



# Federal Aviation Administration

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## MEMORANDUM

Date: October 27, 2020

To: Regional Airports Division Directors  
Airports District Office Managers  
610 Branch Managers  
620 Branch Managers  
Regional Counsel and AGC-600

From: Director, Office of Airport Planning and Programming (APP-1)

Copy: Director, Office of Airport Compliance (ACO-1)  
Office of the Chief Counsel (AGC-600)  
Director, Office of Airport Safety and Standards (AAS-1)

Subject: **Instructions to Airports District Offices and Regional Office of Airports Employees Regarding Airport Layout Plan Reviews and Projects Potentially Affected by Section 163 of the FAA Reauthorization Act of 2018**

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### Summary

This document provides instructions to the FAA's Airports District Offices (ADO) and Regional Offices of Airports as well as states participating in FAA's State Block Grant program regarding changes in legal authority under the FAA Reauthorization Act of 2018. This document explains the internal process for reviewing airport layout plan (ALP) changes when new development is proposed by an airport sponsor and provides instructions on release of federal grant obligations and the circumstances under which these actions are necessary. Additionally, this document provides information on the way in which environmental review under the National Environmental Policy Act (NEPA) should address the new limitations on FAA's regulatory authorities. These are internal instructions for implementation of FAA's statutorily revised authorities over use of airport property and do not require new actions from airport sponsors.

### Applicability.

These instructions are for the internal use of the FAA and those administering the Airport Improvement Program (AIP) under the State Block Grant program. These instructions are not legally binding in their own right and will not be relied upon by the FAA as a separate basis for affirmative enforcement action or other administrative penalty.

## **Background and Purpose**

On October 5, 2018, H. R. 302, “*FAA Reauthorization Act of 2018*” (referred to in this document as “the Act”) was signed into law (P.L. 115-254). Section 163 of the Act (referred to in this document as “section 163”) necessitates changes in how the FAA has historically operated with respect to oversight of airports. These instructions address two significant changes in FAA practices brought about by section 163.

First, section 163(a) narrows the scope of the FAA’s authority over airport land uses by generally prohibiting the FAA from “directly or indirectly regulating” airport land. However, Congress then identified certain circumstances where section 163(a) does not apply. These circumstances are described in sections 163(b) and 163(c). Field employees will most frequently encounter the resulting change in FAA authority when considering whether to require a release of aeronautical use and other grant obligations before an airport sponsor moves forward with a change in airport land use or disposal of airport land. The statutory text and instructions on how to implement these changes are described below in greater detail.

The second way that section 163 changed prior practices of the FAA is a reduction in the FAA’s ALP approval authority, addressed in section 163(d). Prior to enactment of the statute, the FAA had the ability to approve or deny any change on an ALP – effectively controlling an airport operator’s ability to undertake any construction or physical change on the airport. Section 163(d) limited this approval authority to only those situations where the ALP change would affect one of three zones of interest. If a project doesn’t affect one of the three zones of interest, the FAA will accept rather than approve the ALP. Instructions for properly exercising the agency’s ALP approval authority are also detailed below.

It is important to highlight several other components of these instructions. The instructions contain information on sponsor obligations that have not changed. The document also identifies related considerations that are affected indirectly by the statutory changes, including the effect of section 163 on the FAA’s NEPA compliance.

These instructions provide sufficient information to the Field so that the majority of section 163 determinations can be made by the Regional Airports Division Offices and ADOs without the need to coordinate with the Headquarters Section 163 Workgroup ([AWA-ARP-Section163@faa.gov](mailto:AWA-ARP-Section163@faa.gov)). Those Regional Airports Division Offices and ADOs that need assistance in conducting the necessary reviews can still coordinate with the Headquarters Section 163 Workgroup, which is available to answer questions on these instructions. Additionally, these instructions may not have anticipated every possible issue raised by the statutory changes. Please consult Headquarters, or legal counsel as appropriate, for any questions that are not answered in this document.

Since section 163 became law, Headquarters has coordinated with field offices to help review airport sponsor activity potentially affected by section 163. Using the lessons learned from this coordination, the following provides detailed instructions on how to determine if the FAA retains approval authority for ALP changes and/or the change in use or disposal of airport-owned land. This document includes:

1. Screening Process
  - 1.1. Criteria for Determinations Under Section 163(d)
  - 1.2. Criteria for Determinations Under Section 163(a) – (c)
2. Sponsor Release Requests
3. No Change to Certain Requirements
4. ALPs Approved Prior to Issuance of these Instructions
5. Application of the National Environmental Policy Act (NEPA)
6. Questions Regarding these Instructions

#### Appendix A – Section 163 Implementing Scenarios

Provides instructions for specific project scenarios, along with how to apply NEPA (if applicable).

#### Appendix B – Changes to ALP Statute [49 U.S.C. § 47107(a)(16)]

Has additional information regarding the specific language in the Act regarding ALPs and its interpretation.

## **1. Screening Process**

When a sponsor submits an ALP change, requests a change in land use from aeronautical to non-aeronautical, or requests to dispose of airport-owned land, the FAA must determine whether the proposal is subject to the agency's approval authority, as defined/limited by section 163. This determination involves a two-step process. In order to ensure the FAA exercises its regulatory authority consistent with the statutory constraints, the FAA must separately examine and reach a determination regarding its authority under both steps outlined in these instructions. The first step is to determine if FAA has ALP approval authority (under section 163(d)). The second step is to determine how the land was acquired (and therefore if a release of obligations may be required (under section 163(a))).

The analysis begins with section 163(d). If the FAA retains ALP approval authority under section 163(d) for a proposed project, or a portion of a project, then the FAA would not in most circumstances consider releasing sponsor obligations related to non-aeronautical use or disposal as to that specific portion of the proposed project. However, regardless of the outcome of the ALP approval authority determination, Step 2 is required to complete an analysis for section 163(a) through(c).

Prior to beginning the section 163 analysis, the Field may need all or some of the following information:

- ✓ A copy of the current approved ALP or draft ALP change (e.g., pen-and-ink change) that identifies the project and its location on the airport;
- ✓ A copy of the on-airport land use map;

- ✓ A copy of the Exhibit A property map, conforming with ARP SOP 3.0 (Standard Operating Procedure for FAA Review of Exhibit 'A' Airport Property Inventory Maps). This SOP includes identification of the funding source used for purchase of the property;
- ✓ Any supporting deeds or any other conveyance documentation regarding airport ownership of the land the project is located on, including surplus or any other property deeds of conveyance, etc.;
- ✓ Source(s) of funding for the proposed project (and/or for facilities previously funded or impacted by the proposed project); and
- ✓ A project description of the proposed alteration(s) to the airport or its facilities, if available.

For all instances, the Field will be required to verify how the land was acquired in order to show it was not acquired with Federal funds or from the United States. It is the responsibility of the airport sponsor to adequately document how land was acquired. Adequate documentation may include a properly prepared Exhibit A Property Map with supporting deeds or other conveyance documents, including the surplus property deed of conveyance, etc. If the sponsor is unable to produce sufficient record of the acquisition, the FAA cannot determine how the property was acquired. The sponsor may conduct a title search or other methods to provide the Field verification of how the property was acquired.

