[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

Docket No. FAA-2012-0754

Airport Improvement Program (AIP): Policy Regarding Access to Airports From Residential Property

AGENCY: Federal Aviation Administration (FAA).

ACTION: Final Policy Statement.

SUMMARY: This action adopts a Policy Statement, based on Federal law, concerning through-the-fence access to a federally-obligated airport from an adjacent or nearby property, when that property is used as a residence. This Policy Statement replaces FAA's previously published Interim Policy (76 FR 15028; March 18, 2011) with regard to commercial service airports, and establishes how FAA will implement section 136 of P.L. 112-95.

DATES: The effective date of this Final Policy is [insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

Availability of Documents

You can get an electronic copy of this Policy and all other documents in this docket using the Internet by:

(1) Searching the Federal eRulemaking portal (http://www.regulations.gov/search);

(2) Visiting FAA's Regulations and Policies Web page at http://www.faa.gov/regulations_policies; or

(3) Accessing the Government Printing Office's Web page at http://www.gpoaccess.gov/index.html.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Airport Compliance and Management Analysis, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267-3085. Make sure to identify the docket number, notice number, or amendment number of this proceeding.

Authority for the Policy

This notice is published under the authority described in Subtitle VII, part B, chapter 471, section 47122 of title 49 United States Code.

Background

Detailed background regarding FAA's development of Policy documents specific to through-the-fence access to federally obligated airports from adjacent or nearby property, when that property is used as a residence, is available at:

- 75 FR 54946; September 9, 2010;
- 76 FR 15028; March 18, 2011; and
- 77 FR 44515; July 30, 2012.

On February 14, 2012, FAA Modernization and Reform Act of 2012 (FMRA) was signed into law (P.L. 112-95). Section 136 of this law permits general aviation airports, as defined by the statute, to enter into residential through-the-fence agreements with property owners or associations representing property owners. This must be a written agreement that requires the property owner to:

- Pay access charges that the sponsor determines to be comparable to those fees charged to tenants and operators on-airport making similar use of the airport;
- Bear the cost of building and maintaining the infrastructure the sponsor determines is necessary to provide access to the airfield from property located adjacent to or near the airport;
- Maintain the property for residential, noncommercial use for the duration of the agreement;

- Prohibit access to the airport from other properties through the property of the property owner; and
- Prohibit any aircraft refueling from occurring on the property.

In order to implement this law, FAA amended the grant assurances (77 FR 22376; April 13, 2012). Among the modifications, paragraph g of Grant Assurance 5, *Preserving Rights and Powers*, was amended to clarify that sponsors of commercial service airports are not permitted to enter into residential through-the-fence arrangements. However, sponsors of general aviation airports may enter into such an arrangement if the airport sponsor complies with the requirements of section 136 of P.L. 112-95 and the grant assurances. In addition, Grant Assurance 29, *Airport Layout Plan*, was amended to require all proposed and existing access points used to taxi aircraft across the airport property boundary be depicted on the airport layout plan (ALP).

A complete list of the current grant assurances can be viewed at:
http://www.faa.gov/airports/aip/grant_assurances/

On July 30, 2012, FAA published its interpretation of section 136 of P.L. 112-95 and its Proposed Policy on Existing Through-the-Fence Access to Commercial Service Airports From A Residential Property (77 FR 44515; July 30, 2012). The FAA invited public comment on both the Proposed Policy and its interpretation of the law for 30 days. At the request of an aviation membership association, FAA extended this comment period for an additional two weeks.

Comments Received on the Notice and Proposed Policy

The FAA received 84 comments from individuals, including private homeowners with current through-the-fence access to an airport, industry associations, companies, a state aviation department, a county airport manager, and a state legislator. Half of the comments submitted expressed generally negative views about FAA's proposed interpretation of the law, but were not specific and did not recommend any changes for FAA to consider. Instead, these comments discussed what the submitters described as benefits of having aircraft owners live near airports. Approximately 21 commenters raised objections to what they perceived as a 20-year limit on the duration of residential through-the-fence access agreements at general aviation airports, and FAA's requirement that airport sponsors demonstrate evidence of compliance prior to entering into new agreements. Two commenters shared their positive experiences as residential through-the-fence users. Two commenters expressed support for the interpretations made by FAA, especially with regard to self-fueling. The FAA will respond to specific comments submitted by organizations and individuals in the discussion below.

Aircraft Owners and Pilots Association

The Aircraft Owners and Pilots Association (AOPA) appreciated FAA's narrow interpretation related to self-fueling and commercial aeronautical activities. AOPA recommended maintaining consistency with regard to the dates presented in the Compliance Guidance Letter noting that FAA alternatives between September 30, 2012 and the phrase "beginning in Fiscal Year 2014". AOPA also recommended sunsetting FAA headquarters' review of residential through-the-fence access agreements as described in section V of the Compliance Guidance Letter. The Experimental Aircraft Association (EAA) expressed similar comments.

The FAA agrees that it should be consistent with regard to the date upon which evidence of compliance will be required and has amended the Compliance Guidance Letter to specify "October 1, 2014" in all places it is referenced.

AOPA, as well as other commenters, misinterpret the process for reviewing existing and new residential through-the-fence access agreements as discussed in the Compliance Guidance Letter. Section IV.A.3.a states, "Regional Offices will determine if access agreements submitted by sponsors of general aviation airports and privately-owned reliever airports effectively address the terms and conditions contained in P.L. 112-95." The Office of Airport Compliance in Washington headquarters will only review a residential through-the-fence access agreement for a general aviation airport with existing access when the Regional Office expresses concern that the agreement does not meet the statutory requirements contained in the law. Under section V.C, sponsors of general aviation airports proposing to establish new residential through-the-fence access agreements may request the Office of Airport Compliance to review their proposed agreement only in the event that the Regional Office rejects it. The FAA recognizes that several readers found this process to be unclear and has clarified this language in the Compliance Guidance Letter. In most cases of establishing residential through-the-fence access at general aviation airports, the role of the Office of Airport Compliance will be to monitor this activity.

Experimental Aircraft Association

Overall, EAA found that the new Policy meets the needs of the general aviation community. EAA expressed support for FAA's interpretations regarding self-fueling and aeronautical commercial activities, but offered a series of recommendations which include:

- Maintaining consistency with regard to the dates presented in the Compliance Guidance Letter;
- Clarifying that FAA has not imposed any limitation on the duration of access agreements at general aviation airports;
- Allowing AIP funding for specific costs associated with relocating a residential through-the-fence access point to facilitate safety, security, or long-term planning needs;
- Permitting new residential through-the-fence access agreements at commercial service airports and privately-owned reliever airports, but requiring more rigid FAA, Transportation Security Administration (TSA), and airport sponsor security and safety standards;
- Establishing a three-year sunset provision to streamline the approval of residential through-the-fence access agreements for general aviation airports at the Airports District Office (ADO) level, but require Regional Office concurrence for agreements at reliever (publically-owned and privately-owned) and commercial service airports;
- Clarifying the terms "adjacent to" and "near the airport";
- Clarifying the ADO, Regional Office, and Office of Airport Compliance access plan review timeframes; and
- Recognizing the uniqueness of aviation in Alaska.

EAA's positions were supported by an individual commenter.

