

NOTICE OF PROPOSED GUIDANCE DOCUMENT

DTIMBOA27

Pursuant to Wis. Stat. s. 227.112, the Wisconsin Department of Transportation is hereby seeking comment on DTIMBOA27, a proposed guidance document.

PUBLIC COMMENTS AND DEADLINE FOR SUBMISSION

Comments may be submitted to the Wisconsin Department of Transportation for 21 days by:

1. Department's website: <https://appengine.egov.com/apps/wi/dot/guidance-docs?guidDocId=DTIMBOA27>

2. Mailing written comments to:

Division of Transportation Investment Management
Wisconsin Department of Transportation
4822 Madison Yards Way
PO Box 7913
Madison, WI 53707-7913

WEBSITE LOCATION OF FINAL GUIDANCE DOCUMENT

The final version of this guidance document will be posted at wisconsin.dot.gov to allow for ongoing comment.

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Airport Leases

**An Airport Owner and Management Reference
Document**

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Introduction

Airport leases are important tools to help make the airport as self-sustaining as possible and ensure that the users of the airport contribute their fair share towards the operation of the airport. This document provides guidance for the development of airport leases that adequately protect the airport and, for those airports that have received state and/or federal development funds, comply with Wisconsin Conditions of State Aid and with Federal Aviation Administration (FAA) sponsor grant assurances. For additional information on lease agreements as they relate to federal grant assurances, please see Chapter 12 of FAA Order 5190.6B, *Airport Compliance Manual*.

- FAA Order 5190.6B, *Airport Compliance Manual* can be accessed here:
http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/

Lease agreements should be developed in order to protect the airport from uses that are detrimental to the airport's operation and development. Airports that have received Wisconsin state aid or federal Airport Improvement Program assistance have an obligation to negotiate airport lease agreements that help the airport become as financially self-sustaining as possible by ensuring that users of the airport contribute a fair share towards the operation of the airport. Airport leases may involve ramp or tie-down areas, hangars, terminal buildings, other municipally-owned structures, and, most commonly, land. Agreements can be for aeronautical purposes or non-aeronautical purposes (such as agricultural); however, the airport owner must treat these uses differently.

This guidance document provides general recommendations that airports should consider incorporating into their lease agreements. It is not intended to provide guidance on all components of the lease document. Airport owners should also work with their local legal counsel when developing lease agreements. For additional information and assistance on airport lease agreements, please contact the Wisconsin Bureau of Aeronautics (BOA).

Aeronautical Lease Agreements

Aeronautical lease agreements will generally involve two types of airport users: *airport commercial operators/tenants* and *non-commercial airport tenants*. *Commercial operators/tenants* are individuals or entities that provide goods or services for a profit. *Non-commercial airport tenants* are individuals, clubs, government agencies, and others not using the airport for profit. Airport owners should establish a leasing policy to help ensure that lease rates and principles are applied to individual tenants in a

An airport is "federally obligated" when the airport owner has accepted federal funds to buy land or develop or improve the airport. With the acceptance of federal funds, airports agree to comply with certain grant assurances, some of which relate to tenants and businesses operating on an airport. A complete list of federal grant assurances can be found here:

https://www.faa.gov/airports/aip/grant_assurances/

Those airports that have received state funds are subject to Conditions of State Aid, which can be found here:

https://docs.legis.wisconsin.gov/code/admin_code/trans/55

uniform manner; it is crucial that there is equitable treatment of similarly-situated tenants in assessing rates, charges, and lease terms.

Lease Agreements and Minimum Standards/Rules and Regulations

Minimum Standards for Commercial Aeronautical Activities

(“*minimum standards*”) are a set of requirements that commercial operators must meet or exceed in order to conduct business at an airport. Establishing the facility, operational, and functional standards for the provision of services at an airport can help prevent economic discrimination and the granting of an exclusive right to conduct aeronautical activities at the airport, both of which are violations of federal and state grant obligations. Airport owners should note that “non-compete” and “right of first refusal” clauses often grant exclusive rights and must not be included in lease agreements.

For additional guidance related to minimum standards, please consult <http://wisconsin.gov/Documents/doj-nq-bus/aeronautics/resources/minimum-standards.pdf>

Similarly, every airport should have *rules and regulations* that set the standards for airport user conduct. These may be in the form of local ordinances or a stand-alone document developed by the airport. Airport rules and regulations may include vehicle and pedestrian rules, air traffic patterns, security, sanitation, restriction of access to certain areas, fire protection, fueling of aircraft, storage of hazardous materials, hangar use, and any other areas for which the airport owner deems fit to develop guidelines.