This statute does not change:

- The requirement that airport operators maintain an up-to-date ALP, nor the authority of the agency to define the requirements for the form of the ALP.<sup>1</sup>
- Obligations related to receiving or paying fair market value and revenues generated by the use, lease, encumbrance, transfer, or disposal of land.
- The requirement to conduct an airspace review for any proposed development.

#### 1.1. Step 1: Criteria for Determinations under Section 163(d)

Section 163(d) limits the FAA's review and approval authority for ALPs to those portions of ALPs or ALP revisions that affect one of three zones of interest.<sup>2</sup> FAA retains ALP approval authority for portions of ALPs or ALP revisions that:

- i. Materially impact the safe and efficient operation of aircraft at, to, or from the airport;
- ii. Adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations;<sup>3</sup> or

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<sup>1</sup> The Act continues to require sponsors to submit an ALP "in a form the Secretary prescribes." 49 U.S.C. § 47107(a)(16)(A).

<sup>2</sup> "Zones of interest" is not an official term; rather, it is a phrase that these instructions use to refer to the three criteria established by Congress for when FAA retains ALP approval authority. It does not refer to any specific physical area on the airport.

<sup>3</sup> The FAA's ALP approval authority does not extend beyond the airport property line.

- iii. Adversely affect the value of prior Federal investments to a significant extent.

The FAA always has authority to approve or disapprove the ALP under zones of interest (i) and (ii) above if a project would result in a change or alteration within any of the following existing or future areas on the airport:

1. Any area on an airport where an aircraft moves or parks, which include these two areas:
  - a. Movement areas (e.g., runways, taxiways, and other areas of an airport that are used for taxiing or hover taxiing, air taxiing, takeoff, and landing of aircraft including helicopters and tilt-rotors);
  - b. Non-movement areas (e.g., aircraft parking areas, including ramps and hangars);<sup>4</sup>
2. Any Runway and Taxiway Safety Areas, Object Clearing Areas, Object Free Area, or Obstacle Free Zone;
3. Runway Visibility Zones;
4. Runway Protection Zones;
5. Navigational Aid critical areas; or
6. Approach and departure surfaces.<sup>5</sup>

In addition, the FAA retains authority to approve or disapprove an ALP change that impacts an approach or departure surface and/or procedure, or that impacts Airport Traffic Control Tower (ATCT) line of sight.

If a proposed project is located within any of the six areas listed above or would affect an approach or departure procedure or ATCT line of sight, then the FAA retains ALP approval authority and the project should be processed as a normal ALP review. In addition, if a proposed project would not be located in one of the areas defined above, but would affect zone of interest (i) or (ii), then the FAA would also retain ALP approval authority and the project should be processed as a normal ALP review.

In addition to the review of ALP approval authority under zone of interest (i) and (ii), proposed projects shall be evaluated to determine if zone of interest (iii) applies. This is done by first determining if any of the following circumstances exist:

- 1) the proposed project would adversely affect an area of the airport or a facility located thereon that received *any* Federal funds (including funds originating outside the FAA); or

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<sup>4</sup> Terminal buildings will not typically be included in the zones of interest that give the FAA ALP approval authority, unless it changes an area that an aircraft moves or parks.

<sup>5</sup> This includes all surfaces listed in FAA Office of Airports Standard Operating Procedure 2.0 – Standard Procedure for FAA Review and Approval of Airport Layout Plans (ALPs) required to be depicted on the ALP.

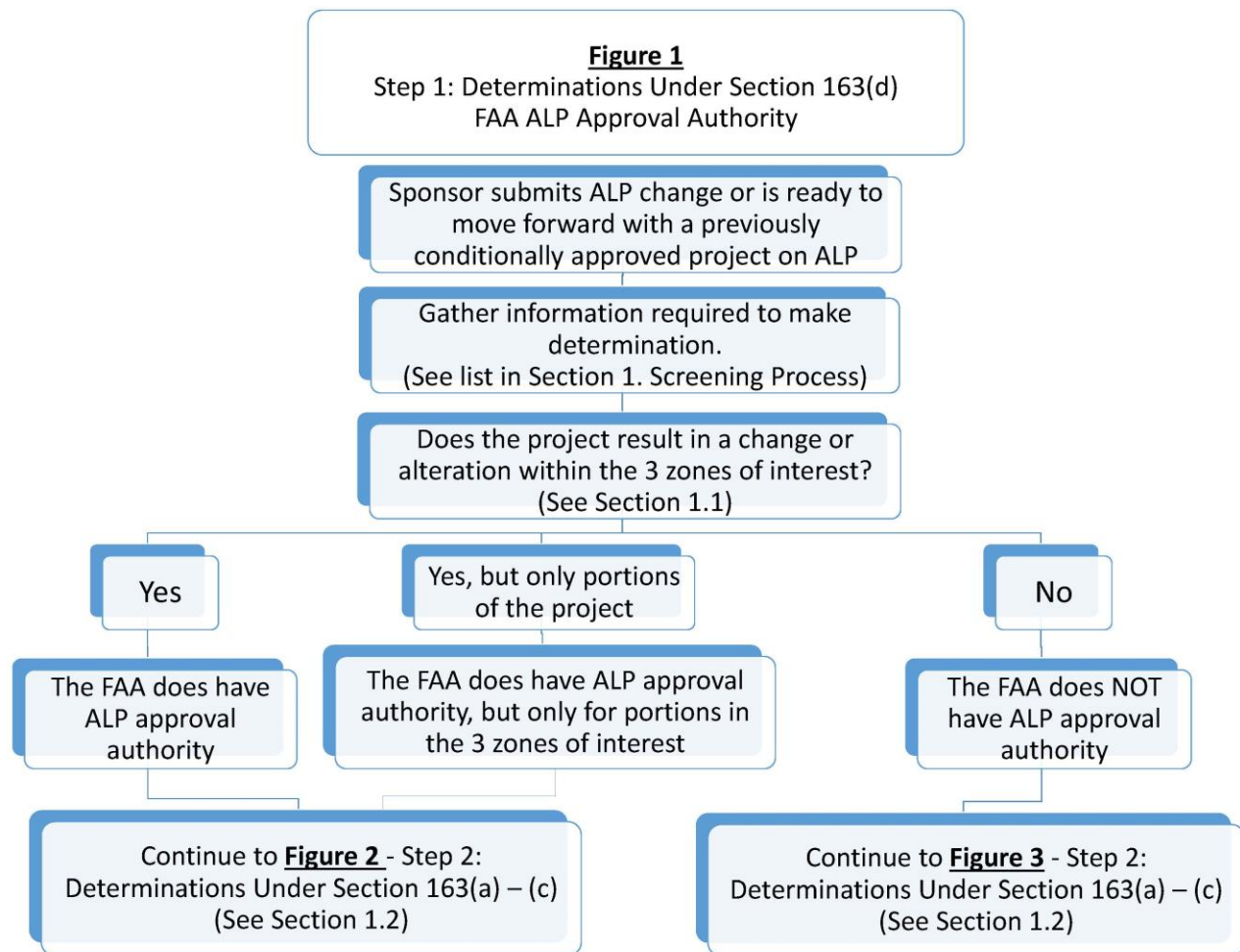
- 2) the proposed project would adversely affect an area of the airport or a facility located thereon that is on any land granted from the U.S. under certain land grant programs;<sup>6</sup> or
- 3) the proposed project would adversely impact aeronautical infrastructure that is critical to the ability of the airport to accommodate existing or future aviation demand.

