



# Oregon

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FILE COPY

Mr. Keith M. Garza  
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Dear Messrs. Garza and Carlson:

This letter responds to the Petition for Reconsideration of the Oregon Department of Aviation's (ODA) August 23, 2010 denial of the application you submitted on behalf of Jack Hogan and Hogan Aviation (Hogan) for a through-the-fence agreement on January 26, 2010. ODA received your petition on October 19, 2010. On July 23, 2008, ODA denied a previous through-the-fence application submitted by Hogan and reaffirmed that decision on reconsideration by letter dated September 3, 2008. Your client petitioned the Marion County Circuit Court for review of that decision. The court affirmed ODA's denial of Hogan's application, and Hogan appealed to the Court of Appeals. While the matter was pending on appeal, ODA withdrew its previous order and allowed Hogan to submit another TTF application. We have considered your request for reconsideration carefully and, as clarified below, hereby reaffirm our August 23, 2010 order denying Hogan's through-the-fence application.

As an initial matter, we find it necessary to address two points raised in your letters attached to the petition. First, Mr. Garza asserts that ODA made a factual error when it stated in its August 23 decision that Mr. Hogan lost legal access over the adjacent parcel owned by TLM Holdings LLC because Hogan "made business decisions that resulted in the loss of that access, and that outcome was upheld in private litigation." Instead, Mr. Garza asserts that "the loss of runway access to which the letter refers was not the result of any business decision but, instead, a scrivener's error in the legal description of a prior conveyance of property."

We disagree with Mr. Garza's assertion, as it does not appear to be supported by Judge Norblad's 2004 letter opinion or the court's findings and general judgment quieting title to the TLM property. But regardless of how Hogan came to lack legal access across what is now TLM's property, a through-the-fence agreement only allows a private landowner to cross the property line between the private property and the state-owned portion of the airport. It remains ODA's position that ODA's statutes and the Operating Minimum Standards set out in OAR chapter 836, division 035, do not authorize, much less require, ODA to grant Hogan a

through-the-fence agreement that would somehow restore whatever interest in TLM's property Hogan or its predecessors-in-interest may have once enjoyed.

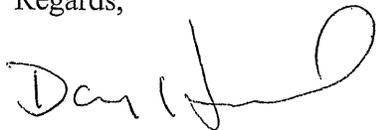
Second, Mr. Carlson's letter asserts that "[TLM's principal] Ted Millar (HD) has had an influence on the decision making of the ODA. It appears that [Board of Aviation Chairman] Mark Gardiner also has a special interest. It appears there is a concern about protecting Mr. Millar's interest which prevents the use of Hogan Aviation's property in the development of Aurora Airport." Mr. Carlson's allegation of improper influence is unsupported, and, in any case, such an inquiry is beyond the scope of ODA's legal analysis of Hogan's application for a through-the-fence agreement.

In additional correspondence Mr. Carlson sent to ODA on behalf of Hogan, dated November 29, he essentially demands that ODA unilaterally terminate TLM's through-the-fence agreement and renegotiate a new access agreement with TLM conditioned upon TLM's grant of an easement to Hogan, and then enter into a through-the-fence agreement with Hogan. Whether ODA's statutes and the Operating Minimum Standards permit, much less require, ODA to condition a grant of through-the-fence access on the grantee's donation of an easement to and for the sole benefit of another property owner is a separate question from whether ODA must grant Hogan's present application for a through-the-fence agreement. It remains ODA's position that ODA's authority in this regard would be limited by constitutional takings principles.

Finally, ODA has condemnation authority under ORS 836.025(2) and ORS 836.045, but the Department may only exercise that authority consistent with Article I, section 18, of the Oregon Constitution, the Fifth Amendment to the U.S. Constitution, and ORS chapter 35. Condemning an easement over TLM's property and donating it to Hogan for Hogan's use and enjoyment is not a public purpose that would support an exercise of eminent domain. Moreover, even if exercise of eminent domain for this purpose were proper under Oregon law, given the Department's current priorities and limited resources, ODA is within its discretion in declining to exercise such authority here.

Accordingly, we reaffirm our August 23, 2010 decision. We reiterate our position that should your client obtain access to the state-owned portion of the airport, whether over TLM's property or another's property, ODA will be willing to review and consider Hogan's application at that time.

Regards,



Doug Hedlund  
Interim Director

cc: Mark Gardiner, Oregon Aviation Board  
Ethan Hasenstein, Oregon Dept. of Justice  
Nicole DeFever, Oregon Dept. of Justice  
Denise Fjordbeck, Oregon Dept. of Justice