

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARGOT SEEFRIED,)
)
 Petitioner,)
)
 vs.) Case No. 12-1512
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 19, 2012, in Palatka, Florida, before Lawrence P. Stevenson, a duly-designated administrative law judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Craig Z. Sherar, Esquire
Law Offices of Craig Z. Sherar
147 Pinetree Road
East Palatka, Florida 32131

For Respondent: Susan Schwartz, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

The issue is whether the Department of Transportation (the "Department") properly issued an Airport Site Approval Order to Monroe Airport, a private airport in Putnam County, in

accordance with section 330.30, Florida Statutes, and Florida Administrative Code Rule 14-60.005.

PRELIMINARY STATEMENT

On March 1, 2012, the Department issued an Airport Site Approval Order, Site Approval Number SW2012-FLA-0117-AP, to Michael D. Monroe that would allow Mr. Monroe to construct a private airport on his property in Putnam County. Pursuant to Florida Administrative Code Rule 14-60.005(7)(b)1., the Department placed an announcement of the issuance of the private Airport Site Approval Order in the March 16, 2012, issue of the Florida Administrative Weekly.^{1/} On April 6, 2012, Petitioner Margot Seefried timely filed a Petition for Administrative Hearing opposing the Airport Site Approval Order.

On April 23, 2012, the Department referred the case to the Division of Administrative Hearings for the assignment of an administrative law judge and the conduct of a formal administrative hearing. The case was originally set for hearing on June 19, 2012. On May 17, 2012, the Department filed a Motion for Continuance due to the unavailability of Mr. Monroe to attend the hearing. By order dated May 21, 2012, the request for continuance was granted. By order dated May 31, 2012, the hearing was rescheduled for August 24, 2012. On August 2, 2012, Petitioner filed a Motion for Continuance to allow an opportunity to take Mr. Monroe's deposition. By order dated

August 7, 2012, Petitioner's motion was granted and the hearing was rescheduled for October 19, 2012.

The hearing convened on October 19, 2012. At the outset of the hearing, Petitioner moved to exclude the testimony of Mr. Monroe because his scheduled deposition had not taken place due to ineffective service of the deposition subpoena. After some discussion, the undersigned provisionally denied the motion. Mr. Monroe would be allowed to testify at the hearing, with the proviso that Petitioner could obtain a continuance and pursue additional discovery should Mr. Monroe's testimony raise the need.

At the hearing, the Department presented the testimony of David Roberts, the Department's aviation operations administrator; Michael Monroe, the owner of the proposed airport; and the rebuttal testimony of Stephen LaPointe. The Department's Exhibits 1 through 4 and 5a through 5m were admitted into evidence. Petitioner testified on her own behalf. Petitioner's Exhibits 4a, 4b, 5 and 6 were admitted into evidence. Petitioner's Exhibits 7 through 9 were proffered but not admitted.

At the conclusion of the hearing, the parties agreed that their proposed recommended orders would be filed within 20 days of the filing of the transcript at the Division of Administrative Hearings. The one-volume transcript of the

hearing was filed on October 29, 2012. The parties timely filed their Proposed Recommended Orders on November 19, 2012.

Unless otherwise noted, all statutory references are to Florida Statutes (2012).

FINDINGS OF FACT

1. The Department is the agency of the State of Florida granted authority to issue Airport Site Approval Orders, license public airports, and register private airports. § 330.30, Fla. Stat.

2. A "public airport" is an airport, publicly or privately owned, that is open for use by the public. A "private airport" is an airport, publicly or privately owned, that is not open for use by the public but may be made available to others by invitation of the owner or manager. § 330.27(5)&(6), Fla. Stat.

3. With some exceptions not relevant to this case, the owner or lessee of any proposed airport must obtain site approval from the Department "prior to site acquisition or construction or establishment of the proposed airport." § 330.30(1), Fla. Stat.

4. Section 330.30(1) provides that applications for approval of a site "shall be made in a form and manner prescribed by the department." The statute requires the Department to grant the site approval if it is satisfied: that the site has adequate area for the proposed airport; that the

proposed airport will conform to licensing or registration requirements and will comply with local land development regulations or zoning requirements; that all affected airports, local governments, and property owners have been notified and any comments submitted by them have been given adequate consideration; and that safe air-traffic patterns can be established for the proposed airport with all existing airports and approved airport sites in its vicinity. § 330.30(1)(a), Fla. Stat.

