

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL ORRANTIA,

Petitioner,

vs.

Case No. 18-2348

GREGORY HENDERSON AND DEPARTMENT
OF TRANSPORTATION,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a disputed-fact hearing in this cause was held by video teleconference between sites in Tampa and Tallahassee, Florida, on July 10, 2018, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent Gregory Henderson:

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STATEMENT OF THE ISSUE

Whether the Florida Department of Transportation (FDOT or Department) properly issued an Airport Site Approval Order to Air-Med Eye Care in Hillsborough County, Florida.

PRELIMINARY STATEMENT

On November 17, 2017, FDOT issued an Airport Site Approval Order to Dr. Gregory Henderson to construct a private heliport in Hillsborough County, Florida. On or about November 27, 2017, Dr. Michael Orrantia timely filed a petition for administrative hearing challenging the proposed Airport Site Approval Order. Dr. Orrantia filed an amended petition on December 22, 2017, and the matter was scheduled for an informal hearing. On April 21, 2018, Dr. Orrantia filed a second amended petition for administrative hearing. On May 10, 2018, the Department referred this matter to the Division of Administrative Hearings for a disputed-fact hearing.

During the disputed-fact hearing, FDOT presented the testimony of Alice Lammert and called no other witnesses. Dr. Henderson testified on behalf of himself and offered additional testimony from Christopher Hill and David Roberts.

Dr. Orrantia did not testify but did offer testimony from Dr. Henderson as part of his case-in-chief. FDOT Exhibits 1 through 4, 7 through 10, and 12 were admitted into evidence. Dr. Henderson Exhibits 1 through 17, 19 through 44, 46 and 47, were admitted into evidence. There were no exhibits received into evidence on behalf of Dr. Orrantia.

A Transcript of the disputed-fact hearing was filed with the Division of Administrative Hearings on July 26, 2018. On August 2, 2018, Petitioner filed an Agreed Upon Motion for Extension of Time to File Proposed Recommended Orders. The motion was granted, and on August 16, 2018, each party submitted a Proposed Recommended Order.

FINDINGS OF FACT

1. In March 2017, Dr. Henderson submitted to FDOT an application for approval to construct a private airport (heliport) in Hillsborough County, Florida.

2. FDOT has authority under section 330.30, Florida Statutes (2018),^{1/} to issue airport site approval orders, register private airports, and license public airports.

3. Section 330.27(2) defines an "airport" as "an area of land or water used for, or intended to be used for, landing and takeoff of aircraft, including appurtenant areas, buildings, facilities, or rights-of-way necessary to facilitate such use or intended use.

4. Section 330.27(4) defines a "private airport" as "an airport, publicly or privately owned, which is not open or available for use by the public, but may be made available to others by invitation of the owner or manager."

5. Public airports must submit to an on-site inspection and provide documentation to the Department for consideration of an airport site approval order. Private airports are required to maintain the same documentation required of public airports, but are not required to submit documents to the Department or submit to an on-site inspection. Instead, applicants seeking a private airport site approval order use an interactive database to respond to a series of questions and the applicant then certifies that they possess the documentation required to support the application.

6. On February 10, 2009, the Hillsborough County Board of County Commissioners (county commission) granted Dr. Henderson a zoning approval for the development of his property located on Eichenfeld Drive in Brandon, Florida. The zoning approval contained a number of restrictions but generally allowed for the construction of medical/professional offices, a commercial apartment, and a heliport.^{2/} Specifically as to the heliport, the county commission approved the same with the following limitation, to wit: "the permitted helicopter for the site shall be a Robinson R44 or similar model subject to staff review and

approval.” The Robinson R44 is the only model of aircraft that the county commission has zoned for operation at the heliport.

7. On April 17, 2009, Dr. Henderson transferred the property by general warranty deed to KMDG-Eichenfeld, LLC. On January 1, 2017, KMDG-Eichenfeld, LLC, leased the property to Gregory Henderson, MD, FACS, Inc., for a ten-year term.

