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**Articles**

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Paul Stephen Dempsey*

## I. Introduction

Airports impose significant environmental costs and economic benefits on their surrounding communities. In an effort to ameliorate those costs, local governments sometimes are inspired to attempt to regulate them away, or at least subdue them via regulation. The difficulty is that the local airports are part of the national air transportation system that falls within the domain of the federal government. This system poses a conflict between state and local authorities, exercising police power to protect the health, safety, and welfare of their citizens, on the one hand, and federal environmental and

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aviational regulation, on the other.

Prior to 1972, local police power regulation or common law actions were the principal means of arresting airport noise pollution.[1] But with promulgation of federal noise control legislation, the inherent police power of the states collided with the Supremacy Clause of the U.S. Constitution, as the federal government has sought to regulate air transportation and its environmental consequences under the Commerce Clause. Courts have therefore been forced to draw lines dividing state and federal jurisdiction in this arena.

Beyond issues of conflicting state and federal law, airport operators or proprietors[2] can also be subject to state nuisance and inverse condemnation litigation. This brings another Constitutional provision into play – the Takings Clause – that prohibits governmental confiscation of private property without just compensation.[3] Inverse condemnation has mandated compensation by airport operators for the acquisition of "avigation" easements from residents bombarded by aircraft noise. Bearing in mind this reality, both the federal judiciary and the legislature have been far more deferential to the regulatory efforts of local airport proprietors and municipal governments that own and operate airports.

Municipalities that own and operate airports have far more regulatory power over airport operations municipalities that do not. In the former case, the municipality exercises authority as airport proprietor and seeks to protect its legitimate interest in avoiding trespass, nuisance, and inverse condemnation liability; in the latter case, the municipality seeks to exert its inherent police powers to protect local safety and health. It is the latter function that courts have held is preempted by federal legislation over noise and air transportation.

## II. Noise

Since the inauguration of the jet age in the late 1950s, noise has been the most prominent environmental concern of the aviation sector.[4] Jet engines produce noise as fuel ignites and exhaust gasses and turbine blades strike the surrounding air. Reverse thrust, as a means of braking, increases noise volume. In addition, the aircraft fuselage profile

1. Noise Control Act of 1972, Pub. L. No. 92-574, § 2, 86 Stat. 1234 (1972).

2. For present purposes, an airport proprietor, and an airport operator, are synonymous. A state or local government can act in both a proprietary and governmental capacity. United States v. New York, 552 F. Supp. 255, 264 (N.D.N.Y. 1982).

3. U.S. CONST. amend. V and XIV.

4. Paul Stephen Dempsey, *Trade & Transport Policy in Inclement Skies – The Conflict Between Sustainable Air Transportation and Neo-Classical Economics,* 65 J. AIR L. & COM. 639, 646-47 (2000).

displaces air and produces aerodynamic noise.[5] The ground traffic of air and surface vehicles at the airport also creates noise. A survey of residents near airports found a significant association between the level of noise annoyance and reported symptoms including waking, depression, irritability, chronic tinnitus (buzzing in the ear), minor accidents, and health service use.[6]

Solutions to airport noise problems have included land use planning (zoning) around airports, sound-proofing homes in flight paths, altering flight paths to minimize noise impacts, imposing flight curfews at night, and mandating quieter Stage 3 engines on aircraft.[7] Prudent airport planning requires measuring of aircraft noise, land use planning, and aircraft noise abatement procedures such as mandating the use of quieter engines, installing home insulation, or condemning or relocating residential areas.[8] Advanced aerodynamic aircraft and engine designs have also reduced noise footprints. Thus, noise abatement is a shared problem of airport designers, airport operators, local governments, airline operations, and airframe and engine manufacturers.[9]

Assessing noise impacts requires quantification of noise including frequency, pitch, time of day, and number of intrusions. Several metrics of aircraft noise have been developed.[10] The U.S. Federal Aviation Administration [FAA] has adopted a noise threshold of 65 decibels [dB] DNL[11] as the trigger for unacceptable noise levels. Environmentalists

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5. *Transport Canada, The Greening of Aviation*, 45 (1996). Generally speaking, the larger the diameter of the aircraft fuselage passing through the air, the more air it displaces, and the greater noise it produces. An automobile has the same effect as it passes through air.

