Successfully Navigating Airport Land Use Issues



Buchalter

Questions?
Text me!

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What we'll cover in this session:



Legal fundamentals

On-airport development

Off-airport development

Revenue use options and restrictions



1 Federal, State, and Local Layers of Regulation

Who has jurisdiction over airport land use planning?

Who's in charge here?



Federal Aviation Administration

Regulates airport planning and operations primarily through Airport Layout Plans and the federal Grant Assurances

Airport Land Use Commissions (and Other State Aviation Agencies)

Statutorily -created bodies responsible for ensuring airport land use planning is consistent with state standards.

Local Land Use Jurisdictions

Cities and counties charged with approving new developments and issuing permits.

“The FAA has no regulatory authority for controlling land uses to protect airport capacity.”

- FAA Guidance on Land Use Compatibility and Airports

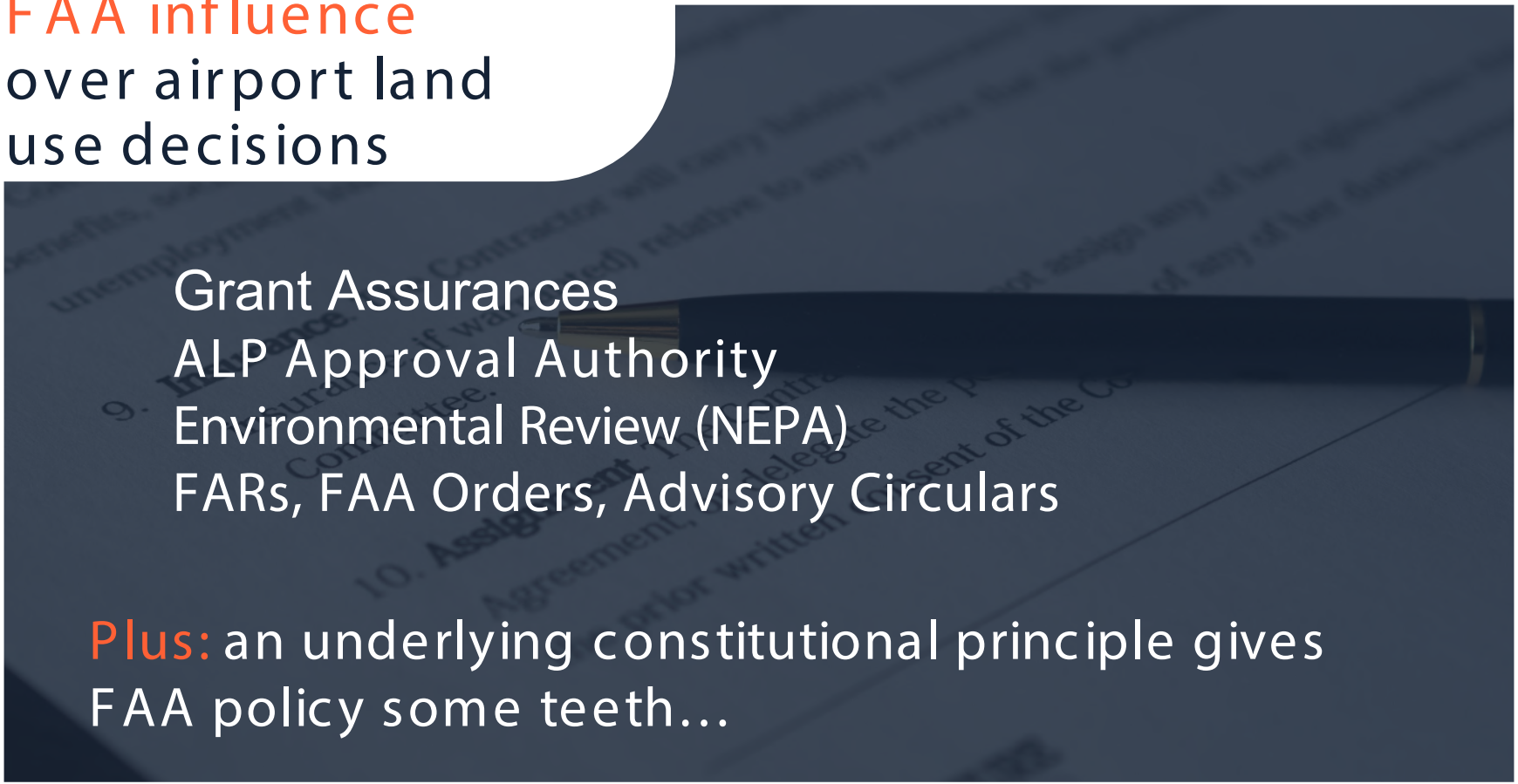




“State and local governments are **responsible for land use planning**, zoning, and regulation including that necessary to provide land use compatibility with airport operations.”

