BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES

In the Matter of	)	
	)	OAH No. 21-2446-APT
70 NORTH LLC	)	Agency No. ADA-09185
	)	

RECOMMENDED DECISION

I. INTRODUCTION

70 North LLC sought an amendment to its long-term lease at the Birchwood Airport to expand its aviation business. This request evolved over the next several years through multiple rounds of review, culminating in a decision by DOT&PF Division of Statewide Aviation ("SWA") that approved much of 70 North's expansion concept, but imposed certain restrictions on building placement and design and rejected a proposal to add additional tracts to the lease. 70 North appealed the discrete issues SWA had denied. This appeal, however, revealed some fundamental flaws with SWA's review — namely, that the Division was approving the substance of lease amendments without reviewing particular lease language and that the Division was approving matters by lease amendment that were already provided for under the lease. When asked about these procedural issues, both parties urged the Commissioner to make any necessary corrections rather than remand to SWA for a new decision. This Recommended Decision therefore provides those corrections, including draft lease language, for the Commissioner's consideration.

The Administrative Law Judge provides this Recommended Decision as the review officer's written recommendation under 17 AAC 45.920. As discussed below, this Decision recommends: (1) approving a five-foot setback exception under the lease, without conditions on the placement of hangar doors; (2) approving lease amendment language to add Parcels A and B to the lease that includes an agreement for 70 North to voluntarily relinquish these tracts if it does not timely complete its expansion; (3) requiring a performance bond, under the terms of the lease, to further incentivize 70 North to timely complete its expansion; and (4) issuing a non-final decision for 70 North to review and respond to the proposed lease amendment language, to be followed by a final decision.

II. BACKGROUND

70 North acquired a lease with an existing hangar at the Birchwood Airport in September 2016.[1] 70 North and Alaska DOT&PF entered a new lease, ADA-09185, for this same property the following year ("Lease").[2] The Lease authorizes use of the land for "[o]peration and maintenance of a hangar for flight training; private aircraft storage; tie down rentals; air taxi operation; air freight; [and] related vehicle parking" for a term of 55 years.[3]

The 70 North Lease is one of several that border an area designated on the Birchwood Airport Layout Plan as the Northeast Apron.[4] An "apron" is a "portion of an airport designed, constructed, or designated by the department for the parking, loading, and unloading of aircraft."[5] The portion of the apron that immediately borders these leases is also a taxilane, which is a path for low speed taxiing to and from aircraft parking and terminal areas.[6]

70 North's hangar is situated back from the taxilane/apron lease line by more than 50 feet with its hangar door facing the taxilane.[7] 70 North also holds a permit to a parcel located to the south, separated from the Lease by an airport road ("Parcel A"). This permit allows 70 North to use Parcel A for employee, visitor, and customer parking.[8] To the west of Parcel A is an unsurveyed area set aside by the airport for snow storage ("Parcel B").[9] The following image, excerpted from Exhibit A to the Lease, shows the Lease, Parcel A, and existing improvements:[10]

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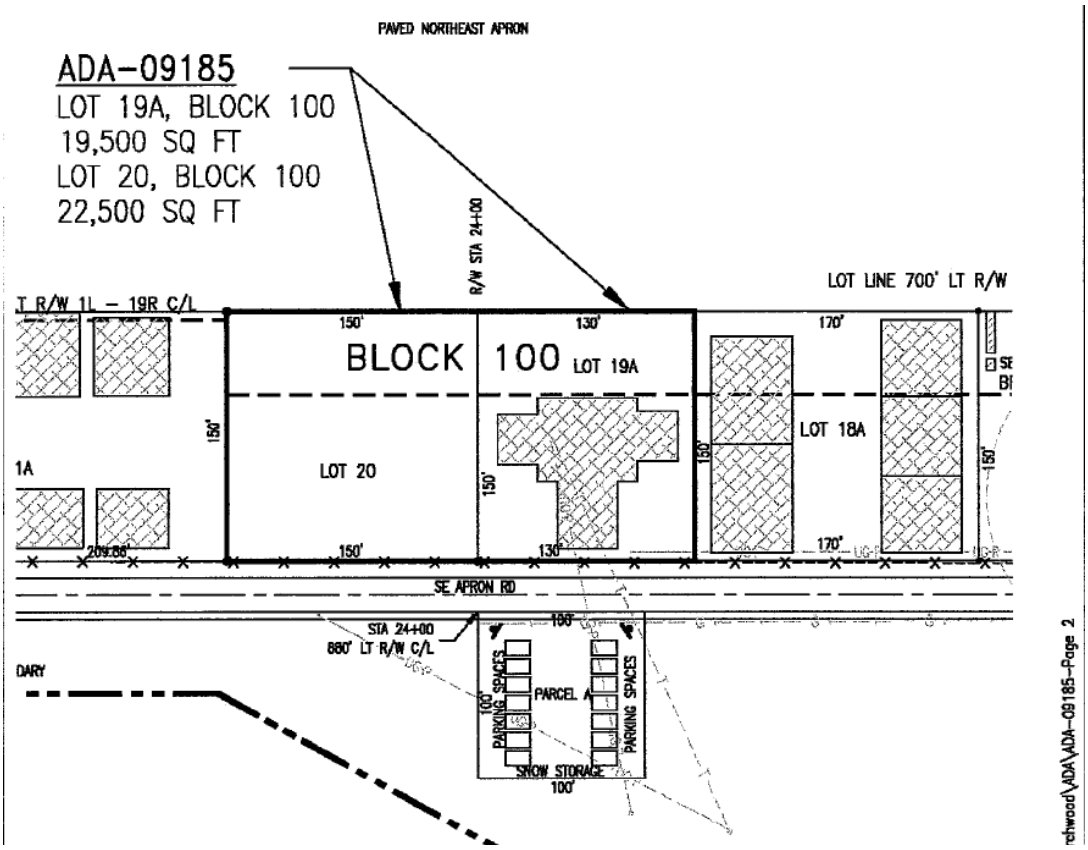
1 Stipulated Statement of Facts ("Stip.") ¶ 4.
2 Stip. ¶ 5.
3 Stip. ¶¶ 4, 6; R. 000308.
4 R. 001784.
5 17 AAC 45.990(13).
6 Stip. ¶ 41; R. 1016. The term "taxiway" also appears throughout the record. A taxiway is broader term referring to paths for taxiing around an airport; a taxilane is a taxiway for low speed and precise taxiing. R. 001016. Because 70 North's Lease borders a taxilane within an apron, this decision refers to its northern lease line as the taxilane/apron lease line.
7 R. 000459.
8 Stip. ¶ 7; R. 000335, 001793.
9 Stip. ¶ 23.
10 R. 000335 (Ex. A to Lease).



