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Airport "Through the Fence" operations and
Residential Airparks at Publicly Funded Airports
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AOPA

Over the past several years, members have contacted the Association with questions regarding Through-the-fence operations at public use airports. However, since the General Accounting Office (GAO) released a report[1] critical of the Federal Aviation Administration's (FAA) failure to adequately oversee airport land use, the FAA has implemented an active program of conducting land use inspections at obligated airports. With these increased inspections, the FAA has identified (and continues to discover additional) airports that they believe are not following federal guidance on land use. The Association is currently experiencing an increase in the frequency of issues surrounding land use and through the fence activity at publicly funded airports that are grant obligated to the FAA. Some FAA regions are more aggressive in seeking resolutions to this issue than others and actually prohibiting Through The Fence access to the airport. Sponsors that do not prevent access from off-airport property are having their federal grants withheld or denied. If an airport is found be in non-compliance with federal grant obligations, the FAA will direct the airport sponsor to develop a "corrective action plan" to resolve the issues.

Association members are squarely on both sides of this issue. Some favor through the fence access to the airport (most of those are members who own off-airport property or existing structures off-airport) while members who are located on the airport paying the airport's current rates and charges, do not necessarily favor off-airport access to the airport since they believe the through the fence operator is not adequately funding the airport; especially in cases with the TTF access is legally deeded with little or no access fee paid to the airport.

There can potentially be some positives for the airport and members with a properly structured and FAA approved access agreement that provides appropriate financial support to the airport. However, while the FAA does not have legal authority to actually prohibit such uses, the agency has historically "strongly discouraged" through the fence access to a publicly funded airport for a number of reasons specific to federal grant assurances.

What is a Through the Fence Operation?

Generally speaking, a Through the Fence (TTF) operation is defined by the Federal Aviation Administration (FAA) as any activity or use of real property of an aeronautical or non-aeronautical nature that is located outside (or off) of airport property but has access to the airport's runway and/or taxiway system. Airport property is property owned by the airport sponsor and shown on an FAA approved Airport Layout Plan (ALP). Through the Fence operations occur from property that is immediately adjacent to the airport but which is owned by

[1] GAO Report RCED-99-109

corporations, businesses or private parties. These properties are not under control in any manner by the airport sponsor.

The FAA views Through the Fence access as a privilege and not a right. Under existing federal law, there is no requirement for a public airport sponsor to provide access to the airport from private property adjacent to the airport.

The FAA officially defines[2] Through the Fence as:

> " Through-the-fence operations are those activities permitted by an airport sponsor through an agreement that permits access to the public landing area by independent entities or operations offering an aeronautical activity or to owners of aircraft based on land adjacent to, but not part of, the airport property. **The obligation to make an airport available for the use and benefit of the public does not impose any requirement for the airport sponsor to permit ground access by aircraft from adjacent property.**" [emphasis added]

Through the Fence applies to PROPERTY and not INDIVIDUALS. Individual activities such as independent aircraft mechanics and flight instructors are addressed very specifically in the FAA Advisory Circular on Minimum Standards for Commercial Activities[3].

Types of Through the Fence Arrangements

There are several different types of through the fence operations. The first is an airpark or residential environment where private parties construct a residence most often with an aircraft hangar and are provided access to the airport infrastructure.

The second is a private party or company that owns land next to the airport with access to the airport infrastructure and constructs facilities with the intent of providing commercial aeronautical services to the public that often compete with existing on-airport businesses. And the third is a business that owns property adjacent to the airport with access to the airport infrastructure but which does not provide any commercial services to the public and whose aircraft use of the airport is incidental to such business.

The Agreement

Access to the public airport is provided primarily through two different mechanisms. One is what is referred to as "deeded access." This means that the adjacent property owner, when purchasing the property was granted a real estate deed that very specifically outlined the property owner's right to access the airport from his adjacent property. Deeded access is a legal right of passage governed and bound by state laws in the state where the transaction occurred. In some cases, deeded access does not have any fees attached for access to the airport. It is more of a property "right." Deeded access is also referred to as an easement legally attached to the property deed recorded with local government agencies.

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[2] Advisory Circular 150/6190-7 (8-28-06) – Minimum Standards for Commercial Aeronautical Activities, page 14

[3] Advisory Circular 150/6190-7 (8-28-06) – Minimum Standards for Commercial Aeronautical Activities page 6 section 1.3 Minimum Standards Apply By Activity 1.3a and 1.3b

The second mechanism is through an access agreement. This is a legal document entered into between the specific parties much like a lease. These agreements contains the terms and conditions associated with granting access to the public airport. Access agreements may or may not have an annual fee associated with granting the access.

