



Federal Aviation Administration

Memorandum

Date:

To: ACO-1, ACO-100, Regional and Airports District Managers and Compliance Specialists

From: Charles C. Erhard, Manager of Airport Compliance & Field Operations

Subject: Compliance Guidance Letter 2009-1 - Through-the-Fence and On-Airport Residential Access to Federally Obligated Airports

I. – SUMMARY AND DEFINITIONS: This Compliance Guide Letter (CGL) is to provide guidance to FAA Airports personnel regarding an airport sponsor's Federal obligations as it relates to an airport residential development and through-the-fence and on-airport residential access to federally obligated airports. The CGL is consistent with Order 5190.6B, FAA Airport Compliance Manual. For purposes of this CGL:

- Airport Property – all property identified on an airport's Exhibit A property map.
- Through-the-Fence (TTF) Access – is access to the public landing area by aircraft based on off-airport land adjacent to the airport property.
- Residential Use – includes single or multi-family dwellings; duplexes; apartments; primary or secondary residences even when collocated 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 on a weekly or monthly basis.

II. – BACKGROUND: As a general principle, FAA does not support agreements that grant access to the public landing areas by aircraft stored and serviced off-site on adjacent property. This type of agreement is to be avoided since these agreements can create situations that lead to violations of the sponsor's federal obligations. It has been the FAA's experience that sponsors find it difficult to correct FAA grant assurance violations that result from TTF access. The inability to correct such violations can result in an airport losing its eligibility to receive Airport Improvement Program (AIP) grant funds.

Specifically, TTF agreements can have the effect of:

A. Placing contractual and legal encumbrances or conditions upon the airport property that cedes control of airport access to a TTF operator in violation of Grant Assurance 5, *Preserving Rights and Powers*. The sponsor must maintain the necessary rights and powers to comply with the grant assurances. The sponsor cannot relinquish its rights and powers to a private third party;

B. Limiting the sponsor's ability to ensure safe operations in both movement and non-movement areas, in violation of Grant Assurance 19, *Operation and Maintenance*. TTF access may bring both aircraft and uncontrolled vehicular traffic to the airfield creating unsafe conditions;

C. Creating unjustly discriminatory conditions for on-airport commercial tenants and other users by granting access to off-airport competitors or users in violation of Grant Assurance 22, *Economic Nondiscrimination*;

D. Effectively granting an exclusive right to the TTF operator in violation of Grant Assurance 23, *Exclusive Rights*, if the operator conducts a commercial business and no on-airport operator is able to compete because the terms given to the TTF operator are so much more favorable;

E. Affecting the airport's ability to be self-sustaining in violation of Grant Assurance 24, *Fee and Rental Structure*, because the airport may not be in a position to charge TTF operators adequately for the use of the airfield;

F. Weakening the sponsor's ability to remove and mitigate hazards and incompatible land uses, in violation of Grant Assurance 20, *Hazard Removal and Mitigation*, and Grant Assurance 21, *Compatible Land Use*;

G. Making it more difficult for an airport sponsor to implement future security requirements that may be imposed on airports.

Airport sponsors have no federal obligation to provide airport access to off-airport enterprises or individuals. In fact, the sponsor may simply deny TTF access if it chooses. In addition, TTF users are not protected by the sponsor's federal obligations to the FAA. *M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board* (FAA Docket 16-06-06, January 19, 2007). Therefore, FAA will not consider complaints from off-airport entities attempting to establish TTF access or who have issues with their existing TTF access agreements (e.g. terms and conditions, or rates and charges). However, an improperly structured TTF agreement may subject a sponsor to a formal complaint by on-airport tenants under 14 CFR Part 16 (Part 16), *Rules of Practice for Federally Assisted Airport Enforcement Proceedings* alleging violations of the sponsor's grant obligations or federal property conveyances.

III. – SCOPE: The following is a discussion of FAA's position on various types of TTF access and on-airport residential development.

