



# TransLaw

## Federal Regulation of Airports: Rethinking the Appropriate Role\*

Thomas R. Devine and Christian L. Alexander

One of the most difficult things for lawyers to comprehend when they first begin to represent airports is the extent to which the federal government regulates airports without codified regulations.<sup>1</sup> Many of us who practice in this area have been swimming in this murky sea for so long that we just accept that this is the way it is, without really questioning whether it actually makes sense or is a reasonable way to govern. It would be interesting to see how the experience of those of us concerned with federal regulation of airports compares to that of practitioners who represent recipients of other federal transportation grants.

Certainly the federal restrictions on airports are not intuitively obvious to local political leaders, or even the general public. Many airport attorneys have heard some variation of the following questions, from political leaders and interested citizens: You mean we can't use funds generated by our airport for other city/county/state projects? Why can't we restrict the operations of the noisiest aircraft? Can we provide incentives for low-fare

carriers, so we can get our sky-high airfares down? And so on.

A primary mechanism for regulation is the array of grant assurances imposed on airports for accepting federal airport grants under the Airport Improvement Program (AIP), and related policies and orders. There are no codified regulations associated with the AIP.<sup>2</sup> Instead, the FAA utilizes its Airport Improvement Program Handbook to implement the Airport and Airway Improvement Act of 1982 (AAIA),<sup>3</sup> although the Handbook is not regulatory.<sup>4</sup> Subject areas in which the federal government regulates airports without codified regulations include use of airport

revenues, airport rate-setting,<sup>5</sup> the use of airport property, and landlord-tenant (or operator-user) relations.

### Links Between Federal Funding and Federal Regulation of Airports

In 1970, in response to congestion and capacity concerns at airports around the country, Congress established the Airport Development Aid Program and the Planning Grant Program, and created the Airport and Airway Trust Fund (AATF) to pay for federal aid to airports through levies on aviation users and fuel.<sup>6</sup> These programs tied revenue from federal aviation user taxes directly to FAA funding of airport capital development, in contrast to the previous practice of funding FAA capital grants through the general fund of the U.S. Treasury.<sup>7</sup>

In 1982, after two years in which Congress failed to authorize taxes supporting the AATF, it passed the Airport and Airway Improvement Act of 1982

<sup>5</sup>However, in reviewing the DOT/FAA Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996), the Court of Appeals stated that, "[a]lthough he calls it a Final 'Policy,' the Secretary has clearly promulgated a rule." *Air Transp. Ass'n of America v. U.S. Dep't of Transp.*, 119 F.3d 38, 40 n.3 (D.C. Cir. 1997).

<sup>6</sup>Cong. Research Service, *Airport Improvement Program (AIP): Reauthorization Issues for Congress* [hereinafter Cong. Research Service] (2009) at 3.

<sup>7</sup>Cong. Budget Office, *The Status of the Airport and Airway Trust Fund* [hereinafter Cong. Budget Office] (1988) at 4.

<sup>2</sup>To further confuse matters, however, there are still regulations on the books associated with the prior, superseded federal airport grant programs: 14 C.F.R. Parts 151 and 152 (2011), relating to the Federal Aid to Airports Program (FAAP) and the Airport Development Aid Program (ADAP), respectively. The statutory authorities for those programs, the Federal Airport Act of 1946 and the Airport and Airway Development Act of 1970, were repealed in 1970 and 1982, respectively.

<sup>3</sup>Pub. L. 97-248, 96 Stat. 671, as amended and recodified without substantive change at 49 U.S.C. § 47101 *et seq.* (2006).

<sup>4</sup>The Airport Improvement Program Handbook "provides guidance and sets forth policies and procedures for the administration of the Airport Improvement Program (AIP) by the Federal Aviation Administration (FAA)." Order 5100.38C (June 28, 2005) (available through FAA website at [www.faa.gov](http://www.faa.gov)).

*The views expressed herein do not necessarily reflect the views of any KKR client, the Federal Bar Association, the Transportation and Transportation Security Law Section, or any government agency.*

<sup>1</sup>Regulations concerning certain aspects, primarily safety-related, of airport facilities and operations are contained in 14 C.F.R. Part 139 (2011). This article discusses regulation of airports beyond the scope of Part 139.

**AIRPORTS continued on page 6**

## Also In This Issue...

CHAIR'S CORNER.....	P. 3
LETTER FROM THE EDITOR.....	P. 3
RECENT SECTION EVENTS PROVIDE NETWORKING AND EDUCATIONAL OPPORTUNITIES .....	P. 4

## Who's Who in the DOT and TSA

### IMMEDIATE OFFICE OF THE SECRETARY OF TRANSPORTATION

Ray LaHood  
*Secretary of Transportation*

Joan DeBoer  
*Chief of Staff*

Marlise Streitmatter  
*Deputy Chief of Staff*

### OFFICE OF THE DEPUTY SECRETARY

John Porcari  
*Deputy Secretary*

### OFFICE OF THE ASSISTANT SECRETARY FOR TRANSPORTATION POLICY

Polly Trottenberg  
*Assistant Secretary for Transportation  
Policy*

### OFFICE OF THE ASSISTANT SECRETARY FOR AVIATION AND INTERNATIONAL AFFAIRS

Susan Kurland  
*Assistant Secretary for Aviation and  
International Affairs*

### OFFICE OF THE GENERAL COUNSEL

Robert S. Rivkin  
*General Counsel*

Judith S. Kaleta  
*Deputy General Counsel*

James Cole Jr.  
*Deputy General Counsel*

### FEDERAL AVIATION ADMINISTRATION

Michael Huerta  
*Acting Administrator*

Kathryn B. Thomson  
*Chief Counsel*

### FEDERAL HIGHWAY ADMINISTRATION

Victor Mendez  
*Administrator*

Fred Wagner  
*Chief Counsel*

### FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Anne S. Ferro  
*Administrator*

Scott Darling  
*Chief Counsel*

### FEDERAL RAILROAD ADMINISTRATION

Joseph C. Szabo  
*Administrator*

Melissa Porter  
*Chief Counsel*

### FEDERAL TRANSIT ADMINISTRATION

Peter M. Rogoff  
*Administrator*

Dorval R. Carter Jr.  
*Chief Counsel*

### MARITIME ADMINISTRATION

David Matsuda  
*Administrator*

Franklin R. Parker  
*Chief Counsel*

### NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

David L. Strickland  
*Administrator*

Kevin Vincent  
*Chief Counsel*

### PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

Cynthia L. Quarterman  
*Administrator*

Vanessa Allen Sutherland  
*Chief Counsel*

### RESEARCH AND INNOVATIVE TECHNOLOGY ADMINISTRATION

Gregory Winfree  
*Acting Administrator*

Ellen Partridge  
*Chief Counsel*

### SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION

Collister (Terry) Johnson Jr.  
*Administrator*

### OFFICE OF INSPECTOR GENERAL

Calvin L. Scovel III  
*Inspector General*

Omer Poirier  
*Chief Counsel*

### TRANSPORTATION SECURITY ADMINISTRATION

John Pistole  
*Administrator*

Francine J. Kerner  
*Chief Counsel*

## TRANSPORTATION AND TRANSPORTATION SECURITY LAW SECTION LEADERSHIP

### CHAIR

Hector O. Huevo  
U.S. Department of  
Transportation

### CHAIR-ELECT

Monica R. Hargrove  
Airports Council  
International-NA

### DEPUTY CHAIR

David F. Rifkind  
Leonard, Street and Deinard  
P.A.

