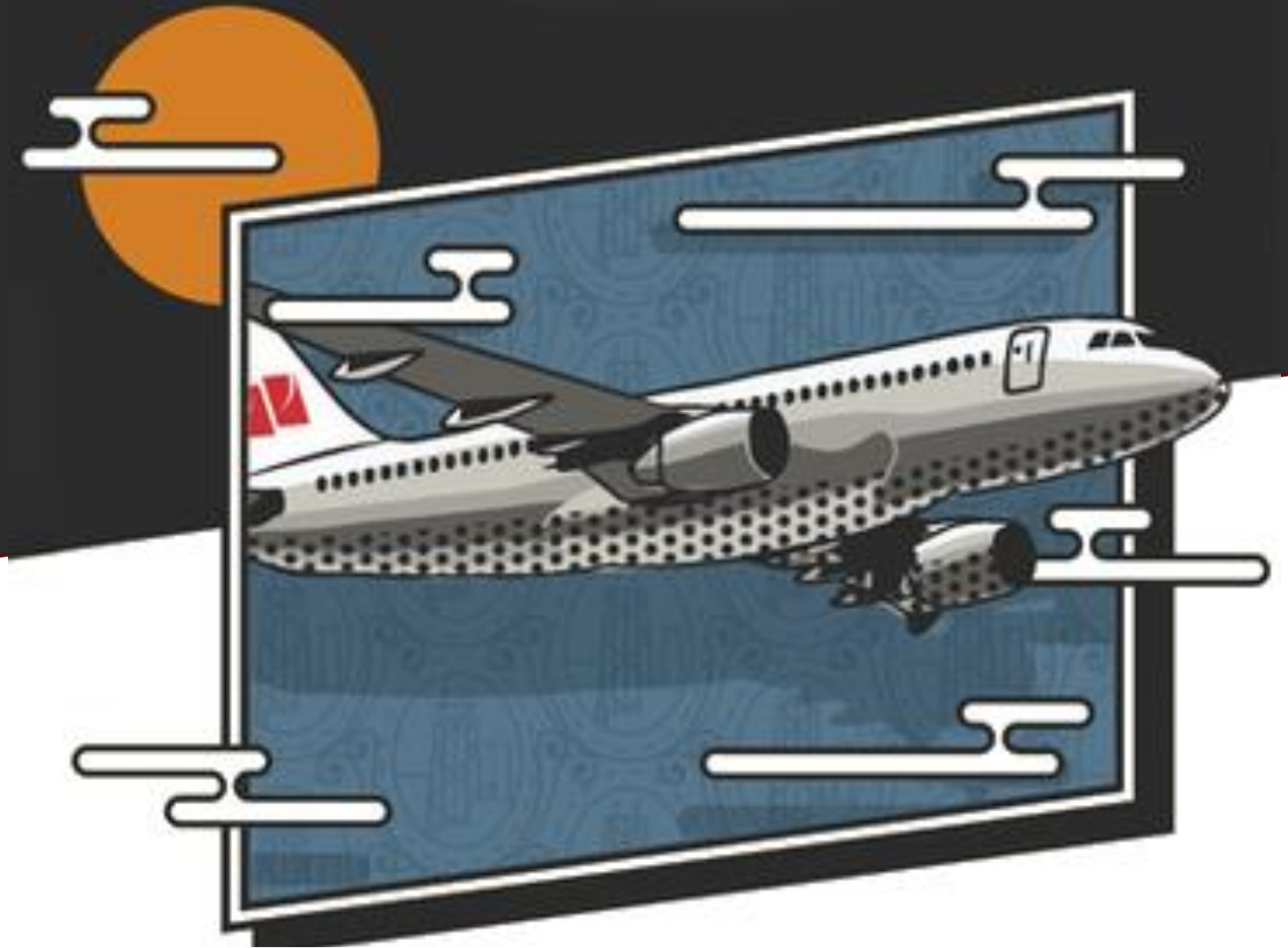




40th Annual
Airport Law Workshop



Session #5

Strategies for *non-aeronautical* development

Speakers

Peter J. Kirsch



Partner
Kaplan Kirsch LLP

Barbie Schalmo



Land Use +
Economics Lead
C&S Companies

In the beginning...



...FAA regulated all airport land and land uses

And so, sponsors must:

- Secure approval for any change to **Airport Layout Plan** (GA 29)
- Secure approval for **land uses** (deed restrictions; GA 22; 49 USC 47107(a))
 - Secure approval for *nonaeronautical uses*
- Maintain a **self-sufficient** airport (GA 24)
 - Charge reasonable rates for aeronautical uses
 - Receive fair market value (FMV) for *nonaeronautical uses*

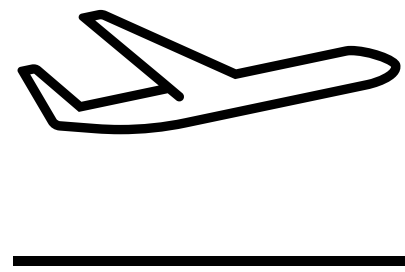


"In this world, there's just us..."

Aeronautical uses

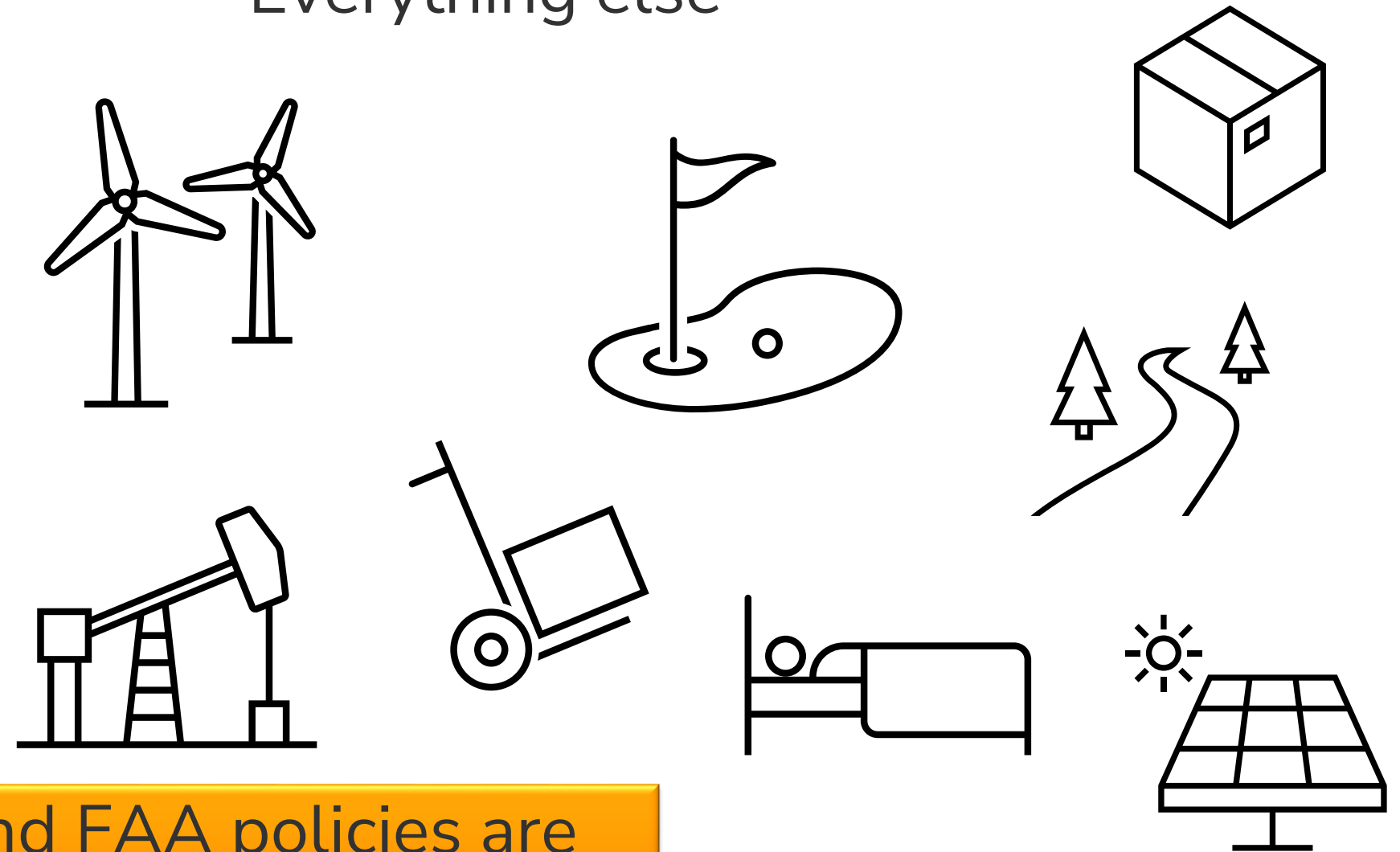
"all activities that involve or are directly related to the operation of aircraft, including activities that make the operation of aircraft possible and safe"