- FAA Guidance on Land Use Compatibility and Airports

FAA influence over airport land use decisions



Grant Assurances
ALP Approval Authority
Environmental Review (NEPA)
FARs, FAA Orders, Advisory Circulars

Plus: an underlying constitutional principle gives FAA policy some teeth…



Federal preemption

The FAA preempts the field of "aviation safety" and "aircraft operations." This includes local land use decisions that may affect safety. This can save your municipality millions.

Case Study: A Tale of Two Airports



A Southern-California developer rolls into a snow-blanketed resort town with grand plans for a multi-million dollar development at the local airport. FAA objects. Caught between a rock and a hard place, the town reverses course and opposes the development. The developer then sues the municipality for millions of dollars.

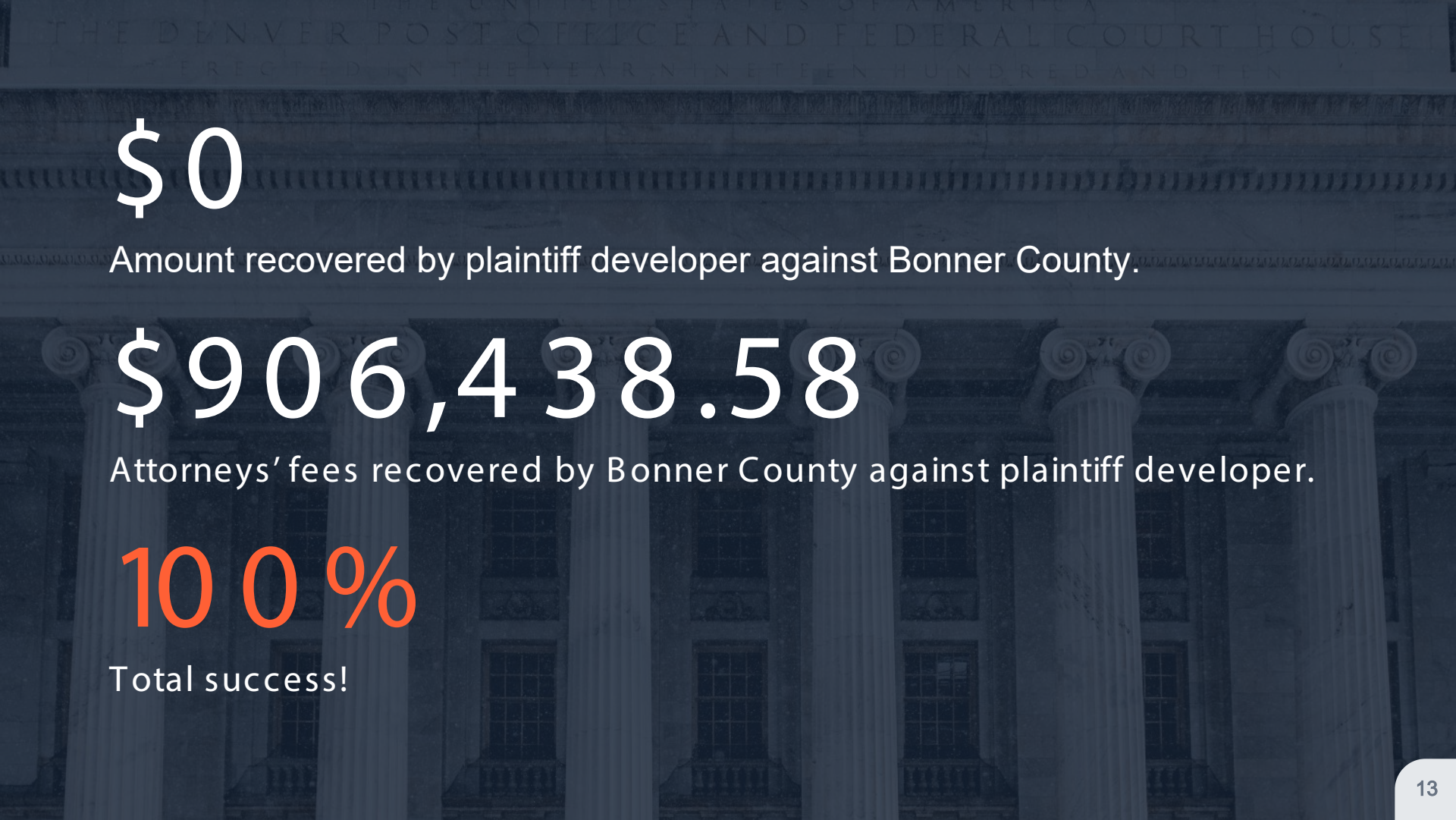
Case Study: A Tale of Two Airports

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes (2010) 191 CA4th 435.

