



**FAA
Airports**

FAA's Interpretation of Section 136 of FAA Modernization and Reform Act of 2012

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

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.