



U.S. Department
of Transportation
**Federal Aviation
Administration**

Memorandum

Subject: **ACTION:** Program Guidance Letter 04-5

Date: Aug 17, 2004

From: Manager, Airports Financial Assistance
Division, APP-500

Reply to
Attn. of:

To: PGL Distribution List

04-5.1 Airport Development Rights Pilot Program – Rick Etter (202) 267-8773
and Mark Beisse (202) 267-8826.

Section 152 of Vision 100 adds a section 47138 to Title 49, United States Code, which is a pilot program for buying development rights at 10 privately-owned airports that are open to the public to preclude loss of the property as a public airport.

Purpose of the Pilot Program

This PGL sets forth the process for selecting pilot program airports and sponsors to address the issue of buying development rights to preserve a public-use airport. For purposes of this PGL, a “public-use airport” is a privately-owned airport open to the public. The requirements of 49 USC 47102(17) that the airport is a reliever or has scheduled passenger service do not apply since this provision identifies public-use airports eligible for planning and development. For purposes of this PGL, sponsors are pilot program grantees buying development rights from private airport owners to preserve public-use airports.

The development rights for purposes of this guidance apply to property interests in a complete airfield or those combined parcels that collectively allow it to serve as a privately-owned public-use airport. The meaning of “public airport” for purposes of this PGL does not include the requirement of 49 USC 47102(16) that the airport is under the control of a public agency. This PGL should not be applied to projects for the purchase of property interests exclusively within selected areas of an airport such as runway protection zones.

The pilot program will evaluate procedures needed to purchase future development rights while ensuring objectives of the aviation community are met. The concept has substantial potential since currently 1,154, or 22 percent, of public-use airports within the United States are privately-owned.

Definitions

For purposes of the airport development rights pilot program, the definitions below apply.

1. “Airport development rights” are the rights of the private owner to develop the airport land for non-aeronautical use or for uses for other than supporting the airport or enhancing convenience of the aviation activities. In other words, the rights to be acquired under the pilot program – when acquired – would prevent the airport from being used for other than airport purposes.
2. “Instrument recording the purchase of development rights” is the document evidencing the purchase of the airport development rights by the sponsor, and the easement or covenant given by the owner that the airport shall remain a public-use airport in perpetuity. The instrument must include provisions specified in this PGL and be recorded in the local registry of deeds and land transfers.
3. “Owner” means the private entity that owns the airport. The owner may operate the airport. However, the owner could arrange for operation of the airport by written agreement with another party.
4. “Sponsor” means the State or political subdivision of a State that as the public agency sponsor receives a grant for an airport development rights project. (The meaning for purposes of this PGL includes no private owner of a public-use airport as allowed under 49 USC 47102(19)).

What is Purchase of Development Rights?

The intent of the FAA in administering this pilot program is to encourage the sale of airport development rights that would contribute to the safe and efficient use of airports. The sponsors and owners must follow provisions of this PGL to be considered for the pilot program.

The purchase of development rights (PDR) may involve most airports open to the public that are under private ownership. The law permits sponsors to use any apportionments to fund a PDR. However, as a practical matter, only State apportionments or non-primary entitlements may be available to the sponsor. Contact APP-520 prior to recommending proposals involving a passenger or cargo entitlement airport for the pilot program.

The pilot program will evaluate the PDR instead of the purchase of fee simple interests for the airports. The airports may be threatened by pressure to convert airport land for higher value land development (e.g. residential, commercial or industrial use). PDR will compensate an owner for the sale of their development

rights to prevent such development and require continued airport use of the property.

The owner would convey to the sponsor the development rights and a permanent easement or similar restrictive covenant that ensures the continued public airport operation in perpetuity. The easement conveyed must “run with the land,” must be enforceable against the current owner and assigns, future owners and any other current or subsequent interest in the real property, and must be recorded as an interest in or encumbrance on the property under local law.

The owner may be compensated for the market value of the development rights sold based on an acceptable “before and after” appraisal. Under this appraisal method the market value of the development rights conveyed is appraised at the difference between the market value of the property for continued airport use and the current market value of the property for some other development. See Order 5100-37A and Advisory Circular 150/5100-17 for guidance on “Before and After” appraisals.

Any proposed PDR grant at an airport would not necessarily change the eligibility to allow other AIP projects that are otherwise ineligible.