5. Michael Monroe is the owner of property in Crescent City on which he proposes to place a private airport. Mr. Monroe has in fact constructed an airstrip on the property. In constructing his airstrip in 2008, Mr. Monroe caused the dredging and filling of jurisdictional wetlands without a permit. An enforcement action by the Department of Environmental Protection led to a consent order dated October 28, 2009. The consent order required payment of a civil penalty and required Mr. Monroe to undertake various actions in mitigation of his unpermitted wetlands activities.

6. The Department's Aviation Office sent a cease and desist letter to Mr. Monroe, dated April 27, 2010, and signed by Micki Liddell, then the Department's Private Airport

Registration Manager. The letter stated as follows, in relevant part:

This letter is follow-up to our telephone conversation of this date regarding a citizen complaint received by the Florida Department of Transportation (FDOT) April 27, 2010, concerning allegations of flight operations to and from your property.

The law (section 330.30, F.S.) states that the owner or lessee of any proposed airport shall obtain approval of the airport site by the Department and subsequently shall have either a public airport license or private airport registration "prior to the operation of aircraft to or from the facility." Our records show that neither an Airport Site Approval Order nor airport license or private airport registration have been issued by the Department for your residence. Flight operations to and from your residence would confirm that your residence is being used as an "airport" and being unauthorized by the Department would constitute a violation of Florida law and could put a site approval request in jeopardy.

In that regard, the Department hereby advises you to cease all flight operations to and from your residence until such time as you have followed the appropriate procedures to obtain airspace approval from the Federal Aviation Administration (FAA), local zoning approval, airport site approval and private airport registration from the Department, provided your site meets the criteria of chapter 330, Florida Statutes.

7. At the final hearing, Mr. Monroe testified that he had flown planes in and out of his property on four occasions prior to the issuance of the cease and desist letter. He stated that he has only flown a plane out of his property on one occasion

since receiving the cease and desist letter, and that he had received verbal approval from the Department for the flight.

8. On July 30, 2010, Mr. Monroe received airspace approval from the FAA for a private use landing area, with the following provisos: a) all operations will be conducted in VFR weather conditions; b) the landing area will be limited to private use; and c) an operational letter of agreement ("LOA") will be entered between Mr. Monroe, and the owners of nearby airfields Eagle's Nest Aerodrome, Mount Royal Airport, Jim Finlay Airport, and Thunderbird Airpark, to provide for compatible traffic pattern operations, considering common radio frequencies, traffic pattern altitudes, and other items as appropriate. The FAA also recommended certain approach slope ratios and centerline separation from roads and other objects. On November 15, 2010, the FAA issued an amended determination providing a fourth condition to its approval: that all arrivals, departures and traffic pattern operations remain clear of a nearby military restricted area.

9. In August 2010, Mr. Monroe applied to the Putnam County Zoning Board of Adjustment for a special use permit ("SUP") to allow a private airport on his property, which was zoned Agricultural. At its public meeting on October 20, 2010, the Zoning Board unanimously denied the SUP after hearing Petitioner and a representative of the U.S. Navy speak in opposition. The

Navy had initially contended that the airport would be located within the restricted airspace of the Lake George bombing range. Further review confirmed that the airport was outside that particular restricted airspace, but the Navy continued to assert that the airport was within the generally restricted airspace of its military operating area.

10. After clarifying that the airport property was not in restricted airspace, Mr. Monroe reapplied for the SUP in September 2011. By Final Order dated November 16, 2011, the Zoning Board issued SUP-11-009 to Mr. Monroe and his wife, finding that the Putnam County Land Development Code allowed for a private aircraft landing facility by SUP in an Agricultural zoning district and that the proposed special use "will not adversely affect the general public health, safety and welfare of the residents of Putnam County." Appended to the Final Order were minutes of the public hearings, schematics of Mr. Monroe's property, and a Department of Environmental Protection closure request form stating that the conditions of the October 28, 2009, consent order had been satisfactorily completed.

11. On January 27, 2012, Mr. Monroe submitted a site approval application to the Department, using the interactive internet-based system established under rule 14-60.005(3)(b).

