

Strings Attached—Permissible Uses of Airport Property and Revenue

July 26, 2022



Today's Learning Objectives

- **Identify the relationship between use of airport property and use of airport revenue**
- **Navigate current regulatory requirements for non-aeronautical development on airports**
- **Obtain approvals for real estate development on airports**

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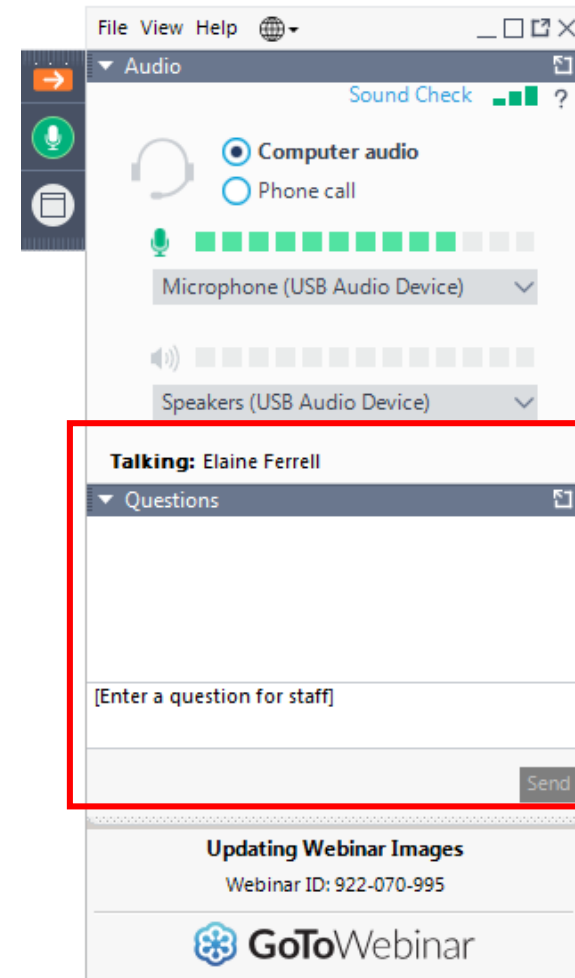
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Questions and Answers

Please type your questions into your webinar control panel

We will read your questions out loud, and answer as many as time allows

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Elizabeth Smithers

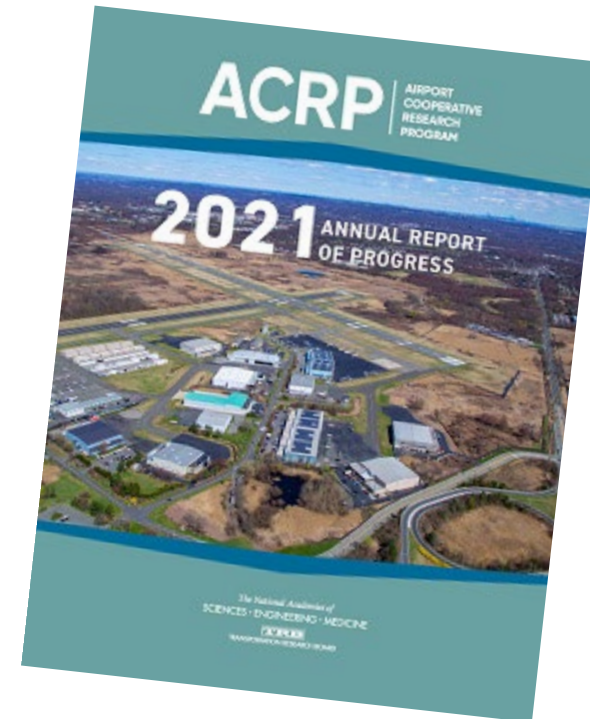
Charlotte Douglas International Airport

- Senior Assistant City Attorney
- Chair of the ACRP Legal Panel
- Young Professional member of the ACI Legal Steering Committee
- 10+ years of Aviation Legal experience
- Supporting Technology, Innovation & Experience, ADA, Title VI, Public Art and Public Records



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- Publishes and disseminates research results through free publications and webinars.



Today's Speakers

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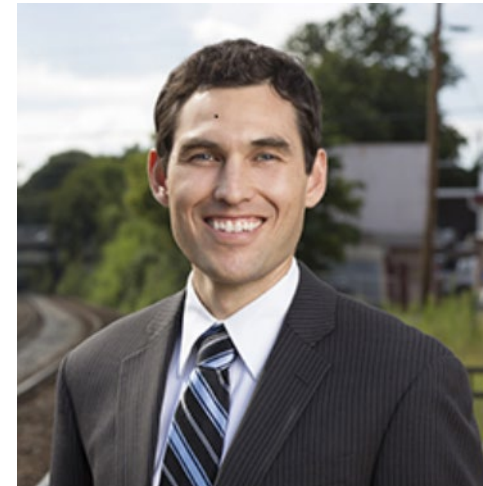
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Strings Attached: Permissible Use of Airport Revenue and Property

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Speakers

Christian L. Alexander

- Lawyer focusing on development and operation of transportation systems – airports and rail
- Co-author of LRD 40, “Permissible Uses of Airport Property and Revenue” (2020)
- J.D. University of Colorado
- B.A. Amherst College



Peter J. Kirsch

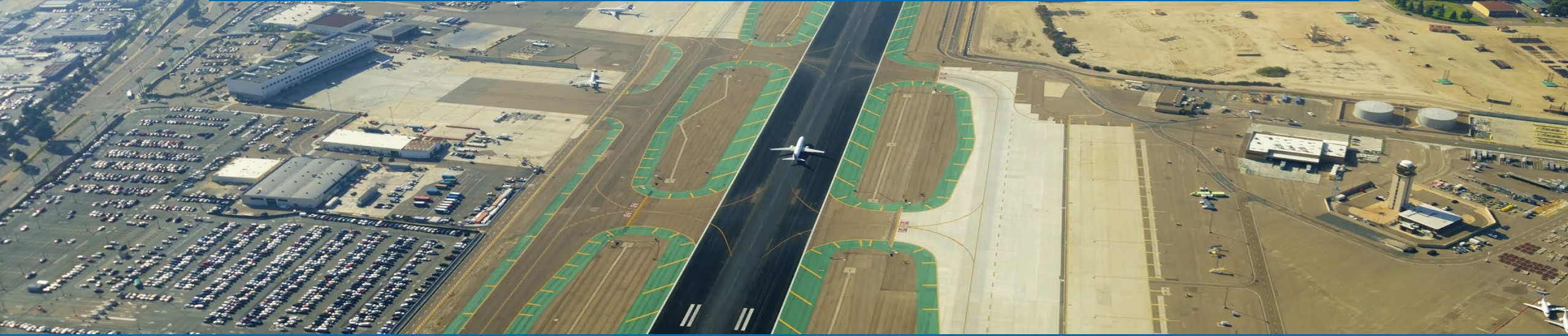
- Lawyer representing airport sponsors in complex developments, financial matters and in regulatory compliance
- Co-author of LRD 40, “Permissible Uses of Airport Property and Revenue” (2020)
- J.D. University of Chicago
- B.A. Oberlin College



Outline

- I. Background and context
- II. Federal regulation of airport revenue and property
- III. Section 163 and new limits on FAA authority

I. Background and Context



Public ownership and funding of U.S. airports

- The vast majority of public-use airports in the U.S. are owned by local governments or government authorities
- Many airport properties were conveyed by the federal government (post-WWII wind-down)
- Nearly all have received some form of federal grant support, which always includes substantial cradle-to-grave regulation of airport operations and property use



Trends affecting revenue/property use



Historical perspective --

- Air travel has been supported to benefit traveling public and boost regional economic activity
- Airport property to be used primarily for airport functions and as buffer

More recently --

- Airports have become economic hubs themselves – e.g. the Airport City concept
- Airport property recognized as a valuable asset that can generate revenue
- Pressure to reduce costs, attract passengers/service, increase revenue and revenue streams

Calculus framing use of airport land/revenue

- **Who pays the costs of airport development?**
 - Local government/tax-payers vs. federal government/tax-payers
- **Who receives the economic benefits of airport investment?**
 - Local communities, passengers, airlines
- **How are the two balanced fairly?**



Federal regulation of airports

- **Federal subsidies = regulatory hook for federal requirements**
- **Vehicle for regulation: contractual Grant Assurances; deeds; statute**
 - Grant Assurances required by statute, 49 U.S.C. 47107(b)
 - Also direct federal requirements for federal assistance, 49 U.S.C. 47133
- **Grant Assurances/deed conditions include:**
 - Restrictions on use of revenue
 - Restrictions on use and transfer of property
 - Comprehensive regulation of financial matters, contractual relationships with tenants, environmental, record-keeping, etc.