-Airport Compliance Manual



Non-aeronautical uses

Everything else



...but...the line is not always obvious and FAA policies are changing

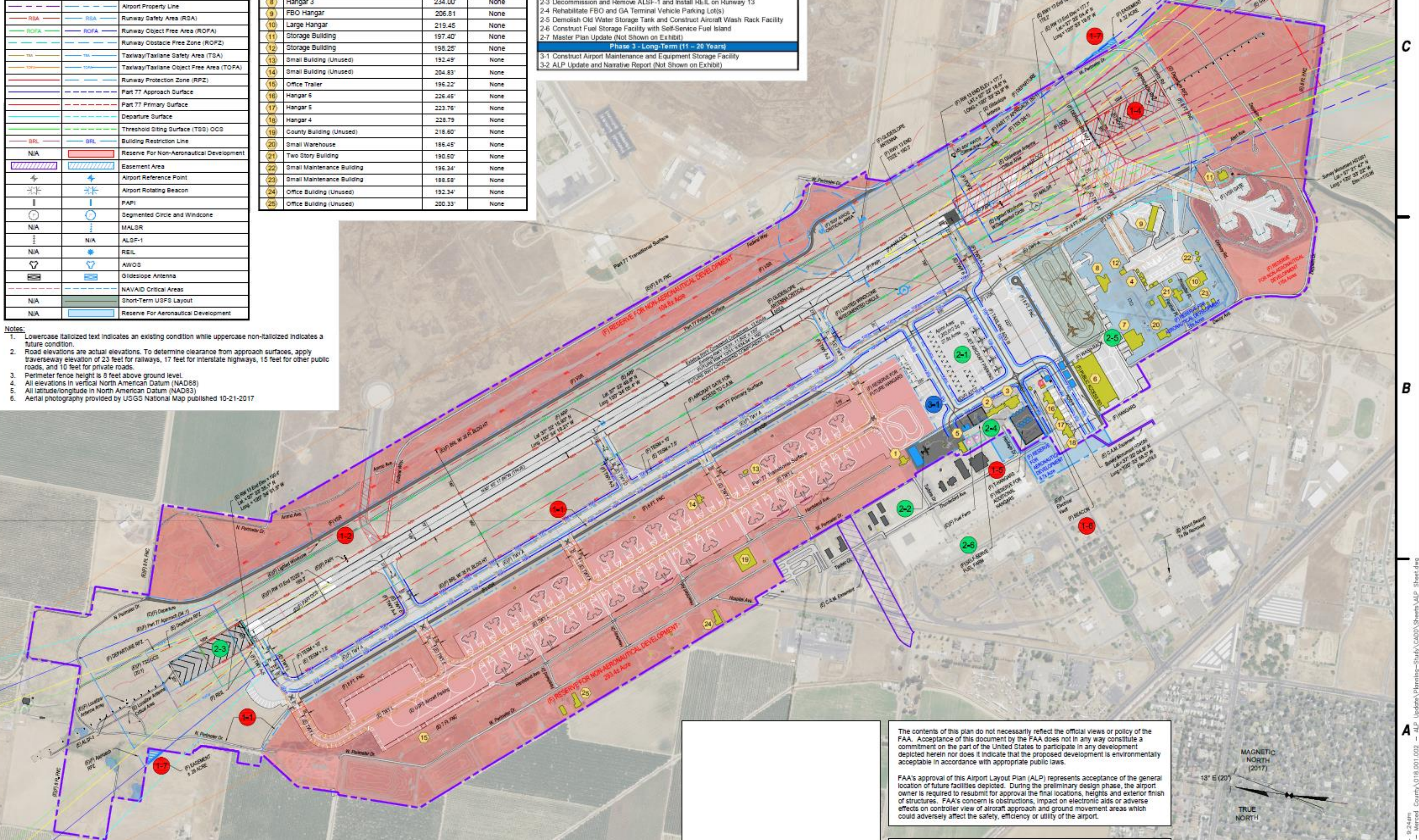
	Runway Safety Area (RSA)
	Runway Object Free Area (ROFA)
	Runway Obstacle Free Zone (ROFZ)
	Taxiway/Taxilane Safety Area (TSA)
	Taxiway/Taxilane Object Free Area (TOFA)
	Runway Protection Zone (RPZ)
	Part 77 Approach Surface
	Part 77 Primary Surface
	Departure Surface
	Threshold Siting Surface (TSS) OCS
	Building Restriction Line
	Reserve For Non-Aeronautical Development
	Easement Area
	Airport Reference Point
	Airport Rotating Beacon
	PAPI
	Segmented Circle and Windcone
	MALSR
	ALSF-1
	REIL
	AWOS
	Glideslope Antenna
	NAVAID Critical Areas
	Short-Term USFS Layout
	Reserve For Aeronautical Development

9	Hangar 3	234.00'	None
10	Large Hangar	219.45'	None
11	Storage Building	197.40'	None
12	Storage Building	198.25'	None
13	Small Building (Unused)	192.49'	None
14	Small Building (Unused)	204.83'	None
15	Office Trailer	196.22'	None
16	Hangar 6	226.45'	None
17	Hangar 5	223.76'	None
18	Hangar 4	228.79'	None
19	County Building (Unused)	218.60'	None
20	Small Warehouse	186.45'	None
21	Two Story Building	190.50'	None
22	Small Maintenance Building	196.34'	None
23	Small Maintenance Building	188.58'	None
24	Office Building (Unused)	192.34'	None
25	Office Building (Unused)	200.33'	None

2-3 Decommission and Remove ALSF-1 and install REIL on Runway 13
 2-4 Rehabilitate FBO and GA Terminal Vehicle Parking Lot(s)
 2-5 Demolish Old Water Storage Tank and Construct Aircraft Wash Rack Facility
 2-6 Construct Fuel Storage Facility with Self-Service Fuel Island
 2-7 Master Plan Update (Not Shown on Exhibit)

Phase 3 - Long-Term (11 - 20 Years)
 3-1 Construct Airport Maintenance and Equipment Storage Facility
 3-2 ALP Update and Narrative Report (Not Shown on Exhibit)

- Notes:**
1. Lowercase italicized text indicates an existing condition while uppercase non-italicized indicates a future condition.
 2. Road elevations are actual elevations. To determine clearance from approach surfaces, apply traverseway elevation of 23 feet for railways, 17 feet for Interstate highways, 15 feet for other public roads, and 10 feet for private roads.
 3. Perimeter fence height is 8 feet above ground level.
 4. All elevations in vertical North American Datum (NAD83)
 5. All latitude/longitude in North American Datum (NAD83)
 6. Aerial photography provided by USGS National Map published 10-21-2017