Pilot Program Selection Criteria

Sponsors and owners proposing a PDR project will be selected for participation in the pilot program based on the criteria below.

Sponsor:

- The sponsor must provide a resolution of the legislative body authorizing its representative to file an application.
- Sponsors do not need to own airport development. However, the sponsor must provide, upon request, an opinion by its attorney indicating that it is legally capable of receiving a grant and accepting airport development rights.
- FAA should determine the sponsor to be able to comply with statutory and administrative requirements within standard grant assurances in the event it may receive future AIP assistance for airport development or acquisition. The potential AIP funding would obligate the owner or sponsor to continue airport operation until grant obligations expire. Therefore, to avoid duplicate funding or excess compensation, PDR grant amounts may be subtracted from future AIP grants.
- Sponsors must be determined to have procedures for requesting a release from the FAA approving any subsequent transfer or disposal of

development rights bought under the pilot program if that is found to be in the public interest by the FAA.

- The sponsor must be determined by the FAA to be capable of financing, operating and maintaining the airport in the event it becomes obligated to do so.

Sponsor and Owner:

- An airport property map (Exhibit A) must support the proposal. The Exhibit A should describe the existing land and development subject to the agreement. The sponsor and owner must approve the Exhibit A.
- The project will be processed in accordance with all policies and procedures applicable for airport acquisition in fee simple. However, standard grant assurances will be omitted, and the Federal share must be not greater than 90 percent of the project costs involved with the PDR.
- Proposals must include an adequate real property conveyance instrument for recording the PDR. An agreement between the sponsor and owner under which the owner conveys to the sponsor the development rights with an easement or covenant requiring that the airport shall remain an airport that is open to the public in perpetuity may serve as the instrument recording the PDR. Such agreement must contain all provisions in Attachment 1.
- The sponsor or owner must provide an instrument recording the PDR in the appropriate local registry of deeds and land transfers before the sponsor receives the final grant payment. Regions will use Attachment 1 as a grant special condition. Therefore, the Attachment 1 terms and conditions will commonly apply to both the sponsor and owner.
- The sponsor and owner should provide a listing of any existing AIP obligations. The FAA will consider the nature and duration of existing Federal obligations.
- The sponsor and owner must be willing and able to assist us in assessing difficulties with the PDR. The sponsor and owner must provide requested information before, during and after project completion.
- We have initially decided our policy will be to limit PDR grants to funding from a single year to simplify the pilot program.

Owner and Airport:

- The owner must agree to allow a site inspection by the FAA and sponsor prior to the project.
- The owner must provide to the FAA the legal description and the acreage of the airport property.
- The owner must have filed a notice with the FAA under Title 14, Code of Federal Regulations, Part 157, that the airport status is privately-owned and open to the public. For purposes of the PDR pilot program, the airport does not need to be in the National Plan of Integrated Airport Systems (NPIAS) since it would receive no airport planning or development project grant under 49 USC 47102(12) and 47105(b)(2). Airports only need to be in the NPIAS where they are applying for airport planning or development project grants. Sponsors in the pilot program will apply for purchase of development right grants rather than planning or development project grants.
- The owner must have no prior obligation in a Federal agreement requiring that the airport remain open. For instance, such owner obligations resulting from AIP land acquisition projects are not limited in duration and the FAA may determine the project has additional useful life for airport development or noise compatibility programs. In the PDR pilot program, the mixing of these obligations will be avoided.
- The owner must provide a letter describing its concept for ownership and operation of the airport over the next ten years. The letter should identify whether a change in airport ownership or operating arrangements is currently anticipated during that period.
- An owner must either operate the airport or have a contractual agreement with another party for airport operation. Airport operators must be familiar with Advisory Circular 150/5200-28. If airport operation involves another party, a copy of the lease/agreement should be provided to the FAA.

How Does an Owner and Sponsor Express Interest?

Regions may contact potentially interested owners and/or sponsors at any time and informally invite them to express interest in the pilot program.

The procedure for selecting participants in the pilot program is to obtain a letter proposing the project on behalf of the sponsor. If the owner does not cosign the sponsor's letter, it must contain an indication of the owner's agreement to the proposal.

The statute sets no time period for the pilot program except indirectly by limiting it to the ten projects.

Planning a PDR

Planning required prior to selection of the proposal to prepare the Exhibit A or associated documentation should be treated as project formulation costs rather than a separate grant.

A separate planning project at the airport prior to the grant for the PDR is discouraged.

