

# Navigating Section 163

## A Guide to Facilitating Non-aeronautical Development at Your Airport



www.csc.os.com



\* September 2022 Supplemental Briefing Included

September 2021

**UPDATE**  
Sept. 2022

# Navigating Section 163

*The FAA issued a revised internal guidance memorandum in August 2022 that changed several elements of the agency's policy guidance on application of Section 163. In addition, in September 2022, FAA issued a proposed policy on land use which also indirectly affects its Section 163 decisions. Pending a revision to the Navigating Section 163 guidebook, please review the following summary of the key changes in agency policy.*

## Portions of a Project

The most important change to agency guidance concerns the definition of a project for purposes of Section 163. Prior agency policy allowed an airport sponsor to avoid FAA approvals or ALP approval for any portion of a project that would be subject to Section 163. This allowed airport sponsors to subdivide larger endeavors into smaller pieces to take advantage of Section 163. The FAA has revised its policy guidance to provide that if any portion of a "project" requires FAA approval, then the FAA retains approval authority over the entire project.

This change appears designed to assert agency approval authority even if only a small portion of an endeavor would be subject to FAA approval authority. The term "project" is not defined in Section 163 or in any existing agency guidance document. The agency has not provided any guidance on what constitutes a "project" for purposes of this guidance. That term is not used in NEPA or any other similar statute, though it is possible that it is intended to reflect the scope of NEPA review, which prohibits segmentation of an undertaking into smaller pieces to reduce or eliminate environmental review. The only explanation offered in the guidance is that FAA approval authority is triggered for an entire "project" if the "project cannot be whole without other components" that would themselves require FAA approvals.

The change raises questions as to whether this new interpretation conflicts with the statutory provision that prohibits any FAA direct or indirect regulation of activities on property that is subject to Section 163. It is likely that the agency will have to issue clarifying guidance on what constitutes a project for purposes of the latest guidance. In the meantime, airport sponsors will have to examine their endeavors with careful scrutiny to determine whether portions of an endeavor can "be whole without other components" in order to take advantage of Section 163.

## Proposed New Land Use Policy

FAA has published a draft Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land. The draft Policy addresses how the FAA would review and approve sponsor requests to use certain airport property for non-aeronautical purposes. The proposed Policy has potentially significant implications for airport sponsors' leasing practices.

### Application of NEPA

FAA's revised Section 163 guidance removes any reference to environmental review under NEPA. It is not clear why this language was removed, but perhaps it was to avoid any appearance of inconsistency with existing FAA orders on NEPA environmental review, Orders 1050.1E and 5050.4B.

The proposed Policy complements the Section 163 guidance because the Policy applies only to property that is not generally subject to Section 163 – namely, property that was (a) donated by the federal government (e.g., through the Surplus Property Act); (b) purchased with FAA grants; or (c) property that affects airport safety.

The FAA's stated purpose in adopting the Policy is to "confirm and clarify its prior policy and practice regarding the implementation of its statutory responsibility to review and approve or consent to, or deny, requests for land use changes on federally acquired or federally conveyed land." However, it appears that the Policy has the potential to significantly change certain elements of the way that the FAA considers and approves sponsor requests for non-aeronautical and mixed-use of airport property.

The Policy identifies and defines four different types of uses of airport property (aeronautical, airport, mixed-use, and non-aeronautical), and the definitions are critical because they control whether the FAA must approve land use changes. The FAA states that it "must approve or consent to all nonaeronautical and mixed uses of federally acquired and federally conveyed land." By contrast, the Policy states that "if the FAA determines that the proposed use serves an aeronautical use or airport purpose... then FAA approval or consent is not required." The Policy provides definitions for these four land use categories.

## How Do We Proceed Now?

### **ADJUST**

As with FAA's original Section 163 guidance, the agency's revised Section 163 guidance memorandum is internal direction to FAA staff and is not intended specifically for airport sponsors. Nevertheless, it provides valuable insight into how FAA will review requests for agency approval or ALP revision applications. The internal guidance revisions are already in effect and can be reviewed [here](#).

### **ACT NOW (Time Sensitive)**

By contrast, the proposed Policy was published in draft form in the Federal Register, and the agency is seeking comments before the Policy is finalized. Given its range of possible implications, including on potential non-aeronautical development on residual aeronautical land, Airport sponsors and the industry as a whole are encouraged to review the draft Policy [here](#) and submit comments before October 17, 2022, [here](#).

### **ASK US**

This continues to be an area where agency practice is evolving with increased experience. C&S Companies planning, land use and economic advisors and Kaplan Kirsch & Rockwell lawyers are available to assist airport sponsors and other clients in navigating this novel process.



#### **C&S Companies**

Barbie Schalmo, [bschalmo@cscos.com](mailto:bschalmo@cscos.com)  
Kelly Moulton, [kmoulton@cscos.com](mailto:kmoulton@cscos.com)



#### **Kaplan Kirsch & Rockwell**

Katie van Heuven, [cvanheuven@kaplankirsch.com](mailto:cvanheuven@kaplankirsch.com)  
Peter Kirsch, [pkirsch@kaplankirsch.com](mailto:pkirsch@kaplankirsch.com)  
Nick Clabbers, [nclabbers@kaplankirsch.com](mailto:nclabbers@kaplankirsch.com)

---

## Acknowledgments

### C&S Companies

C&S is one of the most diverse and capable aviation consulting firms in the U.S. With more than 100 aviation-dedicated professionals and 400 innovative experts in complementary fields, C&S delivers industry-leading solutions to our airport partners. Airports are our main business, and we have spent 50 years refining our approach to delivering excellent aviation consulting, becoming one of the most experienced and trusted firms in the country. From airfield pavements to terminal buildings, landside infrastructure to master and sustainability planning, C&S has the capacity and the experience to manage any assignment. With seasoned professionals in airfield and landside engineering, planning, architecture, sustainability, grants administration, construction services, and other specialized disciplines, we help clients realize the vision they have for their airports. As one of those key disciplines, our Land Use & Economics team advises airports on strategic positioning, planning, and development of real estate to capture market opportunity, further revenue and financial goals, optimize compatible context-sensitive land use, and integrate with broader community planning and economic development.

### Kaplan Kirsch & Rockwell

Kaplan Kirsch & Rockwell is a national law firm with a practice focused on solving problems that involve environmental, land use, public lands, transportation, and infrastructure law. The Firm's airports practice is the largest in the country dedicated airport law. It is characterized by a comprehensive, creative, and strategic approach that comes from a deep understanding of the airport industry and from experience at more than 100 airports—from the largest fortress hubs in the world to small general aviation airports. Increasingly, the Firm is called on to advise sponsors on creative land acquisition and development strategies, particularly in light of potential regulatory relief for non-aeronautical development provided by Section 163 of the FAA Reauthorization Act of 2018. Our website, [www.kaplankirsch.com](http://www.kaplankirsch.com), provides information about the Firm, our attorneys, and many of our projects. We also provide links to publications authored by the Firm and our attorneys and to other websites that relate to our clients, our practice, and hot topics in relevant fields of law. The firm organizes and provides the faculty for the annual Airport Law Workshop, a three-day boot camp for those interested in airport law that is sponsored by American Association of Airport Executives and International Municipal Lawyers Association.

### Copyrights:

COPYRIGHT © 2021 C&S Engineers, Inc.

COPYRIGHT © 2021 Kaplan Kirsch & Rockwell LLP

### Legal Disclaimer

This guide is for informational purposes only and is NOT intended to be used for providing legal advice—including the application of law to any particular set of facts and circumstances—and does not necessarily represent the views of any particular federal government entity. Readers are urged to confer with their counsel and consultants about their particular facts and to address any specific legal questions.

## About the Authors



### **Catherine M. van Heuven. Partner, Kaplan Kirsch & Rockwell**

Katie van Heuven is an attorney with the law firm, Kaplan Kirsch and Rockwell and has been representing airports for almost twenty years. Katie is an expert on a broad range of environmental and land use issues and specializes in airport and transportation projects. She frequently advises clients on projects involving federal environmental reviews under NEPA and related local land use regulations and has advised many airport sponsors regarding the implications of Section 163 of the FAA Reauthorization Act on proposed development projects. Katie has extensive experience advising airport sponsors on matters involving compliance with FAA rules and regulations applicable to planning and environmental review for major airport projects. She provides strategic counsel to numerous airports on matters related to compliance with federal grant assurances, drafting minimum standards and rules and regulations, and securing FAA approvals related to land acquisition and development.

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

(303) 825-7036



### **Kelly Moulton, CM, ENV-SP. Director, C&S Companies**

From general aviation to commercial service airports, Kelly Moulton has more than 17 years of aviation environmental, planning and project management experience. Her technical background includes airport master plans, airport layout plans, land use and facility planning, environmental planning under NEPA & CEQA, regional system planning, sustainability planning, FAA grant coordination, alternative project delivery and airport capital improvement planning. As a former airport employee, Kelly also provides unique perspective and insight having worked at airports of varying size and type facilities.