Airport minimum standards and rules and regulations are intended to serve as foundational documents that may be modified as the airport matures, but lease agreements may span several decades. For this reason, it is important that lease agreements reference these documents and contain language that conveys that minimum standards and rules and regulations are subject to change from time to time. Should there be a conflict between the lease agreement and these documents, the most recent minimum standards and rules and regulations should take precedence.

Components of Aeronautical Lease Agreements

Airport leases should be developed to protect the unique circumstances and interests of each individual airport and community. Many municipalities have standard lease language and requirements, so airport owners should work with their local legal counsel to develop any lease on the airport. The following lease components are recommended in order to help protect the interests of the airport:

Subordination to Federal and State Obligations: Lease agreements must stipulate they are subordinate to the owner’s federal and state obligations and that tenants must comply with current and future federal grant assurances and conditions of state aid. Similarly, airport owners may want lease agreements to be subordinate to local ordinances and codes as well.

Use of Premises: In order to ensure hangars and other facilities on the airport are used appropriately, it is critical lease agreement adequately describe the allowed use. Non-aeronautical storage is of particular concern and is a common challenges for airport managers. In June 2016, the FAA

published a long awaited updated policy on hangar storage. It's recommended that airport lease agreements reflect this policy. The policy can be summarized as follows:

1. All hangars must be used for an aeronautical purpose. FAA considers the following uses aeronautical:
 - a. Storage of active aircraft;
 - b. Shelter for maintenance, repair, or refurbishment of aircraft, but not the indefinite storage of non-operational aircraft;
 - c. Non-commercial construction of amateur-built or kit-built aircraft;
 - d. Storage of aircraft handling equipment, (e.g. tow bar, glider tow equipment, work benches, tools and materials used to service aircraft); and
 - e. Storage of materials related to an aeronautical activity (e.g. balloon and skydiving equipment, office equipment, teaching tools).
2. Provided the hangar is used primarily for an aeronautical purpose, an airport may permit non-aeronautical items to be stored in hangars provided they do not interfere with the aeronautical use of the hangar.
3. While airports may develop more restrictive rules, FAA would not consider non-aeronautical storage to interfere with the aeronautical use of the hangar unless the items:
 - a. Impede the movement of the aircraft in and out of the hangar;
 - b. Displace the aeronautical contents of the hangar. A vehicle parked at the hangar while the vehicle owner is using the aircraft would not be considered as displacing the aircraft;
 - c. Impede access to other aeronautical contents of the hangar;
 - d. Are used for a non-aeronautical business or municipal agency function (including storage of inventory); and
 - e. Are stored in violation of airport rules and regulations, lease provisions, building codes or local ordinances.
4. Hangars cannot be used as a residence. The FAA differentiates between crew rest areas and a hangar residence in that the former are designed to be used for overnight/resting periods for crew members and not as a permanent or even temporary residence.
5. If the airport has empty hangars with no demand for aeronautical use, the airport can rent hangar space for temporary, non-aeronautical storage provided:
 - a. The non-aeronautical storage is pre-approved by FAA;
 - b. A fair market value commercial rental rate is charged; and
 - c. The hangar reverts to aeronautical use as soon as there is demand.

In addition, commercial tenant leases should outline what services are to be provided on the airport and what activities are not allowed to take place. If the airport has adopted minimum standards, then commercial tenants must also comply with those minimum standards as part of the lease agreement. It's also important the lease specifies that the lessee is granted a non-exclusive right to conduct certain aeronautical activities on the airport and use, in common with others, all public airport facilities and improvements.

Term: Aeronautical lease terms should be long enough for a tenant to fully amortize their initial investment, but not so long that it relinquishes the airport owner's control over the property. A lease term around 20-25 years is recommended for ground leases. Lease terms of 50 years or more are considered a disposal of state and federally obligated land, which violates grant conditions if the proper

processes for releasing land from state and federal obligations are not followed. If necessary, the lease may have extensions, but there should not be more than two and they should not be longer than ten years each. Airport owner should maintain the right to approve or deny lease transfers or subleases by the tenant.

All lease agreements should contain an escape clause allowing the airport owner to terminate the lease if the land is needed for airport improvement or other purposes. Lease agreements should also contain a reversion clause stipulating that upon termination of the lease, all improvements (financed by the tenant or otherwise) revert back to the airport, regardless of how the lease is terminated.

Rates: Aeronautical lease rates should be fair and reasonable and may be varied depending on size, function, location, and level of improvements to the land and facilities being leased. Rates should be set so that they maximize revenue and all lease agreements should contain an escalation clause which allows the rate to be increased over the term of the lease. This rate of escalation can be tied to the Consumer Price Index (CPI) or another mechanism that the owner chooses, provided that the escalation is uniformly applied to all tenants.

