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December 18, 2009

Mr. Charles C. Erhard
Manager, Airport Compliance and Field Operations (AAS400)
Federal Aviation Administration
800 Independence Ave. SW
Washington, DC 20591

Dear Mr. Erhard:

On behalf of the 415,000 members of the Aircraft Owners and Pilots Association (AOPA), we appreciate the opportunity to review and provide comments regarding the agency's "*Compliance Guidance Letter 2009-1 – Through-the-Fence and On-Airport Residential Access to Federally Obligated Airports.*"

Please note that AOPA is focusing our comments on the residential component of the policy. We will leave comments regarding commercial issues to those organizations that represent business interests.

While we understand that the Federal Aviation Administration (FAA) has not changed its long-time policy relative to the aforementioned subject matter, there has been much confusion regarding the policy due to what many perceive as a lack of consistent and national guidance to regional and local Airports offices. As a result, these offices often seem to have applied their own individual interpretation to Through-the-Fence (TTF) issues that came to their attention. In some instances, local Airports offices were actually aware of the proposed residential TTF development prior to construction and to some degree approved these developments. We are pleased to see the agency working to clarify FAA direction on enforcement activity in this area through the issuance of detailed guidance to all field offices.

Over the past year, AOPA has heard directly from members who have serious concerns regarding the FAA's residential TTF policy. In short, many of our members feel that recent actions are a departure from past practices, and that efforts to terminate existing TTF access are being implemented too aggressively and unevenly throughout the country, especially where the FAA was aware of the residential uses in the past; and attempts to apply a "one-size fits all" approach. We agree with the perception that the proposed guidance is too inflexible and does not provide any latitude for circumstances that may be beyond the control of the publicly obligated airport sponsor.

III. – SCOPE, Paragraph C. – Residential Through-the-Fence Access: There are no acceptable residential TTF agreements.

AOPA considers this statement a significant departure from past FAA policy in this area. In the past, the FAA has approved TTF access, but set a very high standard for what constituted an acceptable TTF agreement. We believe that the FAA should recognize that a number of residential TTF agreements already exist and in some cases any changes may be impossible for the airport sponsor to undertake without doing great damage to the airport and local aviation community. For example, a real estate deed that has been legally recorded and provides such access would put the airport sponsor in an impossible position to modify without enduring litigation costs at the least. If the sponsor attempts to negate or modify the deed as the FAA directs, the likely litigation to follow would fall in the state judicial system where the FAA would not be a party. In these cases, there is no guarantee that the judicial decision would be in the airport sponsor's favor, or would be so high a price as to be unaffordable.

We can understand the agency's desire to limit or prevent new developments from being built, and believe that the new guidance can and should address the FAA expectations for challenges facing approval of residential TTF agreements going forward. At the same time, we do not believe the current draft guidance provides an adequate vehicle to deal with existing residential TTF developments – some of which have been in place for decades.

In these cases, we believe the FAA should work closely with the public sponsor to ensure that the existing access agreement (deeded or recorded easement) provides appropriate financial support to the airport on an equitable basis in line with fees paid by on-airport tenants. There is no doubt that without adequate financial support, the airport could face a limited lifetime and at some point be forced to close provided federal grant assurances had expired. At that point, the aviation-related value of the deeded access or easement allowing access would likely cease to exist.

We also believe that as a part of this process, the airport sponsor should seek unrestricted aviation easements from all property owners in favor of the airport, as well as and any other local planning and zoning rules that would be beneficial to protecting the continued operation of the airport.

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

AOPA understands the FAA's desire to review all new, revised or renewed TTF access agreements. We support amending the Airport Layout Plan (ALP) to depict the appropriate points of access to the airport from adjacent property. However, we must reiterate our comments above relating to perpetual deeded or easement granted access. It is worth repeating that the airport sponsor should not be subject to severe penalty because of a legal inability to terminate or modify such deeds. This will only serve to harm the local aviation community and an airport in which there is already a significant public investment.

VI. – FAA ACTIONS ON CORRECTIVE ACTION PLANS

Reading in part at page 7, paragraph 1 The FAA will not require sponsors 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. (emphasis added)

We strongly believe that existing access granted in perpetuity must be reviewed for any legal consequences to the airport sponsor. If the sponsor is unable to legally force changes to an existing agreement, that agreement must stand without change. Forcing the airport sponsor into litigation in the state judicial system only serves to place an unrealistic and costly expense on the public airport sponsor, the cost of which will not be fully reimbursed by the FAA. Further, we suggest that it is not always in the best interests of an airport to terminate all existing TTF access, especially when it is of long duration and has become an integral and valuable part of the airport's operations

It is our suggestion that the FAA take a much more aggressive stance with publicly funded airport sponsors to enact appropriate zoning protections for airports as required under Grant Assurance 21 – Compatible Land Use to prevent future incompatible land use approval by the local public sponsor, especially development that is not “aviation-friendly”.

AOPA has heard from a number of members who do not share the FAA's view that residential TTF are necessarily bad for the publicly funded airport. They often cite the benefits that accrue to the airport through taxes, fuel purchases and providing security to the airport since those who reside adjacent to the airport would recognize anything that is out of the norm.

In working with airport sponsors to develop corrective action plans, the FAA must also be cognizant of the impact on the value of the real estate involved in a residential TTF arrangement. If action by the agency with the airport sponsor creates a situation where the value of the adjacent property is diminished, the airport sponsor may find themselves in litigation relative to a taking of private property – again leading to extensive litigation in a state or federal court.

We appreciate the opportunity to comment on the draft guidance letter and hope that our concerns will be taken into consideration as the draft document is converted into the official Compliance Guidance Letter.

Sincerely,



Gregory Pecoraro
Vice President, Airports and State Advocacy