[kmoulton@cscos.com](mailto:kmoulton@cscos.com)

(530) 400-4711



### **Barbie Schalmo, AICP. Associate Director, C&S Companies**

Barbie Schalmo, AICP, leads C&S' Land Use + Economics practice in their national aviation planning group. With a background in city and regional planning and real estate economics, she works with airports to strengthen economic sustainability and community benefit by identifying market-based opportunities and crafting land and economic development strategies in view of FAA requirements. Her experience spans integrative market and economic analyses, strategic real estate positioning, land use and site planning, stakeholder engagement, and development advisory services. She works across the country with airports of all types, as well as public and private entities outside aviation.

[bschalmo@cscos.com](mailto:bschalmo@cscos.com)

(407) 956-6617

# Table of Contents

Section 1   Overview .....	1
Section 2   How to Use this Guide .....	2
Section 3   Section 163—A New Realm .....	3
Section 4   Setting the Stage for Development.....	6
Section 5   How Does Section 163 Change the Development Process? .....	8
Section 6   Practical Guidance: Application of Selection 163.....	13
Scenario 1: Sponsor Seeks Development Opportunities.....	14
Property Inventory: Start With What You Have .....	15
Property Conditions: Complete a Section 163 Checklist .....	15
Property Potential: Identify the Potential Uses.....	16
Property Vision: Consider Your Long-term Plans.....	17
Property Strategy: Make it a Reality.....	18
Scenario 2: Sponsor Receives Non-aeronautical Development Proposal.....	20
Project Initiation: First Things First .....	20
Project Structure: Determine Financial Roles and Responsibilities.....	21
Project Agreement: Negotiate all the Details.....	22
Project Constraints: Physical Requirements and Considerations.....	23
Project Approvals: The Regulatory Pathway .....	24
Project Playbook: Build a Timetable and Understanding .....	24
Project Partner: Coordinate with FAA.....	25
Section 7   FAQs and Background.....	27



# 1.0 Overview

*In a time of uncertainty and consistently changing regulations, our industry cannot always predict what will happen next, but we can plan and position airports to be as resilient as possible.*

Section 163 of the 2018 FAA Reauthorization Act included new language that has provided a fundamental shift in airport land use regulation and the FAA's role in the process.

**This Guide intends to help both airport sponsors and their potential development partners navigate the complex new statutory requirements and realize the potential benefits under Section 163 in a practical manner.**

Recognizing that Section 163 will have more limited implications for traditional aeronautical development opportunities and airport real estate transactions (i.e., fixed base operator (FBO) development, air cargo facilities or fuel farms), the focus of this Guide is on non-traditional and non-aeronautical projects.



# 2.0 How to use this Guide

*The Guide is designed to help the reader understand key issues and grasp the related regulatory implications for development on land owned and controlled by an airport. It also provides a roadmap for airport sponsors and their partners who want to minimize potential barriers to on-airport investment.*

## **The Guide will assist:**

- Airport sponsors that already have a proposed non-aeronautical land use development project in mind
- Airport sponsors that have available land but no formalized project or development plan
- Airport sponsors looking for additional revenue streams

## **This Guide may also prove helpful to:**

- Prospective developers who are considering pursuing on-airport opportunities
- Local government officials and economic development partners who play a key role in supporting their local airport sponsor in advancing on-airport land development
- Anyone who is new to the world of airports and/or airport property and its development

While it's impossible to anticipate every nuance or situation an airport sponsor or developer may encounter, **this Guide provides a framework so the reader can readily identify the scope of issues that should be considered.** In addition to the practical considerations, the Guide also provides an overview understanding of the aviation planning and legal concepts that both airport sponsors and developers need to consider.



Throughout this Guide, the reader can find spotlights

on technical issues and considerations alongside the practical guidance.





# 3.0 Section 163-A New Realm

*Without question, Section 163 of the FAA Reauthorization Act of 2018 has prompted some of the most significant changes ever to occur in the airport land use paradigm.*

For several generations, virtually any construction on an airport required review and approval by the Federal Aviation Administration (FAA), which triggered environmental reviews under the National Environmental Policy Act (NEPA). Often the time and cost associated with the NEPA process led to many missed airport development opportunities.

Section 163 has fundamentally shifted FAA's role in the regulation of airport land use. The effect of this new statute is a profound change in the FAA's role in the land use approval process. The statute reverses the prior expectation that almost all airport development is subject to FAA review and approval. **Under the new law, FAA's authority to regulate on-airport land use is limited to only development that affects the airfield and aircraft operations or implicates federal funding.**

**Section 163 can simplify the airport land development process in many cases, but also adds additional considerations and federal decision points to the mix. This further increases the importance of robust—and early—land use planning to navigate both the Section 163 determination process and the development process as a whole more effectively.**



The National Environmental Protection Act (NEPA)

requires federal agencies to consider the significant environmental consequences of major proposed actions and inform the public about potential environmental impacts.

Airport development projects historically triggered NEPA requirements in one of the following ways:

- the project received direct federal funding through the Airport Improvement Program (AIP);
- the project necessitated an FAA approval for the use of Passenger Facility Charges (PFCS)
- the project necessitated a change to the airfield layout or airport facilities, which required FAA approval of an amendment to the Airport Layout Plan (ALP)

## Understanding Section 163

Section 163 makes several critical changes to FAA's historic practices. FAA issued informal, internal guidance in late 2020 regarding the agency's interpretation and application of this new law. The goal of the guidance is to assist FAA Airport District Offices as they take on the significant task of reviewing proposed airport projects and changes to the ALP, determining the effect of Section 163 on the agency's authority. While this guidance is informal and is internal to FAA, it is intended to provide some national uniformity in interpretation of the statute and gives Sponsors insight into the process and a lens through which FAA must now review all airport land uses. The application of this guidance can help Sponsors navigate FAA reviews and approvals for projects in light of Section 163 and help guide the development process, documentation, and proactive coordination with FAA.

FAA conducts a two-step analysis to complete its Section 163 determination.

### Step 1: Does FAA retain ALP approval authority?

Under the first step, FAA examines whether it retains authority to approve changes to the Airport Layout Plan (ALP). Prior to enactment of the 2018 FAA Reauthorization Act, FAA had express authority to review and approve the entire ALP. Section 163(d) of the 2018 Act now limits FAA's ALP review and approval authority to only those portions of the ALP that fall within **three zones of interest consisting of:** As to zones of interest (1) and (2), FAA takes the position that it will always retain authority to approve or disapprove a proposed change to an ALP that would:

**1** A material impact to the safe and efficient operation of aircraft;

**2** An adverse effect to the safety of people or property on the ground; or

**3** An adverse effect to the value of prior federal investments "to a significant extent"

- Impact an approach or departure surface and/or procedure;
- Impact Airport Traffic Control Tower (ATCT) line of sight;
- Result in a change within any of the following areas on the airport:
  - » Any area of an airport where an aircraft moves or parks, including **movement areas** (e.g., runways, taxiways, and other areas of an airport that are used for taxiing or hover taxiing, air taxiing, takeoff, and landing of aircraft including helicopters and tilt-rotors); and **non-movement areas** (e.g., aircraft parking areas, including ramps and hangars);
  - » Any Runway and Taxiway Safety Areas, Object Clearing Areas, Object Free Area, Obstacle Free Zone, Runway Visibility Zones, Runway Protection Zones, Navigational Aid critical areas; or approach and departure surfaces.



### Key Resources:

[FAA Guidance](#)

[Updated Grant Assurances](#)

[section163.com](http://section163.com)



Per the FAA guidance, "zones of interest is not an official term, rather, it is a phrase that these instructions use to refer to the three criteria established by Congress..."

As to zone of interest (3), FAA examines whether the proposed project would adversely affect:

- Areas/facilities that received any federal funds (including funds originating outside the FAA);
- Areas/facilities that are on any land granted from the U.S. under certain land grant programs; or
- Critical aeronautical infrastructure (i.e., necessary to accommodate aviation demand).

If any or all of these situations are present, FAA takes the position that a prior federal investment needs to be considered under Section 163(d). The most recent guidance recommends that the Airports District Office (ADO) consult with FAA Headquarters to determine whether the adverse impact from the proposed project to that federal investment would be significant. If FAA determines that a significant impact exists, FAA will conclude that it retains ALP approval authority.

## Step 2: Is a “release” required?

Under the second step of the Section 163 analysis, FAA determines whether a release of obligations is required for the proposed action. It is important to understand that this analysis is conducted whether or not FAA has determined it retains ALP approval authority under Step 1. **Relevant to FAA’s second-step analysis, Section 163(a) narrows the scope of the FAA’s authority over airport land uses by generally prohibiting the FAA from “directly or indirectly regulating” airport land.** However, subsection 163(b) and (c) preserve the FAA’s authority:

1. To ensure the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations;
2. Over land and facilities acquired or modified using federal funding;
3. Under Surplus Property Act instruments of transfer; and
4. Under the Passenger Facility Charge (PFC) statute (Title 49 U.S. Code, § 40117).