SilverWing at Sandpoint, LLC v. Bonner Cty., 700 F. App'x 715 (9th Cir. 2017).

$43,500,000

The amount the Town of Mammoth Lakes will pay out as a result of losing one airport case.



$0

Amount recovered by plaintiff developer against Bonner County.

$906,438.58

Attorneys' fees recovered by Bonner County against plaintiff developer.

100%

Total success!



“What was the County supposed to do? Just tell the FAA to kiss off?”

- Ninth Circuit Judge to plaintiff’s counsel during oral argument



2

On-Airport Development

The concept of the airport sponsor as a real estate developer

Airport Layout Plans



Grant Assurance 29 requires the sponsor to depict the airport's boundaries, including all facilities, and to identify plans for future development on its ALP.

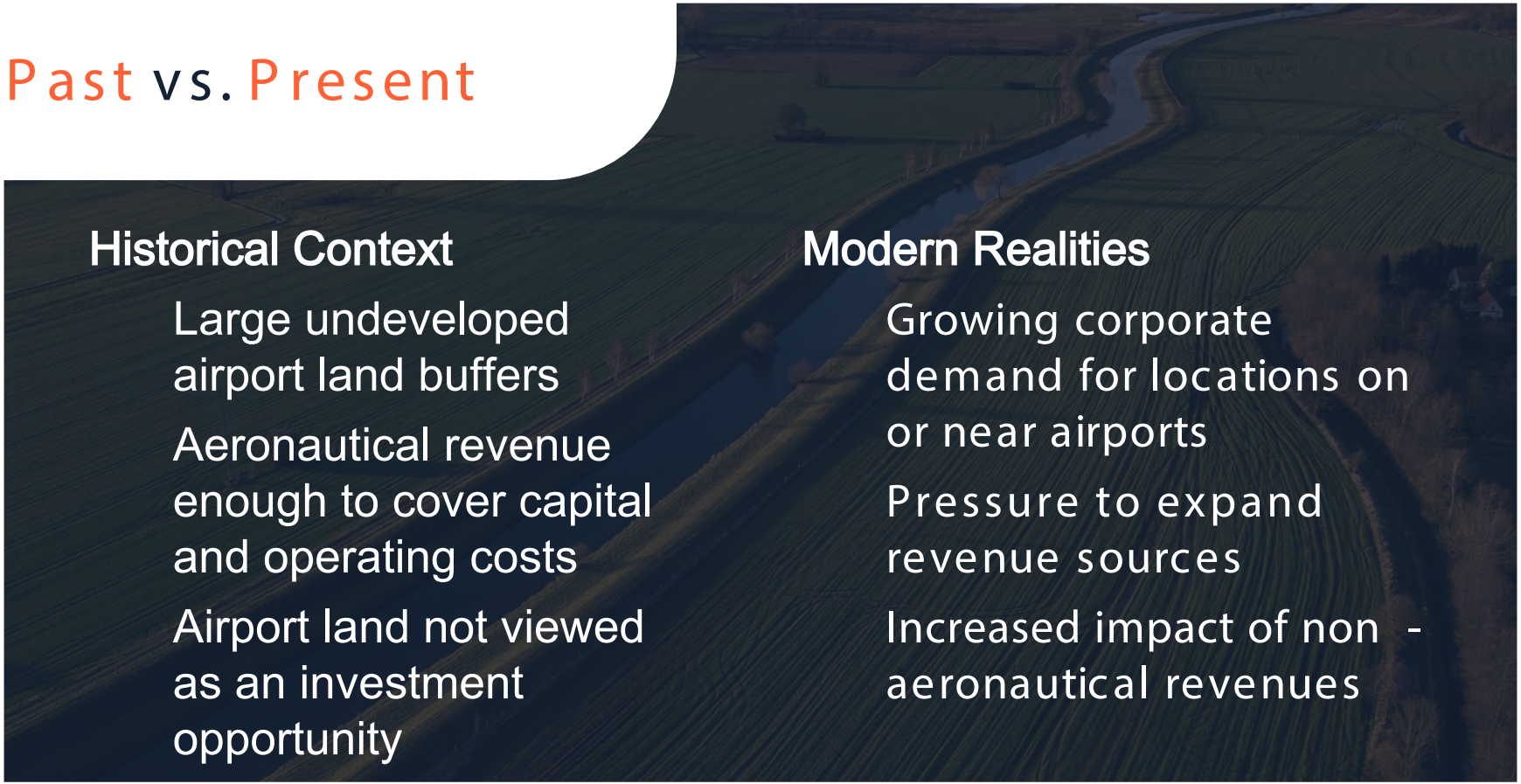
FAA can conditionally or unconditionally approve the ALP and changes typically require FAA approval.

Project must be reflected on unconditionally approved ALP to qualify for FAA funding and implementation.