The Lease requires certain setbacks for any new structures, absent written approval from the lessor:

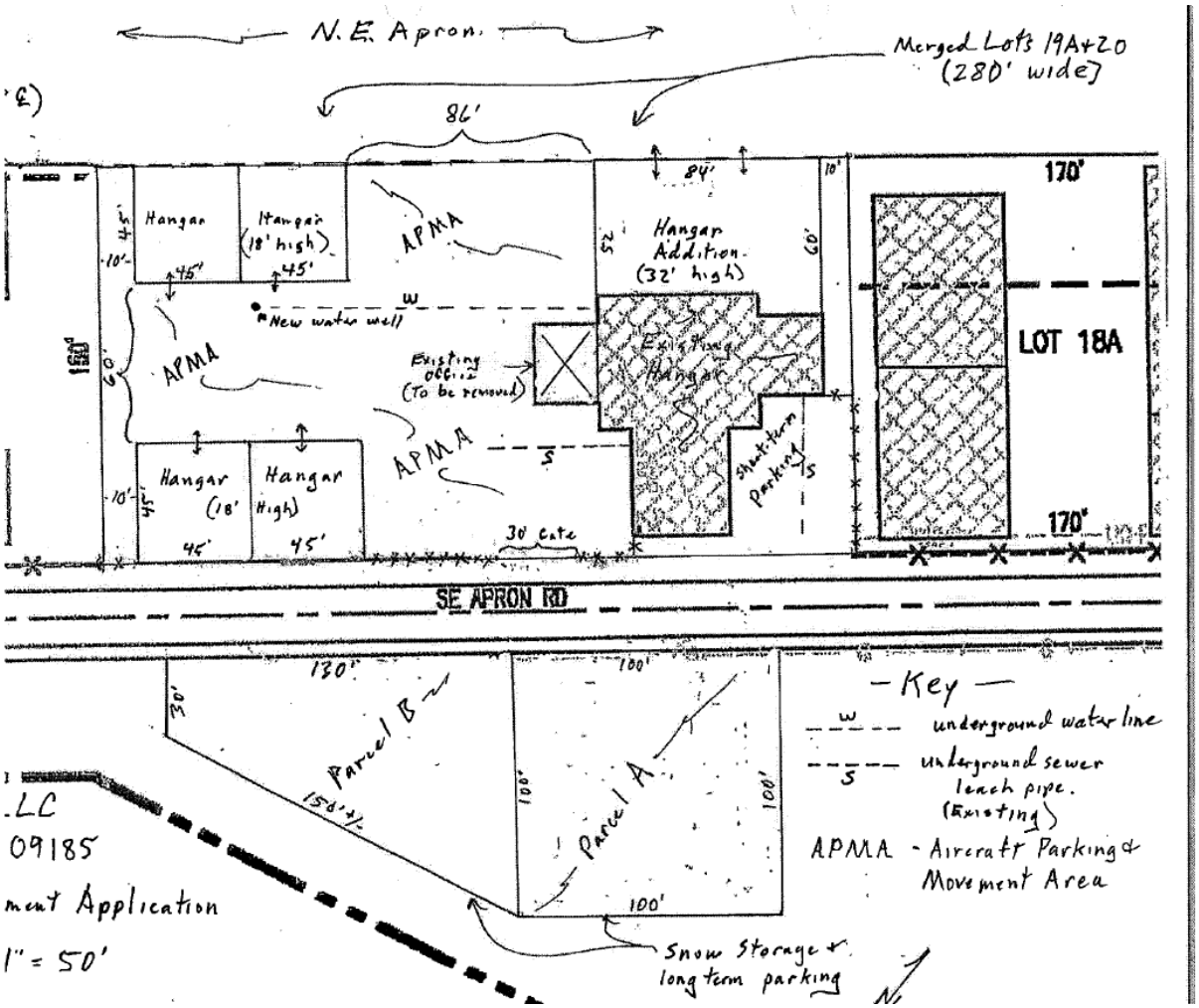
> No new building or other permanent structure may be constructed or placed within twenty (20) feet of any boundary line of the Premises *without Lessor's prior written approval*. In addition, no building or other permanent structure may be constructed or placed within 50 feet of any boundary line of the Premises which fronts on a landing strip, taxiway, or apron.[11]

The Lease also requires lessor approval of any building design through an airport building permit and reiterates the review standard for airport building permits that is set forth in regulation.[12]

70 North submitted a proposed Lease amendment on October 15, 2018 as part of a plan to expand its facilities.[13] 70 North's plans and its proposed Lease amendment evolved over the next several years through a lengthy review process.[14] The final proposal, depicted on the drawing below, includes expanding the existing hangar to the taxilane/apron lease line, with the hangar

[11] R. 000312 (Lease Paragraph 6.B.2) (emphasis added). The discrepancy between the Lease's 20-foot setback and the 30-foot setback language required by regulation is not an issue that need be resolved here.
[12] R. 000312 (Lease Paragraph 6.B.6-7); *compare* Lease Paragraph 6.B.7 *with* 17 AAC 45.280(d) (review standard for rural airport building permits).
[13] Stip. ¶¶ 8-10; R. 000277-82.
[14] Stip. ¶¶ 10-20.

door continuing to face that lease line.[15] 70 North also proposed installing four smaller hangars, two along the taxilane/apron lease line and two along the southern lease line, all with hangar doors facing inward. And 70 North asked to add Parcels A and B to the Lease.



In a February 5, 2021 decision, SWA determined that most of 70 North's proposal was approvable as a lease amendment.[16] Notably, the decision reviewed aspects of 70 North's plans as a Lease amendment, but not actual language for amending the Lease.

70 North takes issue with three aspects of the February 5, 2021 SWA decision.[17] The first two issues relate to building location and design. SWA approved amending the Lease to allow 70 North to expand its hangar towards the taxilane/apron lease line and install additional hangars, but on the condition that (1) there is a five foot setback from the taxilane/apron lease line; and (2) no

15 The drawing is excerpted from R. 000059; *see also* R. 000141.
16 R. 000479-82.
17 Stip. ¶ 22; R. 000469-75.

hangar or personnel doors face the taxilane/apron lease line.[18] SWA reasoned that a setback ensures construction activities and the improvements themselves remain fully within lease boundaries.[19] SWA also stated that if doors face the taxilane, it may cause planes to be loaded or unloaded on the taxilane instead of within the Lease area, creating unsafe conditions, potential disruption to common use of the taxilane, and the perception that 70 North has been granted exclusive use of the public taxilane.[20]

The third issue involves a proposal to expand the Lease to include Parcel A, where 70 North currently holds a permit, and the adjacent Parcel B, which has been designated for airport snow removal.[21] SWA rejected the proposal, stating that Parcels A and B are "not eligible" to be added to the Lease because "it is not standard practice to include parcels of land that are not immediately adjacent to one another to be included in the same lease agreement."[22] SWA stated that 70 North may apply to lease these parcels as a separate lease, but that its application lacked sufficient detail addressing concurrent utility permits to consider it as a separate lease application now.[23] Parcel A is subject to underground utility permits for electrical distribution and fiber optic cables.[24] DOT&PF has never leased Parcel A and has never leased or permitted Parcel B.[25] The parties explained at oral argument that Parcel B is vacant and has never been used by the airport for snow removal.