The FAA agrees that it can be more transparent regarding the fact that its Policy Statement does not limit the duration of new residential through-the-fence access agreements. An additional

paragraph has been added under sections III and IV of the Compliance Guidance Letter to clarify this issue.

EAA incorrectly assumes FAA's Policy for commercial service airports, which permits airport sponsors to relocate existing access points without submitting a proposal to extend its existing access, is linked to an AIP funding decision. The language in section II of the Final Policy On Existing Through-the-Fence Access From A Residential Property was a comment received prior to the publication of FAA's Interim Policy. (See 76 FR 15028; 15032 (March 18, 2011)) The commenter proposed that an airport sponsor should not be required to update its access plan or meet supplemental standards if it negotiated with its residential through-the-fence users to relocate an already existing access point to another location on the airport's boundary in order to address a specific need at the airport. The FAA agreed this was a reasonable solution and amended the Interim Policy accordingly.

In addition, FAA notes that any decision to relocate an access point would be initiated by the airport sponsor, not FAA. As such, it would be up to the airport sponsor to identify an appropriate source of funding for the costs associated with the relocation. Costs associated with on-airport infrastructure and facilities used exclusively or primarily for the accommodation of residential through-the-fence users are considered private-use and remain ineligible for AIP funding.

The FAA disagrees with EAA's recommendation to permit new residential through-the-fence access agreements at privately-owned reliever airports and commercial service airports. Similar

comments were submitted by numerous individuals who stated that prohibiting privately-owned reliever airports from entering into new residential through-the-fence access agreements violates the spirit and intent of the law. Some commenters stated that FAA had not identified any privately-owned relievers with existing residential through-the-fence access agreements at the time the law was written.

The FAA will respond to all of these comments here. House Report 112-381 does not provide any explanation regarding Congress' intent of this provision. Therefore, FAA must rely on a plain reading of the language. The provision is narrowly drafted to apply to "general aviation airports" only. Prior to the passage of P.L. 112-95, no statutory definition for "general aviation airports" existed. The definition included in this law and now codified at title 49, U.S.C. 47102(8) excludes privately-owned reliever airports. The FAA raised concerns regarding the definition of "general aviation airports" with the Congressional Committee prior to passage of the law because FAA was aware of both privately-owned reliever airports and commercial service airports with existing residential through-the-fence access. While FAA will grandfather seven privately-owned reliever airports with existing residential through-the-fence access agreements under the Policy Statement for general aviation airports, FAA will apply the law as it is written with regard to new agreements. The FAA has proposed a separate Policy for the four commercial service airports with existing residential through-the-fence access which is adopted without substantive change in this notice.

The FAA declines to clarify the terms "adjacent to" or "near the airport." Section 136 of P.L. 112-95 does not define these terms and implies it is within the airport sponsor's discretion to

determine what constitutes a real property "adjacent to" or "near the airport" and requiring access to the airfield.

EAA notes that the Compliance Guidance Letter encourages ADOs and Regional Offices to complete their review of existing residential through-the-fence access agreements at general aviation airports within 60 days, but provides additional time for general aviation airports proposing new residential through-the-fence access agreements. The FAA believes this is appropriate. The FAA's acceptance of a new residential through-the-fence access agreement requires FAA to review an updated ALP. It is FAA's experience that approval of an updated ALP is based on the scope, detail, and quality of each submission. As such, FAA is not inclined to shorten the target review periods as proposed.

The FAA acknowledges EAA's comments regarding the uniqueness of aviation in Alaska. The FAA reiterates its desire to take a more flexible approach with existing residential through-the-fence access agreements. However, section 136 of P.L. 112-95 does not specify a more lenient posture toward Alaskan airports with regard to the terms and conditions it requires residential through-the-fence access agreements to meet.

Independence Airpark Homeowners Associations

The Independence Airpark Homeowners Associations submitted separate comments and indicated their support for the comments and conclusions provided by EAA. The following comments were presented by the Independence Airpark Homeowners Associations:

- The intent of Congress was fairly simple, but FAA has added significant complexity along with associated opportunities for a lot of subjective determination by requiring things in addition to what is contained in the law;
- The requirement that new residential through-the-fence access agreements be pre-certified is not in the law and is unnecessarily wasteful for both Federal and local resources;
- It's unrealistic to exclude future airport improvements and changes required by regulations to be excluded from AIP funding; and
- The FAA is not taking a pro-active approach in local land use planning and zoning activities as a means to protect the national airport system and help local economic development offices attract new aviation related businesses which may want to be located adjacent to existing airports where land was available and appropriately zoned for their use.

The FAA is proposing to interpret section 136 in a manner that improves transparency and reduces the potential for severe infringements on rights to use private property for self-fueling and nonaeronautical commercial services. The tool that airport sponsors and FAA employees will use to verify that existing residential through-the-fence access agreements comply with the law, the Access Agreement Review Sheet which is included in FAA's Compliance Guidance Letter as Appendix C, is limited to the terms and conditions contained in the law.

Numerous commenters, in addition to the Independence Airpark Homeowners Associations, objected to the language in the Policy Statement requiring general aviation airport sponsors proposing to establish new residential through-the-fence access agreements to provide evidence

of compliance prior to executing an agreement with a residential user and/or homeowners association.

While the law does not require airport sponsors to demonstrate their compliance with the terms and conditions contained in section 136 prior to entering into the agreement, FAA believes this is an important safeguard for both the airport sponsor and the residential through-the-fence user. If an airport sponsor enters into a residential through-the-fence access agreement which does not comply with the terms and conditions included in the law, and cannot be re-negotiated to comply, FAA may be placed in a position where it needs to initiate a compliance action against the sponsor. A finding of noncompliance could result in the withholding of Federal AIP funds from the airport sponsor. This has the potential to disproportionately impact residential through-the-fence users who could be asked to bear a higher burden of the airport's costs or find the value of their residential property linked to an airport struggling to address its infrastructure development and maintenance needs.

The FAA anticipates that most homeowners seeking to establish a residential through-the-fence access agreement will desire a lengthy or perpetual term. Airport sponsors should insist on strong and effective subordination clauses as part of the access agreement as an appropriate means to reserve the right to correct any matters of noncompliance after the agreement is executed. The FAA seeks to avoid sponsor noncompliance and believes the best use of Federal resources would be applied to ensuring airport sponsors comply with the law prior to executing an agreement. With that said, FAA is amending its interpretation of the law to state that airport sponsors of general aviation airports proposing to establish new or add new residential through-

the-fence agreements must provide evidence of compliance prior to establishing the access point. This will not preclude a general aviation airport sponsor from executing a new residential through-the-fence agreement with a residential user and/or association representing residential users prior to FAA reviewing the proposed agreement and approving amendment of the ALP. However, the airport sponsor would do so at its own risk and would not be permitted to establish the access point until the updated ALP is approved. FAA employees would be precluded from approving the ALP until they have verified the agreement will comply with the law. The FAA has made corresponding revisions to the Compliance Guidance Letter.

FAA Order 5100.38C, *Airport Improvement Program Handbook*, contains numerous restrictions against using AIP funds for on-airport infrastructure that will be used for the exclusive or near exclusive use of an air carrier, fixed base operator, or tenant. Limiting future airport improvements to projects related to general public demand at the airport is not inconsistent with the definition of "airport development" which is codified at title 49, U.S.C., § 47102(3).
As noted above, the Independence Airpark Homeowners Associations also expressed concern that FAA is not taking a pro-active approach in local land use planning and zoning activities as a means to protect the national airport system and help local economic development offices attract new aviation related businesses which may want to be located adjacent to existing airports where land was available and appropriately zoned for their use. The Federal Government lacks the authority to regulate local land use. Land use zoning is the responsibility of state and/or local authorities.