Airport Operation, Maintenance, and Development: Aeronautical leases should not inhibit the airport owner's ability to operate, maintain, and develop the airport. The airport owner must retain the right to temporarily close the airport or any of its facilities for maintenance, improvement, or for the safety of the public. Additionally, the airport owner must retain the right to construct facilities such as hangars, ramps, offices, shops, buildings, etc. The airport owner should share long-range plans and the Airport Layout Plan (ALP) with current and potential tenants. However, the airport owner should develop the airport as it sees fit without obligation to lessee and without interference or hindrance. For this reason, the airport owner must retain the right to terminate an existing lease when necessary for airport development.

While the airport owner should protect its right to operate, maintain, and develop the airport, it should not be the airport owner's responsibility to maintain privately leased areas. The lessee should be responsible for general maintenance, repairs, and grounds upkeep as well as improvements upon their leased land. However, the airport should review and approve any construction and/or alterations taking place on airport property (regardless of whether the building is privately owned) before changes are made. Minimum standards and/or rules and regulations documents are good places to outline the specific standards and responsibilities of airport tenants.

Security Requirements: Lessees should be educated and trained in the security requirements of the airport. These items may be best addressed in the minimum standards and/or rules and regulations documents so that they can be easily modified to reflect changing needs. Leases and other documents should require compliance with any current or future aviation-specific, state or federally-mandated security requirements.

Tenant Liabilities: Lease agreements should ensure that the airport owner is properly insulated from tenant liabilities. This includes a hold harmless clause as well as an insurance requirement with an

established minimum level of comprehensive liability insurance for the various types of tenants based at the airport. Additionally, leases should include an environmental/hazardous substance contamination clause that holds the tenant responsible for any damaging environmental impact they may cause. If there are any taxes or fees associated with hangar or commercial tenant development projects, these costs should be paid by the lessee. Lessees should be made aware that lenders cannot be allowed to dispose of public airport property in the interest of satisfying a defaulted loan.

Economic Nondiscrimination: Airport owners must include specific provisions to ensure aeronautical service providers engage in reasonable and nondiscriminatory practices. FAA Grant Assurance 22.b, *Economic Nondiscrimination* should be consulted for specific language to include in leases.

Inspections: Airport owners and their management team must be allowed, within reason, to access leaseholds to confirm compliance with the lease, airport rules and regulations, minimum standards, and any applicable local, state, and federal codes, statutes, ordinances, rules, regulations and/or grant assurances. Inspections should be conducted at agreed upon times and with a reasonable advance notice. Failure to permit the airport owner or representative access to the leased premises should result in termination of the lease.

Through-the-Fence Agreements

A through-the-fence (TTF) agreement (aka access agreement) or lease authorizes a person or entity to access an airport from adjacent property. The obligation of an airport owner to make the airport available for the use and benefit of the public does not impose any requirement to permit access of aircraft from adjacent property. FAA policy prohibits new residential through-the-fence access at federally-obligated airports and those airports that currently have residential through-the-fence access must have FAA approved access plans. Commercial through-the-fence access, while not currently prohibited by FAA, should be carefully considered and should have a well-constructed agreement that reflects airport safety concerns and expenses. Please contact the BOA before undertaking any commercial through-the-fence access agreement.

Non-Aeronautical Use

Airport property is intended for aeronautical purposes and any non-aeronautical use of airport property must be treated differently than aeronautical use. Non-aeronautical use of airport property should be interim and in terms of five years or less. The airport owner must receive a benefit for the use of airport property and the value of that benefit must be equal to or more than the fair market value of similar, off-airport property. The revenue from non-aeronautical uses must be used for the development, operation, or maintenance of the airport, not for general expenses of the airport owner. Most importantly, non-aeronautical use must not interfere with the aviation use of the airport. The property must not jeopardize future airport development and the use must not create or contribute to a flight hazard. Agricultural leases are a common and acceptable non-aeronautical use of airport property; however, airport owners are strongly urged to contact BOA for guidance before undertaking other non-aeronautical endeavors on airport property.

Agricultural lease agreements

Granting leases for agricultural crop production can be a useful revenue generator for airports. However, it is important that any and all agricultural uses have lease agreements that contain proper protections for the airport. In addition to incorporating components of aeronautical lease agreements, agricultural lease agreements should consider:

Location and Height of Crops: Leases should stipulate that crops should be low growing and must not interfere with the Part 77 Obstruction Surfaces or with FAA Design Standards. Certain areas must be kept free of any crops or farming equipment, including the Runway Safety Area, Object Free Areas, Obstacle Free Zone and Runway Visibility Zone. Additionally, airport owners should ensure that farming operations do not interfere with the Approach Light Systems, approach aids, or navigational aids.