12. Rule 14-60.005(4) sets forth the following as conditions for site approval:

The Department shall grant site approval for a proposed airport that complies with all the requirements of section 330.30, Florida Statutes, subject to any reasonable conditions necessary to protect the public health, safety, or welfare. Such conditions shall include operations limited to VFR flight conditions, [2/] restricted approach or takeoff direction from only one end of a runway, specified air-traffic pattern layouts to help prevent mid-air collision conflict with aircraft flying at another nearby airport, airport noise abatement procedures in order to satisfy community standards, or other environmental compatibility measures.

13. Rule 14-60.005(5)(a)-(m) sets forth the supporting documentation that an applicant for a public airport site approval must submit to allow the Department to make its site approval determination and "to ensure the applicant's satisfaction of conditions" set forth in subsection (4) above.

The supporting documentation is as follows:

(a) Property Rights. Provide a copy of written legal confirmation of ownership, option to buy, or lease agreement for the real property that comprises the site on which the proposed airport would be located. Although adequate safety areas surrounding an airport site are important and a factor in the Department's approval determination, the applicant is not required to hold property rights over those real property areas that would constitute runway approach surfaces.

(b) Facility Diagram. Provide a scale drawing showing the size and dimensions of the proposed facility; property rights of way and easements; lighting, power, and telephone poles; location of building(s) on

property and surrounding areas; and direction, distance, and height of all structures over 25 feet within 1,000 feet of the site perimeter.

(c) Geodetic Position. Provide a copy of a U.S. Geological Survey quadrangle map or equivalent with the proposed site plotted to the nearest second of latitude and longitude.

(d) Location Map. Provide a copy of a map or sketch, at least 8.5 x 11 inches in size, showing the location of the proposed site, with respect to recognizable landmarks and access roads to the site clearly marked.

(e) Aviation Facilities. Provide a list of names and mailing addresses for adjacent airports, including a sample copy of the letter submitted as proposal notification to these airports, and attach a copy of all airport reply correspondence.

1. For a proposed airport or seaplane landing facility, list all VFR airports and heliports within five nautical miles and all IFR airports within 20 nautical miles.

2. For a proposed heliport, list all VFR airports and heliports within three nautical miles and all IFR airports within 10 nautical miles.

(f) Local Government. Provide a copy of each of the letters of notification, showing the recipient's name and mailing address, that have been submitted to each zoning authority having jurisdiction, for the municipality and county in which the site lies or which is located within five nautical miles of the proposed airport site. The applicant shall also include a copy of all related correspondence from each city or county authority, including a statement that the proposed airport site is in compliance

with local zoning requirements or that such requirements are not applicable.

(g) Adjacent Property. Provide a list of the names and mailing addresses of all real property owners within 1,000 feet of the airport site perimeter, or within 300 feet of the heliport or helistop site perimeter, including a single copy of the letter of notification submitted as notification to these adjacent real property owners, and include a copy of all real property owner correspondence in reply. If notification was provided by a local government as part of its review and approval process for the airport, provide written confirmation of the fact, in lieu of the above required submittal by the applicant.

(h) Public Notice. Provide a copy of the notice and of the letter, showing the recipient's name and mailing address, requesting publication of notification of the proposed airport site in a newspaper of general circulation in the county in which the proposed airport site is located and counties within five nautical miles of the proposed airport site. If this condition has been accomplished by a local government as part of its review and approval process for the airport, provide written confirmation of the fact, in lieu of the above required submittal by the applicant.

(i) Waste Sites. Provide written confirmation that the runway(s) on the proposed airport would not be located within 5,000 feet of any solid waste management facility for a proposed airport serving only non-turbine aircraft, or within 10,000 feet of any solid waste management facility for a proposed airport serving turbine-driven aircraft.

(j) Air Traffic Pattern. Provide written confirmation, including a graphical depiction, demonstrating that safe air

traffic patterns can be established for the proposed airport with all existing and approved airport sites within three miles of the proposed airport site. Provide a copy of written memorandum(s) of understanding or letter(s) of agreement, signed by each respective party, regarding air traffic pattern separation procedures between the parties representing the proposed airport and any existing airport(s) or approved airport site(s) located within three miles of the proposed site.

(k) Safety Factors. Provide written confirmation that the runway and taxiway design criteria and airport design layout of the proposed airport have appropriately taken into account consideration of the manufacturer's performance characteristics for the type(s) of aircraft planned to be operated; the frequency and type(s) of flight operations to be anticipated; planned aviation-related or non-aviation activities on the airport; and any other safety considerations, as necessary, to help ensure the general public health, safety, and welfare of persons located on or near the airport.