Due Diligence

Regions should ensure, at minimum, that planning accomplished for the proposal considers proposed obligations of the owner and sponsor.

Regions should discuss with owners as well as sponsors the terms and conditions of the PDR to ensure both parties understand each of them. Coordination of the proposal with airport owners, states, and potential sponsors is required to be certain that requirements of this PGL have been adequately addressed.

Federal interests are identified in standard terms and conditions of any proposed PDR. Use of this standard requires due diligence on the part of FAA to ensure the transaction adheres to all financial, legal, and environmental requirements or best practices. PDR is the acquisition of an interest in real property that requires the same due diligence as if the AIP grant was used for fee simple acquisition.

Selection and Project Application

APP-500 intends to review the proposals and select candidates for participation in the pilot program that have the most potential for demonstration of the PDR. After selection of a proposal by APP-500, sponsors would be asked to provide the grant application using the same procedures as other airport projects except as noted above.

We will evaluate pilot program projects on all phases of property rights takeover, including the valuation and compliance with the Federal agreements. We will determine whether the costs of the PDR are significantly less than buying the airport outright. Occasionally, fee acquisition may cost nearly the same as the PDR, which would suggest an individual PDR is inappropriate.

Regional Recommendations

Please send the proposals to APP-520 when you have a recommendation. We do not anticipate setting a proposal deadline. Do not disclose recommendations to airport owners, states or potential sponsors until a notice of selection.

for *John P. Horne*

Barry L. Molar

Attachment

Required Provisions in a Grant for Purchase of Development Rights

The State or political subdivision of the State as the Project Sponsor agrees that the instrument recording the purchase of airport development rights shall include required terms and conditions as follows:

1. Airport Property Map. Parcels of land obligated under the development rights agreement are described on the airport property map (Exhibit A).
2. Notice to Airmen. The owner will promptly notify airmen of any condition affecting aeronautical use of the airport property on the Exhibit A.
3. Acquisition of Development Rights. The acquisition of development rights by the Sponsor is for the right to develop and use the property depicted on the Exhibit A for a purpose other than as an airport open to the public or enhancing convenience of aviation activities. The purpose of the acquisition of development rights is to ensure that the airport will continue to be available as a public airport.
4. Hazardous Substance. The Federal Aviation Administration, State or political subdivision of the State do not assume any right to control the means by which the airport owner complies with restrictions on airport property nor an assumption of liability for discharge of a hazardous substance.
5. Public-Use Airport in Perpetuity. The airport owner, for good and valuable consideration, shall grant the Sponsor an easement or covenant that the airport shall remain open to the public for use as an airport in perpetuity. Such easement or covenant shall be in effect in perpetuity unless modified or released with the approval of the FAA under item 6 herein.
6. Modification or Release of Purchased Rights and Covenant. The Sponsor shall obtain approval of the FAA before a modification of the airport development rights that it purchased. The Sponsor shall obtain approval of the FAA before transfer or disposal of the airport development rights that were purchased only if the FAA finds that it is in the public interest.
7. Recordation. The Sponsor shall record the instrument evidencing the purchase of development rights and the granting of the easement or covenant that the airport shall remain open to the public for use as an

airport in perpetuity, in the local registry of deeds and land transfers in compliance with local law.

8. Final Payment. The full amount of the Federal grant to the Sponsor for the purchase of the development rights shall not be transferred to the Sponsor until the instrument recording the purchase of development rights and easement has been recorded in accordance with item 7 herein.
9. Sponsor's Obligation for Airport Operation. The Sponsor may be obligated to operate and maintain the airport if it is closed during other than periods of temporary climatic conditions that interfere with safe operation and maintenance. The airport owner and Sponsor agree that in the event the owner discontinues safe airport operation and maintenance, the Sponsor, in consultation with the FAA, may be required to assume that obligation.
10. Owner's Obligation for Airport Operation in Perpetuity. The airport owner or its successor is obligated to own the airport and operate it as an airport except for periods of temporary climatic conditions that interfere with safe operation and maintenance. In the event the airport owner discontinues safe airport operation and maintenance, the owner shall notify the FAA within 24 hours.
11. Enforcement of Development Rights by FAA. The instrument recording the purchase of development rights shall grant the FAA third party beneficiary rights to enforce the easement or covenant that the airport shall remain a public-use airport in perpetuity and the Sponsor's obligation for airport operation.