

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.



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