These exceptions mean that much airport property is still subject to federal regulation and that FAA retains the authority to require a release of obligations for airport land use projects that occur on land or facilities acquired or developed with one of the funding or acquisition methods identified in items (2) – (4) above.



A “release” refers to a release from the federal obligation to use the land for airport purposes.



# 4.0 Setting the Stage for On-Airport Development

*Before delving into the impacts of Section 163 on specific scenarios, readers should have a basic understanding of the traditional airport legal and planning considerations.*

## Understanding the Legal Landscape

Many aspects of on-airport development are no different than off-airport development projects. In this respect, sponsors and prospective developers must consider conventional planning considerations such as land use and zoning restrictions, building codes, and local permitting processes. However, **there are a set of unique legal considerations that have significant consequences for airport development projects that all sponsors and prospective developers should understand.**

## FAA Grant Assurances

FAA exercises unique regulatory authority over airport management and operations arising from contractual commitments made by airport sponsors in consideration for grant funding through the Airport Improvement Program (AIP). These obligations, known as grant assurances, generally carry a 20-year duration from the date of the last FAA grant, although some are perpetual.

## Deed Restrictions

A second – sometimes unexpected – source of federal regulation comes from underlying deed restrictions. Many airport sponsors received land from the federal government, especially after World War II, under the Surplus Property Act. Deeds conveying land under the Surplus Property Act and related statutes contain obligations mirroring many current grant assurances. These deed restrictions apply even if an airport sponsor has not received any federal grant funds and are supposed to last in perpetuity, even if AIP grants have expired. Prospective developers (and sponsors) should also recognize that the federal government may have reserved a reversionary interest in many airports, providing the right to reclaim airport property if it is no longer used for airport purposes.

### New to airport development?

Take a deeper dive into the FAQ on page 27.



Airport sponsors often partner with legal counsel

and other experts to assist with complex land and compliance issues.

## Releases

Historically, the FAA took the position that all land that is depicted on the “Exhibit A” Property Map was presumed to be designated for aeronautical uses unless FAA had approved its use for non-aeronautical uses. It is important here to distinguish between FAA “approval” and FAA “release.” FAA approval is no longer always required for changes in land uses as a result of Section 163. While the enactment of Section 163 severely limits the FAA’s authority to approve changes in land use, FAA retains the authority over release of federal obligations on land acquired, donated, or developed with federal funding.

## Airport Planning Considerations

The starting point for any discussion on proposed airport development is a review of the existing or approved ALP set. The ALP reveals critical information including the boundaries of property owned by the airport sponsor and designated for airport purposes and the location of existing and approved airport facilities and structures.

A review of the ALP Property Map (as well as the “Exhibit A”) is the best place to begin the process of understanding the degree to which certain airport parcels may be subject to restrictive conditions. For example, how a parcel was acquired can be a key factor in whether or not Section 163 removes FAA approval authority for a particular project and/or its elements. The statute carves out an exception for property that was acquired with federal funding or under a Surplus Property Act or comparable deed from the United States.

Understanding the underlying land use restrictions is also critical for development planning because land designated for aeronautical uses generally cannot be used for non-aeronautical purposes without prior FAA approval – either approval of a “concurrent use of aeronautical property” or a more formal “release” from the obligation to use that land to support aeronautical activities.

The Existing ALP drawing depicts existing and approved future land uses. In the context of planning for an airport development project, the critical question is whether land is designated for **aeronautical** or **non-aeronautical** uses because this distinction has significant regulatory implications.

All uses of the land, airspace, improvements, or airport facilities for any operational purpose related to the flight of aircraft at, to or from the airfield are considered aeronautical uses and the related property is referred to as aeronautical property. Traditionally, aeronautical property includes the property occupied by the runways, taxiways, parking aprons, and any other areas used or intended to be used for supporting services and facilities related to the operation of aircraft. Aeronautical property also includes land normally required by those activities that are complementary to flight activity such as concessions and ground transportation.



**Aeronautical** uses include any use 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.

**Non-aeronautical** uses are everything else.



The “Exhibit A” Property Map refers to the map appended as an exhibit to a grant agreement. It is often (but not always) the same as the Property Map from the ALP set.



# 5.0 How Does Section 163 Change the Typical Development Process?

*Development projects now need a “Section 163 determination.”*

**Section 163 now requires an additional, preliminary screening process during which FAA determines the extent (if any) of its authority to regulate the proposed change to the airport.** As noted earlier in this Guide, this is a two-step process in which the FAA must separately determine:

1. Whether it retains authority to approve a change to the ALP; and
2. Whether the proposed action requires a release from the obligation to use it for aeronautical purposes.

In its guidance, the FAA has described its process for making these determinations. **It is important to understand that neither the statute nor FAA’s recent guidance prescribes any specific timing for this process.** The timing of the review is dependent on certain factors a sponsor can control (e.g., clear records regarding land uses on the airport, manner of acquisition of relevant parcels, etc.), as well as factors outside of the sponsor’s control (e.g., a decision by Headquarters as to whether or not an adverse effect to a prior federal resource will be “significant”).

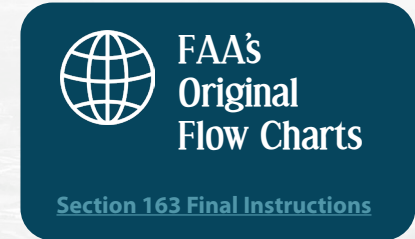
***The following pages provide visually simplified versions of the FAA decision charts issued in the Section 163 Guidance.***



Readers should understand that the charts lay out the steps FAA utilizes to think through a Section 163 determination.

Original FAA charts are available via link on the following page.

# Section 163 Screening Process at a Glance



## FAA Figure 1

Step 1: Determinations Under Section 163(d) FAA ALP Approval Authority

Sponsor submits ALP change or is ready to move forward with a previously conditionally approved project on ALP

Gather information required to make determination.

Does the project result in a change or alteration within the 3 zones of interests?

Yes

The FAA does have ALP approval

Continue to **FIGURE 2: Step 2**

Yes, but only portions of the project

The FAA does have ALP approval authority, but only for portions in 3 zones of interest