The appeal was heard on the record, stipulated facts, briefs, and a May 12, 2022 oral argument.

III. DISCUSSION

The first step in amending a rural airport lease is for the agency to determine if the amendment is "approvable."[26] A lease or lease amendment is only *approvable* at this point, not *approved*, because it is still subject to public notice and comment and competing proposals for the

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18 R. 000479-80; *see also* R. 000044. The taxilane/apron lease line is coterminous with an airport "Building Restriction Line" or "BRL," beyond which permanent structures are prohibited. Thus there are many references to the BRL throughout the record, including in the SWA decision that is on appeal here. Because the Lease provision at issue addresses setbacks from lease lines, this decision refers to lease lines, not the BRL.

19 R. 000480.

20 R. 000480.

21 Stip. ¶¶ 23-24; 480-81; *see also* R. 000045,

22 R. 000480.

23 R. 000480-81.

24 Stip. ¶ 23.

25 Stip. ¶ 23.

26 17 AAC 45.210(b).

same property rights.[27] 70 North's application has gone through nearly four years of reviews decisions, protests, and appeals and it is still at this first step. Thus the issue here is whether the amendments 70 North proposed are approvable.

By regulation, all proposed lease amendments are approvable unless the agency makes certain findings.[28] The February 5, 2021 SWA decision purports to make those findings. 70 North has the burden to show these findings are inconsistent with the law or unsupported by the record.[29]

A. SWA Reviewed an Expansion Plan, Not a Lease Amendment.

A threshold issue to assessing whether a material lease amendment is approvable is whether the proposal at issue is even a material lease amendment.

A material amendment is "a written change to a lease . . . that alters its terms to an important extent, as determined by the department in light of the circumstances, including an increase in the size of or a reconfiguration of the premises, an extension of the term, or a change in the authorized use of the premises."[30] 70 North initially applied for a lease amendment to combine the two lots that make up the Lease, add additional tracts, move a building restriction line, and modify the Lease's authorized use language.[31] Each of those issues would likely have required altering lease terms. But during the review process, SWA went from considering discrete lease amendments to reviewing 70 North's expansion plans as a whole, down to the location and design of specific proposed structures.

The parties acknowledged at oral argument that as the review progressed, it focused more on substance than form. 70 North had an expanded business plan in mind and was looking for the necessary approvals to move forward. SWA was looking to ensure any expansion is safe, reflects sound airport planning, and is consistent with applicable laws and the Lease. By focusing on these end goals, the parties lost sight of what the Lease and the law already provide, whether a lease amendment is the appropriate vehicle for addressing issues, and what Lease provisions the parties were seeking to amend or add.

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27 17 AAC 45.210(c), (d).
28 17 AAC 45.210(b).
29 17 AAC 45.920(j).
30 17 AAC 45.990(66)(A).
31 R. 000277.

1. SWA Did Not Review or Approve Amended Lease Language.

A material amendment is defined as "written change to a lease."[32] Yet the plans SWA reviewed for its February 5, 2021 decision do not include, describe, or identify any proposed language changes. At oral argument, SWA's counsel stated that language could be drafted at a later stage. The regulations do provide an option for the agency to send a lease or material amendment form to a lessee after it is determined to be approvable.[33] But that process is for finalizing an amendment form; it does not replace the requirement that the agency find a material amendment to be approvable. By not including, describing, or identifying written changes, the application here is not a material amendment, it is an *idea* that could become an amendment.

It is important that SWA and the Commissioner review proposed written language because the Lease is a contract — a very long-term contract that will dictate the parties' rights and obligations for the next half century. The Lease's language matters. Minor differences in wording can make a substantial difference in the parties' rights and obligations — differences that might determine whether that language is approvable or not. It is therefore critical that SWA and the Commissioner review specific proposed lease changes, not a mere concept or plan.

The disputed issues highlight the importance of reviewing specific lease language when determining if a proposed amendment is approvable. For example, 70 North has asked to add Parcels A and B for snow removal and parking. But the extent of the property right depends greatly on how it is described in the Lease. 70 North might have in mind language that adds these tracts for "vehicle parking." That broad language would leave it open for 70 North to start running a separate paid parking business at the airport. Language to use these tracts for "vehicle parking in support of 70 North's commercial aviation business," on the other hand, narrows the potential use. "Vehicle parking *for employees, visitors, and customers* in support of 70 North's commercial aviation business" narrows the property right even further. SWA or the Commissioner might reach a different conclusion on the approvability of a lease amendment depending on whether it consists of the broader or more narrow language. Similarly, if found approvable and public noticed, the public might have different feedback on broader or narrower lease amendment language. In dealing with a mere concept, however, the agency and the public do not have all information on the nature and extent of the proposed amendment.

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[32] 17 AAC 45.990(66)(A).
[33] 17 AAC 45.210(h).

The lack of any proposed language addressing the outstanding building and location and design issues here no doubt obscured an even more critical point: that no lease amendment is necessary or appropriate to address those issues.

2. A Lease Amendment is Unnecessary and Inappropriate to Address Lease Line Setbacks.

70 North wants to expand its hangar to the taxilane/apron lease line, install two hangars that abut the taxilane/apron lease line, and install two hangars that abut the southern lease line. The Lease states that:

> No new building or other permanent structure may be constructed or placed within twenty (20) feet of any boundary line of the Premises without Lessor's prior written approval. In addition, no building or other permanent structure may be constructed or placed within 50 feet of any boundary line of the Premises which fronts on a landing strip, taxiway, or apron.[34]

At oral argument, SWA stated that the 50-foot setback language above resulted from an error with a boundary restriction line and therefore this sentence should be eliminated from the Lease.[35] But even with that sentence, the paragraph can be reasonably interpreted to give the lessor discretion to decrease or waive either setback. The parties agreed at oral argument that this paragraph gives the lessor this authority. It is thus unnecessary to amend the Lease to allow 70 North to position its hangars less than 20 feet from lease lines; what is needed is an approved setback exception under the existing lease terms.

A lease amendment to eliminate all setbacks is not only unnecessary, but inappropriate. By regulation, a rural airport lease must include language imposing a 30-foot setback from lease lines.[36] A lease amendment that eliminates those setbacks would thus violate that regulation. A state agency may not agree to contract terms that contradict its own regulations.[37]

3. A Lease Amendment is Unnecessary and Inappropriate to Address Building Design.

A lease amendment is similarly unnecessary and inappropriate to address the design of proposed structures, including the location of hangar and personnel doors. An earlier decision

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[34] R. 000312 (Lease Paragraph 6.B.2.) (emphasis added). The discrepancy between the Lease's 20-foot setback and the 30-foot setback language required by regulation is not an issue that need be resolved here.