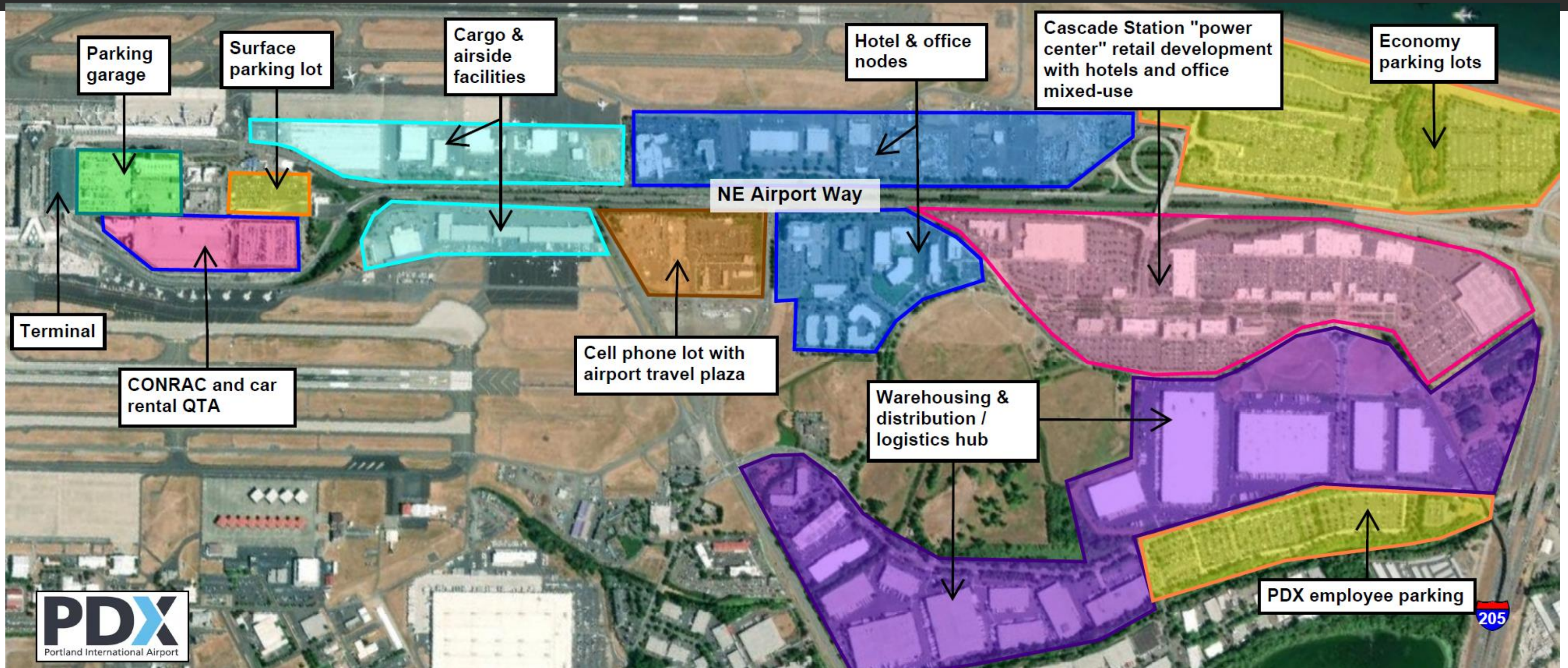


The contents of this plan do not necessarily reflect the official views or policy of the FAA. Acceptance of this document by the FAA does not in any way constitute a commitment on the part of the United States to participate in any development depicted herein nor does it indicate that the proposed development is environmentally acceptable in accordance with appropriate public laws.

FAA's approval of this Airport Layout Plan (ALP) represents acceptance of the general location of future facilities depicted. During the preliminary design phase, the airport owner is required to resubmit for approval the final locations, heights and exterior finish of structures. FAA's concern is obstructions, impact on electronic aids or adverse effects on controller view of aircraft approach and ground movement areas which could adversely affect the safety, efficiency or utility of the airport.



Non-aeronautical IRL



If FAA's purpose is protecting and preserving aero...

Why is non-aero in the picture at all?

- Residual land (*aka "mythical 3rd runway"*)
- Funding constraints >> revenue generation
- Economic development pressures
- Market forces
- Community interests & local





Lengthy but known

Secure approval for nonaeronautical uses (Order 5190.6)

“Release” from the obligation to put land to aeronautical use (public notice required); or

“Approval” for concurrent use; or

“Approval” for interim use

Tension created by FAA land use jurisdiction

- Mother may I
- Time is money
- Marketplace unfamiliarity with FAA
- Limited agency expertise with complex real estate

