KAPLAN KIRSCH ROCKWELL

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Kevin Smith, General Manager
TRUCKEE TAHOE AIRPORT DISTRICT

FROM: KAPLAN KIRSCH & ROCKWELL LLP

DATE: February 15, 2017

SUBJECT: Increasing Operational Control over Airport

INTRODUCTION

We understand that one of your Board members has asked for advice on whether – and how – the District Board might be able to increase its degree of control over operations at Truckee-Tahoe Airport (TRK) in light of the considerable regulatory and financial control that the Federal Aviation Administration (FAA) exercises over airports like TRK. We are responding to these inquiries with two memoranda. This memorandum addresses the underlying issue of the degree of federal control over the airport and actions that some airport sponsors have taken to assert greater control. Under separate cover, we are providing a memorandum on the meaning and importance of the requirement that the District operate the airport as financially self-sustaining.

BACKGROUND

Airports in the United States are generally grouped into several categories based upon their usage and their relationship to the national aviation system. The vast majority of the 20,000 airports in the United States are privately owned, operated, and not available for public use. Approximately 5,000 airports are available for public use. A smaller number of airports (approximately 3,400) are not only available for public use but also are eligible to receive grants from the FAA under the Airport Improvement Program. These are known as "grant-eligible" airports and constitute the National Plan for Integrated Airport Systems (NPIAS).[1] This rather awkward term merely refers to airports whose importance is such that the FAA has decided their operation is part of the national system of public airports. Almost all – but not all – NPIAS airports have in fact received grants from the FAA under the Airport Improvement Program.[2]

TRK is a NPIAS airport and has received FAA grant funds. The precise manner by which grant funds are made available is beyond the scope of this memorandum, but it is important to recognize that every NPIAS airport is entitled to receive some grant funds (so-called

[1] *See* FAA, *National Plan for Integrated Airport Systems*, https://www.faa.gov/airports/planning_capacity/npias/ (last visited Feb. 10, 2017).
[2] *See generally* FAA, *Airport Improvement Program (AIP) Grant Histories*, https://www.faa.gov/airports/aip/grant_histories/ (last visited Feb. 10, 2017).

"entitlement funds") and can receive discretionary funds as well. In most instances, FAA grant funds can only be used for capital projects or planning. The District receives entitlement funds every year and has generally received discretionary funds as well. The amount and purpose for which discretionary grant funds are made available are subject to a complex formula and involves considerable discretion by the FAA's Airport District Office.

The receipt of FAA grant funds is critically important in understanding the authority of the District and the power of the FAA. FAA does not directly regulate most airports in the United States but instead indirectly regulates airports through the grant process.[3] Whenever an airport sponsor receives FAA grant funds, it must execute a "grant agreement," which is a contract with the federal government setting forth the manner in which grant funds will be used.[4] Accompanying every grant agreement are a series of 39 "Grant Assurances" which are contractual commitments between the airport sponsor and the FAA governing how the airport will be operated.[5] *It is these Grant Assurances that provide the basis for almost all FAA regulation of general aviation airports.*

The Grant Assurances are extremely broad in scope and regulate many aspects of how an airport functions, including how an airport operates, how it enters into contracts, and how it buys and uses real estate. It is no exaggeration to say that the 39 Grant Assurances have the effect of regulating almost every aspect of the day-to-day operation of an airport and its capital program.

While it is beyond the scope of this memorandum to explain the substantive requirements of all 39 Grant Assurances, it is crucial for this memorandum to understand that the majority of the Grant Assurances commit the airport sponsor for a period of 20 years following receipt of a grant.[6] In practice, this means that FAA will regulate an airport for 20 years following the receipt of its last grant. Because most NPIAS airports (including TRK) receive grants every year, that 20-year clock resets every year.