[35] Given SWA's statement, the proposed lease language below deletes this sentence.

[36] 17 AAC 45.410(b)(9)(A). The discrepancy between the Lease's 20-foot setback and the 30-foot setback language required by regulation is not an issue that needs to be resolved here.

[37] *Exxon Corp. v. State*, 40 P.3d 786, 796-97 (Alaska 2001) (agency may not "agree to contract terms that violate its regulations" or to "contract outside of its regulations").

that SWA largely affirmed on February 5, 2021 stated that construction of the hangar addition and new hangars was "[a]pproved upon submission of a Building Permit application to Leasing and receipt of an approved, executed Building Permit," subject to the condition that no doors face the taxilane/apron.[38] But the Lease already provides for a lessee to obtain lessor approval solely through the permitting process:

> The Lessee must first obtain the Lessor's written approval in the form of an approved Airport building permit before beginning any land development, construction or demolition of any improvements on the Premises, or before beginning any alterations, modification, or renovation of existing structures on the Premises.[39]

There is no need for the Lease to be amended to add an additional approval for specific building plans. Furthermore, 70 North is required by regulation to obtain an Airport building permit.[40] Providing part of that approval by lease amendment runs contrary to the regulation and is therefore inappropriate.

4. A Lease Amendment is Necessary to Add Parcels A and B.

Adding additional tracts to the Lease, such as Parcels A and B, would require an amendment to the Lease. The parties both agreed at oral argument that an amendment here would be necessary.

5. This Decision Recommends Approving Lease Language and a Setback Exception, But Not an Airport Building Permit.

It is readily apparent from the record that SWA and 70 North put considerable effort into this review process. The parties put further effort into this appeal, working out a set of stipulated facts to support this Recommended Decision. But despite what may have been the best of intentions, the parties' efforts put substance over form. And when it comes to amending a contract, form is key.

The Commissioner could remand this matter for SWA and 70 North to start fresh with the appropriate process for approvals under existing lease terms and to draft lease language for review where needed. But this review process has already been quite lengthy. When asked at oral argument about a potential remand, both parties urged the Commissioner to decide the issues as

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38 R. 000044.
39 R. 000313 (Lease Paragraph 6.B.6.).
40 17 AAC 45.280.

much as possible and agreed the current record is sufficient for the Commissioner to make these decisions.

The record does provide sufficient information to draft amended lease language to add Parcels A and B. As discussed below, this Decision recommends specific lease language and a finding that the language is approvable.

Similarly, the record provides sufficient information to approve a setback exception under the existing lease terms.

SWA's approval of 70 North's building plans is a closer call. The discrete lease amendments 70 North Proposed morphed into a review of its building plans. By regulation and the terms of the Lease, that type of approval should be by airport building permit. The Commissioner could convert this process into approval of airport building permit to avoid any further delay. The application requirements for lease amendments and airport building permits are similar in many respects.[41] And SWA has already reviewed and approved most of 70 North's plans. There are, however, aspects of the airport building permit application form that do not appear to be addressed in the record, such as whether approval by other regulators is required or has been secured.[42] Accordingly, this decision recommends that the Commissioner not approve an airport building permit through this decision.

B. A Five-Foot Setback is Reasonable.

By submitting plans to locate its hangar expansion and new hangars along the taxilane/apron and southern lease lines, 70 North effectively asked to waive the Lease's setback requirement. SWA approved a significantly reduced setback of only five feet from the taxilane/apron lease line because (1) a five-foot setback will ensure foundations, doors, exterior lights, roof lines, and other exterior improvements stay within the lease boundary; and (2) a five-foot setback will ensure construction activities stay within the lease boundary.[43] In its briefing, SWA stated that 70 North had agreed to a five foot setback from the southern lease line.[44] 70 North, however, takes issues with a setback from the taxilane/apron lease line.

The parties agree there is no regulation or FAA standard that either requires or prohibits a five-foot setback.[45] 70 North argued against a setback based on this lack of a legal requirement.

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41 *See* 17 AAC 45.205; 17 AAC 45.280.
42 *See* application form at https://dot.alaska.gov/stwdav/forms/BPApplication.pdf.
43 R. 000044, 000479-80.
44 Statewide Aviation Leasing's Prehearing Brief at 5, n.12.
45 Stip. ¶ 42.

That argument ignores the terms of the Lease. By *contract*, there is a required setback of 20 feet absent an exception. The Lease further states that "[a]ny approval required of the Lessor by this Lease will not be unreasonably withheld."[46] The Lease thus gives DOT&PF broad discretion within the bounds of reasonableness.

SWA's findings that a five-foot setback would ensure improvements and construction activities remain fully within the lease area provides a reasonable basis for a modest five-foot setback. A five-foot setback allows 70 North to maximize its use of the lease area while providing sufficient space for a person to walk around the hangars — for construction, maintenance, or daily use — without stepping outside the lease. Considering the northern lease line borders a common area used for aircraft taxiing and the southern lease line borders a public road, it is reasonable to leave this minimal buffer so 70 North's use of the apron and road is no different from any other lessee's use of these public areas.

70 North pointed to examples of buildings at other airports. Considering rural airport leases are required to impose a default 30-foot setback, shorter setbacks would be the product of a setback exception. That exception process is individualized. A setback exception at another airport or another lease at the Birchwood Airport does not set a rule or a standard that DOT&PF must or should apply here. What DOT&PF found reasonable for one airport or lease may not be reasonable for another. To look for a comparable situation, however, 70 North needs look no further than the leases on either side of the Lease. Both of those leases have hangars setback five feet from the taxilane/apron lease line.[47]

Based on the circumstances, SWA did not unreasonably withhold approval of a setback exception by approving a five-foot setback from the taxilane/apron lease line to ensure 70 North's hangars and construction and maintenance activities can remain within the lease and avoid using the apron differently from other airport users.

C. The Reasons SWA Gave for Making Door Placement a Condition of a Setback Exception Are Not Reasonable.

SWA approved 70 North's building plans conditioned on hangar and personnel doors not opening onto the taxilane. SWA reasoned that taxilane-facing doors could result in supplies and passengers being loaded and unloaded on the taxilane, which might (1) create unsafe conditions; (2) be viewed as providing 70 North an exclusive use of the taxilane; (3) be viewed as 70 North

[46] R. 000326.
[47] Stip. ¶ 27.

being allowed an unfair advantage; and (4) lead to other tenants similarly loading and unloading on the taxilane in front of 70 North's lease, obstructing access to its own hangars.[48] At oral argument, SWA stated that with a five-foot setback, personnel or garage doors could face this lease line, leaving only the issue of hangar doors. The only hangar door 70 North plans to face the taxilane/apron lease line is the door on its expanded hangar.[49] Thus this is the only door placement at issue.

