

Part IV: Airports and Aeronautical Users

Chapter 12. Review of Aeronautical Lease Agreements

12.1 Introduction.

This chapter discusses procedures for reviewing lease agreements between the airport sponsor and aeronautical users. As part of the compliance program, the FAA Regional Airports Division (Region) or Airports District Office (ADO) may review such agreements upon request, advising airport sponsors of their federal obligations, and ensuring that the terms of the lease do not violate an airport sponsor's federal obligations.

12.2 Background.

The operation of a federally obligated airport involves complex relationships between the airport sponsor and its aeronautical tenants. In most instances, the airport sponsor will turn to private enterprise to provide the aeronautical services that make the airport attractive and self-sustaining.

a. Rights Granted by Contract. Airport lease agreements usually reflect a grant of three basic rights or privileges:

- (1) The right for the licensee or tenant to use the airfield and public airport facilities in common with others so authorized.
- (2) The right to occupy as a tenant and to use certain designated premises exclusively.
- (3) The commercial privilege to offer goods and services to airport users.

b. Consideration for Rights Granted.

The basic federal obligation of the airport sponsor is to make public landing and aircraft parking areas available to the public. However, the airport sponsor may impose a fee to recover the costs of providing these facilities. (See chapter 18, *Airport Rates and Charges*, for a further discussion on rates and charges). Frequently, the airport sponsor recovers its airfield costs indirectly from rents or fuel flowage fees that it charges its commercial tenants. The airport sponsor's substantial capital investment and operating expense necessitates assessing airport fees to recover these costs. (See chapter 9, *Unjust Discrimination between Aeronautical Users*, for information on fees and terms and conditions).

c. Operator/Manager Agreements.

Sometimes an airport sponsor may, for various reasons, rely on commercial tenants to carry out certain airport sponsor federal obligations. For instance, an airport sponsor

may (i) contract with a commercial tenant to perform all or part of its airfield maintenance, (ii) delegate to a tenant responsibility for collecting landing fees, publishing notices to airmen (NOTAM), or (iii) contract for airport management. When these functions are defined in one agreement, the airport sponsor should make provisions for the survival and separation of management responsibilities in the case of default. This makes the respective responsibilities for each activity clear and enables the airport sponsor to deal with a possible default in one activity (*i.e.*, management agreement) without terminating a second, separate activity not subject to a default. (See chapter 6, *Rights and Powers and Good Title*).

12.3 Review of Agreements.

a. Scope of FAA Interest in Leases.

The FAA does not review all leases, and there is no requirement for an airport sponsor to obtain FAA approval before entering into a lease. However, when the Region/ADO reviews a lease agreement, the review, at a minimum, should include the following issues:

- (1) Determine if a lease has the effect of granting or denying rights that are contrary to federal statute, airport sponsor federal obligations, or FAA policy. For example, does the lease grant options or rights of first refusal that preclude the use of airport property by other aeronautical tenants? Does the lease extend an exclusive right in any capacity?
- (2) Ensure the airport sponsor has not entered into an agreement that would surrender its ability to control the airport.
- (3) Identify terms and conditions that could prevent the airport from realizing the full benefits for which it was developed.
- (4) Identify potential restrictions that could prevent the airport sponsor from meeting its federal obligations from federal property conveyances and grant assurances. (See chapter 3, *Federal Obligations from Property Conveyances*, and chapter 4, *Federal Grant Obligations and Responsibilities*). For example, does the lease grant the use of aeronautical land for a nonaeronautical use?

b. Form of Lease or Agreement.

The type of document or written instrument used to grant airport privileges is the responsibility of the airport sponsor. In reviewing such documents, the FAA Region or ADO should concentrate on determining the nature of the rights granted and whether granting those rights may be in violation of the sponsor's federal obligations from federal property conveyances and grant assurances. The most important lease provisions to review include:

(1) Premises.

What is being leased – land or facilities or both? Does the lease include only the land and/or facilities that the aeronautical tenant can reasonably use or has the tenant been granted options or rights of first refusal for other airport property and/or facilities that it will not immediately require? Do options or rights of first refusal grant the tenant an exclusive right by allowing the tenant to control a majority or all of the aeronautical property on the airport that can be developed?

(2) Rights and Obligations.

Does the lease grant the tenant an explicit or implied exclusive right to conduct a business or activity at the airport? Does the lease state the purpose of the lease, such as “the noncommercial storage of the owner’s aircraft?” Does the lease require any use to be approved by the airport sponsor? This will prevent future improper nonaeronautical uses of airport property.