Since at least 1989, the FAA has actively discouraged through the fence agreements at publicly funded airports. The FAA Order 5190.6A, also known as the Airports Compliance Handbook states as an agency position of the subject[4]

> "As a general principle, FAA will recommend that airport owners refrain from entering into any agreement which grants access to the public landing area by aircraft normally stored and serviced on adjacent property. Exceptions can be granted on a case-by-case basis where operating restrictions ensure safety and equitable compensation for use of the airport."

The FAA's policy has not changed. What has changed is a mandate from Congress.

As the FAA has worked to comply with this Congressional guidance[5] and actively pursue additional airport land use inspections, the agency has broadened their examination of land use surrounding publicly funded airports past the federal mandate. The FAA has begun to inventory Through The Fence access at airports and identified a number of publicly funded, public use airports that they believe are in violation of certain federal grant assurances. The law also requires the FAA to submit a report to Congress annually that lists airports that are not in compliance with these federal grant obligations and the corrective actions planned to bring the airport back into compliance with federal grant obligations. This is an issue extremely important to AOPA and the health of public use airports that are supported financially by residential airparks adjacent to the airport.

Federal Grant Obligations and the Compliance Program

When the sponsor of an airport that is eligible to receive federal funding under the FAA's Airport Improvement Program (AIP) accepts federal funding, the airport sponsor is required to execute a contract with the FAA. This contract includes thirty-nine (39) Grant Assurances – a series of performance metrics – that the airport sponsor agrees to abide by in operating the airport. Grant Assurances are codified in federal law[6] and can be found on the FAA's web site[7].

Major components of the FAA's Grant Assurances include the following subject areas:

- Prohibition of exclusive rights
- Use of airport revenue
- Proper maintenance and operation of airport facilities
- Protection of approaches
- Keeping good title of airport property
- Compatible land use
- Availability of fair and reasonable terms without unjust discrimination

[4] FAA Order 5190.6A, October 1, 1989 at section 6-6 paragraph d – Agency Position
[5] AIR-21 (HR 1000) section 737. (Public Law 106-181) and codified as USC Title 49 § 47131
[6] United States Code (USC) Title 49 § 47107 (a)
[7] http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/

- Adhering to the approved airport layout plan
- Self-sustainability
- Sale or disposal of Federally acquired property
- Preserving rights and powers
- Using acceptable accounting and record-keeping systems
- Compliance with civil rights requirements

Congress has also provided the FAA with a mandate and the ability to "protect the federal investment" and to ensure that an airport sponsor abides by these assurances through penalties ranging from withholding future grants to implementing legal action through civil actions against the airport sponsor both administratively and in the federal judicial system. The FAA has a statutory mandate to ensure that airport owners comply with these assurances.[8] This is the FAA Grant Compliance Program. An overview of the FAA Compliance Program can be found on the agency's web site[9].

Grant Obligations that apply regarding Through The Fence Operations

Of the 39 federal grant assurances, in most cases, the FAA typically focuses on 4 or 5 assurances when reviewing Through The Fence issues. At the same time though, different FAA Regional Airport Division offices are applying varying interpretations of different grant assurances to Through the Fence access issues. The assurances most often cited generally by the FAA during investigation of Through the Fence access include:

Grant Assurance # 5 – Preserving Rights and Powers

a. "It [sponsor] will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary."

<u>It is important to note that Assurances apply only to property owned and controlled by the airport sponsor</u> as depicted on the FAA approved Airport Layout Plan (ALP). Off-airport, Through the Fence facilities do not have the same protections as those who are located on actual airport property. As such, rules, regulations and operating requirements do not apply to TTF operators. In actuality, the airport sponsor has no control or power over those off-airport properties unless an access agreement has been executed by the parties that provide such control to the airport sponsor. By not having the ability to control TTF operators, the airport sponsor may be viewed by the FAA as having subrogated its responsibility and rights and powers.

Grant Assurance #21 – Compatible Land Use

"It [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 the

[8] See 49 USC § 40101, 40103(c), 40113, 40114, 46101,46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d) and 47106(e)

[9] http://www.faa.gov/airports_airtraffic/airports/airport_obligations/overview/

> 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 respect to the airport, of the noise compatibility program measures upon which federal funds were expended."

Since 1982, the FAA has emphasized the importance of avoiding the encroachment of residential development on public airports, and the Agency has spent more than $1.8 billion in Airport Improvement Program (AIP) funds to address land use incompatibility issues. A substantial part of that amount was used to buy land and houses and to relocate the residents.

The FAA's policy on compatible land use adjacent to a publicly funded airport was further codified legally in a Part 16 ruling[10] issued January 19, 2007. This Directors Determination, at page 42, ruled:

> "The FAA generally discourages residential airparks adjacent to airport property because such airparks can create a compatible land use problem, especially with noise compatibility and zoning issues, in the future. Grant assurance 21, Compatible Land Use, requires airport sponsors to take appropriate action, 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 taking off of aircraft. The FAA recognizes residential development adjacent to airport property as an incompatible land use."