The parties agree no law or FAA standard prohibits or creates a right to taxilane/apron-facing doors.[50] Both parties argued this settles the issue in their favor. But as discussed above, the standard for a setback exception under the lease is reasonableness. The lack of a law or standard addressing door placement does not resolve whether prohibiting taxilane/apron-facing hangar doors is reasonable.

Both parties pointed to examples of other hangar doors. SWA pointed to the lots on either side of the Lease, where hangar doors do not face the taxilane/apron.[51] 70 North pointed to numerous examples of doors opening in the direction of taxi lanes or taxiways at other rural airports. SWA countered that these examples all include some distance of setback from the lease line. Overall, what these examples show is that SWA has sometimes approved building designs with hangar doors facing a taxilane and sometime approved designs with hangar doors that do not. The record does not indicate whether, when, or under what circumstances these door placements have been approved. These examples are thus of limited use in determining whether 70 North's proposed hangar door could reasonably face its taxilane/apron lease line.

The issue here, more specifically, is whether the reasons SWA gave for prohibiting a taxilane-facing hangar door are reasonable. All SWA's stated reasons stem from the possibility 70 North might load and unload supplies or passengers on the taxilane if its hangar door faces the taxilane. At oral argument, SWA's counsel stated that lessees like 70 North are required to load and unload within their lease areas and that allowing 70 North to do so on the apron would give 70 North an exclusive right contrary to FAA standards for this airport. The record, however, does not support this argument. The Lease includes no requirement to load and unload exclusively within the lease area. Nor do the FAA materials in the record include such a requirement. To the contrary, loading and unloading is one of the stated purposes of an apron. In regulation, the apron

48 R. 000480.
49 R. 000059; R. 000141.
50 Stip. ¶¶ 43, 45.
51 Stip. ¶ 29.

is defined as a "portion of an airport designed, constructed, or designated by the department for the parking, loading, and unloading of aircraft."[52] FAA Advisory Circular 150/5300-13A further states that "[t]he function of an apron is to accommodate aircraft during loading and unloading of passengers and or cargo" and "[a]pron areas must also accommodate aircraft servicing, fueling, loading and unloading of cargo."[53] SWA's concerns about 70 North loading or unloading in the apron are thus at odds with the very purpose of the apron.

Safety and equal treatment of lessees are valid concerns. But here, the connection between SWA's concerns and 70 North's proposed door placement are tenuous at best, based entirely on speculation about how 70 North or others may use the apron and how others may view that use. It would be equally speculative to assume 70 North would never load or unload on the apron simply because its hangar door faces a different direction.

Safety and equal treatment could be more directly and effectively addressed by imposing rules on apron use that would apply to all similarly situated users. 70 North, like any airport user, is already required by regulation to "avoid hindering or obstructing another person, a vehicle, or an aircraft from lawful use of airport property."[54] If SWA believes additional restrictions are necessary for the Birchwood Airport apron, it has authority to impose restrictions that apply directly and explicitly to how all lessees use the apron.[55]

SWA's basis for prohibiting a taxilane/apron facing hangar door is speculation that 70 North may use the apron for one of its stated purposes, that this stated purpose may create unidentified safety concerns, and that others may see 70 North using the apron as it was intended and conclude 70 North is receiving preferential treatment. This speculation is unsupported by the record, at odds with the apron's purpose, and does not provide a reasonable basis to prohibit the expanded hangar's door from opening in the direction of the taxilane/apron lease line as a condition of approving the five-foot setback.

Previous SWA decisions cited concerns about sight lines for planes taxiing directly from a hangar onto the taxilane. Even though this reasoning was abandoned by SWA in the decision that is on appeal here, 70 North emphasized that it would not allow planes to exit the hangar door under power, thereby avoiding sight line safety concerns. At oral argument, 70 North offered to

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52 17 AAC 45.990(13).
53 R. 001264.
54 17 AAC 45.020(a)(2).
55 17 AAC 45.020(c) ("The department may, subject to the terms of a pre-existing lease, permit, or concession, authorize, restrict, or prohibit air carrier operations, concessions, or other uses in designated areas of airport land, buildings, or facilities.").

make this a Lease requirement. In light of 70 North's position, a requirement that planes not enter or exit taxilane/apron-facing hangar doors under power would a be reasonable condition for approving a setback exception. Alternatively, this could be added to the Lease, as 70 North offered, as a prohibited user under Lease Section III.C. This Recommended Decision includes this in the draft lease amendment language below.

D. SWA's Reason for Finding a Lease Amendment Adding Parcels A and B to be Not Approvable is Not Supported by the Record, the Lease, or the Law.

70 North proposed adding Parcels A and B to the Lease to use for parking and snow storage in support of its Lease activities.[56] DOT&PF reviews a proposed lease amendment to determine if it is "approvable."[57] If approvable, and if no one submits a competing application, DOT&PF either approves and executes the lease amendment or denies it for a reason allowed under the rural airport regulations.[58]

A lease amendment application is approvable unless (1) the proposed use is prohibited or inconsistent with a state obligation under a covenant running with the land, an exclusive right that has been conferred, sound airport planning, airport safety or operation, state statute or regulation, an FAA grant assurance incorporated by state regulation, or a written plan or program required by state or federal law; (2) the proposed use is inconsistent with the State's best interests; (3) an application has already been approved for the same land; (4) there is a competing approvable application for a higher priority use; (5) the applicant fails to establish acceptable financial responsibility; or (6) the applicant has violated certain state laws, a material contract term, is in arrears on rent or other material financial obligation, or is in default on a lease or permit.[59] The State's best interests include safe, effective, and efficient operation of rural airports, encouraging economic and rural airport development, protection of property rights, public health, the environment, and state resources, compliance with state law and contracts, minimizing impacts on the surrounding area, minimizing interference with aviation activities, and avoiding monopolization or undue limits on land availability for future use.[60]

70 North argued that the phrasing of the regulation — that amendments are approvable unless SWA makes certain finding — puts the onus on SWA to establish that an amendment is

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56 R. 000277.
57 17 AAC 45.210(b).
58 17 AAC 45.210(d).
59 17 AAC 45.210(b).
60 17 AAC 45.900.

not approvable. SWA responded that 70 North was trying shift the burden, which is on 70 North in an appeal to the Commissioner. Both are correct, at least in part. 70 North does have the burden.[61] But its burden is to show that SWA's basis for rejecting the lease amendment is not supported by the law, the Lease, or the record. In other words, SWA needs a valid reason to reject a lease amendment, and it is up to 70 North to show its reason was not valid.

The regulatory criteria for a lease amendment give SWA broad authority to approve or deny a lease or lease amendment. There is a whole range of reasons SWA could find an amendment to add addition tracts to be not approvable. The task here is not to speculate reasons the Parcel A and B amendment could have been rejected, but to review the particular reason SWA gave for rejecting the amendment.