Section 136 of P.L. 112-95 deals solely with agreements that grant a person that owns *residential* real property adjacent to or near the airport access to the airfield. See 49 U.S.C. 47107(t)(2)(B)(iii). ("An agreement described in paragraph (1) between an airport sponsor and a property owner…shall require the property owner, at a minimum….to maintain the property for residential, noncommercial use, for the duration of the agreement…..") The FAA lacks sufficient information to determine how its implementation could be used to facilitate local land use planning and zoning.

National Air Transportation Association

The National Air Transportation Association (NATA) offered comments which generally concurred with FAA's interpretation of section 136 of P.L. 112-95. NATA supports FAA's desire to review new residential through-the-fence access agreements before they are executed and notes, "after-the-fact reviews of signed RTTF agreements present no pathways to compliance…" However, NATA felt that FAA's interpretation on commercial activities is not specific enough because it could still permit the homeowner to allow a third party to offer a commercial aeronautical service on their property. NATA requested FAA modify this interpretation to indicate that allowing public use of the property to receive commercial aeronautical services would be a violation of the terms and conditions set forth in the law. Additionally, NATA, like AOPA and EAA, also recommended review of new residential through-the-fence access agreements be transitioned to the ADOs or Regional Offices.

The FAA agrees that it can be more specific regarding its interpretation of the limitation on commercial activities. The FAA has amended its Policy Statement on section 136 and the

Compliance Guidance Letter to prohibit the property owner from allowing any third party to offer commercial aeronautical services from the residential property covered by a residential through-the-fence access agreement.

Oregon Department of Aviation

A number of commenters, including the Oregon Department of Aviation (Department), stated their view that the FAA over-reached the intent of Congress and questioned why FAA did not better address security and TSA concerns about access to restricted parts of airports. Specifically, the Department believes that restrictions imposed by FAA will have a chilling effect and states:

- No other grant assurance requires FAA headquarters level pre-approval of a signed agreement;
- The change to Grant Assurance 29, *Airport Layout Plan*, should remain permissive;
- Using safety as a triggering event for a sponsor to update its access plan is vague, but implies that the very nature of residential through-the-fence use may subjectively be the cause of any safety issue and might be used as a reasoning to prevent or find fault with a residential through-the-fence access agreement; and
- The 20-year limit on reviewing access agreements imposes an artificial limit on the access agreement.

The Department's comments conclude by discussing their positive experience with residential through-the-fence agreements and encourage FAA to regulate the activity in a pragmatic and

reasonable way that reflects an understanding that one size does not fit all. Oregon State Senator Betsy Johnson submitted a letter in support of the Department's comments.

The FAA disagrees with the sentiment expressed by the Department and believes its overall approach provides the flexibility to address unique situations at individual airports. The FAA is limiting its review of residential through-the-fence access agreements at general aviation airports to the criteria specified in section 136 of P.L. 112-95. In addition, FAA has clearly defined the scope of its review of requirements related to fueling and commercial activities on residential property.

The FAA consulted with TSA during the development of the Interim Policy which now forms the basis for the Final Policy On Existing Through-the-Fence Access To Commercial Service Airports From A Residential Property. Additionally, the Final Policy permits FAA to consult with TSA prior to accepting an access plan from a commercial service airport. Section 136 of P.L. 112-95 does not include any terms or conditions related to security, so FAA will not review security related matters when verifying that residential through-the-fence agreements comply with the law. However, this does not preclude TSA from initiating its own review.

The FAA published a Federal Register notice announcing revisions to the grant assurances and seeking comment on April 13, 2012 (77 FR 22376 (April 13, 2012)). No comments were received. Grant Assurance 29 was clarified to specifically include "all proposed and existing access points used to taxi aircraft across the airport's property boundary" as an item required to be depicted on the sponsor's Airport Layout Plan. The Compliance Guidance Letter, at section

X.D, states, "establishing a new access point not depicted on an FAA-approved ALP may result in a violation of Grant Assurance 29…" The FAA believes the Department's concerns regarding Grant Assurance 29 are addressed through the language in the Compliance Guidance Letter.

The FAA disagrees with the Department's assessment regarding the inclusion of safety as an event which triggers a commercial service airport to update its access plan. Given the limited number of airports impacted by the Final Policy, combined with knowledge of safety issues associated with the residential through-the-fence access points, FAA believes identification of a safety concern should remain a triggering event for commercial service airports with existing residential through-the-fence access agreements. The FAA notes that the terms and conditions contained in section 136 of P.L. 112-95 do not address safety concerns, and therefore FAA is not requiring any additional safety reviews when reviewing residential through-the-fence access agreements for compliance with the law.

The FAA disagrees with the Department's assessment that establishing a 20-year limit on review of residential through-the-fence access agreements at general aviation airports effectively imposes an artificial limit on the access agreement. Similar comments were submitted by the Tuolumne County Airports Manager. Neither the law, nor FAA's guidance imposes a limitation on the duration of a residential through-the-fence access agreement at a general aviation airport. The Department's recommendation that future reviews follow standard airport inspection practices is not practical due to the limited number of general aviation airports inspected by FAA annually through its land use inspection process – less than 20. The twenty-year review

requirement is consistent with airport planning horizons and is not burdensome for the airport sponsor.

Washington Airport Management Association

The Washington Airport Management Association (WAMA) was generally supportive of the Policy and certain elements contained in the law. However, WAMA expressed concern that without some limitations on future through-the-fence locations or a strong policy position to discourage residential growth adjacent to airports that incompatible development will continue to erode and impact airport operations as well as degrade quality of life. WAMA encouraged provisions be put in place to require planning for future public use hangars and tie-down locations on-airport to avoid unfettered growth of through-the-fence at general aviation airports. In addition, WAMA recommended FAA subject existing and new residential through-the-fence agreements to standards similar to those required of commercial service airports by rule or adoption of best management practices, and cautioned that failure to adequately address such issues could result in higher future public costs on airport expansion.

While WAMA raises very valid points with regard to airport planning, FAA believes the law limits its review of new residential through-the-fence agreements to a narrow scope. The FAA will strongly encourage airport sponsors contemplating such agreements to engage in planning studies to identify potential on-airport needs. However, FAA cannot require these sponsors to do so. One of the goals stated in FAA's Interim Policy was its desire to use the access plans to identify best management practices and recommendations. In light of the adoption of P.L. 112-95, FAA's knowledge in this area remains limited.

Comments Submitted by Individuals

Comment: Two commenters inquired as to what will occur after the 30-day comment period is over.

Response: FAA initially established a 30-day comment period in order to apprise the public of its plans for implementing section 136 of P.L. 112-95 and its intent to alter and finalize its previously issued Interim Policy. This comment period was extended by two weeks at the request of an aviation membership association. The FAA sought to balance the opportunity for public comment with the Agency's desire to move forward with implementation. The FAA has deferred its review of any proposals to establish new residential through-the-fence access arrangements pending the completion of this Policy Statement and associated guidance. The FAA is now prepared to review these requests in a consistent manner.