If any or all of these situations are present, there is a prior Federal investment that needs to be considered under section 163(d). The Field should then consult with Headquarters Section 163 Workgroup to determine whether the adverse impact from the proposed project to that Federal investment would be significant.

**Figure 1** provides a flow chart to assist in making determinations on whether the FAA retains ALP approval authority under section 163(d).

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<sup>6</sup> The FAA may retain approval authority over proposed ALP changes in the use of lands granted to airport sponsor from the U.S., including under the *Surplus Property Act*, 49 U.S.C. § 47125, section 16 of the *Federal Airport Act of 1946* Pub.L. 79–377, section 23 of the *Airport and Airway Development Act of 1970*, Pub.L. 91–258, and former military airports conveyed to local public entities under the congressionally authorized Base Realignment and Closure program because lands granted under these statutes constitute federal investments in the airport. Deeds conveying the lands from the U.S. typically contain similar airport use requirements and reversionary clauses if the land ceases to be used for airport purposes. Consequently, an adverse impact on the federal investment may occur if, for example, the sponsor proposes to cease using the land for airport purposes or violates another deed covenant protecting the U.S.’ interests in the land. Examine each deed from the U.S. to make the determination whether such proposed use adversely affects the prior federal investment.



### 1.2. Step 2: Criteria for Determinations under Section 163(a) through (c)

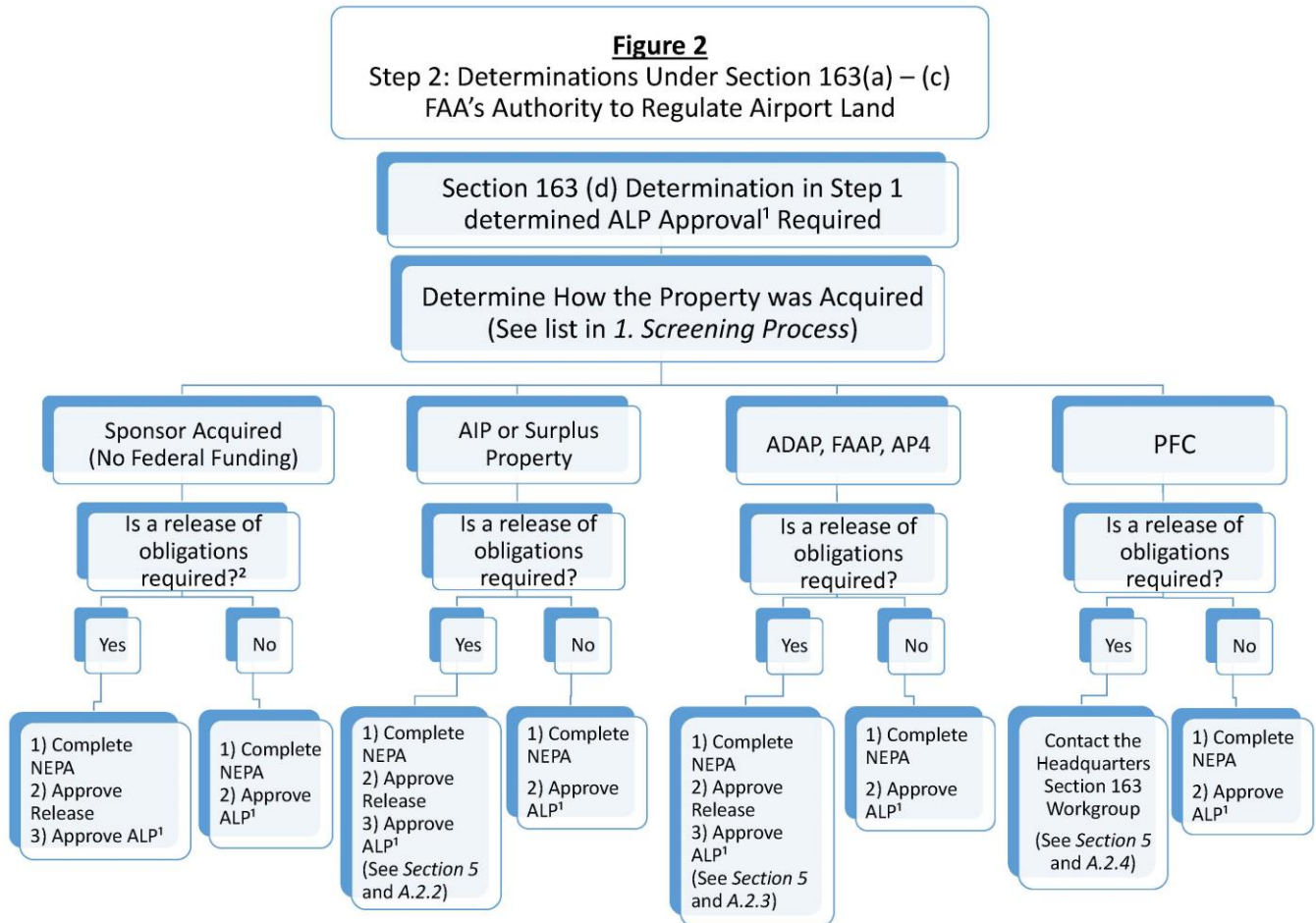
Section 163(a) of the Act limits the FAA’s authority to directly or indirectly regulate an airport owner or operator’s acquisition, use, lease, encumbrance, transfer, or disposal of land, any facility upon such land, or any portion of such land or facility. In some cases, the Airport may not be required to get a release of obligations from the FAA to use land for non-aeronautical purposes. However, subsection 163(b) and (c) of section 163 preserves the FAA’s authority:

1. To ensure the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations;
2. Over land and facilities acquired or modified using Federal funding;
3. Under Surplus Property Act instruments of transfer; and
4. Under the Passenger Facility Charge (PFC) statute (Title 49 U.S. Code, § 40117).

Under section 163(b) and (c), the FAA retains the authority to require a release of obligations for airport land use projects that occur on land or facilities acquired or modified by one of the funding or acquisition methods identified in items (2) – (4)

above. In those cases, the FAA should process a release request consistent with the information in section 2, below.

**Figure 2** provides a flow chart to assist in making determinations on whether the FAA retains approval authority under section 163(a)-(c) if it has already been determined that the FAA has ALP approval authority over all or portions of the project.