DEFEDERALIZING

Airport sponsors occasionally consider pursuing a strategy known as "defederalizing." This is a process by which an airport sponsor attempts to relieve itself of the Grant Assurance obligations. In most instances (the exceptions are not important here), the process of defederalizing an airport

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[3] Commercial service airports – those that serve large transport category passenger aircraft – are regulated through Part 139 of the FAA regulations. TRK is not a commercial service airport. Only about 500 airports are subject to direct FAA oversight under this regulation.
[4] *See* 49 U.S.C. § 47107(a)-(e) (listing required grant agreement terms).
[5] *See generally* FAA, *Assurances – Airport Sponsors*, https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip.pdf (last visited Feb. 10, 2017). While Grant Assurances are enforced as a matter of contract, the content of the Grant Assurances is actually dictated by federal statute. *See* note 4, *supra*.
[6] *See Assurances*, *supra* note 5, at 1 ("The terms, conditions and assurances of this grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer of Federal funds for the project."). Certain Grant Assurances also apply "so long as the airport is used as an airport." *Id*.

takes in excess of 20 years: an airport sponsor must not take FAA grant funds for at least 20 years before it can even consider becoming free of FAA regulation. There are some exceptions to the 20-year rule, however, and in some instances an airport is not assured of being released from federal obligations even after that time. For example, if an airport sponsor has used FAA grants to purchase real estate or any of the airport property was gifted by the federal government under the Surplus Property Act, certain regulations remain in effect in perpetuity.[7]

In recent memory, only a small handful of airport sponsors have even attempted to defederalize, and we are aware of only two that have successfully completed the process. A third airport sponsor is in the final stages of defederalizing.[8]

The advantages of defederalizing are considerable: with a few small exceptions, a defederalized airport is only subject to FAA regulation on matters concerning use of airport revenue. Of course, the disadvantages are also obvious: a defederalized airport is not entitled to receive entitlement or discretionary grant funds.

INCREASED CONTROL WITHOUT DEFEDERALIZING

Because of the complexity of the Grant Assurances and the time it would take an airport to defederalize, some airport sponsors have explored other ways to increase their control over airport operations within the federal regulatory system. The following discussion highlights areas where airports have considered the need for greater local control and have attempted to secure such control.

Noise and Access Restrictions. Until 1990, airport sponsors could impose restrictions on access to their facility (for noise or other environmental reasons) upon satisfaction of a relatively generous constitutional standard that requires only that such restrictions be reasonable in the circumstances of the airport and be supported by facts that demonstrate the need for the restriction.[9] In 1990, Congress enacted the Airport Noise and Capacity Act, which shifted considerable authority from airport sponsors to the FAA.[10] Today, if an airport sponsor wants to adopt any sort of access restriction (*e.g.,* a restriction based upon noise, a restriction based upon type of aircraft, or a restriction based upon other impacts of airport operations), it generally must secure FAA approval.[11] Like all FAA regulations, there are some narrow exceptions but FAA

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[7] *See id* ("There shall be no limit on the duration of the terms, conditions, and assurances with respect to real property acquired with federal funds.").
[8] For example, Blue Ash Airport in Cincinnati successfully closed after waiting in excess of 20 years from its last grant. Meigs Field in Chicago was able to close because of unique provisions in the grant agreements that exempted the airport from the 20-year rule. Opa-Locka West airfield in Florida closed after waiting less than 20 years because the FAA determined that it was not economical to repair the airfield after a hurricane in the early 2000s. Santa Monica Airport in Southern California has not taken grants for more than 20 years but does lie on property that was gifted under the Surplus Property Act. The City of Santa Monica recently signed an agreement with the FAA that will allow the airport to close in 2028. East Hampton Airport in New York is nearing the end of the 20-year waiting period. There may be a few other examples of airports that are in the process of letting the 20-year clock run.
[9] *See e.g.*, *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1980); *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75 (2nd Cir. 1977).
[10] 49 U.S.C. § 47521, *et seq.*
[11] *See id*. § 47524.

approval is required in most instances. The FAA is extraordinarily reluctant to approve restrictions. The agency has *never* approved a restriction for noise purposes and only rarely approves restrictions that are not strictly and entirely safety-based.