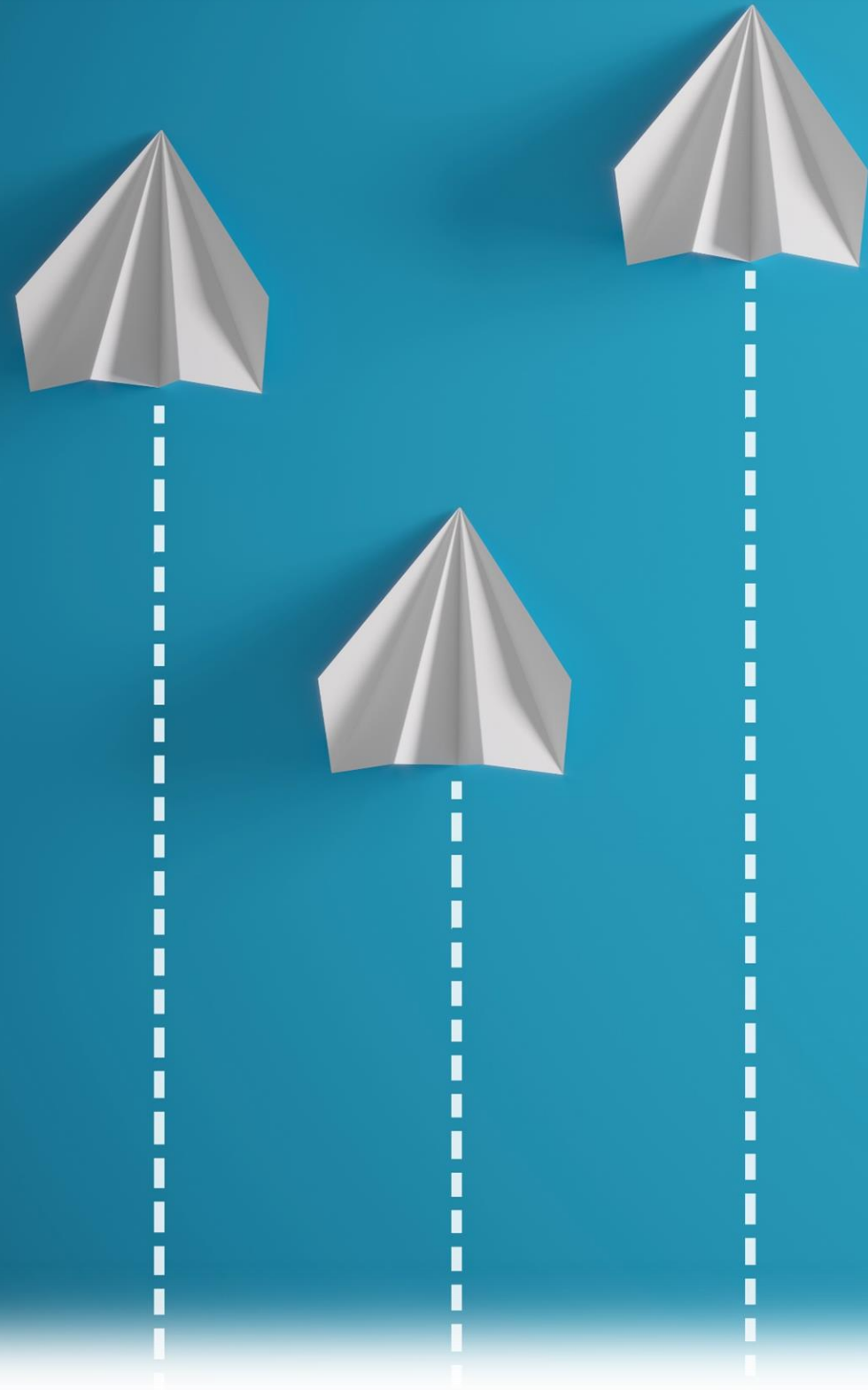


Paradigm shift

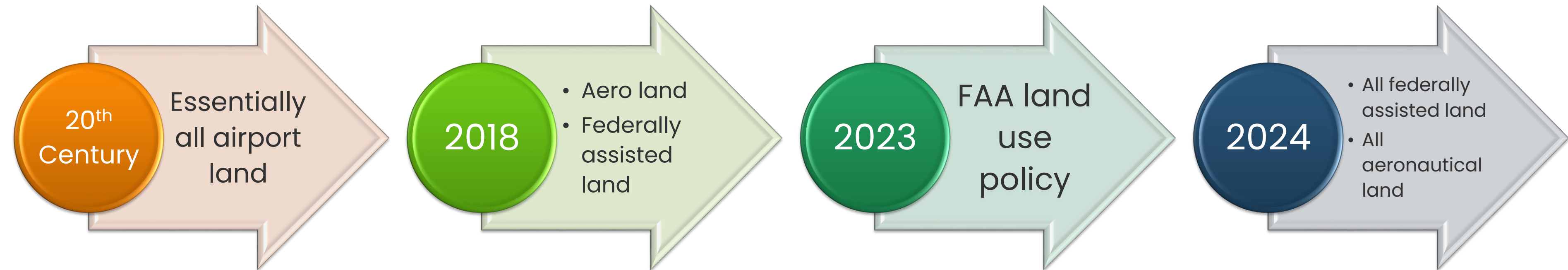
SECTION 163
(REVISED as
SECTION 743)

&

FAA LAND USE
POLICY



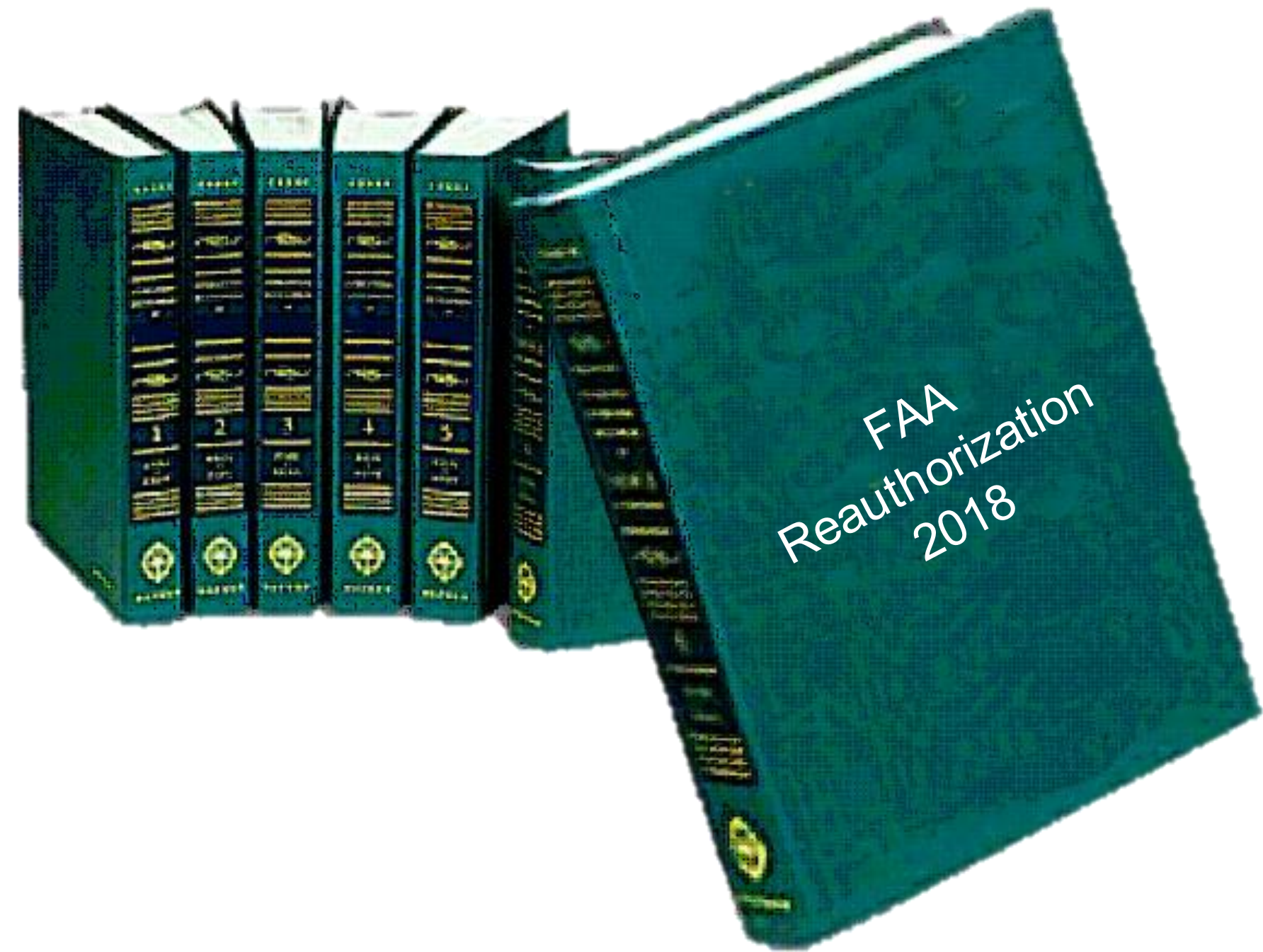
Evolution of FAA jurisdiction



Section 163

Congressional purpose :

- Eliminate FAA review over land use that is not core to its mission
- Streamline and expedite airport development projects
- Give airport sponsors increased (*but not unlimited*) autonomy to make land use decisions