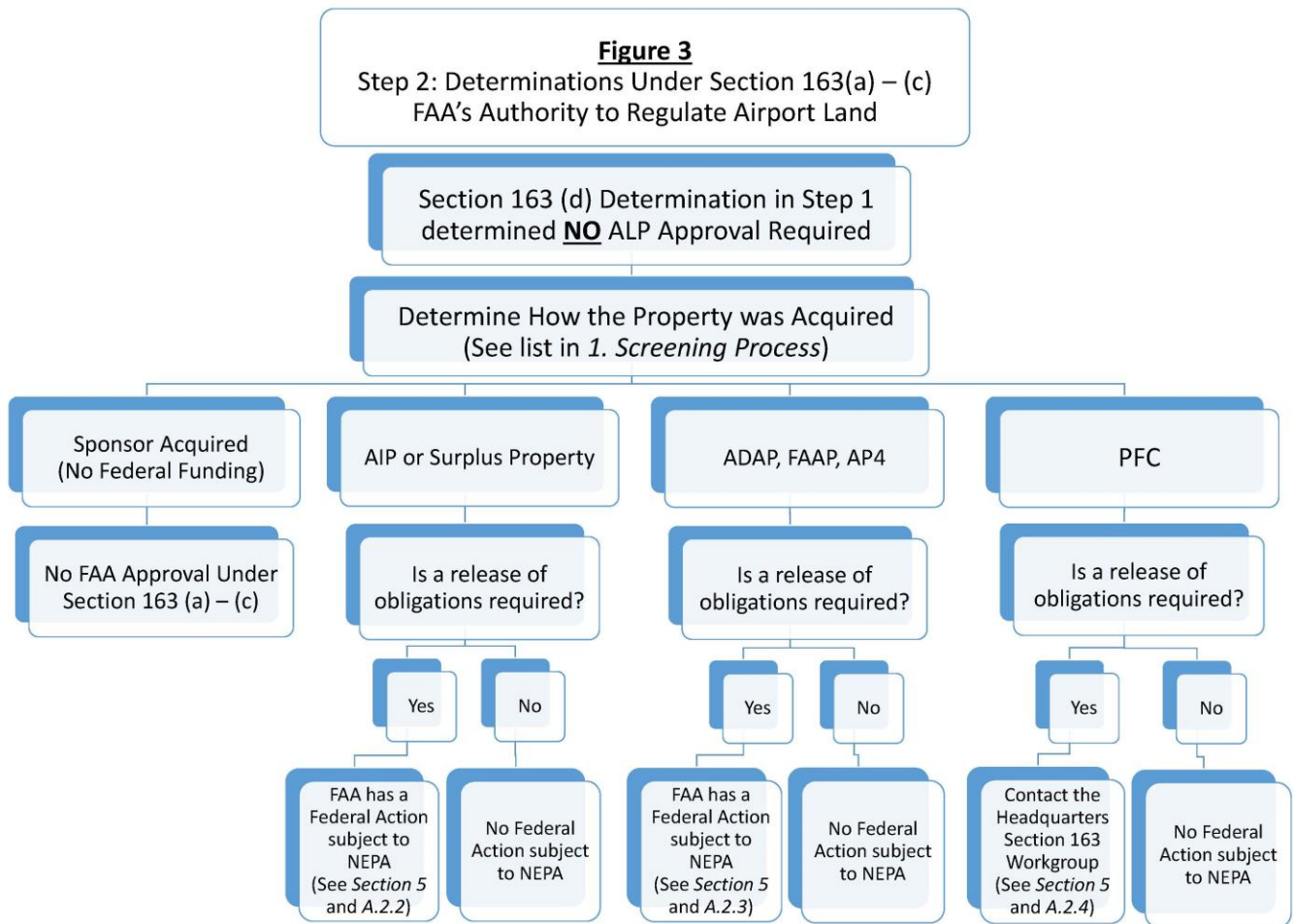


<sup>1</sup> ALP Approval for all or portions of the project, as determined in Step 1: Determinations Under Section 163(d)

<sup>2</sup> For example, when sponsor acquired property is pledged as a local match for an AIP grant.

**Figure 3** provides a flow chart to assist in making determinations on whether the FAA retains approval authority under section 163(a)-(c) if it has already been determined that the FAA **does not have** ALP approval authority over all or portions of the project.





## 2. Sponsor Release Requests

The FAA will examine the property ownership and the potential need for release of obligations for the property associated with the project. Throughout the review process for section 163 requests, the term “release” is used to cover several actions. The Airport Compliance Manual, Order 5190.6, defines a “release” as the formal, written authorization discharging and relinquishing the FAA’s right to enforce an airport’s contractual obligations. Please note that the FAA is not under an obligation to release property that it determines is needed for airport purposes.

Chapter 22 of the Order states that a sponsor may:

- (a) be released by the FAA from the responsibility to maintain a grant-acquired parcel for its originally intended aeronautical use (making it available for non-aeronautical use to generate airport revenue);
- (b) be released by the FAA to use the parcel for a concurrent or interim non-aeronautical use to generate airport revenue; or
- (c) be released by the FAA to dispose of the parcel at fair market value.

The Field should confirm whether the request from the sponsor is for a release of the sponsor's obligation to use the land for aeronautical purposes, or a release of all sponsor obligations to permit disposal (sale) of the land. If the FAA grants the requested release, statutory, regulatory, and agreement-specific restrictions may continue to apply, including covenants established as permanent encumbrances on the property.

Under section 163, land acquired by sponsors without Federal assistance is no longer subject to release requests for changes in land use unless it meets one of the preserved authorities described in Section 2.2 of these instructions. The following describes what aeronautical and non-aeronautical development is:

### 1. Aeronautical Property

All property comprising the land, airspace, improvements, and facilities used or intended to be used for any operational purpose related to, in support of, or complementary to the flight of aircraft at, to or from the airfield is considered aeronautical use of real property. It is not confined to land or improvements eligible for development with Federal aid (FAAP/ADAP/AIP) or to property acquired from Federal sources. In addition to the property occupied by the runways, taxiways, and parking aprons, aeronautical property includes any other areas used or intended to be used for supporting services and facilities related to the operation of aircraft. It also includes property normally required by those activities that are complementary to flight activity such as convenience concessions serving the public including, but not limited to, shelter, ground transportation, food, and personal services. Examples of aeronautical property include: pavement areas used for the movement or parking of aircraft, portions of passenger terminals, hangars, ARFF stations, fuel storage facilities, FBOs, etc. (FAA Order 5190.6b, Appendix Z, p. 317).

Generally, a release is not required for aeronautical projects on aeronautical property, including aeronautical support projects. Where non-aeronautical activities and services occur on such property, the Revenue Use Policy "requires that the airport receive fair market value for the provision of non-aeronautical facilities and services" (*Policies and Procedures Concerning the Use of Airport Revenue*, Section VII, C., 64 F.R. 7696 at 7721). Aeronautical support projects may or may not require ALP approval depending on the facility's location on the airport.

### 2. Non-aeronautical Land Use

All other uses of airport property that do not fall in the category above is generally considered non-aeronautical land uses. Examples of non-aeronautical land uses include, but are not limited to: non-airport vehicle and maintenance equipment storage, aircraft museums, municipal administrative offices, recreational facilities and parks, industrial parks, agricultural or grazing leases, and retail businesses.<sup>7</sup>

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<sup>7</sup> Though not specifically defined, both FAA Order 5190.6B, *FAA Airport Compliance Manual*, and AC 150/5070.6, *Airport Master Plans*, provide examples of land uses that would be considered non-aeronautical.