Comment: The law does not limit residential through-the-fence agreements to 20 years.

Response: The FAA agrees that the law does not set any time limit on the duration of residential through-the-fence access agreements at general aviation airports, as defined by the statute. The FAA notes that it is not proposing any such limit at these airports. The FAA believes these commenters confused either FAA's Proposed Final Policy for commercial service airports with its approach to airports covered by the statute or the language in the draft Compliance Guidance Letter stating that FAA's review of an access agreement is valid for a period not to exceed 20 years or until a triggering event occurs. The FAA has added a paragraph to section III and a footnote to section IV of the Compliance Guidance Letter to clarify this issue.

Comment: Including the statement, "going forward, the FAA expects sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements to comply with the terms and conditions of the law" infers that current agreements have been illegal. Other commenters referred to this language as ambiguous and confusing.

Response: The FAA did not intend to infer that existing agreements have been illegal, nor did it intend to be ambiguous or confuse readers. With that said, FAA is aware of existing residential through-the-fence access agreements which may not presently fulfill the terms and conditions included in section 136 of the law. In fact, some commenters, such as the Tuolumne County Airports Manager, raised these issues in their submissions to the docket. The FAA reiterates its desire to address such situations on a case-by-case basis and report these issues to interested Congressional Committees.

Comment: The FAA is adding additional requirements to regulate.

Response: When reviewing residential through-the-fence access agreements for general aviation airports, FAA is only reviewing the agreement to ensure it complies with the terms and conditions of the law. The Final Policy for commercial service airports includes other factors not included in the law, such as safety of airport operations. The law is silent with regard to airports not meeting the definition of general aviation airport, and FAA is finalizing its previously published Interim Policy to address commercial service airports.

Comment: The language requiring residential through-the-fence users to bear the cost of building and maintaining the infrastructure the sponsor determines necessary to provide access to

the airfield from the property located adjacent to or near the airport is too open-ended. An airport sponsor could dictate that access be via gold lined taxiways.

Response: This language is taken directly from the law. The FAA believes airport sponsors and potential residential through-the-fence access users will negotiate this matter reasonably.

Comment: Language in the Proposed Final Policy On Existing Through-the-Fence Access To Commercial Service Airports From A Residential Property related to supplemental standards for commercial service airport sponsors proposing to extend their existing agreements is too open-ended. The commenter refers to requiring through-the-fence users to acknowledge that their property will be affected by aircraft noise and emissions which may change over time and waiving any right to bring an action against the sponsor for existing and future operations and activities at the airport associated with aircraft noise and emissions. The commenter states that such an agreement would allow the use of the airport for a nighttime war exercise or permitting all regional flight schools to use one airport to conduct intrusive operations. Another commenter refers to this language and states that the law does not favor a priori waiver of the legal right to sue. Other comments on the supplemental standards included objections to enforcing safety and operating rules on through-the-fence users identical to on-airport users and the sponsor's ability to limit future use and ownership of through-the-fence property to aviation-related uses.

Response: The FAA believes these are prudent commitments to memorialize in an agreement proposing to extend residential through-the-fence access at commercial service airports now covered by this Final Policy. The use of broad waivers was recommended to FAA

by individuals and communities advocating in support of residential through-the-fence access agreements during discussions with FAA in 2010. By statute, commercial service airports with more than 10,000 annual passenger boardings are apportioned a minimum of $1 million annually in AIP funding. The FAA seeks to ensure that extending a residential through-the-fence agreement will not limit investments made at the airport. It's also important to note that nothing in section 136 alleviates a federally-obligated airport sponsor's obligation to make the airport available for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities.

Comment: It makes no sense to "save" unused, available adjoining land for imagined airport growth when a through-the-fence development is an actual and existing demand for airport use.

Response: The FAA does not require airport sponsors to "save" adjoining land; FAA supports planning through the use of master planning and forecast demand studies. The FAA encourages airport sponsors to address existing demand for airport use on the airport when possible. In addition, FAA encourages airport sponsors to ensure that adequate areas to accommodate forecasted aeronautical growth be identified. An airport sponsor may be limited in its ability to acquire additional land needed for commercial aeronautical services if adjacent properties are used primarily for residential purposes. Adjacent properties used primarily for residential through-the-fence purposes are not aeronautical development; FAA's focus is on-airport aeronautical development, and the Agency is concerned when off-airport development degrades the aeronautical utility of an airport.

Comment: Requiring residential owners to pay a comparable fee to access and maintain the airport is inequitable. The commenter explains that his airport currently has no "airport" tenants except gliders who are not paying a fair lease rate, and that through-the-fence commercial owners pay fees. Another commenter objected to the "parity" of costs and claims it would be a taking.

Response: The law requires residential through-the-fence users to pay access charges that the sponsor determines comparable to those fees charged to tenants and operators on-airport making similar use of the airport. The FAA recognizes that it may need to assist some airport sponsors in achieving compliance with the law. The FAA will work directly with these airport sponsors as these issues are identified.

Comment: Three commenters raised concerns related to commercial through-the-fence operations. The Aviation Professionals Group requested FAA include language stating that past, present, and future commercial through-the-fence decisions and rulings will be no more adverse to this policy for a commercial property than had it been a residential property in compliance with the law. Another commenter described the non-residential off-airport hangar he uses and asked FAA to modify its Policy to address this use. A third commenter asked FAA to consider changing its rules to allow industrial or service/distribution companies to have similar access.

Response: The FAA appreciates the opportunity to clarify its views on commercial through-the-fence activities which is discussed in FAA Order 5190.6B, *Airport Compliance Manual*, in chapter 12. The grant assurances do not prevent an airport sponsor from entering into commercial through-the-fence access agreements, and FAA does not prohibit such agreements outright. However, FAA strongly cautions airport sponsors to research such agreements to

ensure they will not inadvertently result in a violation of the airport sponsor's Federal obligations. In addition, FAA discourages airport sponsors from entering into through-the-fence agreements with commercial service providers (including aircraft storage) that intend to compete with an on-airport service provider.

The FAA is not proposing to alter or change this guidance with the exception of arrangements which currently co-mingle commercial and residential activities. Going forward, airport sponsors will need to determine if the potential through-the-fence user is proposing a commercial activity (including aircraft storage) or a residential use. Section 136 of P.L. 112-95 requires residential through-the-fence access users to maintain their property for residential, noncommercial use for the duration the agreement, and FAA is interpreting this as a limitation on commercial aeronautical activities only.

Comment: One comment states that "residential property" is not defined and questions if an empty lot is a residential property.

Response: The draft Compliance Guidance Letter on FAA Review of Existing and Proposed Residential Through-the-Fence Access Agreements includes a definition of "residential property." It defines residential property as a piece of real property used for single- or multi-family dwellings; duplexes; apartments; primary or secondary residences even when co-located with a hangar; hangars that incorporate living quarters for permanent or long-term use; and time-share hangars with living quarters for variable occupancy of any term. An empty lot would likely not qualify as residential property unless the airport sponsor certified it as existing access in response to the definition included in FAA's Interim Policy On Existing Through-the-Fence Access From A Residential Property. Such a distinction would no longer be relevant to a general

aviation airport as sponsors of these airports may now enter into new residential through-the-fence agreements.

