



STAFF REPORT

Minor Adjustments to Practice
for Alternative Site Framework

September 2010

General Background

In December 2008, the FTZ Board adopted a staff proposal to modify the Board's practice under the FTZ Act and the Board's regulations in order to make available to FTZ grantees a specific "alternative site framework" (ASF) providing greater flexibility and responsiveness for establishing and managing FTZ sites to serve individual companies' needs. The FTZ Board staff's December 2008 report to the Board contained a brief summary of the ASF proposal, which stated in part:

The ASF involves a change in FTZ Board practice that will allow the grantee to propose sites (subject to the grantee's standard 2,000-acre activation limit) within a defined service area. The 2,000-acre limit would be specifically apportioned among approved sites -- for example, authority to activate 200 acres within a 900-acre industrial park site. Unapportioned acreage from the overall activation limit would remain in reserve for future sites.

Under the ASF, a grantee would propose in an application to the FTZ Board:

- 1) Its service area (typically a list of counties); and,
- 2) "Magnet" site(s) -- a magnet site is a site intended to draw future users (as opposed to a "usage-driven site" that is designated to meet a specific user's need). The grantee would indicate the boundaries of any magnet site and the amount of the 2,000-acre activation limit to be apportioned to the site.

Appendix 1 of the staff's report contained additional details regarding the final staff proposal adopted by the Board, including the following:

3. The "service area" within which the grantee intends to be able to propose general purpose FTZ sites (e.g., specific counties, with documented support from new counties if the service area reflected a broader focus than the FTZ's current area served) using its standard 2,000-acre activation limit. The term "service area" applies a name to a concept which already exists in certain approved FTZ applications in which a grantee organization has named the localities it intends to serve. It should be noted that any service area must meet the "adjacency" requirement of the FTZ Board's regulations (60 miles/90 minutes driving time from CBP Port of Entry boundaries). A grantee's proposed service area would need to be consistent with enabling legislation and the grantee organization's charter...

Appendix 2 of the staff's report ("Discussion of Elements of Final Proposal") included the following language:

Also, although the need for a grantee to document support from counties within its proposed service area is most critical when counties were not previously served by the zone, the standard practice should be to require evidence of support from all counties within a proposed service area. The age and/or limited scope of many existing FTZ sites

means that a county's past support for one or more sites may not be indicative of its support for a proposed broader "service area" within the county.

August 2010 Proposal

In August 2010, the FTZ Board staff published a Federal Register notice seeking public comment on two proposed adjustments to the Board's ASF practice (see notice at Appendix A). The two proposed adjustments were:

1) [T]o eliminate the current requirement that each site of a participating zone be assigned a specific limit on the amount of space that can be activated with U.S. Customs and Border protection at that site. The original intent of site-specific activation limits was to help ensure compliance with the overall 2,000-acre activation limit for each general-purpose zone project. However, feedback from grantees indicates that the site-specific activation limits are cumbersome in practice. This is particularly true because a grantee could face the burden of requesting changes to site-specific activation limits based on unforeseen circumstances in the future.

In the period since the adoption of the ASF proposal, the FTZ Board staff has been developing a system (the Online FTZ Information System -- OFIS) to make available via the internet a range of information about every FTZ site. OFIS will include user accounts for grantees so that a grantee will be able to update the information regarding the amount of space activated at its sites as new activations (or deactivations) occur. Given that the OFIS functionality to display FTZ site information on the internet should be available for general use within a few months, the Board staff is now proposing that the tracking of activated acreage via OFIS be adopted as a substitute for the site-specific activation limits. For any zone already approved under the ASF or with a pending application, the site-specific activation limits contained in the grantee's application to reorganize under the ASF would simply no longer apply (with only the standard 2,000-acre activation limit for each general-purpose zone continuing to govern overall activation within the zone).