- A. Non-Residential Compatible Through-the-Fence Access:** On occasion, an off-airport entity with a compatible use will request TTF access to the airport. The primary driver for such agreements would be a use whose space requirements surpass the airport's ability to offer an on-airport site or the need would absorb so much airport property that it would limit future aeronautical development. Sponsors may face this situation when an industrial airpark or manufacturing facility is developed in conjunction with the airport and seeks access to the airfield solely for aircraft use without offering any aeronautical services to the public. While FAA does not encourage TTF access, a properly structured agreement with a compatible industry may be acceptable. *Sponsors should seek review of proposed TTF agreements by FAA Airports District Offices (ADOs) or Regional Division Offices (ROs) in advance of signing to ensure compliance with the sponsor's grant obligations and property conveyances. The access should be identified on the Airport Layout Plan and approved by the FAA.* The information below under "Procedures for Establishing TTF Access" will assist airport sponsors in developing a compliant TTF access agreement.
- B. Fixed Base Operations (FBO) and Other Aeronautical Service Providers**
TTF: The FAA does not support airport sponsors entering into TTF agreements with an FBO, or other aeronautical service providers, that compete with on-airport FBO's and aeronautical service providers. Such agreements can undermine the sponsor's rights and powers to operate the airport and impede compliance with its federal obligations. *JetAway Aviation, LLC v. Board of County Commissioners, Montrose County, Colorado* (FAA Docket 16-06-01). In addition, it can undermine the financial viability of on-airport aeronautical businesses and undermine an airport in becoming self-sustaining. *If an airport sponsor elects to enter into a TTF access agreement with an FBO or other aeronautical service provider, the sponsor should seek review of the proposed TTF agreement by the FAA ADO or RO in advance of signing to ensure compliance with the sponsor's grant obligations and property conveyances. The access point should be identified on the Airport Layout Plan and approved by FAA.* The information below under "Procedures for Establishing TTF Access" will assist sponsors in developing a compliant TTF access agreement.
- C. Residential Through-the-Fence Access:** *There are no acceptable forms of residential TTF agreements.* Residential use adjacent to an airport is an incompatible land use and in accordance with Grant Assurance 21, *Compatible Land Use*. Airport sponsors must take appropriate action, including the adoption of zoning laws, to restrict the use of land, to the extent reasonable, next to or near the airport to uses that are compatible with normal airport operations. (Title 49 § 47107(a)(10)). When an airport allows or promotes adjacent residential use by granting TTF access, it violates Grant Assurance 21 and jeopardizes its eligibility to receive AIP grant funding. *Carey v. Afton-Lincoln County* (FAA Docket 16-06-06, Jan. 19, 2007).

On-Airport Residential Use: FAA ADOs and ROs are responsible for ensuring residential developments are not approved when reviewing ALPs. There is no justification for the introduction of residential development inside a federally obligated airport. It is the sponsor's federal obligation not to make or permit any changes or alterations in the airport or any of its facilities that are not in conformity with the ALP, as approved by the FAA, and that might, in the opinion of the FAA, adversely affect the safety, utility, or efficiency of the airport.

The FAA differentiates between a typical pilot resting facility or crew quarters and a hangar residence or hangar home. The FAA recognizes that 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. There may be a need for aircraft rescue and fire fighting (ARFF) quarters if there is a 24-hour coverage requirement. Moreover, an airport manager or a fixed-base operator (FBO) duty manager may have living quarters assigned as part of his or her official duties. Living quarters in these cases would be airport-compatible if an airport management or FBO job requires an official presence at the airport at off-duty times, and if the specific circumstances at the airport reasonably justify that requirement.

However, other than the performance of official duties in running an airport or FBO, the FAA does not consider permanent or long-term living quarters to be an acceptable use of airport property at federally obligated airports. This includes developments known as airparks or fly-in communities, and any other full-time, part-time, or secondary residences on airport property – even when co-located with an aviation hangar or aeronautical facility. While flight crew or caretaker quarters may include some amenities, such as beds, showers, televisions, and refrigerators, these facilities are designed to be used for overnights and resting periods, not as permanent or even temporary residences for flight crews, aircraft owners or operators, guests, customers, or the families or relatives of same.

Allowing residential development on federally obligated airports is incompatible with aircraft operations and conflicts with several grant assurance and surplus property requirements as mentioned above. Residential development inside federally obligated airports is inconsistent with federal obligations regarding the use of airport property.

Access Not Permitted: No exception will be made to permit TTF access for certain purposes:

1. The FAA will not approve TTF access for residential airpark purposes since that use is an incompatible land use.
2. The FAA will not approve a release of airport land for TTF access by aircraft, because airport land may only be released if the land no longer has an airport purpose. If the land would be used for the parking and operation of aircraft, it would not qualify for a release. A release of airport land for an aeronautical

use would simply serve to reduce the sponsor's control over the use and its ability to recover airport costs from the user.

IV. – PROCEDURES FOR ESTABLISHING THROUGH THE FENCE ACCESS

A. The FAA ADOs or ROs will determine whether arrangements granting access to the airfield from off-site locations are consistent with applicable federal law and policy. If the FAA ADO or RO determines that such an agreement lessens the public benefit for which the airport was developed, it will notify the sponsor that the airport may be in violation of its federal obligations if it grants TTF access. Therefore, sponsors should seek review of proposed TTF access agreements to the FAA in advance of the sponsor's signing the agreement to ensure compliance with its federal obligations.