Like much of this review process, SWA's view of the Parcels A and B lease amendment fluctuated considerably over time. Indeed, in a July 3, 2019 decision, SWA determined that this lease amendment was *approvable* so long as the tracts were used to support development of 70 North's existing lease area.[62] 70 North did not appeal that decision. The July 3, 2019 decision is thus a final agency decision. Yet SWA did not proceed with public notice for this or any of 70 North's other approvable lease amendments. It appears that the approvable amendments may have been held up by 70 North amending its application to address the amendments SWA did not find approvable.[63] That delay proved fatal to the Parcels A and B amendment when SWA issued a new decision on December 23, 2019 finding these tracts are "unavailable due to conflicts with existing utilities."[64] SWA did not address, let alone acknowledge, the fact that it had already determined these tracts could be added to the Lease.[65]

The February 5, 2021 SWA decision on appeal here again rejected the Parcel A and B lease amendment, but for a wholly different reason. SWA admitted that the existing utility permits on these tracts do not preclude concurrent use of the tracts for other purposes.[66] But according to SWA, the tracts are "not eligible" to be added to the Lease because a road separates Parcels A and B from the Lease and it is "not standard practice" to include non-contiguous tracts in the same lease.[67] SWA stated that 70 North could apply for a separate lease for Parcels A and

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61 17 AAC 45.920(j).
62 R. 000567.
63 *See* R. 000110.
64 R. 000111.
65 *Id.*
66 R. 000480.
67 *Id.*

B, but that the application would need to include more detail "to address construction and development issues related to the existing utility infrastructure."[68] Because this is the decision on appeal, it is this decision's reason for rejecting the Parcels A and B amendment — the fact that they are non-contiguous with the Lease — that is reviewed here.

6. The Fact that Parcels A and B are Non-Contiguous Does Not Support Any of the Criteria for Rejecting a Lease Amendment.

The parties stipulated that there is no written rule, law, or policy that either prohibits or requires non-contiguous tracts in a single lease.[69] Instead SWA claimed that it has an unwritten standard practice. As 70 North pointed out, if SWA has a practice that it applies as a bright line rule, that practice might need to be adopted by regulation.[70] The record, however, provides no evidence — such as a policy manual, information on past decisions, or an affidavit from personnel familiar with agency practices — that a rule or standard agency practice against leases with non-contiguous tracts exists. Indeed, the record does not indicate whether SWA has ever considered a non-contiguous rural airport lease, let alone done so with sufficient frequency to have established a standard practice. 70 North, on the other hand, provided an example of a lease at the Ted Stevens International Airport that is intersected by a public road.[71]

Even if SWA has an unwritten rule against leases with non-contiguous tracts, the issue came up in the context of a proposed lease amendment. Therefore SWA needed to provide a reason for rejecting that amendment that falls within one of the many regulatory criteria for rejecting lease amendments. Unfortunately, the February 5, 2021 SWA decision does not identify which, if any, of the regulatory criteria it was relying on to reject this lease amendment.[72] Looking at the regulations, it is hard to discern how the contiguousness of tracts might fall into these criteria. Whether 70 North holds tracts under one lease or two would not impact how SWA plans or operates the airport itself.[73] One lease or two does not affect airport safety, security, or

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68 R. 000480-81.

69 Stip. ¶¶ 46-47.

70 AS 44.62.640(a)(3) (regulation is a rule of general application that interprets or implements a law). Whether an agency action or interpretation of a law constitutes rulemaking depends on the circumstances. Because the record does not provide those circumstances, this decision need not address whether the circumstances would constitute rulemaking.

71 R. 000474. This example poses a simple alternative to non-contiguous tracts: a larger lease that include the span of road that separates the existing Lease from Parcels A and B. Airport leases do not confer exclusive rights. AS 02.15.210. Therefore lease terms could be drafted to include this span of road as a non-exclusive lease right, with language that ensures the Lease does not alter the road or road usage and that 70 North does not use the road differently from any other member of the public.

72 R. 000480-81.

73 17 AAC 45.210(b)(1)(C), (b)(2); 17 AAC 45.900(c)(1), (7)-(9).

maintenance.[74] It does not contradict any written law, rule, or FAA standard, as the parties stipulated.[75] It does not change the state resources involved or potential impact to public health or the environment.[76] One lease or two is really a matter of contract management.[77]

SWA did raise two contract management issues at oral argument, but neither are supported by law or the record. First, SWA argued that separate leases would be easier to manage because 70 North could more easily assign or sublease Parcels A and B separately from the Lease. This of course is not part of SWA's reasoning in its February 5, 2021 decision. More importantly, nothing in law or the Lease prohibits 70 North from assigning or subleasing a portion of the Lease, nor is it readily apparent that assignment of a separate lease is administratively simpler or preferable to assignment of a portion of a lease.

Second, SWA argued at oral argument that separate leases make more sense because 70 North is planning to use Parcels A and B for a different purpose than its existing lease. But 70 North has proposed using these tracts in support of its expanded aviation business, not as a separate business, such as a public paid parking business. The Lease also allows 70 North to use part of the Lease for parking and snow removal. Parking and snow removal are therefore not a different purpose from the Lease.

The purpose of a lease is to confer rights and obligations and provide the terms for a contractual relationship between the lessor and lessee. There could be reasons to manage these rights and relationships under different instruments for non-contiguous tracts. But the mere fact that tracts are non-contiguous does not necessarily make a single contract inappropriate, illegal, or unwise.[78]

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74 17 AAC 45.210(b)(1)(C), (b)(2); 17 AAC 45.900(c)(1), (2), (8).

75 17 AAC 45.210(b)(1)(D), (E); 17 AAC 45.900(c)(6).

76 17 AAC 45.900(c)(5).

77 The other lease amendment criteria relate to competing rights or interests, financial responsibility, or history of default — none of which are at issue here. *See* 17 AAC 45.210(b)(1)(A), (B), (b)(3)-(6).

78 At oral argument, SWA's counsel mentioned that Parcel B might be important for airport planning because even though it has not been used for snow removal, the airport has designated the land for this purpose and may need the space for snow removal in the future. That type of argument falls within the regulatory criteria for deeming a lease amendment not approvable and might have supported such a finding here — but SWA did not offer that as a reason for finding 70 North's amendment not approvable. It is also worth noting that the Birchwood airport plan designates Parcel A for snow removal as well, and SWA has permitted that land to 70 North for parking. See R. 001786.

7. A Potential Difference in Lease Terms Does Not Make a Lease Amendment Not Approvable.

One difference separate leases could make is to the lease term. SWA did not raise this issue in its February 5, 2021 decision as a basis for finding the lease amendment not approvable and on that basis alone, 70 North's burden did not include addressing this issue. To the extent the Commissioner is concerned with this issue, however, there are other ways to address it.