### SECRETARY

Thomas Lehrich  
Transportation Security  
Administration

### TREASURER

Scott M. Mirelson  
U.S. Department of  
Transportation

### TRANS<sup>L</sup>AW EDITOR

Alice Koethe  
U.S. Department of  
Transportation

### IMMEDIATE PAST CHAIR

Amy Cassidy  
Department of Homeland  
Security

*TransLaw* is published by the Federal Bar Association Transportation and Transportation Security Law Section, ISSN No. 1069-157X. © 2012 The Federal Bar Association. All rights reserved. The opinions expressed herein are solely those of the authors unless otherwise specified. Managing Editor: Sarah Perlman

## Chair's Corner

*Hector O. Huezo*

Fall is finally here! You would think that our board is getting ready to enjoy a vacation from our section's activities after the recent Annual Meeting and Convention in San Diego. However, the opposite is true. Our board, whose dedication and involvement inspire me, continues to be very active and resourceful. I thank our board for all the guidance, support and encouragement over the last few months.

Since the new section board took over, we have sponsored several events for our membership, including our Annual Legislative Update, a half-day Aviation Security Law Forum, a

Lawyers' Lunch on Regulatory Issues and Legal Perspectives on Airline Bankruptcies, and a Roundtable on aviation legal matters with the chief counsels of the Federal Aviation Administration, the Transportation Security Administration, and the assistant general counsel of the National Transportation Safety Board. The board continues to plan informative and entertaining events for our members, culminating in our annual Chief Counsels' Reception on the Hill to recognize the Lawyers of the Year. Please mark your calendars for the Chief Counsels' Reception, which will

be held on Oct. 18, 2012 at 6 p.m.

We hope that you continue to support and be involved in the section this year. Please encourage your colleagues, both within and outside of the government, to join us and become active members in the Transportation and Transportation Security Law Section. See you at one of our upcoming events soon. ❖



## Letter From the Editor

*Alice Koethe*

Please enjoy the latest issue of TransLaw! In this edition, Thomas Devine and Christian L. Alexander of Kaplan, Kirsch & Rockwell LLP bring us a critique of the current airport regulatory regime entitled "Federal Regulation of Airports: Rethinking the Appropriate Role." We also present summaries of three recent

Transportation and Transportation Security Law Section brownbag lunches—our May roundtable discussion on aviation with legal advisors from FAA, TSA, and NTSB, our special July Intern Lawyers' Lunch, which focused on careers in transportation and transportation security law, and a September lunch on legal issues in emerging tech-

nologies. Many thanks to all of our contributors! As always, please feel free to contact me with article ideas through Sherwin Valerio at [svalerio@fedbar.org](mailto:svalerio@fedbar.org). ❖



## Have You Moved Recently?

**Update your information online in the Members Only area at [www.fedbar.org](http://www.fedbar.org) or contact the FBA Membership Department at [membership@fedbar.org](mailto:membership@fedbar.org) or (571) 481-9100.**

## Recent Section Events Provide Networking and Educational Opportunities

### Roundtable on Aviation with Legal Advisors from FAA, TSA, and NTSB By Nancy Kessler

What is the role of legal counsel at government agencies? This issue was discussed by chief counsels at executive agencies that handle aviation matters, at the May 22, 2012, Lawyers' Lunch hosted at U.S. Department of Transportation headquarters. The panelists were Kathryn B. Thomson, chief counsel of the Federal Aviation Administration, Francine Kerner, chief counsel of the Transportation Security Administration, and Shannon Bennett, assistant general counsel of the National Transportation Safety Board. The panel was moderated by David Rifkind of Leonard, Street, and Deinard. Each panelist emphasized the need for government lawyers to be nimble and responsive and to work closely with their program and client offices.

TSA Chief Counsel Francine Kerner began by describing her critical role—with the cooperation of the deputy general counsel of the Army Corps of Engineers and the chief counsel of Customs—in establishing the legal office of TSA after the Sept. 11, 2001, attacks. Kerner then gave the audience an insider's look at the role of TSA lawyers in handling an important project—that of deploying advanced imaging technology (AIT) scanners at airports.

In 2004, Congress directed TSA to deploy AIT scanners to discover bombs and other devices not sensed through metal detectors. Lawyers from different facets of TSA eventually worked on the scanner issues. For example, TSA lawyers were asked to address the fundamental Constitutional issue of whether the AIT scanners violated a passenger's Fourth Amendment rights against unreasonable search and seizure; the lawyers concluded that the scanners did not violate the Fourth Amendment, because they would be reasonably intrusive, given the Government's programmatic need to

perform airport security. TSA regulatory lawyers looked into whether a new rulemaking was required, because the AIT scanners would be used for primary screening; they concluded that the existing regulations governing TSA procedures were adequate and it would be unnecessary to develop a new rule governing AIT scanner usage. Lawyers involved with acquisition and procurement worked with TSA officials on scientific studies on scanners to test for radiation and other potential hazards and advised on the advantages of competitive procurement. TSA legislative lawyers answered inquiries from members of Congress about the scanners. TSA privacy and FOIA lawyers interacted with the Electronic Privacy Information Center (EPIC). When EPIC sued TSA on Fourth Amendment, privacy, and regulatory process grounds, TSA litigation lawyers successfully defended the agency's actions. See *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011).

FAA Chief Counsel Kathryn Thomson paid a tribute to Andrew Steinberg, a former FAA chief counsel and DOT assistant secretary for aviation and international affairs, who recently passed away. The section will miss his dedication to public service and his enthusiastic support for the aviation bar.

Thomson emphasized the importance of the FAA lawyer's role to agency's mission of overseeing and maintaining the safest aviation system in the world. FAA is implementing the Next Generation of airspace technology and following the blueprint in FAA Destination 2025 to move air traffic safely, swiftly, efficiently, and seamlessly around the globe. [http://www.faa.gov/about/plans\\_reports/media/Destination2025.pdf](http://www.faa.gov/about/plans_reports/media/Destination2025.pdf) FAA's aspirations include moving to the next level of safety, creating the workplace of the future, delivering aviation access through innovation sustaining our future through environmentally responsible and energy efficient actions, and advancing global collabo-

ration.

Thomson described her "can do" approach as providing answers and solutions to meet good public policy, rather than imposing legal impediments. Thomson emphasized that a typical matter at FAA will involve cross-cutting issues among different FAA lines of business, and FAA lawyers typically work closely with their region officials and program clients. Due to close interaction with program officials, FAA lawyers can practice "preventive law" and respond flexibly to difficult legal questions. Preventive law practice also occurs at meetings with stakeholders, where FAA lawyers educate stakeholders and FAA laws and mission and therefore avert compliance issues. FAA lawyers also support FAA safety enforcement and compliance actions to ensure that the parties operate safely; FAA relies on voluntary disclosure programs.