(3) Term of Aeronautical Lease.

Does the term exceed a period of years that is reasonably necessary to amortize a tenant’s investment? Does the lease provide for multiple options to the term with no increased compensation to the airport sponsor? Most tenant ground leases of 30 to 35 years are sufficient to retire a tenant’s initial financing and provide a reasonable return for the tenant’s development of major facilities. Leases that exceed 50 years may be considered a disposal of the property because it likely exceeds the useful life of the structures erected on the property. All disposals of federally acquired and federally conveyed property require concurrence of ACO-100. The Region or ADO should not consent to proposed lease terms that exceed 50 years. (For information on disposal of land, see chapter 22, *Land Use Changes and Releases of Federally Acquired and Federally Conveyed Land*).

(4) Payment of Fees to the Sponsor.

Does the lease assess the tenant rent for leasing airport property and/or facilities and a concession fee if the tenant provides products and/or services to aeronautical users? Does the lease provide for the periodic adjustment of rent? Has the rental of airport land and/or facilities been assessed on a reasonable basis (e.g., by an appraisal)? Additionally, all leases for a term of more than five (5) years should contain provisions for periodic adjustment of rates.

(5) Title.

Does the title to tenant facilities vest in the airport sponsor at the expiration of the lease? Do any lease extension or option provisions provide for added facility rent once the title of facilities vests in the airport sponsor?

(6) Subordination.

Is the lease subordinate to the airport sponsor's federal obligations? Subordination may enable the airport sponsor to correct tenant activity through the terms of its lease that otherwise would put the airport sponsor in violation of its federal obligations.

(7) Assignment and Subleasing.

Has the airport sponsor maintained the right to approve in advance an assignment (a sale or transfer of the lease) or sublease by the tenant? For example, could the airport sponsor intervene if (a) a dominant fixed-base operator (FBO) decides to acquire all other competing FBOs on the airfield, or (b) an aeronautical tenant decides to sublease aeronautical space to a nonaeronautical tenant?

12.4 FAA Review of Leases.

Since the FAA's interest in a lease is confined to the lease's impact on the airport sponsor's federal obligations, the airport sponsor should not construe the acceptance of the lease as an endorsement of the entire document. When the FAA reviews a lease and determines it does not appear to violate any federal compliance obligations, the FAA will advise the airport sponsor that it has no objection to the agreement. The FAA does not approve leases, nor does it endorse or become a party to the lease agreements.

12.5 Agreements Covering Aeronautical Services to the Public.

In reviewing airport leases and agreements, the Region or ADO should give special consideration to those arrangements that convey to aeronautical tenants the right to offer services and commodities to the public. In particular the review should ensure that the agreement complies with the airport sponsor's federal obligations, including (a) the airport sponsor maintains a fee and rental structure in the lease agreements with its tenants that will make the airport as self-sustaining as possible and that (b) the facilities of the airport are made available to the public on reasonable terms without unjust discrimination. Any lease or agreement granting the right to serve the public on the airport should be subordinate to the airport sponsor's federal obligations. That is, the lease should provide that it will be interpreted to preserve its compliance with the federal obligations. This will enable the airport sponsor to preserve its rights and powers and to maintain sufficient control over the airport to guarantee aeronautical users are treated fairly.

a. Required Economic Nondiscrimination Provision.

[Grant Assurance 22\(b\), Economic Nondiscrimination](#), requires the airport sponsor to include specific provisions in any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted.¹ The intent of this provision is to ensure aeronautical service providers engage in reasonable and nondiscriminatory practices and to provide the airport sponsor with authority to correct unreasonable and discriminatory practices by tenants should they occur. When reviewing lease agreements, Regions or ADOs should ensure that the agreement contains the required provision and, if it is missing, instruct the airport sponsor to insert the provision in the agreement.

b. Nonaeronautical Service to the Public.

Although the grant assurances and property deed restrictions are not generally applicable to nonaeronautical leases and agreements (as compared to aeronautical agreements), the lease of premises or an agreement granting rights to offer nonaeronautical services to the public must incorporate specific language prohibiting unfair practices regarding civil rights assurances as outlined in 49 CFR parts 23 and 26.

12.6 Agreements Involving an Entire Airport.**a. Contracts to Perform Airport Maintenance or Administrative Functions.**

The important point in such arrangements is that the airport sponsor may delegate or contract with an entity of its choice to perform any element of airport maintenance or operation. However, such arrangements in no way relieve the airport sponsor of its federal obligations. The airport sponsor has the ultimate responsibility for the management and operation of the airport in accordance with federal obligations and cannot abrogate these responsibilities. When the airport sponsor elects to rely upon one of its commercial operators or tenants to carry out airport maintenance or operating responsibilities, there is the potential for a conflict of interest and the potential for a violation of the airport sponsor's federal obligations.