6. Health Council of the Netherlands, *Report on Public Health Impacts of Large Airports* (draft March 10, 1999). According to one source:

> The negative appraisal of noise leads to acute dysregulation of the organism both in a physiological and psychological sense: physiologically by, *inter alia*, the production of stress hormones, magnesium excretion and constriction of the blood vessels; psychologically by, *inter alia*, strain, annoyance and resignation. Continuing noise exposure would result in chronic dysregulation of the organism that would become manifest by chronic elevated cortisol and noradrelin levels, changes in calcium and magnesium ration in the heart muscle and arteriosclerosis. In the long run this may lead to an increased prevalence of cardiovascular disease in the exposed population and possibly of other diseases. *Id.*

7. The technical noise levels for Stage 1, 2 and 3 aircraft are complex, and set forth in 14 C.F.R. § 36, App. C365. (2002).

8. INT'L CIVIL AVIATION ORG., *Airport Planning Manual* 1 at 41 (2d ed. 1987).

9. Martin Noble, *A Volcano That May or May Not Erupt*, 54 INTERVIA 19 (1999).

10. ROBERT HORONJEFF & FRANCIS MCKELVEY, PLANNING AND DESIGN OF AIRPORTS 719-63 (4th ed. 1994).

11. DNL stands for day-night noise level. "Day-Night Noise Level ("DNL") is a 24-hour, time-weighted energy average noise level based on the A-weighted decibel. It is a measure of the overall noise experienced during day. "Time-weighted" refers to the fact that noise occurring during certain sensitive time periods is penalized for occurring at

have criticized that standard on grounds that it is based on an averaging of noise, rather than a loud single event such as a passing aircraft, and that the standard is based also on the threshold of 65 dB, which is significantly lower than many people find annoying.[12] Typically, airports and governmental agencies in developed nations embrace a multitude of methods for reducing noise pollution.[13]

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these times." Grand Canyon Trust v. FAA, 290 F.3rd 399, 343 n. 1 (2002). 14 C.F.R. § 150.7 (2002).

12. JENNIFER STENZEL & JONATHAN TRUTT, FLYING OFF COURSE: ENVIRONMENTAL IMPACTS OF AMERICA'S AIRPORTS 4 (Natural Resources Defense Council 1996). As an alternative, California and several European governments have adopted the community noise equivalent level [CNEL], which imposes a 5-decibel penalty during the hours of 7:00 p.m. to 10:00 p.m., in addition to the DNL's 10-dB nighttime penalty. *Reducing Aircraft Noise: Hearing Before the Subcomm. on Tech. of the U.S. House Science Comm.* (Oct. 21, 1997) (testimony of Donald MacGlashan, Citizen's for the Abatement of Aircraft Noise). Environmentalists have argued the threshold should be 55 dB CNEL rather than 65, and that single event noise rather than averaging should be taken into account by using the single exposure level [SEL] in conjunction with the CNEL. *Id.* at 5.

13. For example, in 1990, Amsterdam's Schiphol Airport became one of the first airports in the world to formulate an Environmental Policy Plan. The comprehensive plan specifies 24 action items, from installation of a noise monitoring system, to an environmental protection system directed at promoting the use of public transport. In 1967, the Kosten unit (Ke), named for Professor Kosten, was adopted to measure aircraft noise. The 35 Ke zone surrounding the airport has been reduced from 42,000 homes in 1979, to about 15,000 in 1990, with the use of quieter aircraft and better planning of runways and flight paths. Many houses near Schiphol have been insulated against noise. By 2015, the 35 Ke zone will contain 10,000 homes, an absolute maximum. Night flying must meet the 26 Laeq standard, which means that the annual average bedroom noise levels during night time (11 p.m. to 6 a.m.) must not exceed 26 decibels, while day time flying must not exceed the 40 Ke level. A fifth runway is being constructed at Schiphol to steer flight paths away from population centers. AMSTERDAM AIRPORT SCHIPHOL, FACT SHEET: INTRODUCTION TO THE WORLD OF AMSTERDAM AIRPORT SCHIPHOL (1997); AMSTERDAM AIRPORT SCHIPHOL, BALANCING ENVIRONMENT AND ECONOMICS (1997).