National Transportation Safety Board Assistant General Counsel Shannon Ann Bennett described the board as an independent executive agency with no regulatory authority; as such, the board attempts to implement change through its safety recommendations. The board's primary aviation role is to investigate all civilian and public-use aircraft accidents. Although only nine lawyers currently work at NTSB, they are integral to the mission of the board. They participate in the "go" teams with parties (which may include FAA, aircraft manufacturers, aircraft engine manufacturers, air carriers) investigating aircraft accidents. The NTSB General Counsel serves as legal advisor to the five member board and ensures the Government in the Sunshine Act is followed at board meetings. FAA lawyers also advise the board in its appellate capacity for FAA, Coast Guard, and Merchant Marine enforcement actions. ♦

## Transportation Attorneys Discuss Careers in Transportation Law

By Alice Koethe

On July 19, 2012, the section held a Lawyers' Brownbag Lunch on the topic of "Career Paths in Transportation and Transportation Security Law" at the U.S. Department of Transportation Conference Center. On the panel were Paula Lee, Thomas Lehigh, David Rifkind, and Monica Hargrove. The event was well attended by summer legal interns.

The lively and informative panelists represented a cross-section of transportation legal career paths. They each briefly outlined the highlights of their careers, provided helpful advice for interviewing and job searching, and answered questions from the audience of DOT and Department of Homeland Security legal interns.

After brief introductions from Hector Huezo, chair of the Transportation Security and Transportation Law Section Board, Paula Lee led off. Lee is a trial attorney in the Litigation Office of the DOT Office of General Counsel. She joined the department through the DOT Honors Attorney program in 2010,

and rotated through the DOT Office of General Counsel's Litigation Office and the Chief Counsel's Offices at the Office of the Inspector General, the National Highway Traffic Safety Administration, and the Federal Motor Carrier Safety Administration. Lee provided many useful insights from the perspective of a recent graduate.

Next, Thomas Lehigh spoke about his experience in the private and public sectors. Lehigh is currently the assistant chief counsel for legislation and authorities at the U.S. Department of Homeland Security, Transportation Security Administration. Prior to joining TSA in 2009, Lehigh spent 10 years in the DOT Office of the Inspector General. Lehigh held multiple positions in the OIG Chief Counsel's Office, including that of chief counsel. Lehigh weighed in on a number of topics, including transitioning from the public sector to the private sector.

David Rifkind spoke next, and provided valuable insights into the transportation-related practice options in the private sector. Rifkind, a shareholder in the law firm of Leonard Street and DeNard, previously worked at a large Washington law firm and the Washington office of a mid-sized New York-based firm. In his remarks, Rifkind discussed on-campus interviews, and advised applicants how to make a positive impression in that setting.

Finally, the audience heard from Monica Hargrove, general counsel of Airports Council International-North America. Before joining ACI-NA, Hargrove served as the associate general counsel of U.S. Airways, where she was generally responsible for the legal management of the company's regulatory affairs. She began her legal career as a trial

attorney in the Antitrust Division of the U.S. Department of Justice's Honors Program. Hargrove provided information regarding legal careers in transportation-related positions as in-house counsel for airline companies and legal counsel for associations of regulated aviation entities. Hargrove's ideas on how to achieve work-life balance were of particular interest to the group. ❖

## Lawyers' Lunch on Legal Issues in Emerging Technologies

By Nancy Kessler

On Sept. 13, 2012, section members and interested lawyers were treated to a lively panel discussion on Legal Issues in Emerging Technologies. Amy Tovar, associate general counsel at the U.S. Department of Transportation (DOT) moderated the panel. Ronald Jackson, assistant general counsel for operations at DOT, introduced general issues federal lawyers face in advising clients on emerging technologies, including intellectual property, security, records management, and privacy. Kevin Vincent, chief counsel for the National Highway Traffic Safety Administration, discussed legal topics to be addressed with "connected vehicle programs," such as funding, interface with state and other federal agencies (such as the Federal Communications Commission on spectrum allocation), system security, antitrust considerations, liability, privacy, intellectual property and data ownership. Gary Michel, supervisory attorney for the Federal Aviation Administration (FAA), described the status of the unmanned aircraft system (UAS) and the role of the FAA in integrating the UAS and unmanned aerial vehicles (UAV) into the national airspace. Chris Calabrese, legislative counsel for the American Civil Liberties Union, examined civil liberties issues in these and other emerging technologies. Michael Goldman, partner with Silverberg, Goldman & Bikoff LLP, completed the panel by giving the private sector perspective of commercial UAV operators. The section appreciates the continued interest in and support of its activities by these presenters. ❖



*AIRPORTS continued from page 1*

(AAIA), which reestablished airport grant funding and established the AIP.<sup>8</sup> The AAIA set up a grant funding program similar to predecessor programs under the 1970 legislation while altering the system for distributing funds, expanding aviation capital spending, and renewing and increasing aviation user fees.<sup>9</sup> The AAIA also contained provisions, first enacted in 1976, to cap the amount of funding that could be allocated to FAA operations, thereby reinforcing the program's emphasis on funding capital projects.<sup>10</sup>

The AAIA also mandated that DOT include an array of "grant assurances," obligations to be imposed on airports, in any agreement to provide AIP grants to an airport.<sup>11</sup> The AAIA-mandated grant assurances covered areas such as prohibiting unjust discrimination against aeronautical users, prohibiting the grant of exclusive rights to aeronautical service providers, and a requirement to set fees so as to be as self-sustaining as possible,<sup>12</sup> and have been expanded over the years to include terms for hangar rentals,<sup>13</sup> intercity bus access,<sup>14</sup> and the participation of certain types of small businesses in the provision of the sale of consumer goods and services,<sup>15</sup> i.e., concessions whose facilities are ineligible for AIP funding. The grant assurances last for the useful life of the project being funded, up to a maximum of 20 years,<sup>16</sup> with exceptions for assurances related to the diversion of airport revenues, conferring an exclusive right upon an aeronautical user, and civil rights, which do not expire.<sup>17</sup> Thus,

even if an airport proprietor declined any further AIP funding, it would be subject to most of the grant assurances for another 20 years, except for the three that last in perpetuity.

Due to recent and ongoing changes in the U.S. political and financial landscapes, there is interest in potentially excluding larger airports from AIP funding and possibly letting them out of the grant assurances. Federal funding of airports has been reduced,<sup>18</sup> with further cuts likely, due to federal budget concerns and pressures for other uses of revenues generated by aviation user fees and taxes, principally FAA operations.

The concept of dropping larger airports from federal funding and related obligations has been debated since before the AAIA. In 1981, there were proposals from the administration<sup>19</sup> and the Senate<sup>20</sup> to "defederalize" the 69 busiest airports (large and medium hubs)<sup>21</sup>—make them ineligible for federal funding and let them out of their existing federal obligations related to previous federal airport grants. This concept was ultimately abandoned, only to bubble up again now, 30 years later.

The relationship among federal

restriction of airports' ability to raise funds from air travelers, federal funding of airports, and broader federal regulation of airports has evolved over the past forty years. The U.S. Supreme Court declared that a charge imposed by airport proprietors on air travelers is reasonable, and therefore lawful, "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce."<sup>22</sup> In response, Congress passed the Anti-Head Tax Act (AHTA), which prohibited airports from imposing direct and indirect charges on air passengers using their facilities.<sup>23</sup> In 1990, Congress enacted a limited exception to the AHTA, allowing airports, with FAA approval, to impose a Passenger Facility Charge of up to \$3.00 per trip segment, subject to certain restrictions, including eligibility standards for uses of PFC revenue.<sup>24</sup> The PFC cap was raised to \$4.50 in 2000.<sup>25</sup> Through federal statutes imposing aviation user fees/taxes<sup>26</sup> and providing federal airport grants,<sup>27</sup> the government, in essence, raises revenue from those same air passengers, and gives a fraction of it to airports.

