

June 15, 2009

## FAA Re-Authorization Moves Forward

### House of Representatives Passes FAA Re-Authorization Bill

The U.S. House of Representatives passed its version of a long-term FAA re-authorization bill (H.R. 915) on May 21. FAA is currently being funded by a temporary "stopgap" which expires on September 30, 2009. The bill addresses numerous aviation-related matters; NBAA has highlighted the benefits of the bill for general aviation by its inclusion of funding for the development of the Next Generation Air Traffic Control System, also known as "NextGen." The bill would fund NextGen through mechanisms including an increase in general aviation fuel taxes, which had been NBAA's preferred alternative. Before there is a final FAA bill and it becomes law, however, the Senate must craft its own bill and differences worked out with the House. This almost happened last fall, but was derailed at the last moment. Senators involved in this bill have their own priorities, and so the legislative process is likely to continue through the summer.

### TSA Revises Restrictions for Transient Pilots

TSA has enacted a new security directive that allows transient pilots flying into airports with commercial service to not have an airport badge or background check, as was previously required. The directive takes effect June 1 and, instead, requires pilots to "remain close to their aircraft," leaving it only for trips to and from the FBO or airport exit. Full details are pending; due to the sensitive nature of the document ((SD) 1542-04-08G), TSA has not made the full text widely available. At least for now, pilots should continue to call ahead and inquire about security procedures at their destination airports. For more information about the directive from NBAA, see <http://www.nbaa.org/news/pr/2009/20090529-044.php>.

### Regional News Round-Up

The Stafford County Board of Supervisors' decision to cut the personal property tax rate for aircraft based in the county has had dramatic and immediate effects, according to Ed Wallis, the Manager of Stafford Regional Airport. The airport leased four hangars to private aircraft within days of the tax rate being reduced from \$3 per \$100 of assessed value to 10 cents per \$100 on April 21. Two more have since been leased, and four contracts are being reviewed by potential tenants. Thirteen of the 40 personal aircraft hangars remain available. Wallis told the Free Lance-Star that there has been "[i]lots of buzz throughout the aviation community about the tax reduction."



**Maryland Airport** in Indian Head has begun a \$30 million expansion project, largely funded by FAA and the State of Maryland. The project will include improvements to runways, taxiways, and ramp areas. Washington County also is a recipient of FAA Airport Improvement Program funds; a \$2.3 million grant will be used to fund 95% of the costs of a new fire station at **Hagerstown Regional Airport**.



Carroll County expects to hold a public hearing in July on the final environmental assessment report for planned expansions to **Carroll County Regional Airport**. The assessment was requested in order to evaluate if any environmental conditions would prevent the preferred plan of development (which includes a new 6,400-foot runway), and whether any such conditions could be mitigated. The study – which was conducted by Delta Airport Consultants – evaluated eighteen environmental categories including wildlife, wetlands, air quality, and noise.

Once the public hearing has been held and comments obtained from the public, the county Board of Commissioners will vote on whether to proceed to the next phase, which would include permitting, wetlands mitigation, and land acquisition.

## **GUEST VIEWPOINT:**

### ***Three Common Myths About Purchasing and Selling An Aircraft***

*GWBAA is pleased to present the following discussion from Keith G. Swirsky and Kara M. Kraman of GKG Law, P.C.*

You are looking to sell your aircraft and have found a potential buyer. Or maybe you have been thinking about getting an aircraft and have decided that the market is right to buy one. Before you enter into an aircraft transaction, educate yourself about these three commonly held myths so that you can minimize your taxes and maximize the protection of your interests.

#### **Non-Refundable Deposits**

Most people tend to believe that a non-refundable deposit in escrow is as good as a non-refundable deposit in their bank account. The use of escrow agents is standard in most aircraft purchases and indeed escrow agents serve an important and essential function in aircraft transactions. However, it is important to

understand exactly what having money in escrow means when a deal goes bad. Specifically, it is important for the seller to understand that an escrow agent will normally not release a non-refundable deposit to the seller without confirmation from the purchaser that the purchaser does not plan to challenge the seller's assertion of breach of contract.

