

STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION

In re: The Matter of the Proposed)	
Children's Memorial Hospital)	Honorable Richard E. Neville (Ret.)
Rooftop Heliport to be Located)	Hearing Officer and
in Chicago, Illinois)	Administrative Law Judge
)	

MEMORANDUM IN OPPOSITION TO APPLICATION FOR REHEARING

Children's Memorial Hospital ("CMH") hereby responds to the Application for Rehearing submitted on behalf of the Streeterville Organization of Active Residents ("SOAR").

I. INTRODUCTION

Following five years of exhaustive information gathering, hearings, analysis, studies, and reports, the Illinois Department of Transportation, Division of Aeronautics ("IDOT") affirmed its Certificate of Approval for CMH to operate a heliport at the Ann and Robert H. Lurie Children's Hospital of Chicago. Throughout this process, opposition to the helipad has come almost exclusively from one small, but vocal neighborhood group, SOAR. In the present motion, SOAR both argues that it was prevented from presenting everything that it desired for IDOT's consideration while simultaneously arguing that IDOT erred by leaving the record open for an extraordinary period of time. SOAR further argues that IDOT should have rejected the information provided by the thousands of lay people, professionals, and technical experts who testified and presented analysis and statements in favor of the helipad, as well as the independent experts hired by IDOT, in

favor of the few witnesses and experts retained by SOAR. For the reasons expressed below, SOAR's motion should be denied.

II. APPLICABLE LEGAL STANDARD

Pursuant to 620 ILCS 5/64, IDOT clearly has the discretion to modify its orders and/or to grant rehearing. Still, "agencies have broad discretion in conducting administrative hearings," and this discretion is so broad in fact that, even in true adversarial hearings, "an administrative agency is not required to open up the record and consider new evidence." *Bailey v. Illinois Liquor Control Com'n*, 405 Ill.App.3d 550, 560 (1st Dist. 2010)(internal citations omitted).

Ultimately, should IDOT's decision to grant CMH's permit request be reviewed on appeal, IDOT's factual determinations will be presumed true and correct, and only clearly erroneous decisions of mixed law and fact will be set aside. *Id* at 553-554. Naturally, however, IDOT's conclusions of law will be subject to *de novo* review. *Id* at 553.

A. The factors to be considered by IDOT in consideration of CMH's permit application are clearly articulated and well established.

The Illinois Aeronautics Act provides at 620 ILCS 5/48 that:

In determining whether it shall issue a certificate of approval for any airport or restricted landing area, or any alteration or extension thereof, the Department shall take into consideration its proposed location, size and layout, the relationship of the proposed airport or restricted landing area to the then current national airport plan, the then current Federal airways system, the then current State airport plan, and the then current State airways system, whether there are safe

areas available for expansion purposes, whether the adjoining area is free from obstructions based on a proper glide ratio, the nature of the terrain, the nature of the uses to which the proposed airport or restricted landing area will be put, the possibilities for future development, and such other factors as, under the circumstances, it regards as having an important bearing thereon.

By the terms set out above, these legislative standards apply broadly to “any airport, restricted landing area, or any alteration or extension thereof.” IDOT has in turn set forth regulations applicable to the different types of facilities used for aircraft operations, and as to heliports, it set forth the following:

The Division will issue a Certificate of Approval for a heliport in accordance with Section 14.115, and, taking into consideration:

- 1) the heliport's proposed location;
- 2) the heliport's size and layout;
- 3) the relationship of the proposed heliport to the then current State and Federal Airport and Airways System;
- 4) whether there are safe areas available for expansion purposes;
- 5) whether the adjoining areas are free from obstructions based on a proper glide ratio;
- 6) the nature of the terrain;
- 7) the nature of the uses to which the proposed heliport will be put;
- 8) the possibilities for future development; and,
- 9) the minimum standards contained in this Subpart H, including Section 14.Appendix G, Illustrations A, B and C and Section 14.Appendix H, Table A. (See Section 48 of the Act.)