Federal subsidies for airports

- **Federal government has substantial capital investment in airports to ensure a safe, efficient, and national air transportation system**
- **Main forms of subsidies:**
 - land transfers/gifts,
 - funding for land acquisition,
 - funding for airport planning and development projects
- **Opportunity for implementing federal policies at local airport level**



Goals of federal regulation of airport revenue and property

- ✓ **Use all airport-generated revenue for airport purposes**
- ✓ **Keep charges to airport users reasonable**
- ✓ **Promote airport self-sufficiency through encouraging nonaeronautical revenue streams**
- ✓ **Provide federal funding for strategic/critical projects and planning of airport development**

Why talk about airport revenue and land together?

- Federal subsidies come in the form of both funding and land
- Real estate can be monetized
- Airport property used inefficiently or for non-airport purposes effectively “diverts” potential or actual airport revenue from use for legitimate airport purposes

Federal regulation of airport revenue

General rule:

- All airport revenue and aeronautical property must be used for airport/aeronautical purposes

Justification:

- Airports should be self-sufficient; federal government cannot cover full costs of investment
- Considerable federal investment should not subsidize local non-aviation activities



Permissible uses of “airport revenue”

- **Statutory rule - airport revenue can be used *only* for the capital and operating costs of:**
 - (A) the airport;
 - (B) the local airport system; or
 - (C) 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.
- **Rule applies to vast majority of public use airports – BUT... specific obligations may depend on history of funding and deeds to airport property**

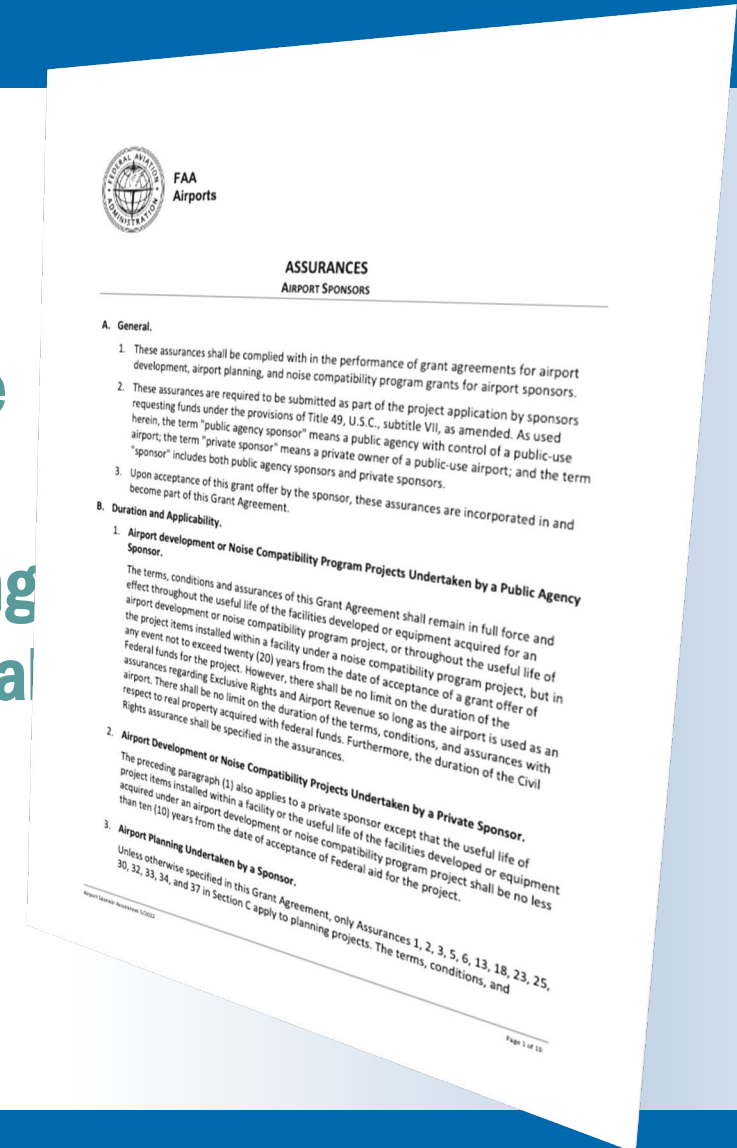
FAA's definition of "airport revenue"

- **Payments to airport proprietor for use of airport property and proprietor-provided services**
 - From both aeronautical and nonaeronautical users: air carriers, tenants, concessionaires, lessees, purchasers of airport property; airport permit holders
- **Payments derived from sale or transfer of airport property and resources**
- **Revenue from state and local taxes on airport services and functions (e.g. fuel tax)**



Relevant Grant Assurances

- **GA 22: Make airport available for public use on reasonable terms without unjust discrimination**
- **GA 24: Airport must have rental structure that makes the airport as self-sustaining as possible**
- **GA 25: All revenues must be spent on capital or operating costs of the airport; the local airport system; or other local airport facilities related to air travel**

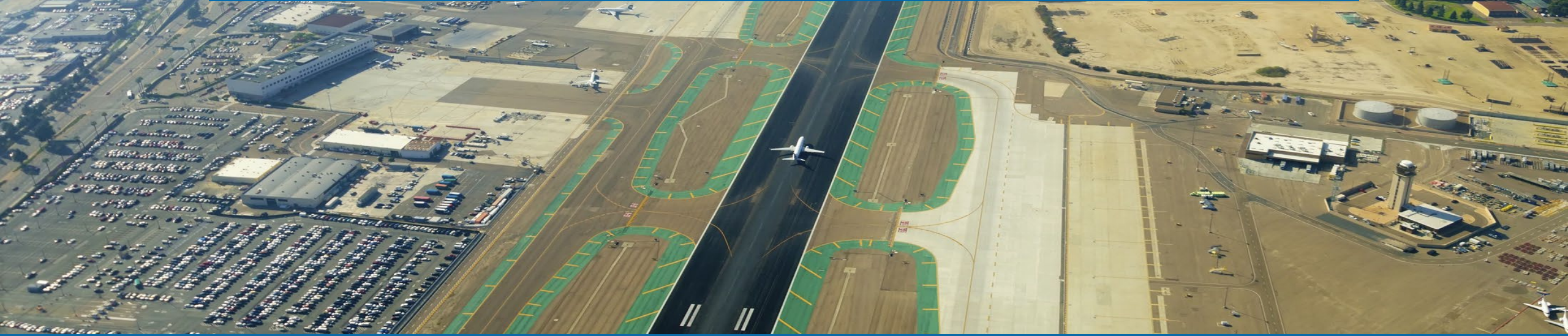


What is *not* considered “airport revenue”