Projects categorized as non-aeronautical land use would be subject to a release of obligations if the land was acquired with Federal funds, (i.e., AIP, surplus property transfer, FAAP, ADAP, etc.) or was pledged as part of a Federally funded project.

### **3. No Change To Certain Requirements**

In all cases, regardless of the outcome of the evaluation of ALP approval authority and continuing authority to require (and approve) releases from Federal obligations, the following requirements continue to apply and the FAA retains authority to ensure that:

- The airport must receive not less than Fair Market Value (FMV) in the context of a commercial transaction for the use, lease, encumbrance, transfer, or disposal of land, any facilities on such land, or any portion of such land or facilities; or the airport must not pay more than FMV in the context of a commercial transaction for the acquisition of land or facilities on such land; and
- All revenues generated as a result of the use, lease, encumbrance, transfer, or disposal of land may only be expended consistent with the requirements of:
  - Grant Assurance 25, *Airport Revenues*, for land acquired without Federal financial assistance,
  - Grant Assurance 31, *Disposal of Land*, for land acquired with AIP funds, and
  - FAA Order 5190.6B Chapter 22, per revenue use restrictions in 49 U.S.C. 47107(b) and 47133.

### **4. ALPs Conditionally Approved Prior to the Issuance of these Instructions**

The FAA may have approved projects on ALPs in the past that no longer fall under our approval authority as of October 2018. The sponsor and the Field should coordinate with each other regarding undeveloped projects that are on conditionally or unconditionally approved ALPs and have not been built once the sponsor is ready to proceed with the project.

When implementing these instructions, pay particular attention to:

- Projects that are already depicted on the ALP, but upon examination under section 163, the FAA no longer retains ALP approval authority.
- Areas designated as non-aeronautical may have been acquired with Federal funds, but a formal release wasn't initiated or completed.
- Areas that may have been designated as "business park" or "future hotel," but not specifically designated as non-aeronautical.
- Areas that may have been designated as non-aeronautical, but the last ALP approval was many years ago and the aviation demand at the airport has changed.

## 5. Application of NEPA

The analysis below, including the definition of the major Federal action and the examination of effects, applies only to section 163 related approvals. These instructions are consistent with FAA Order 1050.1. The scope of the NEPA analysis for FAA actions is limited by the agency's authority under section 163. The following questions and answers should help you in identifying changes in our NEPA practice necessitated by section 163.

- **Q1:** Where a proposed project includes elements that require FAA approval and elements that do not require FAA approval, are the latter elements considered “connected actions?”
- **A1:** No. The FAA previously held approval authority over a variety of sponsor activities, and those authorities have been reduced or removed under section 163. As a result, where proposed projects, or portions thereof, no longer require any FAA approval, the FAA's NEPA obligation is similarly limited. Those proposed projects or portions of proposed projects for which FAA authority has been removed are not Federal actions and cannot be “connected actions” under 40 C.F.R. § 1508.18 and 1508.25 of the current Council on Environmental Quality (CEQ) NEPA regulations and Order 1050.1.<sup>8</sup>
- **Q2:** If the airport sponsor's proposed project requires an FAA action for some part of the overall project (but not the whole project), is there a difference between the development the sponsor intends to undertake and the FAA's major Federal action subject to NEPA? If so, how does this affect how the agency writes its NEPA document?
- **A2:** Yes. Subsequent to the passage of section 163, where an airport sponsor proposes a project for implementation at an airport that includes limited portions subject to FAA approval, there is a difference between the development the sponsor intends to undertake and the FAA's major Federal action subject to NEPA. Typically, the Federal action would be ALP approval and/or release of federal obligations for those portions of the airport sponsor's proposed project subject to FAA's approval authority. The NEPA document should make clear what the airport sponsor's proposed project is and that the proposed federal action describes *only the exercise of agency approval authorities as to those portions of the airport sponsor's proposed project subject to those approvals*. To be consistent with section 163, it is necessary that the NEPA document clearly differentiates between the FAA's proposed federal action and the airport sponsor's proposed project. Section 163 does not change the existing requirements for NEPA compliance related to federal funding of a project, including AIP and PFC funded projects. See below for more specific information about projects funded using PFCs.

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<sup>8</sup> The treatment of projects affected by section 163 in this manner is consistent with FAA Order 1050.1F. FAA Order 1050.1F states: “The provisions of this Order and the CEQ Regulations apply to actions directly undertaken by the FAA and to actions undertaken by a non-Federal entity where the FAA has authority to condition a permit, license, or other approval. Where Congress has explicitly removed previously held authority, the FAA cannot reestablish such authority under NEPA to meet the criterion of having “authority to condition a permit, license, or other approval.”

- **Q3:** How should the FAA analyze environmental effects when the FAA's proposed federal action includes ALP approval and/or release of federal obligations for only a portion of the project elements in the proposed project?
- **A3:** FAA Order 1050.1 and 5050.4 both indicate that where there will be subsequent development on an airport as a result of a federal action by the FAA, the FAA must examine the environmental effects of that subsequent development. For example, the Orders indicate the need to examine the future uses of an airport parcel when the federal action at issue is a release of grant obligations. See paragraphs 5-6.1(b), FAA Order 1050.1F; §207.c.(4), FAA Order 5050.4B. At the time the FAA drafted these orders, any change on the airport would have been subject to NEPA analysis because the FAA retained approval authority for the entirety of the airport under the ALP approval process, and retained separate approval authorities as to the entire airport when the future use required a release of grant obligations. As a result, the orders assumed that there was always a need for evaluation of environmental effects of the ultimate build-out on an airport, regardless of the nature of the specific proposed project. Even though the Orders' assumption that the FAA must approve any development on an airport is no longer correct, the Orders continue to apply to the portions of a project directly subject to FAA approval. Therefore, it is the FAA's obligation under NEPA to examine the environmental effects of any development that is subject to FAA's retained approval authorities, including ALP approvals and grant obligation releases. This means that for projects that contain a mix of portions subject to a federal approval and portions not subject to a federal approval, those portions subject to FAA's control and approval must be examined for environmental effects.

However, section 163 has reduced the scope of such approvals, both under the ALP approval process and the release from Federal grant obligations. As a result, portions of a project that are not subject to FAA approval or disapproval **may** need to be examined as an effect of the FAA's actions. The Field must consult with AGC to determine whether the scope of the effects analysis includes the subsequent development for the entire project, or only portions of the project, depending on the factual circumstances of the specific project, as described below:

- Where some or all of the portions of the proposed project that do not require any FAA approval **are independent from** the portions of the project requiring FAA approval, the environmental effects of the independent portions are not "caused by" the federal action and need not be examined as effects of the federal action.
- Where some or all of the portions of the proposed project that do not require any FAA approval **depend on** the portions of the project requiring FAA approval in order to be constructed or operated as planned, the environmental effects of those dependent portions are "caused by" the federal action and need to be examined as effects of the federal action.