“[A]dministrative agencies are bound to follow their own rules as written, without making ad hoc exceptions or departures.” *Provena Health v. Illinois Health Facilities Planning Bd.*, 382 Ill.App.3d 34, 42 (1 Dist., 2008).

SOAR’s motion mostly disregards the established criteria for the grant or denial of a helipad permit and attempts to argue that other factors were not given due consideration. Of the recognized criteria, SOAR merely argues that in the assessment of the applicable terrain, IDOT should have evaluated the urban high-rise environment. Yet, both the possibility of obstructions and winds that might be prevalent in the environment were analyzed and commented upon by IDOT.

To the extent IDOT considered any testimony or evidence that was extraneous to the nine factors set out in the above quoted regulation, it was clearly not obligated to do so, and the grant or denial of a permit for reasons other than those set out above would be contrary to law. Further, as IDOT is instructed by statute and regulation merely to consider the factors set out above, IDOT is clearly expected to use discretion in determining the weight, if any, to be granted to these factors in its analysis.

B. Expressions of preliminary impressions by IDOT staff do not demonstrate bias or provide any basis for rehearing.

SOAR argues that IDOT was predisposed to grant CMH’s permit and was otherwise biased in favor of CMH. These assertions are predicated on statements

attributed to Gary Stevens, a pilot and former IDOT employee. Yet, as IDOT states in its Supplemental Order, "Mr. Stevens retired from IDOT in 2010 and played no role in the Director's decision and Supplemental Order." Clearly, any statements made by Stevens were irrelevant to IDOT's final determination and do not reflect upon IDOT or the decision ultimately issued in any manner. Further, the immense record compiled by IDOT demonstrates that it did not rely upon any initial impressions made some five years prior to final approval. Since the November, 2006 letter referenced by SOAR was written, IDOT devoted significant resources to six days of public hearings, retention of at least five independent (state retained) experts, review of thousands of public comments and written statements, and review of the analysis and studies presented by the proponents and opponents of CMH's permit application.

III. ARGUMENT

SOAR's motion for rehearing must be weighed against CMH's critical, life saving mission. Despite SOAR's contentions, IDOT's decision is supported by a record that contains overwhelming support for the helipad from the constituents that SOAR purports to represent, a long, safe, history of successful operations by CMH at its present location, support for the purpose served by CMH, scientific studies undertaken at great expense by IDOT, modeling and analysis undertaken at great expense by CMH, implementation of the latest technological tools and physical design characteristics to ensure safe operations, adoption of procedural safeguards CMH, data compiled following several successful flight

tests, and extreme, comprehensive evaluation undertaken by IDOT. Given the full consideration already granted to SOAR and its arguments, further hearings would serve no purpose.

A. From the onset of the public hearings, CMH had already met its burden of proof, as reflected in the preliminary approval of its certificate.

SOAR focuses much energy on the hearings conducted in July of 2009 and June of 2011. These hearings were conducted in response to SOAR's objection to the preliminary approval granted to CMH's permit application, as indicated in Orders dated September 9, 2008 and April 14, 2009. In other words, but for any countervailing material or testimony that the minority who opposed approval of the permit wished to present, all interested persons were on notice that IDOT was inclined to grant the permit. Indeed, CMH had already presented a comprehensive application that exceeded all regulatory requirements and standards, and CMH was not obligated to present anything further in support of its application.

At various opportunities, IDOT announced and clarified that the intent of the hearings was solely an opportunity for IDOT to gather further information for it to consider in its evaluation of CMH's application, and it would be a non-adversarial event. SOAR and the public at large were told throughout the course of the hearings and the extensive information gathering process undertaken by IDOT that anything and everything anyone wished to present related to the approval or operation of the helipad

would be received and considered. Judge Richard Neville presided over the hearings and took steps to ensure that the informational gathering purpose would be served. Toward this end, trial type tactics, cross-examination, and adversarial attacks were disfavored, and an atmosphere prevailed in which a free and open exchange of information was promoted.

