" of the existing business (historically and at the time the agreement expired)?
- If an existing business was interested in leasing additional airport property, how was it handled?
- What were the circumstances and conditions in the industry, within the market, and at the airport – at the time?
- Had a pattern been established for doing business a certain way – with existing or prospective businesses – based on the circumstances and conditions?

Patterns

Predicated on a review of past practices, if a pattern is readily apparent, it may be appropriate for a business to pursue a course of action that is consistent with the pattern. However, it is important for a business to assess the circumstances and conditions in the industry, within the market, and at the airport to determine what has changed (over the years) and what may change (going forward).

Additionally, a business should obtain "buy-in" (at least, conceptually) from the sponsor before pursuing a particular course of action as this could save both parties a considerable amount of time, effort, and energy.

If a pattern is not readily apparent and procurement laws and/or regulations or PMCDs do not exist, the business should formulate an approach based on an assessment of the circumstances and conditions. Even if a pattern is readily apparent, it may no longer be appropriate and a different approach may be warranted based on the changes or differences in circumstances and conditions.

Current Situation – Is the Airport Sponsor's Backyard in Order?

In addition to assess the circumstances and conditions (past and present), a business should carefully consider the current situation at the airport from a number of perspectives (including planning, development, operation, management, and financial) before leasing property at the airport. A discussion of each of these key areas follows.

Planning: Does the airport have primary **planning** documents (i.e., strategic, business, and/or master plan) that, on a collective basis, convey the airport's mission, vision, values, goals, objectives, and action plans? *Is leasing airport property (i.e., the subject property) consistent with the airport's (short and long term) planning goals?*

Development: Is the airport being developed in accordance with the airport's primary **planning** documents? Has consideration been given to land uses from airside and landside perspectives? *Is leasing the subject property consistent with the airport's (short and long term) development (and land use) goals?*

Operational: Is the airport being operated in a safe, secure, and efficient manner? Are the needs of the public being met (i.e., is the sponsor fulfilling its customer service responsibility to the public)? In many cases, airport sponsors rely on businesses to meet the aviation products, services, and facilities needs of the public. *As such, is leasing the subject property consistent with the airport's (short and long term) operational requirements while also helping the sponsor fulfill its customer service responsibilities?*

Managerial: Do PMCDs exist? This includes a leasing/rents and fees policy, minimum standards, rules and regulations, and development standards that, on a collective basis, if well-written: (1) contribute to the financial health of an airport, (2) facilitate orderly development at the airport, (3) promote the provision of quality products, services, and facilities at the airport, (4) protect the health, safety, interest, and general welfare of the public; and, (5) reduce the potential for (and help facilitate the successful resolution of): (a) conflicts with lessees, customers, and users, (b) complaints (which may be filed under 14 CFR, Part 13 and 16), and (c) lawsuits (in federal, state, and local courts).

In essence, PMCDs set forth the parameters for doing business at an airport and, as such, PMCDs play an important role in the management of an airport. While there may be alternatives to having PGDs including a "make up the rules as you go" approach to managing the airport and "managing (the airport) by lease," both approaches are highly problematic. *Does the sponsor have PMCDs that set forth the parameters and outline the process for leasing airport property for conducting commercial aeronautical activities? Will the sponsor's PMCDs help ensure that airport property will be leased in a consistent (objective, uniform, and not unjustly discriminatory) manner and that rents and fees will be established and adjusted in a timely fashion without undue influence?*

Financial: Is the sponsor developing, operating, and managing the airport as a public enterprise and in a cost-effective manner? Is the sponsor demonstrating good stewardship (i.e., is the sponsor fulfilling its fiduciary responsibility to the public)? Is the sponsor charging "market" rents and "cost-recovery" fees? Are the fees reasonable and appropriate? *Is leasing the subject property consistent with the airport's (short and long term) financial requirements while also helping the sponsor fulfill its fiduciary responsibilities?*

Airports are like fingerprints; no two are exactly the same. Within this context, the answers to the preceding questions will reveal whether or not an airport's backyard is in order and, most importantly, the answers will help a business determine if the airport is a good place to lease property for conducting commercial aeronautical activities (or not).

It is important to remember that the decision to do business at an airport is, perhaps, one of the most important choices a business can make.

This approach is much like a job interview. While a potential employer wants to learn about a candidate, the candidate is also trying to learn about the potential employer (to try to determine if the company would be a good fit). Therefore, while a sponsor wants to learn about a business (and its capabilities, capacity, goals, objectives, and plans), the business should learn as much as possible about the sponsor before entering into a lease agreement that, ultimately, provides the foundation for the relationship between the parties.