B. Access Agreement Provisions: Sponsors should consider the following provisions in preparing a TTF access agreement:

1. The access agreement should be a written legal document with an expiration date and signed by the sponsor and the TTF operator. It may be recorded. Airports should never grant deeded access to the airport or grant a right of access in perpetuity.
2. The right of access should be explicit and apply only to the TTF operation (i.e. right to taxi its aircraft to and from the airfield).
3. The TTF operator shall not have a right to grant or sell access through its property so other parties may gain access to the airfield from adjacent parcels of land. Only the airport sponsor may grant access to the airfield, which should be consistent with Transportation Security Administration requirements.
4. The access agreement should have a clause making it subordinate to the sponsor's grant assurances and federal obligations. Should any provision of the access agreement violate the sponsor's grant assurances or federal obligations, the sponsor shall have the unilateral right to amend or terminate the access agreement to remain in compliance with its grant assurances and federal obligations.
5. The TTF operator shall not have a right to assign its access agreement without the express prior written approval of the sponsor. The sponsor should have the right to amend the terms of the access agreement to reflect a change in condition or value to the aeronautical portion of off-airport property if the TTF access is to continue.
6. The fee to gain access to the airfield should, at minimum, reflect the airport fees charged to similarly situated on-airport tenants and aeronautical users. For example, landing fees, ground rent, or tie-down fees paid to the sponsor by on-airport aeronautical users or tenants to recover the capital and operating costs of the airport should be reflected in the access fee assessed comparable TTF operators. In addition, if the TTF operator is granted the right to conduct a commercial business catering to aeronautical users either on or off the airport, the sponsor shall assess the same concession terms and fees to the TTF operator as assessed to all similarly situated on-airport commercial operators. As previously

stated, the FAA does not support the granting of TTF access to aeronautical commercial operators that compete with on-airport operators.

7. The access agreement should contain termination and insurance articles to benefit the sponsor.
8. The expiration date of the access agreement should not extend beyond a reasonable period from the sponsor's perspective. It may not depend upon the full depreciation of the TTF off-airport investment (i.e. 30 years), as would be the case had the investment been made inside the airport. In any case, it should not exceed the appraised useful life of the off-airport facility. Should the access agreement be renegotiated at its expiration, the new access fee may reflect an economic rent for the depreciated off-airport aeronautical facilities (i.e. hangar, ramp, etc); comparable to what would be charged by the sponsor for similar on-airport facilities. That is, when on-airport facilities are fully amortized and title now vests with the airport instead of the tenant, the airport may charge a higher economic rent for the lease of its aeronautical facility. The access fee for the aeronautical portion of a depreciated off-airport facility should be adjusted in a similar fashion notwithstanding that title still vests with the off-airport operator. However, other than achieving parity with on-airport tenants and aeronautical users, there is no upper or maximum limitation on what the airport sponsor may charge for TTF access.

V. – FAA REVIEW OF THROUGH-THE-FENCE AGREEMENTS

Sponsors shall submit **new, revised or renewed** TTF access agreements to the FAA ADO or RO for review to ensure compliance with the grant obligations and federal property conveyances prior to the sponsor signing the agreement. In addition, the TTF access points must be noted on the new, revised or renewed Airport Layout Plan (ALP). If a sponsor enters into a new, revised or renewed TTF access agreement that the FAA has objected to based on a grant assurance or federal property conveyance violation (e.g., residential use, access via perpetual easement, etc.) the sponsor risks enforcement action by FAA. Such action may lead to the loss of grant funding, especially if the violation has compromised the utility of the federal investment in the airport or if the sponsor has granted rights to a private party that undermines the sponsor's ability to comply with the grant assurances.

If the airport has existing TTF access, it must identify all access points on the ALP at the next update and provide a copy of the TTF access agreements for review by the FAA ADO or RO. Approval of the ALP change will be conditioned on the TTF access agreement complying with the sponsor's federal grant obligations.

VI. - FAA ACTIONS ON CORRECTIVE ACTION PLANS

The FAA ADO and RO will work closely with the sponsor to develop a corrective action plan that provides for (1) preventing future residential building on properties with TTF

access, (2) preventing further residential TTF, and (3) seeking ways to convert noncompatible residential use to compatible or aeronautical use at the expiration of the TTF agreement. FAA will not require sponsor's to terminate existing TTF access agreements. FAA seeks, in most cases, to convert noncompatible residential use only after the TTF agreement has expired under its own terms. This does not apply to grants of TTF access in perpetuity. Such TTF agreements must be amended as they may undermine a sponsor's ability to comply with the FAA grant assurances.

In reviewing a corrective action plan, the FAA is open to considering new avenues for resolution such as participating in purchasing the property and making it part of the airport if it is eligible for AIP funding. After the purchase, the property shall be converted to compatible aeronautical use.

References:

M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board (FAA Docket 16-06-06, January 19, 2007)

JetAway Aviation, LLC v. Board of County Commissioners, Montrose County, Colorado (FAA Docket 16-06-01, November 6, 2006)

Title 49 USC 47107 (a) (10), (13), (16)

FAA Grant Assurances

Surplus Property Act of 1944 as amended by Public Law 80-289

Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*

FAA Airport Compliance Manual, Order 5190.6B