(l) Security Factors. Provide written confirmation that the proposed airport site owner or lessee will take appropriate steps to help protect the general public health, safety, and welfare through secure airport operations and that they will develop and implement adequate airport security measures to safeguard airport and aviation-related assets from misappropriation or misuse in order to prevent potential loss or public endangerment.

(m) FAA Approval. Provide a copy of the notification to the FAA regarding the proposed airport site and a copy of the FAA's airspace approval correspondence given in response.

14. Rule 14-60.005(6) provides that an applicant for private airport site approval is subject to the same requirements as stated for a public airport site approval applicant. However, private airport applicants are not required to submit a hard copy, written site approval application nor the supporting documentation set forth in the preceding paragraph. Private airport site approval applicants are required to "retain for their records all of the required documentation related to the site approval application, in order to be able to respond to any possible future local, state, or federal inquiry."

15. The private airport site approval applicant submits his application through a Department website. Once the applicant obtains a user ID and password to the site, he proceeds to an interactive site approval screen that requires him to provide the following data: type of facility (airport, heliport, or ultralight); personal information (name, address, phone number, fax number, and email address); facility data (facility name, physical location, geographical information -- latitude, longitude, and elevation -- and primary type of facility use); and landing area data (runway/helipad magnetic bearing, length, width, and type of surface -- paved/unpaved).

16. The applicant is also required to certify that he has completed all the conditions set forth in rule 14-60.005(5)(a)-(m). The applicant must check a certification box next to each

and every requirement of the rule. For example, as to the requirement of rule 14-60.005(5)(c), the applicant checks a box next to the following statement:

Geodetic Position -- I certify that I have a copy of a U.S. Geological Survey quadrangle map or equivalent with the proposed site plotted to the nearest second of latitude and longitude.

17. In other words, as a private airport applicant, Mr. Monroe was not required under the rule to submit the supporting documentation demonstrating his satisfaction of the conditions set forth in rule 14-60.005(5), but he was required to certify that at the time of his application he possessed all such documentation and was capable of submitting it in response to a governmental inquiry.

18. On March 1, 2012, the Department issued an Airport Site Approval Order to Mr. Monroe, to be effective April 15, 2012. On April 6, 2012, Petitioner timely filed a challenge to the site approval order. Petitioner is the owner of property directly abutting the southeast corner of Mr. Monroe's property. Petitioner raises goats on her property, and contends that low-flying planes frighten her animals, causing them to stampede and injure themselves. Petitioner's challenge has stayed the effective date of the site approval order.

19. David Roberts, the Department's aviation operations administrator, testified that in preparation for this proceeding

he asked Mr. Monroe to produce all the documentation which he had certified to meet the requirements of rule 14-60.005(5)(a)-(m). The Department introduced into evidence all of the documents that Mr. Monroe provided in response to Mr. Roberts' request.

20. As to rule 14-60.005(5)(a), Mr. Monroe provided copies of his deed for and mortgage on the Crescent City property sufficient to establish his property rights to the site on which the proposed airport is to be located.

21. As to rule 14-60.005(5)(b), Mr. Monroe provided a hand drawing of the property indicating the configuration of the airstrip and showing the general locations of the entrance gate, barn, pond, bridge, and trailer on the property. The map is not drawn to scale and does not show property rights of way and easements or lighting, power and telephone poles. The map does not indicate the "direction, distance, and height of all structures over 25 feet within 1,000 feet of the site perimeter," but Mr. Monroe's testimony that there are no such structures is credited.

22. As to rule 14-60.005(5)(c), Mr. Monroe provided a personally commissioned survey map of the property that the Department accepted as the "equivalent" of a U.S. Geological Survey quadrangle map.

23. As to rule 14-60.005(5)(d), Mr. Monroe provided a map, but not one that showed "recognizable landmarks and access roads."