- **Q4:** When a request is made that requires only a release of obligations, with no specific project, what is the scope of the effects analysis?
- **A4:** Only reasonably foreseeable projects should be considered for their effects. Consult AGC if you need assistance in determining what is reasonably foreseeable.
- **Q5:** What about cumulative impacts?
- **A5:** The method for determining and analyzing cumulative impacts is unchanged by section 163.
- **Q6:** How does section 163 affect projects that may be paid for with PFCs?
- **A6:** The PFC program requires a NEPA finding in order to make an application to use PFCs. In circumstances when a sponsor anticipates the possibility of a future application to use PFCs for a project, or portion of a project, for which FAA would not otherwise have approval authority pursuant to section 163, the sponsor may ask FAA to conduct a NEPA analysis for that project. FAA may conduct the NEPA analysis at the sponsor's request to preserve PFC eligibility. In such cases, FAA may conduct the NEPA analysis as if the project required FAA approval. The Field should refer to counsel for further instruction on scope and content of the NEPA review.

If these instructions and the additional materials in Appendix A do not adequately address the factual circumstances of the federal action you are reviewing, consult with the Headquarters Section 163 Workgroup.

## **6. Questions Regarding These Instructions**

If there is any uncertainty regarding the applicability of section 163, or you have any general questions regarding these instructions, please contact Michael Lawrance at [michael.lawrance@faa.gov](mailto:michael.lawrance@faa.gov) or 202-267-7648.

## Appendix A – Section 163 Implementing Scenarios

### A. Scenarios

#### A.1. Section 163(d) Determinations

The following scenarios provide examples of typical ALP approval requests. It's important to note that the review process for an ALP hasn't changed. Planners are still reviewing ALPs to ensure they meet design standards, provide for safety and efficiency, and meet future aeronautical demand facility needs. The requirements for what should be shown on the ALP is still at the discretion of the FAA.

##### A.1.1. ALP's Prepared and Submitted as Part of a Planning Project (Circumstances Under Which FAA Typically Grants Conditional ALP Approval).

Section 163 limits FAA's authority to approve ALPs to the areas defined in paragraph 1.1 above. For ALP's that are prepared and submitted for review as part of a broader planning project (i.e. master plan, ALP update), the FAA will not make a determination whether it retains approval authority over proposed facilities depicted for a number of reasons, including:

- The ALP may not show a sufficient level of detail for a proposed facility;
- The proposed facilities may not be ripe for development in the short term, and the ultimate development may differ; or
- The aeronautical needs of the airport may change, which could affect proposed development alternatives.

An area on the airport may receive a determination that the FAA doesn't retain approval authority, which may give the sponsor a false impression that no further review by the FAA is required and they can build what they want, regardless of what may have been proposed initially.

FAA will only make a determination on proposed facilities that are ripe for development during this process. Conditional ALP approval letters currently being used must be revised to include the following section 163 language (where appropriate):

*The FAA Reauthorization Act of 2018, section 163(d), has limited the FAA's review and approval authority for ALPs. The Act limits the FAA's authority to those portions of the ALP that:*

- *Materially impact the safe and efficient operation of aircraft at, to, or from the airport;*
- *Adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations; or*

- *Adversely affect the value of prior Federal investments to a significant extent.*

*FAA's approval of this ALP is limited to existing facilities only (or those specific areas that FAA retains approval authority). The FAA has not made a determination on whether or not it retains review and approval authority for any proposed facilities depicted on the ALP associated with this letter (unless otherwise noted). Under Title 49 U.S.C. § 47107(a)(16) (as revised per section 163(d) of Pub.L. 115-254), FAA will separately determine whether it retains approval authority for each individual proposed facility depicted on an ALP before construction occurs.*

*Although section 163(d) has limited the FAA's review and approval authority of proposed projects depicted on an ALP, airport sponsors must continue to maintain an up-to-date ALP in accordance with Federal law, 49 U.S.C. § 47107(a)(16).*

#### **A.1.2. Individual Projects Ready for Development**

For projects already depicted on a conditionally approved ALP, or submitted as a pen-and-ink change, the FAA must determine whether or not it has ALP approval authority over all or portions of the proposed project. The ADO must consider all project components (e.g., new hangar, taxiway, auto parking, access road, etc.) separately, as not all components may be subject to ALP approval.

The ADO will reevaluate any existing conditionally approved ALP that depicts a proposed project, or defines any area of airport property as non-aeronautical, to determine whether or not FAA still retains approval authority over that project. The ADO reevaluates the FAA's approval authority when the sponsor is ready to move forward with the previously conditionally approved project.

Likewise, ADOs must reevaluate any NEPA analysis that may have been scoped prior to these instructions, or that is currently underway, to determine whether or not the FAA still has an action subject to NEPA. Consult with the Headquarters Section 163 Workgroup to determine what changes to ongoing NEPA reviews may be necessary.

If a project is determined to fall entirely within the FAA's authority to approve (e.g., the project is located in any area designated in Paragraph 1.1), the ALP approval process proceeds with in the same fashion as was the practice prior to enactment of section 163.

#### **A.1.3. Projects Only Implicating Partial ALP Approval**

There may be some circumstances where a proposed project is made up of multiple components, some of which are subject to FAA review and approval and some that may no longer be subject to review and approval in accordance



with section 163.

For example, a proposed project may include a taxiway, aircraft storage (hangar development), automobile parking lot, and access road (assuming for this scenario that a release of obligations is not required for any project components). The taxiway and aircraft storage would be subject to FAA ALP approval because they fall under the exemptions in paragraph 2.1 above. But the auto parking and access road would not require ALP approval, as they would not impact the three areas of interest also described in section 2.1.

In cases such as this, the FAA must conduct NEPA for the projects still subject to FAA review and approval. Additionally, the ADO would need to examine the other portions of the project that are not subject to FAA ALP approval to determine whether their effects would be caused by the federal approval. The NEPA reviewer asks:

- “Can the auto parking be constructed and operated as planned regardless of FAA’s approval of the taxiway and aircraft storage?” If yes, the auto parking is not caused by the federally approved project components and the effects of construction and operation of the auto parking are not effects of the federal action. If, however, the auto parking depends on the taxiway and aircraft storage from a construction or operational perspective, the environmental effects of construction and operation of the auto parking are caused by the federal action and are effects of the federal action.
- “Can the access road be constructed and operated as planned regardless of the FAA’s approval of the taxiway and aircraft storage?” If yes, similar to the auto parking, the access road’s construction and operation are not caused by the federal action and are not effects of the federal action. Similarly, if the access road would not be constructed or operated as planned without the FAA’s approval of the taxiway and/or aircraft storage, then the access road’s environmental effects are caused by the federal action and are effects of the federal action.
- Cumulative impact analysis has not changed.

#### A.2. Section 163(a) – (c) Determinations

In cases where FAA lacks approval authority for an ALP revision, FAA must determine if there needs to be a release of grant assurance obligations for the project to move forward. If so, NEPA applies.

For all scenarios below, the Field will be required to verify how the land was acquired in order to show it was not acquired with Federal funds or from the United States. It is the responsibility of the airport sponsor to adequately document how land was acquired. Adequate documentation may include a properly prepared Exhibit A Property Map with supporting deeds or other conveyance documents, including the

surplus property deed of conveyance, etc. If the sponsor is unable to produce sufficient record of the acquisition, the FAA cannot determine how the property was acquired. The sponsor may conduct a title search or other methods to provide the Field verification of how the property was acquired.