8. On July 25, 2017, Dr. Henderson received airspace approval from the Federal Aviation Administration (FAA) for a private use heliport on the property subject to restrictions, including a designated approach and departure path.

9. FDOT’s on-line application process requires an applicant to certify that they complied with all airport site approval conditions and that they will maintain documentation related to the application.

10. Dr. Henderson completed the on-line application process and certified that he had rights to the property, local government authorization, and FAA approval.

11. Dr. Henderson further certified that for the site, he had a facility diagram, a quadrangle map showing the geodetic position, and a location map.

12. In accordance with the certification, Dr. Henderson maintained a list of VFR (visual flight rules) airports within three nautical miles and IFR (instrument flight rules) airports within 10 nautical miles of the proposed site and he, as

required, sent a notice of the heliport establishment to each of the listed facilities.

13. Dr. Henderson maintains a list of real property owners within 300 feet of the proposed heliport and sent each a letter notifying them of the proposed use. Dr. Henderson received a single response to the notification, an email listing concerns from Dr. Orrantia, who owns the adjoining property.

14. As required, Dr. Henderson published a public notice in the Tampa Bay Times.

15. Dr. Henderson appropriately certified that there are no solid waste facilities within 10,000 feet of the heliport's final approach and takeoff area, safe air traffic patterns have been established, and safety and security measures have been implemented.

16. Alice Lammert is FDOT's private airport compliance manager. On or about July 26, 2017, Ms. Lammert, in response to an email from Christopher Hill who works as Dr. Henderson's representative, provided Mr. Hill with instructions for securing approval from FDOT of the proposed heliport site. The instructions list several steps associated with FDOT's approval process. Step 6 of the instructions provides, in part, that "[o]nce FDOT is satisfied that all of the conditions of [Florida Administrative Code Rule] 14-60.005(5) (a-m) have been met, an Airport Site Approval Order will be issued."

17. Step 5 of the instructions provides as follows:

Once a complete application has been submitted and all documentation requested has been received, FDOT's review will begin. Please keep in mind that this review may take several weeks, as we conduct our own airspace analysis; **determine if adequate area exists for the type of aircraft that will be operated from the site;** and conduct an examination of obstacles, approach/departure paths, ownership rights, and so on. (emphasis added).

18. On October 4, 2017, Ms. Lammert submitted to Mr. Hill a list of questions related to Dr. Henderson's application. One of the questions asks "What is the make and model of the aircraft that will be operating from the helipad?" Mr. Hill responded "Robinson R66." Ms. Lammert conducted an analysis of the runway and taxiway design criteria and airport design layout in light of the performance characteristics of the Robinson R66 and determined that the proposed heliport could accommodate this particular model of aircraft. FDOT did not however, perform a similar analysis for the Robinson R44, which is the only aircraft zoned for operation at the site by the county commission.

19. Dr. Henderson testified that the Robinson R66 and R44 aircraft have similar design and performance characteristics. Dr. Henderson's opinion as to the design and performance characteristics of the respective helicopters is not credited because there was insufficient proof offered to establish that

Dr. Henderson possesses the necessary training, experience, or education to render such a technical opinion.

20. David Roberts, FDOT's aviation operations administrator, explained that FDOT is required to ensure that the applicant has local government authorization to construct a heliport, but the Department does not dictate what aircraft is to be used on the heliport once constructed. According to Mr. Roberts, the type of aircraft to be used at the facility is determined by the airport operator, the FAA, and the local political subdivision. Mr. Roberts also testified that the airport owner must certify during registration every two years that the airport meets the operational requirements of the aircraft that are using the facility.

21. Ms. Lammert reviewed the FAA Notice of Heliport Airspace Determination authorizing the airspace use above the heliport. A separate analysis conducted by an FDOT contractor confirmed that, subject to the conditions and recommendations of the FAA, the private use landing area would not adversely impact the navigable airspace.