It is common for the escrow agent to obtain the purchaser's consent before releasing the purchaser's deposit, *even though the deposit is designated as non-refundable in the agreement*. This may sound surprising, but it makes sense from the point of view of the escrow agent; the escrow agent will want to avoid liability in the event there is a dispute over whether or not the purchaser has breached the contract. In short, the

escrow agent will not take the side of one party over another. That said, if the deposit is non-refundable, the facts surrounding the purchaser's breach are unequivocal, and the purchase agreement is completely unambiguous on the issue of breach of contract, the seller should ultimately get to keep the deposit.

This could happen in several ways. The purchaser could consent to the release of all, or perhaps some negotiated amount of the deposit, or, if the escrow agent fails to obtain the purchaser's consent, the escrow agent could interplead the money to the local court. Once the money has been interpleaded to the court, the seller would need to go to court to claim it. If the purchaser does not show up to court to contest the claim, the court would then most likely issue a default judgment in the seller's favor. If the purchaser does contest the seller's right to keep the deposit, the court would then make a determination about who is entitled to the money based on the facts, circumstances and documentation in the case.

One thing is certain: the seller should not treat a non-refundable deposit in escrow as money already in the bank, even if the purchaser has "accepted" the aircraft and agreed that the deposit is non-refundable. To help protect itself in the event of a breach, the seller should ensure that the purchase agreement is very clear on matters relating to the purchaser's breach and forfeiture of the deposit. Further, the seller should attempt to document any circumstances that could give rise to purchaser's breach of contract.

### **Avoiding Sales (and Use) Tax on the Purchase of an Aircraft**

There are several misconceptions regarding liability for sales (and use) tax. It is commonly believed that taking delivery of an aircraft in a state that does not impose

sales tax, using a Delaware entity, or finding a seller that is a retailer and does not collect sales tax effectively avoids the imposition of sales (and use) tax on the purchase. "Technically" the use of the above devices may avoid the imposition of sales tax; however, nothing has been achieved from a state tax liability perspective.

Although sales tax itself is generally only assessed by the state where the transaction occurs (in the case of aircraft, usually where the aircraft is physically delivered to the purchaser), if the aircraft is going to be based (e.g., hangared) in a state other than the one where it was delivered, the state where the aircraft is based may assess use tax. State sales and use taxes are complimentary and are generally imposed at the same rate. "Use tax" is not imposed on the sale transaction itself but rather on the use, storage or consumption of an aircraft within the borders of a state. In other words, even if sales tax is avoided on the purchase of an aircraft, planning for eliminating or minimizing use tax is still needed. To make matters more cumbersome, an aircraft can be "used and consumed" in more than one state, creating a potential for liability for use tax in multiple states.

Although there are some common planning opportunities in many states (discussed below), it is important to realize that each state uniquely applies and interprets its tax statutes. For example, application of a "sale for resale" exemption in two different states may vary significantly, hinging on issues such as minimum or maximum term of a lease, acceleration of tax due on rental payments, and apportionment, just to name a few. Some states will not impose use tax on property that is brought into the state after a certain amount of time, six months for example; other states will not impose use tax on aircraft that are used in commercial aviation (which itself is defined differently by each state); some have trade-

in credits or exemptions for "casual sales;" still other states will look at how many days per year an aircraft is in the state. In addition, state law is constantly evolving, and in these lean economic times, often evolving toward a stricter and more encompassing approach to imposing use tax (and for that matter sales tax) on aircraft to help the state raise revenue.

Despite the many ways in which an aircraft may be subject to tax, it is often possible to reduce, defer or even eliminate the sales and use tax on an aircraft. While there may be exemption opportunities available on the purchase of an aircraft to avoid sales tax, if a buyer intends to base an aircraft in a state that imposes its own sales tax, there is usually no advantage in taking delivery of the aircraft in another state. Advance planning that takes into account not only where the aircraft is purchased, but where it will be used will lead to the best possible results.

### **A "Simple" Transaction Can Be Handled Without an Aviation Tax Lawyer**

Besides the potential to reduce, defer, or eliminate sales and use tax discussed above, the ability to take depreciation deductions, or in some cases, even bonus depreciation deductions, the ability to deduct aircraft operating expenses on the owner's federal tax return, and utilizing Section 1031 of the Internal Revenue Code to effect a tax free exchange, are just a few of the ways good tax planning on an aircraft purchase has the potential to literally save a buyer millions of dollars.