San Diego International's Airport Layout Plan



Past vs. Present



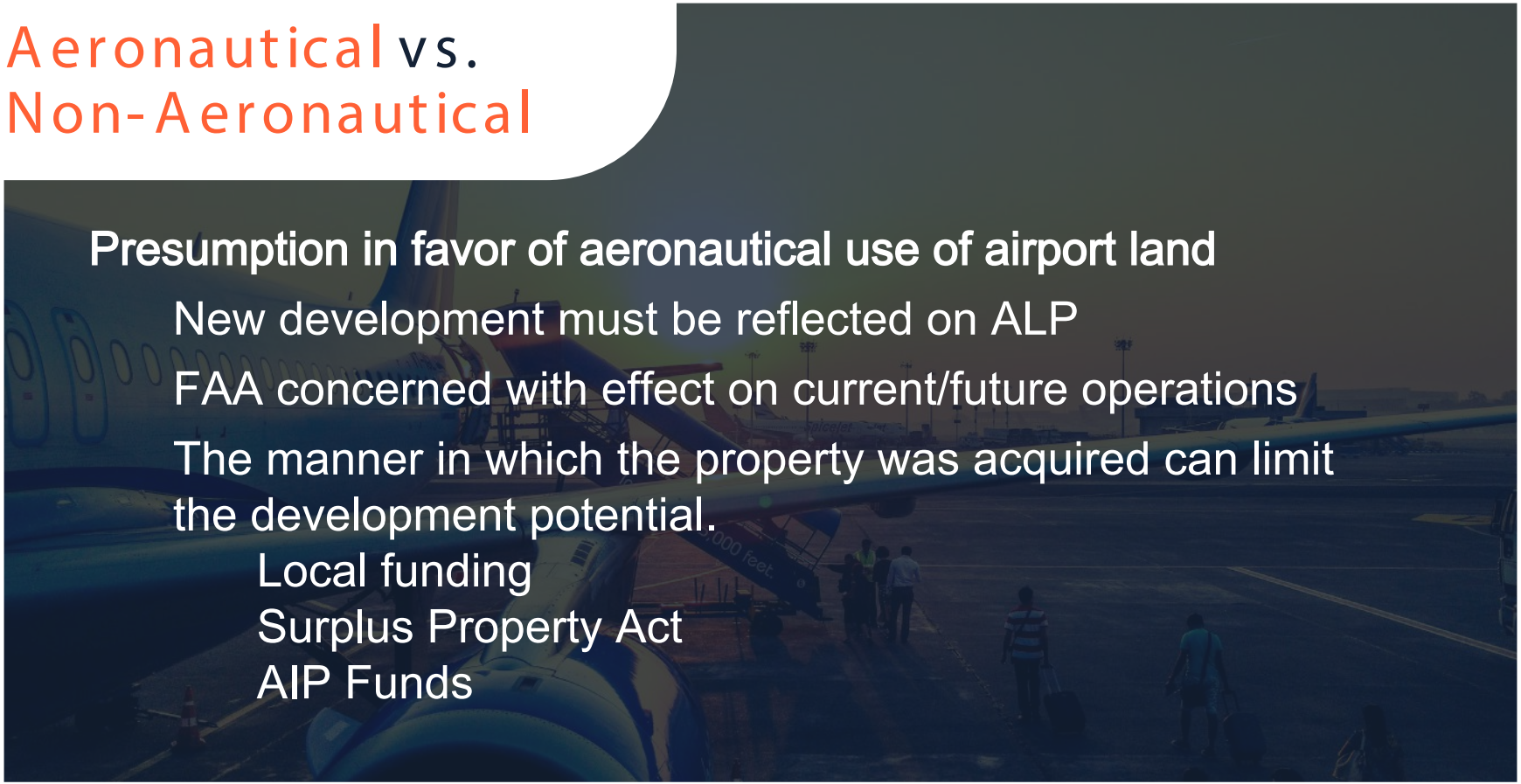
Historical Context

- Large undeveloped airport land buffers
- Aeronautical revenue enough to cover capital and operating costs
- Airport land not viewed as an investment opportunity