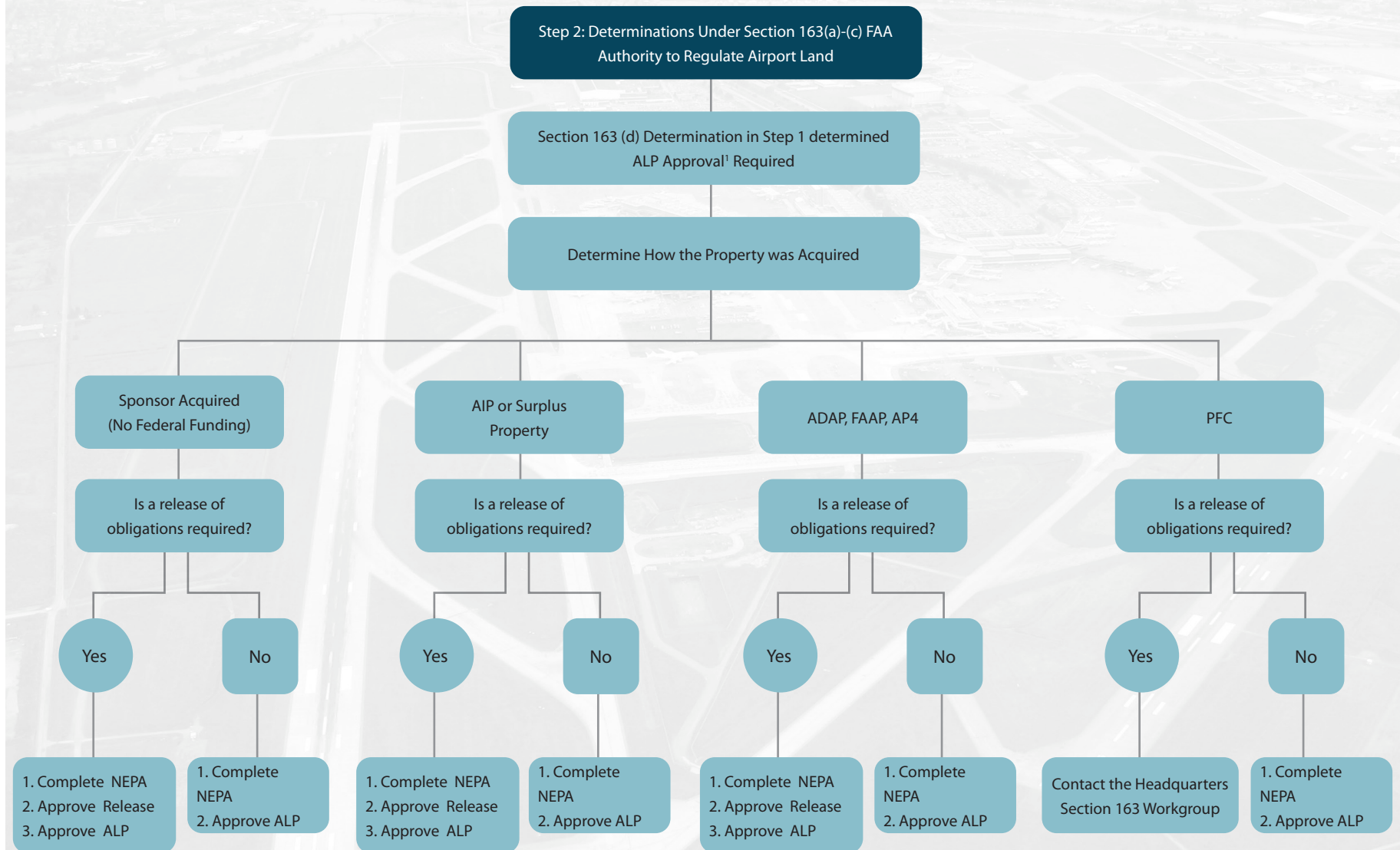
No

The FAA does NOT have ALP approval

Continue to **FIGURE 3: Step 2**

# Section 163 Screening Process at a Glance

## FAA Figure 2

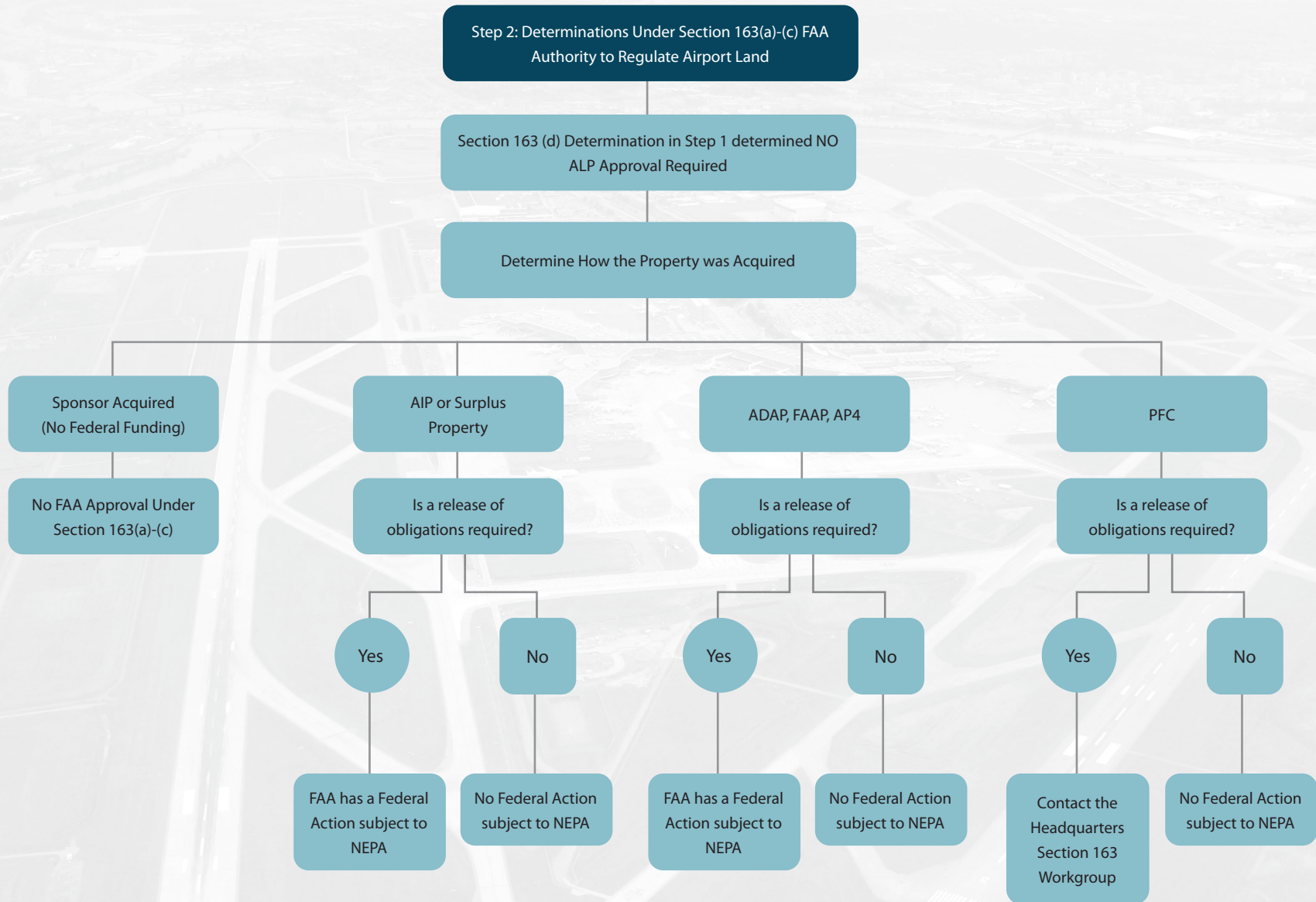


<sup>1</sup>ALP Approval for all options of the project, as determined in Step 1: Determinations Under Section 163(d); <sup>2</sup> For example, when sponsor acquired property is pledged as a local match for an AIP grant.



# Section 163 Screening Process at a Glance

## FAA Figure 3



## Development Projects – Or Parts Thereof – May No Longer Trigger NEPA Reviews

**To the extent that Section 163 limits or removes FAA’s previous regulatory and approval authority, the FAA’s NEPA obligation(s) are similarly limited.**

In a straightforward scenario, if a development project is proposed that does not implicate any of the three zones of interest, then FAA retains no authority to approve the ALP. Without this federal action, the project can proceed without the need to prepare a NEPA document.

**Section 163 can also present a new complicated scenario – where some portions of the proposed project no longer require any FAA approval, but others do.** In this regard, FAA has clarified that where there are portions of the project that **are independent from** the portions of the project requiring FAA approval, the environmental effects of the independent portions are not “caused by” the federal action and need not be examined under NEPA as effects of the federal action.

However, FAA has also determined that when portions of the proposed project that do not require any FAA approval **depend on** the portions of the project that do require FAA approval in order to be constructed or operated as planned, the environmental effects of those dependent portions are “caused by” the federal action and need to be examined as effects of the federal action.

## The Confluence of Change and Opportunity

Disruption events happen and can directly impact aviation in a blink of an eye. In the last decade, airports have endured terrorism, a national recession, and now a global pandemic. As with any major disruption, the COVID-19 pandemic should serve as both a reflection and inflection point to reassess opportunities and conduct proactive, rather than reactive, planning for revenue growth and advancing resiliency – financial and economic, as well as climate-related. In this context, **Section 163 becomes all the more relevant, because if artfully exploited, it can meaningfully expedite development that, in the long run, will generate revenue at a time when it is particularly critical, and thereby facilitate greater economic resiliency for airports.**

There is one important caveat, however. **FAA retains its authority to review any airport development that could affect airport operations or safety.** A convenient, but technically inaccurate, distinction is often made that Section 163 applies only to “non-aeronautical” development. In fact, both aeronautical and non-aeronautical development projects can benefit. That said, the full benefits of Section 163 will be realized for projects considered collateral development or non-aeronautical development and other projects that may be related to but do not affect airport operations or safety.



Remember that Section 163 only applies to the federal actions and approvals. Applicable state environmental processes may still apply!



Airports should work closely with the FAA to determine how Section 163 impacts the NEPA process for a particular project. When working with the FAA, start with the ADO.



While we cannot predict when or what the next disruption will be, we can prepare for such events by positioning airports to be as resilient as possible when they occur.



## 6.0 Practical Guidance: Application of Section 163

*What do these legal requirements and regulatory changes mean for airport sponsors seeking to build economic and financial resiliency through revenue diversification?*

**Is Section 163 an advantage or simply an additional burden in developing airport property for non-aeronautical use?** That answer largely depends on how prepared an airport sponsor is ahead of or coming into a project – and how much lead time there is.

Suppose the objective is to develop property for non-aeronautical revenue generation. In this case, the goal must be to reduce the unknowns in the path of development – in processes, in approvals, in site and market conditions, in cost – and ultimately, and most especially, in time. In other words, **an airport sponsor's goals are to spot as many hurdles ahead and then to address those issues upfront to the degree possible to minimize or even eliminate the hurdles altogether.**

It is simply impossible to predict each possible non-aeronautical development scenario that can present itself. Even on one airport, the considerations for different projects will vary depending on factors such as where the proposed project will be located, how the underlying land was acquired, where current and future development is predicted, what the surrounding market conditions and dynamics are, etc.

To that end, this Guide sets up two basic scenarios for consideration:

1. An airport sponsor that has undeveloped land that is not ideally suited for aeronautical purposes and is looking for a revenue-generating opportunity.
2. An airport sponsor that has a non-aeronautical project ready to develop on airport land.

While the issues at your particular airport – or with your particular project – may not align perfectly with these two scenarios, the issue spotting exercise will still be the same.



The rest of this section is divided into two practical application scenarios:

1. Sponsor seeks development opportunities.
2. Sponsor receives non-aeronautical proposal.

The sections provide a brief overview and key questions and considerations to help airport sponsors and prospective developers spot issues on the road(s) ahead.