- Revenue generated by airport tenants themselves from their activities or sale of their own goods and services
 - But revenue from services provided by airport proprietor itself is airport revenue
- Grandfathered state and local taxes; ancillary special taxing districts
- Parking tickets and police fines
- Passenger Facility Charges (PFCs)—but similar restrictions apply to PFC revenue

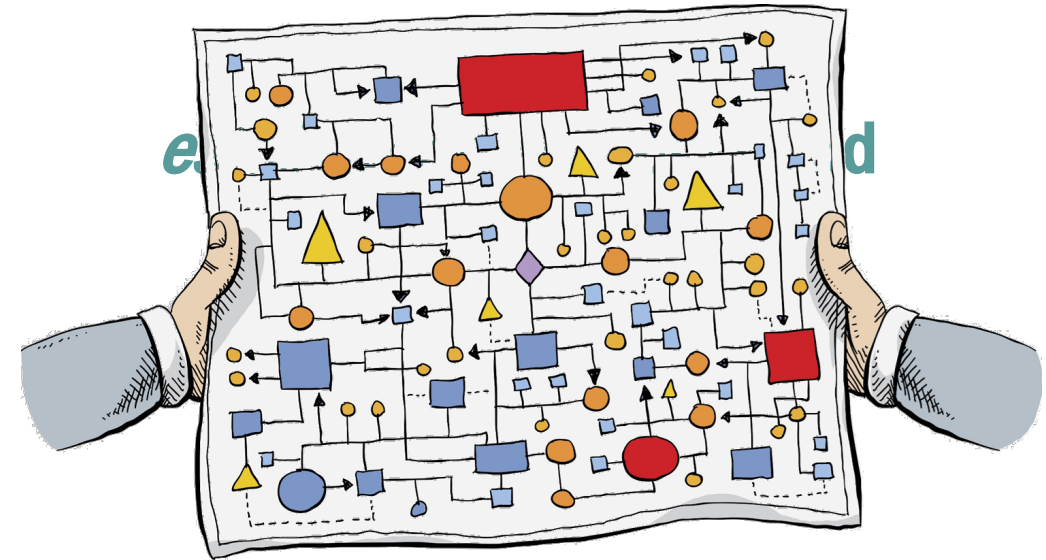


II. Federal Regulation of Airport Revenue and Property

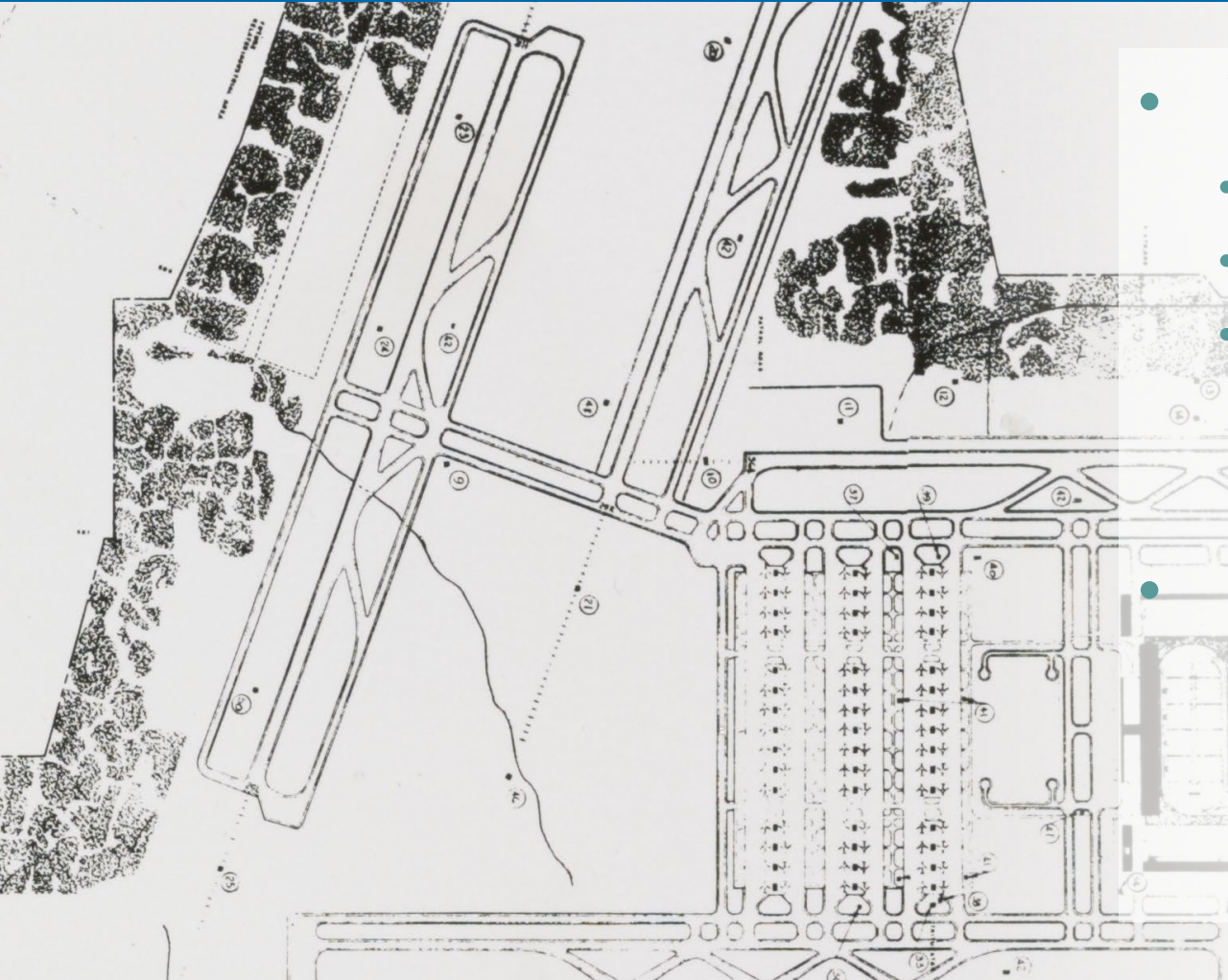


Real estate history

- **History of acquisition and use of airport land critical for understanding scope of regulatory burdens**
- **Not always easy – poor recordkeeping, old and incomplete documents are common**
- **Airports often proactively do a *real***
 - - What land the airport owns
 - How the land was purchased
 - What it is being used for