Comment: The FAA's proposal to use "appropriate mitigations" to assist some sponsors in complying with the terms and conditions of the law needs limitations and definitions consistent with the law.

Response: Flexibility has been a basic premise reflected in FAA's previous Policy documents on residential through-the-fence access. The codification of specific terms and conditions on these agreements has limited FAA's ability to be more flexible with sponsors whose agreements have ceded important rights and powers. The FAA reiterates its intent to address these situations on a case-by-case basis and report these issues to interested Congressional Committees.

Comment: The Tuolumne County Airports Manager expressed concerns related to the possibility of reducing funding for airports which cannot comply with the law, noting that the term "reduced level of funding" could be open to interpretation by FAA staff in ADOs or Regional Offices.

Response: The FAA Compliance Guidance Letter notes that any decisions that might impact future AIP investments will be analyzed on a case-by-case basis by the Office of Airport Compliance, the Planning and Environmental Division, and the Airports Financial Assistance Division who will provide more specific guidance to the local staff.

Comment: The Tuolumne County Airports Manager also raised concerns with the direction contained in Appendix D of the Draft Compliance Guidance Letter which states that an ADO should not forward an access agreement to the Regional Office if the airport sponsor fails to address any statutorily required terms and conditions. This commenter also offered other suggestions regarding the wording of paragraphs VII.B and VIII.A.

Response: The FAA expects airport sponsors to address all of the terms and conditions contained in the law. If an existing access agreement precludes a sponsor from meeting a specific term or condition contained in the law, the sponsor should identify the language in the agreement which creates the conflict. Such a notation will assist FAA staff in determining the appropriate level of review for that specific access agreement.

The FAA declines to replace "and/" in paragraph VII.B. with "or" because commercial service airports would be required to submit both an agreement and access plan. Although FAA declines to delete "as part of a master plan" in paragraph VIII.A, FAA has added the phrase "or upon completion of an AIP-funded project" to include these scenarios as well.

Comment: One commenter questioned the restriction on self-fueling contained in the law stating it's not fair and doubts it's legal.

Response: The FAA addresses this concern by interpreting the prohibition on fueling to apply only to the sale of fuel. As stated in the Federal Register on July 30, 2012, "the FAA will not concern itself with self-fueling activities which may be permitted by local regulation." (77 FR 44515; 44518 (July 30, 2012))

Comment: One commenter encouraged FAA to extend this provision to inside the fence.

Response: The FAA is implementing section 136 of P.L. 112-95 which is specific to through-the-fence access only. FAA Order 5190.6B, *Airport Compliance Manual*, addresses the issue of on-airport residences and crew quarters in chapter 20. Certain aeronautical uses such as commercial air taxi, charter, and medical evacuation services may have a need for limited and short-term flight crew quarters for temporary use, including overnight and on-duty times. Some airport sponsors may assign living quarters to the airport manager in order to facilitate specific management-related duties. However, FAA does not consider permanent or long-term living quarters to be an appropriate use of federally-obligated airport property.

Comment: One commenter encouraged FAA to consider the emerging field of carplanes and their access needs.

Response: This Policy Statement is not intended to apply to carplanes or any type of aircraft brought to the airport on a trailer. Federally-obligated airport sponsors are prohibited from unjustly discriminating against or denying access to these types of aircraft. This Policy Statement applies to the agreements governing aircraft taxied from private, residential properties across the airport's property boundary in order to access aviation infrastructure.

Comment: Two commenters encouraged FAA to extend the protections of the grant assurances to off-airport users.

Response: While the grant assurances have been interpreted to convey certain rights to aeronautical users, this is not their primary purpose. These assurances are designed to ensure the public's investment in the airport will be fully utilized and benefit civil aviation. Through-the-fence users base their operations on private property, and there is no Federal interest to be

protected. With that said, FAA recognizes that through-the-fence users negotiate terms of access directly with an airport sponsor, and at times may request terms which seek to protect their private interest. The FAA expects airport sponsors to weigh such requests against their Federal obligations in order to benefit the civil aviation system.

Comment: One commenter encouraged FAA to disallow any new residential through-the-fence agreements and dissolve any past agreements in the interest of safety.

Response: Section 136 of P.L. 112-95 specifically permits residential through-the-fence agreements at general aviation airports, as defined by the statute. This law specifically includes existing and new agreements. Although FAA cannot consider this comment in whole, FAA notes that Grant Assurance 5 now prohibits commercial service airports from entering into new residential through-the-fence agreements, and the Final Policy requires commercial service airports with existing agreements to address safety concerns in their access plan.

Changes to the FAA's Interpretation of the FMRA's Section 136

Enforcement

The FAA is amending its interpretation of the law to state that airport sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements must provide evidence of compliance prior to establishing an access point. This will not preclude a general aviation airport sponsor from executing a new residential through-the-fence agreement with a residential user and/or association representing residential users prior to FAA reviewing the proposed agreement and signing the ALP. However, this action would be taken at

the airport sponsor's own risk. Establishing a new access point not depicted on a FAA-approved ALP may result in a violation of Grant Assurance 29, *Airport Layout Plan*.

Changes: The third paragraph under Enforcement now states, "Airport sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements must provide evidence of compliance prior to establishing the access point. The establishment of a new residential through-the-fence agreement which does not comply with the law or results in a violation of the sponsor's commitments with the Federal Government may result in enforcement proceedings under 14 Code of Federal Regulations (CFR), part 16. Establishing a new access point not depicted on a FAA-approved ALP may result in a violation of Grant Assurance 29, *Airport Layout Plan*."

Terms and Conditions – Commercial Activities

The FAA has inserted references to "any third party" in its description of this prohibition. This is necessary to ensure that the residential through-the-fence user does not permit the residential property to be used as a location for a third party to offer commercial aeronautical services.

Changes: The two sentences in the first paragraph of this section now contain references to "any third party." The first paragraph now reads, "Section 136 states that residential property owners must maintain their property for residential, noncommercial use for the duration of the agreement. The FAA interprets this as a prohibition on commercial aeronautical services offered by residential through-the-fence users or any third party that might compete with on-airport aeronautical service providers, whether existing or not, or chill the airport sponsor's ability to attract new commercial service providers on the airport. Therefore, in its review of agreements

proposing to establish new residential through-the-fence access, FAA will interpret this condition as a prohibition on commercial *aeronautical* activities only. Agreements which limit the scope of this prohibition to only commercial aeronautical activities offered by the residential through-the-fence user or any third party will be acceptable. However, FAA will not concern itself with unrelated commercial activities which may be permitted by local regulation."

FAA's Interpretation of the FMRA's Section 136

Section 136 permits sponsors of general aviation airports, as defined by the statute at title 49, U.S.C., § 47102(8), to enter into agreements granting through-the-fence access to residential users, but includes specific terms and conditions. The FAA interprets the inclusion of specific terms and conditions as Congress' intent for FAA to enforce the provision accordingly. Therefore, FAA will request sponsors with existing residential through-the-fence agreements to demonstrate their compliance with the law. Additionally, FAA will also request sponsors of general aviation airports proposing to establish new residential through-the-fence agreements to demonstrate that their agreements will comply with the law. Airport sponsors are encouraged to review FAA's Compliance Guidance Letter on FAA Review of Existing and Proposed Residential Through-Fence-Access Agreements, which will be issued concurrently with this notice.