SOAR reiterates arguments intended to suggest that it was denied certain due process or procedural safeguards that guarantee the right to an adversarial hearing. However, prior to the July, 2009 public hearings, IDOT fully explained the difference between its proceeding and hearings conducted pursuant to the Illinois Administrative Procedures Act, in its "Response to Motion to Exclude Evidence Which is Not Presented at the Public Hearing." To summarize: a) the hearings conducted by IDOT related to the helipad application were conducted under IDOT's investigative authority as identified in 620 ILCS 5/51 and were not intended to be evidentiary or adversarial in nature; b) because the hearings would not resolve the individual rights, duties, or privileges of a party, the hearings would not meet the definition of a "contested case" under the Administrative Procedure Act at 5 ILCS 100/1-30; c) the Administrative Procedure Act specifically contemplates that state agencies, such as IDOT, will conduct informational hearings and investigations pursuant to their own regulations, as set forth in 5 ILCS 100/1-5 (Applicability); and, d) the cases cited by SOAR have no bearing on the proceedings to resolve CMH's permit application because they involve adversarial proceedings to determine individual rights, duties and privileges. In other words, IDOT has the ability to

conduct non-adversarial, information-gathering proceedings, and when it does so, the rules that govern adversarial proceedings are inapplicable.

B. IDOT compiled a comprehensive and exhaustive record, and its conclusion merely demonstrates that material submitted in opposition to approval of the certificate was unpersuasive, not that it wasn't given proper consideration.

SOAR complains that IDOT was not persuaded by some of the arguments and materials that SOAR submitted, and it suggests that IDOT's failure to specifically discuss some of this material in its orders demonstrates that IDOT failed to consider those materials at all. Yet, as reflected in the Administrative Record Index and the materials compiled on IDOT's website, the record in this case spans five years, six days of public hearings, and well over 20,000 pages. The Supplemental Order likely represents IDOT's final word on this material, and in a span of 36 pages, IDOT manages to summarize and comment on much of what transpired over the course of its evaluation of CMH's application, as well as to delineate the primary factors that led to approval of the application. Still, Director Shea and a full complement of IDOT staff were present throughout all the hearings; the record demonstrates that all expert reports and testimony were reviewed; and, the Supplemental Order demonstrates that careful consideration was given to the material submitted on behalf of SOAR and the many others who contributed to the record. It would serve no purpose for IDOT to make specific reference of everything it reviewed and considered during the course of this project.

It should also be noted that the attention given to SOAR's concerns has been greatly disproportionate to its interest. Clearly, SOAR does not speak for the community as a whole. As reflected in the index to IDOT's administrative record over 16,000 individuals took the time to draft formal statements in support of CMH's application. The supporters include neighbors of both the existing CMH facility and the new hospital, medical professionals, aviation professionals, and distinguished members of the community. Less than 400 members of the public have written to IDOT to express some form of opposition to the helipad operation. SOAR's disproportionate voice was, perhaps, best illustrated by the testimony of David Kostelansky, as transcribed on July 24, 2009 at pages 97 to 105:

My name is David Kostelansky. My family and I live at 244 East Pearson Street and have been residents of the Streeterville neighborhood for a long time, about 18 years. But more importantly, we live directly on the main approach corridor that the helicopter would take from the lake over the park. . . . I applaud SOAR's interest in this topic; however, it's important to note that not all members of SOAR live in the flight corridor. In the testimony last night, it was stated that there were 19,000 residents in Streeterville. But it wasn't mentioned that less than 5 percent of the residents are members of the organization. . . . I, along with many other residents, are actively involved and, in fact, support the proposed heliport. Surveys on the local streets which helped to gather over 10,000 additional signatures in favor of the heliport and conversations with many people in the parks prove this to be true. . . . Before SOAR was presumptuous enough to prepare and present information from consultants they engaged on behalf of all the residents, perhaps they should have polled the Streeterville residents to determine their beliefs regarding the heliport. Perhaps they would have found that the majority of the residents provided with balanced data want the heliport built.