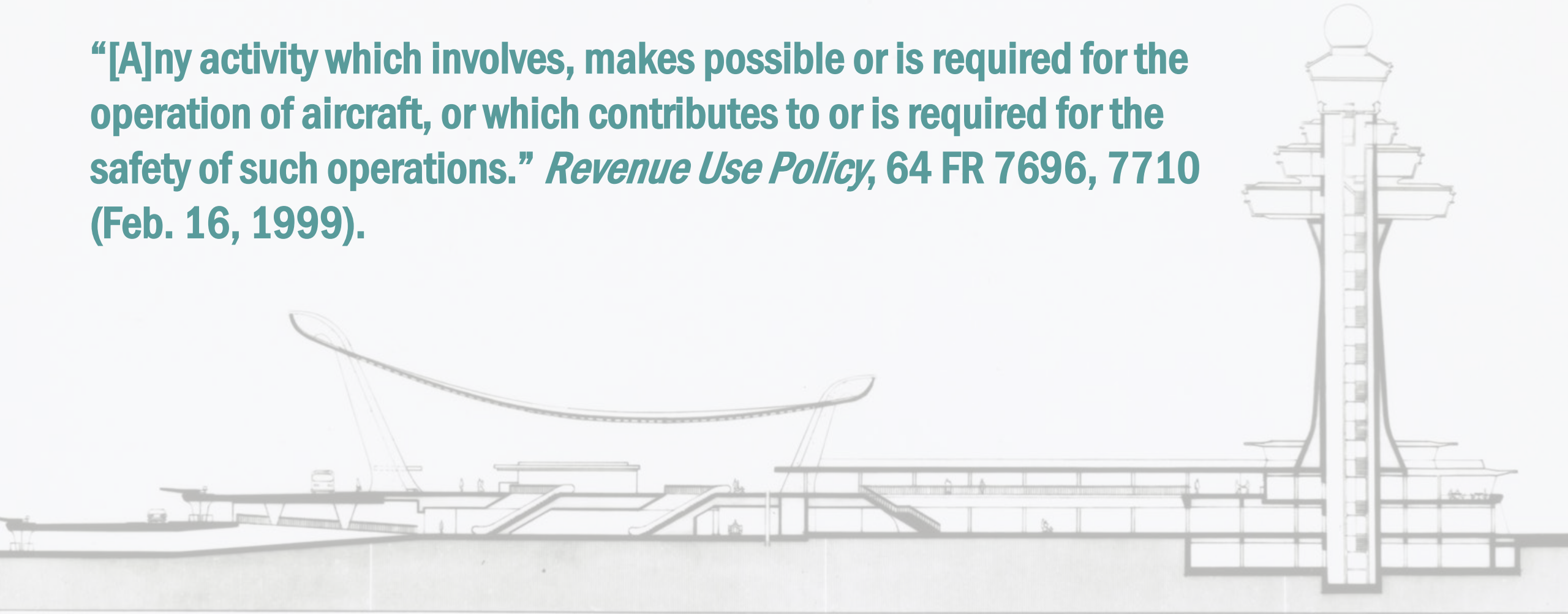
Understanding land use restrictions



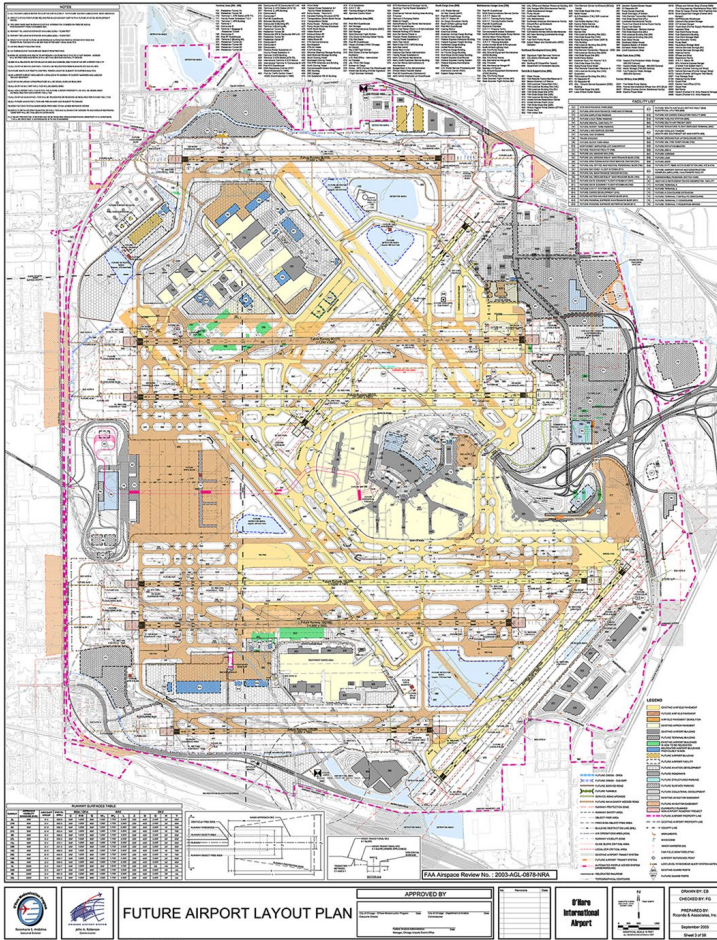
- **Was land at the airport:**
 - Acquired from the federal government?
 - Acquired with federal (AIP) funding?
 - Acquired by a grant-obligated owner and is dedicated for airport purposes
- **If yes to any of the above, then use of that property is regulated and must generally be approved by FAA**

Definition of “aeronautical use”

“[A]ny activity which involves, makes possible or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations.” *Revenue Use Policy*, 64 FR 7696, 7710 (Feb. 16, 1999).



“Dedicated” for airport purposes



- Grant Assurances require grant recipients to prepare Airport Layout Plans (ALPs)
- Prior to 2018, FAA interpreted requirements to mean that any property identified in ALP as “airport property” was subject to federal grant assurance requirements
- We will discuss important change in law in 2018 later in this presentation

Revenue from land – aeronautical vs. nonaeronautical

- **Nonaeronautical airport revenue: Airport sponsor must receive fair market value**
 - Limited exceptions for community/public uses
- **Aeronautical airport revenue: Airport must balance “self sufficiency” considerations with “reasonable rates”/no-surplus requirements**

Historical exceptions for non-aeronautical use of airport property designated for aeronautical use

“Concurrent use” – non-aeronautical use is compatible with aeronautical use

- E.g., agricultural lease of runway clear zone area
- Cannot degrade aeronautical use or potential
- User must pay FMV; revenue must be use for airport purposes
- No need for formal FAA release of property

“Interim use” – temporary nonaeronautical use of aeronautical property pending aeronautical use

- Designation requires FAA approval
- Not granted if interim use is incompatible, or there is a demonstrated aeronautical demand for property
- Interim use should not last more than five years

Noise land and noise buffer land



- **AIP funding is available to acquire noise-affected land, i.e. “noise land” ...of course, strings are attached:**
 - Disposed of at FMV when no longer needed for noise compatibility purposes
 - Proceeds reinvested in airport
 - Alternatively, converted to airport property (normally aeronautical use)
 - “Noise buffer land” may be leased at fair market value for airport-compatible uses

Disposal of airport land

- Generally requires FAA approval or release from federal obligations
- Airport must receive fair market value
- Proceeds are considered airport revenue
- If land acquired from the government or with federal assistance, proceeds must be reimbursed to federal government or used for another FAA-authorized airport purpose

Violations for impermissible use of airport revenue and property

- **“Diversion” of airport revenue is a violation of Grant Assurances/deed and federal law.**
- **Enforcement options:**
 - Withholding future grants
 - Withholding approval of PFC applications
 - Withholding other federal transportation funding
 - Civil penalties (3x amount of diverted revenues)
 - Seeking injunctive relief, reimbursement, and monetary penalties in federal district court
- **Most federal deeds contain a reversion in the event of noncompliance with use!**



Prohibited uses of airport revenue

Payments (direct or indirect) for anything other than the value of service and facilities provided to the airport; includes:

- General economic development costs; marketing and promotional activities unrelated to the airport
- State and local taxes, and payment in lieu of taxes (except for value of services provided)
- Loans to local governments without interest
- Use of property without rent (FMV for nonaeronautical uses)
- Direct subsidies to air carriers (outside of temporary promotional programs)

III. Section 163 and new limits on FAA authority



The place we find ourselves...



