

42nd Annual AAAE
Airport Law Workshop
Phoenix, AZ

Session #15

Options for Funding Airport Capital Projects



KAPLAN KIRSCH

Speakers



David Y. Bannard

Of Counsel, Kaplan Kirsch LLP
dbannard@kaplankirsch.com



Gisela Shanahan

Managing Director,
Frasca & Associates LLC
gshanahan@frascallc.com



Adam M. Giuliano

Partner, Kaplan Kirsch LLP
agiuliano@kaplankirsch.com

Today's Agenda

- Planning is Key to Success!
- Match Sources to Uses
 - o Federal grants
 - o TIFIA loans
 - o Pay as you go
 - o Passenger Facility Charges (PFCs)
 - o Customer Facility Charges (CFCs)
 - o Debt – Bonds, etc.
 - o Public-private partnerships (P3s)
- Consider Using Multiple Funding Sources for Projects
- An Airport Lawyer's Role in Developing a Funding Program



Planning Is Critical to Success

An Airport Lawyer's Role Is Key

- Know your 5-year capital improvement program
 - Assess needs and prioritize
 - Break capital program into multiple projects
 - Consider plan of finance
 - Staff capacity
 - Risk management
 - Phasing
- Understand the pluses and minuses of each source of funding
- Consider and communicate the legal issues raised by each type of funding
- Establish a flexible financing program



Context is Crucial

The nature of the project will shape available funding, delivery and financing options

Airside / Aeronautical

- Terminal development
- Airside cargo
- FBOs
- Airport privatization (AIPP and non-AIPP)

Landside / Non-Aero

- ConRACs
- Ground transportation and parking
- APMs / rail and transit connectors
- Landside cargo
- Hotels

Federal Grant Funding



Entitlement & Discretionary Grants

- Procurement requirements
- Costs funded with AIP excluded from – and reduce – rates & charges
- Typically used first for airside projects
- Critical for smaller airports with less revenue
- Advance planning = readiness for supplemental grants

Legal Considerations:

- Grant assurances
- Federal requirements – 2 C.F.R. Part 200 (Buy American, etc.)
- AIP Handbook compliance – FAA Order 5100.38D and Advisory Circulars
- Legal authority to accept grants
- Grant administration
- Required legal opinion

TIFIA Loans

Considerations

- Very low interest rates (tied to fed funds)
- Deeply subordinated – below revenue bonds and subordinate debt (but with “springing lien”)
- Initial payments can be deferred for up to five years
- Requires investment-grade rating
- Few airport TIFIA loans to date

Legal Requirements

- Buy American requirements apply
- FAA and Build America Bureau jointly oversee
- Must coordinate with Indenture/Trust Agreement – allow for subordinated debt
- Project must qualify – “TIFIA for airports” sunset under IIJA and other options

Pay As You Go Funding

Airport Revenue

- Most flexible source of funds, but caveats:
 - Use of airport revenue highly regulated:
 - Airport
 - Airport system
 - Other facilities owned or operated by airport sponsor and directly related to transportation by air
 - Bear in mind contractual restrictions; e.g., AULA, Indenture
- Airport is a “closed loop” financial system
- Differentiate between aeronautical and nonaeronautical revenues



Passenger Facility Charges (PFCs)

Operational Issues

- “Local” funds; not subject to federal requirements
- Project eligibility limited to:
 - Competition
 - Noise
 - Safety, security, or capacity
- Gates funded with PFCs cannot be subject to exclusive, long-term (>5 years) leases
- Can be used for debt service for eligible projects

Legal Considerations

- Complex application process
- Subject to separate set of assurances
- Governed by statute, regulations & FAA Order:
 - 49 U.S.C. § 40117
 - 14 C.F.R. Part 158 (includes assurances)
 - FAA Order 5500.1
- Need to segregate from other airport funds

Customer Facility Charges (CFCs)

- Not federally regulated, except as airport revenue
- Some states regulate, however
- Requires agreement with rental car companies; may result in limitations on use
- No impact on aeronautical rates & charges



Airport Debt – Bonds & Loans

- Wide range of types of debt, including bonds, TIFIA loans, bank loans, short-term debt and more
- Allows Airport to match repayment with useful life of funded project – spread costs over time
- Widely accepted in the capital markets
- Represents a loan from one or more lenders, backed by a promise to repay from a specific revenue stream or source
- Best used to fund revenue-generating projects in order to provide a source of repayment



Types of Airport Debt

Bonds are your friends!

