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FAA Focuses on Controlling Revenue Diversion.

The concern of the Federal Aviation Administration ("FAA") regarding the use by airport operators of airport generated revenues to soften budget shortfalls off the airport appears to be growing. In a speech delivered at the November 11, 2019 National Air Transportation Association Leadership ("NATA") Conference, Kirk Shaffer, FAA's Associate Administrator for Airports, solicited the assistance of the aviation community in working with jurisdictions on compliance. Mr. Shaffer went on to opine that jurisdictions that operate airports are sometimes unaware of the laws governing revenue diversion, or confused by revenue flows, particularly as related to state and local taxes. He illustrated the problem by sharing the fact that, of the 177 jurisdictions with which the FAA has worked over the past five years on revenue diversion issues, 107 still remain noncompliant.

That number of noncompliant jurisdictions is somewhat surprising as the rules governing the use of airport revenues from airports are fairly explicit. The general rule is that revenues generated by a public airport may only be expended for the capital and operating costs of: (1) the airport; (2) the local airport system; or (3) other facilities owned or operated by the airport operator and directly and substantially related to the air transportation of passengers or property. 49 U.S.C. §§ 47107(b)(1) and 47133(a). The use of airport revenue for purposes other than airport capital or operating costs is generally considered "revenue diversion" and is prohibited by federal law. See Policy and Procedures Governing the Use of Airport Revenue, 64 Fed.Reg. 7696, 7720 (February 15, 1999) ("Revenue Policy"). Airport revenues subject to the revenue use requirements include all fees, rents, charges, or other payments received from anyone who makes use of the airport and from the airport sponsor's activities on the airport. Id. at 7716.

The third prong provides unique revenue allocation opportunities to airport sponsors that own or operate other facilities.

Specifically, the statute permits sponsors to use airport revenue for other facilities owned or operated by the airport owner and directly and substantially related to the air transportation of passengers or property. "Owned" means that the airport owner or operator holds legal title to the facilities for which airport revenue is used. FAA Bulletin 1: Best Practices – Surface Access to Airports (2006). "Operated" means that the local or state government or authority that owns or operates the airport is legally responsible for the operation of the facility and operates the facility either with its own employees or through a management contract with another public agency or private firm. Id. "Directly and substantially related to the air transportation of passengers" is a standard that FAA interprets on a case by case basis with a focus on whether the project of facility is intended primarily for users of the airport. Where revenues are not expended wholly or primarily for users of the airport, they must be prorated to the actual or forecasted use of the facility. For example, if 10% of actual or projected use of the facility will be for non-airport purposes, the airport revenues can only be used to pay for 90% of the project.

Finally, federal law and policy permit the use of airport revenues for certain costs of off-airport environmental mitigation incurred for an airport development project. "Airport revenue may be used where airport development requires a sponsoring agency to take an action, such as undertaking environmental mitigation measures contained in an FAA Record of Decision approving funding for

an airport development project, or constructing a ground access facility that would otherwise be eligible for the use of airport revenue." Revenue Use Policy at 7720.

In short, airport operators are allowed to spend airport generated revenues on airport operation and development, including an off-airport project that contributes substantially to that operation and/or development. Off-airport uses that are unrelated, or marginally related, to airport operation or development are explicitly precluded by the airport revenue use policy.

This emphasis is particularly interesting in light of FAA's recent decision to allow the City of Santa Monica to use airport revenues to tear up portions of its runway to make access by jets less likely. (See blog post FAA Ignores Its Own Regulations in Allowing Expenditure of Airport Revenue to Demolish Runway at Santa Monica Municipal Airport, November 11, 2019). Nevertheless, revenue diversion occupies a central position in the complex of policies directed at airport development. It is essential for any airport operator to understand and apply these policies scrupulously, for the purpose of avoiding FAA retribution, including, but not limited to, repossession of grant funds already allocated, sometimes amounting to millions of dollars. In the long run, being safe is more effective than being sorry.

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