2) [T]o allow more flexibility regarding application requirements for letters from jurisdictions (ordinarily counties) within the proposed service area. The Board staff recognizes the challenge that certain grantees have faced in obtaining "support" letters from jurisdictions, particularly given the standard language for such letters initially developed by the staff as part of the implementation of the ASF. As a result, the Board staff proposes to allow the submission in ASF reorganization applications of letters from the jurisdictions which simply (1) acknowledge that the appropriate official(s) of the jurisdiction is aware of the proposal to include the jurisdiction in the service area of the zone in question and (2) present any views of the official(s) of the jurisdiction on the proposal. This proposed modification also recognizes that the regulatory standard (15 CFR 400.23(a)) applicable to the review of such applications includes a range of criteria, one of which is the "views of State and local public officials."

Comments Received

In response to the Federal Register notice inviting public comment, submissions were received from a number of organizations (see Appendix B). As a general matter, the comments were all supportive of the proposed changes. However, several commenters also raised other aspects of the Board's ASF practice which they believe should be modified to make the ASF function better and to better serve the needs of businesses engaged in international trade. The comments fell into the following categories:

1) Proposal to eliminate allotment of 2,000-acre activation limit to individual sites

All commenters supported this proposed change, indicating that it would reduce burden on grantees, with the current allotment practice being unnecessary and even "contrary to the spirit of the ASF." Some commenters also requested confirmation that the proposed change would extend to already approved ASF grantees or those with applications pending which, as submitted, contained site-specific activation-limit allotments.

2) Proposal to allow more flexibility for letters from jurisdictions within the service area

All commenters also supported this proposed change. One commenter stated that "this flexibility would be very beneficial in certain instances" and added "[i]f there is ever a circumstance where a Grantee is not able to secure a service area letter from a County due to a lack of response, [we] would like clarification as to exactly what would meet the new proposed requirements." In addition, two commenters raised the related issue of what documentation could be submitted for an application proposing to serve a particular county when the state's structure does not include governmental bodies at the county level.

3) Requests for more flexibility on defining the limits of a service area

Several commenters stated that an additional change could be warranted pertaining to the FTZ Board staff's current practice of requiring an exact geographic delineation of the limits of a service area. These commenters ask that, at or near the limits of "adjacency" to a CBP port of entry, the Board staff allow the limits of the service area to be left undefined (with the matter of the adjacency of specific proposed sites in the future to be handled at the time that those sites are proposed).

4) Request that the definition of Usage-Driven site take into account rural situations

One commenter indicated that the existing definition of Usage-Driven site appears to have the effect of discriminating against some rural areas by limiting Usage-Driven designation to sites that are portions of industrial parks or business districts.

Discussion

1) Proposal to eliminate allotment of 2,000-acre activation limit to individual sites

As noted above, all commenters supported this proposed change. The change is clearly in sync with the spirit of the ASF by further simplifying the Board's practice. Specifically, it replaces a relatively cumbersome requirement to allot a grantee's 2,000-acre activation limit in advance with a procedure whereby each grantee approved under the ASF uses the FTZ Board's automated system to update the activation information for sites only when actual changes take place at those sites. As such, the revised approach should function better at accomplishing the original goal: To help ensure that activated space within a given zone does not exceed the 2,000-acre limit (unless the FTZ Board has given approval in advance to do so).

2) Proposal to allow more flexibility for letters from jurisdictions within the service area

The comments on this proposed change warrant a clarification of the intent of this part of the ASF practice. In developing the initial ASF proposal, one goal of the FTZ Board staff was to ensure that counties (the default level of jurisdiction used to define a service area, although a different level of jurisdiction could be used by applicants) would not be included in a zone's service area without the appropriate county officials being aware of their counties' proposed inclusion. The ASF proposal reflected the simplest and most cautious approach on that question, namely requiring "letters of support" from the counties in question. However, a year and a half of experience with various zones' actual development of ASF applications has revealed that there may be other methods available to accomplish the same goal while offering flexibility to address a broad range of circumstances.

