



MEMORANDUM

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TO: Truckee-Tahoe Airport District

FROM: KAPLAN KIRSCH & ROCKWELL LLP

DATE: February 28, 2018

SUBJECT: Expenditure of Funds for Off-Airport Residence/Property Acquisition and Mitigation

SUMMARY AND CONCLUSION

The Truckee-Tahoe Airport District (District) is interested in purchasing off-airport property outside of a formal Noise Compatibility Planning Program under 14 C.F.R. Part 150 (Part 150), consistent with its long-term goals of acquiring nearby property with the purpose of limiting encroachment of residential development where overflights may occur. We summarize below the available options, and have included a background section detailing the full suite of applicable regulations (including those relevant to Part 150 programs) for reference. In addition, as the District does not currently collect Passenger Facility Charges (PFCs), this memorandum does not contain an exhaustive analysis of the potential uses of PFC revenue.¹ However, where key differences exist between AIP- and PFC- funding regulations exist, we have provided relevant information in footnotes.

In brief, the District has the following options to pursue land acquisition or sound insulation programs without entering into a formal Part 150 process:

1. Use Airport Improvement Program (AIP) or PFC funds to pay for:
 - Any mitigation measure in a Record of Decision for an environmental document for airport development.
 - Acquisition or sound insulation for any adversely affected facility used primarily for medical or educational purposes.

2. Use PFC funds to pay for:

¹ Even if the District were to levy a PFC, the revenue from such charges would be minimal.

- Acquisition of land/residences within the 60 dB CNEL contour.
 - Sound insulation of residences built prior to 1998² and within the 60 dB CNEL contour that have indoor sound levels above 45 dB.
3. Use AIP or PFC funds to pay for:
- Acquisition of any land to the extent that it is needed for “airport purposes” (*i.e.*, any aviation activity normally found on an airport).
 - “Land banking” for future airport development projects reasonably foreseeable within the next 20 years.
 - Acquisition of any land necessary to protect airspace surfaces (*e.g.*, obstacle clearance surfaces, Part 77 surfaces, approach and departure surfaces, and runway protection zones), so long as the land is within 5,000 feet from a runway end and the airspace to be protected will be used or needed within the next 20 years).
4. Use airport revenue to pay for:
- Any of the above-cited uses eligible for either AIP or PFC funding.
 - Acquisition of land for any identifiable aeronautical purpose (including options such as acquiring land for an off-site sky-diving drop zone).
 - Acquisition of land for a revenue-generating non-aeronautical purpose to assist the District in its obligation to be self-sustaining.
 - Acquisition of land for a “community use”³ (*e.g.*, open space or park) for the purpose of maintaining positive airport-community relations so long as:
 - o The community use does not adversely affect the capacity, security, safety or operations of the airport;
 - o The property acquired would not reasonably be expected to produce more than *de minimis* revenue at the time the community use is contemplated, and the property is not reasonably expected to be used by an aeronautical tenant or otherwise be needed for airport operations in the foreseeable future.
 - o The community use does not preclude reuse of the property for airport purposes if such reuse will provide greater benefits to the airport than continuation of the community use.
5. Use of unrestricted (*i.e.*, non-airport) revenue to pay for any land acquisition or sound insulation so long as the use does not violate any existing grant assurance (*e.g.*, the prohibition against exclusive rights).

² Unless TRK had no published noise contours before 1998.

³ Traditionally, community use is allowed for property that has been purchased by an airport for another purpose but there is nothing in FAA regulations that appears to *prohibit* such land acquisition.

DISCUSSION

I. AIP Funds

A. Use of AIP Grant Funds for Noise-Compatibility Purposes

Airport sponsors may use Airport Improvement Program (AIP) funding to purchase land for noise-compatibility purposes in only four circumstances,⁴ and none of which appear to be currently available to the District.

1. Approved in a Part 150 Noise Compatibility Program (NCP)⁵

Airports may collaboratively address noise near airports by participating in the voluntary program called Airport Noise Compatibility Planning or “Part 150.” Through the Part 150 process, airport operators may choose to purchase land near airports to maintain compatible land use or provide sound insulation for homes, schools and other buildings near the airport that meet the required standards.