Modern Realities

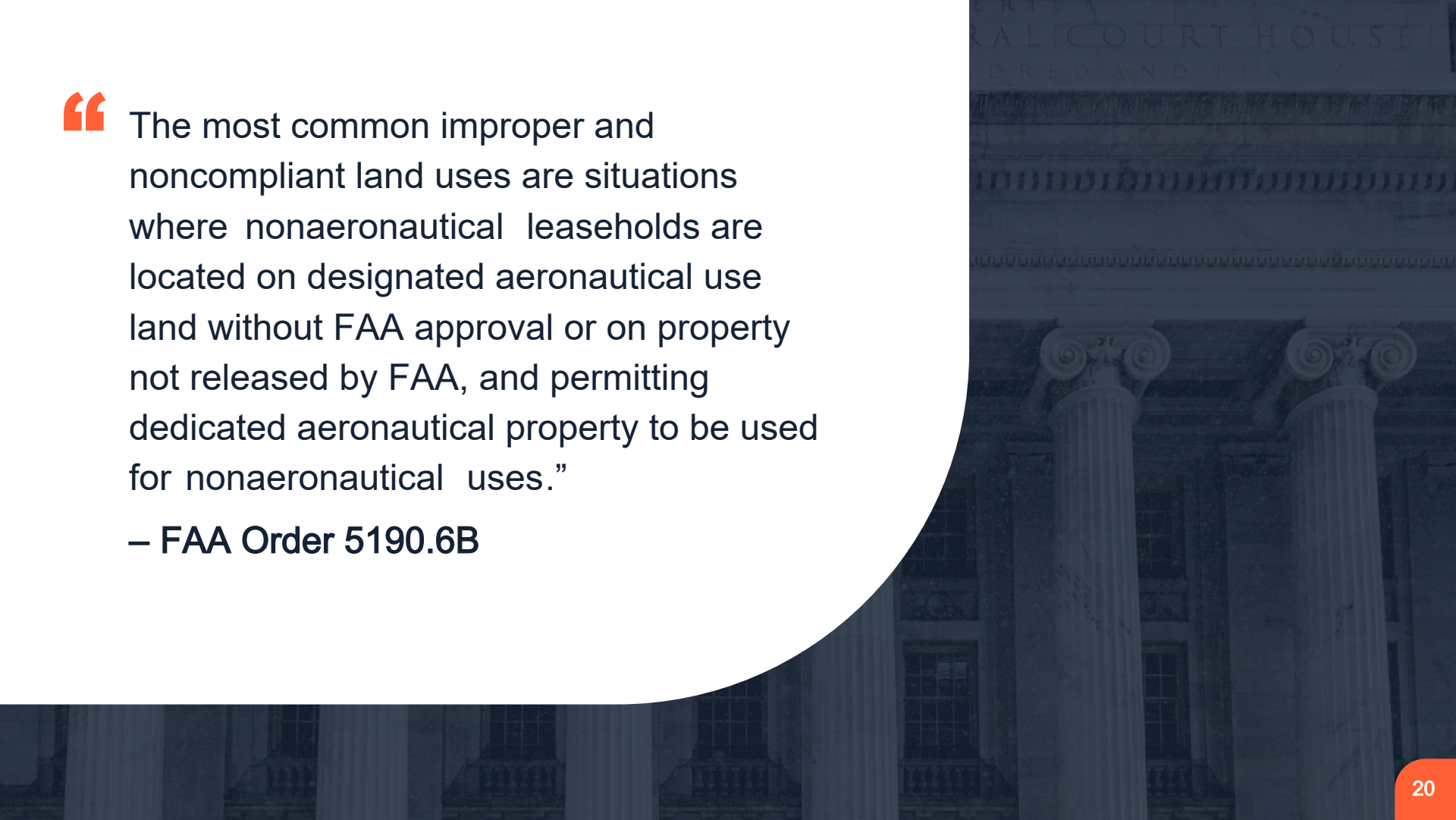
- Growing corporate demand for locations on or near airports
- Pressure to expand revenue sources
- Increased impact of non - aeronautical revenues

Aeronautical vs. Non-Aeronautical



Presumption in favor of aeronautical use of airport land

- New development must be reflected on ALP
- FAA concerned with effect on current/future operations
- The manner in which the property was acquired can limit the development potential.
  - Local funding
  - Surplus Property Act
  - AIP Funds



> The most common improper and noncompliant land uses are situations where nonaeronautical leaseholds are located on designated aeronautical use land without FAA approval or on property not released by FAA, and permitting dedicated aeronautical property to be used for nonaeronautical uses."
>
> – FAA Order 5190.6B

FAA Reauthorization Act of 2018: Non-Federally Sponsored Property

Section 163 amends federal law to clarify and streamline non-aeronautical development by airport sponsors.

Sponsor may immediately begin leasing and development with no formal approval from FAA on land already designated on ALP as non-aeronautical and not purchased with federal funds or donated from the federal government.

BUT must be developed so as not to impact the safe and efficient operation of the airport.