Evaluating other methods is important for two reasons. First, in some instances it may not be possible for a grantee to obtain any response whatsoever from officials of certain counties (or there may simply be no government at the county level). Second, the initial proposal's focus on "letters of support" could give a mistaken impression with regard to the regulatory standard applicable to the Board's review of all applications pertaining to general-purpose zones. Specifically, section 400.23(a) of the Board's regulations delineates five criteria for the Board to apply in evaluating such applications. The third of those criteria includes "the views of State and local public officials involved in economic development." Therefore, the "views" of such public officials is only one factor for the Board to consider, and the Board's ASF practice should not include any requirement that could be seen as indicating otherwise.

In this context – and given the variety of different situations and local-government structures that exist across the country and that can have an impact on certain grantees' ASF applications – it appears that flexibility is warranted. The key for any more flexible practice would be to ensure that appropriate county officials are able to provide their views to the FTZ Board regarding each ASF application. Consistent with that goal, grantees should be able to have two general options:

a) Submitting letters from appropriate county officials acknowledging the proposed inclusion of their counties in the service area of the zone, and presenting their views on the proposal; or,

b) In the absence of letters from appropriate county officials, submission of evidence that appropriate officials of the affected counties were notified of the proposal and were provided information on how they could submit comments to the FTZ Board regarding the proposal. For this option, a grantee should be required to use standard language provided by the FTZ Board staff, thereby ensuring that clear explanation and instructions were given to appropriate officials of the affected counties.

As noted above, there is also the question of what a grantee should do in the absence of governments at the county level. In such circumstances, the potential burden of contacting appropriate local officials across the proposed service area would increase exponentially. In that context, the publication of local public notice regarding the application – as is already required by the FTZ Board’s regulations – should allow a full range of local public officials to be informed of the application and to submit comments if they wish to do so. However, if a grantee will be relying on the publication of local public notice due to an absence of governments at the county level, the grantee should explain that situation within the body of the “application letter” signed by an authorized grantee official.

In sum, any of these options should function properly in the circumstances described to ensure that public officials are informed of an ASF proposal so that they can present their “views” (15 CFR 400.23(a)(3)) to the Board for consideration.

3) Requests for more flexibility on defining the limits of a service area

The comments regarding difficulties in defining the boundaries of a service area at or near the limits of adjacency to a CBP port of entry pertain to a matter of practice by the FTZ Board staff within the framework adopted by the Board for the ASF. Those comments also reflect a reality already seen in several ASF applications submitted to the FTZ Board. The FTZ Board staff’s practice has been to require clear geographic definition of all portions of a proposed service area. That requirement is easily met when an entire county is adjacent and is proposed for inclusion in a service area. However, when only part of a county falls within the adjacency limits, the grantee has been required to indicate clear geographic limits – such as a road or series of roads – to define the portion of the county that is to be included in the service area.

The perspective expressed by the commenters is understandable, and the type of flexibility they propose would simplify the process of developing an application to reorganize a zone under the ASF. At the same time, two of the key goals of the ASF are simplicity and predictability. Under the FTZ Board staff’s current practice, an approved service area has – by definition – already had any questions regarding adjacency vetted prior to approval of the application proposing that service area. The commenters effectively propose to increase flexibility at the application stage by deferring determinations regarding which portions of some counties meet the adjacency requirement until minor boundary modifications (MBMs) are proposed for Usage-Driven sites in those counties. As such, the proposal does not simplify practice under the ASF but merely shifts burden to a different stage of the ASF process. Further, deferring determinations on adjacency for part of a service area would add complexity – by creating a two-tiered service area, with certain counties fully vetted but other counties only partially vetted (*i.e.*, lacking any definition regarding the adjacent portions of those counties) – and would decrease predictability for any

companies located in counties for which determination of the adjacent portion of the county had been deferred.