24. As to rule 14-60.005(5)(e), Mr. Monroe submitted a list of five airports that met the notification requirement: Eagle's Nest Aerodrome, Mount Royal Airport, Jim Finlay Airport, Thunderbird Airpark, and Palatka Municipal Airport, also known as Kay Larkin Field. Mr. Monroe also included a sample copy of the letter providing proposal notification to these airports. The only direct reply correspondence that Mr. Monroe submitted was an emailed letter of congratulations from the manager of Palatka Municipal Airport, dated May 15, 2012. Mr. Monroe also submitted a June 10, 2012, email from Jim Manus of Royal Park Airport in support of Mr. Monroe's intent to align his common traffic advisory frequency ("CTAF") with that of Mount Royal and Eagle's Nest. The tone of Mr. Manus' correspondence indicates approval of Mr. Monroe's airport. No response was provided from Jim Finlay, Thunderbird, or Eagle's Nest.^{3/}

25. As to rule 14-60.005(5)(f), Mr. Monroe provided copies of his letters of notification to the Marion County director of growth management and the Volusia County growth and resource management office. Volusia County responded by stating that it took no issue with the proposed airport and that the FAA had

informed the county that it needed to take no action on the matter. Mr. Monroe provided no response from Marion County.

26. As to the notice requirements of rule 14-60.005(5)(g)&(h), Mr. Monroe provided a list of names and addresses of nearby property owners along with a letter of notification dated August 30, 2004, stating Mr. Monroe's intention to establish an airstrip on his property. He included no reply correspondence. Petitioner rightly argues that an eight-year-old letter cannot be held to meet the notice requirement of the rule. Though the rule does not state a temporal limitation as to the notice, the context of the notice requirement clearly requires the applicant to provide his neighbors with notice of the pending site approval. However, Mr. Monroe also provided the receipt from a newspaper notice that he ran in 2010 regarding his SUP application and he credibly testified that the county notified his neighbors prior to issuance of the SUP. Thus, the requirements of rule 14-60.005(5)(g)&(h) were met.

27. As to rule 14-60.005(5)(i), Mr. Monroe submitted documentation that demonstrated there are no active solid waste management facilities within the prescribed distances.

28. As to rule 14-60.005(5)(j), Mr. Monroe provided a graphical depiction of the traffic pattern and approaches to his own proposed airport. The depiction also lists radio

frequencies for Mr. Monroe's airport, Mount Royal, and Eagle's Nest. Mr. Monroe did not submit any documentation to demonstrate that safe traffic patterns can be established for the proposed airport with all existing airport sites within three miles of the proposed airport. Mr. Monroe also did not submit written memoranda of understanding or letters of agreement with the other airports as regards air traffic pattern separation procedures.

29. As to rule 14-60.005(5)(k)&(l), Mr. Monroe submitted an opinion letter from aviation consultant Robert E. Babis, dated April 19, 2012, addressing safety and security factors at the proposed airport. Mr. Babis stated that he was a retired Department public transportation manager, a flight instructor, airport inspector, and aviation planner. Mr. Babis further stated that he has inspected and landed at over 200 private airports in Florida. Mr. Babis concluded that Mr. Monroe's airport "is a safe and secure facility with a very low risk for operational accidents or illegal activities." The Department reasonably accepted this letter as satisfying the criteria of rule 14-60.005(5)(k)&(l).

30. As to rule 14-60.005(5)(m), Mr. Monroe submitted a copy of his amended FAA approval determination, dated November 15, 2010. Petitioner noted that Mr. Monroe has yet to fulfill one of the conditions of the FAA determination: he has

yet to produce an operational LOA with the owners of Eagle's Nest, Mount Royal, Jim Finlay, and Thunderbird to provide for compatible traffic pattern operations, common radio frequencies, traffic pattern altitudes, and other items as appropriate.

31. In summary, the evidence presented at the hearing demonstrated that, despite his certification otherwise, Mr. Monroe did not possess all the documentation required by rule 14-60.005(5)(a)-(m). Mr. Monroe did not meet the requirement of paragraph (b) that he provide a scale drawing showing property rights of way or easements, lighting, power and telephone poles. He did not meet the requirement of paragraph (d) that his map show recognizable landmarks and access roads.

32. Most importantly, Mr. Monroe did not meet the requirement of paragraph (j) that he submit documentation demonstrating that safe traffic patterns can be established for the proposed airport with all existing airports within three miles. This failure, coupled with Mr. Monroe's failure to fulfill his commitment to the FAA that he would enter an LOA with the owners of four nearby airports, not to mention Mr. Monroe's history of building his airstrip and flying in and out of his property before obtaining legal permission to do so, indicates a casual approach to regulatory compliance that should give the Department pause in granting site approval.

