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Re: Comments: Docket Number FAA 2022–1203, Draft FAA Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land

ACI-NA appreciates the opportunity to provide the following comments concerning the Draft FAA Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land (the Draft Policy). The Draft Policy—issued under Docket No. FAA-2022-1203—was published in the *Federal Register* on September 15, 2022.

Airports Council International-North America (ACI-NA) represents local, regional, and state governing bodies that own and operate commercial airports in the United States and Canada. ACI-NA's members enplane more than 95 percent of the domestic and virtually all the international airline passenger and cargo traffic in North America. Our members operate over three hundred airports, including all large hub, all medium hub, and most small hub airports in the U.S. We are submitting these comments on behalf these members.

AIRPORT INTEREST IN THE DRAFT POLICY

Almost all commercial service and many public general aviation airports in the United States have land parcels that have been either acquired with federal assistance—most commonly Airport Improvement Program (AIP) grants—or conveyed from federal ownership in accordance with federal statutes and programs (e.g., 50 U.S.C. 1622). Changes to the policies, procedures, and criteria applied to how such land can be used have direct and potentially substantive impacts on their operations, planned development, and compliance with federal laws and regulations.

Accordingly, the Draft Policy is of considerable interest to an array of U.S. airports that see it imposing new federal review and approval processes on airport planning and development.

ACI-NA appreciates the efforts of the Federal Aviation Administration (FAA) to clarify its policies and procedures regarding the processing of land use changes on federally acquired or federally conveyed airport land. However, we and our U.S. airport members are concerned that the Draft Policy as currently written is confusing, introduces new areas for inconsistent application among FAA Regional Offices and Airport District Offices, will interfere with airport planning and business decisions, and potentially lead to airport capital project development delays and increase project development costs and complexity.

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We believe that the FAA can address these issues working collaboratively with ACI-NA, other airport organizations, and airports themselves to refine the Draft Policy and limit its remit to non-regulatory provisions.

AIRPORT SPONSORS ARE BEST POSITIONED TO EVALUATE THEIR DEVELOPMENT NEEDS AND ASSOCAITED LAND USE CLASSIFICATIONS

Airport sponsors are best positioned to make determinations regarding future aviation needs. The U.S. National Airspace System has been built on this precept, with planning and development responsibilities at almost all United States airports being assumed by their local and state governing organizations, rather than centrally at the national level.

Considerable deference should be granted to these sponsors in making these designations as well as in refining these designations in response to changed circumstances. This includes providing reasonable processes for airports to consider and reconsider the way in which airport land is being used in response to both near-term and long-term needs.

SPECIFIC COMMENTS

I. Rationale for the Draft Policy Needs to Be Provided

ACI-NA is unclear on the need for the revisions included in the Draft Policy and are uncertain regarding the issue or issues that the FAA trying to cure by issuing the new Policy. Airports have long relied on Chapter 22 of the current Airport Compliance Handbook, and Chapter 2 Section 2 and Chapter 7 of the previous version, Airport Compliance Requirements, FAA Order 5190.6A.

We request that the final policy clearly articulate the rationale underlying the changes to airport compliance requirements instituted under the Draft Policy.

II. Proposed Policy Changes Need to be Clarified

The FAA proposes to make the following the five changes[1] in the manner it reviews and approves requests for modifications to land use designations on federally acquired or federally conveyed land:

Change 1. When reviewing proposed land use changes on federally acquired or federally conveyed airport land, the FAA will review the proposal in its entirety without individually examining components of the proposal as aeronautical or non-aeronautical.

Change 2. A letter of approval or consent is required for a non-aeronautical use or mixed use and the approval or consent will remain in effect for the duration of the lease term.

Change 3. The determination of whether the non-aeronautical use is significant will be based on the primary use of the project.

[1] The FAA states the Draft Policy "confirms and clarifies its prior policy and practice." We respectfully disagree and believe the FAA is instead introducing substantive new requirements on airport sponsors. The FAA appears to acknowledge the substantive and novel nature of these requirements when it notes "FAA Order 5190.6, Airport Compliance Manual, will be updated to reflect this policy guidance."

Change 4. FAA will only release Federal obligations when the airport sponsor proposes the sale or conveyance of federally acquired or federally conveyed airport land that meets FAA release requirements.