In this context, it is reasonable for airports to question whether "federal funding" is an appropriate basis for federal regulation that controls signifi-

*AIRPORTS continued on page 9*

<sup>8</sup>*Id.* at 8-9.

<sup>9</sup>*Id.* at 9.

<sup>10</sup>*Id.*

<sup>11</sup>49 U.S.C. § 47107.

<sup>12</sup>49 U.S.C. § 47107(a)(1-3), (4), and (13).

<sup>13</sup>49 U.S.C. § 47107(a)(21).

<sup>14</sup>49 U.S.C. § 47107(a)(20).

<sup>15</sup>49 U.S.C. § 47107(e).

<sup>16</sup>FAA Order 5190.6B, *FAA Airport Compliance Manual*, App. C, p.27 (Sept. 30, 2009) [hereinafter *Compliance Manual*] ¶ 4.3, p. 4-2.

<sup>17</sup>*Id.* at p. 4-3.

<sup>18</sup>In 2008, Congress authorized \$3.675 billion and made \$3.471 billion available for AIP grants. In 2009, Congress authorized \$3.9 billion and made \$3.385 billion available such grants. Cong. Research Service, *supra* note 6, at 11. For FY2012, AIP funding is \$3.35 billion. FAA Modernization and Reform Act of 2012, Pub. L. 112-95, 126 Stat. 15 (2012).

<sup>19</sup>*Bill Summary & Status—97th Congress (1981-1982) H.R.2930 (By Request)—All Information*, Lib. Cong. THOMAS, [thomas.loc.gov/cgi-bin/bdquery/z?d097:HR02930:@@L&summ2=m&](http://thomas.loc.gov/cgi-bin/bdquery/z?d097:HR02930:@@L&summ2=m&) (last visited June 8, 2012).

<sup>20</sup>*Bill Summary & Status—97th Congress (1981-1982) S.508—All Information*, Lib. Cong. THOMAS, [thomas.loc.gov/cgi-bin/bdquery/z?d097:SN00508:@@L&summ2=m&](http://thomas.loc.gov/cgi-bin/bdquery/z?d097:SN00508:@@L&summ2=m&) (last visited June 8, 2012).

<sup>21</sup>See Office of the Secretary of Transportation, *The Effects of Airport Defederalization Final Report*, U.S. Department of Transportation, *Report of the Secretary of Transportation to the United States Congress Pursuant to Section 522 of Public Law 97-248, Airport and Airway Improvement Act of 1982* 10 (1987).

<sup>22</sup>*Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 716-17 (1972).

<sup>23</sup>See Pub. L. No. 93-44, 87 Stat. 88 (1973), now codified at 49 U.S.C. § 40116 (the Anti-Head Tax Act) (2006).

<sup>24</sup>Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 9110(2), 104 Stat. 1388 (Title IX, Aviation Safety and Capacity Expansion), codified at 49 U.S.C. § 40117.

<sup>25</sup>Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 105(a), 114 Stat. 61, 71 (2000) (codified at 49 U.S.C. § 40117(b)(4)).

<sup>26</sup>The Internal Revenue Code of 1986, § 9500 et seq. ("Trust Fund Code of 1981").

<sup>27</sup>49 U.S.C. § 47101, et seq.

# connect



## through the Federal Bar Association

The Federal Bar Association offers an unmatched array of opportunities and services to enhance your connections to the judiciary, the legal profession, and your peers within the legal community. Our mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.

### Advocacy

The opportunity to make a change and improve the federal legal system through grassroots work in over 80 FBA chapters and a strong national advocacy.

### Networking

Connect with a network of federal practitioners extending across all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

### Leadership

Governance positions within the association help shape the FBA's future and make an impact on the growth of the federal legal community.

### Learning

Explore best practices and new ideas at the many Continuing Legal Education programs offered throughout the year—at both the national and chapter levels.

## expand your connections, expand your career

**THREE WAYS TO APPLY TODAY:** ① Join online at [www.fedbar.org](http://www.fedbar.org); ② Fax application to (571) 481-9090; or ③ Mail application to FBA, 1220 North Fillmore St., Suite 444, Arlington, VA 22201. For more information, contact the FBA membership department at (571) 481-9100 or [membership@fedbar.org](mailto:membership@fedbar.org).

## FEDERAL BAR ASSOCIATION APPLICATION FOR MEMBERSHIP (CONTINUES ON REVERSE)

### Applicant Information

First Name \_\_\_\_\_ M.I. \_\_\_\_\_ Last Name \_\_\_\_\_ Suffix (e.g., Jr.) \_\_\_\_\_ Title (e.g., Attorney At Law, Partner, Assistant U.S. Attorney) \_\_\_\_\_

Male  Female Have you been an FBA member in the past?  yes  no Which do you prefer as your primary address?  business  home

Firm/Company/Agency		Number of Attorneys	
Address		Suite/Floor	
City	State	Zip	Country
( )	( )		
Phone	Fax	E-mail	

Address			Apt. #
City	State	Zip	Country
( )	( )		
Phone	Fax		
/ /			
Date of Birth	E-mail		

### Bar Admission and Law School Information (required)

U.S.	Court of Record: _____
	State/District: _____ Original Admission: / /
Tribal	Court of Record: _____
	State: _____ Original Admission: / /
Foreign	Court/Tribunal of Record: _____
	Country: _____ Original Admission: / /
Students	Accredited Law School: _____
	State/District: _____ Expected Graduation: / /

### Practice Information

#### PRACTICE TYPE

- Private Sector:  Private Practice  Corporate/In-House  
 Public Sector:  Government  Association Counsel  
 Nonprofit  University/College  
 Military  Judiciary

#### PRIMARY PRACTICE AREAS

- Administrative  Health  
 Admiralty/Maritime  Immigration  
 ADR/Arbitration  Indian  
 Antitrust/Trade  Intellectual Property  
 Bankruptcy  International  
 Communications  Labor/Employment  
 Criminal  Military  
 Environment/Energy  Social Security  
 Federal Litigation  State/Local Government  
 Financial Institutions  Taxation  
 General Counsel  Transportation  
 Government Contracts  Veterans  
 Other: \_\_\_\_\_

### Membership Levels

#### SUSTAINING MEMBERSHIP

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5% discount on the registration fees for all national meetings and national CLE events.