3 Off-Airport Development

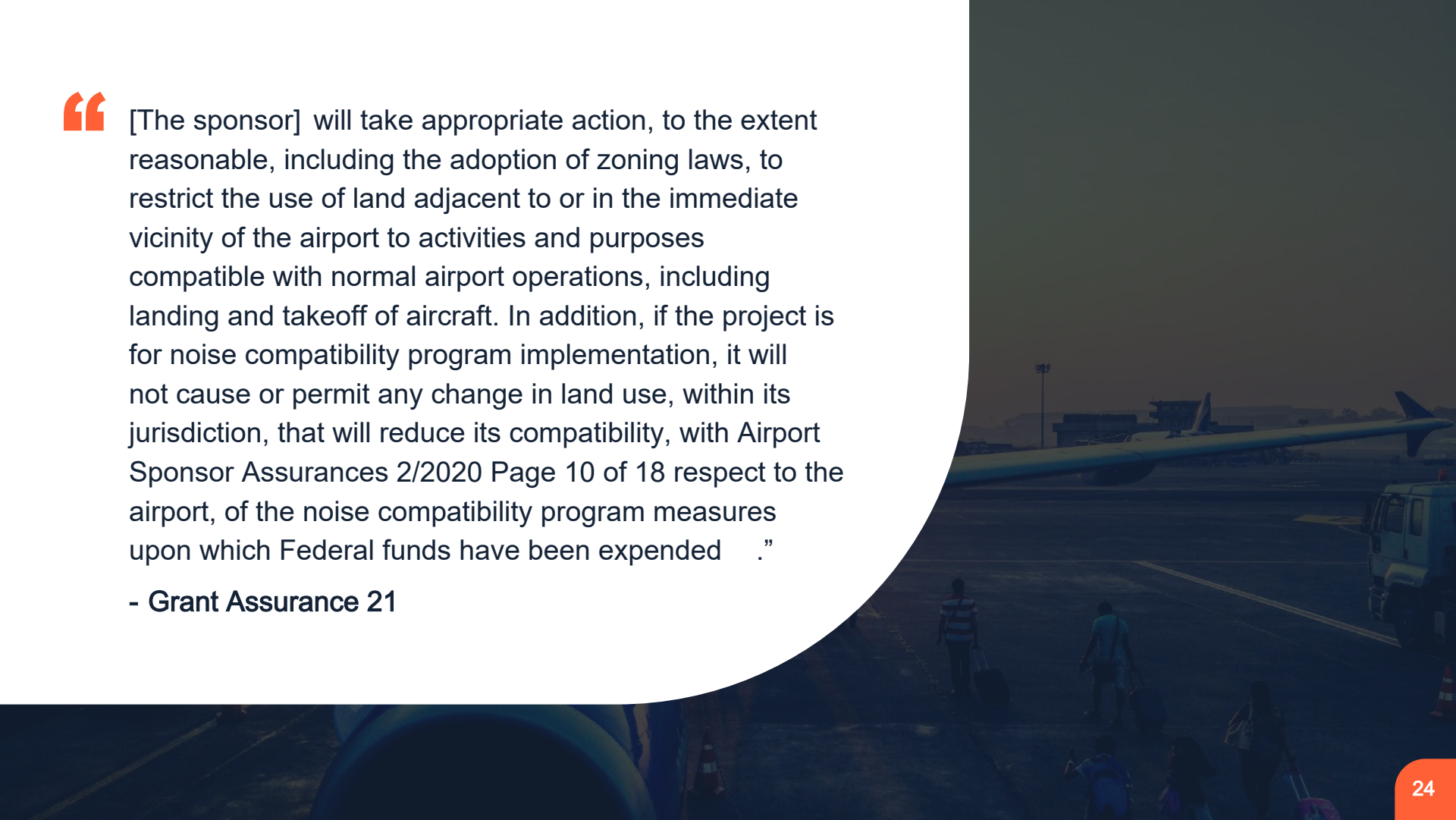
Local obligations to ensure compatible land use planning.

“[The sponsor] will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.” **- Grant Assurance 20**



“[The sponsor] will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with Airport Sponsor Assurances 2/2020 Page 10 of 18 respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended .”