The economic problem

- ◆ Pressure to reduce aeronautical charges
- ◆ Need for new, creative revenue sources
- ◆ Unused (potentially valuable) real estate
- ◆ Complex and uncertain process to develop land



Setting the stage



- **Non-aeronautical development:**
 - ➔ Established approach, known complexities, multiple considerations...
- **Everything in light of Section 163**

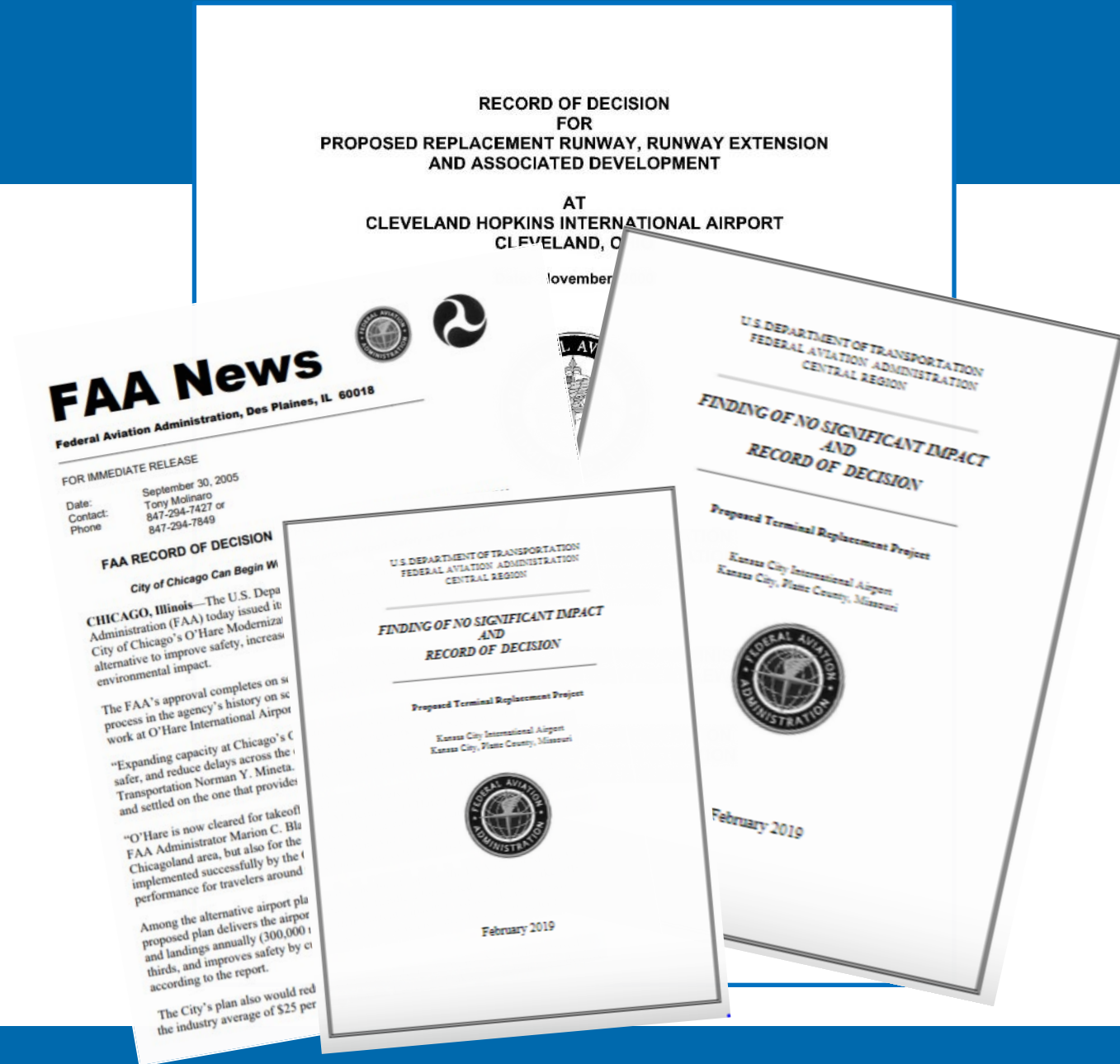
Graphic: <https://www.sasaki.com/projects/den-real-estate-strategic-development-plan/>

Overview

- Historically FAA has had approval authority over virtually *all* airport development

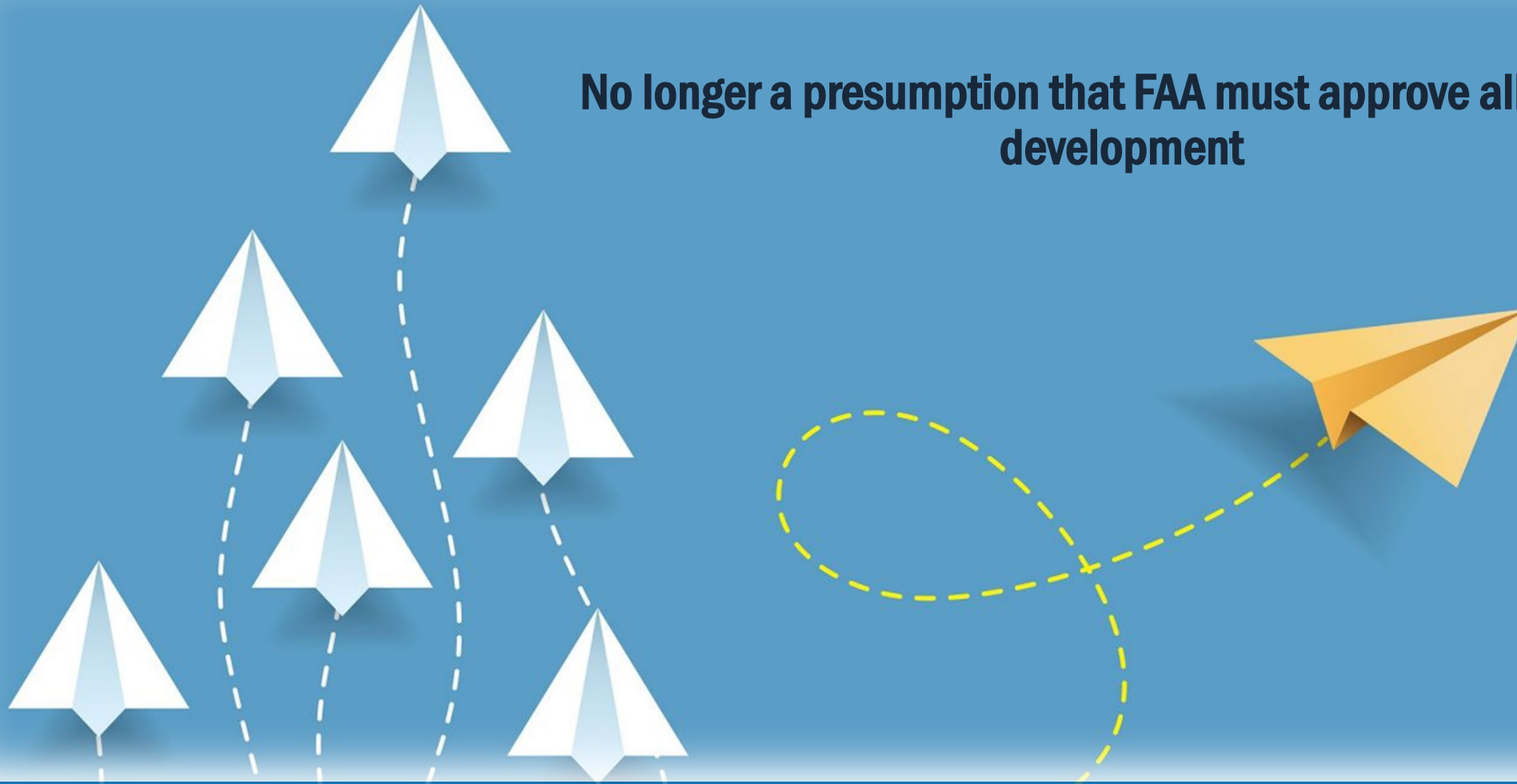
- FAA approval has meant –

- Environmental review
- Federal scrutiny outside agency expertise
- Complex process



