



**FAA
Airports**

FAA's Final Policy on Existing Through-the-Fence Access to Commercial Service Airports from a Residential Property

From 78 Fed. Reg. 42419 (July 16, 2013)

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 Fed. Reg. 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.