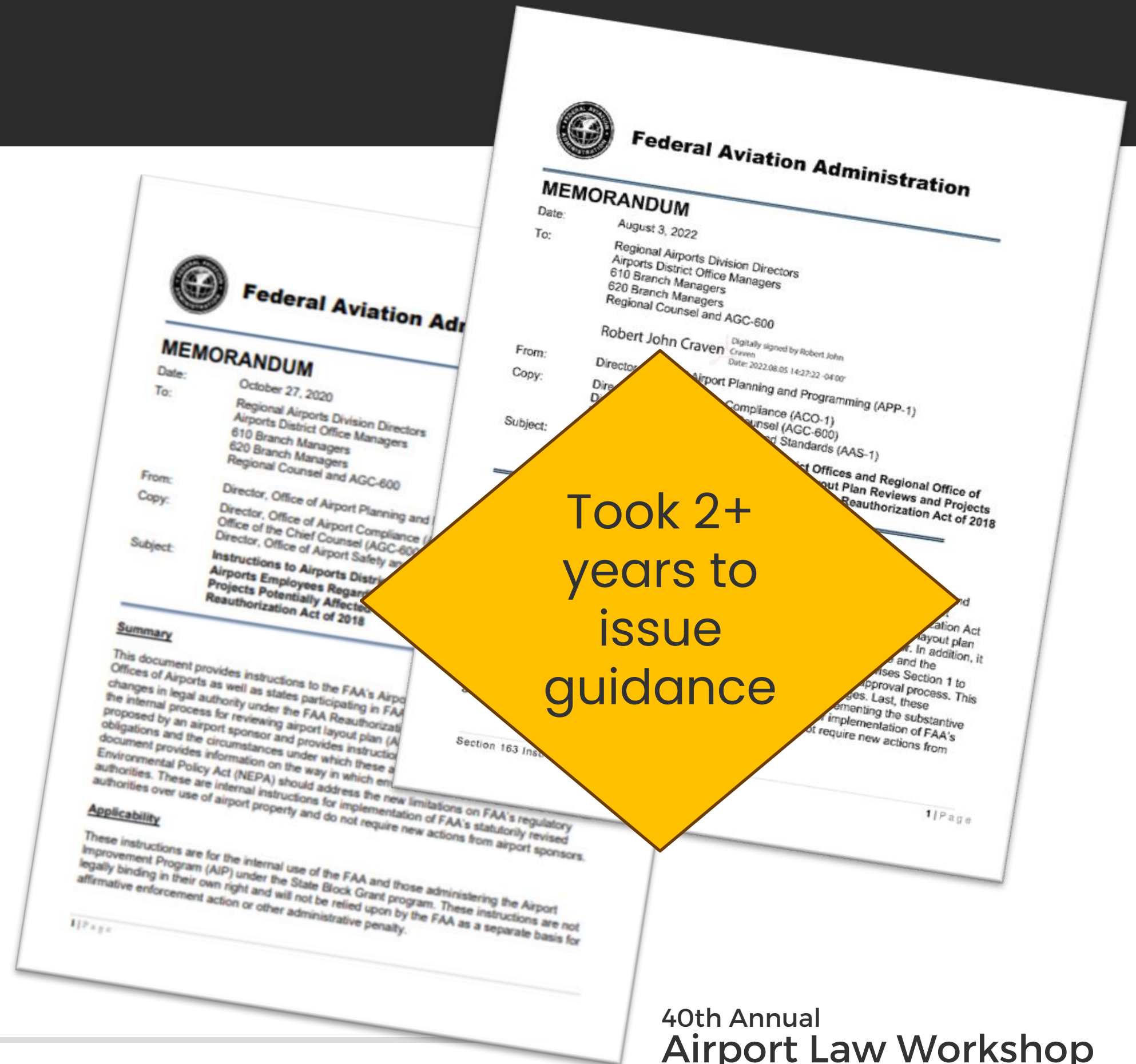


Section 163 (2018)

2018 FAA Reauthorization Act

What changed via Section 163?

- 163(a) – Limits FAA jurisdiction and authority over airport land use
- 163(b) - Exceptions where FAA retains jurisdiction
- 163(c) - Preserves FAA authority over airport revenue
- 163(d) – Limits FAA approval authority over ALPs



Zones of interest

FAA implementation guidance



Materially impact the safe and efficient operation of aircraft at, to, or from the airport



Adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations



Adversely affect the value of prior federal investments to a significant extent

“Zones of interest is not an official term...”

FAA Land Use Policy

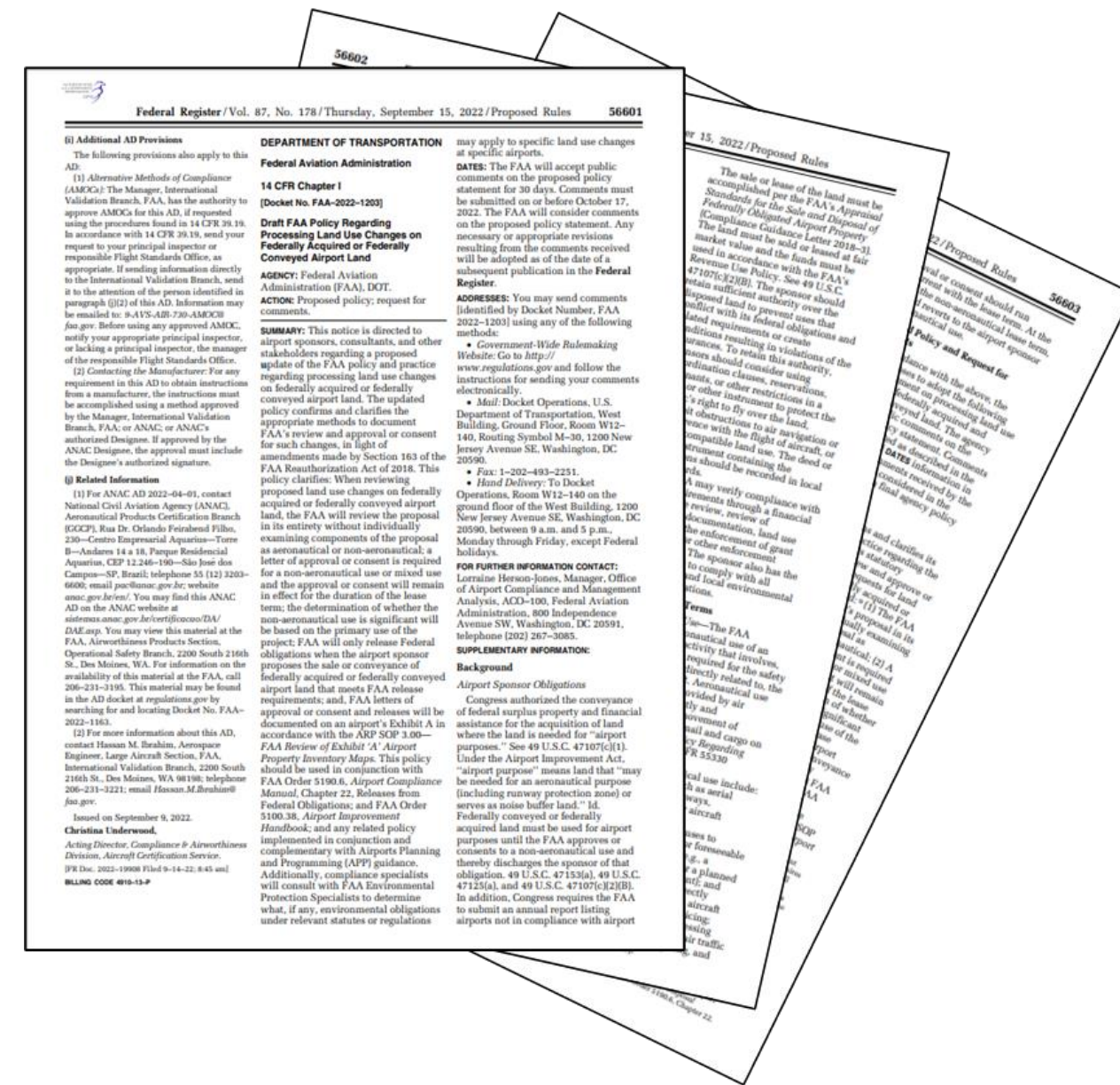
Complement to Section 163

- Issued late 2023
- Applies when FAA retains approval authority
- Four defined types of land use
- “Letter of consent or approval” required for *any* uses that are not aeronautical or airport purpose
 - *Supersedes prior interim use or concurrent use approvals*
 - *No set timeframe for approvals*
- Property can no longer permanently be designated as ‘non-aeronautical’
 - *Supersedes prior ability to permanently redesignate land as non-aeronautical*
 - *Releases now only available for sale of airport property*
- ADOs are given considerable discretion in reviewing and approving land uses

Underlying principles

Significant changes for all airport property

- Policy applies when FAA retains approval authority
- New FAA approvals required for *all* property uses that are not *aeronautical* or *airport purpose*
- Property can no longer permanently be designated on the ALP or property map as 'non-aeronautical'
- Every approval has a sunset date
- Releases can be used only for sale of airport property
- ADOs are given considerable discretion in reviewing and approving land uses



All airport land now fits into one of six buckets





Section 743 ~~163~~ land: Land not subject to FAA land use regulation



Aeronautical use: Any use that involves, makes possible, or is required for the operation of an aircraft/vehicle, or that contributes to or is required for the safety of such operations.



