



MEMO FOR: Foreign-Trade Zone Grantees

FROM: Andrew McGilvray *ajm*  
Executive Secretary

SUBJECT: Two Current Questions Related to Continued Designation of Certain FTZ Sites

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## SUMMARY

Under the Foreign-Trade Zones (FTZ) Act of 1934 (the Act), the FTZ Board is authorized to grant to qualified organizations the privilege of establishing FTZs in or adjacent to customs ports of entry in the United States. Each FTZ is established at one or more sites selected by the “grantee” organization based on the sites’ suitability for FTZ uses.

This document contains the analysis of the FTZ Staff and its legal advisors in applying the FTZ Act and the Board’s regulations to two questions related to continued FTZ designation of sites previously approved by the FTZ Board:

1) Do the FTZ Act and/or regulations give a property owner a right to FTZ designation?

The simple answer to this first question is that the FTZ Act only authorizes the FTZ Board to grant the “privilege” (not “right”) of FTZ authority to the class of organizations specifically defined as “grantees” in the FTZ Act. Non-grantee property owners are not mentioned in the FTZ Act and the Board has no authority to grant them any right or privilege pertaining to FTZ designation for sites.

2) Can a grantee retain a FTZ site against the wishes of the owner<sup>1</sup> of the property?

The simple answer to this second question is that if a property owner’s authorization for a grantee’s use of a site was a basis for the FTZ Board’s approval of the site, then the grantee should not be able to retain FTZ designation for the site if the property owner no longer wishes the property to be included in the FTZ in question.

More detailed analyses pertaining to these questions follow the “Background” section below.

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<sup>1</sup> Or other party with the right to use the property -- see detailed discussion of Question # 2 below.

## BACKGROUND

The FTZ Act (19 U.S.C. 81a-81u) delineates the specific powers of the FTZ Board. Section 81b(a) establishes the Board's primary authority<sup>2</sup>:

The Board is authorized, subject to the conditions and restrictions of this chapter and of the rules and regulations made thereunder, upon application as hereinafter provided, to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States.

In addition, section 81a(h) of the FTZ Act defines that:

The term "grantee" means a corporation to which the privilege of establishing, operating, and maintaining a foreign-trade zone has been granted.

The Board's regulations (15 CFR Part 400) provide further explanation regarding the Board's authority and on the relationship between a zone, a zone grantee, and zone sites. The "Authority of the Board" section of the regulations (Sec. 400.11(a)) states in part that, "in accordance with the Act and procedures of this part, the Board has authority to... [i]ssue grants of authority for zones and subzones, and approve modifications to the original zone project..." (Sec. 400.11(a)(2)).<sup>3</sup> In addition, the "Definitions" section of the regulations (Sec. 400.2) includes the statements that the "[z]one grantee is the corporate recipient of a grant of authority for a zone project" (Sec. 400.2(p)) and that "[z]one project means the zone plan, including all of the zone and subzone sites that the Board authorizes a single grantee to establish" (Sec. 400.2(r)).

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<sup>2</sup> Other authority of the Board provided by the FTZ Act includes issuing regulations (Sec. 81h), revoking grants for violations of the FTZ Act (Sec. 81r), issuing fines for violations of the FTZ Act or the Board's regulations (Sec. 81s), and ordering "the exclusion from the zone of any goods or process of treatment that in its judgment is detrimental to the public interest, health, or safety" (Sec. 81o(c)).