Change 5. FAA letters of approval or consent and releases will be documented on an airport's Exhibit A in accordance with the ARP SOP 3.00— FAA Review of Exhibit 'A' Airport Property Inventory Maps.

Four of these changes should be clarified and republished for public comment. Specifically:

1. In Change 1, the FAA introduces two terms: "proposal" and "components of the proposal" provide a basis for determining the purpose for changes in land use designations. Definition of the term "proposal" (as used in the Draft Policy) is needed to reduce the potential for confusion and debate between airport sponsors and the FAA regarding what constitutes a "proposal" and arbitrary designation of proposed land use changes as "components of a proposal."

2. In Change 2, it is unclear whether the FAA plans to require letters of approval or consent retroactively for all non-aeronautical or mixed land uses on federally acquired or federally conveyed land. As noted at greater length below, Change 2 will create substantial new workload for both the FAA and airport sponsors since it will require a time-consuming review and approval processes every time leases for non-aeronautical or mixed land uses expire. These issues would be exacerbated considerably if *all* airport land use designations need to be reviewed as opposed to only new proposals to change land use designations.

   To this end, we strongly recommend that existing land use designations at airports be grandfathered, with the Draft Policy only applying to changes in land use designations going forward.

3. In Change 3, the FAA does not provide a definitions of the terms "significant non-aeronautical use" and "primary use" nor the processes and criteria that will be used to make determinations whether non-aeronautical uses are significant. The FAA notes subsequently that "The process [for making these determinations] involves a certain level of discretion by the FAA and airport sponsor".

   This approach seems to be a recipe for arbitrary decision-making varying across FAA Airport District Offices and Regions. The lack of clear definitions and processes for making these determinations will introduce uncertainty and conflict into airport development processes, possibly resulting in project delays and increases in project costs. If the FAA seeks to assert greater regulatory authority over what it deems to be mixed land use, it should clearly articulate how it will do so. If instead, the definitions of "significant non-aeronautical use" and "primary use" defy definition, we believe that substantial discretion should be granted to airport sponsors to make these determinations based on their intimate understanding of their facilities and associated development needs.

4. Change 4 is confusingly worded. As currently written, it appears that FAA will only release Federal obligations when an airport sponsor proposes to sell or convey land, presumably to a third party. However, this provision appears to restrict airport sponsors from seeking the release of Federal obligations on land that the sponsors do not plan to sell or convey. We do not think that this is the FAA's intent and request wording of the

> Change be clarified accordingly. The alternative wording, "When the airport sponsor proposes the sale or conveyance of federally acquired or federally conveyed airport land, the FAA will only release Federal obligations that meets FAA release requirements," would address this issue.

We accept the need to document FAA letters of approval or consent in airport Exhibit A property inventory maps, but we note Exhibit A updates should be conducted as part of planned airport updates to their Airport Layout Plans and Exhibit A maps, rather than be imposed as an immediate and stand-alone compliance requirement.

III. FAA Authority over Surplus Property Act Transfers Need to be Clarified

Under Section 163(b)(3)(A), the FAA retains jurisdiction for "any authority contained in . . . a Surplus Property Act instrument of transfer."[2] There is a general concept of "surplus property" that encompasses many laws, including transfers as a result military base closures and realignments over the past 40 or 50 years. However, the defined term "Surplus Property" is a reference to the Surplus Property Act of 1944, as amended, and now codified at 49 U.S.C. 47151, originally dealing with military property used during WWII. The Draft Policy cites 47151 once, but never quotes it or analyzes it. Instead, the Draft Policy relies on 49 U.S.C. 47125, which is an entirely different statutory provision dealing with conveyance of land by the federal government "necessary to carry out a project . . . at a public airport, to operate a public airport, or for the future development of an airport under the national plan of integrated airport systems," which only dates back to the mid-1990s. In fact, the FAA's own Airport Compliance Handbook, FAA Order 5190.6B, refers to transfers of property pursuant to section 47125 as "Nonsurplus Property Transfers." See FAA Order 5190.6B at 1-7.