The term of a rural airport lease is based on the fair market value, purchase price, or proposed investment.[79] 70 North is currently five years into a 55-year Lease term, expiring June 30, 2072. If expanded, 70 North would also hold Parcels A and B for the next 50 years. If 70 North was to lease Parcels A and B under a separate lease, however, it would need a planned investment of $337,500 for these tracts to qualify for a 50-year lease term.[80] In its appeal, 70 North characterized its entire proposed project, including new and expanded hangars, as a $500,000 investment.[81] Thus a separate lease based solely on the investment needed to continue parking on Parcel A and prepare Parcel B for snow removal or additional parking would likely be for a shorter term.[82]

70 North has cited a potentially shorter lease term, and difficulties obtaining financing for disparate lease terms, as reasons for seeking to include these tracts in its Lease.[83] One or two leases thus makes a difference to 70 North in this one respect. The state's best interest — one of the criteria for rejecting a lease amendment — includes encouragement of economic development and continued development of airports, aviation services, and businesses at airports.[84] To the extent a separate lease with a short lease term would discourage 70 North's business plan, these state's best interests would actually *support* the lease amendment, not provide a reason for rejecting it as not approvable.

The state's best interest in the airport development would not, however, be served by tying up Parcels A and B for 50 years if 70 North did not ultimately use these tracts to expand its aviation business. That concern could be addressed through existing or amended lease terms. The Lease currently provides for performance bonds.[85] DOT&PF, as lessor, could impose a

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79 17 AAC 45.225(j).
80 *Id.*
81 R. 000470.
82 70 North has characterized the potential term of separate Parcel A and B lease as "much shorter" than its Lease. R. 000474.
83 R. 000101; R.000474.
84 17 AAC 45.900(c)(3), (4).
85 R. 000314 (Lease Section V.C.)

performance bond — such as $50,000, representing 10% of the estimated expansion project cost — as an incentive for 70 North to timely proceed with its expansion. The parties could also agree to a lease amendment that includes 70 North voluntarily relinquishing Parcels A and B if it does not complete its expansion within a certain period of time. For example, the amended Lease could include voluntary relinquishment if 70 North does not submit an airport building permit within one year of the lease amendment going into effect or complete construction within three years of an airport building permit being issued. The draft lease amendment and recommendations below include a bond and a provision for voluntary relinquishment for the Commissioner's consideration.

8. The Lease Does Not Prohibit a Lease Expansion.

SWA argued the Parcels A and B lease amendment should be rejected because the Lease requires 70 North to set aside adequate space for parking and snow removal within the lease area.[86] This is another *ex post facto* justification that SWA did not include in its February 5, 2021 decision. But even if it was, the Lease simply does not support it.

The Lease does not require 70 North to set aside room on its Lease for parking or snow removal. The Lease states that 70 North "is required to provide vehicle, equipment, and aircraft parking space, snow storage, and drainage on the premises adequate for the Lessee's activities on the premises *or confine parking to such other places on the Airport as designated in writing by the Lessor*."[87] The Lease further states that 70 North is responsible for "plowing, removing and disposing of snow *from the Premises to a Lessor-approved location*, or providing suitable storage within the boundaries of the Premises."[88] Thus the Lease requires 70 North to provide for parking and snow removal, but it may do so either in the lease area or in an approved off-lease area.

Indeed, 70 North is currently providing off-lease parking with SWA's approval through its permit for Parcel A. It would be inconsistent with SWA's issuance of that permit and the terms of the Lease itself to now require 70 North to provide parking only within the existing lease area — and to use that as justification for rejecting a proposed lease expansion.

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86 SWA Brief at 9-11.
87 R. 000320 (Lease Paragraph VIII.F) (emphasis added).
88 R. 000318 (Lease Paragraph VII.C.1) (emphasis added).

9. The Degree of Construction Detail Does Not Make the Amendment Not Approvable.

The February 5, 2021 decision stated that 70 North's application lacked sufficient construction detail, even for a separate lease.[89] As discussed above, however, the Lease requires 70 North to apply for an airport building permit before any land development or construction.[90] This includes clearing, excavating, or filling Parcels A or B.[91] It is during the permit review process when 70 North will provide detailed information about its plans and that SWA can ensure those plans will not interfere with existing utility permits. The degree of detail 70 North provided with its lease amendment application, therefore, is not a reason to find the amendment not approvable.

10. An Amendment to Add Parcels A and B is Approvable.

In sum, the fact that a road separates Parcels A and B from the Lease — which is the only reason SWA has currently determined these tracts cannot be added to the Lease — is simply not an impediment. The parties agree no law or written policy prohibits noncontiguous tracts. There is no evidence in the record of an unwritten policy against noncontiguous tracts. Contiguousness alone does not fall within the regulatory criteria for rejecting a lease amendment. It is a matter of contract management that SWA can address through existing Lease terms or the language of the amendment itself. Because non-contiguousness does not justify rejecting the Parcels A and B lease amendment, 70 North met its burden on this issue.

IV. DRAFT LEASE AMENDMENT LANGUAGE

As discussed above, a concept for amending a lease is not a proposed lease amendment. A lease is a contract, and amending it involves changing its language. To avoid the time and expense of a remand — something the parties urged the Commissioner not to issue — this decision provides draft lease amendment language.

Amending a contract requires the agreement of both parties. If the application had included draft lease amendment language, 70 North would have already agreed to the language. As discussed above, the regulations do provide for an exchange of lease forms following an approvability finding, but the process does not include a step for the lessee to approve or reject lease language until much later, after public notice and final agency approval.[92] The regulations

89 R. 000480-81.
90 R. 000313 (Lease Paragraph 6.B.6.).
91 17 AAC 45.280(a).
92 17 AAC 45.210(h).

thus contemplate that the lessee would have approved language earlier in the process in the form of its application. Because no language was drafted or even described in detail until now, it would be appropriate, and potentially avoid future disputes, for the Commissioner to give 70 North an opportunity to review and agree to the draft lease language before it goes out for public notice.

This Decision therefore recommends that the Commissioner (1) find that the following lease language is approvable as a lease amendment; (2) issue a non-final decision and retain jurisdiction so 70 North may review the proposed language; (3) give 70 North 30 days to (a) agree to the lease language; (b) propose alternative language; or (c) state that it does not agree to some or all of the language because it intends to appeal this decision; and (4) require the parties to provide a mutually agreed drawing depicting Parcels A and B that can be attached to the Lease as an amended Exhibit A. If 70 North agrees to the lease language, this decision can be deemed final and the process of publicly noticing the lease amendment may proceed. If 70 North proposes alternative language, the Commissioner may determine whether to address the proposal or remand to SWA to further refine the language with 70 North. And if 70 North prefers to appeal, the Commissioner can issue a final decision that can be appealed.

Alternatively, the Commissioner could distribute this Recommended Decision to the parties and allow feedback specific to the draft lease language.

The draft lease amendment language is as follows:

1. Article I, Paragraph A is amended to add:

> Parcel A, consisting of approximately 10,000 square feet of land, as shown on Exhibit A to this Lease.
>
> A tract of land immediately adjacent to Parcel A, consisting of approximately 9,100 square feet, as shown on Exhibit A to this Lease and designated for purposes of this Lease as Parcel B.