33. At the final hearing, Mr. Roberts of the Department testified that because a private applicant such as Mr. Monroe is not required to submit his supporting documentation to the Department to demonstrate compliance with rule 14-60.005(5)(a)-(m), the Department may not deny the site approval to Mr. Monroe once he has certified that he has all the documentation. Mr. Roberts testified that the Department's only recourse upon learning that Mr. Monroe in fact does not have the documentation would be to revoke the site approval order.

34. The Department's rule sets forth the criteria for revocation of a site approval order. One of the grounds for revocation is a Department determination that "aircraft have operated on the site prior to airport licensing or registration, except as required for an in-flight emergency." Fla. Admin. Code R. 14-60.005(8)(b)3. By his own admission, Mr. Monroe flew into and out of his property prior to registration.^{4/} However, Mr. Roberts testified that the Department could not base a revocation action on those flights because they occurred prior to the date on which Mr. Monroe applied for site approval. Mr. Roberts could cite to no language in the rule that supported his restrictive view of the revocation provision.

35. The Department does not persist in supporting Mr. Roberts' reasoning in its Proposed Recommended Order. The Department concedes that Mr. Monroe has failed to meet all the

documentation criteria set forth in the rule and that it has the authority to deny the site approval order. The Department does not concede that the maps submitted in response to paragraphs (b) and (d) of rule 14-60.005(5) are deficient, but it does concede that Mr. Monroe failed to comply with paragraph (j) regarding the LOA setting forth jointly agreed-upon departure and arrival routes and common radio frequencies with the other nearby airports.

36. The Department argues that Mr. Monroe should nonetheless be granted a Site Approval Order, subject to the condition that Mr. Monroe enter into an LOA establishing safe traffic patterns and radio frequencies with all airfields within three miles of his facility. The Department notes that if Mr. Monroe's application were denied in this proceeding, he could immediately procure the LOA and reapply. Granting the site approval in this proceeding would merely obviate the need for Mr. Monroe to take that largely redundant step. As authority for its contention that it may issue a site approval order prior to an applicant's compliance with all provisions of rule 14-60.005(5), the Department cites section 330.30(1)(d), which states: "Site approval may be granted subject to any reasonable conditions the department deems necessary to protect the public health, safety, or welfare."^{5/}

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

38. The general rule is that the burden of proof, apart from a statutory directive, is on the party asserting the affirmative of an issue before an administrative tribunal. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833-834 (Fla. 1993); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). In this case, the Department bears the burden of showing that the applicant is entitled to a private airport site-approval order.

39. On January 27, 2012, Mr. Monroe submitted a site approval application to the Department via the internet, as provided in rule 14-60.005(3)(b):

(3) An application for airport site approval shall be made in the form and manner required by the Department. There are no monetary fees required for this airport site approval service.

* * *

(b) Private Airport. Private airport site approval applicants shall complete an interactive internet-based registration application and certify that the information is true and correct to the best of their knowledge, using a Department electronic aviation facility data system.

40. Rule 14-60.005(6) provides as follows, in relevant part:

Private airport site approval applications, as stated in paragraph 14-60.005(3) (b), F.A.C., above, are subject to the same requirements for approval as stated for public airport site approval applicants in paragraphs 14-60.005(5) (a)-(m), F.A.C., above. However, private airport site approval applicants are required only to respond to interactive inquiries on the specified Department private airport website. Private airport applicants are not required to submit a hard copy, written site approval application nor supporting documentation, as required of public airports. However, all private airport site approval applicants shall retain for their records all of the required documentation related to the site approval application, in order to be able to respond to any possible future local, state, or federal inquiry.

41. Based on the certifications provided by Mr. Monroe in his internet-based application, the Department issued an Airport Site Approval Order to Mr. Monroe on March 1, 2012, with an effective date of April 15, 2012. Petitioner timely filed a challenge to this approval order pursuant to rule 14-60.005(7) (b). As the owner of property directly abutting Mr. Monroe's property, Petitioner has standing to initiate this proceeding.

42. Rule 14-60.005(6) provides that a private airport site approval applicant must satisfy the same requirements for approval that are set forth for public airport site approval

applicants in rule 14-60.005(5)(a)-(m). The only difference is that the private airport applicant is not required to submit his supporting documentation to the Department. The rule is clear, however, that the applicant must be in possession of the supporting documentation. The evidence produced at the hearing established that Mr. Monroe did not have in his possession the supporting documentation to establish his entitlement to a private Airport Site Approval Order.