Before 1990, it was relatively common – especially in California – for airports to adopt restrictions on the time when an airport was open, on the type of aircraft that could use the airport, and on the permissible noise level of aircraft. Those pre-1990 restrictions were grandfathered under the new law and most remain in effect. Since 1990, only two new restrictions have been imposed at NPIAS airports (at Naples Municipal in Florida and at East Hampton in New York) and both were subject to considerable litigation by users and the FAA.[12]

Other Operational Restrictions. Although the Airport Noise and Capacity Act severely limits the authority of an airport sponsor to impose restrictions for environmental or community reasons, airport sponsors do retain substantial control and regulatory authority over the operation of business enterprises on the airport. Through adoption of airport rules and regulations or minimum standards, both of which are recommended by the FAA,[13] airports can regulate the types of business enterprises that operate at the airport, the terms and conditions under which they operate, and the quality or type of services they provide. While airports generally cannot grant exclusive rights (or monopolies) to certain businesses to operate at the airport, the sponsor itself can always exercise what is known as the "proprietary exclusive" right to be the exclusive provider of certain (or even all) aeronautical services.[14] Similarly, some airport sponsors engage in non-aeronautical business at the airport, which can be a source of substantial revenue.

Real Estate Matters. The regulation of airport real estate is complex and is dependent upon two factors: the purpose for which the real estate is dedicated (*i.e.*, aeronautical or non-aeronautical) and the funds that were used to acquire the property (*i.e.,* federal funds, airport funds, or funds unrelated to the airport sponsor). FAA approval is generally required in most instances to use airport property for non-aeronautical purposes.[15] Securing that approval is not simple, but airport sponsors occasionally receive FAA approval for good financial and operational reasons (*e.g.,* in order to generate airport revenue or because the property has no value for aeronautical purposes). An airport sponsor's ability to gain greater control over the use of airport real estate depends upon a number of airport-specific factors but is often a tool that airport sponsors use to gain greater flexibility (and less regulatory oversight) over prospective land uses. TRK has a number of parcels that FAA has already approved as appropriate for non-aeronautical development.

Sale of airport real estate requires more exhaustive FAA approval, which is difficult to secure. The sale of airport real estate is generally considered not to be in accordance with best practices and FAA will often instead authorize the lease for non-aeronautical purposes to generate a continuing stream of revenue.

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[12] *See Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133 (2d Cir. 2016); *City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005).
[13] FAA Order 5190.6B at ¶ 10.2 (Compliance Manual).
[14] *Id*. at ¶ 8.5
[15] *Id*. at ¶ 3.5.

Other Financial Matters. It is extraordinarily difficult for an airport sponsor to be released from the regulations that impose restrictions on the use of airport funds. Unlike most airport regulation, regulation of airport finances is one of the few areas of federal regulation that is statutory and not based upon receipt of FAA grants.[16] Under federal law, any airport that received grants after 1982 is required to comply with FAA regulations that require that all airport funds be used only for the capital and operating expenses of the airport.[17] The FAA strictly regulates the use of airport revenue and aggressively enforces the requirement that airport revenue cannot be "diverted" to non-airport uses. There is no practical way to circumvent the revenue use requirements so long as the airport is operational.

CONCLUSION

The FAA exerts significant and long-lasting control over most aspects of an airport's operation via the Grant Assurances. Without waiting until the Grant Assurances expire or otherwise receiving a release of those obligations, an airport sponsor has limited options to retake additional control of the airport from FAA. The option that provides an airport sponsor with the most potential for some measure of control concerns real estate and the potential development of non-aeronautical property, but even that option requires a degree of FAA involvement and approval. Notwithstanding the seemingly pervasive FAA regulation of airports, creative airport sponsors are often successful in negotiating arrangements that survive FAA scrutiny so long as those arrangements do not frustrate the FAA's fundamental policy objectives of ensuring that all NPIAS airports are available to the public on reasonable terms and conditions.

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[16] 49 U.S.C. § 47107(b).
[17] *See* FAA, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (Feb. 16, 1999) (Revenue Use Policy).