<sup>3</sup> The remaining authority described in 15 CFR 400.11 involves prescribing rules and regulations concerning zones (Sec. 400.11(a)(1)), approving manufacturing and processing activity in zones and subzones (Sec. 400.11(a)(3)), making determinations on matters requiring Board decisions under the regulations (Sec. 400.11(a)(4)), deciding appeals in regard to certain decisions of the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary (Sec. 400.11(a)(5)), inspecting the premises, operations and accounts of zone grantees and operators (Sec. 400.11(a)(6)), requiring zone grantees to report on zone operations (Sec. 400.11(a)(7)), reporting annually to the Congress on zone operations (Sec. 400.11(a)(8)), restricting or prohibiting zone operations (Sec. 400.11(a)(9)), imposing fines for violations of the Act and the regulations (Sec. 400.11(a)(10)), revoking grants of authority for cause (Sec. 400.11(a)(11)) and determining, as appropriate, whether zone activity is or would be in the public interest or detrimental to the public interest (Sec. 400.11(a)(12)).

## ANALYSIS

### Question # 1 Do the FTZ Act and/or Regulations Give a Property Owner a Right to FTZ Designation?

The first issue to examine in detail has a potential impact on the ability of a number of grantees to manage their zone projects effectively. Until recent decades, individual FTZs tended to have only one site -- or, at most, a small number of sites -- and the sites were often owned by the grantee (such as a port or airport authority). However, grantees have increasingly been proposing to the FTZ Board inclusion of non-grantee owned sites; such sites have often been justified based on projections of FTZ use. Under the FTZ Act and the Board's regulations, non-grantee owned land may be approved as zone sites. However, the question that we are seeking to address is whether the non-grantee owner of land within an approved FTZ has any right to the FTZ designation of the land under the FTZ Act or regulations. A related question is whether there is any bar or limitation under the FTZ Act or regulations to a grantee proposing removal of FTZ designation from such a non-grantee owned site.

The starting point in assessing the question of whether there are non-grantee rights to FTZ designation is evaluating the scope of the Board's authority to make grants of FTZ designation. The FTZ Act indicates that the sole relevant authority of the FTZ Board is the Board's primary authority as delineated in section 81b(a): "The Board is authorized... to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones..." The FTZ Act also states that "a corporation to which the privilege of establishing, operating, and maintaining a foreign-trade zone has been granted" is termed a "grantee" (section 81a(h)). Based on the plain language of these sections of the FTZ Act, the only corporations to which the FTZ Board is authorized "to grant... the privilege of establishing, operating, and maintaining foreign-trade zones" are "grantees." The FTZ Board's regulations are clear in reinforcing the language of the FTZ Act regarding the authority of the Board. Specifically, the regulations state that the Board "has authority... to [i]ssue grants of authority for zones and subzones, and approve modifications to the original zone project" (Sec. 400.11(a)(2)) and that the "[z]one grantee is the corporate recipient of a grant of authority for a zone project" (Sec. 400.2(p)), with a zone project defined as "including all of the zone and subzone sites that the Board authorizes a single grantee to establish" (Sec. 400.2(r)).

The FTZ Act and the Board's regulations are consistent and unambiguous in expressing that the Board's authority is to grant to "grantees" the "privilege of establishing, operating, and maintaining foreign-trade zones." The FTZ Act and regulations do not reflect any other authority relative to approving FTZ sites. As described above, the regulations state that the grantee is "the corporate recipient of a grant of authority" for "all of the zone and subzone sites that the Board authorizes a single grantee to establish." In this context, the Board has no legal authority to grant authority related to the establishment of any FTZ site to any entity other than a grantee.

It should also be noted that the records generated by the FTZ Board since the enactment of the FTZ Act are clear regarding the specific corporations which have been approved as "grantees." Each grantee to which the FTZ Board has granted authority is specifically identified as such in

the official Board Order establishing that grantee's FTZ, as well as in subsequent Board Orders for that FTZ. Therefore, for example, the City of New York is identified as "the Grantee" in Board Order Number 2 (dated 1/30/1936) establishing FTZ # 1 in New York City, and is identified as the grantee in the subsequent Board Orders for FTZ # 1 to the present day.<sup>4</sup> The Board has consistently maintained and made publicly available the official lists of these authorized grantees, including in its statutorily mandated annual reports to Congress. The Board's web site -- accessible via [www.trade.gov/ftz](http://www.trade.gov/ftz) -- contains an up-to-date list of all authorized grantees.

