

Airport “Through the Fence” operations and
Residential Airparks at Publicly Funded Airports
By Bill Dunn
Vice President Airports
AOPA

Over the past several years, members have contacted the Association with questions regarding Through-the-fence operations at public use airports. However, since the General Accounting Office (GAO) released a report¹ critical of the Federal Aviation Administration’s (FAA) failure to adequately oversee airport land use, the FAA has implemented an active program of conducting land use inspections at obligated airports. With these increased inspections, the FAA has identified (and continues to discover additional) airports that are not following federal guidance on land use. The Association is currently experiencing an increase in the frequency of issues surrounding land use and through the fence activity at publicly funded airports that are grant obligated to the FAA.

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

There can be some positives for the airport and all members with a properly structured and FAA approved access agreement that provides financial support to the airport. However, the FAA has historically “discouraged” through the fence access to a publicly funded airport for a number of reasons.

What is a Through the Fence Operation?

Generally speaking, a Through the Fence (TTF) operation is defined by the Federal Aviation Administration (FAA) as any activity or use of real property of an aeronautical or non-aeronautical nature that is located outside (or off) of airport property but has access to the airport’s runway and/or taxiway system. Airport property is property owned by the airport sponsor and shown on an FAA approved Airport Layout Plan (ALP). Through the Fence operations occur from property that is immediately adjacent to the airport but which is owned by corporations, businesses or private parties. These properties are not under control in any manner by the airport sponsor.

The FAA officially defines² Through the Fence as:

“ Through-the-fence operations are those activities permitted by an airport sponsor through an agreement that permits access to the public landing area by independent entities or operations offering an aeronautical activity or to owners of

¹ GAO Report RCED-99-109

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

aircraft based on land adjacent to, but not part of, the airport property. **The obligation to make an airport available for the use and benefit of the public does not impose any requirement for the airport sponsor to permit ground access by aircraft from adjacent property.**” [emphasis added]

Through the Fence applies to PROPERTY and not INDIVIDUALS. Individual activities such as independent aircraft mechanics and flight instructors are addressed very specifically in the FAA Advisory Circular on Minimum Standards for Commercial Activities³.

Types of Through the Fence Arrangements

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

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

The Agreement

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

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

Since at least 1989, the FAA has actively discouraged through the fence agreements at publicly funded airports. The FAA Order 5190.6A, also known as the Airports Compliance Handbook states as an agency position of the subject⁴

“As a general principle, FAA will recommend that airport owners refrain from entering into any agreement which grants access to the public landing area by aircraft normally stored and serviced on adjacent property. Exceptions can be

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

⁴ FAA Order 5190.6A, October 1, 1989 at section 6-6 paragraph d – Agency Position

granted on a case-by-case basis where operating restrictions ensure safety and equitable compensation for use of the airport.”

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

As the FAA has worked to comply with this Congressional guidance⁵ and actively pursue additional airport land use inspections, the agency has identified a number of publicly funded, public use airports that they believe are in violation of certain federal grant assurances. The law also requires the FAA to submit a report to Congress annually that lists airports that are not in compliance with these federal grant obligations and the corrective actions planned to bring the airport back into compliance with federal grant obligations. This is an issue extremely important to AOPA and the health of airports, nationwide.

Federal Grant Obligations and the Compliance Program

When the sponsor of an airport that is eligible to receive federal funding under the FAA’s Airport Improvement Program (AIP) accepts federal funding, the airport sponsor is required to execute a contract with the FAA. This contract includes thirty-nine (39) Grant Assurances – a series of performance metrics – that the airport sponsor agrees to abide by in operating the airport. Grant Assurances are codified in federal law⁶ and can be found on the FAA’s web site⁷.

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

- Prohibition of exclusive rights
- Use of airport revenue
- Proper maintenance and operation of airport facilities
- Protection of approaches
- Keeping good title of airport property
- Compatible land use
- Availability of fair and reasonable terms without unjust discrimination
- Adhering to the approved airport layout plan
- Self-sustainability
- Sale or disposal of Federally acquired property
- Preserving rights and powers
- Using acceptable accounting and record-keeping systems
- Compliance with civil rights requirements

Congress has also provided the FAA with the ability to “protect the federal investment” and to ensure that an airport sponsor abides by these assurances through penalties ranging from withholding future grants to implementing legal action against the airport sponsor both administratively and in the federal judicial system. The FAA has a statutory mandate

⁵ AIR-21 (HR 1000) section 737. (Public Law 106-181) and codified as USC Title 49 § 47131

⁶ United States Code (USC) Title 49 § 47107 (a)

⁷ http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances/

to ensure that airport owners comply with these assurances.⁸ This is the FAA Grant Compliance Program. An overview of the FAA Compliance Program can be found on the agency's web site⁹.