- Airport revenue bonds
- “Double-barrel” bonds – revenues plus PFCs or CFCs
- General obligation (“GO”) bonds
- Commercial paper
- Bank loans – line of credit
- Special facilities revenue bonds
- Third-party funding (P3)



Legal Issues to Watch

Airport Lawyers Need to Monitor!

- State law compliance
 - Legal authority is strictly construed
 - Legal authority relates to both funding/financing and contracting models
 - Authorization process
 - Grant of security interest – UCC applies?
- Federal tax law (if issued on tax-exempt basis)
 - Governmental purpose vs. airport facility
 - Initial and ongoing compliance
 - IRS audits

But wait, there's more!



Legal Issues to Watch, Part 2

Airport Lawyers Need to Monitor

Federal securities laws

- SEC regulation is limited
- Rule 10b-5 anti-fraud requirements
- Rule 15c2-12 – initial and continuing disclosure, including annual & event filings

Key provisions of governing documents

- Trust agreement / Bond indenture
- Continuing disclosure agreement
- Tax certificate/agreement
- Related agreements – e.g., special facility lease





Some Pro Tips – Flexibility Is All!

- Retain ability to add or delete revenue sources from pledge
- Provide for senior and subordinate (multi-level?) debt
- Flexible reserve funds – general, series-specific, or none
- Remedies for an Event of Default – debt acceleration is not required!
- Ability to change permitted investments
- Coverage requirements may vary – “rolling” vs. hard coverage
- Additional debt tests can be flexible, too
- Understand local requirements, e.g., PILOT
- Crucial issue – how do these requirements affect your Use & Lease Agreement, especially rates & charges?



Public-Private Partnerships (P3s)

Both a delivery method and a financing mechanism

Structuring is typically bespoke – start by structuring the project, not using an existing structure

Can include project design and delivery as well as financing

Includes both debt and equity investors, with *very* different perspectives

Hallmark is identification and allocation of risks

Practical Considerations

- Typically requires greater return than airport bonds
- Third parties can add expertise and expand the team
- Can be a good way to acquire specific facilities
- Common repayment approaches can offer variety
 - Direct payment – at risk
 - Payment for performance – “availability”
 - Use of alternative sources – CFCs, PFCs, TIFIA
 - Management fees and other service charges

Legal Issues

- Typically requires explicit state-law authority – but in the airport sector authority can come through non-P3-specific statutes
- Documentation is often complex
- Investors are generally risk averse – seek to off-load most risks
- Often require joint venture of various functions

Understanding the P3 Context

Key first-order lingo and common deal structures

Structures and Concepts

- DBFOM P3 vs. Privatization / monetization / concession
- Revenue-risk vs. payment for performance
- Progressive project delivery & PDAs
- Revenue-sharing
- The role of equity
- Bankability
- Financial modeling
- Best value vs. value for money