	<u>Private Sector</u>	<u>Public Sector</u>
Member Admitted to Practice 0-5 Years .....	<input type="radio"/> \$155	<input type="radio"/> \$135
Member Admitted to Practice 6-10 Years .....	<input type="radio"/> \$215	<input type="radio"/> \$190
Member Admitted to Practice 11+ Years .....	<input type="radio"/> \$255	<input type="radio"/> \$220
Retired (Fully Retired from the Practice of Law).....	<input type="radio"/> \$155	<input type="radio"/> \$155

#### ACTIVE MEMBERSHIP

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

	<u>Private Sector</u>	<u>Public Sector</u>
Member Admitted to Practice 0-5 Years .....	<input type="radio"/> \$95	<input type="radio"/> \$75
Member Admitted to Practice 6-10 Years .....	<input type="radio"/> \$155	<input type="radio"/> \$130
Member Admitted to Practice 11+ Years .....	<input type="radio"/> \$195	<input type="radio"/> \$160
Retired (Fully Retired from the Practice of Law).....	<input type="radio"/> \$95	<input type="radio"/> \$95

#### ASSOCIATE MEMBERSHIP

Foreign Associate Admitted to practice law outside the U.S. ....  \$195  
Law Student Associate Currently enrolled in an accredited law school.....  \$30

Dues Total: \$ \_\_\_\_\_

### Practice Area Sections

<input type="radio"/> Alternative Dispute Resolution.. \$15	<input type="radio"/> Intellectual Property Law..... \$10
<input type="radio"/> Antitrust and Trade Regulation.. \$15	<input type="radio"/> International Law..... \$10
<input type="radio"/> Bankruptcy Law..... \$10	<input type="radio"/> Labor and Employment Law..... \$15
<input type="radio"/> Civil Rights Law..... \$10	<input type="radio"/> Securities Law Section..... \$0
<input type="radio"/> Criminal Law..... \$10	<input type="radio"/> Social Security..... \$10
<input type="radio"/> Environment, Energy, and Natural Resources..... \$15	<input type="radio"/> State and Local Government Relations..... \$15
<input type="radio"/> Federal Litigation..... \$10	<input type="radio"/> Taxation..... \$15
<input type="radio"/> Government Contracts..... \$20	<input type="radio"/> Transportation and Transportation Security Law..... \$20
<input type="radio"/> Health Law..... \$10	<input type="radio"/> Veterans Law..... \$20
<input type="radio"/> Immigration Law..... \$10	
<input type="radio"/> Indian Law..... \$15	

### Career Divisions

- Federal Career Service (past/present employee of federal government).....N/C
- Judiciary (past/present member or staff of a judiciary).....N/C
- Corporate & Association Counsels (past/present member of corporate/association counsel's staff)..... \$20
- Senior Lawyers\* (age 55 or over)..... \$10
- Younger Lawyers\* (age 36 or younger or admitted less than 3 years) .....N/C

\*For eligibility, date of birth must be provided.

Sections and Divisions Total: \$ \_\_\_\_\_

### Chapter Affiliation

Your FBA membership entitles you to a chapter membership. Local chapter dues are indicated next to the chapter name (if applicable). If no chapter is selected, you will be assigned a chapter based on geographic location. \*No chapter currently located in this state or location.

<u>Alabama</u> <input type="radio"/> Birmingham <input type="radio"/> Mobile <input type="radio"/> Montgomery <input type="radio"/> North Alabama	<input type="radio"/> Tallahassee <input type="radio"/> Tampa Bay <u>Georgia</u> <input type="radio"/> Atlanta-\$10 <u>Hawaii</u> <input type="radio"/> Hawaii	<u>New Hampshire*</u> <input type="radio"/> At Large <u>New Jersey</u> <input type="radio"/> New Jersey	<u>Puerto Rico</u> <input type="radio"/> Hon. Raymond L. Acosta/ Puerto Rico-\$10
<u>Alaska</u> <input type="radio"/> Alaska	<u>Idaho</u> <input type="radio"/> Idaho	<u>New Mexico*</u> <input type="radio"/> At Large	<u>Rhode Island</u> <input type="radio"/> Rhode Island
<u>Arizona</u> <input type="radio"/> Phoenix <input type="radio"/> William D. Browning/ Tucson-\$10	<u>Illinois</u> <input type="radio"/> Chicago <u>Indiana</u> <input type="radio"/> Indianapolis	<u>New York</u> <input type="radio"/> Eastern District of New York <input type="radio"/> Southern District of New York	<u>South Carolina</u> <input type="radio"/> South Carolina
<u>Arkansas*</u> <input type="radio"/> At Large	<u>Iowa-\$10</u> <u>Kansas*</u> <input type="radio"/> At Large	<u>North Carolina</u> <input type="radio"/> Eastern District of North Carolina <input type="radio"/> Middle District of North Carolina <input type="radio"/> Western District of North Carolina	<u>South Dakota*</u> <input type="radio"/> At Large
<u>California</u> <input type="radio"/> Central Coast <input type="radio"/> Inland Empire <input type="radio"/> Los Angeles <input type="radio"/> Northern District of California <input type="radio"/> Orange County <input type="radio"/> Sacramento <input type="radio"/> San Diego <input type="radio"/> San Joaquin Valley	<u>Kentucky</u> <input type="radio"/> Kentucky <u>Louisiana</u> <input type="radio"/> Baton Rouge <input type="radio"/> Lafayette/ Acadiana <input type="radio"/> New Orleans <input type="radio"/> North Louisiana	<u>North Dakota*</u> <input type="radio"/> At Large	<u>Tennessee</u> <input type="radio"/> Chattanooga <input type="radio"/> Memphis Mid-South <input type="radio"/> Nashville <input type="radio"/> Northeast Tennessee
<u>Colorado</u> <input type="radio"/> Colorado	<u>Maine*</u> <input type="radio"/> At Large	<u>Ohio</u> <input type="radio"/> John W. Peck/ Cincinnati/ Northern Kentucky	<u>Texas</u> <input type="radio"/> Austin <input type="radio"/> Dallas-\$10 <input type="radio"/> Del Rio-\$25 <input type="radio"/> El Paso <input type="radio"/> Fort Worth <input type="radio"/> San Antonio <input type="radio"/> Southern District of Texas-\$25 <input type="radio"/> Waco
<u>Connecticut</u> <input type="radio"/> District of Connecticut	<u>Maryland</u> <input type="radio"/> Maryland	<u>Oklahoma</u> <input type="radio"/> Columbus <input type="radio"/> Dayton <input type="radio"/> Northern District of Ohio-\$10	<u>Utah</u> <input type="radio"/> Utah
<u>Delaware</u> <input type="radio"/> Delaware	<u>Massachusetts</u> <input type="radio"/> Massachusetts -\$10	<u>Oregon</u> <input type="radio"/> Oregon	<u>Vermont*</u> <input type="radio"/> At Large
<u>District of Columbia</u> <input type="radio"/> Capitol Hill <input type="radio"/> D.C. <input type="radio"/> Pentagon	<u>Michigan</u> <input type="radio"/> Eastern District of Michigan <input type="radio"/> Western District of Michigan	<u>Pennsylvania</u> <input type="radio"/> Eastern District of Pennsylvania <input type="radio"/> Middle District of Pennsylvania <input type="radio"/> Western District of Pennsylvania	<u>Virgin Islands</u> <input type="radio"/> Virgin Islands
<u>Florida</u> <input type="radio"/> Broward County <input type="radio"/> Jacksonville <input type="radio"/> North Central Florida-\$25 <input type="radio"/> North Central Florida Law Student-\$0 <input type="radio"/> Orlando <input type="radio"/> Palm Beach County <input type="radio"/> South Florida <input type="radio"/> Southwest Florida	<u>Minnesota</u> <input type="radio"/> Minnesota	<u>Virginia</u> <input type="radio"/> Northern Virginia <input type="radio"/> Richmond <input type="radio"/> Roanoke <input type="radio"/> Tidewater	<u>Washington*</u> <input type="radio"/> At Large
	<u>Mississippi</u> <input type="radio"/> Mississippi	<u>West Virginia*</u> <input type="radio"/> At Large	<u>Wisconsin*</u> <input type="radio"/> At Large
	<u>Missouri*</u> <input type="radio"/> At Large	<u>Wyoming</u> <input type="radio"/> Wyoming	
	<u>Montana</u> <input type="radio"/> Montana		
	<u>Nebraska*</u> <input type="radio"/> At Large		
	<u>Nevada</u> <input type="radio"/> Nevada		