We also note that Surplus Property Act instrument of transfer are not all the same. Some of the Surplus Property deeds dating back to the late 1940s, 1950s and early 1960s and issued by the War Assets Administration and its successor, the General Services Administration, restricted the use of the property to "aeronautical" or "aviation" uses. Some are provided for permitted compatible non-aviation uses, while others are restricted to industrial uses. More recent (starting in the late 1960s) deeds administered by the FAA and its predecessor agency restrict the property use to "airport uses."

The FAA has found repeatedly that the generation of revenue to support airport maintenance and operations is an airport use that does not require a release from the airport use obligation (conversely, using property restricted for aeronautical use for non-aeronautical revenue production may require a release). The Draft Policy needs to recognize these variations and the way in which they relate to the original intent behind use of airport land.

IV. Lack of Consideration of Origins of Federal Interest in Affected Land Parcels

With respect to land acquired with federal assistance, the Draft Policy ignores the different types of federal assistance that obligated land acquisition. As one example, under the FAA's Airport Improvement Program, land may be acquired for noise buffers, an aeronautical purpose. Such "noise land" that is not otherwise restricted may be used for non-aeronautical commercial and light industrial purposes to generate revenue for the airport. Such use does not require an FAA

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[2] 'FAA Reauthorization Act of 2018, Pub. L. No. 115-254 (2018), https://www.govinfo.gov/app/details/PLAW-115publ254

release. This, of course, says nothing of all of the other federal programs on which an airport may rely for funding for property acquisition, none of which would restrict it to aeronautical use.

However, the Draft Policy appears to presume that airport land “federally acquired or federally conveyed” for aeronautical purposes must be restricted to aeronautical use. Historically and legally, this has not been the case.

We recommend that the FAA revised the Draft Policy to recognize these types of distinctions regarding airport land acquired with federal assistance.

V. Draft Policy May Harm Airport Sponsors’ Ability to Lease Excess Land, In Turn Harming Airport Sponsors’ Ability to Be Financial Self-Sustaining

The historical record demonstrates that non-aeronautical developments on airport property can be greatly beneficial to airports without displacing aeronautical uses or diminishing the safety, efficiency, and utility of the airport. Many airport sponsors own federally acquired land that is reserved for long-term future development of the airport. There may be no anticipated aeronautical demand for the land for many years. Under these circumstances, it makes perfect sense for the airport sponsor to lease that land for non-aeronautical use until such time as there is an aeronautical demand for the land. The interim revenue from these non-aeronautical leases can help the airport sponsor be financially self-sustaining. The Draft Policy creates regulatory and administrative burdens that will significantly hamper an airport’s ability to compete for and win these non-aeronautical developments.

Change 2 in the Draft Policy, which requires a letter of approval or consent from the FAA for a non-aeronautical use or mixed use of leased property directly tied to the lease term of the property, will introduce time- and resource-consuming new requirements on both the FAA and airport sponsors. Non-aeronautical leases often have short terms of 5-years or less. If the use of the land remains the same, there is no reason for the FAA to reevaluate its approval of non-aeronautical use every time the lease term expires. This would be overly burdensome and unnecessary for both the FAA and airport sponsors.

VI. Concern About FAA’s Assertion of Authority to Deny Non-Aeronautical and Mixed Land Use Designations Without Explanation or Defined Opportunities to Appeal these Decisions

In the Draft Policy, the FAA states the following when discussing its authority over approval of non-aeronautical or mixed designations of federally acquired or federally conveyed airport land:

> *The use should be compatible with the airport’s current or future aeronautical use or demand. FAA approval shall not be granted if the FAA determines that an aeronautical demand for the land is likely to exist within the period of the proposed use, or it compromises the safety and operation of the airport. FAA consent to or approval of a non-aeronautical use should only extend for duration of the lease term and must provide that the land will be returned to aeronautical use at the end of the term.*[3]

We are concerned about the second sentence of this statement, which when read in plain language, appears assert that FAA can veto airport sponsor determinations regarding aeronautical demand and the associated land and development needed to accommodate it.

[3] Draft FAA Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land, 87 Fed. Reg. 56604 (Sept. 15, 2023)

We strongly recommend that the FAA revise the referenced statement and provide additional information about how FAA will engage in determinations of aeronautical demands for land and what information and criteria will be used for them. We also strongly recommend that the FAA enumerate the manner in which airport sponsors can appeal these determinations through administrative processes to avoid costly legal action as an alternative.