Best Practices Perspective

Best practices are methods or techniques that consistently produce superior results or outcomes. Best practices evolve over time as better – new and/or improved – methods or techniques are identified through experience which includes “trial and error” and the practical application of “lessons learned”.

Without a doubt, it is wise to study the best practices of successful organizations (both public and private). Certainly, sponsors and businesses can learn by studying the processes, procedures, and systems used by successful organizations and adopting (or adapting – for the situation and/or circumstances) the best practices identified. By implementing best practices, sponsors and businesses can leverage and build on the success of others. This is a continuous process – as best practices are fluid.

Approach

It is important to understand that the FAA does not require that sponsors use a specific approach to lease airport property for conducting commercial aeronautical activities. As long as the approach complies with the Airport Sponsor Assurances and is consistent with the guidance provided by the FAA, sponsors can utilize any reasonable and justifiable approach.

An airport lease agreement: (1) allows the use of airport property for a specified period of time (term) for specific consideration (e.g., payment of rent) and subject to various terms and conditions; (2) conveys privileges to engage in certain aeronautical activities at the airport; (3) requires that certain obligations be met (in exchange for the privileges granted); and, (4) protects the sponsor, the public (the airport’s customers and stakeholders), and the lessee.

For the most part, the FAA’s interest in lease agreements is focused primarily on the agreement’s impact on the sponsor's obligations. When the FAA reviews a lease agreement and the agreement does not appear to violate any of the sponsor’s obligations, the FAA may indicate that it has no objection to the agreement.

However, the FAA does not approve leases, nor does it endorse or become a party to lease agreements. [Order 6B, 12.4.]

As such, an argument can be made that the FAA’s interest regarding the approach a sponsor employs to lease airport property for conducting commercial aeronautical activities would be

similar. In other words, as long as the sponsor does not violate any obligations or contradict the FAA's guidance, the FAA would not have any objection to the approach; although, as with leases, the FAA will not approve or endorse an approach.

Options

As long as a sponsor complies with the assurances and guidance, a sponsor could enter into a lease agreement through negotiation, solicitation, or other means. Within this context, a sponsor could:

- Lease available airport property without soliciting the interest of others
  - A sponsor is not required to issue an RFI, RFQ, or RFP
  - A sponsor is required, however, to negotiate in good faith (with those parties who are willing and qualified to provide commercial aeronautical services to the public) to lease available and suitable airport property

- Refuse to lease available airport property if: (1) the area/space is not suitable for engaging in the specific aeronautical activity; (2) the interested party is not qualified; and/or, (3) the interested party is not willing to meet the sponsor's (reasonable and not unjustly discriminatory) terms and conditions

- Issue a solicitation to lease available airport property

In addition to the assurances and guidance, when developing an approach for leasing airport property for conducting aeronautical activities, sponsors need to consider:

- Existing laws and regulations *(as discussed throughout this Guide)*
- Circumstances and conditions (past and present) and the current situation at the airport

Framework

A best practices framework for leasing airport property begins by analyzing demand and capacity. If demand for aviation products, services, and/or facilities in the market exceeds capacity at the airport, an action plan needs to be formulated for addressing any deficiencies. The following questions can be used to determine how the deficiencies will be addressed and by whom.

The demand-capacity analysis should include an assessment of the range, level, and quality of aviation products, services, and facilities being provided at the airport (capacity) and the needs and expectations of customers in the market (demand). As part of this analysis, consideration should be given to key market indicators, competition, market and customer segments, and market drivers. Additionally, the financial feasibility of adding capacity (making additional capital investment) at the airport needs to be ascertained. In other words, can capacity be added, can revenue be generated to cover costs and expenses, and can a reasonable profit and return on investment be realized (i.e., is the development sustainable). This type of analysis is also useful for ensuring that the development is appropriate (right-sized) for the airport and the market.

- Will the sponsor work with existing entities at the airport to determine the level of interest in leasing airport property and/or developing additional capacity to address the deficiency?
- Will the sponsor issue a RFI, RFQ, and/or RFP seeking responses from other parties who may be interested in leasing airport property and/or adding capacity?
- If existing businesses are not interested in the opportunity and/or an acceptable response (to the RFI, RFQ, or RFP) is not received, is the sponsor willing to add capacity? If so, is the sponsor willing to: (1) enter into a management contract with an existing business (or other party) to operate and manage the capacity or (2) operate and manage the capacity directly?

If an existing entity (who is qualified, has been/is in good standing, and has been/is providing excellent customer service) makes an assessment of demand in the market and determines that demand exceeds capacity at the airport and the business is ready, willing, and able (financially and otherwise) to "step up to the plate" and add capacity at the airport, **why wouldn't a sponsor negotiate an extension of an existing lease agreement or enter into a new lease agreement with the entity** – especially if other property is available for other parties to develop at the airport?