43. At the hearing, Mr. Roberts opined that the Department lacks authority to deny Mr. Monroe his Site Approval Order because Mr. Monroe had complied with the rule's requirement that he certify that he is in possession of the supporting documentation. The subsequently-discovered fact that Mr. Monroe did not have all of the required documentation might establish cause to revoke the Site Approval Order at a later time but would not be cause to deny issuance of the site approval in the first instance.

44. Given the statutory and rule scheme regarding the registration of private airports, it would be possible for an applicant to bluff his way through the process and obtain site approval and a private airport registration while having absolutely none of the required documentation in his possession, provided no third party challenged him. However, rule 14-60.005(7)(b) provides a point of entry for affected persons to

contest the Department's preliminary decision to issue a private Airport Site Approval Order. If Mr. Roberts' view were correct, there would be no point in allowing such a challenge. The Department would be bound to issue the Airport Site Approval Order even if the applicant could produce no documentation at all to the administrative tribunal, provided the applicant had certified his possession of the documentation prior to the filing of the challenge.

45. The purpose of the administrative challenge must be to put the applicant to his proof. The rule requires the applicant to "retain for [his] records all of the required documentation related to the site approval application." The formal administrative hearing is the forum in which that documentation is produced and tested against the standard of rule 14-60.005(5). Mr. Roberts' reasoning would render futile the administrative challenge process, and is therefore rejected.

46. To its credit, the Department did not pursue Mr. Roberts' line of reasoning in its Proposed Recommended Order. Rather, the Department conceded that Mr. Monroe failed to comply with rule 14-60.005(5)(j), which requires that the applicant:

Provide written confirmation that the runway and taxiway design criteria and airport design layout of the proposed airport have

appropriately taken into account consideration of the manufacturer's performance characteristics for the type(s) of aircraft planned to be operated; the frequency and type(s) of flight operations to be anticipated; planned aviation-related or non-aviation activities on the airport; and any other safety considerations, as necessary, to help ensure the general public health, safety, and welfare of persons located on or near the airport.

47. The Department argues that Mr. Monroe should nonetheless be granted an Airport Site Approval Order, but that it should be made subject to the condition that Mr. Monroe enter into an LOA establishing jointly agreed upon departure and arrival routes, and common radio frequencies, with all airfields within three miles of Mr. Monroe's facility.

48. The Department observes that denial of Mr. Monroe's application in this proceeding would not be the end of the matter. After denial, Mr. Monroe could simply obtain the missing LOA and reapply for the private Airport Site Approval Order. The Department argues that granting the conditional site approval in this proceeding would be a more practical and efficient use of the state's resources.

49. Assuming arguendo that the Department has the authority to waive a requirement of rule 14-60.005(5)(a)-(m) and grant a conditional site approval, the question occurs as to why the Department considers Mr. Monroe a candidate for such

preferred treatment. This is an applicant who illegally filled in jurisdictional wetlands to build his airstrip and was subject to an enforcement action by the Department of Environmental Protection. The construction of the airstrip also appears to violate section 330.30(1)(a), which provides (with exceptions not here relevant) that site approval must be obtained from the Department "prior to site acquisition or construction or establishment of the proposed airport." The Department issued a cease and desist order against Mr. Monroe on April 27, 2010, based on credible allegations that he had been flying planes in and out of his property without site approval or private airport registration. At the hearing, Mr. Monroe admitted that he had flown planes in and out of the property.

50. Mr. Monroe's airspace approval from the FAA, dated July 30, 2010, included the proviso that he obtain an operational LOA with neighboring airports to provide for compatible traffic pattern operations and common radio frequencies, the same LOA that the Department now suggests should be a condition of site approval in this case. Mr. Monroe did not obtain the LOA during the more than two years that passed between the FAA approval and the date of the hearing in this case. Provisional approval from the FAA did not serve as a compliance incentive to Mr. Monroe. The Department has offered

no reason for its faith that Mr. Monroe would comply with the provisions of a conditional site approval in the instant case.

51. In any event, it is concluded that the Department does not have authority to waive the requirements of section 330.30 or its implementing rules. As authority for its contention that it may issue a Site Approval Order prior to an applicant's compliance with all provisions of rule 14-60.005(5), the Department cites section 330.30(1)(d), which states: "Site approval may be granted subject to any reasonable conditions the department deems necessary to protect the public health, safety, or welfare."