Congress has authorized the use of AIP grant funds to conduct noise studies and fund noise control measures if the specific measure is approved as part of a noise compatibility program under 14 C.F.R. Part 150.⁶ There is no current approved Part 150 program at TRK. However, even if it proceeds with a Part 150 study, the District may not be successful in securing eligibility for AIP funding for desired land acquisition.

a. The land use must be incompatible with the documented level of aircraft noise.

The most important consideration in this regard is whether FAA recognizes a noise issue in the first place. Table 1 of Appendix A in 14 CFR part 150 contains the requirements for determining when various land uses are incompatible with aircraft noise, and therefore potentially eligible for AIP funding. FAA generally considers all identified land uses to be compatible with airport and aircraft noise levels below DNL 65 dB.⁷ However, FAA included an important note in its regulations recognizing the ability of local governments to establish their own land use compatibility standards and regulations.⁸

⁴ FAA Order 5100.38D at Appx R.

⁵ Noise project eligibility under the PFC program is the same as noise eligibility under AIP except that the project need only be eligible for inclusion in an approved Part 150 Noise Compatibility Plan (NCP); it need not be actually included in an approved NCP. FAA Order 5500.1, *Passenger Facility Charges*, (2001) at § 4-6(a).

⁶ 49 U.S.C. § 47504(c).

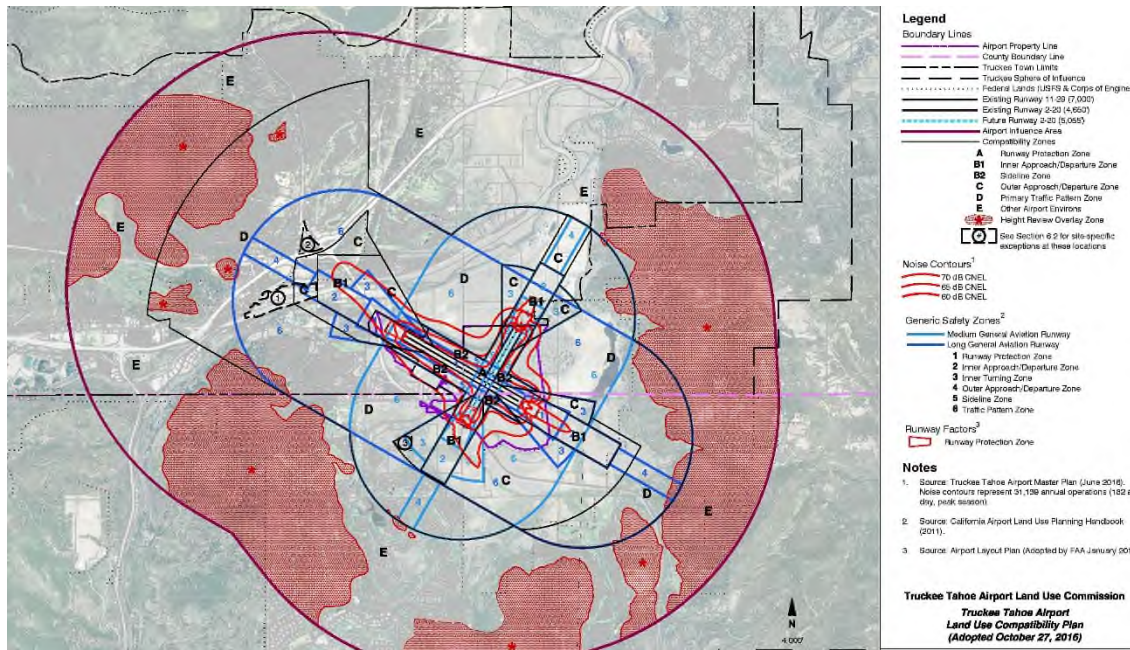
⁷ 14 C.F.R. Part 150 App. A Table 1.

⁸ 14 C.F.R. Part 150 App. A Table 1 n.* (“FAA determinations under Part 150 are not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.”)