In the statutory and regulatory context delineated above, there is no party other than the grantee with any authority granted by the FTZ Board related to the establishment of FTZ sites. It is worth noting that even the authority which may be granted to grantees is explicitly framed as a "privilege" rather than a "right" in the FTZ Act (Sec. 81b(a)). Accordingly, not even grantees, to which the FTZ Board grants the privilege to establish a FTZ, have rights under the FTZ Act to site designation. It is clear, therefore, that property owners in a site, who are not even mentioned in the FTZ Act, do not have any right to site designation.

Moreover, the Board's regulations make two other key points on the general issue of FTZ designation of privately owned land or facilities as it relates to grantees' management of their zone projects: 1) private ownership of land or facilities within a FTZ is permitted only to the extent that "the zone grantee retains the control necessary to implement the approved zone project" (15 CFR 400.28(a)(8)) and 2) "[z]one grantees shall ensure that the reasonable zone needs of the business community are served by their zone projects" (15 CFR 400.41). When taken together with the regulations' requirement for a justification for any proposed FTZ site (15 CFR 400.23(a)), these sections of the regulations have an impact not only on questions of whether a grantee initially decides to propose various sites for FTZ designation but on the degree to which such designation is appropriate for the grantee to maintain over time.

A FTZ site is designated by the Board based on a justification submitted by the requesting grantee. Such a justification, which generally indicates that the proposed site is needed to meet the trade-related needs of the region served by the grantee, commonly incorporates projections of future use. However, such projections inherently are speculative to varying degrees. As such, projected future use may not actually occur. Such a circumstance is a key example of a situation in which a grantee may determine that a designated FTZ site is no longer needed to serve potential FTZ users.

Requesting removal of FTZ designation from unused sites -- possibly in combination with requesting authorization of FTZ designation for one or more other sites which appear to be better suited for meeting evolving trade-related needs -- is inherently part of the function of a grantee. As noted above, the FTZ Board's regulations state that "[z]one grantees shall ensure that the reasonable zone needs of the business community are served by their zone projects." Ensuring that reasonable zone needs are served involves both proposing new FTZ sites as needed and

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<sup>4</sup> For example, the City of New York is identified as the grantee of FTZ # 1 in Board Order Number 1010 dated (11/16/1998) which approved the grantee's application to expand FTZ # 1 to include a new site that included land owned by a non-grantee corporation.

proposing to remove old FTZ sites that are not needed. (The removal of older FTZ sites is often tied to the addition of new sites because it can be more difficult for a grantee to demonstrate a need for new sites if the grantee has existing inactive older sites -- the “Criteria for grants or authority for zones and subzones” section (Sec. 400.23) of the Board’s regulations specifically requires “justification for duplicative sites” (Sec. 400.23(a)(2)).)

In sum, as explained above, the FTZ grantee is the sole party to which the FTZ Board is authorized to grant any authority related to FTZ sites. The FTZ Act and regulations do not even give grantees a right to continued site designation. Therefore, property owners in a site do not have any such right under the FTZ Act or regulations. Further, requesting removal of FTZ designation from certain sites is inherent to the expected functioning of a FTZ grantee. In this context, for a grantee considering whether it can propose removal of FTZ designation from one or more sites based on the grantee’s determination that the sites are no longer necessary to meet the trade-related needs that the grantee is seeking to serve, there is no impediment based on any right of a non-grantee property owner under the FTZ Act or the Board’s regulations.<sup>5</sup> It is worth noting that grantees are bound by the statutory requirements to operate as a public utility and to offer uniform treatment to users (19 U.S.C. 81n). However, those requirements do not necessarily preclude a grantee’s proposing the removal of FTZ sites.