Although the law became effective on February 14, 2012, FAA will afford airport sponsors a grace period for compliance. Airport sponsors with existing residential through-the-fence agreements must provide evidence of compliance not later than October 1, 2014. In most cases, FAA will define evidence of compliance as the airport sponsor's submission of required

documentation. This may include copies of access agreements, deeds, covenants, conditions, and restrictions, etc.

Airport sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements must provide evidence of compliance prior to establishing the access point. The establishment of a new residential through-the-fence agreement which does not comply with the law or results in a violation of the sponsor's commitments with the Federal Government may result in enforcement proceedings under 14 CFR, part 16. Establishing a new access point not depicted on a FAA-approved ALP may result in a violation of Grant Assurance 29, *Airport Layout Plan*.

The FAA acknowledges that its approach to sponsors with existing residential through-the-fence access agreements will be different than the posture to be taken with sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements. This is because airport sponsors with existing agreements may have ceded important rights and powers through the execution of these existing agreements, and their ability to comply with the terms and conditions of the law may be severely hampered. The FAA intends to address such situations on a case-by-case basis, assist these airport sponsors in the development of appropriate mitigations when possible, and report these issues to interested Congressional Committees. Going forward, FAA expects sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements to comply with the terms and conditions of the law. The FAA will not waive these terms and conditions for new agreements.

Applicability

Section 136 applies to sponsors of general aviation airports. The FMRA adopted a definition of "general aviation airport" which is now codified at 49 U.S.C., 47102(8). A general aviation airport is defined as "a public airport that is located in a State that, as determined by the Secretary- does not have commercial service; or has scheduled service with less than 2,500 passenger boardings each year." This definition excludes privately-owned reliever airports. In implementing section 136, FAA will grandfather the seven privately-owned reliever airports with existing residential through-the-fence access. The owners of these airports will be asked to comply with the law and be treated in a manner similar to general aviation airports as defined in the statute. However going forward, FAA will apply the statutory prohibition on privately-owned reliever airports and disallow these airports from entering into such agreements. Publically-owned reliever airports are included in the statutory definition of a general aviation airport; sponsors of publically-owned reliever airports will be permitted to enter into residential through-the-fence agreements that comply with the terms and provisions contained in section 136.

The FAA proposes the Final Policy included in this notice to address commercial service airports with existing residential through-the-fence agreements. Commercial service airports which do not currently have residential through-the-fence agreements continue to be prohibited from entering into such agreements by statute.

Terms and Conditions – Commercial Activities

Section 136 states that residential property owners must maintain their property for residential, noncommercial use for the duration of the agreement. The FAA interprets this as a prohibition on commercial aeronautical services offered by residential through-the-fence users or any third party that might compete with on-airport aeronautical service providers, whether existing or not, or chill the airport sponsor's ability to attract new commercial service providers on the airport. Therefore, in its review of agreements proposing to establish new residential through-the-fence access, FAA will interpret this condition as a prohibition on commercial *aeronautical* activities only. Agreements which limit the scope of this prohibition to only commercial aeronautical activities offered by the residential through-the-fence user or any third party will be acceptable. However, FAA will not concern itself with unrelated commercial activities which may be permitted by local regulation.

The FAA recognizes that some existing residential through-the-fence agreements permit the co-location of homes and aeronautical businesses. In these cases, FAA will require airport sponsors to execute two separate agreements with the homeowner. One agreement must address the duration, rights, and limitations of the homeowner's residential through-the-fence access, and the second agreement must address the conduct of the commercial aeronautical activity. The second agreement must be consistent with FAA's current policies on commercial through-the-fence activities and ensure the off-airport business does not result in unjust economic discrimination for on-airport aeronautical service providers. The FAA encourages airport sponsors with these types of mixed-use arrangements to adopt long-term plans to relocate the off-airport commercial aeronautical activity onto the airport when feasible and practicable to do so. Going forward, airport sponsors proposing to establish a residential through-the-fence agreement must meet the

statutory terms and conditions, including the prohibition on using the residential property for commercial aeronautical use. Therefore, agreements which propose the co-location or mixed-use of residential and commercial aeronautical activities will be not be consistent with the law.

Terms and Conditions – Authorized Access

Section 136 states that residential property owners must prohibit access to the airport from other properties through the property of the property owner with access. The FAA interprets this as a prohibition on unauthorized access to the airport; this condition does not necessarily prescribe a scenario in which all residential through-the-fence users must have their own dedicated access point to enter the airport. The FAA encourages sponsors of general aviation airports proposing to establish new residential through-the-fence agreements to limit the number of access points in a manner that is consistent with airport planning practices. Compliance with this condition will require access agreements stipulate that residential through-the-fence access agreement holders are prohibited from permitting unauthorized users (any individual not party to an access agreement with the airport sponsor) to pass through or "piggy back" on their access in order to enter the airport. The FAA expects airport sponsors to establish their own policies, restrictions, and/or requirements to be imposed on fly-in guests who taxi from the airport property to visit off-airport residents.

Terms and Conditions – Fueling

Section 136 states that residential property owners must prohibit any aircraft refueling from occurring on the property with access. The FAA interprets this as a prohibition on the sale of

fuel from residential property. The FAA will not concern itself with self-fueling activities which may be permitted by local regulation.

Final Policy On Existing Through-the-Fence Access To Commercial Service Airports From A Residential Property

Applicability

This Final Policy applies to commercial service airports with existing residential through-the-fence access.

For the purposes of this Final Policy:

"Access" means:

1. An access point for taxiing aircraft across the airport boundary; or

2. The right of the owner of a particular off-airport residential property to use an airport access point to taxi an aircraft between the airport and that property.

"Existing access" through the fence is defined as any through-the-fence access that meets one or more of the following conditions:

1. There was a legal right of access from the property to the airport (e.g., by easement or contract) in existence as of September 9, 2010; or

2. There was development of the property prior to September 9, 2010, in reliance on the airport sponsor's permission for through-the-fence aircraft access to the airport; or

3. The through-the-fence access is shown on an FAA-approved airport layout plan (ALP) or has otherwise been approved by FAA in writing, and the owner of the property has used that access prior to September 9, 2010.

"Extend an access" is defined as an airport sponsor's consent to renew or extend an existing right to access the airport from residential property or property zoned for residential use, for a specific duration of time, not to exceed 20 years.

"Development" is defined as excavation or grading of land needed to construct a residential property; or construction of a residence.

"Residential property" is defined as a piece of real property used for single- or multi-family dwellings; duplexes; apartments; primary or secondary residences even when co-located with a hangar, aeronautical facility, or business; hangars that incorporate living quarters for permanent or long-term use; and time-share hangars with living quarters for variable occupancy of any term.

"Transfer of access" through the fence is defined as one of the following transactions:

1. Sale or transfer of a residential property or property zoned for residential use with existing through-the-fence access; or

2. Subdivision, development, or sale as individual lots of a residential property or property zoned for residential use with existing through-the-fence access.

I. Existing through-the-fence access from residential property at federally-obligated commercial service airports

The Agency understands that it may not be practical or even possible to terminate through-the-fence access at many of those commercial service airports where that access already exists. Where access could be terminated, property owners have claimed that termination could have substantial adverse effects on their property value and investment, and sponsors seeking to terminate this access could be exposed to costly lawsuits. Accordingly, FAA will not consider the existence of existing residential through-the-fence access by itself to place a sponsor in noncompliance with its grant assurances at these commercial service airports.

