

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HART LAND AND CATTLE CO., )  
INC., RON L. HART and )  
VICTORIA S. HART, )  
 )  
Petitioners, )  
 )  
and )  
 )  
BRUCE BEST and CHERYL ) CASE NO. 91-7369  
SANDERS, )  
 )  
Intervenors, )  
 )  
vs. )  
 )  
RON BIRITZ and DEPARTMENT OF )  
TRANSPORTATION, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This matter came on for hearing in New Smyrna Beach, Florida, before Robert T. Benton, II, Hearing Officer of the Division of Administrative Hearings, on March 1, 1992. The parties filed proposed recommended orders (or adopted others already filed) on or before April 9, 1992. The attached appendix addresses proposed findings of fact by number. Neither Ron L. Hart nor Victoria S. Hart entered an appearance.

APPEARANCES

For Petitioner Dan R. Warren, Esquire  
Hart Land and Judge and Warren, P.A.  
Cattle Company: 315 Silver Beach Avenue  
Daytona Beach, FL 32118

Pro Se: Bruce Best  
Post Office Box 2793  
New Smyrna Beach, FL 32170

Pro Se: Cheryl M. Sanders  
Post Office Box 2793  
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For Respondent James S. Morris, Esquire  
Biritz: Storch, Hansen & Morris, P.A.  
1620 South Clyde Morris Blvd., #300  
Daytona Beach, FL 32219

For Responden      Vernon L. Whittier, Esquire  
DOT:                      605 Suwanee Street  
                                 Tallahassee, FL 32399-0458

#### STATEMENT OF THE ISSUE

Whether respondent Department of Transportation (DOT) should grant co-respondent Ron Biritz's application for site approval for and licensure of a private airport three miles west of Oak Hill at 28o 51' 25" N., 81o 54' 26" W., as proposed in DOT's order No. 91-34?

#### PRELIMINARY STATEMENT

After DOT entered order No. 91-34, Cheryl M. Sanders and Hart Land and Cattle Company, by its agent Clyde L. Hart, who may also have been acting as the other petitioners' agent, requested formal administrative proceedings on the airport site approval and license application. DOT forwarded the latter, but not the former, request to the Division of Administrative Hearings for hearing, in accordance with Section 120.57(1)(b)3., Florida Statutes (1991).

At hearing, both Ms. Sanders and Mr. Best were allowed to intervene, subject to proof at hearing of a substantial interest to be determined by the proposed site approval and licensure. Clyde L. Hart sought but was denied the right to act as qualified representative for petitioners, although he testified as a witness.

#### FINDINGS OF FACT

1. Selwin Coleman is the record holder of land located near Maytown Road three miles west of Oak Hill, Florida, at latitude 28o51'25" North, longitude 80o54'26" West in Sections F and G, Township 19 South, Range 34 East in Volusia County (the proposed site). He has authorized his son-in-law, Ron Biritz, to seek DOT site approval and a license for a private airport as the proposed site.

2. Petitioners and intervenors own land in the general vicinity, and Robert L. Hart owns extensive mineral rights, including rights to any minerals underlying the proposed site. Other land owners, including Warren J. Brull, who owns part of the land over which the existing air strip runs, C.R. "Dick" Powell, and Vaughn L. Grasso, who owns a crop duster he stores in a building he characterizes as agricultural, also made Mr. Biritz their agent for purposes of the pending application.

3. Known as "Blue Ridge Flightpark," a 4,000-foot grass air strip at the proposed site had been used by light planes for some time, until recently. The air strip has been significantly improved within the last two years; at one time watermelons were grown on the property. Originally, scrub hickory and gopher tortoise holes made its use as an air field impractical.

4. When John Bronson Monteith, the aviation specialist for DOT's District Five, learned the grass strip at the proposed site was "operational," he contacted the owners and instructed them to close down operations until site approval was granted; and told them how to apply for site approval.

5. As one result, they caused a large "X" to be placed on the strip, indicating the field was closed to operation. When Mr. Monteith visited the proposed site on November 21, 1991, he saw rust on a brake disc on Mr. Biritz's airplane, suggesting disuse.

6. After DOT received the application, Mr. Monteith determined that it was complete and seemed to meet all rule and statutory criteria, so he prepared a notice to grant the application for Nancy Houston's signature. He caused copies of the notice of intent to be sent by certified mail to all airports and municipalities within 15 miles and to all landowners within 1,000 feet of the proposed site. The notice of intent was published in the News Journal, and a public hearing was held on July 18, 1991.

7. There is some question regarding the true nature of several largish buildings along the air strip. Treated as "agricultural" for purposes of construction without building permits, the buildings look to some more like hangars than barns. But, as to the air strip itself, Volusia County zoning officials have recognized a nonconforming use antedating adoption of County zoning ordinances, a use which the ordinances allow to continue, as long as it does not entail construction of any new structures. Respondent's Exhibit Nos. 4 and 7.