22. On or about November 17, 2017, FDOT issued an Airport Site Approval Order for the Air-Med Eye Care and noted therein the following:

The Department is satisfied that your airport, if completed in accordance with your site proposal, will meet all of the following

required conditions: (1) that the site has adequate area allocated for the airport, as proposed; (2) that the proposed airport will conform to the Department's licensing or registration requirements; (3) that the proposed airport will comply with the applicable local government land development regulations and zoning requirements; (4) that all affected airports, local governments, and property owners have been notified and any comments submitted by them have been given adequate consideration; (5) that safe, air-traffic patterns can be established for the proposed airport with all existing airports and approved airport sites in its vicinity.

The Airport Site Approval Order is granted subject to your compliance with the following conditions that are deemed necessary by the department to protect the public health, safety, or welfare:

All operations are conducted in DAYNFR weather conditions;

The landing area is limited to private-use;

All helicopter ingress/egress route operations are conducted on 210° (ingress) magnetic clockwise to 030° (egress) magnetic headings, additional approach/departure route operations are conducted on 080° (ingress) to 260° (egress) magnetic headings, using the touchdown pad (TLOF) as the center of the compass rose.

CONCLUSIONS OF LAW

23. 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.

24. 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, FDOT bears the burden of showing that the applicant is entitled to a private airport site-approval order.^{3/}

25. Section 330.30(1) provides in part as follows:

(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.

* * *

(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).

26. The conditions imposed by section 330.30, as cited above, establish statutory prerequisites that must be met before FDOT grants approval of an airport site. See Seefried v. Dep't of Transp., Case No. 12-1512 (Fla. DOAH Feb. 21, 2013; Fla. DOT Mar. 25, 2013).

27. Section 330.27 provides definitions of certain terms used in section 330.30. Section 330.27 does not, however, define the term "satisfied" as used in section 330.30. The word "satisfy" is the root word of "satisfied" and according to Merriam-Webster, the transitive verb "satisfy" means "to put an end to doubt or uncertainty." <https://www.merriam-webster.com/dictionary/satisfy>.

28. In order to satisfy itself that a particular airport site should be approved, FDOT promulgated rule 14-60.005 and set forth therein several conditions that must be met by the applicant. Rule 14-60.005(4) provides as follows:

Conditions for Site Approval. The Department shall grant site approval for a proposed airport that complies with all the requirements of Section 330.30, F.S., subject to any reasonable conditions necessary to protect the public health, safety, or welfare. Such conditions shall include

operations limited to VFR flight conditions, 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.

29. Rule 14-60.005(5), as applicable to private airports pursuant to rule 14-60.005(6),^{4/} provides as follows:

Public Airport Site Approval. Public airport site approval applications shall be accompanied by the following supporting documentation to allow the Department to make its airport site approval determination and to ensure the applicant's satisfaction of conditions stated in subsection 14-60.005(4), F.A.C., above:

(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.

30. As previously noted, Dr. Henderson, as part of the application review process, provided FDOT with information from the county commission showing that the Robinson R44 is the only aircraft zoned for operation at the heliport. Subsequent to receiving approval from the county commission, and knowing of

Robinson R44 zoning limitation, Dr. Henderson informed FDOT that he would operate a Robinson R66 helicopter on the heliport and not the Robinson R44. It is without question that FDOT knows that the county commission has not approved the heliport for the Robinson R66 model helicopter.

31. Dr. Henderson's statement to FDOT that he will operate a Robinson R66 model helicopter at the heliport is an admission by Dr. Henderson that he knowingly intends to operate the heliport in contravention to the zoning requirements established by the county commission.

32. In its Proposed Recommended Order, FDOT asserts that it "requires local zoning authorization, but does not enforce the conditions set forth by the local zoning board" when considering an application for airport site approval. The agency also contends that "the Department does not restrict the aircraft authorized to use an airport to the aircraft identified in the application." The essence of FDOT's position seems to be that as part of the site approval process, the Department really does not concern itself with the specifics of the approval issued by the local zoning board, and further, that it does not care about the type of aircraft to be operated at the facility.