Aeroports de Paris also employs a multitude of innovative mechanisms to reduce noise impacts. Aircraft noise is monitored carefully by noise monitoring equipment at strategic points around Paris. At Paris Orly Airport, strict curfews on aircraft takeoffs and landings are imposed between 11:30 p.m. and 6:00 a.m. Aircraft landing fees are graduated depending upon noise emissions, with higher taxes imposed on noisier aircraft. Noise contour maps are drawn up to identify regions where no new construction is permitted. Flight paths are directed around residential areas. AEROPORTS DE PARIS, ORLY, MASTERING THE FUTURE 20 (1997). Both to buffer noise and improve the aesthetic appearance of the airport property, a major tree-planting project is underway south of Charles de Gaulle Airport. AEROPORTS DE PARIS, CHARLES DE GAULLE AIRPORT: EUROPE'S FOREMOST TRANSPORT HUB 25 (1997). Recognizing the need to keep the community informed about what the airport is doing to try to reduce noise bombardment, and to encourage dialogue with the community, Aeroports de Paris established an Environmental Resources Center to act as a contact point and meeting place with the community, and to display information on technology and pollution. AEROPORTS DE PARIS, ENVIRONMENTAL RESOURCE CENTER (1997). SEE PAUL STEPHEN DEMPSEY, AIRPORT PLANNING & DEVELOPMENT HANDBOOK: A GLOBAL SURVEY (McGraw Hill 2000).

## III. Trespass, Nuisance & Inverse Condemnation

While noise is of national concern, aircraft noise around airports is a highly localized political and legal problem. Property owners complain that airport noise adversely effects both their property values and their enjoyment of their property.[14] Local governments and their airports sometimes find themselves in the cross hairs of litigation objecting to aircraft noise. Moreover, individuals sometimes use state common law trespass, nuisance, inverse condemnation actions and Constitutional takings provisions[15] in seeking airport noise abatement.

### *A. Trespass*

Trespass constitutes an interference with the exclusive possession of land.[16] It involves an unauthorized physical entry onto another's land. Such physical invasion need not involve entry by persons or tangible objects and may instead constitute such things as smoke, gasses, and odors.[17]

With respect to a potential trespass by an aircraft, the Restatement (Second) of Torts provides:

* * *

(2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,

(a) it enters into the immediate reaches of the air space next to the land; and

(b) it interferes substantially with the other's use and enjoyment of his land.[18]

* * *

Thus, "traversing the airspace above another's land is not, in and of itself, a trespass; it is lawful unless done under circumstances that cause injury."[19]

Trespass may be intentional or unintentional. If the defendant's action consists of an *intentional trespass*, harm and mistake are irrelevant, and typically nominal damages are recoverable (in addition to actual damages, where proven).[20] Some courts have held that one with

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14. Luis G. Zambrano, *Balancing the Rights of Landowners With the Needs of Airports: The Continuing Battle Over Noise,* 66 J. AIR L. & COM. 445, 446 (2000).

15. The Fifth and Fourteenth Amendments to the United States Constitution prohibit a taking of property for public use without just compensation. U.S. CONST. amend. V and XIV.