The determination went on to state, in relevant part:

> "In this case, the Respondent not only failed to object to establishing the residential airpark, but also is actively involved in promoting the development. The Respondent made airport property available to the developer of the airpark….. Having residential homes adjacent to the airport is an incompatible land use. The Director finds the Respondent is in violation of grant assurance 21, Compatible Land Use, by allowing and promoting the development of a residential airpark adjacent to the airport."

In some cases, the development of residential properties adjacent to the airport actually creates obstructions to the airport and associated Part 77[11] surfaces, airport Runway Protection Zones (RPZ) and Obstacle Free Areas (OFA) as required by the FAA.[12] Such impacts have a potential negative impact on the full utility of the airport as well as creating potential hazards to air navigation.

Another thought concerning residential development surrounding a public use airport is that such uses, if approved by an airport sponsor, will make it much more difficult or even impossible for the airport sponsor to reject other proposed residential development surrounding the airport. Those developments may not be "airport friendly" developments.

Grant Assurance #22 – Economic Nondiscrimination

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[10] M. Daniel Carey & Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board Docket No. 16-06-06

[11] 14 CFR Part 77.25. Civil airport imaginary surfaces. These surfaces exist to provide an obstruction free environment around an airport. Penetration of these surfaces by an obstruction may adversely affect the airport by reducing usable runway length, increasing instrument approach minima, etc.

[12] FAA A/C 150/5300-13 Change 10 – Airport Design Handbook

> h. "The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport."
>
> i. "The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

In a number of TTF agreements, the off-airport operators gain access to the public use airport without paying a fee to the airport for that access. In most cases, the TTF access has been granted by a real estate easement granting the fee-less access. At the same time, aircraft operators based on the airport property are subject to the airport sponsors rates and charges. Lack of a reasonable fee structure for access to the airport can create economic discrimination against the on-airport tenants. Off-airport individuals have an economic advantage in violation of grant assurances.

Grant Assurance #24 – Fee and Rental Structure

> "It will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sufficient as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the federal share of an airport development, airport planning or noise compatibility project for which a grant made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act of the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport."

The Fee and Rental Structure assurance requirement has led to a number of law suits against airport sponsors when the sponsor has attempted to implement access fees for TTF access to a publicly funded airport. While the TTF operators have no right under federal assurances, they have brought suit in state courts to prevent implementation of charges for access to the airport – especially when access was granted to them by real estate deed easements. On airport tenants have often been forced to absorb the costs of these expensive legal proceedings. Portage County, OH and Addison, TX airports are examples.

Additionally, in some cases, on airport tenants have brought formal complaints to the FAA under FAR Part 16 since they have had to pay fees that are not levied on TTF operators.[13]

Additional assurances may apply in some situations including Assurance# 19 – Operation and Maintenance, Assurance# 20 – Hazard Removal and Mitigation and Assurance #23 relating to Exclusive Rights.

The Application of FAA Policy on Through the Fence Operators

<u>If an airport is not federally grant obligated</u> – meaning that past obligations have expired; the airport has never accepted any FAA airport development funding; the airport is not bound by any federal surplus property Quit Claim Deed restrictions – Through The Fence operations do not fall under the jurisdiction of the FAA in any manner.

[13] See FAA Docket No. 16-06-01 and Docket No. 16-06-06

However, if the public use airport (whether publicly or privately owned) is obligated to federal grant assurances, then the FAA indeed has legal authority to become involved with the airport sponsor in working to develop a solution that is in the best interest of the airport.

The FAA estimates that there are approximately 50 publicly funded, grant obligated public use airport that are affected by the Agency's policies on Through The Fence operations which covers both residential and commercial developments on property adjacent to the publicly funded airport.

In fact, the Agency has indicated on numerous occasions that they are not opposed to residential airparks at private use airports since these airports are operated for the benefit of the private owners. At the same time, the Agency has indicated that a public airport receiving Federal financial support is different because it operated for the benefit of the general public.

The FAA strongly discourages (and as noted previously, some regions outright prohibit) TTF operations because they claim to make it difficult for an airport operator to maintain control of airport operations and allocate airport cost to all users. TTF arrangements also can complicate the control of vehicular and aircraft traffic.

In any event, the local FAA Airport District Office (ADO) with oversight responsibility for the particular airport should be consulted BEFORE any TTF agreement is approved or modified. Negotiated access agreements should, in the eyes of the FAA, be for a finite period of time rather than perpetual in nature; providing the airport with the flexibility to terminate agreements if airport rules, regulations or policies are not met or unsafe conditions exist.

Potential Resolution Strategies to the FAA Policy.

First, it is important to understand that there is no federal law, or FAA policy that requires an obligated airport sponsor to allow TTF operations.