8. As experience has demonstrated, the proposed site is "feasible" and "adequate." Despite military air traffic in the general vicinity, the Federal Aviation Authority concluded that, if limited to private use, the "airport will not adversely affect the safe and efficient use of airspace by aircraft." Respondent's Exhibit No. 3. Only a windsock and markings, including threshold markings, are needed to meet licensing requirements.

#### CONCLUSIONS OF LAW

9. Since DOT referred the hearing request to the Division of Administrative Hearings, in accordance with Section 120.57(1)(b)3., Florida Statutes (1991), "the division has jurisdiction over the formal proceeding." Section 120.57(1)(b)3., Florida Statutes (1991).

10. The statutory and rule provisions under which the present application is pending contemplate a unified site approval and licensure process. Section 330.30, Florida Statutes (1991), entitled "Approval of airport sites and licensing of airports; fees," provides:

(1) SITE APPROVALS; REQUIREMENTS, FEES, EFFECTIVE PERIOD, REVOCATION.

(a) . . . [T]he owner or lessee of any proposed airport shall, prior to the acquisition of the site or prior to the construction or establishment of the proposed airport, obtain approval of the airport site from the department. Applications for approval of a site and for an original license shall be jointly made on a form prescribed by the department . . . . The department, after inspection of the airport site, shall grant the site approval if it is satisfied:

1. That the site is adequate for the proposed airport;

2. That the proposed airport, if constructed or established, will conform to minimum standards of safety and will comply with applicable county or municipal zoning requirements;

3. That all nearby airports, municipalities, and property owners have been notified and any comments submitted by them have been given adequate consideration; and

4. That safe air-traffic patterns can be worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity.

(b) Site approval may be granted subject to any reasonable conditions which the department may deem necessary to protect the public health, safety, or welfare.

. . .

(2) LICENSES; REQUIREMENTS, FEES, RENEWAL, REVOCATION.

(a) . . . [T]he owner or lessee of an airport in this state must obtain a license prior to the operation of aircraft on the airport. An application for such license shall be made on a form prescribed by the department and shall be accomplished jointly with an application for site approval. Upon granting site approval, making a favorable final airport inspection report indicating compliance with all license requirements, and receiving the appropriate license fee, the department shall issue a license to the applicant, subject to any reasonable conditions that the department may deem necessary to protect the public health, safety, or welfare. . . .

Implementing these statutory provisions, Rule 14-60.005, Florida Administrative Code, provides:

(8) Site Approval.

(a) Prior to receiving site approval, an applicant shall:

1. Demonstrate that the site is adequate for the proposed airport.

2. Demonstrate that the proposed airport, if constructed or established, will conform to minimum standards of safety.

3. Include documentation evidencing local zoning approval by the appropriate governmental agency. Where there is no local zoning, a statement of that fact from an official of the appropriate governmental agency shall be submitted.

4. Provide the Department a list of all airports and municipalities within 15 miles of the proposed airport and all property owners within 1,000 feet of the proposed airport.

5. Demonstrate that safe air traffic, patterns could be worked out for the proposed airport.

(b) All airport sites must be inspected by a representative of the Department and a written report containing a recommendation filed with the Department.

1. If the inspection show that the site is feasible and can meet the requirements set forth in Rule 14-60.005(8)(a)1.-5. above, the Department shall issue a notice of intent.

11. The procedural steps required by statute and rule have been taken, and no party has contended otherwise.

12. The courts view it "as fundamental that an applicant for a license or permit carries 'the ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency." Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981); Zemour, Inc., v. State Division of Beverage, 347 So.2d 1102 (Fla. 1st DCA 1977) (lack of good moral character found "from evidence submitted by the applicant"). See generally Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). Petitioner has met the burden here.

#### RECOMMENDATION

It is, accordingly,

RECOMMENDED:

That DOT grant site approval on the conditions stated in Order No. 91-34; and, after the requirements of Section 330.30(2), Florida Statutes (1991) have been satisfied, issue a private airport license to Ron Biritz.

DONE and ENTERED this \_\_28\_\_ day of May, 1992, in Tallahassee, Florida.

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ROBERT T. BENTON, II  
Hearing Officer  
Division of Administrative Hearings  
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(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this \_\_28\_\_ day of May, 1992.

#### APPENDIX

Both intervenors adopted petitioner's proposed findings of fact as their own.

Petitioner's proposed findings of fact Nos. 1, 2 and 4 have been adopted in substance, insofar as material.

With respect to petitioner's proposed finding of fact No. 3, the legal status was not clear.

With respect to petitioner's proposed finding of fact No. 5, a preponderance of the evidence established that flights had stopped recently.

Respondent's proposed findings of fact Nos. 1 through 6 have been adopted, in substance, insofar as material.

Respondent's proposed finding of fact No. 7 is properly a conclusion of law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.