NATA
National Air Transportation Association
The Voice of Aviation Business
818 Connecticut Avenue, NW, Suite 900 Washington, DC 20006
P (202) 774-1535 (800) 808-6282
www.nata.aero

NATA White Paper Regarding Stop Eviction Ordinances

Executive Summary
The application of any commercial eviction moratorium ordinance should NOT apply to airports because it: (1) interferes with FAA Grant Assurance compliance; (2) impairs the Airport Authority's financial standing; (3) interferes with contractual commercial relationships; and (4) raises Airport Revenue Diversion complications for the general fund of a municipality.

Background

There are certain municipalities nationwide implementing Ordinances that provide for commercial tenants within the City to forego paying rent, prohibiting evictions, and allowing repayments of rent to be deferred without fee or penalty. In some instances, Ordinances are being extended and include provisions to address tenant harassment.

The problems with the Stop Eviction Ordinances are several-fold:

Obligation to be Financially Self-Sustaining, FAA Grant Assurance 24

Under FAA Grant Assurance 24, public-use federally funded airports are obligated to maintain a fee and rental structure for facilities and services that will make the airport as financially self-sustaining as possible. The Ordinance has the strong potential to interfere with airport compliance with Grant Assurance 24. Any County or City Council action or amendment that puts an Airport Enterprise Fund at risk by allowing the airport commercial tenants to forego paying rent without showing and having confirmed evidence of financial need and without facing any repercussion of eviction, thereby interfering with the airport's ability to comply with Grant Assurance 24 because it directly and significantly reduces the collection of revenues by the airport.

As written, such Ordinances apply not only to the airport, but also to several layers of commercial tenants and subtenants based at an airport. Most airport authorities lease ground and sometimes facilities to one or more large commercial tenants, who in turn, sublease ground and/or facilities to one or more commercial subtenants. An Ordinance that allows all tenants and subtenants to suspend the payment of rent and fees, resulting in multiple layers of withheld rent and fee payments flowing up, with the total rent shortfall falling at the doorstep of the airport. Due to the reduction in operations as a result of COVID-19, almost all public-use airports are struggling to meet their own operating expenses, debt service, and bond obligation requirements. Allowing deferment of rent and fees, without penalty, until an outside date will result in a severe reduction of rent and fees to an airport for 2020 that could otherwise be avoided if not for the leveraging incentives created by such an Ordinance.

In many commercial airport leases, a tenant's gross revenue from subtenants is itself the basis for fees and rent paid to the airport authority. Thus, the revenue to the airport is reduced two-fold; first, subtenants may withhold rent and fees from tenants; secondly, tenants may withhold rent and fees from the airport.

Diversion of Airport Revenue, Grant Assurance 25

An Ordinance pre-emptively takes away and restricts the airport's ability to produce financially self-sustaining revenues in compliance with Grant Assurance 24. Further, it diverts the airport's revenues to non-aeronautical purposes, which is in violation of Grant Assurance 25. FAA Grant Assurance 25 requires all airports to use airport revenues solely for permitted aeronautical purposes, which include operating expenses and development. By suspending payment of what would otherwise be collectible rent and fees, the Ordinance can be construed as a diversion of the airport revenues, exposing the City and the airport to FAA administrative actions (Part 13 and Part 16 complaints) including suspension of federal grants and civil penalties. Such a complaint process may be avoided by providing municipalities' further guidance.

Interference with Airport Authority Financial Standing

Although such Ordinances may have initially intended to provide short-term relief to commercial businesses as the economic recovery from COVID-19 begins, extending an Ordinance to the airport (or other airports), and the overall effect on the financial bottom line of an airport would be quite large. In fact, it places an airport's Airport Enterprise Fund at risk of negative cash flow, and absent the necessary reserves that the Ordinance will decimate, the airport's Airport Enterprise Fund will need to be financially supported by the County or City's General Fund. Even if an airport can withstand a significant shortfall of funds in 2020, the financial status of the airport, and its standing to borrow funds for ongoing and future development projects, will be greatly reduced in the eyes of lenders and bond issuers.

A significant shortfall of revenue will also be reported on the annual financial disclosures that airport authorities must report to the FAA. These financial disclosures are included in the evaluation of an airport's application for federal grant funding for development projects. They were also used as a component in the calculation of the CARES Act funding recently awarded to airports. It is likely that a significant revenue short-fall in 2020, and worse, should a municipality extend without bifurcating the airport's Airport Enterprise operations from such actions, this will negatively affect future qualification for development funds and any future potential CARES-type funding grants.

Interference with Contractual Commercial Relationships

Residential rental properties and airport commercial properties differ in important respects. Airport agreements are not always consistent with traditional off-airport commercial leases and are usually in the form of Use and Occupancy or License Agreements with different legal provisions related to tenancy. Airport agreements generally contain strict deadlines for timely payment but provide an opportunity for cure of breach for late payment.

By contrast, residential rental properties are more likely to be subject to eviction processes in case of non-payment. Airport properties are occupied by tenants who have often invested significant sums in capital development of the property for specific purposes resulting in specific ground lease provisions that limit usefulness to other tenants. Turning over a commercial airport

property to a new tenant is a long process. By contrast, residential rental property is fungible, and occupancy can be easily turned over to new renters.

A master leaseholder at an airport is in an unusual position. It is required pursuant to its lease with the airport to make expensive capital improvements to the leasehold interest, such as building hangars and terminals. To be able to make such improvements, the master leaseholder borrows or finances the improvement required by the airport. As the lender cannot place a lien on the real property of the airport or the improvement, lenders often require a personal guarantee from the principals of the master leaseholder. For this reason, the leasehold interests are more than 30 years in term to allow the master leaseholder to recoup the financing of the improvement and make a modest return. As the master leaseholder is reliant upon the monthly payment from its subtenants at the airport to provide the sufficient cash flow to pay the lender, an Ordinance puts the master leaseholder in an untenable position of not having the needed cash flow, while still being obligated to make the full monthly payment to the lender. Not only does an Ordinance unilaterally change the terms of the lease between the airport and the master leaseholder in violation of the "mutual written consent of both parties," it also interferes with the relationship between the master leaseholder and its subtenants and places the master leaseholder in a position of default with its lender.

Finally, it places principals of the master leaseholder in a position of being personally liable pursuant to the required personal guarantees to the lender as the master leaseholder will be in default with the lender.

Airport leases to tenants, and between tenants and their subtenants, are the result of lengthy negotiations of the specific needs and timeframes of the parties, all of which need to conform to FAA policy. Interfering with commercial lease provisions, even though intended for good reason, may disrupt the commercial provisions for the airport's Airport Enterprise Fund in ways that cannot be fully anticipated. The highly negotiated nature of commercial airport leases and the fact that new tenants for airport properties are not easily found, will encourage airport tenants, and subtenants to negotiate and agree upon any needed unique financial concessions. **We suggest and advise municipalities to recognize the nuances that make airport commercial leases unique, and to permit the airport to work individually with its commercial tenants in establishing COVID-19 relief efforts, including rent relief, without the threat of restricting their rights or the argument such actions are taking.**

Recommendation

For these reasons, application of, and any Ordinance that applies to airports, puts airports at risk for violations of FAA Grant Assurances 24 and 25, as well as potentially jeopardizing the airport's Airport Enterprise Fund covenants, policies, tenant/subtenant lender and bond covenants, and unduly interferes with airport's working directly with its airport tenants and subtenants. Such an Ordinance is unnecessary and ill-advised and should not be applied to airports.