There are a number of possible solutions which might potentially be implemented to resolve or mitigate FAA concerns. It is important that the FAA play an active role in seeking any resolution regarding off-airport access to the publicly funded airport. Each identified TTF issue should be negotiated and resolved on an airport by airport basis. One size does not fit all.

In July 2009, AOPA wrote to the Acting Associate Administrator of Airport at FAA in Washington, DC strongly encouraging the agency to work closely with airport sponsors and stakeholders while at the same time being flexible in seeking a resolution to the agency's concerns regarding TTF access.

It is important to note that, with the exception of airport revenue use compliance issues, the agency's only recourse when a publicly funded airport is found to be in noncompliance with grant assurances, is to deny future funding to the airport sponsor.

1. Discontinue airport eligibility for receiving federal AIP airport development funding

Probably the most effective strategy is to withdraw from the AIP development program. However, at that point, all future development projects will fall squarely on airport tenants, business and TTF operators to fund.

This is the case in Oneida County, TN., where Oneida County, the airport's sponsor, is proposing to develop a high-end residential component adjacent to the airport with access to a taxiway on the airport. The FAA has advised the county that such a development would jeopardize future federal funding. Instead, the county has chosen to withdraw from the program. However, since grant assurances normally have a 20-year obligation from the date of the last grant, the agency may not accept this option as a "final" resolution to a current TTF situation. Even so, with the exception of the FAA Policy and assurance relative to Revenue Diversion, the agency's enforcement ability would indeed be limited to refusing future grants.

Sand Point, ID also chose to remove the airport from future FAA grant eligibility and maintain their TTF access to the airport.

2. Establish economic uniformity between TTF and On-airport users

All stakeholders on the airport and off airport operators should be involved with the airport sponsor in developing a rates and fee structure (including an access fee) that brings economic parity to all parties with access to the publicly funded airport. At those airports where no fee is charged for TTF access to the publicly funded airport, work with impacted parties to develop a structure acceptable to the FAA. The sponsor of the Portage County Airport attempted to establish comparable fees for TTF operators as those already imposed on on-airport tenants. The airport's efforts were met with a series of lawsuits in State court, which upheld the TTF operators "deeded access" to the airport without financial compensation. Thereafter, in order to keep the airport open and solvent, the sponsor implemented a Airport Use Fee based on size of aircraft and number of annual operations broken into two Categories. An on airport tenant brought a formal complaint before the FAA claiming economic discrimination.[14] The FAA upheld the validity of the fee as reasonable.

3. Modification of access agreements and/or deeded access easements

Modify any existing agreements or easements that provide access to the public airport so that TTF operators are legally bound to follow all airport procedures, rules and policies to include Minimum Standards. The application of a uniform "fee for access" to bring fiscal parity to both on-airport and TTF operators would be a part of these modifications. Additionally, residential property sales should include avigation easements recorded on property deeds named in favor of the airport.

4. Avoid any expansion of TTF access and facilities

The FAA has at times been willing to "accept", although reluctantly, existing residential airpark developments, as they exist in number and size on a specific date at a publicly funded airport provided that the controlling entity enters into an agreement with the FAA that will prevent any expansion of the airpark or add additional housing development from being built on the property. At the same time, the FAA will look to the airport sponsor to address any fiscal disparity with on-airport tenants and to ensure the airport has a level of control of the access.

5. Removal of obstacles

If a TTF facility has been deemed an obstacle to air navigation under the Part 77 process, it is likely that the mitigation measure has fallen to the airport in the form of higher traffic patterns,

[14] See FAA Docket No. 16-05-14 R/T-182 v Portage County Regional Airport Authority

changes to traffic pattern flow or direction, or the raising of airport approach minima; sometimes to a height that may make an IFR approach no better than a VFR day approach.

The FAA's only "legal" recourse in mitigating the impacts of a hazard determination is to penalize the airport.

Any off-airport development should comply fully with the obstruction evaluation process and not pose a safety hazard or hazard to air navigation to other aircraft operating at the airport.

6. A change in federal law covering FAA Grant Assurances.[15]

Changes to the FAA grant assurances would likely be met with some significant challenges especially relating to Assurance #21 – Compatible Land Use. If changes were made to allow residential airpark development adjacent to a publicly funded airport, such change would severely hamper or even potentially eliminate the agency's ability to object to an airport sponsor's approval of a residential development in close proximity to a public airport that did not have airport access.

One of the biggest challenges to public use airports is an airport sponsor's approval of residential development near an airport. In most cases, when these are constructed, the new residents complain to city and county officials about noise emanating from the airport and call for restriction or curfews at the airport.

Another factor to consider is that some states already have statutes on the books that discourage or even prohibit residential development within a certain distance from the airport.

Note again that none of this applies IF the public use airport, whether privately or publicly owned, has not accepted federal grant monies or does not intend to seek federal airport development funding.