Section 163: a paradigm shift

No longer a presumption that FAA must approve all airport development



Effect of FAA review on private development

Confusion

Uncertainty

Competitive disadvantage

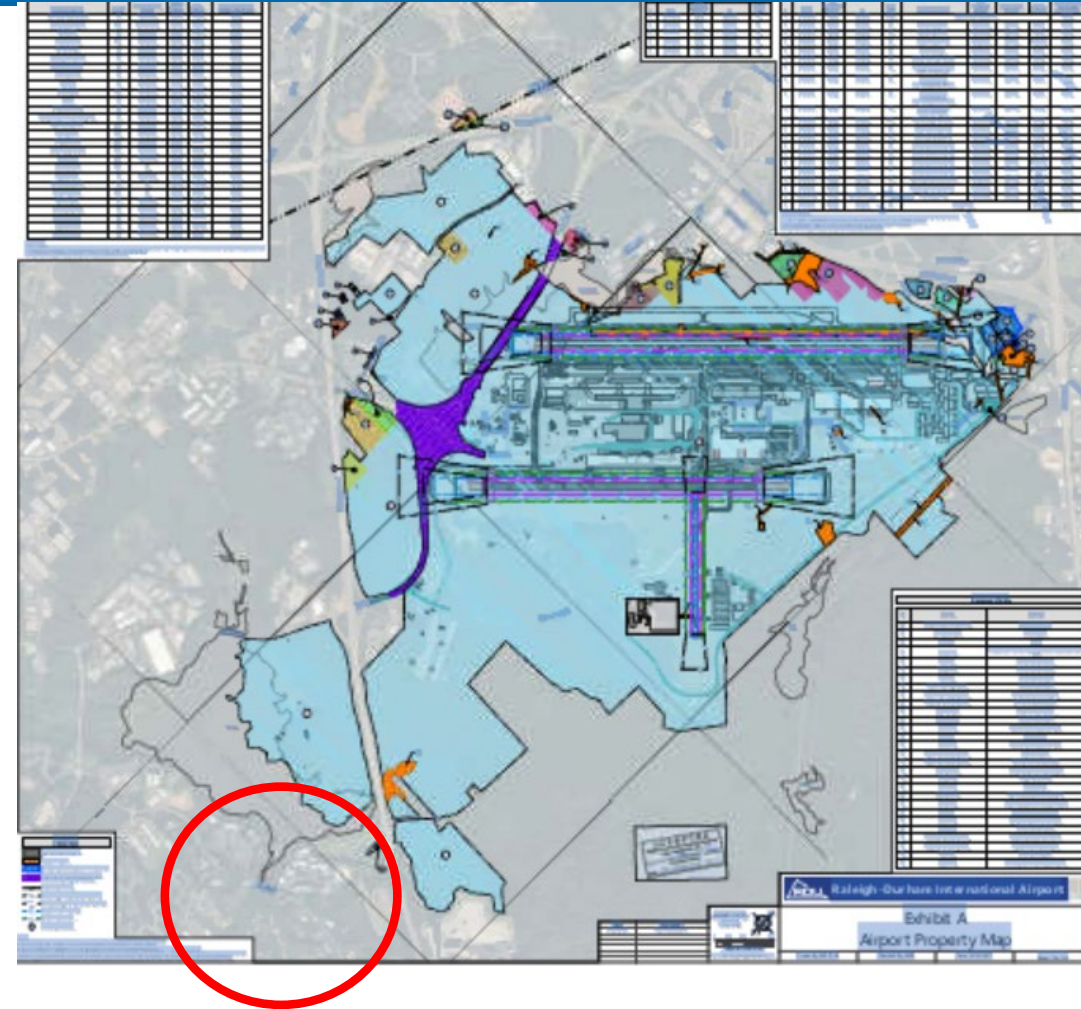
Time

Cost



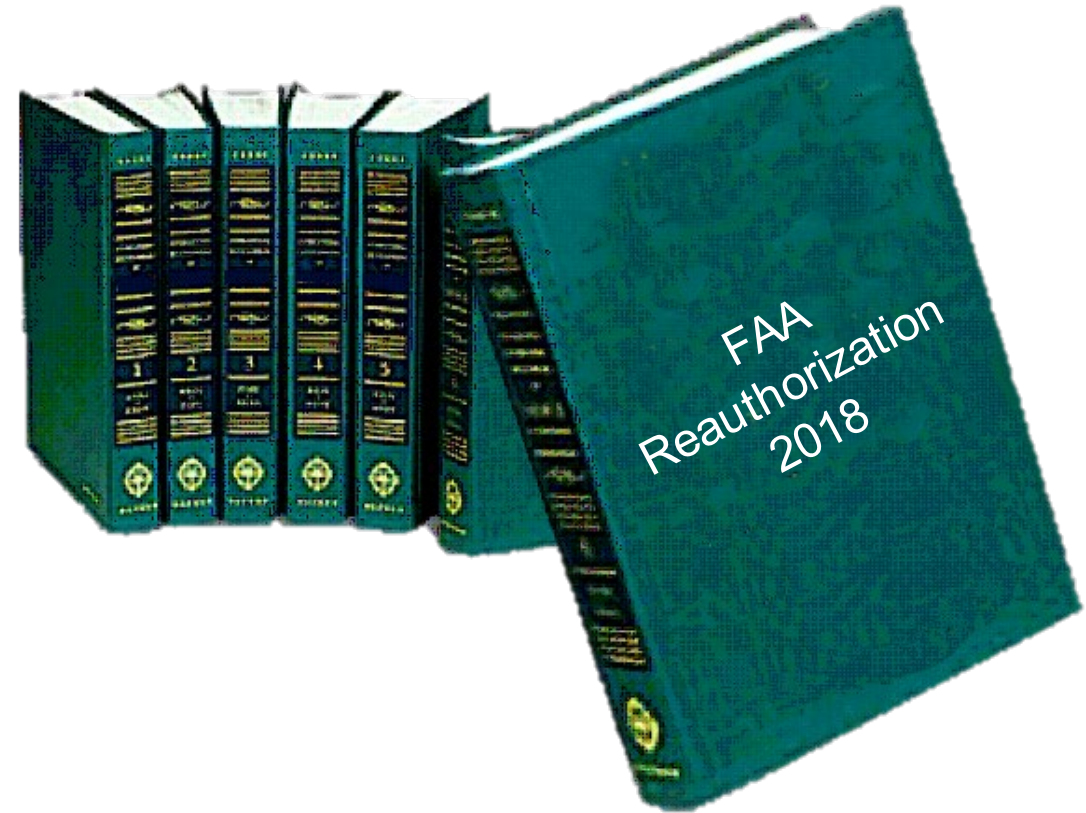
FAA Reauthorization Act of 2018 – Section 163

- **Congressional purpose in enacting Section 163:**
 - Eliminate FAA review over land use that is not core to its mission
 - Streamline and expedite airport development projects
 - Give airport sponsors increased *(but not unlimited)* autonomy to make land use decisions



What has changed?