In some cases, FAA has found that through-the-fence access rights can interfere with the sponsor's ability to meet its obligations as sponsor of a federally assisted public use airport. This is discussed in detail at 75 FR 54946, 54948 (Sept. 9, 2010). As a result, FAA believes that

sponsors of commercial service airports with existing through-the-fence access agreements must adopt measures to substantially mitigate the potential problems with residential through-the-fence access where it exists to avoid future grant compliance issues. Therefore, FAA, as a condition of continuing grants to commercial service airports with residential through-the-fence access, will require these sponsors to adopt measures to substantially mitigate the potential problems with residential through-the-fence access to avoid future grant compliance issues.

Accordingly, the sponsor of a commercial service airport where residential through-the-fence access or access rights already exist will be considered in compliance with its grant assurances if the airport depicts the access on its ALP, satisfies the terms and conditions contained in section 136 of P.L. 112-95, and meets certain standards for safety, efficiency, parity of fees, and mitigation of potential noncompatible land uses. Those standards are listed in section II, *Standards for compliance at commercial service airports with existing through-the-fence access*. The FAA's review of those standards will be detailed in a Compliance Guidance Letter which will be issued concurrently and published on FAA's Web site at www.faa.gov/airports. An airport sponsor covered by this Final Policy will be required to seek FAA approval before entering into any agreement that would extend (including renewal of access) through-the-fence access. Sponsors are reminded that nearby homeowners possess no right to taxi aircraft across the airport's property boundary, and no off-airport property owner will have standing to file a formal complaint under 14 CFR, part 16 with FAA to challenge the sponsor's decision not to permit such access.

II. Standards for compliance at commercial service airports with existing through-the-fence access

The FAA understands that municipally-owned airports have varying degrees of zoning authority. For example, one sponsor may have substantial zoning powers, while another may have none. Also, the nature of existing through-the-fence rights can greatly affect the sponsor's ability to implement measures to control access. Accordingly, FAA does not expect every sponsor of an airport with existing residential through-the-fence access to adopt a uniform set of rules and measures to mitigate that access. However, FAA does expect each such sponsor to adopt reasonable rules and implement measures that accomplish the following standards for compliance and satisfy the law, to the fullest extent feasible for that sponsor. In general, the greater the number of residential through-the-fence access points and users of the airport and the higher the number of aircraft operations, the more important it is to have formal measures in effect to ensure the sponsor retains its proprietary powers and mitigates adverse effects on the airport.

In order to satisfy the law, the sponsor and the property owner or an association representing property owners must have a written agreement that requires the property owner to:

- Pay access charges that the sponsor determines to be comparable to those fees charged to tenants and operators on-airport making similar use of the airport;
- Bear the cost of building and maintaining the infrastructure the sponsor determines is necessary to provide access to the airfield from property located adjacent to or near the airport;

- Maintain the property for residential, noncommercial use (FAA interprets this limitation as a prohibition on commercial aeronautical services only) for the duration of the agreement;
- Prohibit access to the airport from other properties through the property of the property owner (FAA interprets this limitation as a prohibition on access to the airport not authorized by the airport sponsor); and
- Prohibit any aircraft refueling from occurring on the property (FAA interprets this as a prohibition on the sale of fuel from residential property).

The FAA's standards for compliance for any sponsor of a commercial service airport with existing residential through-the-fence access are as follows:

1. *General authority for control of airport land and access*. The sponsor has sufficient control of access points and operations across airport boundaries to maintain safe operations, and to make changes in airport land use to meet future needs.

2. *Safety of airport operations*. By rule, or by agreement with the sponsor, through-the-fence users are obligated to comply with the airport's rules and standards.

3. *Parity of access fees*. The sponsor can and does collect fees from through-the-fence users comparable to those charged to airport tenants.

4. *Protection of airport airspace*. Operations at the airport will not be affected by hangars and residences on the airport boundary, at present or in the future.

5. *Compatible land uses around the airport*. The potential for noncompatible land use adjacent to or in the immediate vicinity of the airport is minimized consistent with Grant Assurance 21, Compatible Land Use.

These standards will be applied, on a case-by-case basis, in FAA's evaluation of whether each commercial service airport with existing residential through-the-fence access meets the above requirements to the fullest extent feasible for that airport. In situations when access can be legally transferred from one owner to another without the sponsor's review, FAA will treat the access as existing. Because the ability of some sponsors to control access has been compromised as a result of legal rights previously granted to through-the-fence users, existing access locations may be evaluated under the alternative criteria for some standards as indicated below, if applicable to that airport.

In some cases, a sponsor may seek to relocate an existing access point. If the sponsor can demonstrate that this action will improve the airport's overall safety or better address issues associated with the sponsor's long-term planning needs, FAA will not consider the access rights associated with the replacement access point to extend an access. In order to transfer the terms of the existing access point to a new access point without a change in compliance status, the former existing access point must be removed. Such requests should be coordinated with FAA's ADO or Regional Airports Division and upon FAA concurrence, clearly depicted on the sponsor's ALP.

III. Standards for compliance at commercial service airports proposing to extend through-the-fence access

Once allowed, residential through-the-fence access is very difficult to change or eliminate in the future. This is because residential owners, more so than commercial interests, typically expect that their residential property will remain suitable for residential use and protected from adverse effects for a long time. Residential buyers and their mortgage lenders may ensure that the property is purchased with rights that guarantee no change in the access to the airport for decades, or indefinitely. Because each additional residential through-the-fence access location introduces the potential for problems for the airport in the future, and because this access is effectively permanent and resistant to change once permitted, FAA will review extensions of existing residential through-the-fence access at public use airports carefully.

The following supplemental standards will be applied to FAA's case-by-case review of sponsors' proposals to extend residential through-the-fence access. In situations when the transfer of access from one owner to another requires the sponsor's concurrence, FAA will treat the access as an extension. The FAA will not approve requests to extend access that are inconsistent with the sponsor's grant assurances (excluding Grant Assurance 5, Preserving Rights and Powers, paragraph "g" as amended). Furthermore, the sponsor will be required to demonstrate the following standards for compliance:

- The new access agreement fully complies with the terms and conditions contained in section 136 of P.L. 112-95.

- The term of the access does not exceed 20 years.

- The sponsor provides a current (developed or revised within the last 5 years) airport master plan identifying adequate areas for growth that are not affected by the existence of through-the-fence access rights, or the sponsor has a process for amending or terminating existing through-the-fence access in order to acquire land that may be necessary for expansion of the airport in the future.

- The sponsor will impose and enforce safety and operating rules on through-the-fence residents utilizing this access while on the airport identical to those imposed on airport tenants and transient users.

- Through-the-fence residents utilizing this access will grant the sponsor a perpetual avigation easement for overflight, including unobstructed flight through the airspace necessary for takeoff and landing at the airport.

- Through-the-fence residents utilizing this access, by avigation easement; deed covenants, conditions or restrictions; or other agreement, have acknowledged that the property will be affected by aircraft noise and emissions and that aircraft noise and emissions may change over time.

- Through-the-fence residents utilizing this access have waived any right to bring an action against the sponsor for existing and future operations and activities at the airport associated with aircraft noise and emissions.