#### Question # 2 – Can a Grantee Retain a FTZ Site Against the Wishes of the Property Owner?

The second issue to address involves designated FTZ sites for which the owners of the properties (or the parties with the right to use the properties<sup>6</sup>) determine that it is no longer warranted or desirable to be a part of the FTZs in question. Such a situation would ordinarily be very easy to deal with: the property owner would coordinate with the grantee so that the grantee could submit a request to the FTZ Board to terminate the site’s FTZ designation. However, on occasion a grantee may be unwilling or unable -- at least in a timely fashion<sup>7</sup> -- to request such termination of FTZ designation to meet a property owner’s need.

Analysis of this scenario is quite straightforward. The FTZ Board’s regulations require that a grantee demonstrate its “right to use” any site not owned by the grantee or the proposed operator

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<sup>5</sup> Therefore, for example, the grantee would not need to obtain the consent of the owner(s) of land which had been designated as a FTZ site and which the grantee has since determined is no longer appropriate for continued FTZ designation and now proposes to remove from the FTZ.

<sup>6</sup> Any discussion under this scenario also should generally apply to situations where the consent of a party other than the property owner has been the basis for meeting the regulations’ “right to use” requirement for FTZ designation of a site but where that party subsequently determines that designation of the property as a site of the FTZ in question is no longer warranted or desirable.

<sup>7</sup> The ability of an owner to remove its property from a FTZ in a timely fashion may be important because continued FTZ designation could lead to additional cost for the property owner or result in other complications.

(15 CFR 400.24(d)(3)(i)) in order for the site to be proposed for FTZ designation.<sup>8</sup> Given that a grantee's right to use is a key underpinning of any approved designation, demonstration that a grantee no longer has a right to use the site -- and that the party with the right to use is opposed to continued designation as a site of the grantee's FTZ -- inherently undercuts continued designation of the site as part of the grantee's FTZ. In such circumstances, a property owner (or other party with the right to use the site) should be able to resort to a direct request to the FTZ Board for removal of FTZ designation if the grantee has been unable to act in a timely manner on the property owner's request for the grantee to propose termination of the site's designation to the FTZ Board.<sup>9</sup> Any process based on such a direct request from a property owner (or other party with the right to use the site) should involve the FTZ Board contacting the affected grantee so that the grantee would have an opportunity to present its perspective on the matter.

## CONCLUSION

Based on the analysis above, it is clear that a non-grantee owner of land which has been designated as part of a FTZ has no right to that designation under the FTZ Act and the Board's regulations. In fact, the grantee has an obligation to manage its FTZ on an ongoing basis in a manner that ensures that trade-related needs are being met. That ongoing management will inherently involve, at times, decisions to request termination of FTZ designation for sites that are no longer needed to serve trade-related needs (based on the grantee's assessment). However, the analysis also indicates that a grantee should not be able to continue FTZ designation of a property against the wishes of the property owner or the party with the right to use the property.

The roles of the two types of parties -- grantee and property owner/user -- can be seen as complementary, with each contributing an essential element for FTZ designation. The grantee contributes its determination that a site is appropriate for proposed (or continued) FTZ designation. Property owners/users contribute their consent for specific parcels of land to be proposed (or maintained) as FTZ sites. These complementary roles balance the interests and influence of the parties.

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<sup>8</sup> To demonstrate the "right to use" a proposed site, it has been common for grantees to present letters from property owners in which the owners indicate their concurrence with proposed FTZ designation for the land. Given that a grantee is the sole party to which the FTZ Board is authorized to grant any authority related to FTZ sites, a grantee's use of a property owner's concurrence letter to meet the requirement of 15 CFR 400.24(d)(3)(i) is in no way indicative of the property owner sharing in any FTZ site authority approved by the FTZ Board.

<sup>9</sup> Such a direct request to the FTZ Board by the property owner (or other party with the right to use the site) should effectively be a last resort, and should therefore include full documentation of the steps already taken to obtain action by the grantee on proposing removal of the site in question to the Board.