2. Article III, Paragraph A.1 is amended:

> The Lessor authorizes the Lessee to use the Premises for the following uses only:
>
> > **Lots 19A and 20, Block 100, for operation** ~~Operation~~ of a commercial aviation business, including air carrier operations; aircraft maintenance and repair; aircraft parking; aircraft loading and unloading; air freight; flight training; operation of one

or more hangars; hangar space subleasing; aircraft tiedown rentals; and short-term vehicle parking;[93]

Parcels A and B for snow removal and vehicle parking for employees, visitors, and customers in support of the commercial aviation business operated on Lots 19A and 20.

3. Article III, Paragraph A.3 is added:

Lessee agrees to relinquish and contract from the Lease Parcels A and B, to take effect immediately upon notice from the Lessee or Lessor that (1) Lessee has failed to apply for an airport building permit that includes installing additional hangar space on Lots 19A and 20 and improvements to Parcels A and B so these Parcels can be used for their authorized use ("Expansion Permit") within one year of the effective date of the lease amendment adding Parcels A and B; or (2) Lessee has failed to complete construction of the improvements approved in the Expansion Permit within three years of the Expansion Permit being granted.

4. Article III, Paragraph C.8 is added (to the list of prohibited uses):

Taxiing aircraft under power to or from a hangar door that faces a boundary line that fronts a landing strip, taxiway, or apron and is located less than twenty feet from that boundary line.

5. Article IV, Paragraph A.1 is amended:

The rent for the Premises is **$8798.40** ~~$4,116~~ per year, calculated at the rental rate of **$0.144** ~~$0.098~~ per square foot per year (**$0.144** ~~$0.098~~ x **61,100** ~~42,000~~ square feet = **$8798.40** ~~$4,116~~), payable semi-annually in equal payments of **$4399.20** ~~$2,058~~ due on July 1st and January 1st of each year of the term of this Lease as specified in Article II (Term). Any additional fees are specified elsewhere in this Lease. All payment required by this Lease must be made in U.S. dollars.[94]

6. Article V, Paragraph B.2, the second sentence is deleted.[95]

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[93] This language amends the lease amendment that was public noticed in December 2019. *See* R. 000035.

[94] A lease amendment public noticed in December 2019 decreased the annual rent from $4116 per year to $2363.56 per year. R. 000035. A December 17, 2018 letter, however, stated that $2363.56 was *semiannual* rent, so the publicly notice amendment appears to have been in error. R. 000290. That same letter stated that effective July 1, 2022, the annual rent would be $6048, based on a rate of $0.144 per square foot. The above language thus uses the July 1, 2022 rent and adds additional rent at the same rate for Parcels A and B ($6048 (42,000 square feet at $0.144 per square foot) + $2750.40 (19,100 square feet at $0.108 per square foot) = $8798.40).

[95] This is the 50-foot setback language SWA stated should be deleted.

V. RECOMMENDATIONS

This Recommended Decision recommends that the Commissioner:

1. Approve a setback exception of five feet from the taxilane/apron lease line and the southern lease line for 70 North to expand its existing hangar and install additional hangars, as depicted on R. 000059. This setback exception is not conditioned on any particular building design, including door placement. In accordance with regulations and the terms of the Lease, 70 North will need to obtain an airport building permit before beginning any land development or construction.

2. Find the draft lease language listed above to be approvable, subject to agreement by 70 North. By adopting this decision, the Commissioner is issuing a non-final decision. 70 North will have 30 days from the date of issuance to (a) file notice with the Commissioner that it agrees to the draft lease language; (b) file proposed alternative language with the Commissioner; or (c) file notice with the Commissioner that it does not agree to some or all of the draft lease language because it intends to appeal the Commissioner's decision to superior court. Within those 30 days, the parties will also file with the Commissioner a mutually agreed drawing depicting Parcels A and B that can be attached to the Lease as an amended Exhibit A. If 70 North agrees to the draft amendment language, the Commissioner will issue a final decision finding this language approvable. If 70 North proposes alternative lease language, and depending on the extent and nature of that language, the Commissioner will determine whether to issue a final decision on approvability of the lease amendment or remand to SWA for further review. If 70 North rejects the proposed lease language because it wants to appeal, the Commissioner will issue a final appealable decision. At the Commissioner's discretion, OAH may assist with issuance of the final decision.

3. As an alternative to recommendation 2, distribute this Recommended Decision to the parties and allow the parties to provide a response limited to the draft lease amendment language before issuing a final decision on the approvability of this language.

4. Require 70 North to provide, within 30 days of the effective date of a lease amendment adding Parcels A and B to the Lease, a $50,000 performance bond, on a form acceptable to DOT&PF, with 70 North as principal and DOT&PF as obligee, payable to DOT&PF upon notice from DOT&PF that 70 North has failed to either (a) apply for an airport building permit that includes installing additional hangar space on Lots 19A and 20 and improvements to Parcels A and B so these Parcels can be used for their authorized use

("Expansion Permit") within one year of the effective date of the lease amendment adding Parcels A and B; or (b) complete construction of the improvements approved in the Expansion Permit within three years of the Expansion Permit being granted. The performance bond will remain in place until 70 North completes construction of its Expansion Permit improvements and DOT&PF issues a notice of release.

VI. CONCLUSION

With no doubt the best of intentions, the review process here put substance over form, culminating in a February 5, 2021 SWA decision that reviewed a concept rather than a proposed lease amendment and that did not take into account existing lease language. SWA's reasoning for prohibiting taxilane-facing doors and rejecting a lease amendment to add Parcels A and B was further unsupported by law, the Lease, and the record. SWA's reasoning for approving a five-foot setback, however, is supported and reasonable. The recommendations above provide the form that was lacking in SWA's decision and recommend a five-foot setback with no condition on door placement and lease language to add Parcels A and B.

DATED: July 18, 2022.

By: [redacted]
Rebecca Kruse
Administrative Law Judge

Commissioner's Order in Response to Administrative Law Judge's Recommendation

Having reviewed and considered the contents of the Administrative Law Judge's Recommended Decision and accompanying materials:

☒ I accept and adopt the Review Officer's assessment and conclusions and adopt the following recommendations:

☒ Recommendation #1 approving a five-foot setback exception.
☒ Recommendation #2 finding draft lease language approvable subject to agreement by 70 North. Depending on 70 North's response, either a final decision or remand will follow.
☐ Recommendation #3, as an alternative to Recommendation #2, distributing draft lease language to the parties for a limited response with either a final decision or remand to follow.
☒ Recommendation #4, requiring a $50,000 performance bond.

This is a non-final decision. As noted, either a remand or final decision will follow.

Dated: 10/18/2022

[redacted]

Ryan Anderson, Commissioner
Department of Transportation & Public Facilities