

The Legal Constraints Of Deactivating an Airport

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Personal Background

- Member, Chevalier, Allen & Lichman LLP, handling many aviation and airport issues
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Issue Background

- Economic realities of airports
- Focus of presentation is the legal constraints on an airport proprietor if the proprietor decided to close the airport



Grant Assurances and Deactivation

Examine the Grant Assurances Closely

- Take a look at the grant documents in airport sponsor's possession
- These will describe the obligations of the sponsor
- Grant Assurances cover a number of issues
- Based on both statute (49 U.S.C. § 47107(a)) and FAA Order 5190.6B

Grant Assurances Primarily Relevant to Airport Closing

- Grant Assurance C.5.b: the airport sponsor, may not “sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property ... for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary [of Transportation].”
- The airport sponsor is obligated to obtain FAA consent to delete any land so described and shown. FAA Order 5190.6B § 22-1.
- FAA consent shall be granted only if it is determined that the property is not needed for present or foreseeable public airport purposes.

Grant Assurance C.19.a

- The airport sponsor is obligated to “suitably operate and maintain the airport and facilities. . . . Any proposal to temporarily close the airport for nonaeronautical purposes must first be approved by the Secretary . . . [the Sponsor] will not cause or permit any activity or action thereon which would interfere with its use for airport purposes.”
- This obligation to maintain the Airport includes the responsibility to operate the aeronautical facilities and common use areas for the benefit of the public. FAA Order 5190.6B, p. 2-15

Grant Assurance 31.b.1

- “[f]or land purchased under a grant for airport development purposes (other than noise compatibility), [the airport sponsor] will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary [of Transportation] an amount equal to the United States’ proportionate share of the fair market value of the land.”
- See also, Grant Assurance B.1, FAA Order 5190.6B, p. 2-14


Duration of Grant Assurances

- Facilities developed or equipment obtained with Federal funds, Assurances remain in effect for the useful life of the facilities, but not longer than 20 years after the grant was accepted; Grant Assurance B.1, FAA Order 5190.6B, p. 2-13
- No limit on the duration if Grant Assurances regarding real property acquired with federal funds. FAA Order 5190.6B, p.2-14

Summary of Grant Assurance

Deactivation of an airport requires:

- Approval by the Secretary of Transportation (*i.e.*, FAA);
- Payment of the FAA's proportionate share of the FMV of all real property acquired with Federal Funds;
- Coordination with the FAA with respect to the disposition of grants made for airport development or improvement,



Federal Regulations Allow the
Release of the Airport Sponsor's
Obligations under the Grant
Assurances

FAA has established procedures for airport deactivation

- “Within the specific authority conferred upon the Administrator by law, the FAA will, when requested, act to release, modify, reform, or amend any airport agreement to the extent that such action will protect, advance, or benefit the public interest in civil aviation.”
FAA Order 5190.6B Section 22.31
- The FAA may grant relief from specific limitations or covenants of an agreement, or grant a complete and total release which authorizes the subsequent disposal of obligated airport property. *Id.*
- The FAA’s release may apply to specific facilities and parcels of land acquired with Federal assistance, which ultimately results in a partial airport closure, or disposal of an entire airport.

Deactivation or Permanent Closure of the Entire Airport

- An airport sponsor may request the release of obligations for an entire airport. FAA Order 5190.6B, Section 22.20.
- ARP-1's concurrence is required before granting any release that would enable the disposal of an entire airport for non-aviation purposes.
- Each request to release an entire airport is considered by ARP-1 on a "case-by-case" basis without limitation to the guidance in FAA Order 5190.6B.

Constraints on ARP-1' s Discretion

- ARP-1's discretion is not unlimited: guided by Grant Assurances and Federal regulations and procedures;
- Example: for release of land purchased with federal funds it must be demonstrated that, pursuant to FAA Order 5190.6B, Section 22-19:
 - (1) the land is no longer “needed” for airport purposes; and
 - (2) the airport will repay that portion of the property's FMV proportionate to the Federal Government's share of the cost of the acquisition of such land, which sum is to be deposited in the Aviation Trust Fund.