If a sponsor requests development on land depicted as non-aeronautical, an evaluation will determine if:

1. A release was actually completed on land that was acquired with Federal funds, or by Surplus Property Act conveyance; and
2. The ALP adequately depicts the long-term aviation facility needs of the airport that can be accommodated without encroachment into the previously depicted non-aeronautical land use area.

#### A.2.1. Projects Proposed on Land Acquired by the Sponsor

Projects on, or the disposal of, land acquired by the sponsor without federal financial assistance (e.g., by local funding or donation) are not subject to FAA approval. Therefore, there is no federal action subject to NEPA.

The airport sponsor remains obligated to keep its ALP up to date at all times (subsequent development must be depicted on the ALP). In addition, the sponsor remains responsible for submitting all airport projects for airspace review under 14 CFR part 77.

In some cases, a determination that finds the FAA lacks authority over a parcel under section 163 may be insufficient to clear record title to the parcel under state law. A sponsor may request FAA assistance to administratively clear title, such as a determination letter in recordable form, a disclaimer of interest, or a similar instrument. The requirements may vary according to state law. Contact the Headquarters Section 163 Workgroup for assistance in clearing title.

#### A.2.2. Projects Proposed on Land Acquired with AIP or Surplus Property

Land acquired with AIP funds or conveyed under a Surplus Property Deed, remains federally obligated for airport purposes. If a sponsor requests FAA release obligations to permit a change in land use or disposal, FAA retains authority to release the applicable sponsor obligations under statute.<sup>9</sup> Section 163 does not change this authority.

Any sponsor request to release obligations that pertain to AIP or surplus property acquired land should be analyzed and processed per the guidance contained in the Order 5190.6, Chapter 22. For release requests on surplus

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<sup>9</sup> 49 U.S.C. § 47107(h) requires public notice to be given for land acquired with AIP, 49 U.S.C. § 47125 requires public notice be given for conveyances of U.S. government land, and 49 U.S.C. § 47153 requires public notice to be given for land conveyed under the Surplus Property Act.

property, it's important to carefully read every deed to verify whether a release of obligations is required. Many surplus property deeds are similar in that they restrict the use of the property to "airport purposes," but not all deeds contain this restriction, and may allow for non-aeronautical development.

If the Field makes a determination to grant the release request, the Field should prepare the Federal Register notice as required by statute. There is no need to coordinate with the Headquarters Section 163 Workgroup.

Where a release is required, the FAA's release approval is a federal action subject to NEPA. This means that the NEPA process must be completed (i.e., CATEX, FONSI, or ROD issued as appropriate) prior to issuing the release document.

The airport sponsor remains obligated to keep its ALP up to date at all times (subsequent development must be depicted on the ALP). In addition, the obligation to submit all airport projects for airspace review under 14 CFR part 77 continues to apply. Other continuing restrictions and conditions may be included in the release document consistent with established policies in Chapter 22 of Order 5190.6.

In cases where an airport sponsor has been released from obligations requiring the aeronautical use of AIP acquired or surplus property, a subsequent request to release the land for disposal requires a Federal Register notice. The FAA's approval of the release for disposal is a federal action subject to NEPA.

A.2.3. *Projects Proposed on Land Acquired with Federal Funding (ADAP, FAAP, AP-4, etc.)*

Section 163(b)(2) of the Act preserves the FAA's authority over land and facilities acquired or modified using Federal funding. This includes land or facilities acquired or improved with ADAP, FAAP, or any other source of federal funding. The federally funded land or facility remains subject to the terms and conditions contained in the deed of conveyance and to the airport's Federal grant obligations. Order 5190.6, Chapter 22 should be followed with respect to the release of obligations upon federally funded land or facilities, including aeronautical use obligations. In short, a release of obligations is still required, but there is no requirement to provide public notice (i.e. Federal Register notice) of the release request.

Since May of 1980, the ADAP and AIP grant assurances have provided there is "no limit on the duration of the terms, conditions and assurances with respect to real property acquired with the federal funds."<sup>10</sup> Consequently, if an airport has received an AIP or ADAP grant since May of 1980, then any land acquired with federal funds remains subject to the assurances, unless and until those obligations are released.

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<sup>10</sup> See 49 F.R. 35282-35283 for AIP assurances and 14 C.F.R. Part 152, App. D, paragraph 17 for the ADAP assurances.

In the unlikely event an airport has federally funded land, but has not received an ADAP or AIP grant since May 1980, then contact headquarters. Prior and current Office of Management and Budget guidelines require land acquired with federal grants to be used for the grant's purpose, subject to certain exceptions.

A.2.3.1. Proposed Project to Dispose of Land Where Only Action is Approval of Release of Obligations

A sponsor may propose a project to dispose of vacant land that was purchased with federal funding (*ADAP, FAAP, AP-4, etc.*), but is no longer needed for airport purposes. In those cases, the only action would be the approval of the airport's request to release for disposal of the property. That approval does not require public notice, but is a federal action subject to NEPA.

A.2.4. Projects Proposed on Land Acquired with PFC

For projects where a sponsor wants to lease land for non-aeronautical purposes, or dispose of land acquired with PFC, contact the Headquarters Section 163 Workgroup.

A.2.5. Sponsor Funded Property Donated or Pledged as Security for Federally Funded Project

Sponsor funded property which is donated or pledged as the sponsor's share of an AIP or other federal grant may require a release of obligations. Pledged or donated property is subject to Grant Assurance 31. FAA Order 5100.38D, 4-12. NEPA may apply.

A.3. Project Funding Source

A.3.1. Projects Funded Through AIP

FAA retains approval authority for any project that is funded with AIP. Even though the FAA retains approval authority over such funding, the FAA must still determine whether or not the FAA has ALP approval authority for those projects.

The issuance of a grant under AIP is a federal action subject to NEPA.

A.3.2. Projects Funded or Eligible to be funded with PFC

FAA retains approval authority for any project that is requested by an airport sponsor to be reimbursed with PFC funds.

- a) Projects submitted as part of a PFC Impose and Use Application or PFC Use Application:

These projects are subject to NEPA review in accordance with existing practices.

- b) Projects where the sponsor anticipates submitting a PFC application, but has yet to do so:

The FAA may begin a NEPA review for the project(s) to preserve PFC eligibility. A completed NEPA review is necessary prior to construction for the project to remain PFC eligible. It is important to note that a specific development proposal may contain a variety of elements, some of which may require an approval prior to implementation, other portions that may have no associated federal approval, and/or other portions that implicate a future approval related to an application to use PFCs. In these cases, the Field must consult counsel for further instruction on the scope and content of the NEPA document (CATEX, EA, or EIS) to ensure the NEPA document adequately supports both near term and future federal actions. In addition, these complex circumstances may require a variety of *environmental findings* and *project approvals* at the conclusion of the NEPA review process. Due to the inherent complexity of projects implicating possible future applications for use of PFC funds, the Field must consult counsel when drafting any decision document to ensure legal sufficiency of both environmental findings and decisions associated with the project.