In this case, the Truckee-Tahoe Airport Land Use Compatibility Plan (ALUCP) concludes that the maximum CNEL⁹ considered normally acceptable for new residential land uses and other noise-sensitive land uses in the vicinity of TRK is 60 dB CNEL.¹⁰ The ALUCP also provides that the maximum acceptable indoor noise level is 45 dB CNEL for: (1) Any habitable room of single- or multi-family residences; (2) long-term lodging; (3) family day care homes (≤14 children); (4) hotels and motels; (5) hospitals and nursing homes or other congregate care facilities; (6) churches, meeting halls, office buildings, and mortuaries; and (7) schools, libraries, and museums.¹¹

As documented below in Figure 1, even the 60 dB contour barely extends off District property. As a result, even if the District proceeds with a Part 150 study, it is likely difficult to identify off-airport lands that qualify for AIP-funded land acquisition – even given the ALUCP’s lower threshold (60 dB versus 65 dB) for noise compatibility.¹²

Figure 1: Current noise contours¹³



To be eligible for AIP-funded full sound-insulation, a project must meet a two-stage eligibility test: (1) the property must lie within an eligible noise contour threshold (in this case, the 60 dB CNEL); and (2) the property must also meet the interior noise level requirement (in this case, 45 dB CNEL).¹⁴ Even if eligible, the sound insulation package must provide a reduction in indoor

⁹ The FAA recognizes CNEL (community noise exposure level) as an alternative noise metric for California and uses the metric DNL and CNEL interchangeably for projects in California. FAA Order 5100.38D § R-6(b).

¹⁰ Truckee-Tahoe Airport Land Use Compatibility Plan (2016) at § 5.1.2.

¹¹ Truckee-Tahoe Airport Land Use Compatibility Plan (2016) at § 5.1.4.

¹² The requirements for interior noise do not apply to acquisition projects. FAA Order 5100.38D at Table R-6 (e)(5).

¹³ See, Truckee-Tahoe Airport Land Use Compatibility Plan (2016) at Exhibit 3-4.

¹⁴ FAA Order 5100.38D at Table R-6 (g)(3).

noise level of at least 5 dB and also bring the average noise level below 45 dB.¹⁵ In addition, the structure must have been built prior to October 1, 1998, unless the sponsor can demonstrate that no published noise contours existed at that time.¹⁶

b. Not all NCP-approved mitigation measures are AIP eligible.

Even if the land to be acquired is not compatible with existing noise impacts, it is important to also note that not all NCP-approved mitigation measures are AIP-eligible. For example, FAA's AIP Handbook expressly identifies the following activities as not AIP-eligible activities:¹⁷

- **Obstruction Removal – Creation of Parks or Play Fields.** Any redevelopment, such as the creation of parks or play fields, unless required as part of court ordered mitigation. This is because the redevelopment is not an essential element in completing the project.
- **Land for Other than Airport Purposes.** Any use or acquisition of land for other than “airport purposes” (*i.e.*, all aviation activities normally found at an airport).
- **Block Rounding with Lower Local Standards.** For example, if a local standard has been adopted to include residences that lie within the DNL 60 dB noise contour, residences that lie outside the DNL 60 dB are not eligible for block rounding. This is because by accepting a lower local standard, the FAA has already accepted exterior noise that is below the land use compatibility with yearly day-night average sound levels that FAA has accepted in 14 CFR Part 150.
- **Building Code Corrections.** If it is determined in the course of designing a sound insulation project that a building needs improvements in order to conform to local building codes, only the costs of the sound insulation are allowable. This includes making changes to meet current ventilation requirements where the existing central ventilation or air conditioning units do not meet current building code ventilation requirements.
- **Mitigation of a Noise Sensitive Use in a Commercially Zoned Structure. Mobile Homes or Mobile Classrooms.** Mobile homes and mobile classrooms are not viable noise compatibility projects since their design and construction do not lend themselves to effective noise reduction measures. (Note that this is not the same thing as permanent modular buildings.)
- **Non-Aircraft Noise Mitigation.** The mitigation must be based on aircraft noise associated with the airport.