For more information contact AOPA's Airports and State Advocacy office at 301-695-2200.

[15] United States Code title 49 § 47107 provides the legal basis for FAA Grant Assurances

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July 1, 2009

Ms. Catherine Lang
Acting Associate Administrator, Airports
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Dear Ms. Lang:

The Aircraft Owners and Pilots Association (AOPA) represents the general aviation interests of more than 415,000 members, more than two-thirds of the nation's pilots. On behalf of our membership, AOPA is committed to ensuring the future viability and development of general aviation airports and their facilities as part of a national transportation system.

AOPA members are a passionate group of aviation enthusiasts spanning a cross section of airport users from the recreational flyer to the small business owner routinely using his personal aircraft for transportation to and from destinations across the country.

I recently met with the Federal Aviation Administrations' (FAA) Manager of Airports for the Northwest Mountain Region to discuss through the fence issues which has been at the forefront of our members concerns in that part of the country. Our understanding is that the FAA is attempting to conduct an inventory and develop a corrective action plan to eliminate all residential through the fence operations at public use airports with Airport Improvement Program (AIP) funding investments.

AOPA recognizes the need for the FAA to conduct a thorough analysis of through the fence activities and to establish a corrective action plan to establish parity among users and ensure rights and powers of the airport sponsor are preserved. However, we are concerned with the broad brush application of a one size fits all approach to residential through the fence activities and would strongly recommend the FAA seek input and collaboration with the aviation industry prior to a written agency policy on through the fence operations.

Of specific concern to AOPA members is the agency's intent to completely eliminate all through the fence operations that currently exist. Based on the correspondence and corrective action plans the agency has approved, airport sponsors are being required to eliminate through the fence access at the end of an agreement term or future AIP funding will be in jeopardy. Such is the case at several airports currently within the northwest mountain region.

While we understand the FAA has discouraged residential through the fence for many years, there is no written policy guidance or change that the industry is aware of that would require an airport sponsor to completely eliminate residential through the fence operations. It appears that the flexibility the agency once adopted in looking at through the fence operations on a case

by case basis has been eliminated. Without full consideration of the legal consequences, some within the agency have made the point that by forcing the elimination of through the fence access upon a property transfer where deeded access or avigation easements exist could be considered a federal taking of property.

In many ways, residential airparks or hangar homes can provide security and economic benefits to the airport and support an overarching goal of helping the airport become self sustaining. In fact, Independence Airpark in Oregon is a stellar example of the economic benefit the adjacent airpark offers in creating a self sustaining state owned and operated airport. AOPA does recognize that there must be parity among airport users whether based on or off the airport. To that end, we support the FAA's effort to conduct an inventory of residential through the fence operations to ensure economic parity and preservation of the airport sponsors rights and powers.

However, we strongly recommend the FAA reinstitute greater flexibility into the corrective action plan process instead of attempting to implement a one-size-fits all approach by eliminating all existing residential through the fence operations. Further, we would offer that AOPA and the aviation industry could be of great support to the agency through collaboration on a policy that could potentially benefit both the airport and users in the future. To that end, we look forward to working with the agency as they adopt a policy that resolves agency concerns and recognizes the benefits that flexibility and working through these residential through the fence issues on a case by case basis offers.

Sincerely,

Heidi J. Williams
Senior Director
Airports

cc: Ms. Donna Taylor, FAA
Mr. Charles Erhard, FAA

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Associate
Administrator for Airport

800 Independence Ave., SW.
Washington, DC 20591

Mr. Daniel E. Clem
Director, Oregon Department
of Aviation
3040 25th Street SE.
Salem, OR 97302

Dear Mr. Clem:

Regional Administrator Dennis E. Roberts has asked me to respond to your November 8 letter, asking the Federal Aviation Administration (FAA) to provide the Oregon Department of Aviation (ODA) with a written clarification of the FAA's position on residential airparks.

The FAA does not oppose residential airparks at private use airports, such as the one at Sun River, Oregon. Private use airports are operated for the benefit of the private owners, who are free to make any change to the airport's operation, including imposing restrictions on aeronautical activity. The same does not apply for a public use airport receiving federal financial assistance. In this case, the airport is operated for the benefit of the public, and the public interest should in no way become subordinate to the private interests of airpark residents. The two interests, public and private, are not compatible in this instance.

We can agree that a successful private use airport, with or without a residential airpark, is good for aviation. However, we cannot endorse the introduction of residential airparks at federally-obligated airports like Scappoose, Christmas Valley, Creswell, Hood River or Lexington; or the expansion of an existing airpark at Independence State.