Procedural Requirements

- The Request for Release must:
 - (1) be in writing and signed by a duly authorized official of the airport owner [FAA Order 5190.6B, Section 22.23]; and
 - (2) be specific, including the facts and circumstances justifying the request [FAA Order 5190.6B, Section 22.24].

Procedural Requirements

- The FAA will take into consideration factors such as:
 - (1) the past and present owner's compliance record under all its airport agreements and its actions to make available a safe and usable airport for maximum aeronautical use by the public;
 - (2) evidence that the owner has taken or agreed to take all actions possible to correct noncompliance situations at the airport, if applicable;
 - (3) the reasonableness and practicality of the owner's request in terms of aeronautical facilities which are needed and the priority of need;
 - (4) the net benefit to be derived by civil aviation and the compatibility of the proposal with the needs of civil aviation; and
 - (5) consistency with the guidelines for specific types of releases.
- FAA Order 5190.6B, Section 22.27.

Applicable Policy Determinations

FAA must make at least one of several policy determinations:

- (1) the public purpose which a term, condition, or covenant of an agreement, or the agreement itself, was intended to serve is no longer applicable; *or*
- (2) the release, modification, reformation, or amendment of an applicable agreement will not prevent accomplishment of the public purposes for which the airport or its facilities were obligated, and such action is necessary to protect or advance the interest of the United States in civil aviation; *or*
- (3) the release, modification, reformation or amendment will conform the rights and obligations of the owner to the statutes of the United States and the intent of Congress consistent with applicable law.

FAA Order 5190.6B, Section 22.28.

Treatment of Airport Improvements Other Than Land

Where a release is sought to abandon, demolish or convert grant-funded improvements, **other than land**, the FAA must find that:

- (1) the grant agreement involved has expired;
or
- (2) the facility in question is no longer needed for the purpose for which it was developed;
or
- (3) the useful life of the facility in question has expired

Applicable Case Law

Friends of Richard-Gebaur Airport v. FAA, 251 F.3d 1178 (8th Cir. 2001),

- Kansas City consistently lost money operating the Richards-Gebaur Airport. *Id.* at 1183.
- Kansas City submitted an application to the FAA requesting permission to close the airport and seeking to be released from its federal obligations and assurances to maintain the property for public aeronautical use. *Id.*

Results

- FAA and Kansas City negotiated a Memorandum Agreement
- FAA released Kansas City from its grant obligations;
- Kansas City paid the FAA a lump sum to be used for eligible airport improvement projects in the Kansas City Area
- All proceeds from lease of property deposited in aviation account for use solely for specified and general aviation projects

Conclusions Regarding Oceano Airport and the FAA

- No grant obligations for purchase of property;
- Grant obligations for capital expenses;
- Like Kansas City, it may be beneficial to aviation to close Oceano, take at least a portion of the money obtained from leasing the land and apply it to the County's other airports.



California State Considerations for Deactivation of an Airport

State Grants and Loans also Carry Pay Back Obligations

Under the California State Aeronautics Act (*Public Utilities Code § 21000 et seq.*), deactivation of an airport would give rise to two major procedural issues:

- (1) notice to the Department of Transportation ("Caltrans") Division of Aeronautics; and
- (2) repayment of State grants and loans.

State law applicable to Airport Deactivation Planning

Public Utilities Code § 21605 sets forth several conditions which govern the deactivation of an airport financed partially with State funds:

"No proprietor of any permitted airport which is open to the public and has received public funds shall close or suspend operation of the airport, or close an existing runway or taxiway except on a temporary basis for inspection, maintenance, construction, or emergency purposes, without notifying the department **in writing 60 days prior** to the intended closure or suspension of operations. On its own motion or upon the request of an affected or interested person, the department **may conduct a public hearing** to determine the impact of the intended closure or suspension of operations, both **economically and on the entire state air transportation system**. The department may take appropriate action to assist the proprietor in keeping the airport operational and open for public use."