As a result, it may be difficult to identify noise-compatibility projects (including either sound insulation and/or land acquisition) that are eligible for AIP funding at TRK.

2. Required Environmental Mitigation Measures.

A noise-compatibility project is eligible for AIP funding if it is a mitigation measure in a Record of Decision for an environmental document for airport development.¹⁸ We are not aware of any

¹⁵ FAA Order 5100.38D at Table R-6 (g)(4).

¹⁶ FAA Order 5100.38D at Table R-6 (g)(7). *See also* FAA, *Final Policy on Part 150 Approval of Noise Mitigation Measures: Effect on the Use of Federal Grants for Noise Mitigation Projects*, 63 Fed. Reg. 16,409 (April 3, 1998).

¹⁷ FAA Order 5100.38D at Table C-4, Table C-4 & Table C-5.

¹⁸ FAA Order 5100.38D at App. R, Table R-1 & Table R-6(d).

mitigation measures in an FAA Record of Decision that require off-airport land acquisition or sound insulation and would therefore make such projects AIP-eligible.

3. Medical or Educational Facility

A noise-compatibility project is eligible for AIP funding if it involves an adversely affected facility used primarily for medical or educational purposes, regardless of whether or not the airport has a 14 C.F.R. Part 150 Program.¹⁹

4. FAA-Accepted Compatible Land Use Plan

Finally, a noise-compatibility project is also eligible for AIP funding if it is included in a land use compatibility plan prepared for a medium or large hub airport that has not prepared or updated a 14 C.F.R. Part 150 program in the preceding 10 years.²⁰ We note that unless Congress extends this option it is set to expire on March 18, 2018.²¹ Either way, however, this option is not available at TRK as it is not a medium or large hub airport.

B. Acquisition of Land for Non-Noise Purposes²²

Airport sponsors may use AIP grant funds to purchase property for non-noise purposes, but only under one of the following circumstances:

- General Airport Purposes: Sponsors may use AIP funds to acquire any interest in land when that land is needed for *airport purposes*,²³ *i.e.*, “all aviation activities normally found on an airport.”²⁴
- Future Development: Sponsors may use AIP funds to “land bank” property for future airport development (up to 20 years).²⁵
- Current (or Future) Airspace Protection: Sponsors may use AIP funds to acquire land to protect approach surfaces, including, but not limited to, obstacle free zones, threshold obstacle clearance surfaces, 14 CFR part 77 surfaces, approach and departure surfaces, and the runway protection zone.²⁶ In such cases, however, AIP funds may not be used to acquire land more than 5,000 feet beyond the end of the runway. Beyond 5,000 feet from

¹⁹ 49 U.S.C. § 47504(c)(2)(D).

²⁰ 49 U.S.C. § 47141.

²¹ 49 U.S.C. § 47141(f).

²² Similarly, sponsors may use PFC revenue to fund “eligible projects,” including: (1) projects for airport development or airport planning. 49 U.S.C. § 470117(a)(3). However, for FAA to approve the application, it must find that the project will either preserve or enhance capacity, safety or security; or reduce noise; or provide an opportunity for enhanced competition. 49 U.S.C. § 40117(d).

²³ FAA Order 5100.38D (Airport Improvement Program Handbook) at ¶ Q-2.

²⁴ FAA Order 5100.38D at Appx. A.

²⁵ FAA Order 5100.38D at Table Q-4; *see also* 49 U.S.C. § 47102(3)(c) (defining “airport development” eligible for AIP funding to include land acquisition for airport development project, to remove or prevent an airport hazard, to provide an area for fire training, and to provide an area for aircraft deicing).

²⁶ FAA Order 5100.38D at Table Q-4(d).

the runway end, it is expected that the airport sponsor should rely on available local zoning and land use controls to protect approaches.²⁷ In addition, the land purchased must be needed for an approach within the next 20 years.²⁸

Thus, the District could use AIP funds to acquire land, but only to the extent that it can identify an aeronautical need for such land, or that such land is part of any reasonably-foreseeable future airport development, or is reasonably needed to protect current (or future) approach and departure surfaces.