- Grant Assurance 21



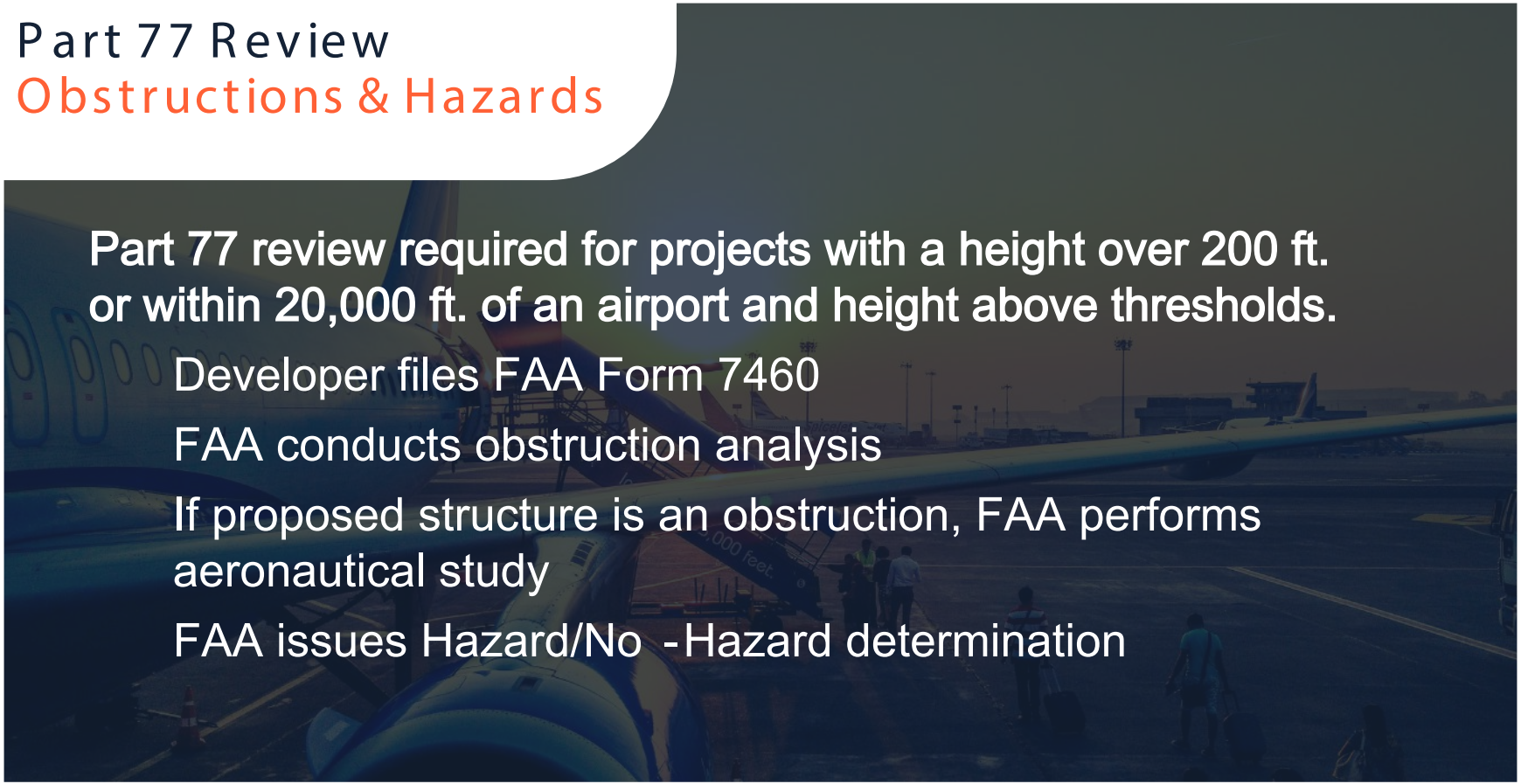
Airport Land Use Commission Review



State and local agencies play a key role in land use compatibility around airports.

- Statutorily-created processes for ensuring compatibility with the airport.
- Airport Land Use Compatibility Plans
- Local overrule powers

Part 77 Review
Obstructions & Hazards



Part 77 review required for projects with a height over 200 ft. or within 20,000 ft. of an airport and height above thresholds.

- Developer files FAA Form 7460
- FAA conducts obstruction analysis
- If proposed structure is an obstruction, FAA performs aeronautical study
- FAA issues Hazard/No -Hazard determination

Sponsor Role in Part 77 Review Process? YES.

The FAA expects airport sponsors to do everything in their power to prevent potential hazards from new development.

- Sponsors should review and comment on 7460 filings and petition for review if necessary (14 CFR 77.37 and 77.35)
- Use zoning rules to prevent hazards
- If you are not the zoning authority, you must take all reasonable actions to prevent the development.



4 Revenue Use Options and Restrictions

Using airport funds for airport -related development.

Using Airport Revenues

Revenues generated by a public airport may only be expended for the capital and operating costs of :

- the airport;
- the local airport system; or
- other facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.