Chapter Total: \$ \_\_\_\_\_

## Payment Information and Authorization Statement

### TOTAL DUES TO BE CHARGED

(membership, section/division, and chapter dues): \$ \_\_\_\_\_

Check enclosed, payable to Federal Bar Association  
Credit:  American Express  MasterCard  Visa

\_\_\_\_\_  
Name on card (please print)

\_\_\_\_\_  
Card No. Exp. Date

\_\_\_\_\_  
Signature Date

By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application and/or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

\_\_\_\_\_  
Signature of Applicant

\_\_\_\_\_  
Date

(Signature must be included for membership to be activated)

\*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5% which is used for congressional lobbying and is not deductible. Your FBA dues include \$14 for a yearly subscription to the FBA's professional magazine.

## AIRPORTS *continued from page 6*

cant aspects of airport operations and development that are unrelated to the AIP-funded projects. Even if federal funding generally justifies federal conditions, the scope of federal regulation of AIP grant recipients is broader, for instance, than it is for recipients of federal transit grants, as discussed below. Some have suggested that the AIP assurances are simply the deal airports have accepted, and so they must live with it. This may be a reasonable argument, were it not for the fact that:

1. The federal government has not been faithful in adhering to the “deal” concerning the purpose for which Airport and Airway Trust Fund revenues were initially raised, i.e., to fund airport grants and FAA’s Facilities and Equipment, and Research and Development (R&D) programs, and *if any funds were left over after fulfilling these capital needs*, the remainder could be used to fund FAA operations;<sup>28</sup>
2. Instead, Congress subsequently reversed the priorities of the Trust Fund, so that huge amounts of Trust Fund revenues are siphoned off for FAA operations, leaving capital programs, such as AIP and FAA’s Facilities and Equipment program, to be funded from what is left over; and
3. At times, the government has unilaterally broadened or extended the scope of airports’ federal obligations, even retroactively.<sup>29</sup>

On the other hand, when Congress reversed the top priority for the use of passenger taxes from capital funding to FAA operations, Congress also included significant increases in AIP funding. For instance, AIP funding

<sup>28</sup>See Cong. Budget Office, *supra* note 7, at 1-11. See also Gen. Accounting Office, B-281779, *Whether the Airport and Airway Trust Fund was Created Solely to Finance Aviation Infrastructure* (1999).

<sup>29</sup>See 49 U.S.C. § 47133; Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7699 (February 16, 1999) [hereinafter Revenue Use Policy].

increased from \$450 million in 1982 to \$1.9 billion in 1992.<sup>30</sup> In 2001, there was a further 70% increase in AIP funding to \$3.2 billion.<sup>31</sup> AIP funding for 2012 is \$3.35 billion.<sup>32</sup>

Nonetheless, for many air carrier airports, AIP funds represent only a small portion of an airport’s total funding—or even its capital funding. For example, the Airports Council International-North America (ACI-NA) estimates that AIP funding amounts to only 16% of funding for committed projects in the 2011-2015 timeframe.<sup>33</sup> It is reasonable to ask whether the acceptance of AIP dollars should dictate how an airport carries out a project or control how an airport conducts its operations, development, land use management, and tenant relations that have nothing to do with the project, or whether federal regulation of airport construction should be more proportionate to the federal contribution.

Interestingly, FAA, itself, has recognized that many of the AIP grant assurances (most of which are mandated by Congress<sup>34</sup>) are unrelated to the projects whose AIP funding triggered the assurances. In 2004, when there were 38 grant assurances, the agency published a proposal to re-categorize the grant assurances into three groups.<sup>35</sup> The first two groups, totaling 19 provisions directly related to the grant-funded projects, would have become grant certifications or grant conditions, because they address how the projects will be carried out.<sup>36</sup>

<sup>30</sup>Cong. Research Service, *supra* note 6, at 9.

<sup>31</sup>*Id.* at 10.

<sup>32</sup>FAA Modernization and Reform Act of 2012, Pub. L. 112-95, 126 Stat. 15 (2012). See note 18 for examples of higher AIP funding in recent years.

<sup>33</sup>Airports Council International-North America, *Airport Capital Development Costs 2011-2015* 10-11 (Feb. 2011).

<sup>34</sup>49 U.S.C. § 47107(a) and (b).

<sup>35</sup>Airport Improvement Program Grant Assurances; Proposed Modifications and Opportunity to Comment, 69 Fed. Reg. 52057 (Aug. 24, 2004).

<sup>36</sup>*Id.* at 52058-59 (Chart).

The remaining 19 assurances in the third group have nothing to do with the projects being funded.<sup>37</sup> Airports have reason to question whether it is appropriate to apply these assurances—relating to airport-tenant relations, use of airport property and airport funds, and access by aeronautical users—to airports simply because they accept federal funds.

### Specific Anomalies in How the Federal Government Regulates Airports

#### *Use of Airport Property*

FAA regulates the use of airport property, *including property not donated or paid for by the federal government*. But why should FAA exert control over the use of airport sponsor donated or purchased airport land<sup>38</sup> except for considerations of safety and efficiency of operations, i.e., not allowing airports to use airport property in a way that interferes with the safe, efficient operation of aircraft?

At the present time, FAA may require airports to obtain its approval or acquiescence in order to transfer or encumber airport property (even via lease) or to change the use of property from aeronautical to non-aeronautical use.<sup>39</sup> FAA may invoke Grant Assurance 5 to ensure that airports comply with FAA guidance for

## AIRPORTS *continued on page 10*

<sup>37</sup>*Id.* at 52058-63 (including Chart).

<sup>38</sup>Note that restrictions imposed as a result of free transfer of federal lands are a different matter. Land transfers legitimately impose restrictions on the use of the transferred parcels. But such restrictions in the non-government context generally apply only to that land, rather than imposing “super restrictions” beyond the transferred parcel’s boundaries, so as to control the use of the donee’s other land.

<sup>39</sup>See Grant Assurance 5 (The airport sponsor “will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application . . . for the duration of the terms, conditions, and assurances in this grant agreement without approval by the Secretary.”). See also Assurance 29, related to Airport Layout Plans.

## AIRPORTS *continued from page 9*

certain decisions on the use of airport property, such as appropriate lease terms (e.g., duration, lease payments) for aeronautical or non-aeronautical uses of airport property.

In an environment in which airports are seeking to become more entrepreneurial and develop non-aeronautical revenue sources, it is difficult to understand why the federal government restricts the proprietor's use of airport property that was not federally donated or funded. It can be quite a cumbersome process to obtain releases or necessary designations for changing proposed land use. It is reasonable for airport proprietors to wonder why they do not have the right to determine the appropriate use of their own property based on airport objectives and market conditions.

