

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DATE: FEB 22 1983

WASHINGTON, D.C. 20591

IN REPLY
REFER TO: APP-510

SUBJECT: Program Guidance Letter No. 9



FROM: Manager, Grants-in-Aid Division, APP-500

TO: All Regions and AAC-960
Attention: Manager, Airports Division

9.1 Noise Compatibility Project Eligibility - Bob Yatzeck (426-3857).

A noise compatibility project is eligible for Federal participation under the Airport Improvement Program if the proposed project is an element of:

1. A noise compatibility program determined by the FAA to be substantially consistent with the purposes of reducing existing noncompatible uses and preventing the introduction of additional noncompatible uses pursuant to Section 104(c)(2) of the Aviation Safety and Noise Abatement Act of 1979 (in accordance with forthcoming final criteria for funding noise compatibility projects under Section 104(c)(2) of the Aviation Safety and Noise Abatement Act of 1979 by APP-600); or

2. A noise compatibility program approved by the FAA pursuant to FAR Part 150.

You should be aware that this relatively "open" policy of considering all such proposed projects eligible could change if subsequent legal determinations indicate these criteria should be more constraining. We will inform you of any developments in this regard if they occur.

9.2 Noise Planning - Bob Yatzeck (426-3857). The AAIA requires that a minimum of eight percent of total funds made available in any fiscal year be used for noise compatibility planning or for implementing noise compatibility programs. Under this requirement, our policy is to fund development of noise exposure maps and related information or noise compatibility programs pursuant to FAR Part 150. More limited noise compatibility efforts will be funded as environmental work under airport master planning (not within the eight percent) either as part of a total airport master plan or alone under a supplemental grant if there has been a relatively recent airport master plan. The Federal participation rate for all noise planning studies will be either 75 percent or 90 percent, as appropriate.

9.3 Eligibility of Airport Pavement Repair - Bob Yatzeck (426-3857).

The application of asphalt seal coats and the cleaning, repair, and resealing of joints in concrete pavements are eligible for Federal participation under certain conditions. These types of pavement repair work will be eligible only when periodic pavement surveys reveal trends in deterioration and it is determined that repair will retain the serviceability of the pavement and the responsible Airports office is satisfied that the sponsor has made a conscientious good faith effort to maintain the pavement during the interim since the most recent construction/restoration/repair project. The following ground rules will apply:

1. Pavement repair work is eligible on runways, taxiways, and aprons on all categories of airports.
2. Eligible repair work should be classified under the "standards" category in the AIP priority system and carry the same priority as the pavement on which it will be accomplished.
3. The \$25,000 project minimum set forth in FAR Part 152, Section 152.107 should be observed unless, in the judgment of the responsible Airports office, it would be in the best interests of the government to award a grant of a lesser amount.
4. Surface preparation: The preparation of the pavement surface, including the cleaning and filling of cracks, before repair work is performed, is eligible when associated with an eligible repair project.
5. Eligible types of seal coats:
 - a. Aggregate seal coat with optional fog seal as a final coat.
 - b. Sand seal coat.
 - c. Rubberized asphalt seal coat.
 - d. Emulsified asphalt slurry seal coat.
 - e. Coal tar pitch emulsion seal coat.
 - f. Rubberized coal tar pitch emulsion seal coat.

9.4 Airport Planning Eligibility - Bob David (426-3858). Two questions have arisen regarding eligibility for planning grants under AIP.

1. Is an airport sponsor who operates two or more airports eligible for a system planning grant under Section 508(d)(4) (the "1 percent money") for planning covering all of its airports? Answer: No, unless the sponsor happens also to be the authorized areawide planning agency as defined by Section 503(a)(10).

2. Are the costs of tuition, travel and subsistence for a sponsor's planning personnel to attend airport planning courses at the FAA Aeronautical Training Center or any seminars/conferences of general interest, e.g., an AOCI seminar, an eligible cost under a grant for continuous system planning? Answer: No. Only travel directly associated with the approved work program is eligible. The grant program may not be directed toward training sponsor or contractor personnel.