Factors Caltrans Might Consider

- whether the airport is approved for night operations;
- whether the airport has an approved instrument approach procedure;
- how many aircraft are based at the airport;
- whether the airport is used for airborne fire attacks;
- whether the airport is used for emergency medical transportation;
- what services the airport provides for the community;
- the size of the community that is served by the airport;
- whether any aviation or transportation agency has designated the airport as having a significant role;
- whether a suitable, public-use airport is situated within a reasonable distance;
- whether closure of the airport will have a negative effect on other airports;
- whether the airport is used for law enforcement purposes.

Airport State Grants and Loans

- Matching Grants

- Payback of State AIP Matching Grants and Acquisition and Development Grants is governed by *Public Utilities Code* §21687
- "If an airport, for which payments have been made from the Aeronautics Account, ceases to be open to the general public for more than one year, the public entity to which those payments were made shall pay to the state funds equal to the amount computed by the department pursuant to paragraph (2), and those funds shall be deposited in the Aeronautics Account." *Cal. Pub. Util. Code* §21687(a)(1)
- "The department shall compute an amount equal to the total of all payments made for the airport from the Aeronautics Account during the preceding 20 years, less 5 percent of the amount of a particular payment multiplied by the number of years since the payment was made, or the unused balance, whichever is greater." *Cal. Pub. Util. Code* §21687(a)(2)(A).

Airport State Grants and Loans

- State Loans

- "Nothing in these regulations shall be construed as prohibiting the sponsor from making early repayment, either in full or in part. Interest due as of the date of early payment shall be included in the early payment." 21 *Cal. Code Regs.* § 4073(a)(3)

Re-Use Constraints, Environmental, Contractual and Political Considerations

- (1) Real Property Re-Use Constraints;
- (2) Environmental issues;
- (3) Airport related contracts that are enforceable against the Airport Sponsor; and
- (4) Probable actions by groups and organizations that are opposed to deactivation of general aviation airports.

Real Property Re-Use Constraints

- The Real Property documents, *e.g.*, Grant Deeds, Gift Deeds and Condemnation Orders, must be reviewed
- Documents must be reviewed for any use restrictions, reservations of rights, remainders, easements, or other terms and condition which may remain in effect and might prohibit, limit or other wise affect the County's planning for deactivating the airport.

Environmental Issues

- Will deactivation of the airport require review under the National Environmental Policy Act ("NEPA") [42 U.S.C. § 4321 *et seq.*] and/or the California Environmental Quality Act ("CEQA") [*Public Resources Code* § 21000 *et seq.*]?
- Are there any environmental clean-up requirements under the Resource Conservation and Recovery Act ("RCRA") [42 U.S.C. § 6901 *et seq.*] and/or the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") [42 U.S.C. § 9601 *et seq.*]?

Contracts That Are Enforceable Against the Airport Sponsor

Examples include:

- (1) Federal leases/licenses for FAA NAVAIDS and communications and weather facilities;
- (2) Department of Defense or National Guard leases/licenses;
- (3) State leases/licenses for police, firefighting, emergency, disaster relief, *etc.*; and
- (4) Private contracts with Fixed Base Operators, hangar and tie-down leases, and other leases and sub-leases.

Potential Opposition to Deactivation of the Airports

It is also probable that citizen groups, Airport users, fixed base operators, concessionaires, local politicians and businesses, citizens' groups and private citizens might pursue legal action to keep the Airport open.

Organizations such as the Aircraft Owners & Pilots Association ("AOPA") have vigorously opposed closings of general aviation airports.

The airport proprietor should include consideration of such potential administrative and/or legal actions in its Airport deactivation planning.

Conclusion

- The deactivation of an airport is not impossible, but it is tricky and complex due to the fact that most airports have accepted federal funds to keep the airport operating safely.
- This speech is not meant to be an exhaustive “how-to” on closing an airport

Additional Information

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