Conversely, if an existing entity had/has issues relating to qualifications, standing, and/or customer service and/or the entity is not willing, ready, and able to "step up to the plate", **why wouldn't a sponsor issue an RFI, RFQ, or RFP**?

Solicitation

A discussion of the various approaches that sponsors can use for a solicitation follows. An **R F I** is typically used to solicit "statements of interest" from parties who are interested in leasing property and engaging in commercial aeronautical activities at an airport. An **R F Q** is typically used to solicit "statements of qualifications and experience". In contrast, an **R F P** is typically used to solicit "proposals" and/or a "business plan" that demonstrate(s) an interested party's qualifications, experience, capabilities, and most importantly, that the party has the capacity (financially and otherwise) to lease and/or develop (if applicable) airport property and successfully engage in commercial aeronautical activities at an airport.

While the **R F Q** and **R F P** approaches are designed to assess qualifications and experience, the **R F I** process is designed primarily to assess interest (in a particular opportunity) and the **R F P** process is designed primarily to assess business capability and financial capacity (and the overall viability) of the interested party's proposal and/or business plan.

From both a sponsor and interested party standpoint, the **R F I** approach is a relatively simple (straight-forward) process. Generally, it does not take as much time (it is not as labor intensive), is less costly, and can be completed relatively quickly – compared to the other approaches. The **R F Q** approach is a more involved process and typically, is more time consuming (labor intensive), more costly, and takes longer to complete. In contrast, the **R F P** approach is much more involved and usually, it is far more time consuming (labor intensive), much more costly, and takes significantly longer to complete.

Therefore, if a sponsor is interested primarily in identifying parties who are interested in a particular opportunity, the **R F I** process may be most appropriate. If a sponsor is interested in gaining a better understanding of the qualifications and experience of interested parties, the **R F Q** process may be most appropriate. If the interest of a sponsor goes beyond gaining a better understanding of the overall qualifications and experience of interested parties to learning more about the capability and capacity of interested parties to successfully fund, develop, operate, manage, and market an aeronautical enterprise at the airport, the **R F P** process may be most appropriate.

Regardless of the circumstances, conditions, situation, or approach utilized (RFI, RFQ, and/or RFP), it is important to remember that the end does not justify the means (i.e., the final outcome does not justify the process). **To be successful, the means must justify the end.** Within this context, a well-written RFI, RFQ, and/or RFP document (and a well thought out process) is more likely, but not guaranteed, to provide the basis for making informed decisions and hopefully, yielding a good outcome – for sponsors and businesses alike.

An important note for consideration: if a business pays “below” market rents and/or “less” than (proportional) cost-recovery fees, the sponsor may not be meeting its obligation under Assurance 24 Fee and Rental Structure (which requires that the sponsor maintain a fee and rental structure… which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport). Conversely, if a business pays “above” market rents and/or “more” than cost-recovery fees, it is likely that these additional costs will be passed through (by the business) to customers which may (ultimately) result in a loss of business for the airport and the business. This is one of the pitfalls of requiring that a business pay a Minimum Annual Guarantee (or MAG) **without** regard to market rents and/or cost-recovery fees which could occur if a sponsor chooses to use an RFP process and awards a lease agreement to the highest bidder – as opposed to the **most qualified** service provider who made the **best proposal** and/or submitted the **best business plan** and offered to pay **market rents** and **cost-recovery fees**).

If airport property is available for development, a sponsor can adopt development standards which set forth the parameters governing the design, development (construction), and/or modification of improvements at the airport. Well-written development standards promote consistent, attractive, and compatible high quality development at an airport. Development standards should include, but not necessarily be limited, to the following key sections: land development, design criteria, procedures for approval, and construction phase. If a business (or any other entity – for that matter) fails or refuses to comply with the airport development standards, a sponsor should deny access to the airport (i.e., prohibit the business or entity from gaining access to the airport to develop airport property).

Working Together

In the end, it is about sponsors and businesses working together to do what is best for the public (in general) and what is most appropriate and reasonable for the airport’s customers and stakeholders (in particular) taking everything – all perspectives, factors, and influences – into consideration.

On one hand, it is incumbent upon sponsors – who have to work within a complicated framework of parameters – to provide the opportunity for a business to be successful. Certainly, this does not imply that sponsors are obligated to ensure the success of a business located at an airport. It does, however, put the impetus on the sponsor to create an environment (business and otherwise) that is conducive to success.

On the other hand, it is equally important for a business to hold up its end of the deal by keeping its commitments and doing its part to ensure the success of the airport.

At the heart of the best – most successful – airports is a true partnership between sponsors and businesses. Abraham Lincoln may have captured the concept of partnership best when he said… "**Determine that the thing can and shall be done**, **and then we shall find the way**."

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