9.5 Private Airport Grants - Bob David (426-3857). The standard assurances to be required of sponsors of eligible privately owned airports are under development. If you have bona fide applications or preapplications on hand, please advise APP-510 so that we may adjust work priorities, if necessary.

Funding for establishment of new airports by private sponsors will not be considered. The committee report on the AAIA clearly shows the intent of the Congress to preserve and improve existing private airports rather than fund new ones. Where the need truly exists for a new reliever or commercial service airport, it should manifest itself through an application from a public sponsor.

9.6 Grant Agreement "Acceptance Dispatch" - John Sekman (426-8590). The ADAP Handbook 5100.36, paragraph 1144a, requires that airport field offices immediately forward a dispatch to the regional Airports and Accounting Offices and to APP-500 upon receipt of a grant agreement. The FAA Form 5100-107 received in Washington fulfills our need in a timely manner, except at the end of the fiscal year. Effective immediately, the dispatch need not be sent to APP-500 except during September of each fiscal year. However, each region should ensure that the needs of the regional Accounting Offices continue to be met.

9.7 Definition of Airport Revenue - Bill Southerland (426-3085).

Section 511(a)(12) of the AAIA requires all revenues generated by the airport to be expended for capital or operating costs of the airport, with some exceptions. Several questions have already arisen regarding what constitutes airport revenue, and we expect more over the next few months. As this is basically a compliance question, inquiries regarding airport revenue should be directed to AAS-310. Attachment #1 to this PGL is a copy of an opinion from the DOT General Counsel stating, in effect, that an aviation gasoline tax levied by the City and County of Denver, Colorado, is not airport revenue. Another question on coverage of interest earned on airport revenue deposits is now under consideration in AAS-310. They will issue further guidance on this and other questions regarding airport revenue.

9.8 FAA Project Signs at Construction Site - Bob David (426-3857).

Paragraph 128 of Order 5100.18A required that signs be erected on the airport describing the project and indicating that it was being funded under the Airport Development Aid Program. Order 5100.36, which cancelled Order 5100.18A, did not address this item. Over the past few years, we have received inquiries from field personnel as to whether or not this type of sign is still required. Signs of this nature will no longer be considered as eligible for funding under the AIP, since they do not fulfill any valid airport development need. Field personnel should be cognizant of this in their review of plans and specifications since many consultants include the sign as part of their standard boiler plate package. In cases where the sign has already been included in the approval plans and specifications, the costs will continue to be eligible.

9.9 Expanded Safety and Security Item Eligibility - Harry Hink (426-3085).

Section 503 "Definitions" of the AAIA adds new language to the definition of airport development by including "safety and security equipment ... specifically approved by the Secretary as contributing significantly to the safety or security of persons and property at such airport." Decisions on such eligibility will be made on a case-by-case basis by AAS-300 and should be submitted to them for approval along with the region's recommendation regardless of the item cost. The basic criteria for eligibility will be whether the item of equipment is needed to meet a unique safety need at a particular airport. Any type of equipment which could be used at most airports but which is not specifically mentioned in Section 503(a)(2) (e.g., sweepers for other than snow removal) will continue to be ineligible.

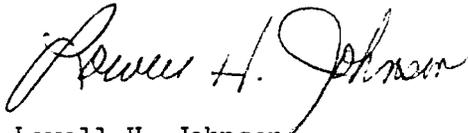
9.10 Cost-Free Land for Nav aids - Bob David (426-3857). This reaffirms the APP-500 January 14, 1983, letter on the same subject and incorporates the guidance into the PGL system. The FAA Chief Counsel has advised us that FAA may include a provision in the AIP grant agreements that will require the sponsors to continue to provide the FAA with the existing site of an F&E navaid, cost-free, upon termination of the existing lease. The Acquisition and Material Services will be asking their regional Logistics staffs to identify such sites. Regional Airports Divisions should be prepared to provide them with a list of proposed grant recipients for the remainder of the fiscal year and anticipated month of the grant so that they may concentrate their efforts on these locations.