## Scenario 1: Sponsor Seeks Development Opportunities

Many airports have land potentially ripe for development or that's been sitting vacant for many years. **This section discusses what Section 163 means in this situation and what considerations need to be understood – both by the airport sponsor and also by the prospective developers – to move successfully towards development.**

The good news, generally speaking, is that in this scenario, the players have the time to dive into the process and ensure that the airport sponsor is ready to act swiftly when the right opportunity comes along.

Sponsors will be most prepared for development opportunities if they perform an early analysis of the key factors under the statute. **Because on-airport development is generally a long game, early issue spotting, proactive land use planning, working with and not against market forces, and implementing a development strategy are necessities to achieving the long-term development goal.** In short, early preparation will minimize unnecessary delays once a potential project emerges which, in turn, will make the particular airport more attractive to prospective developers.

As described in this section, sponsors with developable land and no pressing development projects are best served by proactively taking the following steps:

If the airport sponsor's objective is to develop residual property (i.e., land that is not needed for future aeronautical purpose) for non-aeronautical purposes, then its goal must be to identify and then reduce the hurdles in the path of development.

1	Conducting a property inventory to determine where development makes sense given current and future proposed uses
2	Assembling Section 163 requirements (e.g., deed research, land use review, etc.)
3	Determining target uses, current and future market potential, and economic development alignments
4	Educating partners, asking for market-based feedback, providing information on what you have (land) and the process involved in developing it
5	Identifying preparation needs and potential timing; approvals, timing, risk tolerance, funding strategies, understanding and preparing for additional approvals

## → Property Inventory: Start With What You Have

Some of the initial considerations may seem obvious, but they are vital for ensuring proper planning. Clearly identifying property not needed – or no longer needed – for future aviation use is the first step.

The following measures and considerations can help to define exactly what real estate your airport has to consider and potentially offer:

### Key considerations for each piece of property:

- Identify any land available or potentially opportune for non-aeronautical or aviation-related (but not aeronautical by definition) development.
- Determine how much land is available and where it is located.
- Document basic site characteristics: vacant or occupied, contiguous or dispersed, raw land or development-ready, etc. redevelopment.
- Review approved ALP for designated use and note if designation may need to change.
- Identify if (and which) properties are noise land.
- Based on the information listed above as well as your knowledge and experience, determine if – and what - land is potentially developable.

Through the measures outlined above, putting together a clear, standalone residual property map or Airport Property Inventory provides a helpful tool to lay the foundation for the additional proactive planning that comes next.



As part of this process, consider the current physical conditions (e.g., height restrictions) and environmental constraints (to the extent known) of the land potentially available for development.



Noise land refers to property acquired by the airport for noise mitigation purposes. It is subject to specific rules regarding development and disposal and, in many cases, is treated fundamentally differently from other airport land.



### Recommended Action:

*Prepare or update an Airport Property Inventory clearly identifying land that is potentially developable for non-aeronautical purposes.*

## → Property Conditions: Complete a Section 163 Review

Understanding the “Section 163 basics” for each of your prospective development properties up front can help focus your attention on where this statute may offer relief (or not), where you’ll likely need environmental reviews and/or a land release, and where you may not have enough information at this point to know. Knowing these basics can provide the information you need to have a proactive conversation with FAA regarding your land use and likely process and actions needed.

Although the formal FAA Section 163 review and determination process will most likely not occur until you have a defined project, you can get ready by identifying the underlying conditions of your parcels(s) and gathering the necessary documentation to facilitate a smoother and faster process. Even if the FAA’s approval

authority is confirmed through the Section 163 determination process, this pre-work will be especially helpful if you need to complete an environmental review and/or secure a land release.

## Key considerations for each piece of property:

- Determine if property is located in a safety area, or if its development could affect the safe and efficient operation of aircraft.
- Ensure “Exhibit A” is both current and accurate. The means of acquisition and boundary lines should be documented accurately for all parcels.
- Confirm how the land was acquired and line up documentation such as: federal grants used for purchase or reimbursement, proof that no federal funds were utilized, physical or digital property deeds.
- Establish key development-related site characteristics and identify sources of documentation as appropriate: site access; utilities and infrastructure; wetlands, waterways, or sensitive habitat; known or suspected environmental conditions; sensitive receptors located nearby; regulatory provisions such as zoning and height restrictions.

An “Exhibit A” Property Map should technically include and address each parcel boundary as acquired and its key background information, but this is not always the case in practice. If you are an airport sponsor, you can get ready for future development by formally updating your “Exhibit A” to fully address these requirements. Or, utilize the Section 163 as a checklist to get ready now and then incorporate that information in your “Exhibit A” at the next update.

### Recommended Action:



*Conduct a Section 163 review for each developable parcel, ideally as a composite map with accompanying “basics checklist” and summary of existing conditions by parcel. Supporting documentation should be collected and saved.*

## → Property Potential: Identify the Potential Uses

Understanding what your land should be used for is paramount. An honest assessment of land use potential informs short- and longer-term decision-making, based on what market demand and timing might be, what users and development to target, when and where to invest resources, and what partnerships to forge or strengthen. In addition, **taking the time to understand market conditions helps reduce – or at least manage to some degree - the unknowns of the on-airport development process, including managing expectations** of key partners. Such partners may include airport Board members and staff, elected officials, economic development agencies, even surrounding land owners.



Many airport sponsors use specialized aviation land use consultants to help conduct, guide and advise on the results of a market context and land use diagnostic process.

How the underlying land and the proposed uses intersect with FAA's three "zones of interest" may spell relief from FAA ALP approval authority. However, just because a property may avoid additional regulation due to the application of Section 163 does not necessarily mean its development potential aligns with market opportunities or that it should be the first priority for development. If you can identify land that does not fall within the "zones of interest" and potential uses for it that are market aligned, you can prioritize these parcels for future development to minimize regulatory hurdles.

## Key questions for your portfolio as a whole and individually:

- What are the local market conditions? What does projected demand look like in your area for different asset classes?
- How might unique advantages of on-airport location benefit the property's market position (opportunities for airport-symbiotic development)?
- Is this site best utilized for local market-based demand, aviation industry or economic development driven opportunities (single use or mixed use)?
- What is the anticipated time and capture rate for development at this site? Is there a lot of competing land surrounding it or is available land for development in short supply?
- Have you integrated feedback or insights from relevant market participants?



Weighing property conditions – including the FAA approvals/processes – against market considerations, dynamics, desirability, and feasibility is essential lest you take the supposed path of least resistance only to find it does not align with market interest or need.



### Recommended Action:

*Prepare a market and land use assessment, or a similar diagnostic, to best understand your property's market context and highest and best use.*

## → Property Vision: Consider Your Long-term Plans

When you choose to move forward on a project or ground lease on airport property, you are making a decision that can last for up to 50 years. To that end, you cannot lose sight of the long-term plan. Determining the short- and long-term plans for your portfolio of properties is the next step in reducing the unknowns on the path to development by establishing targets you want to reach.

Develop a framework for evaluating short-term land use decisions in light of long-term vision and goals. Evaluating your portfolio with these key factors in mind can help define those short-, mid- and long-term intentions.

## Key steps to define intentions

- Confirm or establish vision for the use and development of this land.
- Evaluate how the use proposed for this land may affect other airport plans (i.e., if you put a non-aeronautical project here, will it prevent a future runway extension or other critical aeronautical projects? This scenario would also preclude the beneficial use of Section 163).
- Understand how the proposed use affects – or is it affected by – local non-airport plans, as well as community goals, perceptions or concerns.
- Determine the prioritization and positioning of your portfolio of land based on the regulatory, market and site conditions learned thus far.
- Communicate your intentions to and seek feedback from developers, economic development, local community, key stakeholders and partners, your governance structure and airport team.



Consider how airport goals, objectives and initiatives for sustainability and resiliency can be integrated into real estate and land use development as part of this process.

### Recommended Action:



*Formalize these key considerations and determinations through a land use plan and real estate development strategy, perhaps even an airport area plan. This will help guide the decisions and define the actions necessary to achieve your goals.*

## → Property Strategy: Make it a Reality

Prudent and proactive planning does not guarantee that a development project will occur at all or within a target timeframe. Still, it does lessen the hurdles of the development process by identifying issues and reducing the unknowns through a context-specific and adaptable forward strategy.

### Key elements of an implementation plan:

- Understand and evaluate what risk profile and development arrangement works for your airport (i.e., parcel by parcel direct ground lease, master developer and development agreement, level of participation)
- Coordinate with key partners or establish and cultivate those partner relationships if not already in place:
  - FAA
  - Local departments and agencies like relevant planning departments public works, utilities and management districts, etc.
  - Local real estate and development community
  - Local and regional business and economic development organizations



- Confirm a brokerage policy is in place or consider establishing one
- Develop or enhance existing marketing strategy and collateral for efficacy in our digital world
- Evaluate how much investment to make and when to do so

**Recommended Action:**

*Develop a phased action and implementation programs that articulate the context- and needs-specific tactics necessary to move you toward achieving development goals.*

## Summary and Next Steps

With the convenience of time, airport sponsors can proactively position themselves and their property to be ripe for development. With Section 163 considerations, the more prepared an airport sponsor is, the smoother the approvals process should be down the line.