- **163(a)** – Limits FAA jurisdiction and authority over airport land use
- **163(b)** - Exceptions where FAA retains jurisdiction
- **163(c)** - Preserves FAA authority over airport revenue
- **163(d)** – Limits FAA approval authority over ALPs



Land use regulation – actual statute text

(a) The Secretary of Transportation **may not** directly or indirectly regulate—

- the acquisition, use, lease, encumbrance, transfer, or disposal of land by an airport owner or operator; any facility upon such land; or any portion of such land or facility

(b) [FAA **may** regulate for the purpose of] ensuring—

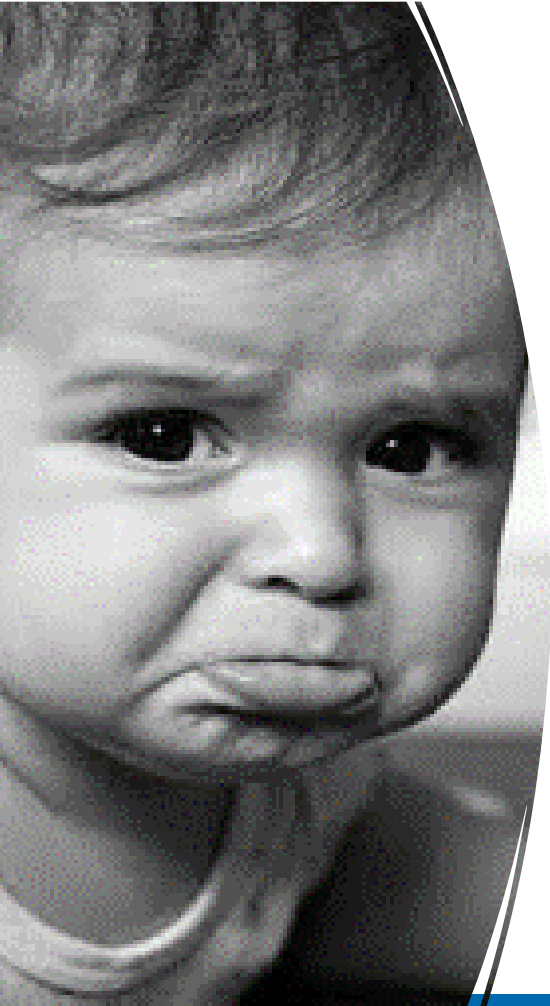
- (A) the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations;
 - (B) that an airport owner or operator receives not less than fair market value or
 - (C) that the airport pays not more than fair market value
- (2) any regulation imposed 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

Changes in ALP approval

(d) The Secretary will review and approve or disapprove only those portions of the [ALP] that materially impact the safe and efficient operation of aircraft . . . or that would adversely affect the safety of people or property on the ground adjacent to the airport . . . or that adversely affect the value of prior Federal investments to a significant extent

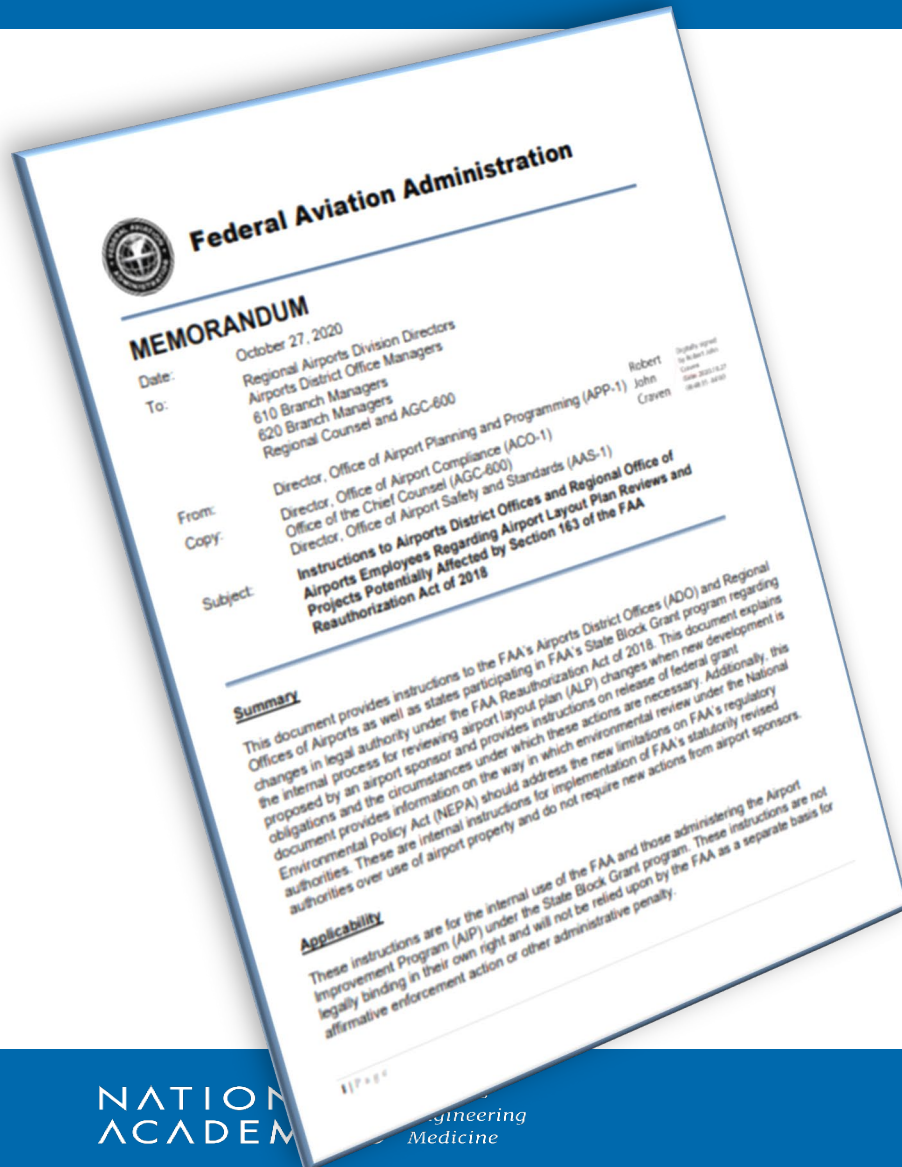


What **hasn't** changed



- **Obligation to maintain a current, up-to-date ALP**
- **Fair market value obligations**
- **Airspace review (Part 77)**
- **Federal revenue use requirements**
- **Grant assurances**

FAA (internal) guidance



- ◆ Made public in late November 2020 (dated 10/27/20)
- ◆ Structured as *internal* guidance only
- ◆ Screening process for all FAA approvals

New concept: FAA's zones of interest



Materially impact the safe and efficient operation of aircraft at, to, or from the airport



Adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations



Adversely affect the value of prior federal investments to a significant extent

Zones of interest

“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...”

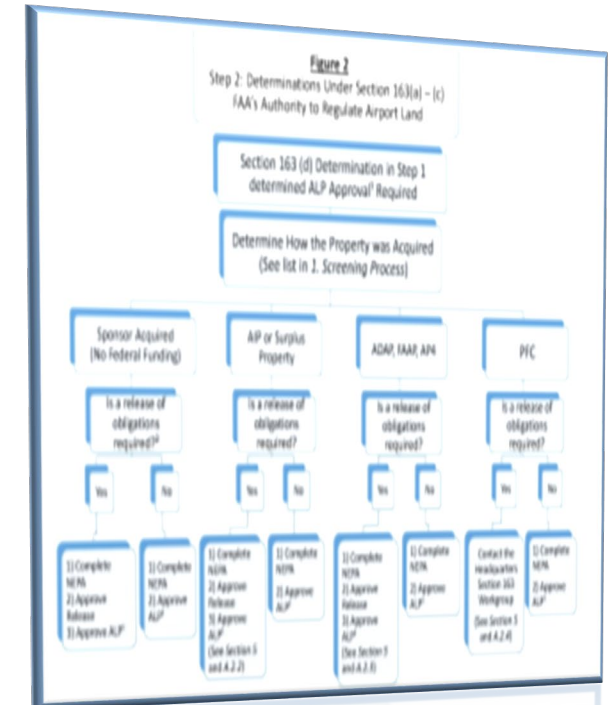
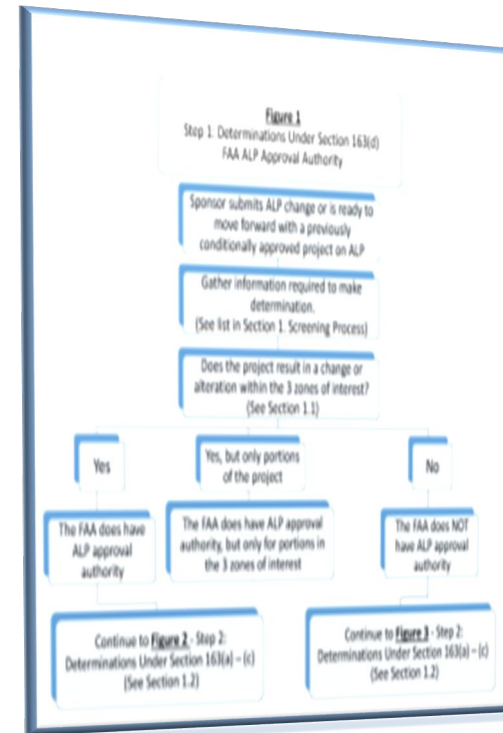
Screening process

Is there ALP approval authority – 163(d)?