For the purposes of paragraph 1122 of Order 5100.36 (CHG 3 dated 9/2/81), any existing site that has not previously been included in a grant shall be considered a new requirement. Since the site has been specifically identified, paragraph 1122c(1) would apply. However, in lieu of including the legal description of the area in the grant condition, it would be permissible to incorporate it by reference. For example, if an ILS has been located on the airport through a lease agreement and that agreement provides an adequate legal description of the area, then the grant condition may refer to the lease. The lease should be attached to the grant as Exhibit "B".

9.11 Special Assurance for Noise Land - Bob Yatzeck (426-3857). Section 511(a)(13) of P.L. 97-248 imposes certain requirements on sponsors receiving grants for the purchase of land for noise compatibility purposes which is conditioned on the disposal of the acquired land. The following special assurance should be used in grants including such land acquisition. This assurance would be added to Part V of FAA Form 5100-100:

It agrees that land in this project purchased for noise compatibility purposes may be subject to disposal at the earliest practicable time. After Grant Agreement, the FAA may designate such land which must be sold by the sponsor. The sponsor will use its best efforts to so dispose of such land subject to retention or reservation of any interest or right therein necessary to insure that such land is used only for purposes which are compatible with the noise levels of operation of the airport. The proceeds of such disposition either shall be refunded to the United States for the Airport and Airway Trust Fund on a basis proportionate to the United States share of the cost of acquisition of such land, or shall be reinvested in an approved project, pursuant to such instructions as the FAA shall issue.

9.12 PGL Index - Ed Williams (426-3857). Attachment #2 lists, by title and PGL number, all of the items covered by PGL's to date. It is included for your reference and guidance in conjunction with the ADAP Handbook 5100.36. We are preparing a new AIP Handbook, but until it is issued, the ADAP Handbook as modified by the PGL will continue to give current national program guidance.



Lowell H. Johnson

2 Attachments

Canceled



U.S. Department of
Transportation

Office of the Secretary
of Transportation

Memorandum

100-100-55

Subject: Application of Section 511(a)(12),
Airport and Airway Improvement Act of 1982,
To Stapleton International Airport

Date: JAN 13 1983

From: John M. Fowler
General Counsel *John M. Fowler*

Reply to
Attn. of:

To: J. E. Murdock III
Chief Counsel, Federal Aviation Administration

As you know, the controversy over the Denver aviation gasoline tax has come to the Secretary's attention, and I have been asked to review the FAA legal opinion on section 511(a)(12) of the new Airport and Airway Improvement Act of 1982, 49 U.S.C. 2210(a)(12).

Section 511 provides, in pertinent part:

(a) Sponsorship. - As a condition precedent to approval of an airport development project contained in a project grant application under this title, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that -

(12) all revenues generated by the airport, if it is a public airport, will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property: *Provided, however,* That if covenants or assurances in debt obligations previously issued by the owner or operator of the airport, or provisions in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all other revenues generated by the airport shall not apply

Background

Stapleton International Airport is owned and operated by the City and County of Denver (Denver), which also imposes a general sales tax throughout its jurisdiction. Denver, Colo., Revised Municipal Code, ch. 16, art. 168 (1981). The tax applies to aviation gasoline ("avgas"), which is sold principally at the Airport, but at a rate of 1.5 percent instead of the general rate of 3 percent. Section .8. The proceeds go into Denver's

general revenue fund, which supports all types of municipal expenditure. Section .24.

In an opinion of September 23, the Assistant Chief Counsel for General Law concluded that the taxes paid at the Airport with respect to avgas constitute "revenues generated by the airport" within the meaning of section 511(a)(12), and advised the Chief of the Grants-in-Aid Division, Office of Airport Planning and Programming, that Denver could not make the required assurance and therefore was not eligible for a grant under the new Act. That opinion has been distributed to FAA regional offices, where it is being treated as a ruling.