Your letter questions the validity of two documents concerning the FAA's position on airparks: (1) FAA Docket Number 16-06-06, *Carey V. Afton-Lincoln Municipal Airport*, dated January 19, 2007, and (2) a letter from Mr. William Watson of FAA to the Port of St. Helens concerning a rezoning application by Sierra Pacific Communities. Both of these documents reflect existing FAA policy, and applicable federal statutes and obligations affecting grant funded airports. These documents do not re-define FAA policy. They reflect existing FAA interpretation of federal law and policy and require no separate rule-making procedures.

The FAA Docket Number 16-06-06 constitutes an FAA administrative decision resulting from the adjudication of a case involving violations of certain federal statutes and related FAA grant assurances, including violations that resulted from the introduction of a residential airpark. The applicable statute and grant assurance in this case was Title 49 of United States Code §47107 (a) (10), *Compatible Land Use*. This statute requires airport sponsors to take appropriate action to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities compatible with normal airport operations.

Title 14 of the Code of Federal Regulations (CFR) Part 16, *FAA Rules of Practice for Airport Enforcement Proceedings* may be used to interpret and enforce the grant assurances. These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996), and became effective on December 16, 1996. A decision under 14 CFR Part 16 interprets existing law and policy in an adjudication and is persuasive precedent for future FAA decisions.

Your letter also expresses a belief that residential airparks are not residential developments and, as such, the FAA should not oppose them. The word residential is used in the term "residential airpark, " because it describes a situation where homes and aviation hangars are collocated. The implication in this use of the word residential always has been that it involves a residence where people live. As such, we did not misunderstand the meaning of the word residential in this context. Residential airpark residents with a financial interest in their homes are no different than residents without airplanes. Both seek to preserve one of their most valued possessions, their home and the quality of life while at home. This is why many residential airparks have restrictions on aircraft operations. Airpark residents may seek restrictions on the operation and future development of the airport to preserve the investment in their homes and a quiet home environment. Such restrictions may undermine the federal investment that was made to provide access for all current and future aeronautical users.

Since 1982, the FAA has spent more than $1.8 billion in federal funding to address land use incompatibility issues at federally obligated airports. A substantial part of this funding was used to buy land and houses and to relocate residents. Encouraging residential airparks on or near a federally obligated airport, as you suggest, would undermine this significant commitment of federal financial resources.

It would be inconsistent for the FAA to require an airport sponsor to prevent residential development in the vicinity of its airport while endorsing the introduction of a residential airpark. Similarly, if an airport promotes a residential airpark, it will not be successful in preventing other incompatible residential development before local zoning authorities. In fact, Oregon's own *Airport Land Use Compatibility Guidebook (January, 2003)* outlines the need to comply with the FAA grant assurances. It also specifically identifies, as *Goals and Policies Related to Land Use Issues*, several measures to protect an airport from incompatible land uses. Further, the guidebook also states that residential use (homes) is an incompatible land use in the airport's Part 77 *transitional surfaces*, which is the area immediately adjacent to the airport where an airpark typically would be located.

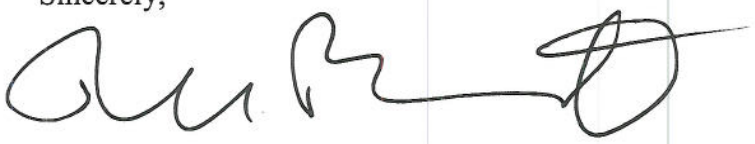
Concerning airport closures, we disagree with your assessment. There are no significant airport closure trends as far as federally obligated, public use airports are concerned. and the FAA has always aggressively denied requests to close airports. In addition, the FAA invests a significant amount of resources in the planning, funding, and development of more than 3,300 federally funded airports nationwide, the vast majority of which are general aviation facilities. The number of closures approved by the FAA in the last 20 years has been minimal.

Even the Aircraft Owners and Pilots Association (AOPA) has recognized FAA's efforts. In its correspondence to the FAA on the Revised Flight Plan 2006-2010, AOPA stated, "The FAA is doing an excellent job of protecting airports across the country by holding communities accountable for keeping the airport open and available to all users."

The FAA will continue to support the future federal funding of Scappoose Industrial Airpark by urging the Port of St. Helens Commission not to permit the penetration of its fence for access to the airfield by residents of an adjacent airpark. As part of its Airport Improvement Program, the FAA reserves the discretion to fund certain projects at federally obligated airports. In cases where the full public benefit is not achieved or is undermined by violations of the federal obligations, the FAA may discontinue federal funding and has done so. In certain instances, the FAA has chosen to not fund airports that promote residential airpark development when it undermines the utility of the federal investment and is not in compliance with the airport's federal obligations.

I hope I have clarified the FAA's position on this matter.