Any agreement conferring such responsibilities on a tenant must contain adequate safeguards to preserve the airport sponsor's control over the actions of the entity. The contract should be separate and apart from any other lease or contract with the airport sponsor that grants property or commercial rights on the airport. (See chapter 6, *Rights*

¹ See [Procurement and Contracting Under AIP – Federal Contract Provisions | Federal Aviation Administration](#).

and Powers and Good Title, section 6.8, *Airport Management and Development Arrangements*, for a discussion of the requirements applicable to such agreements.)

b. Total Delegation of Airport Administration.

In certain cases, an airport sponsor may submit a contractual arrangement to the Region or ADO for the operation of a publicly owned airport by a management corporation or a tenant operator. Whether the contractual document establishing this kind of a relationship is identified as a lease, concession agreement, management contract, or otherwise, it has the effect of placing a third party in a position of substantial control over a public airport that is subject to federal obligations. The Region or ADO should review these documents carefully to ensure that the rights of the airport sponsor and other tenants are protected. (See chapter 6, *Rights and Powers and Good Title*, section 6.8, *Airport Management and Development Arrangements*, for a discussion of the requirements applicable to such contractual arrangements).

c. Resident Agent.

The FAA will, at all times, look to the airport sponsor to ensure the actions of its management corporation contractor conform to the airport sponsor's federal obligations. The FAA will consider a management corporation with a lease of the entire airport, or a tenant operator authorized to perform any of the airport sponsor's management responsibilities, as a resident agent of the airport sponsor and not as a responsible principal.

12.7 Agreements Granting “Through-the-Fence” Access.

There are times when the airport sponsor will enter into an agreement that permits access to the airfield by aircraft based on land adjacent to, but not a part of, the airport property. This type of an arrangement has frequently been referred to as a “through-the-fence” operation even though a perimeter fence may not be visible. “Through-the-fence” arrangements can place an encumbrance upon the airport property and reduce the airport sponsor's ability to meet its federal obligations. As a general principle, the FAA does not support agreements that grant access to the public landing area by aircraft stored and serviced offsite on adjacent property. Thus, an airport sponsor should avoid these agreements because they may violate the airport sponsor's federal obligations. (“Through-the-fence” access to the airfield from private property also may be inconsistent with Transportation Security Administration security requirements).

The FAA strongly cautions airport sponsors to research such agreements to ensure they will not inadvertently violate the airport sponsor's federal obligations. In addition, the FAA discourages airport sponsors from entering into “through-the-fence” agreements with commercial service providers (including those providing aircraft storage) that intend to compete with an on-airport service provider. (See [FAA Policy](#)

[Regarding Access to Airports from Residential Property, 78 Fed. Reg. 42419, 42424, July 16, 2013](#)).

In addition, residential “through-the-fence” property owners must maintain their property for residential, noncommercial use for the duration of the agreement. The FAA interprets this as a prohibition on commercial aeronautical services offered by residential “through-the-fence” users or any third party that might compete with on-airport aeronautical service providers, whether existing or not, or chill the airport sponsor’s ability to attract new commercial service providers on the airport. See the [FAA Modernization and Reform Act of 2012, Pub. L. 112-95, Section 136](#), codified at [49 U.S.C. § 47107\(s\)\(2\)](#); see also, [FAA Policy Regarding Access to Airports from Residential Property, 78 Fed. Reg. 42419, 42426, July 16, 2013](#). For information on residential “through-the-fence” access, see chapter 20, *Compatible Land Use*, section 20.7, *Residential Use of Land on or Near Airport Property*.

The federal obligation to make an airport available for the use and benefit of the public does not impose any requirement to permit access by aircraft from adjacent property.

a. Rights and Obligations of Airport Sponsor.

The federal obligation to make an airport available for the use and benefit of the public does not impose any requirement to permit access by aircraft from adjacent property. The existence of such an arrangement could conflict with the airport sponsor’s federal obligations unless the airport sponsor retains the legal right to require the off-site property owner or occupant to conform in all respects to the requirements of any existing or proposed grant agreement. For example, in any “through-the-fence” agreement, the airport sponsor must retain the ability to take action should a safety or security concern require fencing around the airport. In some cases, airport sponsors have been unable to install actual fencing to mitigate wildlife hazards due to pre-existing “through-the-fence” agreements.

b. Economic Discrimination Considerations.