Airport use: Uses of land directly related to actual operation or foreseeable aeronautical development (includes terminal use)



Non-aeronautical use: All other uses of airport property.



Mixed use: Combination of both aeronautical and non-aeronautical, but the non-aeronautical use is “significant”



Noise land: Land acquired for noise compatibility purposes

163 + Land Use Policy uncertainty

Airport industry concerns

- Section 163 added new procedure
- Ambiguity in statute left considerable FAA discretion
- Congressional intent not realized in practice

Land use policy designed to fill gaps

- Increased, not decreased, FAA oversight over non-aeronautical land



Statutory changes 2024

FAA Reauthorization Act of 2024

Congress revised Section 163 in FAA Reauthorization Act of 2024 (now section 743)

Eliminates some ambiguities –

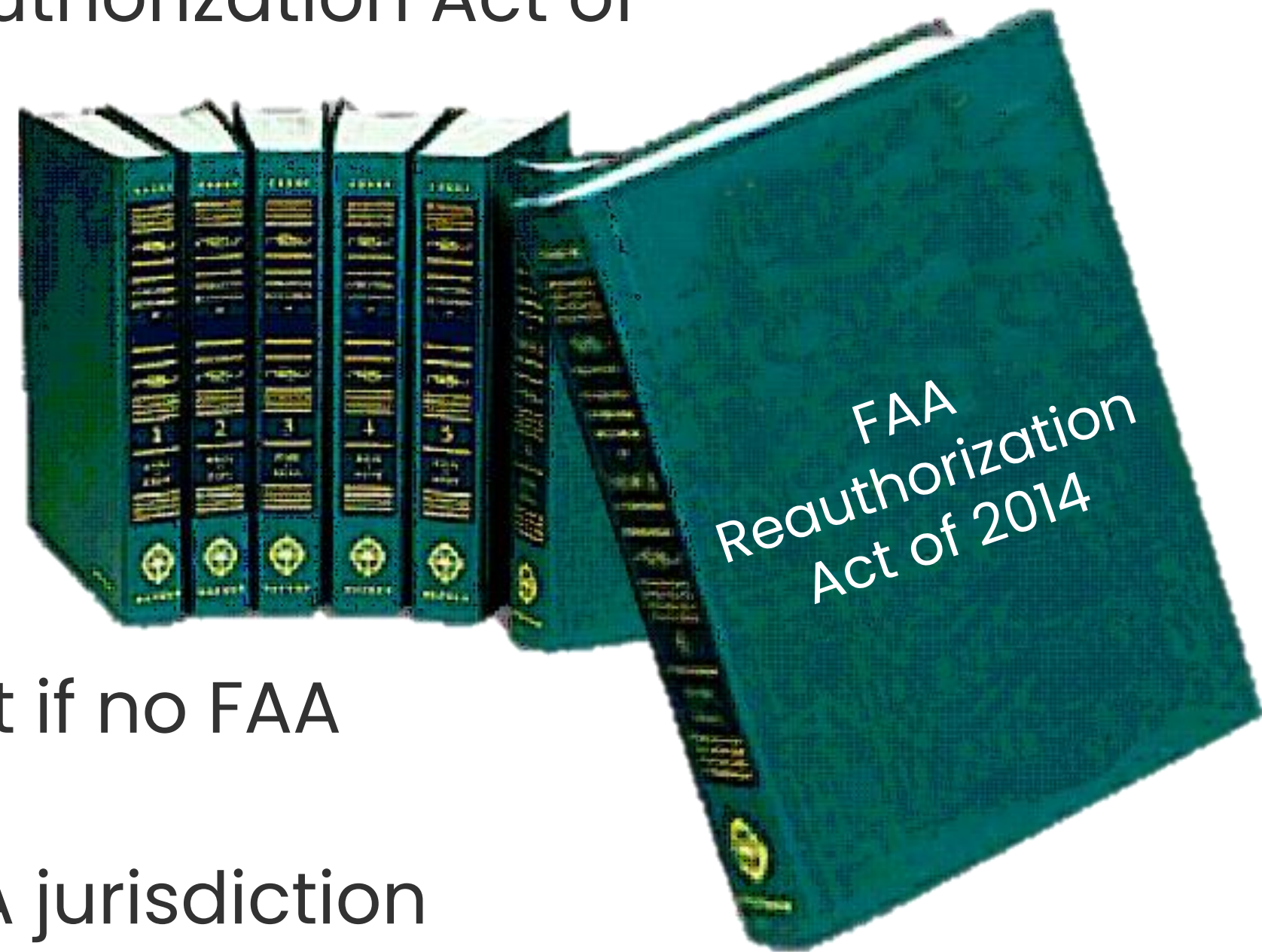
- In original 2018 enactment
- In FAA implementation

Narrows scope of FAA jurisdiction

Simplifies FAA review

Eliminates fair market value requirement if no FAA jurisdiction

No Grant Assurance obligations if no FAA jurisdiction



ALP approvals – what's new

49 U.S.C. 47107(a)(16)(d)

(d) The Secretary will review and approve or disapprove only those portions of the [ALP] that materially impact the safe and efficient operation of aircraft . . . or that would adversely affect the safety of people or property on the ground adjacent to the airport . . . or that adversely affect the value of prior Federal investments to a significant extent

49 U.S.C. (a)(16)(d)

...Subject to subsection (x), the Secretary will review and approve or disapprove the [ALP] and any revision or modification of the plan ...

New 49 U.S.C. 47107(x)(1)

...with respect to any project proposed on land acquired by an airport owner or operator without Federal assistance, the Secretary may review and approve or disapprove only the portions of the [ALP] or any subsequent revision to the [ALP] that

- (A) materially impact the safe and efficient operation of aircraft at, to, or from the airport;
- (B) adversely affect the safety of people or property on the ground as a result of aircraft operations; or
- (C) adversely affect the value of prior Federal investments to a significant extent.

ALP approvals – what's new

49 U.S.C. 47107(c)

(d) The Secretary will review and approve or disapprove those portions of the plan that

materially impact the efficient operation of the airport or that would adversely affect the safety of aircraft operations on the ground adjacent to the airport . . . or that adversely affect the value of prior Federal investments to a significant extent

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NEW: FAA has ALP approval authority over all land acquired with Federal assistance

review and approve modification of the plan

required by an Secretary

] that operation of aircraft

adversely affect the safety of persons or property on the ground adjacent to the airport . . . or that adversely affect the value of prior Federal investments to a significant extent.

Land use changes – what’s new

Section 163(a) & (b)

(a) The Secretary of Transportation **may not directly or indirectly regulate**—

- the acquisition, use, lease, encumbrance, transfer, or disposal of land by an airport owner or operator; any facility upon such land; or any portion of such land or facility

(b) Subsection (a) does not apply to:

(1) Any regulation ensuring—

(A) the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations;

(B) that an airport owner or operator receives not less than fair market value or

(C) that the airport pays not more than fair market value

(2) any regulation imposed with respect to land or a facility acquired or modified using Federal funding; or

(3) any authority contained in—

(A) a Surplus Property Act instrument of transfer, or

(B) section 40117 of title 49, United States Code

New 49 U.S.C. § 47107 (x)(2): “Limitation on Non-Aeronautical Review”

- (A) IN GENERAL.—The Secretary **may not** require an airport to **seek approval** for (including in the submission of an airport layout plan), or **directly or indirectly regulate or place conditions on (including through any grant assurance)**, any project that is not subject to paragraph (1).
- (B) REVIEW AND APPROVAL AUTHORITY.—If only a portion of a project proposed by an airport owner or operator is subject to the review and approval of the Secretary under subsection (a)(16)(B), **the Secretary shall not extend review and approval authority to other non-aeronautical portions of the project.**