We also note that most federally obligated airports already have master plans and associated Airport Layout Plans (ALPs) that include aviation activity forecasts, facility requirements (both aeronautical and non-aeronautical), and detailed long-term development plans. Master planning and ALP update efforts are the appropriate forum to address determinations of the aeronautical demands for land.

VII. Implications of the Draft Policy on NEPA Environmental Review Processes Needs to Be Defined

The proposed policy does not articulate how the new lease review procedures would be implemented and whether this process would constitute a federal action that would trigger NEPA review.[4] Requiring NEPA reviews of non-aeronautical leases—particularly when that lease is either a renewal of an existing lease or a like-for-like replacement of a previous use in an established facility—substantially increases the cost and complexity of locating a business at an airport. It also potentially creates a significant barrier for disadvantaged businesses. FAA should make it clear whether these processes would constitute a federal decision necessitating a NEPA determination.

If they do, the workload and resource requirements associated with obtaining such determinations—inclusive of documentation requirements—should be assessed as part of the implementation issues described below.

VIII. Implementation Issues Need to Be Addressed

As noted previously, the Draft Policy does not address the impacts it will likely have on FAA and airport resources and development timelines. These issues have to be considered because many non-aeronautical developments and lease arrangements are time sensitive and necessitate timely decisions to be successful. To this end, we urge the FAA to carefully consider how the review and approval process described in the Draft Policy can be implemented without undue delays or adverse impacts on other competing review processes FAA Office of Airports staff must engage in.

To ensure that the Draft Policy does not create undue burdens on airport sponsors and recognizing the time-sensitive nature of non-aeronautical development projects, we agree with the FAA should be required to respond to requests for approval or consent within thirty calendar days.

VIX. The Proposed Changes in the Draft Policy May Impose Substantive New Requirements on Airport Sponsors

Despite the statement that “The FAA confirms and clarifies its prior policy and practice regarding the implementation of its statutory responsibility to review and approve or consent to, or deny,

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[4] The FAA appears to acknowledge that its approval or consent to land use designations may constitute a NEPA-triggering federal action when it states, “The requirement for NEPA should be coordinated with FAA Environmental Protection Specialists.” 87 Fed. Reg. 56604 (Sept. 15, 2023).

requests for land use changes on federally acquired or federally conveyed land", the Draft Policy appears to impose substantive new regulatory requirements on airport operators. We believe that the changes proposed in the Draft Policy will slow airport development processes, create substantial levels of additional workload for both airport sponsors and the FAA, and potentially interfere with airports' ability manage their property and commercial interests, inclusive of leasing decisions.

SUGGESTED NEXT STEPS

As we have suggested in past written comments to the FAA Office of Airports, ACI-NA strongly believes that the FAA and U.S. airport operators need to be engaged in an active dialog regarding local and federal roles and responsibilities regarding airport land use and development. We encourage the FAA to refine its draft policy collaboratively with the airport sponsor community and are happy to assist the FAA in coordinating with representatives from the community that can provide substantive and timely input into needed clarifications and refinements to how we collectively deal with land use classification decisions.

Given the substantive nature of the changes included in the Draft Policy, we also request that FAA provide written responses regarding significant comments submitted by ACI-NA, other airport and aviation organizations, and airport sponsors in accordance with informal rulemaking procedures outlined in 5 U.S.C. § 553. These responses will provide the airport community with a clearer indication of how the FAA plans to address its concerns.

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On behalf of the airport community that ACI-NA represents, we appreciate the opportunity to provide our comments regarding Docket Number FAA 2022–1203, "Draft FAA Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land." We hope the FAA incorporates these comments as well as those provided independently by our member airports into the final policy. We also hope that the FAA will work closely with airports in the formulation of land use policies in ways that facilitate safe, efficient, and self-sustaining airport infrastructure for the long-term future.

If you have any questions or need clarification about our comments, please contact me at either coswald@airportscouncil.org or 202.293.4539.

Sincerely,

Christopher J. Oswald
Senior Vice President, Safety & Regulatory Affairs

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