Grant Obligations that apply regarding Through The Fence Operations

Of the 39 federal grant assurances, in most cases, the FAA typically focuses on 4 assurances when reviewing Through The Fence issues. These include:

Grant Assurance # 5 – Preserving Rights and Powers

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

It is important to note that Assurances apply only to property owned and controlled by the airport sponsor. Off-airport, Through the Fence facilities do not have the same protections as those who are located on actual airport property. As such, rules, regulations and operating requirements do not apply to TTF operators. In actuality, the airport sponsor has no control or power over those off-airport properties. Therefore, by not having the ability to control TTF operators, the airport sponsor may be viewed by the FAA as having subrogated its responsibility.

Grant Assurance #21 – Compatible Land Use

“It [sponsor] will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including the landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which federal funds were expended.”

Since 1982, the FAA has emphasized the importance of avoiding the encroachment of residential development on public airports, and the Agency has spent more that \$300 million in Airport Improvement Program (AIP) funds to address land use incompatibility issues. A substantial part of that amount was used to buy land and houses and to relocate the residents.

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

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

The FAA's policy on compatible land use adjacent to a publicly funded airport was further codified legally in a Part 16 ruling¹⁰ issued January 19, 2007. This Directors Determination, at page 42, ruled:

“The FAA generally discourages residential airparks adjacent to airport property because such airparks can create a compatible land use problem, especially with noise compatibility and zoning issues, in the future. Grant assurance 21, Compatible Land Use, requires airport sponsors to take appropriate action, including the adoption of zoning laws, to restrict the use of land adjacent to, or in the immediate vicinity of, the airport to activities and purposes compatible with normal airport operations, including landing and taking off of aircraft. The FAA recognizes residential development adjacent to airport property as an incompatible land use.”

The determination went on to state, in relevant part:

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

In some cases, the development of residential properties adjacent to the airport actually creates obstructions to the airport and associated Part 77¹¹ surfaces, airport Runway Protection Zones (RPZ) and Obstacle Free Areas (OFA) as required by the FAA.¹² Such impacts have a potential negative impact on the full utility of the airport as well as creating potential hazards to air navigation.

Grant Assurance #22 – Economic Nondiscrimination

h. “The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.”

i. “The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”

In a number of TTF agreements, the off-airport operators gain access to the public use airport without paying a fee to the airport for that access. In most cases, the TTF access has been granted by a real estate easement granting the fee-less access. At the same time,

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

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

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

aircraft operators based on the airport property are subject to the airport sponsors rates and charges. Lack of a reasonable fee structure for access to the airport can create economic discrimination against the on-airport tenants. Off-airport individuals have an economic advantage in violation of grant assurances.

Grant Assurance #24 – Fee and Rental Structure

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

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

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

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

The Application of FAA Policy on Through the Fence Operators

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

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

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

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

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

While not "prohibited" by the FAA, the FAA strongly discourages TTF operations because they make it difficult for an airport operator to maintain control of airport operations and allocate airport cost to all users. TTF arrangements also can complicate the control of vehicular and aircraft traffic.

In any event, the local FAA Airport District Office (ADO) with oversight responsibility for the particular airport should be consulted BEFORE any TTF agreement is approved or modified.

Potential Resolution Strategies to the FAA Policy.

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

There are a number of potential solutions which potentially be implemented to resolve or mitigate FAA concerns. It is important that the FAA play an active role in seeking any resolution regarding off-airport access to the publicly funded airport.

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

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

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

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

All stakeholders on the airport and off airport operators should be involved with the airport sponsor in developing a rates and fee structure (including an access fee) that

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

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

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

4. Avoid any expansion of TTF access and facilities

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

5. Removal of obstacles

If a TTF facility has been deemed an obstacle to air navigation under the Part 77 process, it is likely that the mitigation measure has fallen to the airport in the form of higher traffic patterns, changes to traffic pattern flow or direction, or the raising of airport approach minima; sometimes to a height that may make an IFR approach no better than a VFR day.

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

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

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

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

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

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

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

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

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

For more information contact AOPA's Regional Affairs at 301-695-2200.