Of note, one option that could pass muster is to purchase the land as an alternate location sky-diving activities.

C. Implications of Using AIP Funding to Acquire Land

A property acquired with AIP funds for any of these airport purposes is subject to several key conditions.

First, property acquired for development and the associated development must be shown on an approved Airport Layout Plan (ALP) and an updated Exhibit “A” map.²⁹ It is important to recognize that an ALP update triggers obligations for environmental review under the National Environmental Policy Act (NEPA).

Second, if the acquisition requires the relocation of any property owners, the sponsor must pay or reimburse property owners consistent with the Uniform Relocation Assistance and Real Property Acquisition Act.³⁰

Third, a sponsor who has purchased land under a grant must dispose of land when the land is no longer needed for the purposes that it was acquired.³¹ When the land is no longer needed for an airport purpose, the sponsor must dispose of the land at fair market value and reinvest the portion of the proceeds proportional to the federal government’s share of the cost of acquiring the land in one of several approved actions, including investment in an approved noise compatibility project or an approved airport development project.³² When the sponsor so disposes of the land, it must retain or reserve an interest in the land sufficient to ensure that the land will be used in a way that is compatible with noise levels associated with operating an airport.³³

²⁷ FAA Order 5100.38D at Table Q-4(d).

²⁸ FAA Order 5100.38D at Table Q-4(d).

²⁹ FAA Order 5100.38D at Table Q-4.

³⁰ See Grant Assurance 35 (Relocation and Real Property Acquisition) and 49 C.F.R. Part 24 (Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs)

³¹ Grant Assurance 31 (Disposal of Land).

³² 49 U.S.C. §§ 47101(c)(2)(B)(i) & (iii).

³³ 49 U.S.C. § 47101(c)(2)(B)(ii).

Finally, when a sponsor uses AIP grant funding to acquire land, the grant assurance obligations do not expire as to that parcel – they continue in perpetuity until the airport is closed or that parcel is disposed of.³⁴

II. Local Airport Revenue

Once grant-obligated, all airport revenue³⁵ may be used only for “the capital or operating costs of the airport, the local system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.”³⁶ Unlawful revenue diversion occurs when airport revenue is used for any other purposes, including but not limited to: use of airport revenues for general economic development, direct payments that exceed the fair market value of a service or facility, and land rental to or use of the land by the sponsor for non-aeronautical purposes at below fair market value.³⁷

By definition, any activity eligible for AIP- or PFC-funding is eligible for funding with airport revenue. However, there are broader activities that, while not eligible for AIP- or PFC- funding, might constitute permissible uses for airport revenue.

A. Community Use

FAA’s Revenue Use Policy advises that making airport property available at less than fair market value rent for public recreational and other community uses, for the purpose of maintaining positive airport-community relations, can be a legitimate function of an airport proprietor in operating the airport. In general, below-market use of airport land for community purposes will be considered consistent with the prohibition against revenue diversion (and the accompanying grant assurance obligation to be self-sustaining³⁸) only if the following conditions are met:³⁹

1. “The contribution of the airport property enhances public acceptance of the airport in a community in the immediate area of the airport; the property is put to a general public use desired by the local community; and the public use does not adversely affect the capacity, security, safety or operations of the airport. Examples of acceptable uses include public parks, recreation facilities, and bike or jogging paths. Examples of uses that would not be eligible are road maintenance equipment storage; and

³⁴ FAA Order 5190.6B, *FAA Airport Compliance Manual*, at § 4.3 (Sept. 30, 2009); *see also* FAA, *Policies and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7716 (Feb. 16, 1999).

³⁵ Airport revenue” subject to this restriction broadly includes all fees, charges, rents or other payments received by the sponsor related to activities at the airport, including non-aeronautical activities. 49 U.S.C. §§ 47107(b) & 47133. *See also*, FAA Order 5190.6B at § 15.9(a); FAA, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (Feb. 16, 1999).