- The sponsor has a mechanism for ensuring through-the-fence residents utilizing this access will file FAA Form 7460-1, Notice of Proposed Construction or Alteration, if necessary and complying with FAA's determination related to the review of Form 7460-1.

- The sponsor has a mechanism for ensuring through-the-fence residents do not create or permit conditions or engage in practices that could result in airport hazards, including wildlife attractants.

- Where available, the sponsor or other local government has in effect measures to limit future use and ownership of the through-the-fence properties to aviation-related uses (in this case, hangar homes), such as through zoning or mandatory deed restrictions. The FAA recognizes this measure may not be available to the sponsor in all states and jurisdictions.

- If the residential community has adopted restrictions on owners for the benefit of the airport (such as a commitment not to complain about aircraft noise), those restrictions are enforceable by the sponsor as a third-party beneficiary, and may not be cancelled without cause by the community association.

- The access agreement is subordinate to the sponsor's current and all future grant assurances.

- The sponsor has developed a process for educating through-the-fence residents about their rights and responsibilities.

IV. Process and documentation

A. *Existing residential through-the-fence access*.

1. General. The sponsor of a commercial service airport with existing residential through-the-fence access will be considered in compliance with its grant assurances, and eligible for future grants, if FAA determines that the sponsor complies with the law and meets the applicable standards listed above under *Standards for compliance at commercial service airports with existing residential through-the-fence access.* The sponsor may demonstrate that it meets these standards by providing the ADO or regional division staff with a written description of the sponsor's authority and the controls in effect at the airport ("residential through-the-fence access plan" or "access plan"). Sponsors are encouraged to review FAA's Compliance Guidance Letter on FAA Review of Existing and Proposed Residential-Through-Fence Access Agreements, which will be issued concurrently with this notice, prior to submitting their access plan. This guidance letter may be found on FAA's Web site at www.faa.gov/airports. The ADO or regional division will review each access plan, on a case-by-case basis, to confirm that it addresses how

the sponsor complies with the law and meets each of these standards at its airport. The ADO or regional division will forward recommendations regarding each access plan to the Manager of Airport Compliance. Only the Manager of Airport Compliance may accept a commercial service airport sponsor's residential through-the-fence access plan. In reviewing the access plan, the Manager of Airport Compliance may consult with the Transportation Security Administration (TSA). The FAA will take into account the powers of local government in each state, and other particular circumstances at each airport. In every case, however, the access plan must address the law and each of the basic requirements listed under section II of this Final Policy.

2. Residential through-the-fence access plan. The FAA will require evidence of compliance before issuing an AIP grant, beginning in Fiscal Year 2015. FY 2015 and later grants will include a special grant condition requiring the ongoing implementation of these access plans. Generally, FAA will not award discretionary grants to the sponsor until FAA accepts the sponsor's access plan as meeting the law and the standards to the extent feasible for that airport.

3. Airport Layout Plan (ALP). The FAA will require all residential through-the-fence access points to be identified on the airport's ALP. A temporary designation may be added through a sponsor's pen and ink change to immediately identify the locations on the airport property that serve as points of access for off-airport residents. A formal ALP revision that fully depicts the scope of the existing residential through-the-fence agreements should be completed the next time the sponsor initiates an airport master plan study or update.

A sponsor's failure to depict all residential through-the-fence access points is a potential violation of the sponsor's grant assurances, and the Agency may consider grant enforcement under 14 CFR, part 16.

4. FAA review. The FAA's acceptance of the access plan represents an Agency determination that the commercial service airport has met the law and compliance standards for existing residential through-the-fence access for a period not to exceed 20 years. The following actions will trigger a commercial service airport sponsor to update its access plan prior to its 20-year expiration: development of a new master plan or an update to an existing master plan, significant revisions to an ALP, requests for Federal financial participation in land acquisition, identification of a safety concern, or substantial changes to the access agreement. A commercial service airport sponsor's failure to implement its access plan could result in a violation of the special grant condition and potentially lead to a finding of noncompliance.

5. Commercial service airports with existing residential through-the-fence access that do not meet the compliance standards. The FAA recognizes that some commercial service airport sponsors may not be able to fully comply with the law and the standards listed above, due to limits on the powers of the sponsor and/or other local governments, or on other legal limits on the sponsor's discretion to adopt certain measures. Other sponsors have the capability to adopt measures to satisfy the compliance standards but have not done so. The FAA may consider a commercial service airport sponsor's inability to comply with the law and/or the minimum compliance standards as a militating factor in its review of requests for discretionary funding.

6. Commercial service airports that fail to submit an access plan. The FAA expects commercial service airport sponsors with existing residential through-the-fence access to develop an access plan which addresses the law, preserves their proprietary rights and powers, and mitigates the inherent challenges posed by this practice. Beginning in Fiscal Year 2015, a sponsor's failure to comply with the Final Policy may jeopardize its ability to compete for discretionary AIP grant funding.

B. *Requests to extend residential through-the-fence access at airports covered by this Final Policy*

As of the date of the enactment of P.L. 112-95 (February 14, 2012), a sponsor of a commercial service airport proposing to extend an access agreement must submit a current airport master plan and a revised residential through-the-fence access plan as detailed below. The ADO or regional division will forward its recommendations regarding each request to extend access to the Manager of Airport Compliance. Only the Manager of Airport Compliance may approve a sponsor's request to extend access. In reviewing the proposal, the Manager of Airport Compliance may consult with TSA.

1. Master Plan. A sponsor of a commercial service airport wishing to extend an existing residential through-the-fence access agreement must submit a recent airport master plan to the ADO or regional division. The FAA considers a master plan to be recent if it was developed or updated within the past 5 years. The master plan should explain how the sponsor plans to address future growth, development, and use of the airport property over the next 20 years;

sponsors should work with ADO or regional division staff to develop an appropriate scope of work for these master plans.

2. Residential through-the-fence access plan. The sponsor is responsible for revising its access plan, as discussed under section III of this Final Policy, to reflect how it will meet the standards for compliance for the extended access. Once FAA has accepted the revised access plan, FAA will condition future AIP grants upon its ongoing implementation.

3. Continuing obligations. Once the revised access plan is accepted by FAA, and if required, the revised ALP, is approved by FAA, the sponsor must continue to comply with obligations described in section IV.A of this Final Policy.

V. Eligibility for AIP grants

A. General. Beginning in Fiscal Year 2015, a sponsor of a commercial service airport with existing residential through-the-fence access will be required to submit their residential through-the-fence access plan prior to notifying FAA of its intent to apply for an AIP grant. The sponsor will not lose eligibility for entitlement grants on the basis of the through-the-fence access, but FAA will consider the potential constraints on the utility of the airport to be a significant factor in future AIP funding decisions.

B. Public infrastructure and facilities with substantial benefit to private through-the-fence users. The FAA may be unable to justify the Federal investment in a proposed project when private

residential developments with through-the-fence access will receive substantial value from that federally assisted airport infrastructure and/or facility.

C. Exclusive or primary private benefit. On-airport infrastructure and facilities used exclusively or primarily for accommodation of through-the-fence users are considered private-use and are ineligible for AIP grants.

Issued in Washington, DC on July 9, 2013.

Randall S. Fiertz,

Director, Airport Compliance and Management Analysis.

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