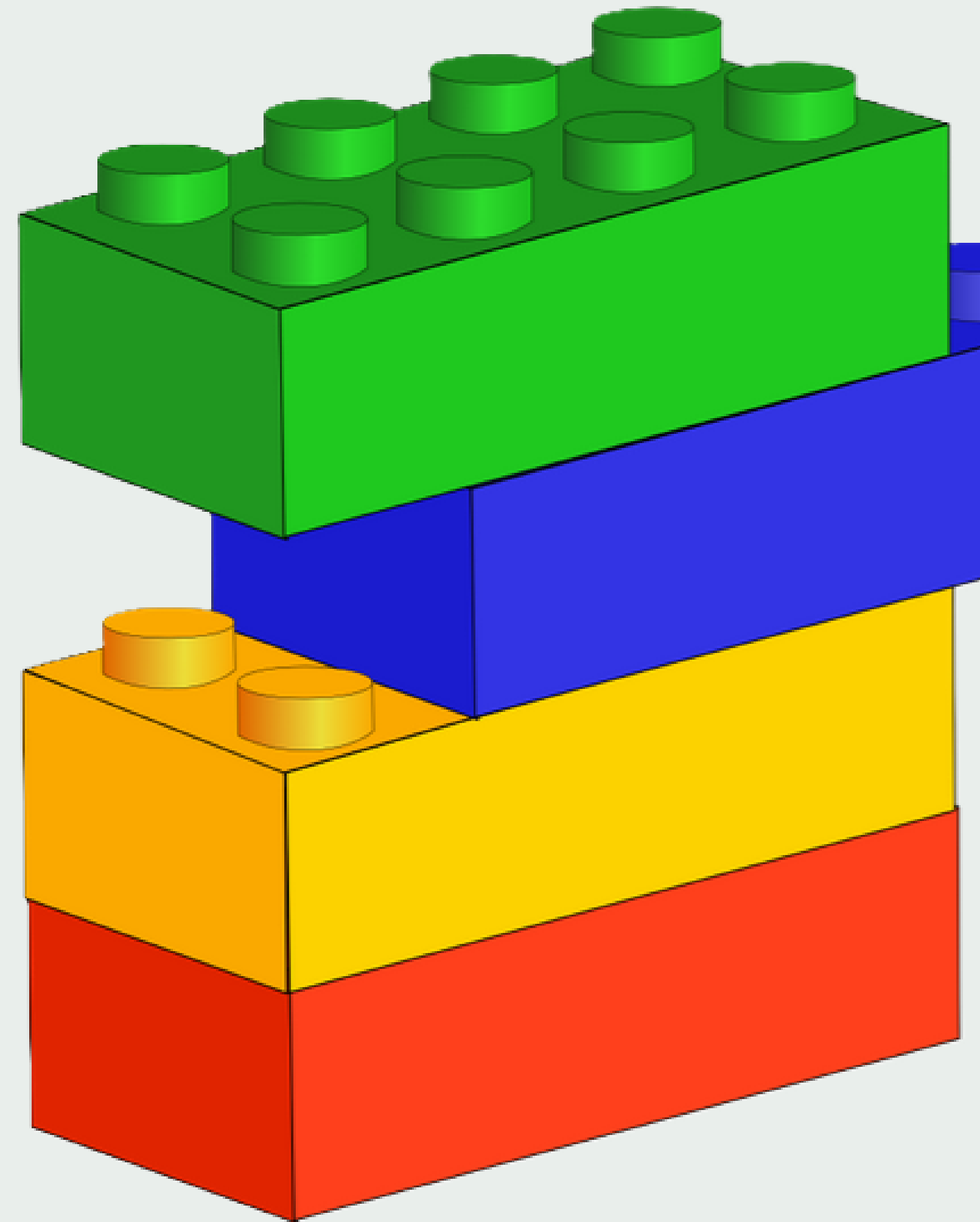
Economic Terms

- Permissible and impermissible sources of revenue
- Rent and revenue-sharing
- Refinancing gains
- Equity return targets
- Use of financial models and “no better, no worse” concepts
- Responsibility for financing costs
- Market-value based termination compensation
- Off-ramps for failing to “pencil”
- Non-competes

Putting It All Together

Crafting an Ideal Funding Mix

- Know your airport's goals and create structure that meets them
- There are multiple sources of funds and financing – what is best for your capital program?
- Understand your projects and your airport
- Get involved early – help avoid time-wasting mistakes
- Use your experts
- Start by structuring the project – not the financing
- Address legal constraints of funding and delivery up front – know the limitations and benefits of various funding methods



42nd Annual AAEE
Airport Law Workshop
Phoenix, AZ

Questions?




KAPLAN KIRSCH

42nd Annual AAEE
Airport Law Workshop
Phoenix, AZ

Thank You!




KAPLAN KIRSCH