Sometimes, opportunity knocks before you're ready and that's okay too. The next section discusses the key considerations and guidelines when a potential airport development project is identified.

## Scenario 2: Sponsor Receives Non-aeronautical Proposal

Congratulations, you've already moved past the first major hurdle and you have a project ready to develop. **Developing on an airport isn't always a straightforward process, and Section 163 can aid in the complexity.**

For some airport sponsors, non-aeronautical development is not an everyday occurrence and for others it's more familiar. On top of that, **the process for a developer of a landside (read: non-aeronautical) project is typically (and often substantially) different than an airside/aeronautical project.** Gaining an understanding of the entire on-airport development process is **important for both the airport sponsor and the developer.** From necessary approvals to review periods outside of the airport sponsor's control, it's best to understand the entirety of the process up front, to cultivate understanding among the parties involved and to openly communicate about how the process differently impacts the airport and developer sides.



Going into the on-airport, non-aeronautical development

process with everyone's eyes wide open will only help to enhance and potentially expedite the project's success.

### → Project Initiation: First Things First

There are several key questions to document and considerations to factor in as soon as a project is seriously considered for development on an airport, before its initiated and well ahead of when agreements with the developer are finalized.

#### Key questions:

- **First, check your ALP** – how is the area in question shown? Is the project consistent with the land use shown? If not, then an ALP update and/or a release may be required.
  - Understand what areas are suitable for non-aeronautical uses, and whether or not the land has been formally designated for non-aeronautical use.
  - Many ALPs do not use clear aeronautical/ non-aeronautical distinctions so it may be necessary to conduct further research to understand whether land will require a release from federal obligation that it be used for aeronautical purposes.
  - An area identified for non-aeronautical use on the future/ultimate ALP drawing is not an assurance that all necessary FAA approvals have been secured.
- **Second, address the Section 163 requirements** – Do you know how the property was purchased? Have AIP funds been invested in the property? Could the project affect the safe and efficient operation of aircraft?



#### Remember:

FAA must undertake a Section 163 determination for each on-airport project.

- Third, **work with the FAA to define its authority over the project.** The FAA will determine what authority the agency has over the project.

If releasing property as part of a project is a consideration, Section 163 will be implicated and sponsors should consider the potential long- and short-term ramifications (depending on what FAA approvals are or are not required).

As described in Scenario 1, having a clear, standalone residual property map or property inventory from the information you gathered above can help to lay the foundation for the additional proactive planning that comes next.



### Recommended Action:

*Take the time to send a formal, well-detailed request for the Section 163 determination, laying out key facts and providing relevant documentation, including the underlying deeds, to expedite and assist FAA in making its determination.*

## → Project Structure: Determine Financial Roles and Responsibilities

It can be challenging to secure traditional modes of funding or financing for on-airport/group lease development. For most airport sponsors, the appeal of bringing third party development onto an airport is the associated revenue. As such, another critical set of considerations involves how the airport sponsor wants to approach the **financial structure of the relationship** before crafting an agreement with the developer and ideally, before issuing a solicitation for development interest, if that's the route an airport plans to take.

**Airport sponsors should think ahead to determine what elements of the development process and project they want to control and what they do not (or do not have the capacity to) or cannot control.** In particular, sponsors need to consider what level of participation they can or are able or willing to take on, including enabling projects and site preparation. There is great flexibility in this process and spectrum of control, but airport sponsors need to make such decisions with an understanding of the financial, legal, and operational imperatives.

### Key questions to consider:

- Who should be responsible for construction costs?
- Which entity should pay for costs associated with roads, access, utilities, storm water, impact fees?
- What type of agreement should this be (ground lease, building lease, master development agreement, participatory agreement or lease)?

- What should the lease rate be? Is the financial arrangement between the developer and the sponsor consistent with FAA regulation requiring fair market value?
- Who should be responsible for bringing utilities and infrastructure to the site?

Airport sponsors with sufficient capital will often choose to fund roadways and utility extensions to the project site – enabling them to charge a higher lease rate to prospective and future tenants. Airports lacking in capital may expect the developer to fund these improvements in return for a lower lease rate. A cost benefit analysis can help the sponsor determine what is in their best interest.



### Recommended Action:

*Develop a project roles and responsibilities plan and define the financial roles and responsibilities of involved parties as early in the process as possible.*

## → Project Agreement: Negotiate all the Details

One of the most complicated early tasks is determining the contract structure between the airport sponsor and the developer. One of the reasons that private sector developers may be interested in leases of airport property is because of the opportunity for shared costs and risks for infrastructure and support facilities.

While it is lawful and possible to enter into a ground lease, larger or more complex projects offer an opportunity to share risk and cost in a way that will provide meaningful incentives both for the airport sponsor and the developer. The permutations are myriad and airport sponsors would be well advised to recognize that their interests and the developers interests are not identical. **Sponsors need to ensure that their own development goals and risk tolerance are thoughtfully considered, while also recognizing the challenges developers can face in securing project funding/financing for on-airport, ground lease development.**

### Key issues to consider:

- Both parties need to fully understand and negotiate risks (e.g., timing and risks during the NEPA process, etc.)
- Airport revenue restrictions and implications
- Lease length considerations versus grant assurance obligations
- Compliance with AIP contracting requirements



Developers who have not yet worked in an airport

environment are often surprised by the extent of federal regulation, including the need for a subordination clause (subordinating the relationship to any current or future FAA contractual or regulatory requirements).

**Recommended Action:**

*Recognize the broad nature and complexity involved in developing this agreement. Build your team to cover the range of needed disciplines to help identify the right terms for your airport and successfully negotiate the development agreement.*

## → Project Constraints: Physical Requirements and Considerations

Most airport personnel are familiar with the Part 77 and FAA Forms 7460 and 7480 requirements associated with building on an airport – but not all developers understand these concepts. **It is critical that both parties communicate about these processes:** who will make the necessary filings, whether and what mitigation may be required (e.g., lighting), and/or whether a project should be reconsidered in light of potential hazard determinations. In particular, airport sponsors should make sure any potential height restrictions are clearly understood by the prospective developer. This ensures that the facility is designed to the necessary standards from day one.

**Both parties should also have a clear understanding of any applicable airport safety restrictions** (e.g., Object Free Areas, Runway Protection Zones, etc.), zoning code obligations, and any relevant land use implications in order to understand any additional requirements. Important steps include:

### Key steps:

- Understand whether – and where – the Part 77 surfaces may limit development opportunities.
- Review applicable zoning and building codes to understand any height limitations on the airport property that are imposed due to the application of the Part 77 surfaces.
- Determine if your airport or jurisdictions have development standards. Often this includes rules about finishes, signage and even landscaping details.
- Ensure both parties fully understand whether – and where – development may be restricted due to airport design criteria.



Part 77 refers to the federal regulations at Title 14 Part

77, providing for notices to FAA of proposed construction, which allow the FAA to identify potential aeronautical hazards and/or to identify mitigation to avoid adverse impacts to the safe and efficient use of navigable airspace.

**Recommended Action:**

*Develop a project requirements memo, which outlines all of the physical limitations of the site.*

## → Project Approvals: The Regulatory Pathway

As discussed in this Guide, the FAA regulatory process includes the Section 163 determination, updates to the Airport Layout Plan, (possible) NEPA reviews, and securing Part 77 determinations. In addition to establishing FAA's role regarding the project (and therefore ALP update and NEPA review required), the parties will also have to plan for additional state and local approvals.

In particular, the parties should consider the local zoning and permitting processes. A meeting with the City/County planning or building department may help define this process – including necessary approvals, permitting and other processes that need to be followed. If special districts are involved (i.e. utilities, water and storm water management, etc), it is also critical to understand their unique jurisdictions, requirements, processes and timelines – for each.

### Key processes include:

- Development application
- State/local environmental approvals
- Planning commission review
- Design review board, grading and building permits, utilities, drainage and storm water, landscaping



### Recommended Action:

*Understanding the regulatory process (both federal and local and/or state) will help you to build a timeline and associated steps to share with the developer. This information should be shared with the developer as early in the process as practicable.*

## → Project Playbook: Build a Timetable and Understanding

Early outreach to understand development requirements is key in understanding and shepherding the process. Ultimately, everyone (developers, private investors, airport, elected officials, FAA) needs to be on the same page as to the plan, process, timing and approvals needed to successfully complete the project. The process involves ongoing communication and education. It is likely that portions of this process will be new to some key players. To that end, a project playbook should include a full schedule that is developed to help everyone understand the process and their role in the timeline. This approach can also lead to collective issue spotting and creative and collaborative solutions to address those challenges.

After developing a timeline, it's also important to understand the implications of that timeline.