49 U.S.C.§§ 47107(b)(1) and 47133(a).

Using Airport Revenues

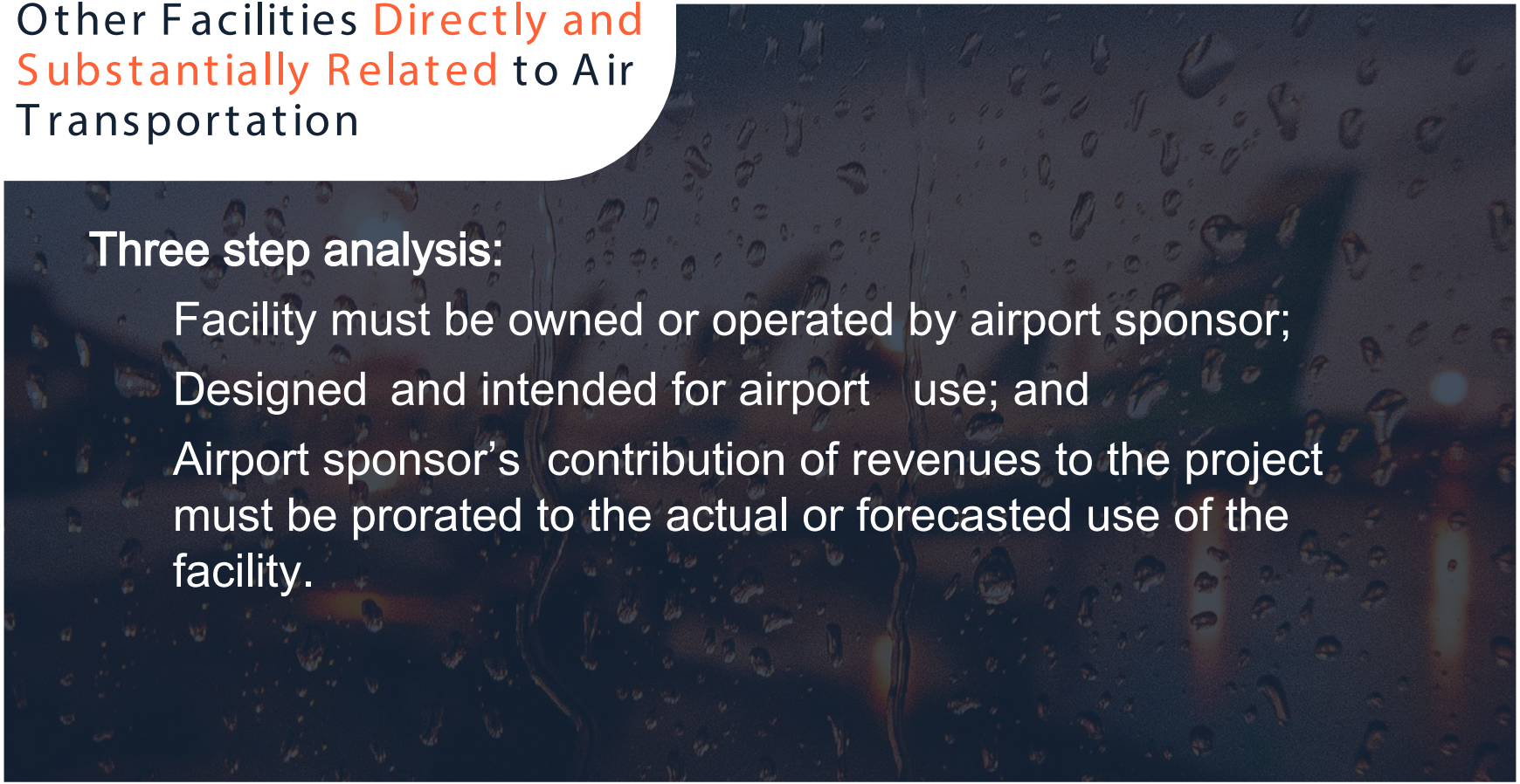
The use of airport revenue for purposes other than airport capital or operating costs is generally considered “revenue diversion” and is prohibited by federal law. (*See* Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7720 [FAA Revenue Use Policy].)

Other Facilities Directly and Substantially Related to Air Transportation



Other facilities or projects directly and substantially related to air transportation may be funded with airport revenues under certain circumstances. *See* FAA Airport Compliance Manual – Order 5190.6B, Chapter 15. This includes facilities that may extend for a distance off airport property or be used in part by non-airport passengers.

Other Facilities Directly and Substantially Related to Air Transportation



Three step analysis:

- Facility must be owned or operated by airport sponsor;
- Designed and intended for airport use; and
- Airport sponsor's contribution of revenues to the project must be prorated to the actual or forecasted use of the facility.

Funding targets



Let's review some concepts



FAA Compliance Matters

Failing to develop and maintain best practices for compliance with FAA policies can result in serious consequences.

The ALP is a Good Starting Point

Airport sponsors should begin on - airport development planning by consulting the existing Airport Layout Plan.

Sponsor's Role in Part 77 Review

The FAA expects the airport sponsor to do everything in its power to prevent potential hazards.

Preemption Protects You

When your land use and development decisions are motivated by an effort to comply with FAA policy, preemption is a solid defense.

Off-Airport Compatibility Matters

Pursuant to the Grant Assurances, the airport sponsor's obligations to ensure compatible land uses extend beyond the boundaries of the airport.

Revenue Diversion Pitfalls

Understanding revenue diversion rules can keep your municipality out of hot water while opening up new development funding options.



Thanks!

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