Sincerely,



David L. Bennett
Director, Office of Airport
Safety and Standards

cc: Gerry Meyer, Executive Director Port Of St Helens Commission

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of Airport Safety
And Standards

800 Independence Ave., S.W.
Washington, D.C. 20591

Mr. Gerry Meyer, Executive Director
Port of St. Helens Commission
Post Office Box 598
St. Helens, Oregon 97051

NOV 7 2007

Dear Mr. Meyer:

Thank you for the opportunity to clarify the Federal Aviation Administration's (FAA) policy on residential airpark development. We understand that the Commission is considering a proposal for an off-airport residential airpark development with a through-the-fence access on to Scappoose Industrial Airpark.

The FAA is on record opposing the development of residential airparks with through-the-fence access to public-use, federally obligated airports. In fact, FAA has denied future funding to airports that have permitted airfield access from off-airport residential airparks. Such developments can conflict with Title 49 U.S.C. §47107(a)(10), Grant Assurance 21, *Compatible Land Use* and possibly other grant assurances. A federally obligated airport must ensure, to the best of its ability, compatible land use both on and off airport. An airport sponsor will not be successful in defending its airport from incompatible residential development if the sponsor is also promoting residential airparks on or next to the airport. A residential dwelling with an attached hangar is still a residential dwelling and once introduced can lead to additional residential encroachment.

Since 1983, FAA has invested over $4,328,502 in Airport Improvement Program funds to improve and develop the airport as a part of the National Airport System. Residential development adjacent to the airport undermines the federal investment.

FAA does not oppose residential airparks at private use airports. Private use airports are operated for the benefit of the private owners, and the owners are free to make any change to the airport's operation, including imposing restrictions on aeronautical activity. A public use airport receiving federal financial assistance is different. It operates for the benefit of the public and in no way should become subordinate to the private interests of airpark residents erecting residential structures whose value is tied to the airport. The two interests, public and private, are not compatible in this case.

Finally, and more importantly, if an airport sponsor elects to promote or permit through-the-fence access on to the airport from an off-airport residential airpark, it is possibly jeopardizing receipt of all future Airport Improvement Program (AIP) grant funds. The FAA strongly recommends that the Commission not compromise the future funding of this public asset by permitting through-the-fence access to the proposed residential airpark.

Sincerely,

Charles C. Erhard
Manager, Airports Compliance
Division

Cc: Donna Taylor, ANM
Joelle Briggs, ANM

U.S. Department
of Transportation
**Federal Aviation
Administration**

Memphis Airports District Office
2862 Business Park Dr, Bldg G
Memphis, TN 38118-1555

Phone: 901-322-8180

September 18, 2007

Mr. Floyd Shoemaker, II, Chairman
Scott County Airport Board
2263 Airport Road
Oneida, TN 37841

Dear Mr. Shoemaker:

This is in response to your request regarding the proposal to allow a "through-the-fence" (TTF) access for the Residential Airpark (Big South Fork) located adjacent to the Scott County Airport, Onieda, TN. It is the decision of the Federal Aviation Administration's Associate Administrator of Airports that permitting development of a residential airpark with TTF access to a public-use, federally obligated airport is in conflict with Title 49 U.S.C. § 47107(a)(10), Grant Assurance 21, Compatible Land Use, and possibly other assurances and statutes. Consequently, we object to your proposal.

We advise that if you elect to allow a TTF access from the proposed residential airpark, you will potentially jeopardize receipt of any future Airport Improvement Program (AIP) grant funds for your airport.

If you have any questions or need further information concerning this matter, please contact me at the number shown above.

Sincerely,

Original signed by Phillip J. Braden

Phillip J. Braden
Manager

Enclosure

cc: The Honorable Ricky Keeton, Scott County Mayor
Bob Woods, TN Division of Aeronautics

U.S. Department
of Transportation

**Federal Aviation
Administration**

Seattle Airports District Office
1601 Lind Avenue, S. W., Ste 250
Renton, Washington 98055-4056

December 5, 2008

Mr. Lewis Rich
Chairman, Bonner County Commission
215 South First Avenue
Sandpoint, ID 83864

Dear Commissioner Rich:

This is in response to your Corrective Action Plan dated October 4, 2008. While we appreciate your continued communication with us, the Federal Aviation Administration (FAA) has serious concerns that your plan does not resolve. First among these: Sandpoint Airport has granted a perpetual easement that deprives the airport of its rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement. We are also dismayed at the apparent failure of the county, as airport sponsor, to seek information and alternatives regarding the perpetual easement granted Silverwings (SW) that allows residential use and through the fence (TTF) access on airport facilities. Based on these concerns, and others outlined below, the FAA is placing Sandpoint Airport on its Non-Compliance List for three years, during which time the airport will be unable to receive any federal funds unless and until satisfactory resolution of these issues is effected.

A vital concern regarding TTF access at Sandpoint: the perpetual easement that was granted without FAA approval is a direct violation of Grant Assurance #5, *Rights and Powers*, which states in part:

"a. It [the sponsor] will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary

b. It [the sponsor] will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application ... for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary."