SOAR's contention that it, or any of its arguments, haven't been given sufficient attention is mistaken.

C. SOAR demonstrates a fundamental misunderstanding of helicopter operations in its characterization of available emergency landing areas and the proposed guidance for missed approaches.

As IDOT recognizes in its Supplemental Order, CMH has obligated itself to ensure that all operations on its pad will be conducted by pilots who are properly certificated, trained, oriented to the environment, and will use twin engine helicopters with all state of the art safety and collision avoidance equipment. Again, as IDOT recognizes, the pilot's obligations include the obligation to maintain awareness of available open space and alternate landing sites in the event of an emergency. The educational tools drafted (and to be further refined by CMH) identify several available alternate landing sites and provide appropriate guidance to the pilots.

To wit:

For those emergencies where controlled flight can be safely maintained but continued flight is inadvisable, pilots should proceed to the most adequate landing area within close proximity

Possible Landing Areas:

- Marine Station Heliport
- Midway Airport
- Chicago O'Hare Airport
- Chicago Executive Airport
- Gary Airport

And:

For those emergencies where there is a high probability of severe injury or death if appropriate actions are not taken immediately, the pilot-in-command is expected to use their best judgment and may deviate from any and all prescribed policies, procedures & regulations as provided for in the Federal Aviation Regulations to ensure a survivable outcome for everyone involved.

See, CMH Heliport Operations, Approach and Departure Routes and Additional Corridor ARC Structure, submitted November 23, 2009.

Again, as IDOT and its experts recognized, an in-flight emergency is a fluid, dynamic event, and it is simply not possible to do more than provide guidance and tools to the pilots. It is not possible to pinpoint an emergency landing location any more than it is possible to determine when, where, or under what circumstances any given emergency may occur. SOAR's contention that CMH or IDOT has somehow failed to recognize its responsibilities or plan for emergency contingencies is mistaken.

Similarly, SOAR's argument that CMH has guided pilots to operate aircraft, "directly into a collision with the side of Water Tower Place," does not reflect a proper understanding of the record. The relevant images of the draft operators' guidance CMH provided to IDOT displays a series of wide directional arrows designed to provide an understanding of the direction of travel that pilots should seek if they abort an approach from the given direction. From the context of the materials, it should be clear that the arrows are general indicators and do not provide precision flight paths, the indicated routes of travel are intended to be conducted well above the height of any obstacles, and diversion to an emergency landing site is recommended if the helicopter has travelled

beyond critical decision point (“CDP”) (“CDP height [is] determined by ambient conditions plus any allowance necessary to ensure adequate clearance above obstacles.” Id.).

IDOT’s failure to devote any significant attention to these arguments is a credit to IDOT’s knowledge and experience in practical aeronautical applications. On the other hand, SOAR’s contention that CMH has failed to identify suitable emergency landing locations or that CMH is instructing pilots to fly into Water Tower Place is mistaken.

D. Safety is central to every aspect of CMH’s application and operations, and safety is the implied and understood goal of the applicable standards and regulations implemented by IDOT.

SOAR contends that IDOT failed to consider “safety” as a factor in CMH’s application. However, as explained above, IDOT’s analysis is restricted to the factors enumerated in its regulations. More to the point, as IDOT recognizes in its Supplemental Order, “Safety is not a stand-alone factor to be considered when granting a Certificate of Approval... ” rather, “[s]ince safety is the overarching goal of the Aeronautics Act, Aviation Safety Rules, and the requirement of IDOT approval of heliports, it should be extrapolated that if a heliport meets all of the factors taken into consideration for a Certificate of Approval, then the heliport is deemed safe in the eyes of the law.” Moreover, the extensive materials submitted by CMH demonstrate that it has improved upon nearly every aspect of the standards applicable to helipad operations.