## Key timeline steps:

- **For the airport sponsor**, this means a complete understanding of the regulatory and development process.
  - Investigate the manner of acquisition of the land parcels considered for development opportunities in order to understand whether additional approvals or regulatory hurdles exist.
  - Identify whether a proposed project implicates special land, such as Part 150 Noise Land (which is land purchased with FAA funds set aside for noise mitigation), that may require approvals from FAA if the land is to be retained and used for development purposes
- **For the developer**, this means understanding the process and the nuances of the FAA regulatory role – remember it’s not easy to develop on an airport.
- **For elected officials**, this means respecting the process and timeline – the appeal of an economic driver for the region must be balanced by the timeline for relevant approvals.



It’s often left to the airport sponsor to make sure all parties understand this process, and often up to the airport staff to serve as an educator for each party. Section 163 adds a new layer of opportunities that need to be understood and communicated as early as possible.



### Recommended Action:

*Develop a Project Playbook which outlines entire process both for internal and external partners.*

## → Project Partner: Coordinate with FAA

No matter the project, coordination with the FAA is key. A close partnership with the FAA is critical to the project moving forward. There is no clear milestone of when the FAA should be brought onto the team. Generally, it’s best to begin consulting with the FAA as soon as there is a defined project.

### Keys for Successful Coordination:

- Outline the details so the FAA can gain a general understanding and provide guidance. That way, as the project evolves, the FAA will already up to speed.
- Annual meetings like the ACIP meeting are great opportunities to let the FAA know you are working on an opportunity and will follow up when you know more.
- Seek FAA input on how involved they want and/or need to be in the process.



The Airports Capital Improvement Plan (ACIP) is prepared each year by the FAA to identify and prioritize key airport development projects across the national system and to serve as a basis for grants distribution. Regional plans are developed accordingly with airport input. Airports prepare their own plans and review them with the FAA in annual ACIP meetings.



### Recommended Action:

*Be prepared and make an effort to coordinate early and often with the FAA to avoid surprises.*

## Summary and Next Steps

Can Section 163 be confusing? Yes, but don't let this scare you away. While non-traditional airport development projects certainly require advance work, the benefits generally far outweigh the initial efforts to kick start the process. In a time where airports are often competing with each other or private landowners for large economic and job inducing opportunities, where the next disruption is just waiting to happen, and regulatory changes and market shifts are certain, airports can proactively position themselves for success. The purpose of this Guide is to help both airport sponsors and prospective developers navigate the complex new statutory requirements under Section 163 and accomplish successful non-aeronautical development, moving toward greater financial resiliency for the airport and its community.

Additional in-depth review and FAQs are addressed in the following section.





# 7.0 FAQs and Background

## Section 163 and Airport Development Considerations

*What if an airport sponsor is mid-process and missed a step (or two) outlined in this Guide?*

It's okay! There is no way to address every scenario or every project. The Guide is intended to help you understand Section 163 and how it can apply to non-traditional airport development. If you are already underway, you can still use this Guide as a reference tool, and you may still catch issues early!

*How do you start if an airport is short-staffed or overwhelmed?*

Start at the beginning and make sure there is a basic understanding of your property, project and regulatory

process. Consider using outside consultants to help you prepare the appropriate strategy.

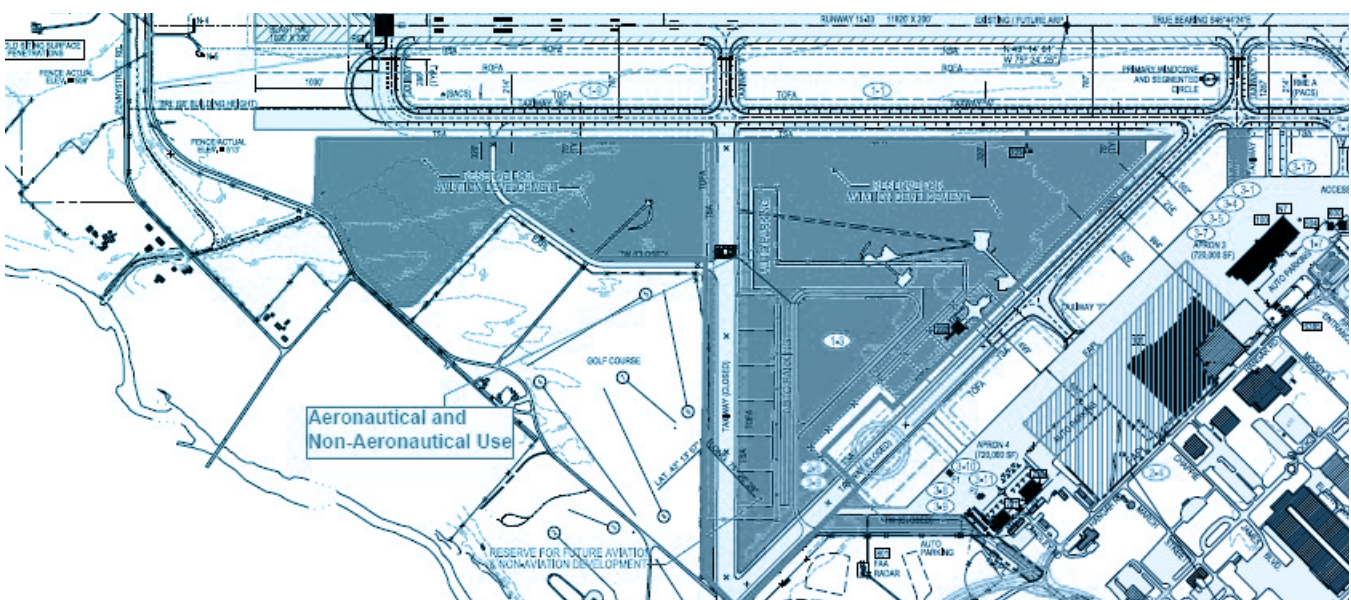
*What if your situation doesn't fit in the models discussed in this Guide?*

That's okay too. The Guide was written to help airports and their development partners understand the general process. The good news is the authors are always a phone call or e-mail away!

## Airport Layout Plans (ALPs)

*What is an Airport Layout Plan (ALP) and why is it important?*

Many airport sponsors prepare airport master plans. Review of these documents and the principles and



directions outlined in an Airport Master Plan can be helpful to guide any proposed airport development project. However, it is actually the **Airport Layout Plan (ALP)** drawing set, not a master plan, that is the key airport regulatory document. By definition, the ALP is a scaled set of drawings of current and future airport facilities that provide a graphic representation of the existing and long-term development plan for the airport. Practically speaking, the ALP set is the most significant regulatory document governing future development because on federally-obligated airports, development must be consistent with the ALP, and changes to the ALP can require FAA approval(s).

*The following questions highlight key “must knows” from the ALP set pertinent to on-airport development projects.*

### *What does the existing Airport Layout drawing tell me?*

The starting point for any discussion on proposed airport development is a review of the existing ALP drawing. This page reveals critical information including the extent of property owned by the airport sponsor and designated for airport purposes and the location and nature of existing and approved airport facilities and structures.

### *What’s the difference between aeronautical and non-aeronautical land on my ALP?*

The existing airport layout plan drawing depicts existing and approved land uses. In the context of planning for an airport development project, the critical question is whether land is designated for **aeronautical** or **non-aeronautical** uses because this distinction has significant regulatory implications.

All uses of the land, airspace, improvements, or airport facilities for any operational purpose related to, in support of, or complementary to the flight of aircraft at, to or from the airfield are considered aeronautical uses of

real property and the related property is referred to as aeronautical property. Traditionally, aeronautical property includes runways, taxiways, parking aprons, and any other areas used or intended to be used for supporting services and facilities related to the operation of aircraft. It also includes property normally required by those activities that are complementary to flight activity such as passenger service concessions and ground transportation.

All other uses of airport property that do not fall in the category above are generally considered non-aeronautical land uses. Examples of non-aeronautical land uses include, but are not limited to: non-airport vehicle and maintenance equipment storage, aircraft museums, municipal administrative offices, recreational facilities, industrial parks, agricultural or grazing leases, and retail businesses.

All land is presumed to be designated for aeronautical uses unless expressly designated for non-aeronautical uses. This is critical for development planning because land designated for aeronautical uses often cannot be used for non-aeronautical purposes without prior FAA approval – either approval of a “concurrent use of aeronautical property” or a more formal release from the obligation to use that land to support aeronautical activities. The implications of releases are discussed more fully earlier in this guide.

### *Does the ALP show where development is restricted?*

Yes, development restrictions can be seen on the ALP. The airport environment creates particular safety and security issues that impact the ability to develop land on or near the airport. FAA has implemented design standards<sup>1</sup> to ensure safety in the airport environment. Many design standards have the effect of restricting development. The following can be seen on the ALP:

<sup>1</sup> See FAA Advisory Circular 150/5300-13(A) Change 1, Airport Design (2014). Note, however, that FAA is in the process of updating this Advisory Circular.

**Runway Protection Zones (RPZs):** trapezoidal areas at ground level that extend beyond each runway end to enhance the safety and protection of people and property on the ground. FAA takes the position that:

- RPZs should be kept free of structures and any development that would create places of public assembly and incompatible activities.
- While there may be some exceptions for existing uses, new structures and roads cannot be built in an RPZ.