- c) Projects that are PFC eligible, but the sponsor does not intend to reimburse the project with PFC:

The ADO must make the sponsor aware that projects eligible to be reimbursed with PFCs require an appropriate NEPA review completed prior to construction for the project to remain PFC eligible.

## **B. Sponsor Obligations Still In Effect**

Even if the FAA does not have approval authority for the change in land use or the disposal of land, all of the airport sponsor's federal statutory and grant assurance obligations remain in full force and effect. The sponsor should retain sufficient authority over the parcel to prevent uses that conflict with its federal obligations and related requirements or create conditions resulting in violations of the assurances. Subordination clauses, reservations, or other restrictions may be appropriate to protect the public's right to fly over the land, prohibit obstructions to air navigation or the interference with flight of aircraft, or assure compatible land use, as provided in Order 5190.6, Chapter 22.16. The FAA may verify compliance with these requirements through a financial compliance review, the enforcement of grant assurances, or other enforcement mechanisms at a later date.

The sponsor also has the responsibility to comply with all federal, state, and local environmental laws and regulations.

Additionally, all on-airport projects are still subject to airspace review under the requirements of 14 CFR part 77, and Grant Assurance 29 still requires the airport to update and maintain a current ALP. Sponsors are required to send the FAA an updated ALP that depicts any development once a project is completed.

If a sponsor submits a project for airspace review through OE/AAA (Obstruction Evaluation/Airport Airspace Analysis), and the project was not previously depicted on the ALP, the Field must evaluate the project to determine if the FAA has approval authority. If the project was previously shown on the ALP, the Field should verify that the project has not materially changed from what was previously depicted and confirm whether or not the project is subject to FAA approval.

## **C. Record Keeping**

When a sponsor is ready to move forward with a project already shown on a conditionally approved ALP, submits a pen-and-ink change for a proposed project, or otherwise indicates readiness to undertake an action that would need to be reflected on the ALP consistent with its obligation to maintain an up-to-date ALP, the ADO must maintain a record of its determination about FAA's approval authority and notify the sponsor of the determination.

### **C.1. Sponsor Communication**

When a determination has been made for a project, a letter should be sent to the sponsor that explains why the decision was made that the FAA either did or didn't have approval authority over the project. The determination letter needs to clearly identify:

1. Proposed project description, including sufficient land acquisition history, if applicable;
2. Determination and rationale regarding whether or not FAA has ALP approval authority for the proposed project;
3. Rationale regarding whether the sponsor must obtain a release of obligations prior to undertaking the proposed project; and
4. Whether there is a federal action subject to NEPA.

For projects submitted as a pen-and-ink change request, the field should use letters currently being used for pen-and-ink ALP approvals, but modified to include the relevant information in the preceding four items. Further actions the sponsor may need to take before beginning construction of the project, if any, should also be included (e.g., submittal of release request, perform NEPA evaluation, submit project for airspace review).

For projects currently depicted on a conditionally approved ALP, the letter to sponsor should be similar to the pen-and-ink approval letter, but changed to reflect that the FAA performed this review based on the sponsor's confirmation that they are ready to move forward with a project.

The ALP template letters currently in OE/AAA do not reflect the changes in FAA's ALP approval authority, and should no longer be used. They will be removed from the system.

Sample letters the section 163 team prepared for various determinations can be provided upon request.

## C.2. Graphical Depiction on ALP

The ALP drawing set should be updated to depict areas where specific determinations have been made. It is the responsibility of FAA field staff to document section 163 determinations on the ALP. Below are some suggested practices:

- When a sponsor is ready to move forward with a project on the currently approved ALP, areas within FAA's approval authority can be individually delineated to clearly identify FAA-approval authority limits.
- Any facilities and/or land area defined in a pen-and-ink change request can be graphically depicted on a sheet in the ALP set;
- The graphic depiction should be made for all determinations, whether or not the FAA has approval authority;
- The specific sheet to document the determination is up to field staff to determine what works best for that specific airport. Depending on complexity of the airport, the applicable sheet may be the ALP, land use plan, property map, or new sheet (for example);
- Depiction can be made electronically, or hand-drawn on a sheet;
- To the extent practical, each determination should be individually numbered and referenced in a table. The table can be drawn on a sheet in the ALP set or attached separately

## D. Coordination with Section 163 Workgroup

Any project not falling within the scenarios in this appendix must be sent to the Headquarters working group before making any determination regarding the effect of section 163 on the FAA's approval authority for a particular ALP or ALP change. To initiate this coordination, send a request directly to the working group at: [awa-arp-Section163@faa.gov](mailto:awa-arp-Section163@faa.gov). In order to assist us with your request and to the extent possible, please provide the necessary information identified in the screening process in Section 1 of these Instructions.

The working group will prepare draft determination letters that will be sent to the Regions for their review, and subsequently sent by the Field to the airport sponsor.

## Appendix B – Changes to Statute

On October 5, 2018, H. R. 302, “*FAA Reauthorization Act of 2018*” (subsequently referred to as “the Act”) was signed into law (P.L. 115-254). Section 163 of the Act limits the FAA’s ability to regulate airport-owned land and reduces the scope of the FAA’s review and approval authority for Airport Layout Plans (ALPs) and changes to such plans.

### Changes to Statute

The foundation of FAA policy on ALPs is derived from Title 49 U.S.C. § 47107(a)(16), which requires airport sponsors to maintain a current ALP that meets certain requirements. Section 163(d) of the Act amends the statute as follows (changes are shown in red):

**(16 )** the airport owner or operator will maintain a current layout plan of the airport that meets the following requirements:

**(A)** the plan will be in a form the Secretary prescribes;

**(B)** the Secretary will review and approve or disapprove only those portions of the plan and (or any subsequent revision to the plan) or modification before the plan, revision, or modification takes effect that materially impact the safe and efficient operation of aircraft at, to, or from the airport or that would adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations, or that adversely affect the value of prior Federal investments to a significant extent,

**(C)** the owner or operator will not make or allow any alteration in the airport or any of its facilities ~~if unless~~ the alteration ~~does not comply~~

(i) is outside the scope of the Secretary’s review and approval authority as set forth in subparagraph (B); or

(ii) complies with the portions of the plan approved by the Secretary approves, and the Secretary is of the opinion that the alteration may affect adversely the safety, utility, or efficiency of the airport; and

**(D)** when an alteration in the airport or its facility is made that is within the scope of the Secretary’s review and approval authority as set forth in subparagraph (B), and does not conform ~~to with~~ the ~~approved portions of the plan approved by the Secretary,~~ and ~~that~~ the Secretary decides that the alteration adversely affects the safety, utility, or efficiency of aircraft operations, or of any property on or off the airport that is owned, leased, or financed by the Government, then the owner or operator will, if requested by the Secretary, ~~will~~

**(i)** eliminate the adverse effect in a way the Secretary approves; or

**(ii)** bear all cost of relocating the property or its replacement to a site acceptable to the Secretary and of restoring the property or its replacement to



the level of safety, utility, efficiency, and cost of operation that existed before the alteration was made, except in the case of a relocation or replacement of an existing airport facility that meets the conditions of section 47110(d).