33. Section 330.30 requires that prior to approving an airport site, FDOT must "put an end to doubt or uncertainty" about whether a proposed airport complies with applicable local

government land development regulation or zoning requirements. The Department cannot fulfill its obligation to the public if it ignores during the site approval process express "aircraft type limitations" imposed on an applicant by a local zoning board. Contrary to FDOT's assertion, the issue, in the context of site approval, is not one of "enforcement" of local zoning requirements, but is instead one of "recognition and acknowledgment" of such requirements so as to protect the health, safety and welfare of the public.

34. Because the county commission conditioned its approval of Dr. Henderson's site on the operation of a "Robinson R44 or similar model subject to staff review and approval," and Dr. Henderson informed FDOT that he will operate a Robinson R66 model helicopter (which has not been approved), Dr. Henderson's pending application for site approval fails to comply with the requirements of rule 14-60.005(5)(f) because he has not, and indeed cannot on the instant record, certify that the proposed airport site will be operated in compliance with local zoning requirements. Stated succinctly, Dr. Henderson has failed to secure local zoning authorization to operate a Robinson R66 model helicopter at the site, and such authorization is a statutory prerequisite to FDOT approving the site.

35. As noted above, FDOT contends that "the Department does not restrict the aircraft authorized to use an airport to the

aircraft identified in the application." Generally speaking, this statement may be true as to post-site approval flight operations. However, there is nothing in section 330.30 or the rules related thereto, which allows an applicant, as part of the site approval process, to circumvent local zoning requirements by misrepresenting, to both FDOT and the local zoning board, the type of aircraft that will be operated at the facility.^{5/} Furthermore, FDOT's assertion flies in the face of the Department's application approval process which asks an applicant to identify the "type of aircraft that will be operated from the site" so that FDOT can "conduct [its] own airspace analysis."

37. Section 330.30(1) dictates that prior to approving an airport site FDOT must be "satisfied" that the proposed airport "will comply with the applicable local government land development regulations or zoning requirements." FDOT has failed to prove that Dr. Henderson's application satisfies section 330.30(1)(a)2., and rule 14-60.005(5)(f).

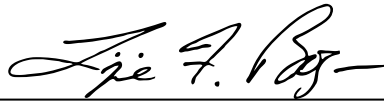
38. Finally, Dr. Orrantia argues that Dr. Henderson does not have sufficient property rights to the heliport because the property is owned by KMDG-Eichenfeld, LLC, and leased to Gregory Henderson, MD, FACS, Inc. The lease agreement admitted into evidence demonstrates that Dr. Henderson is the president of Gregory L. Henderson, MD, FACS, Inc., and is authorized to enter into leases and apply for licenses on behalf of the corporation.

Accordingly, this contention by Dr. Orrantia is without merit and does not provide a basis for denying the airport site approval application of Dr. Gregory Henderson.

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 Gregory Henderson and withdrawing the Airport Site Approval Order issued to Dr. Henderson on November 17, 2017, Site Approval Number SW2017-FLA-0172-HP.

DONE AND ENTERED this 5th day of September, 2018, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of September, 2018.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2018, unless otherwise indicated.

^{2/} A heliport is generally understood as being a facility or structure which facilitates the takeoff and landing of helicopters.

^{3/} The parties agree that FDOT bears the burden of persuasion.

^{4/} Rule 14-60.005(6) provides, in part, as follows:

Private Airport Site Approval. 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.

^{5/} It is difficult to discern what Dr. Henderson's true intentions are with respect to the type of aircraft that he intends to operate at the site. It is either the Robinson R44 or the R66, or possibly neither. If the goal is to protect the health, safety, and welfare of the public, as noted in section 330.30, then it must be the case that FDOT's site approval process should function so as to require truth and accuracy from those who seek airport site approval.

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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.