³⁶ 49 U.S.C. §§ 47107(b) & 47133. *See also*, FAA Order 5190.6B at § 15.9(a); FAA, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7720 (Feb. 16, 1999).

³⁷ FAA, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (Feb. 16, 1999).

³⁸ *See* Grant Assurance 24.

³⁹ FAA, *Policies and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7721 (Feb. 16, 1999).

- police, fire department, and other government facilities if they do not directly support the operation of the airport.
2. The property involved would not reasonably be expected to produce more than *de minimis* revenue at the time the community use is contemplated, and the property is not reasonably expected to be used by an aeronautical tenant or otherwise be needed for airport operations in the foreseeable future. When airport property reasonably may be expected to earn more than minimal revenue, it still may be used for community purposes at less than [fair market value] if the revenue earned from the community use approximates the revenue that could otherwise be generated, provided that the other provisions of [this section] are met.
 3. The community use does not preclude reuse of the property for airport purposes if, in the opinion of the airport sponsor, such reuse will provide greater benefits to the airport than continuation of the community use.
 4. Airport revenue is not to be used to support the capital or operating costs associated with the community use.”⁴⁰

Thus, the District *might* be able to use airport revenue to purchase land for open space or park space, under the justification that it was necessary to enhance community support. However, to do so, the District likely would need to show both that the land would not generate higher non-aeronautical revenue through some other reasonably-available airport use and also that the community use did not preclude future reuse for aeronautical purpose that better serves the airport. In any event, no airport revenue can be used to support capital or operating costs for any open space or park facility purchased with airport revenue.

B. Revenue-Generating Use

As referenced above, grant-obligated sponsors also have an obligation to remain as self-sustaining as possible.⁴¹ The purpose of the self-sustaining rule is to maintain the utility of the federal investment in the airport.⁴² If the District can identify a significant non-aeronautical revenue stream from future uses of off-airport property that could subsidize aeronautical activities at the Airport, it may be able to advance arguments supporting the purchase of land in order to meet its obligation to be self-sustaining. For example, FAA advises that if market conditions or demand for air service do not permit an airport to be financially self-sustaining, the sponsor should establish long-term goals and targets to make the airport as financially self-sustaining as possible.⁴³ Similarly, FAA encourages sponsors to undertake reasonable efforts to

⁴⁰ FAA, *Policies and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7721 (Feb. 16, 1999); see also FAA Order 5190.6B at § 17.15.

⁴¹ *E.g.*, 49 U.S.C. § 47107(a)(13) and Grant Assurance 24.

⁴² FAA Order 5190.6B at § 17.5.

⁴³ FAA Order 5190.6B at § 17.7.

make their particular airport as self-sustaining as possible when entering into new or revised agreements or when otherwise establishing rates, charges, and fees.⁴⁴

III. Unrestricted Revenue

Sponsors can use unrestricted revenue for any manner of projects, including land acquisition and sound insulation. However, grant-obligated sponsors must remember that any use of unrestricted revenue must still comply with the suite of applicable grant assurances, such as the prohibition against conferring an exclusive right (Grant Assurance 23), and the obligation to operate the Airport on a self-sustaining basis (Grant Assurance 24).

For most general-purpose governments, using taxpayer (i.e., non-airport) revenue for airport property acquisition is not practical or politically feasible, but the District stands in an unusual position. The property tax revenue that the District receives is likely to be considered to be non-airport revenue of the District and not subject to the myriad federal restrictions applicable to the use of airport revenue. As a result, so long as the District is meticulous about maintaining an accounting system that segregates District tax revenue, the District has considerable flexibility to use such revenue for purposes that would otherwise be impermissible if it were using airport revenue. A good example of that flexibility is property acquisition that does not meet the strict requirements outlined above. If the District were to purchase property with non-airport property tax revenue, it would want to ensure that its ALP and Exhibit A Property Map carefully designate which property is, and is not, subject to federal restrictions on property use and revenue from airport property. The acquisition and use of such property would be subject only to California and local law on property acquisition and ownership by districts like the District.

⁴⁴ FAA Order 5190.6B at § 17.7.