In sum, the commenters' goal of reducing burden at the application stage is understandable and, in one sense, laudable. However, the benefit of such a modified approach appears to be more than offset by the following negative impacts: increased complexity (through the need for the grantee and the Board staff to keep track of a two-tiered service area); increased burden at the MBM stage (through the need to resolve the adjacency question for a given proposed site at that stage); and reduced predictability (because companies located in counties for which the adjacent portion had not yet been determined would not know whether they could pursue a Usage-Driven MBM to gain FTZ designation). As a result, it is appropriate at this point for the Board staff to continue to require that an application to establish or reorganize a zone under the ASF contain a proposed service area that is clearly delineated and that entirely meets the adjacency requirement (so that Usage-Driven MBMs may later be proposed anywhere in the service area with any questions of adjacency having already been vetted at the time that the service area was approved by the FTZ Board).

4) Request that the definition of Usage-Driven site take into account rural situations

The comment regarding the existing definition of a Usage-Driven site brings to light a potential disparate impact of which the FTZ Board staff had previously been unaware. In the original ASF proposal and resulting staff report, Usage-Driven sites were discussed in terms such as "designation of specific portions of industrial parks or business districts." The framing of the discussion in that manner reflects the fact that it appeared likely that companies' locations to be proposed for Usage-Driven FTZ designation would fall within industrial parks or business districts. Further, such industrial parks or business districts have traditionally been the most common contexts for general-purpose FTZ sites. However, the comment received during the just-ended comment period raises a legitimate concern. When appropriate zoning is in place (most commonly commercial or industrial), the types of activity that would be conducted at a Usage-Driven site in a rural context (*i.e.*, not within a larger industrial park or business district) are not inherently different from the types of activity conducted at urban or suburban Usage-Driven sites (which generally will exist within larger industrial parks or business districts). As with all general-purpose FTZ sites, warehousing and distribution activities can be conducted without additional authority from the FTZ Board while any manufacturing activity would require advance approval from the Board. In sum, there does not appear to be a basis to define a Usage-Driven site as existing within an industrial park or business district. The core Usage-Driven requirements of linkage to a single company (as operator or user) and existence within the Service Area should be the defining characteristics in order to ensure equal opportunities under the ASF for urban, suburban and rural communities.

Recommendations

Based on the discussion above, the FTZ Board staff recommends that the FTZ Board adjust its ASF practice to:

- 1) Eliminate the site-specific allotment of a given grantee's 2,000-acre activation limit (including for FTZs already reorganized or with applications pending for reorganization under

the ASF). Replace the site-specific allotment with a procedure – once the online automated system (OFIS) is available and appropriate training has been provided to grantees – whereby the grantees use the OFIS online system to update information on each site’s activated space.

2) Allow two general options for documentation pertaining to jurisdictions (ordinarily counties) within the service area:

a) Submitting letters from appropriate county officials acknowledging the proposed inclusion of their counties in the service area of the zone, and presenting their views on the proposal; or,

b) In the absence of letters from appropriate county officials, submission of evidence that appropriate officials of the affected counties were notified of the proposal and were provided information on how they could submit comments to the FTZ Board regarding the proposal. For this option, a grantee should be required to use standard language provided by the FTZ Board staff, thereby ensuring that clear explanation and instructions were given to appropriate officials of the affected counties.

In the absence of governments at the county level, the publication of local public notice regarding the application should allow a full range of appropriate local public officials to be informed of the application and to submit comments if they wish to do so. However, if a grantee will be relying on the publication of local public notice due to an absence of governments at the county level, the grantee should explain that situation within the body of the “application letter” signed by an authorized grantee official.

3) Maintain the current practice with regard to service area (*i.e.*, for any county for which only partial inclusion is proposed, require that the portion to be included be defined with specificity at the time of the ASF reorganization application).

4) Clarify that a site can be designated as Usage-Driven so long as the site falls within the grantee’s service area (*i.e.*, meets the standard general-purpose FTZ adjacency requirement), has appropriate zoning (*i.e.*, can accommodate the types of uses ordinarily associated with general-purpose FTZ activity) and is tied to a single operator or user’s use.

Conclusion

For the reasons discussed in this report, adoption of the recommendations listed above should improve the Board’s ASF practice and further enhance access to the FTZ program’s competitiveness tools for U.S.-based operations.