However, saving money on taxes is not the only benefit using an experienced aviation tax and transactions attorney provides. The lawyer will structure a purchase agreement to protect the buyer or seller's interests in case things do not go smoothly and will understand what is commercially standard on a broad range of issues. Of course, no

one ever enters into a transaction thinking it is not going to close, yet everyone knows someone who has been burned by not taking the proper precautions.

One myth that is popular, especially with buyers who are eager to complete the deal and take that first flight, is that if the pre-purchase inspection goes smoothly, it lessens the importance of a well drafted purchase agreement. While it is true the pre-purchase inspection of an aircraft is the most significant aspect of the purchase process, (and if the purchaser "accepts" the aircraft after the inspection, the likelihood of a closing increases greatly), it is still also true that a well drafted purchase agreement clarifies a myriad of issues that are critical to the parties' rights and obligations arising both before and after closing.

While a detailed discussion of the preparation of a comprehensive purchase agreement is not the subject of this article, it is worth mentioning a few important points that are often overlooked by the parties until something goes wrong: (i) whether the purchaser is obligated to accept the aircraft at the conclusion of the inspection or may reject the aircraft for any reason; (ii) whether the seller must correct discrepancies or may choose not to do so; (iii) whether the aircraft has damage history and the definition of "damage" for these purposes; (iv) the responsibility of the parties if the aircraft is damaged prior to closing and the different definition of "damage" for these purposes; (v) how to deal with errors in the specification sheet advertising the aircraft; (vi) international and domestic registration and deregistration issues; (vii) the timing of release of funds out of escrow; (viii) assurance that the taxes and fees on aircraft are paid through closing; and (ix) responsibility for sales taxes.

When it comes to comprehensively documenting an aircraft, or any other purchase transaction, the legal

documentation may never need to be read again if the parties perform in every way as each party expects and requests. So you may ask why it is worth the time and money, and possibly even aggravation to use a lawyer to document a deal? Simple, too often people fail to perform as expected, sometimes through no fault of their own. Before you decide to forgo executing a comprehensive purchase agreement you should ask yourself, what is your tolerance for risk, and do you want to know that if you do end up in a battle, you will be well protected?

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*group's services include Section 1031 tax-free exchanges, federal tax and regulatory planning, state sales and use tax planning, and negotiation and preparation of all manner of transactional documents commonly used in the business aviation industry, including aircraft purchase agreements, leases, joint-ownership and joint-use agreements, management and charter agreements, and fractional program documents. Mr. Swirsky may be reached at the firm's Washington, DC office, 1054 31<sup>st</sup> Street, NW, Suite 200, Washington, D.C. 20007, Telephone: (202)342-5251, Facsimile: (202)965-5725, E-mail: [kswirsky@gkglaw.com](mailto:kswirsky@gkglaw.com).*

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## Upcoming Aviation Events

- **June 20:** Father's Day Fly-In and Antique Automobile Show at Carroll County Regional Airport. For information, please visit <http://www.carrollcountyairport.com/events.htm>.
- **June 20:** "Big Boy's Toys" Open House at Manassas Regional Airport, 10am-3pm.
- **June 23:** International Aviation Club luncheon featuring Roy Kienitz, DOT Under Secretary for Policy, at the Grand Hyatt. For more information, please visit <http://www.iacwashington.org>.
- **June 24:** Committee for Dulles luncheon featuring James E. Bennett, President & CEO, Metropolitan Washington Airports Authority, at the Dulles Airport Marriott. For more information, please visit [http://www.committeefordulles.org/090624\\_lunch.html](http://www.committeefordulles.org/090624_lunch.html).
- **June 24:** James Walsh, Deputy Executive Director of Finance and Marketing at Baltimore/Washington International Thurgood Marshall Airport (BWI), will address the Washington Airline Society at the National Air and Space Museum at 7pm. For more information, please visit <http://washingtonairlinesociety.org>.
- **June 27:** The FAA Safety Team will sponsor a CFI Workshop, Module 3 ("Flight Instructor Refresher Clinic on IACRA and LSA.") at Dulles Aviation in Manassas. For information, visit [http://www.faasafety.gov/SPANS/event\\_details.aspx?eid=25705](http://www.faasafety.gov/SPANS/event_details.aspx?eid=25705).