E. IDOT properly recognized the great lengths CMH has gone to in its efforts to provide incoming pilots with a wealth of critical weather data.

SOAR takes issue with CMH's inability to provide pilots with real time, pinpoint weather information along every segment of the flight path and helipad. Fortunately, IDOT's background and experience proves most valuable. Certainly, IDOT has recognized that for the past century pilots have functioned safely without the benefit of any such information. Rather, pilots rely upon available weather reporting data and experience to predict the conditions that will be encountered on their route. The helicopters that fly throughout downtown Chicago everyday (traffic and weather helicopters, aerial cranes, and various charter operators) follow this type of planning and have done so without incident. Yet, CMH has taken every possible step to provide the pilots that will use the new helipad with a wealth of additional information. Incoming pilots will have the benefit of the reports, studies, and illustrations compiled by RWDI and Continuum Dynamics. They will have visual information provided by multiple windsocks. They will have the benefit of the data reported by an on site automated weather observation system ("AWOS"), and by the time the helipad is operational the pilots will have additional orientation instructions on how to interpret and use the AWOS data.

F. SOAR and all members of the public had ample opportunity to provide materials and information to IDOT for consideration.

IDOT went to extreme lengths to compile a comprehensive record of all information that might be relevant to its consideration of CMH's application. If SOAR failed to provide any testimony, document, or criticism to IDOT, it is certainly not the result of any failure by IDOT. The record demonstrates that IDOT accepted and archived materials continuously for several years, and even left the record open for a considerable period of time after the second set of hearings. To the extent the public hearings were focused or restricted in any respects, Judge Neville and IDOT made it be known that court reporters were nonetheless available to take down any testimony that anyone wished to provide, and additional material could be sent directly to IDOT. To the extent SOAR wished to offer criticisms of any of the witnesses or studies presented by or on behalf of CMH or IDOT, it could have done so through any method. Certainly, it had the ability to make its points be known without resorting to cross examination or the adversarial means that it may have preferred. Given the great responsibility that IDOT has, it should be commended for its extensive review, not criticized for keeping the record open for as long as it did. In any event, SOAR can certainly not demonstrate any prejudice suffered by its members or the public at large by IDOT's choice to gather as much information as possible before rendering a final decision.

IV. CONCLUSION

WHEREFORE, for the reasons expressed above, Children's Memorial Hospital respectfully requests that SOAR's Application for Rehearing be denied.

Respectfully Submitted,

CHILDREN'S MEMORIAL HOSPITAL,

By: s/Alan L. Farkas
One of its Attorneys

Alan L. Farkas
SmithAmundsen Aerospace
150 N. Michigan, Suite 3300
Chicago, Illinois 60601
Phone: 312-894-3200
Fax: 312-894-3210

John J. George
DALEY & GEORGE, Ltd.
20 South Clark Street, Suite 400
Chicago, Illinois 60603
Phone: 312-726-8797
Fax: 312-726-8819

CERTIFICATE OF SERVICE

The undersigned attorney states that he caused to be served a copy of the above-described document(s) via email to the Honorable Judge Neville, care of Brooke Stauffer, and all counsel of record on the below-listed Service List on this 22nd day of November, 2011.

s/Alan L. Farkas
Alan L. Farkas

Service List:

Honorable Judge Neville
c/o Brooke Stauffer
JAMS
71 S. Wacker Drive, Suite 3090
Chicago, IL 60606
bstauffer@jamsadr.com
312.655.9191 (Direct Dial)
312.655.0644 (Facsimile)

Richard S. Porter
Hinshaw & Culbertson, LLP
100 Park Avenue
Rockford, IL 61101
rporter@hinshawlaw.com

Ellen J. Schanzle-Haskins
Illinois Department of Transportation
2300 S. Dirksen Parkway
Springfield, IL 62764
Ellen.schanzle-haskins@illinois.gov