Wildlife Attractant Qualities of Crops: Crops must not attract wildlife that can be hazardous to airport operations. Generally, grain crops, including corn, attract hazardous wildlife. Airport owners should request a cropping plan from potential agricultural tenants to ensure that their crops will not create a hazardous wildlife attractant. BOA can provide guidance on crops that are particularly attractive to hazardous to wildlife. Additionally, it is important that agricultural activities do not create or contribute to standing water, which may attract hazardous wildlife.

Equipment: It is important that agricultural equipment be managed properly when on the airport. Leases should detail the route to and from the leased area and discuss security requirements, including whether or not clearance must be granted by the airport manager, closing and securing airport gates, and other pertinent security considerations. Additionally, the lease should address parking or temporary storage of equipment or crops; nothing should be parked, stopped, or left standing within the primary surface area, transitional surface, Runway Safety Areas, or Object Free Areas.

FAR Part 77 can be found here:
https://www.faa.gov/airports/engineering/airspace_analysis/

FAA design standards can be found here:
http://www.faa.gov/airports/resources/advisory_circulars/index.cfm/go/document.current/documentNumber/150_530_0-13

Damages: A lease should protect the airport in the event that the lessee damages airport surfaces in any way, from causing ruts to leaving Foreign Object Damage (aka FOD). However, a lease should not provide for damages to the lessee in the event that crops are destroyed for airport maintenance, operational, or development purposes. Shorter lease terms prevent the airport from getting into a situation in which they have crops on land that is needed for development or other purposes.

Lease Rates and Terms: The airport owner must receive fair market value for agricultural uses of airport property; airport owners should receive the same rate as similar farmland in the area. Each lease term must be less than five years, but two to three year terms are preferred because they allow the airport to reassess the impact of the agricultural use on airport operations and development. Leases can be renewed, but rates should be adjusted to reflect the fair market value of the land. All leases should

contain an escape clause that allows the airport owner to terminate the lease should the land be needed for aeronautical purposes.

Other Non-Aeronautical Agreements

For airports with land that is appropriate for non-aeronautical use, an agreement must be developed in order to protect the interests of the airport. The agreement must contain a number of conditions and protections for the airport, including the following:

Fair Market Rates: Airport owners must receive fair market value for non-aeronautical use of airport property. The fair market value can be determined by independent appraisal(s) and/or by direct comparison with the prevailing rental rate of comparable property.

Short Term: In order for non-aeronautical uses to be considered interim, and thus not require FAA approval, they must be less than five years. Leases may contain an option for renewal, but the renewals should be in approximately two year increments and the rates should escalate. All non-aeronautical leases must contain an escape clause giving the airport authority to terminate the lease should an aeronautical need for that land arise.

Reversion Clause: Like aeronautical leases, non-aeronautical leases must contain a clause that states that upon termination of the lease, the property reverts back to the airport for aeronautical use.

Given the diversity among Wisconsin airports, airport owners are advised to consult BOA before entering into a lease agreement for a non-aeronautical use of airport property to ensure that the unique needs of the airport are met and the interests of the airport are adequately protected.

Summary

An on-going goal for airports is to be as self-sustaining as possible and thus, well-structured lease agreements are essential for successful airport operation. Airports must ensure that they structure lease agreements to protect their current and future interests and generate sufficient revenue for the airport. Non-aeronautical leases can be great sources of airport revenue, but it is important that non-aeronautical uses not impede the aviation use and future development of the airport. Airport owners are strongly urged to consult BOA before allowing a non-aeronautical use of airport property. BOA can provide guidance and comment on draft lease language to help airports structure lease agreements that provide the greatest benefit to their airport.

References

1. FAA Airport Sponsor Grant Assurances
https://www.faa.gov/airports/aip/grant_assurances/
2. FAA Order 5190.6B, *Airport Compliance Manual*
http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/
3. Chapter 114, Aeronautics, Wisconsin State Statutes
<http://docs.legis.wisconsin.gov/statutes/statutes/114>
4. Wisconsin Conditions of State Aid for Airport Improvement, Chapter Trans 55
https://docs.legis.wisconsin.gov/code/admin_code/trans/55
5. Airport Cooperative Research Program Report 47, *Guidebook for Developing and Leasing Airport Property* http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_047.pdf
6. Wisconsin Department of Transportation Bureau of Aeronautics, *Minimum Standards for Commercial Aeronautical Activities* <http://wisconsindot.gov/Documents/doing-business/aeronautics/resources/min-strds.pdf>
7. Wisconsin Department of Transportation Bureau of Aeronautics, *Wisconsin Airport Land Use Guidebook* <http://wisconsindot.gov/Documents/doing-business/aeronautics/resources/arptlusguibk.pdf>