- **June 29:** Human Factors and Airports Workshop, sponsored by the American Association of Airport Executives, in Alexandria, Virginia. For more information, please visit <http://events.aaae.org/sites/090606/index.cfm>.
- **July 13-14:** American Association of Airport Executives and Airport Legislative 2009 Summer Legislative Issues Conference at the Renaissance Mayflower Hotel. For more information, please visit <http://events.aaae.org/sites/090709/>.
- **July 15-16:** Airport Consultants Council Summer Workshop at the Crowne Plaza Washington National Airport. For more information, please visit [http://www.acconline.org/Content/NavigationMenu/ACCEvents/ACC\\_SWS00\\_RegForm\\_v1.pdf](http://www.acconline.org/Content/NavigationMenu/ACCEvents/ACC_SWS00_RegForm_v1.pdf).
- **July 16:** The Committee for Dulles will sponsor a luncheon on "Tourism in Northern Virginia" featuring Barry Biggar, CEO of Visit Fairfax . For more information, please visit [http://www.committeefordulles.org/current\\_lunch](http://www.committeefordulles.org/current_lunch).
- **July 27-29:** FAA, American Association of Airport Executives, and U.S. Contract Tower Association annual workshop on the FAA Contract Tower Program at the Westin City Center. For information, please visit <http://events.aaae.org/sites/090708/index.cfm>.
- **August 20:** The Committee for Dulles will offer a private tour of The Wright Experience in Warrenton, where replicas of every plane the Wrights built are being constructed. For more information, please visit <http://www.committeefordulles.org/090820wrighttrip.html>.
- **August 24-26:** Airport Council International-North America public safety and security conference at the Ritz Carlton Pentagon City. For more information, please visit <http://www.aci-na.org/conferences/detail?eventId=149>.
- **September 9-11:** Sixth Annual FAA International Safety Forum at the Omni Shoreham. For information, visit [http://www.faa.gov/news/conferences\\_events/2009safetyforum](http://www.faa.gov/news/conferences_events/2009safetyforum).
- **September 29:** Fifth annual GWBAA golf tournament at the Herndon Centennial golf course. More details will be posted shortly.
- **October 3:** Wings, Wheels and Ducks at the Stafford Regional Airport, from 10am until 4pm. For more information, please visit <http://www.staffordrotary.org>.
- **October 10:** 10th annual Culpeper Air Fest, from 10am until 4pm. For information, visit <http://web.culpepercounty.gov/CountyGovernment/Airport/tabid/108/ModuleID/800/ItemID/7/mctl/EventDetails/Default.aspx?selecteddate=10/10/2009>.
- **October 20-22:** NBAA's 62nd annual meeting and convention in Orlando, Florida. For more information, please visit <http://www.nbaa.org/events/amc/2009/>.
- **November 1:** 32nd Gaithersburg Transportation Show at the Montgomery County Fairgrounds. For more information, please visit <http://www.gserr.com/shows.htm>.

- **November 2-5:** Air Traffic Control Association 53rd annual conference at the Marriott Wardman Park. For information, visit <http://www.atca.org/annualconference.aspx>.
- **December 1-3:** International FAA Runway Safety Summit, co-sponsored by the American Association of Airport Executives, at the Omni Shoreham. For more information, please visit [http://www.aaae.org/meetings/meetings\\_calendar/mtgdetails.cfm?MtgID=91107&RecID=754](http://www.aaae.org/meetings/meetings_calendar/mtgdetails.cfm?MtgID=91107&RecID=754).
- **December 3:** Airport Council International-North America international aviation issues seminar at the Fairfax Embassy Row. For more information, please visit <http://www.aci-na.org/conferences/detail?eventId=153>.
- **December 10-11:** Ninth Annual American Association of Airport Executives Aviation Security Summit at the Omni Shoreham. For more information, please visit [http://www.aaae.org/meetings/meetings\\_calendar/mtgdetails.cfm?MtgID=91205&RecID=683](http://www.aaae.org/meetings/meetings_calendar/mtgdetails.cfm?MtgID=91205&RecID=683).
- **January 27:** ABA Forum on Air and Space Law Update Conference at the Ritz-Carlton. For more information, please visit <http://www.abanet.org/forums/airspace/home.html>.

## GWBAA Offers Online Benefits

We continue to add member information for GWBAA's electronic membership directory – <http://www.gwbaa.com/directory.html>. This service is available to GWBAA members at no cost. Please contact Jol Silversmith ([jasilversmith@zsrlaw.com](mailto:jasilversmith@zsrlaw.com)) if you want to post your company's information.

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