As you know, the Airport and Airway Improvement Act was enacted as Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324. Because of the circumstances of its enactment, the legislative history is thin, and the record does not contain a completely adequate explanation of what the Congress intended in enacting subsection (a)(12). Nevertheless, I am convinced that the legislative history we do have points in one direction - that tax proceeds are not "revenues" within the meaning of the new statute. Moreover, the opposite conclusion raises so many inequities and illogical results in administering the program that it is extremely unlikely that Congress could have intended such a reading.

Different Taxing Authority

Assuming for the moment that the FAA conclusion is correct - that the proceeds of the tax on avgas constitute "revenues generated by the airport" - a number of practical and interpretative issues are presented. First, there are many kinds of taxes collected at airports. The most common, a general sales tax, is usually imposed by state authorities. It would be unfair to penalize certain airports by denying them grants when they do not have control over taxes collected on their premises, and I doubt seriously the Congress could have intended such a result.

The FAA response to this argument has been that similar provisions in the predecessor statutes to the present Act (which has not significantly changed the structure of airport grant-in-aid practices) have always been interpreted to require assurances only with respect to matters within the control of the airport sponsor. In this case, that would mean that a 1.5 percent avgas tax collected at Stapleton by the State would not bar grants, while the same tax collected by Denver would. Or, in the alternative, if the State owned the Airport, the Denver avgas tax would not bar grants.

This position, it seems to me, would be as illogical as the first, and was probably not intended by the Congress. The result would be, for example, that very few taxes could be collected at Baltimore-Washington International Airport (BWI), which is owned by the State of Maryland, while any number of state taxes could be collected at the metropolitan New York airports, where the Port Authority that operates them does not have any taxing authority.

I would add here a practical consideration. Suppose Maryland could show that it contributes as much in general revenues to the operation of BWI as it takes in in taxes collected on the airport property. Would this relieve it of the requirement that the "...revenues ... will be expended for the capital or operating costs of the airport"? The statute and its legislative history do not provide for such a situation. And it is plain that some sort of adjustment along these lines would be necessary out of simple fairness.

Taxes "Generated by the Airport"

Further, if we take the position that tax proceeds are "revenues" under the Act, we then have a serious question about what "generated by the airport" might mean. We have heard various suggestions for a test. The September 23 memorandum implies a "but for" test. It notes that "[a]bsent the existence of the airport this source of revenue would not be available to the City." This may be so, but surely there are many other sources of revenue that would not be available to Denver but for the existence of the Airport. Is there a hotel on the Airport? If so, must taxes collected at it either be devoted to airport purposes or repealed? There are certainly food and other concessions at the Airport. What about the taxes collected there? Or any income, excise, or personal property taxes collected on business conducted at the airport? It is difficult to imagine that the Congress intended such a thorough reform of state taxation.

I understand that, to avoid this problem, you may make a distinction between taxes on aviation-related matters and general taxes, such as sales taxes on food, that apply to non-aviation sales. But the statute does not make such a distinction. It refers only to revenues "generated by the airport". While certain categories of taxable activities, such as hotels or concessions, are not exclusively aviation-related, there can be no doubt that their sales and the consequent taxes on them are "generated by the airport" as much as the tax on avgas. Indeed, the legislative history of subsection (a)(12) explicitly states that the provision applies to terminal concessions.

While the statute may be read to apply only to taxes the sponsor has control over, it certainly does not contain any geographical boundaries. Thus, what should happen to the proceeds of taxes on avgas that may be sold off the airport, or taxes on hotels or car rental agencies located just off the airport? These proceeds are as much "generated by the airport" as are taxes collected on the airport property. But if we conclude that the provisions do reach off-airport taxes, how do we establish how much of a business's sales are generated by the airport? A hotel immediately off the airport may also be located on an Interstate highway, and it may be that half its customers arrive by automobile. Do we require the sponsor to split the revenues?