52. Section 330.30(1) provides as follows, in its entirety:

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

(a) Except as provided in subsection (3), the owner or lessee of any proposed airport shall, prior to site acquisition or construction or establishment of the proposed airport, obtain approval of the airport site from the department. Applications for approval of a site shall be made in a form and manner prescribed by the department. The department shall grant the site approval if it is satisfied:

1. That the site has adequate area allocated for the airport as proposed.

2. That the proposed airport will conform to licensing or registration requirements and will comply with the applicable local government land development regulations or zoning requirements.

3. That all affected airports, local governments, and property owners have been notified and any comments submitted by them have been given adequate consideration.

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

(b) Site approval shall be granted for public airports only after a favorable department inspection of the proposed site.

(c) Site approval shall be granted for private airports only after receipt of documentation in a form and manner the department deems necessary to satisfy the conditions in paragraph (a).

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

(e) Approval shall remain valid for 2 years after the date of issue, unless revoked by the department or a public airport license is issued or private airport registration completed pursuant to subsection (2) prior to the expiration date.

(f) The department may extend a site approval for subsequent periods of 2 years per extension for good cause.

(g) The department may revoke a site approval if it determines:

1. That the site has been abandoned as an airport site;

2. That the site has not been developed as an airport within a reasonable time period or development does not comply with the conditions of the site approval;

3. That, except as required for in-flight emergencies, aircraft have operated on the site; or

4. That the site is no longer usable for aviation purposes due to physical or legal changes in conditions that were the subject of the approval granted. (emphasis added).

53. When read in the context of the entirety of section 330.10(1), it is apparent that paragraph (d) does not give the Department authority to waive the clearly stated requirement of subparagraph (a)4. Nowhere in the statute is it stated that the Department may waive any of the enumerated criteria for site approval. If such were the case, paragraph (d) would swallow the rest of the statute, giving the Department carte blanche to set its own "reasonable conditions" without regard to the criteria established by the Legislature. The better reading is that paragraph (d) gives the Department authority to establish additional "reasonable conditions," over and above those set forth elsewhere in subsection (1), where specific circumstances make such additional conditions necessary to protect the public health, safety or welfare.

54. The Department may be correct that upon rejection of his site approval request, Mr. Monroe will obtain the LOA and

reapply. Then again, based on prior form, Mr. Monroe may never obtain the LOA. The contingent nature of future actions is a significant reason why rule 14-60.005(5) requires that its criteria be satisfied before the Site Approval Order may be issued. Despite its interest in conserving administrative resources and streamlining the site approval process, the Department lacks the statutory authority to overlook the fact that Mr. Monroe has not satisfied the permitting criteria of section 330.30(1)(a)4., Florida Statutes, and Florida Administrative Code Rule 14-60.005(5)(b), (d), and (j).

55. Petitioner contends that the facts of this case also establish grounds for revocation of any site approval obtained by Mr. Monroe. As previously noted, one of the grounds for revocation is a Department determination that "aircraft have operated on the site prior to airport licensing or registration, except as required for an in-flight emergency." Fla. Admin. Code R. 14-60.005(8)(b)3. It was undisputed that Mr. Monroe operated aircraft on the site prior to registration. However, given that Mr. Monroe has yet to obtain site approval or private airport registration, it is premature to address the question of revocation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Transportation enter a final order denying the site approval application of Michael D. Monroe and withdrawing the Airport Site Approval Order issued to Mr. Monroe on March 1, 2012, Site Approval Number SW2012-FLA-0117-AP.

DONE AND ENTERED this 21st day of February, 2013, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2013.

ENDNOTES

^{1/} 38 Fla. Admin. W. 1232 (March 16, 2012).

^{2/} Florida Administrative Code rule 14-60.003(2)(b)23. provides:

"VFR" means FAA established "Visual Flight Rules" under which aircraft operate when favorable meteorological conditions, ceiling, or visibility exist that are above the minimums for flight under instrument flight rules.

3/ There was confusion as to whether Mr. Manus' email should be construed as speaking for Eagle's Nest as well as Mount Royal. The return address on his email lists only Mount Royal. The evidence is therefore insufficient to establish that Mr. Manus also represented Eagle's Nest.

4/ Petitioner alleged but failed to prove that Mr. Monroe flew into and out of his property after the date of the April 27, 2010, cease and desist order.

5/ Rule 14-60.005(4) implements this statutory provision. The rule's language is set forth in full at Finding of Fact 12, supra.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.