

A SURVEY OF AIRPORT LEGAL ISSUES

WAMA ANNUAL MEETING

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A Quick Legal Survey In 45 Minutes

References:

- Chapter 14.08 RCW Municipal Airports—1945 Act
- Chapter 53.08 RCW Port Powers
- FAA Airport Compliance Manual — Order 5190.6B
- Grant Assurances
- Necessarily, a blend of legal and business advice but with an eye towards enforceability
- Questions submitted by WAMA members plus 1

Please comment and question along the way

Topics Submitted by WAMA Members

1. Dealing with derelict aircraft – the tenant who pays rent for a non-airworthy aircraft and those who have quit paying rent.
2. Revenue Diversion – moving money from the airport to pay for sponsor provided services.
3. Leases- typical lease terms and guidance before signing a long-term lease.
4. Bid Protests - how best to protect the airport sponsor.
5. Lease Rate Increases- how to raise legacy lease rates to bring them up to current market? Is there a way to do that when a lease rate was established 10, 20, 30 years ago with no adjustments?
6. Through-The-Fence Agreements- ensuring they are paying equivalent to on-airport rates.
7. Under the Radar Businesses- dealing with “under the radar” businesses that operate on the airport without complying with the airport’s Minimum Standards for Commercial Activities Policy or providing insurance .
8. **Plus-** Liability for Ramp Operations – when there are multiple FBOs and carriers using the ramp.

Derelict Aircraft – They Don't Just Flyaway

- Rules and Regulations – Non-airworthy aircraft
 - Prohibit non-airworthy aircraft (except during active restoration or repair)
 - “Non-airworthy” determination made by reasonable determination of Airport
 - Notice and opportunity to contest
 - Allow inspection of all hangars
 - FAA requirement for federally obligated airports
 - Terminate any hangar lease or tie-down agreement for violation
 - Include a reasonable fee for enforcement
 - Include attorney fees

- RCW 14.08.260

An airport operator may adopt all regulations necessary for rental and use of airport facilities and for the expeditious collection of airport charges. The regulations may also establish procedures for the enforcement of these regulations by the airport operator.

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- RCW 14.08.260
 - Allows seizure and sale of aircrafts that have violated the rules
 - Specific process of chaining aircraft, notifying owner and selling “abandoned” aircraft
 - “Abandoned” includes no response for 90 days
 - Must adopt procedures in Rules and Regulations
 - Not limited to seizure – some ideas
 - Lock a hanger door for non-compliance
 - Terminate a lease
 - Practical experience
 - Long and tedious process
 - Notice procedure is complicated
 - Everyone complains and are just days away from making the aircraft “airworthy”
 - Never at net gain – usually costs money
 - Necessary to avoid multiple problem aircraft

Revenue Diversion – Moving Money From The Airport To Pay For Sponsor Provided Services

- FAA Assisted Airports
 - Grant Assurances for AIP Funds
 - Grant Assurance No. 25
 - Airport Planning Grants
 - Noise Mitigation Grants

FAA Airport Compliance Manual — Order 5190.6B

- FAA Policy and Procedures Concerning the Use of Airport Revenue – Chapter 15 of FAA Airport Compliance Manual — Order 5190.6B

Such costs may include reimbursements to a state or local agency for the costs of services actually, received and documented, subject to the terms of the Revenue Use Policy. Operating costs for an airport may be both direct and indirect and may include all of the expenses and costs that are recognized under the generally accepted accounting principles and practices that apply to the airport enterprise funds of state and local government entities.

Policy and Procedures Concerning the Use of Airport Revenue -64 FR 7696 at page 7705

- Reimbursement for capital and operating costs of the airport made by a government entity, both direct and indirect, be supported by adequate documentary evidence.

Adequate documentation consists of underlying accounting records and corroborating evidence, such as invoices, vouchers and cost allocation plans, to support all payments of airport revenues to other government entities. If this underlying accounting data is not available, the Final Policy allows reimbursement to a government entity based on audited financial statements.

Indirect cost allocation plans, however, may use budget estimates to establish pre-determined indirect cost allocation rates. Such estimated rates must, however, be adjusted to actual expenses in the subsequent accounting period.