It is worth noting that another DOT agency, the Federal Transit Administration, does not impose the same expansive requirements on "project property" that the FAA imposes on airport property. For example, the FTA does not require grant recipients to obtain FTA approval prior to selling or leasing land that has *not* been federally donated to the project or paid for by the federal government. Unless it acquired property using federal funds or contributed the property as part of the local share of a federally funded project, a grant recipient is free to determine the best use of the property it owns without federal involvement or oversight.<sup>40</sup>

### *Incentives*

FAA's Revenue Use Policy prohibits the use of airport revenue to provide subsidies and revenue guarantees to air carriers, because the FAA considers such actions to promote "general economic development."<sup>41</sup> However, air service is the fundamental purpose of air carrier airports. Precluding the use of airport funds to provide incen-

tives, including direct credits, offsets, and revenue guarantees to air carriers to provide service seems peculiar in light of the fact that FAA allows airports to use airport revenues for marketing personnel to seek air service.<sup>42</sup> If air service merely constituted general regional development, airport revenues could not fund an airport's efforts to obtain it.

Moreover, Congress, by explicitly authorizing airports to use residual and hybrid rate-setting methodologies,<sup>43</sup> essentially allows airports to provide cash incentives to air carriers to induce them generally to provide air service. For example, at a residual airport, if net concession revenues equal \$20 million, that amount is credited to all signatory air carriers, who can do whatever they want with the money.<sup>44</sup> It seems anomalous that airport revenue can be given to airlines to induce air service on a macro basis, but not on a more targeted basis.

Airport sponsors are also not allowed to tailor incentives for specific types of service they often seek. For instance, airports are not allowed to limit incentives to jet service, or low-fare service.<sup>45</sup> But many airports believe that their passengers strongly prefer jet service. Not all airports share that view, but the key point is that airports should not be forced to include service they do not desire in their incentive programs.

Similarly, if an airport seeks low fare service that provides real competition to particular markets, it is fair to ask why it cannot provide incentives that are limited to low-fare ser-

vice, however the airport defines it. Such action would not be barred by the Airline Deregulation Act (ADA) prohibition against state/local government regulation of airline rates, routes and services,<sup>46</sup> because, as FAA has acknowledged in reviewing a specific air service incentive, the ADA does not apply to voluntary incentives programs adopted by airports.<sup>47</sup> In fact *all* incentive programs allowed by the FAA are intended to affect airline routes, and there is no distinction under the ADA between affecting routes, on one hand, and affecting rates or services on the other. The ADA does not cover situations such as incentive programs, where airlines are not compelled to take any action; they may choose to comply with the requirements of such programs (and thus earn the incentives) or not.

### *Restrictions on Airport Rate-Setting*

Airports are subject to a requirement to impose only reasonable fees on air carriers from a number of sources, both statutory<sup>48</sup> and grant assurance.<sup>49</sup> In general, DOT seems willing to give airports some latitude in the specifics of their charging mechanisms, but for landing fees, the latitude relates more to establishing the appropriate costs to include in the rate base, rather than allowing significant flexibility in establishing a new type of charging methodology.

DOT guidance implies that airports must provide special justification for any deviation from traditional weight-based landing fees,<sup>50</sup> stating that, although congestion is technically not a prerequisite for setting fees by a methodology that is not based solely on aircraft weight, "it is not clear what

<sup>42</sup>*Id.* at 7718.

<sup>43</sup>49 U.S.C. § 47129.

<sup>44</sup>In contrast, at an airport employing a compensatory methodology, that same \$20 million constitutes airport revenue and is subject to Grant Assurance 25 (prohibition against diversion of airport revenue) and the FAA's Revenue Use Policy.

<sup>45</sup>Air Carrier Incentive Program Guidebook: A Reference for Airport Sponsors (September 2010), p. 10 and 21 (available at [http://www.faa.gov/airports/airport\\_compliance/air\\_carrier\\_incentive](http://www.faa.gov/airports/airport_compliance/air_carrier_incentive) (accessed August 20, 2012)).

<sup>46</sup>49 U.S.C. § 41713 (2006).

<sup>47</sup>See Letter from David L. Bennett, FAA Office of Airport Safety and Standards, to Bailis Bell, Dir. of Airports, Wichita Airport Auth., (Nov. 18, 2003), at p. 4.

<sup>48</sup>See, e.g., 49 U.S.C. §§ 40116 and 47107(a).

<sup>49</sup>See Grant Assurance 22.

<sup>50</sup>Typically, U.S. airport landing fees are based on the certified landed weight of aircraft divided by 1,000 pound increments.

<sup>40</sup>See, e.g., 49 C.F.R. § 18.31 (2011); FTA Circular C5010.1D, *Grant Management Requirements* Ch. IV (Nov. 1, 2008).

<sup>41</sup>Revenue Use Policy, *supra* note 29, at 7709-10, 7720.

other circumstances might justify such a fee.”<sup>51</sup> But under the applicable statutes, there is no reason to require special justification for deviating from the traditional weight-based charging system, whose rationality has long been questioned by economists. DOT has declared traditional weight-based landing fees to be reasonable and not-unjustly discriminatory. While it makes sense not to disrupt the widespread—almost universal—weight-based landing fee system employed by U.S. airports, why should innovation and a desire to promote airport goals through rational rate-setting be stifled?<sup>52</sup>

#### *Airport-User Relations*

Grant-obligated airport sponsors must allow all types, kinds, and classes of aeronautical uses at their airports, even though certain uses may not be appropriate at all airports, and mixing various uses may not promote a sponsor’s priorities in the use of airport facilities. FAA mandates that airports “negotiate in good faith” with prospective aeronautical service providers<sup>53</sup> if aeronautical land is available—*regardless of how many similar service providers are already on airport*.<sup>54</sup> FAA regards the mere fact that someone seeks to use the land as sufficient evidence that there is demand for the service.<sup>55</sup> The airport’s views on the appropriate use of the land may be disregarded, unless FAA has specifically approved them in an

<sup>51</sup>Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430, 40437 (July 14, 2008).

<sup>52</sup>It is noteworthy that, in administering the air traffic control (ATC) system, Congress and the FAA have wrestled, unsuccessfully, with the same types of rate-setting issues; perhaps they could benefit from the development of innovative rate-setting models by airports.

<sup>53</sup>Aeronautical service providers include, for example a “Fixed-Base Operator (FBO). A business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc.” *FAA Compliance Manual*, App. C, p. 27.

<sup>54</sup>*Id.* ¶ 9.7.

<sup>55</sup>*Id.*

Airport Layout Plan (ALP). Airports understandably find it perplexing that a prospective tenant’s views may thus be given precedence over their views as the landlord concerning land use decisions.

While FAA may allow an airport sponsor some leeway in establishing the terms of a lease for the use of its facilities, this does not eliminate the fundamental control FAA exercises over them. It may be more appropriate to allow airport sponsors to exercise traditional landlord control over the use of land and facilities at their airports. For example, airports should be able to determine the appropriate mix of uses and exercise discretion in dealing with tenants who provide poor service, gouge the market, or otherwise act contrary to the interests of the airport or the public.

Although the FAA’s grant assurance compliance program ostensibly “protect[s] the public interest in civil aviation,”<sup>56</sup> airports find that more often than not, it is invoked by particular airport tenants or prospective tenants to promote their parochial business interests rather than the public interest. A typical example is an FBO that has a dispute with another FBO, or an FBO that has a dispute with an airport over a routine landlord-tenant issue. For instance, different FBOs have alleged, in formal FAA administrative complaints, that airports violated their grant assurances by failing to automatically renew a long-term lease that had expired, and by allowing a new, competitor FBO to build a facility on the last developable aeronautical parcel on the airport (thus breaking the incumbent FBO’s monopoly at the airport).<sup>57</sup>

These claims are so far afield from the purpose of the compliance program that it is understandable that airports may want FAA to preclude airport tenants and wannabe tenants

<sup>56</sup>*Id.* ¶ 1.5.