Following the line of reasoning the September 23 memorandum begins, I can foresee endless legal disputation on whether a tax produces a revenue generated by an airport, at least in the cases where an airport sponsor has the misfortune to have some taxing authority.

Legislative History

Aside from these interpretational and practical problems, I believe it is reasonable to conclude from the legislative history that the Congress did not intend to reach tax proceeds with subsection (a)(12). First, the Act specifically addresses aviation-related taxes the Congress disapproves of in section 532, which amends section 1113(b) of the Federal Aviation Act, 49 U.S.C. 1513(b). The provision bars certain types of aviation taxes except when they are "wholly utilized for airport and aeronautical purposes." Had the Congress intended the same result for all taxes "generated by the airport" it would most likely have addressed the matter in this general tax provision.

Second, the Conference Report to Accompany H.R. 4961, H.R. Rept. No. 97-760, 97th Cong., 2d Sess., August 17, 1982, in explaining the (a)(12) provision, seems to be addressing the use of fees and charges, as opposed to taxes, at airports for general governmental purposes. The report notes that "... airport users should not be burdened with 'hidden taxation' for unrelated municipal purposes." Report at p. 712. Ordinary taxes, particularly sales taxes, are hardly hidden; they are open and explicit. So are landing fees, leases, and concession contracts, of course; what is hidden is the use of the proceeds of the latter for non-airport purposes.

Conclusion

I therefore conclude that the term "revenues" in section 511(a)(12) was not intended to include tax revenues, and that the City and County of Denver are eligible to receive grants under the Airport Improvement Program without any further legislative action.

Although it is not dispositive, I note also that we have discussed the matter with counsel to the Senate Commerce Committee, who concurs in this interpretation.

Index of Items in Program Guidance Letters

Issued by APP-500 as of February 1983

PGL #1 - July 23, 1982

- 1.1 Retroactive Funding
- 1.2 Cost-Free Land

PGL #2 - August 8, 1982

- 2.1 Alerting Airport Sponsors
- 2.2 Distribution of Grant Agreement
- 2.3 Revisions to Davis-Bacon Regulations
- 2.4 MBE Requirements
- 2.5 Eligibility Change - Airfield Signs
- 2.6 Eligibility Change - Passenger Boarding Devices

PGL #3 - August 19, 1982

- 3.1 Programming Automated Weather Reporting Equipment
- 3.2 A-95 Requirements
- 3.3 Program Income

PGL #4 - August 24, 1982

- 4.1 New Obligations under the AADA
- 4.2 U.S. Share and Funding Pots

PGL #5 - August 31, 1982

- 5.1 Grant Increase Limitation
- 5.2 1982 Grants Funded from both ADAP and AIP
- 5.3 Noise Compatibility Projects

PGL #6 - September 4, 1982

- 6.1 New Grant Agreement and Assurance Forms
- 6.2 Special Conditions and Assurances
- 6.3 Multi-Year Grants

PGL #7 - September 10, 1982

- 7.1 Addendum to Part V Assurances.

PGL #8 - September 27, 1982

- 8.1 Fifty Percent Overage Provision on Land Costs
- 8.2 Estimate of Land Costs
- 8.3 Missing Page on Part V Assurances

PGL #9 - February 22, 1983

- 9.1 Noise Compatibility Project Eligibility
- 9.2 Noise Planning
- 9.3 Eligibility of Airport Pavement Repair
- 9.4 Airport Planning Eligibility
- 9.5 Private Airport Grants
- 9.6 Grant Agreement "Acceptance Dispatch"
- 9.7 Definition of Airport Revenue
- 9.8 FAA Project Signs at Construction Site
- 9.9 Expanded Safety and Security Item Eligibility
- 9.10 Cost-Free Land for Nav aids
- 9.11 Special Assurance for Noise Land
- 9.12 PGL Index