Land use changes – what's new

Section 163(a)

(a) The Secretary of Transportation may regulate—

- the acquisition, use, lease, or disposal of land

(b) Subsection (a) applies to

(1) Any regulation—

- (A) the safe and sound operation of people and property in the vicinity of airport operations;
- (B) that an airport is not to be used for a purpose other than fair market value;**
- (C) that an airport is not to be used for a purpose other than fair market value.**

(2) any regulation imposed with respect to land acquired or modified using Federal funds

(3) any authority contained in—

- (A) a Surplus Property Act instrument of transfer, or**
- (B) section 40117 of title 49, United States Code**

1. Now codified in title 49
2. FAA authority over “Section 163” land is narrowed.
 - No FMV language
 - No reference to PFCs & Surplus Property Act
 - New limit on regulation “through the grant assurances”

Section 163(b)(1)(B)

any **may not** require an

directly or
ons on **(including**

project that is not

AUTHORITY.—If only a

by an airport owner or

and approval of the

16)(B), **the Secretary**

shall **and review and approval authority to**

other n **eronautical portions of the project.**

New notice requirement



- Sponsors shall submit a “Notice of Intent to Proceed” for any proposed project outside of FAA review/ approval authority.
- If FAA “fails to object” within 45 days, the project “shall be deemed as being outside the scope of review and approval authority ...”

Effect of new statute

FAA approval of ALP limited to

- AIP-purchased or federally gifted (Surplus Property Act) land
- Other projects within three 'zones of interest'



Materially impact the safe and efficient operation of aircraft at, to, or from the airport



Adversely affect the safety of people or property on the ground adjacent to the airport as a result of aircraft operations



Adversely affect the value of prior federal investments to a significant extent

FAA issued guidance on Thursday

- Zone of interest #3 is difficult to determine and uncommon
- Nothing particularly surprising or unexpected
- No new sponsor filing required (unlike Section 163 determination process)
- FMV – through grant assurance obligations generally
- Sponsors should retain rights over transferred land to protect against incompatibility

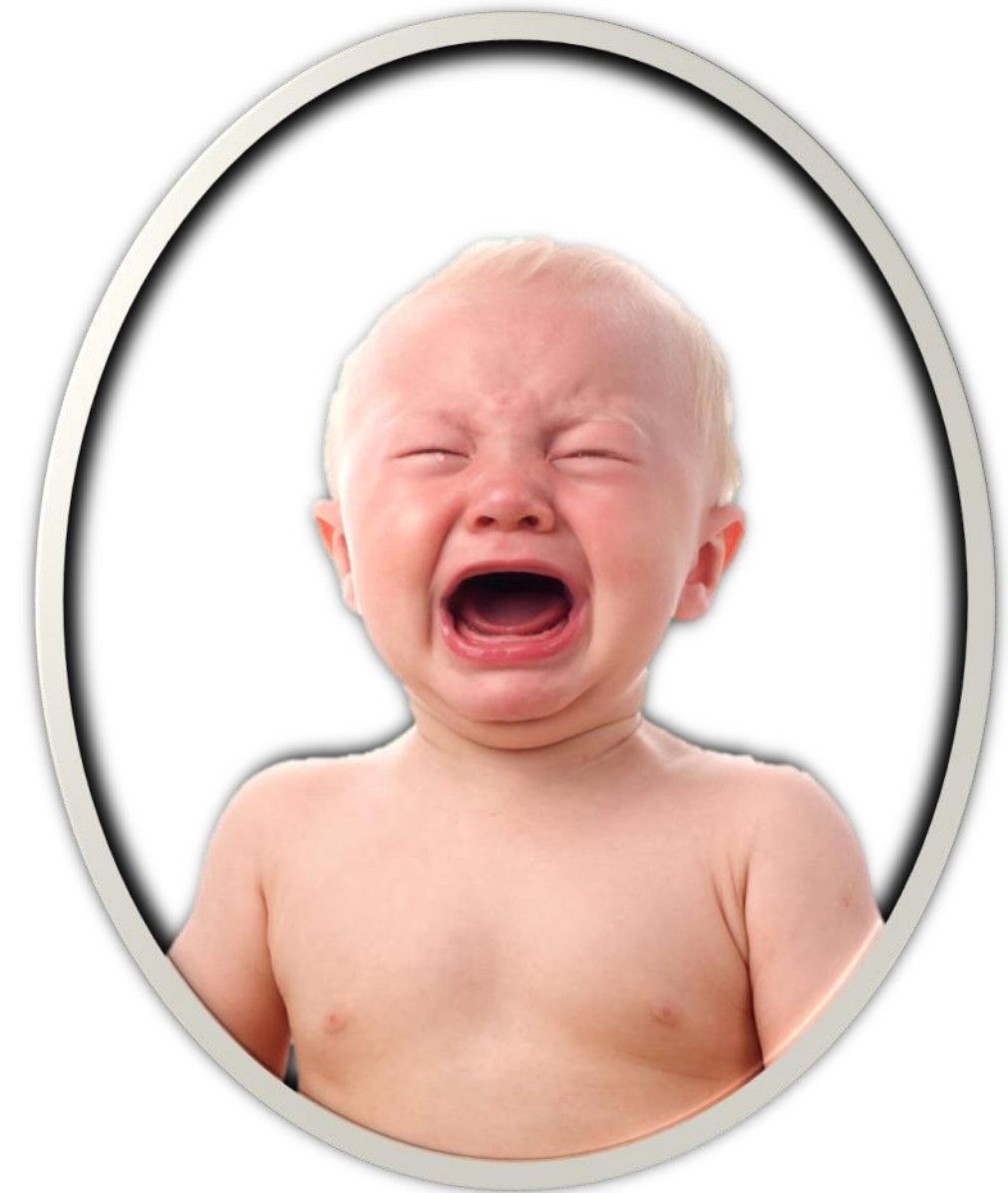
FAA issued guidance on Thursday

- NEPA is complicated for 'partial' projects
- Flowchart – pretty straight forward
- All Notices must be sent to HQ
- ADO verbal contact with sponsors must be documented in writing (?)

- No direction on contents of Notices

What 's next

- Revise Order 5190.6B (compliance)
- Revise Order 1050.1F (environmental reviews)
- Revise other orders, guidance documents on ALP review
 - New A/C on ALP review forthcoming
- Revise grant assurances



Less lengthy and less known: Complexities in new law

FAA can only review the *portion* of a non-aeronautical project that is subject to FAA jurisdiction (*not whole project*)

- Change from existing FAA policy: “If some, then all..”

Grant assurances do not apply to projects outside FAA jurisdiction

Sponsor gives *notice* – no FAA “163 determination”

- FAA has only 45 days to object

Understanding new scope of FAA regulation

1. Regulation today tied to existing and future property use
2. Aeronautical functions always preferred
3. No longer able to designate property permanently as “non-aeronautical” on ALP regardless of existing and future use

Putting this all together



Site specific impediments and opportunities

- Not “highest and best use” – highest and best ***aligned*** use
- Symbiotic relationship with airport needs, aeronautical uses
- Long term needs and opportunities
- Practical ability to use property for aeronautical functions (geographic constraints)
- Horizontal infrastructure



Funding challenges



- Pure unimproved dirt is straight-forward
- Build-to-suit
 - Assure compliance with FAA financial regs
- Horizontal infrastructure
 - Roads
 - Water, sewer, utilities
- Traditional FAA grant funds not generally available
 - But one-time or innovative grant funds may be possible
- State funding opportunities

Steps: how to proceed

01

What is property use on ALP, Master Plan and results of land inventory

02

What are optimal uses for the property

03

How can airport sponsor enhance attractiveness of the property for desired development