<sup>57</sup>This FBO also alleged that the airport unjustly discriminated against it by filing a defense to an action the FBO filed against the airport in state court.

from literally making a federal case out of routine business disputes. FAA should consider whether its compliance program is being used by private parties to advance private interests in ways that do nothing to promote the public interest. Altering the compliance program to preclude such self-interested actions would enhance the public interest that the compliance program is intended to protect.

#### *Use of Airport Facilities for Charitable, Community, or Governmental Purposes*

FAA prohibits communities that have invested in airports from using airport facilities for non-airport purposes except for *de minimis* use. Sponsors cannot, for example, store equipment on airport land that is not currently being used for airport purposes or use vacant offices for meetings or other purposes.

Neither the underlying statute<sup>58</sup> nor the revenue use grant assurance<sup>59</sup> prohibits the use of airport space for other sponsor functions. The Revenue Use Policy, thus, goes farther than required in considering the use of airport facilities by local governments as essentially the same as using airport revenue for non-airport purposes.

The FAA takes the exact opposite position elsewhere in the Policy concerning airline incentives, by providing that an airport *may* allow airlines free use of facilities, even though airport revenues *may not* be used to pay airlines to provide air service.<sup>60</sup> Moreover, statutorily mandated grant assurances *require* airports to allow the federal government free use of facilities (unless such use is “substantial”),<sup>61</sup> based on the fact that the federal government provides some AIP funding to the airport. Also, airports must provide free land to the FAA for ATC

---

#### *AIRPORTS continued on page 12*

---

<sup>58</sup>49 U.S.C. § 47107(b).

<sup>59</sup>Grant Assurance 25.

<sup>60</sup>Revenue Use Policy, *supra* note 29, at 7720.

<sup>61</sup>49 U.S.C. § 47107(a)(11).

## AIRPORTS continued from page 11

and weather facilities<sup>62</sup> (whether or not related to the airport).<sup>63</sup>

It seems paradoxical for the government to impose a *requirement* to allow the FAA free use of airport facilities, but to forbid an airport sponsor from enjoying free use of airport facilities—even if the sponsor has invested far more of its own general funds in the airport than the airport has received in AIP funds.

It is fair to ask whether extensive regulation and oversight by FAA and the DOT Office of Inspector General concerning local use of airport facilities is an appropriate or effective use of federal resources. Loosening the current restrictions would make the standards for use of airport property more balanced in relation to the benefits airports have received from airport sponsors, without interfering with aeronautical operations.

### Should a Notice and Comment Rulemaking Process be Used When FAA Regulates Airports?

Currently, Congress and the FAA regulate airport behavior by prescribing and implementing AIP grant assurances covering a wide variety of airport activities far beyond the scope of the projects funded with AIP dollars. Moreover, the FAA engages in extra-regulatory practices, such as imposing requirements on airports via FAA policy or advisory circulars;<sup>64</sup> treating draft policies as final, enforceable requirements;<sup>65</sup> and imposing burdens on airports through FAA “internal

guidance.”<sup>66</sup>

In an era when federal funding is diminishing and the appropriate role of the federal government in a variety of areas is being debated, it is fair for airports to ask decision-makers to consider whether: (1) the Federal government should limit its regulation of airports to matters of safety, security, and system efficiency; (2) FAA should be required to undertake a notice and comment rulemaking process when seeking to impose burdens on airports; and (3) FAA should refrain from directly or indirectly enforcing existing guidance, advisory circulars, and policies that have not been subject to full regulatory process.

Perhaps, legitimate safety issues should be regulated through *actual regulations*, issued pursuant to a notice and comment process conforming to the Administrative Procedure Act.<sup>67</sup> If safety is the FAA’s number one priority, is it appropriate to regulate safety by contract, such as an AIP assurance contained in a grant agreement?<sup>68</sup> The fact that Congress and the FAA routinely regulate airports via contract or by guidance relating to a contract<sup>69</sup> evidences a peculiar federal perspective that the grant assurances are the convenient way for the government to regulate.<sup>70</sup>

<sup>66</sup>See, e.g., FAA Order 5200.11, *FAA Airports (ARP) Safety Management System (SMS)* (Aug. 30, 2010).

<sup>67</sup>5 U.S.C. § 552 and 553 (2006).

<sup>68</sup>See, e.g., Grant Assurance 20, concerning Hazard Removal and Mitigation, requiring airport sponsors to assure that terminal airspace needed to protect instrument and visual operations will be adequately cleared and protected.

<sup>69</sup>The FAA recognizes, in some documents and Part 16 decisions, the legal principle that internal guidance, such as the Compliance Manual, is not regulatory and is not intended to control airport sponsor conduct. However, the Compliance Manual is routinely cited by parties, FAA, and even courts in interpreting airports’ federal obligations.

<sup>70</sup>However, as the Third Circuit recently observed, “*Chevron* deference is inapplicable to agency interpretations rendered in ‘opinion letters, policy statements, agency manuals, and enforcement guidelines.’” *Tinicum Twp. v. U.S.*

Similarly, when the FAA imposes burdens on airports, it should go through a full regulatory process. This process includes public notice and opportunity for comment, and provisions designed to preclude arbitrary, burdensome regulations, such as consideration of costs and benefits; analysis of unfunded mandates; and federalism analysis of impacts on the relationship between the federal government and state and local governments that own and operate airports.

The problem with the failure to follow the rulemaking process is three-fold: (1) it denies the regulated parties the opportunity to participate in the development of obligations that will be imposed on them; (2) it avoids serious analysis of potential burdens of the requirements; and (3) it allows the FAA to decide on an *ad hoc* basis whether or not to follow the requirements.

This is a particularly good time to consider and address airport concerns about the level and nature of federal regulation, because the appropriate role of the federal government is broadly being debated. Serious consideration is being given to whether, in general, the federal government’s reach should be smaller and whether the government should reduce existing regulatory burdens, and not impose additional regulatory burdens that are a drag on the economy. ♦

*Thomas R. Devine is a partner in Kaplan, Kirsch & Rockwell LLP. Christian L. Alexander is an associate in the same firm.*

<sup>62</sup>49 U.S.C. § 47107(a)(12).

<sup>63</sup>Although the statutory provision also requires airport proprietors to provide property interests in airport buildings for such purposes, this requirement has been essentially nullified by annual appropriations act provisions. See, e.g., Consolidated and Further Continuing Appropriations Act, Pub. L. 112-55, § 111, 125 Stat. 552, 648 (2012).

<sup>64</sup>See, e.g., Grant Assurance 34, making compliance with Advisory Circulars mandatory.

<sup>65</sup>See, e.g., Weight-Based Restrictions at Airports: Proposed Policy, 68 Fed. Reg. 39176 (July 1, 2003).

*Dep’t of Transp.*, No. 11-1472, slip op. at 12-13 (3d Cir. July 6, 2012) (citing *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 154-55 (3d Cir. 2004)).