The airport sponsor is entitled to seek recovery of capital and operating costs of providing a public use airfield. The development of aeronautical enterprises on land off airport and not controlled by the airport sponsor can result in an economic competitive advantage for the “through-the-fence” operator to the detriment of on-airport tenants. To correct this imbalance, the airport sponsor should obtain from any off-airport entity a fair return for its use of the airfield by assessing access fees from those entities having “through-the-fence” access. For example, if the airport sponsor charges \$100 per month for a single-engine aircraft tie-down on the airport to pay for the costs of airport operation, then any other single-engine aircraft operator using the airport “through-the-

fence” should be charged no less than a similar fee. The same is true for the ground lease on a privately owned hangar and the fees charged to “through-the-fence” operators with a hangar off the airport. The airport sponsor must not economically discriminate against those aeronautical users within the airport. **NOTE:** “Through-the-fence” operators, including users with residential “through-the-fence” agreements, are not protected by the grant assurances. The airport sponsor may assess any level of fee it deems appropriate for “through-the-fence” operators so long as that fee is not less than the comparable fee paid by on-airport tenants or users.

c. Safety Considerations.

Arrangements that permit aircraft to gain access to the airfield from off-site properties complicate the control of vehicular and aircraft traffic. In some cases, they may create unsafe conditions. The airport sponsor may need to incorporate special safety and operational requirements in its “through-the-fence” agreements. (For example, a safety requirement may be needed to prevent aircraft and vehicles from sharing a taxiway). When required, the FAA Flight Standards must be consulted on safety and operational matters. In all cases, in any “through-the-fence” agreement, the airport sponsor must retain the ability to intervene if a safety concern arises and take all the necessary actions.

d. Off-Airport Aeronautical Businesses.

As a general principle, the Region or ADO should not support airport sponsor requests to enter into any arrangement that grants “through-the-fence” access to the airfield for aeronautical businesses that would compete with an on-airport aeronautical service provider such as an FBO. Exceptions may be granted on a case-by-case basis where operating restrictions ensure safety and equitable compensation for use of the airport and subordinate the arrangement to the grant assurances and grant agreements. Examples of “through-the-fence” uses that would not compete with an on-airport business include:

- (1) At the airport sponsor’s option, if a bona fide airport tenant has already leased a site from the sponsor and has negotiated airfield use privileges but also desires to move aircraft to and from a hangar or manufacturing plant on adjacent off-airport property, the tenant may gain access through an area provided by the airport sponsor.
- (2) Although not encouraged by the FAA, if an entity doing business on an adjacent tract of land proposes to gain access to the airfield solely for aircraft use without offering any aeronautical services to the public, the airport sponsor may agree to grant this access. Airports commonly face this situation when an industrial airpark or manufacturing facility is developed in conjunction with the airport.

e. FAA Determinations.

The Region will determine whether arrangements granting access to the airfield from off-site locations are consistent with applicable federal law and policy. If the Region determines that such an agreement lessens the public benefit for which the airport was developed, the Region will notify the airport sponsor that it may be in violation of its federal obligations if it grants such “through-the-fence” access. If necessary, the FAA’s Office of Airport Compliance and Management Analysis (ACO-100) is available to assist in such cases.

f. Reasonable Access is Not Required.

It is important to remember that users having access to the airport under a “through-the-fence” agreement are not protected by the airport sponsor’s federal obligations to the FAA. This is because the federal obligation to make the airport available for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities without granting an exclusive right does not impose any requirement to permit access by users from adjacent property. In fact, the airport sponsor may simply deny “through-the-fence” access if it so chooses. The airport sponsor may also charge any fee it sees fit to those outside the airport.

Since federal obligations do not require that access be granted under these circumstances, the FAA will not normally entertain complaints from entities operating from adjacent property with a “through-the-fence” access agreement.