04

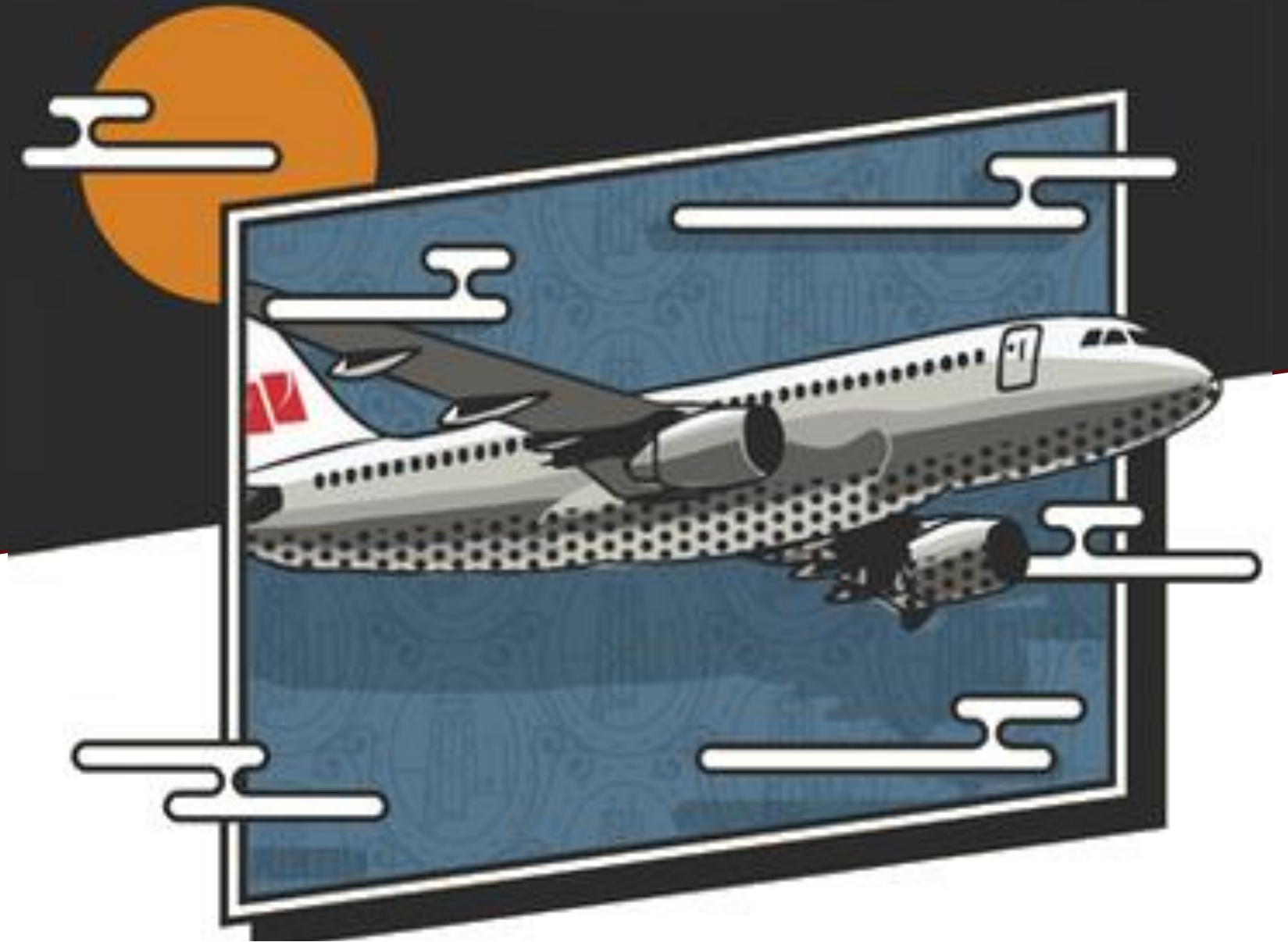
What are the private sector competitive forces

05

What process is required to making the property available



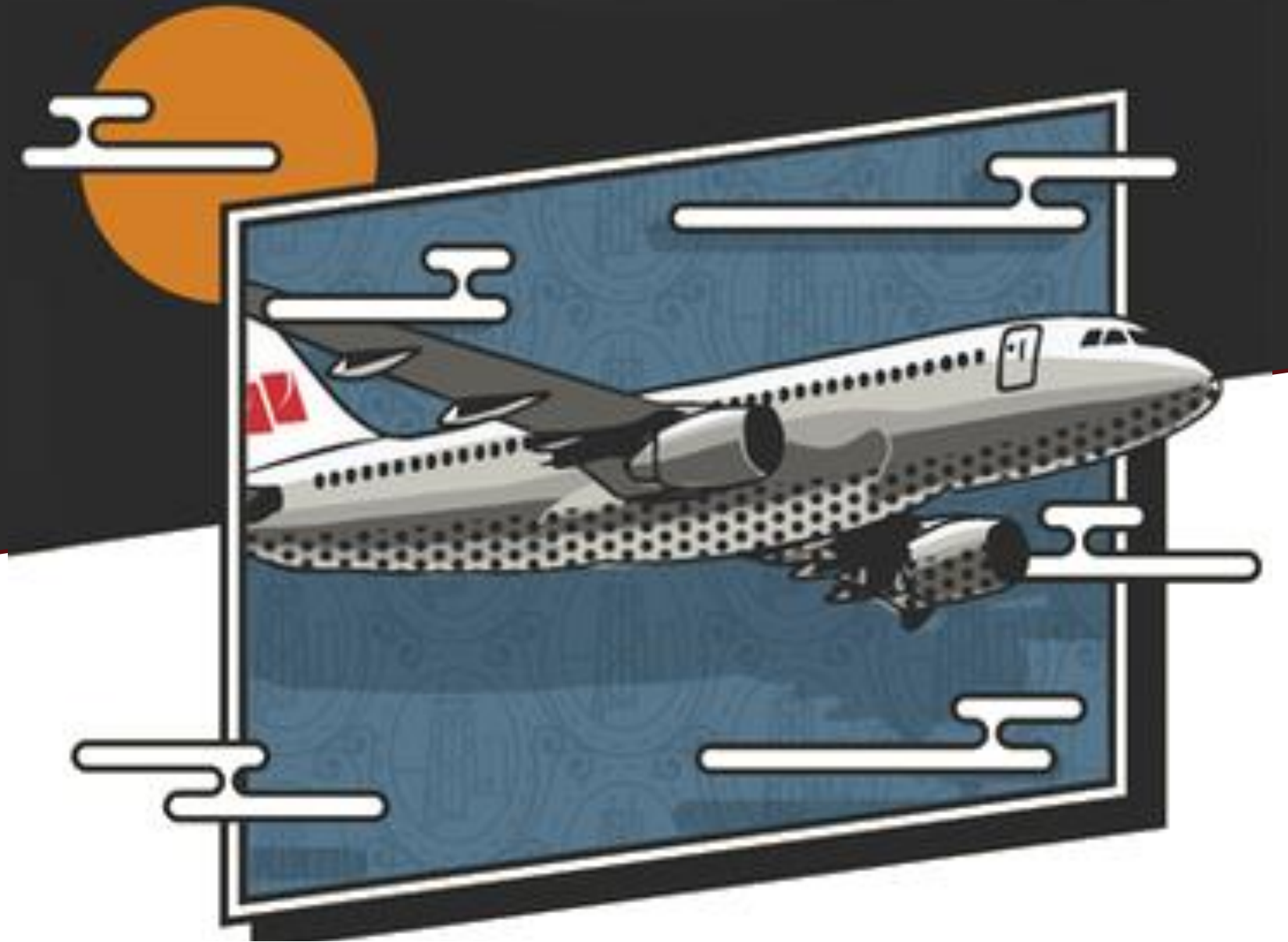
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QUESTIONS?



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THANK YOU!