FAA has refocused its efforts to ensure that airports protect RPZs and RSAs from incompatible development.

**Runway Safety Areas (RSAs):** graded areas typically 500 feet wide and extending 1,000 feet beyond each end of the runway that serve as protection in the event that an aircraft overruns, undershoots, or veers off the side of the runway.

**Runway Object Free Areas (ROFAs):** areas which must remain clear of objects, except for objects that need to be located in the ROFA for air navigation or aircraft ground maneuvering purposes.

**Runway Obstacle Free Zones (ROFZs):** the three-dimensional airspace along the runway and extended runway centerline that is required to be clear of obstacles for protection for aircraft landing or taking off from the runway and for missed approaches.

**Building Restriction Lines (BRLs):** boundaries showing the areas that are suitable – and those that are not – for development.

### *What does the Future Airport Layout Drawing tell me?*

In addition to the existing ALP drawing, an ALP set also includes a future (or proposed or ultimate) ALP page, which is largely a planning document. The future ALP

illustrates the intentions of the airport in terms of future development and land use. While the FAA technically approves the future ALP when it approves the full ALP set, an airport sponsor often cannot change existing airport land uses to reflect land uses shown on a future ALP without additional FAA approval and attendant environmental reviews.

### *What do the Airspace and Approach/Departure Drawings tell me?*

The airspace and approach or departure drawings depict airspace surfaces that must be kept free of obstructions (i.e., development) in order to permit aircraft to safely arrive and depart from the airport. These surfaces are defined in Title 14, Part 77 of the Code of Federal Regulations (the so-called “Part 77” regulations). The Part 77 regulations call for a process to ensure that FAA reviews proposed structures before they are built to identify and mitigate any potential airspace hazards. The Part 77 process begins with the filing of FAA Form 7460 or 7480 (Notice of Proposed Construction or Alteration). The obligation to file the Part 77 notice is on the developer of the proposed construction project—not necessarily the airport sponsor—but the sponsor must file the Form 7480. Ultimately, if the FAA concludes that the proposed structure would constitute an obstruction and also would have a “substantial adverse effect,” then FAA issues a Determination of Hazard. While FAA has no authority to enforce its Part 77 Determinations, local building and zoning codes often prohibit proposed development based on an FAA Determination of Hazard.

### *What do the Airport Property Map and Exhibit A Property Map tell me?*

These maps reveal how each airport parcel was acquired. Airport sponsors often acquire property with federal assistance, either using federal grant funding or federal land transfer programs. For example, many airport sponsors received land from the federal government after World War II, under the Surplus Property Act, or more recently as part of a military base realignment and closure. In many cases, the manner of acquisition involves deed restrictions, or other conditions that affect

the future use of the property. As noted in this Guide, this is critical information for determining the outcome of a Section 163 determination. The ALP Property Map must include a data table that describes each of the various tracts of land acquired to develop the airport and whether any obligations were incurred as a result of obtaining the property (including obligations stemming from a federal grant or a federally-administered land transfer program).



The “Exhibit A” Property Map refers to the map appended as an exhibit to a grant agreement. It is often (but not always) the same as the Property Map from the ALP set.

### *What does it mean if the ALP shows the existence of “noise land”?*

Land acquired by the airport for noise mitigation is subject to specific rules regarding development and disposal and, in many cases, is treated fundamentally differently from other airport land. A full examination of the regulatory implications for the acquisition, use, and disposition of noise land is beyond the scope of this Guide. However, it is important to understand that the presence of noise land does have implications for development options.

While an oversimplification, the basic principle is that the FAA expects that a sponsor will retain most airport land indefinitely – regardless of the funding source for its acquisition – and, as a result, FAA approval is required for any sale of airport land. By contrast, some noise land is acquired with the expectation that the land will ultimately be sold or repurposed for a compatible land use. For example, property that was acquired as a measure set forth in a 14 C.F.R. Part 150 Noise Compatibility Program cannot be repurposed for other uses absent FAA approval<sup>2</sup>.

## FAA Grant Assurances

FAA exercises unique regulatory authority over airport management and operations arising from contractual commitments made by airport sponsors in consideration for grant funding through the Airport Improvement Program (AIP). These obligations, known as grant assurances, generally carry a 20-year duration from the date of the last FAA grant, although some are perpetual. There are 39 individual grant assurances covering a broad array of issues. This section provides a brief overview of the assurances most germane to non-aeronautical development.



The full set of Grant Assurances is available [online](#).

### *Grant Assurance 1 – Compliance with Federal Laws*

Under Grant Assurance 1, sponsors commit to compliance with a broad array of federal laws, including, but not limited to civil rights, labor relations, contracting with disadvantaged business enterprises, and other topics which are not necessarily common in the private sector. In addition, FAA requires that sponsors include a comparable set of contractual provisions in any airport lease or permit with a private sector entity that in many ways mirror the sponsor’s own obligations. The sheer number and breadth of these contractual provisions can be daunting for entities new to airport development projects.

### *Grant Assurance 22 – Economic Discrimination*

Airport sponsors must make the airport available as an airport for aeronautical 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

<sup>2</sup> FAA regulations at 14 C.F.R. Part 150 establish a voluntary program to study and develop solutions for a noise problem and permits airports to develop: (1) a noise exposure map (NEM) depicting present and future cumulative noise exposure and land use compatibility; and (2) a noise compatibility program (NCP) containing abatement and mitigation measures meant to address current and predicted future noise exposure.

the airport. Thus a sponsor may not be able to pursue a non-aeronautical use for land where there are aeronautical development opportunities.

### *Grant Assurance 24 – Self-Sufficiency*

As part of the grant assurance obligation to maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible, airport sponsors are obligated to secure (and document) full fair market value rent for any non-aeronautical uses of airport land.

### *Grant Assurance 25 – Limits on Revenue Use*

Airports that have accepted federal grants are obligated to operate as a closed fiscal system, meaning that all revenue generated at the airport (or on airport-owned real estate) must be used only for the capital and operating costs of the airport. Any use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, is unlawful “revenue diversion” and can subject the airport sponsor to severe penalties. Relevant to airport development projects, FAA has made clear that prohibited uses of airport revenue include: (1) the sponsor’s rental of land to, or the use of land by, a third party for non-aeronautical purposes at less than fair rental/market value; and (2) use of land by the sponsor for aeronautical purposes rent-free or for nominal rental rates.

### *Grant Assurance 29 – Airport Layout Plan*

Grant-obligated sponsors must keep an up-to-date ALP depicting all airport property and all aeronautical and non-aeronautical uses and improvements. Historically, sponsors could not make any change to the ALP – including new on airport development – without securing prior FAA approvals. In turn, these federal approvals could trigger the obligation to perform environmental reviews under NEPA. As discussed in this Guide, this assurance was modified significantly by the enactment of Section 163.

## **FAA Reauthorization Act of 2018, Section 163. Limited Regulation of Non-Federally Sponsored Property**

- (a) IN GENERAL.—Except as provided in subsection (b), the Secretary of Transportation may not directly or indirectly regulate—
- (1) the acquisition, use, lease, encumbrance, transfer, or disposal of land by an airport owner or operator;
  - (2) any facility upon such land; or
  - (3) any portion of such land or facility.
- (b) EXCEPTIONS.—Subsection (a) does not apply to—
- (1) any regulation ensuring—
    - (A) the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations;
    - (B) that an airport owner or operator receives not less than fair market value in the context of a commercial transaction for the use, lease, encumbrance, transfer, or disposal of land, any facilities on such land, or any portion of such land or facilities; or
    - (C) that the airport pays not more than fair market value in the context of a commercial transaction for the acquisition of land or facilities on such land;
  - (2) any regulation imposed with respect to land or a facility acquired or modified using Federal funding; or



- (3) any authority contained in—
  - (A) a Surplus Property Act instrument of transfer, or
  - (B) section 40117 of title 49, United States Code.

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

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

- (1) by striking subparagraph (B) and inserting the following:
  - “(B) the Secretary will review and approve or disapprove only those portions of the plan (or any subsequent

revision to the plan) that materially impact the safe and efficient operation of aircraft at, to, or from the airport or that would adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations, or that adversely affect the value of prior Federal investments to a significant extent;”;

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

“unless the alteration—  
 “(i) is outside the scope of the Secretary’s review and approval authority as set forth in subparagraph (B); or  
 “(ii) complies with the portions of the plan approved by the Secretary; and”;

- (3) in subparagraph (D), in the

matter preceding clause (i), by striking “when an alternation” and all that follows through “Secretary, will” and inserting  
 “when an alteration in the airport or its facility is made that is within the scope of the Secretary’s review and approval authority as set forth in subparagraph (B), and does not conform with the portions of the plan approved by the Secretary, and the Secretary decides that the alteration adversely affects the safety, utility, or efficiency of aircraft operations, or of any property on or off the airport that is owned, leased, or financed by the Government, then the owner or operator will, if requested by the Secretary”.