→ Is project within FAA’s “zone of interests”

How was the property acquired – 163(a)?

- Land and facilities acquired or modified using Federal funding;
- Surplus Property Act instruments of transfer; and
- Passenger Facility Charge (PFC) statute



Is 163 good for airports?

BENEFITS

Considerably shorten approval process

Avoid NEPA and other environmental laws

Make commercial development more competitive

Minimal FAA engagement

RISKS

No public process

No FAA funding available (AIP, PFC, etc.)

Minimal FAA engagement (protection against political pressure)

Getting started after 163: some initial questions

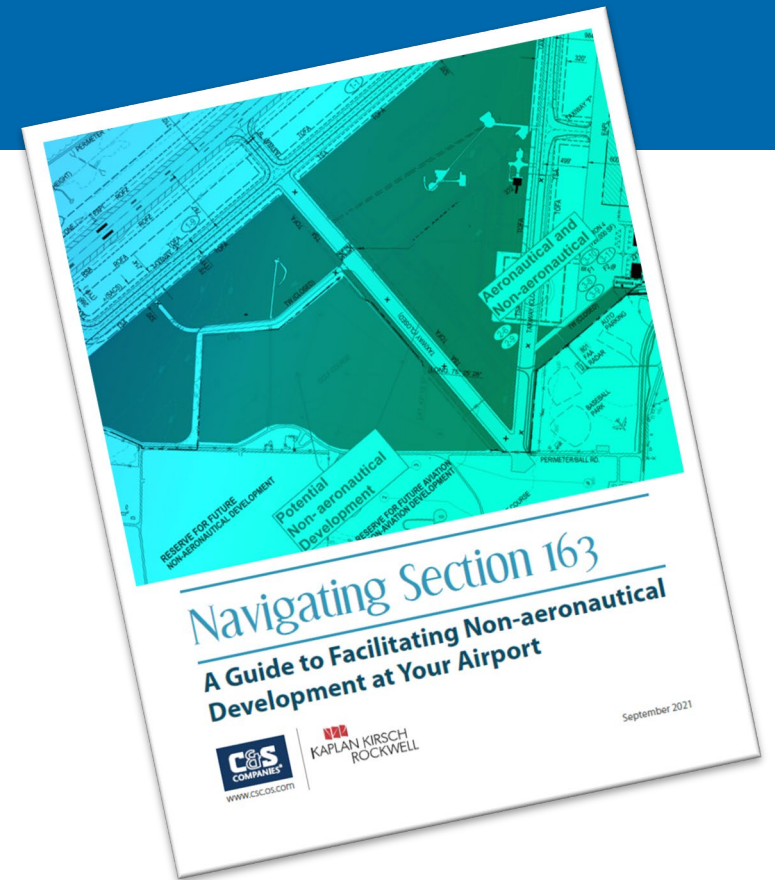
- **How was the property acquired (e.g., local funds, AIP, Surplus Property Act)**
- **Why was the property acquired (e.g., aeronautical, approach protection, noise)**
- **What is the property to be used for**
- **How does the project affect aeronautical functions**
- **Can pieces of the project be separated**

FOR ADDITIONAL INFORMATION



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[Section163.com](https://www.faa.gov/airports/planning_capacity/media/Section-163-Final-Instructions-October-2020.pdf)

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Today's Speakers

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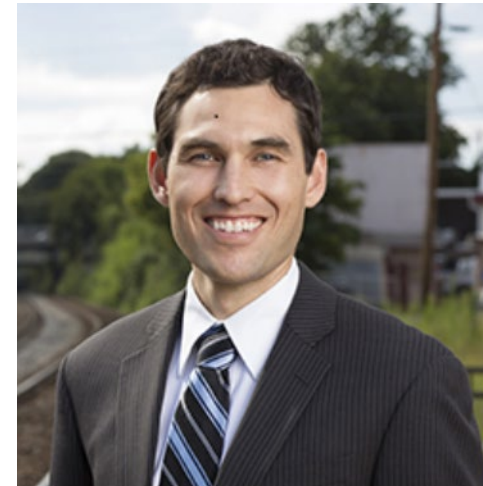
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Conference on Scenario Planning in Transportation

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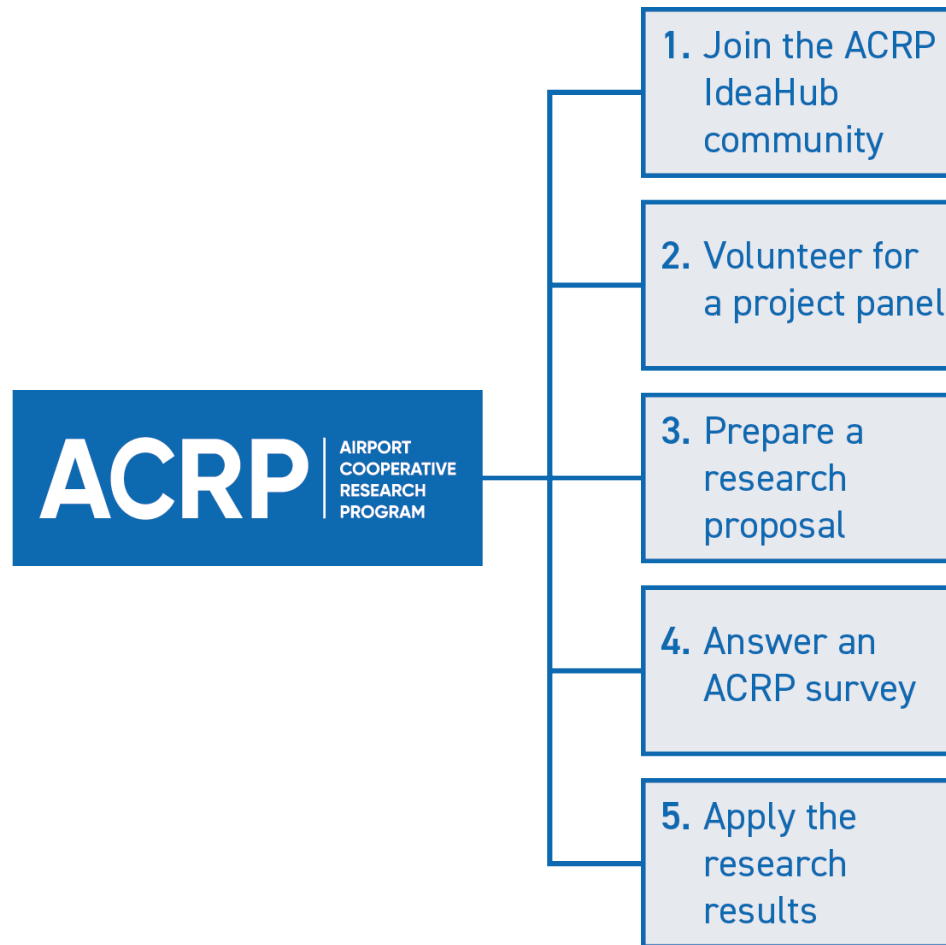
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Research Report 213: *Estimating Market Value and Establishing Market Rent at Small Airports*

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