- No impact fees

Leases - Typical Lease Terms And Guidance Before Signing A Long-Term Lease

- Standard lease document
 - FAA airports require specific language regarding interference with operations of aircraft – Takeoff/Landing, Electromagnetic, Airspace Reservation, Minority Business Enterprise
- Provisions
 - Maximum of 75-year term RCW 14.08.120
 - Match term to improvements
 - Removal requirements
 - Base rent is the monthly payment. “Rent” is base rent plus all other charges (“airport tariff charges”)
 - Must include an adjustment every five years after the first ten RCW 14.08.120(e)
 - Percentage annual increase
 - Readjustment every five years based on raising FMV of Land x percent return
 - Use and assignment provision relationship
 - Liability insurance - \$2 million is the new \$1 million

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- Off-street parking
 - Fire protection
 - No Airport liability for casualty loss – no exceptions
 - At least three months security
 - Environmental indemnification
 - Inspections

Bid Protests: How Best To Protect The Airport

- Award to the lowest “responsive” and “responsible” bidder
- Consider adopting supplemental bidder responsibility criteria – RCW 39.04.350
 - Responsible bidder is a low bar
 - Adopt a set of criteria and a manner of judging
- Before the Bid
 - Make sure the bid documents are clear
 - Fill them out yourself
- Irregularities (informalities) that do not confer an advantage
 - Math errors or other minor errors that do not confer an advantage
 - Failure to sign a bid vs. failure to initial a page

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- If a bidder asks for other bids within two business days of opening – must provide in two days and then delay award for two business days - RCW 39.04.105
 - But . . . The best the protestor can do is obtain an injunction against award
 - No damages
 - No award to the protestor

Best practice if a protest is received

- Always allow enough time from bid to contract – most important advice
- Call your attorney and work out the timeline
- Make your best decision and proceed
- If they protestor gets an injunction, then rebid

Lease Rate Increases: How To Raise Legacy Leases Rates To Bring Them Up To Current Market?

RCW 14.08.120(e)

(e) Acting through its governing body, **to sell or lease any property**, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aircraft landings, aircraft takeoffs or related aeronautic purposes, in accordance with the laws of this state, or the provisions of the charter of the municipality, governing the sale or leasing of similar municipally owned property. . . .

for any period not to exceed seventy-five years, but any such lease of real property made for a longer period than ten years shall contain provisions requiring the municipality and the lessee **to permit the rentals for each five-year period thereafter, to be readjusted at the commencement of each such period** if written request for readjustment is given by either party to the other at least thirty days before the commencement of the five-year period for which the readjustment is requested. If the parties cannot agree upon the rentals for the five-year period, they shall submit to have the disputed rentals for the period adjusted by arbitration.

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- All leases longer than ten years
 - Must contain a provision allowing rent adjustments for each subsequent five-year terms
 - Statute contains an arbitration provision
 - RCW 14.08.120(e)
 - Dates from 1961
 - What about a lease that does not contain these provisions?
 - The lease is potentially void
 - May require a legal action but consider;
 - If airport loses then lease remains in place
 - If airport wins the lease is over

Through-the-Fence Agreements- Ensuring They Are Paying Equivalent to On-Airport Rates

- Grant Assurance No. 22 – Economic Nondiscrimination
 - ... on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.
- Residential Through the Fence (RTTF)
 - Test: RTTF users must pay an access fee which is comparable to on-airport users making similar use
 - Some methodologies
 - RTTF users pay fees equal to tenant tie-down charges
 - RTTF hangar compared to on-airport hangar land value
 - Value of dedicated taxi-way
 - Allocation of capital costs
 - https://www.faa.gov/airports/airport_compliance/residential_through_the_fence/
- Experience: FAA will withhold AIP funds if an airport does not charge enough

“Under The Radar” And The Airport’s Minimum Standards And Insurance Requirements

- Issue. Businesses fail to comply with Airport rules and regulations, most notably providing liability insurance
 - Fuelers
 - “Out of the van” mechanics
- Legal right of airport
 - Require registration and a business license to operate on airport
 - Cost of business license must relate to the cost to the airport
 - Can and should require liability insurance naming the airport sponsor as an “additional insured”
 - This will require an annual check and renewal
 - For fuelers, require pollution legal liability “PLL” insurance
 - “Two million is the new one million”
 - Airport can prohibit such businesses to protect the FBOs
- Clear airport rules and regulations
 - Prohibit entry without an “airport business license”
- Trespass violators
 - Local law enforcement
 - RCW 53.08.220

Plus 1 - Liability For Ramp Operations

- Alfoa v. Port of Seattle (2017)
 - Port held liable for a worker of company operating on the ramp
 - The ramp has numerous companies (fuelers, food providers, baggage, cleaners and airlines) operating together
 - Port had rules, badging and the ability to suspend workers
- Ideas borrowed from common worksite construction sites which imposes safety duty on the general contractor
- Best Practices
 - Have clear rules
 - Enforce the rules
 - Require all ramp users to have liability insurance naming the Port as an additional insured



ANY OTHER QUESTIONS OR
IDEAS?