The intent of Grant Assurance #5 is to ensure that you preserve your rights and powers to operate the airport in compliance with your federal obligations. The situation with the SW residential airpark and midfield access has highlighted the county's inability to exercise its control of the airport, as a direct result of the easement.

Allowing residential development, including hangars that incorporate living quarters for permanent or long-term use, adjacent to federally obligated airports, is incompatible with airport operations. It also conflicts with the following grant assurance requirements:

Grant Assurance #19, *Operation and Maintenance*, airport sponsors will not cause or permit any activity or action that would interfere with the intended use of the airport for airport purposes. Permanent living facilities should not be permitted at public airports because the needs of airport operations are inherently incompatible with residential occupancy from a safety standpoint.

Grant Assurance #21, *Compatible Land Use*, airport sponsors, to the extent possible, must ensure compatible land use both on and off the airport. Residential development in the vicinity of airports may result in complaints from residents concerned about personal safety, aircraft noise, pollution, and other quality-of-life issues. Residential development onto the airport, even in the form of residential hangars, increases the likelihood that quality-of-life issues may lead to conflicts with the airport sponsor and appeals for restrictions on aircraft operations.

Since 1982, the FAA has spent more than $1.8 billion to address land use incompatibility issues at federally obligated airports. Allowing residential use on and adjacent to Sandpoint has already caused the breach of your federal obligations, and may also place you in a poor position to defend against any future litigation brought by residential groups opposed to airport noise and over-flight.

From a safety perspective, the FAA cannot accept midfield taxiway access. As stated above under Grant Assurance #5, you must maintain the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement. When you allow a voluntary amendment, and then do not pursue a mandatory correction of this safety issue, it confirms that you have not preserved your required rights and powers.

Based on our serious concerns, the FAA cannot justify continued use of federal funds at Sandpoint Airport. The county as airport sponsor has violated Grant Assurance #5, among others. This has not been cured, and the county has not mitigated the effects of residential use against safe operation of the airport. We are therefore placing Sandpoint Airport on the FAA Airports Non-Compliance List until the end of 2011 – a three-year period. As a result, Sandpoint will not receive FAA funding for three years, or until satisfactory resolution of these issues is obtained. This will also allow the county and the FAA time to pursue measures that may assist in mitigating the effects of the TTF use of Sandpoint.

We will continue to work with the county to address matters at Sandpoint, and hope that all parties will be able to reach an agreement that will allow the airport to be removed from the Non-Compliance List. Please contact Trang Tran at (425)227-1662 if you have any questions or need additional information.

Sincerely,

Carol Suomi
Manager, Seattle Airports
District Office

Enclosure

cc:
John DeThomas, Idaho Division of Aeronautics
Joelle Briggs, FAA Compliance Program

Summary of Comments

The following is a summary of our comments on the corrective action plan, and our requests for specific changes that comport with your federal obligations.

Corrective Action Plan Comments:

Item #1. Please revise the first sentence to state, "***Bonner County Commissioners will adopt a resolution policy expressly prohibiting any future TTF easements.***" Also refer to your action stated in Item #7.

Item #2. Please revise the second paragraph to state, "***Bonner County*** will notify the City of Sandpoint that it objects to any residential homes adjacent to the Sandpoint Airport. County officials will ask the City of Sandpoint not to grant any future building permits if the request contains a residential component ***or increase in residential density.***"

Item #3. Although you stated that Bonner County has no legal authority to terminate Silverwing's (SW) perpetual easement, you have not indicated what avenues Bonner County has explored. You may be able to obtain control in the future. You stated that SW was unwilling to sign a new TTF agreement when approached by the Airport Advisory Board; however, Bonner County is the Sponsor and should be taking an active role in attempting to resolve this issue. Have County Officials met with SW to attempt to negotiate a change to the easement?

Item #4. Although Bonner County has no legal authority to terminate SW perpetual easement, you could ask the City to deny all permits for residential use with TTF access and all permits that increase the number of residences with TTF access.

Item #5. You stated that Bonner County has no legal means to force SW to renegotiate the TTF agreement to prohibit residential access and the Airport Advisory Board has unsuccessfully asked SW. Bonner County is the Sponsor and should be taking an active role in attempting to resolve this issue. Have County Officials met with SW to attempt to negotiate a change to the agreement to prohibit residential use?

Item #6. We strongly recommend termination of the midfield crossing on the west side of the airport. Access should only be from the end of the runway to prevent negatively impact the safe operation of aircraft. A voluntary amendment is not an acceptable approach.

Item #7. Please revise sentence to state, "Bonner County will adopt a resolution policy requiring as a condition precedent to execution of any TTF agreement full FAA review ***and acceptance***. Such resolution will declare all subsequent easements in violation of said agreement are void ab initio."