A “through-the-fence” access agreement may result in the violation of a number of the s airport sponsor’s federal obligations. Among other things, “through-the-fence” agreements can have the effect of:

- (1) Placing contractual and other legal encumbrances or conditions upon the airport property, in violation of [Grant Assurance 5, Preserving Rights and Powers](#);
- (2) Limiting the airport’s ability to ensure safe operations in both movement and non-movement areas, in violation of [Grant Assurance 19, Operation and Maintenance](#);
- (3) Creating unjustly economically discriminatory conditions for on-airport commercial tenants and other users by granting access to off-airport competitors or users in violation of [Grant Assurance 22, Economic Nondiscrimination](#);
- (4) Effectively granting an exclusive right to the “through-the-fence” operator in violation of [Grant Assurance 23, Exclusive Rights](#), if the operator conducts a commercial business and no on-airport operator is able to compete because the terms given to the “through-the-fence” operator are so much more favorable;

- (5) Affecting the airport sponsor's ability to be self-sustaining, in violation of [Grant Assurance 24, Fee and Rental Structure](#), because the airport may not be in a position to charge "through-the-fence" users adequately for the use of the airfield;
- (6) Weakening the airport sponsor's ability to remove and mitigate hazards and incompatible land uses, in violation of [Grant Assurance 20, Hazard Removal and Mitigation](#), and [Grant Assurance 21, Compatible Land Use](#); and
- (7) Making it more difficult for an airport sponsor to implement future security requirements that may be imposed on airports.

g. Conditions of an Access Agreement.

While FAA does not support "through-the-fence" access, should an airport sponsor choose to proceed, it should do so only under the following conditions:

(1) FAA Review.

Seek FAA review to ensure that its decision will not result in a violation of an airport sponsor's federal obligations, either now or in the future. It has been the FAA's experience that airport sponsors find it difficult to correct grant assurance violations that result from "through-the-fence" access. The inability to correct such violations could result in an airport losing its eligibility to receive Airport Improvement Program (AIP) grant funds.

(2) Access Agreement Provisions.

Airport sponsors should consider the following provisions in preparing an access agreement to grant a right of "through-the-fence" access:

- (a) The access agreement or similar arrangement should be a written legal document with an expiration date and signed by the airport sponsor and the "through-the-fence" operator. It may be recorded. Airport sponsors should never grant deeded access or other legal encumbrances such as easements to the airport. Agreements should be short-term and revocable for cause.
- (b) The right of access should be explicit and apply only to the "through-the-fence" operation (*i.e.*, right to taxi its aircraft to and from the airfield).
- (c) The "through-the-fence" operator shall not have a right to grant or sell access through its property so other parties may gain access to the airfield from adjacent parcels of land. Only the airport sponsor may grant access to the airfield, which should be consistent with Transportation Security Administration (TSA) requirements, as applicable.
- (d) The access agreement should have a clause making it subordinate to the airport sponsor's grant assurances and federal obligations. Should any

provision of the access agreement violate the airport sponsor's grant assurances or federal obligations, the sponsor shall have the unilateral right to amend or terminate the access agreement to remain in compliance with its grant assurances and federal obligations.

- (e) The "through-the-fence" operator shall not have a right to assign, transfer, or sell its access agreement without the express prior written approval of the airport sponsor. The airport sponsor should have the right to amend or renegotiate the terms of the access agreement.
- (f) The fee to gain access to the airfield should reflect the airport fees charged to similarly situated on-airport tenants and aeronautical users. For example, landing fees, ground rent, or tie-down fees paid to the airport sponsor by comparable on-airport aeronautical users or tenants to recover the capital and operating costs of the airport should be reflected in the access fee assessed the "through-the-fence" operator, including periodic adjustments. In addition, if the "through-the-fence" operator is granted the right to conduct a commercial business catering to aeronautical users either on or off the airport, the airport sponsor shall assess, at a minimum, the same concession terms and fees to the "through-the-fence" operator as assessed to all similarly situated on-airport commercial operators. As previously stated, the FAA does not support granting "through-the-fence" access to aeronautical commercial operators that compete with on-airport operators.
- (g) The access agreement should contain termination and insurance articles to benefit the airport sponsor.
- (h) The expiration date of the access agreement should not extend beyond a reasonable period from the airport sponsor's perspective. Also, it should not depend upon the "through-the-fence" operator's off-airport investment (*i.e.*, 30 years), as would be the case had the investment been made inside the airport.

h. Access Not Permitted.

The FAA will not approve "through-the-fence" access for certain purposes, including:

- (1) FAA will not approve new "through-the-fence" access from residential property to a commercial service airport. (See chapter 20, *Compatible Land Use*, for additional details concerning the FAA's position on residential airparks.)

(2) The FAA will not approve a release of airport land for “through-the-fence” access to the airport by aircraft. Airport land may only be released if the land no longer has an airport purpose; if the land would be used for the parking and operation of aircraft, it would not qualify for a release. A release of airport land for an aeronautical use would simply serve to reduce the airport sponsor’s control over the use and its ability to recover airport costs from the user.

12.8 through 12.12 Reserved.