16. Kayfirst Corp. v. Washington Terminal Co., 813 F. Supp. 67 (D.D.C. 1993).

17. Davis v. Ga.-Pacific Corp., 445 P.2d 481 (Or. 1968).

18. RESTATEMENT (SECOND) OF TORTS § 159(2) (1965).

19. Pueblo of Sandia Chaves v. Smith, 497 F.2d 1043, 1045 (10th Cir. 1974).

20. *See e.g.,* Crosby v. Chicago, 298 N.E. 2d 719 (Ill. App. 1973), and cases cited

knowledge or reason to know of physical entry commits an intentional trespass.[21]

Recovery for an *unintentional trespass* may be had for actual harm suffered by recklessness, negligence, or an ultra hazardous activity. For an unintentional trespass, nominal damages are not awarded, and the plaintiff must prove actual damages suffered.[22] The social value of the defendant's conduct is typically not considered in assessing compensatory damages, though it may be relevant on the issue of punitive damages.[23]

Trespass is an intentional tort. In *Wood v. United Air Lines, Inc.*,[24] a plaintiff's trespass action against United Airlines and Trans World Airlines (TWA), whose jets collided and crashed into her apartment building, was dismissed on grounds that no facts were adduced to show that either aircraft was in the pilot's control when the aircraft plunged into the ground.[25] As to ground damage caused by aircraft, the Restatement (Second) of Torts provides:

> If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft,
>
> a) the operator of the aircraft is subject to liability for the harm, even though he has exercised the utmost care to prevent it, and
> b) the owner of the aircraft is subject to similar liability if he has authorized or permitted the operation.[26]

Lord Coke once proclaimed, "*cujus est solum ejus est usque ad coelum*," which essentially translates into one who owns the soil owns

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therein.

21. McGregor v. Barton Sand & Gravel, Inc., 660 P.2d 175, 180 (Or. Ct. App. 1983). *See also* Furrer v. Talent Irrigation Dist., 258 Or. 494 (1970).

22. RESTATEMENT (SECOND) OF TORTS § 165 (1965). Injunctions for an unintentional trespass may be denied if it was made innocently, or the cost of removal would be greatly disproportionate to the harm suffered. Peters v. Archambault, 278 N.E.2d 729, 730 (Mass. 1972).

23. Davis v. Ga.-Pacific Corp., 445 P.2d 481, 483 (Or. 1968). The duty of care a landowner owes to an unintentional trespasser is higher. Thus, in Demand v. N.Y. Cent. & Hudson River R.R. Co., 91 N.E. 259 (N.Y. 1910), the court held that a railroad engineer, having seen the decedent plaintiff trying to remove his horse some 1300 feet before hitting him with the train, should have used "reasonable efforts and care to avoid injuring the latter, even though primarily and originally he may have been a technical trespasser . . . ." *Id.* at 261.

24. 223 N.Y.S.2d 692 (Sup. Ct. Trial Term 1961).

25. *Id.*

26. RESTATEMENT (SECOND) OF TORTS § 520A (1977).

upward to heaven and downward to hell.[27] Theories of owner sovereignty over his land have led to conflicts against aircrafts flying into, on, or near one's property. Many such theories are premised on the ancient common law doctrine of trespass, or the more modern doctrine of nuisance. The Restatement of Torts takes the position that flights within the "immediate reaches" of the air space next to the land constitutes a trespass.[28]

*B. Nuisance*

An interference with the quiet use and enjoyment of land constitutes a nuisance.[29] For a plaintiff to recover, there need be no physical entry onto the land, but actual damages must be proven. In determining whether air travel over one's property constitutes a nuisance, courts examine the purpose of the travel, whether it is conducted in a reasonable manner, and at such height as not to interfere unreasonably with a property owner's use and enjoyment of his land.[30] "Reasonableness," the heart of the nuisance analysis, is an objective standard that depends on the effect upon an ordinary reasonable person or ordinary habits and sensibilities.[31] Under the federal Noise Control Act of 1972, courts have preempted injunctive relief against airport noise.[32] In addition, courts have routinely denied injunctive relief against publicly-owned airports,[33] although petitions for injunctions against new airport construction and privately-owned airports have fared better.[34] Nevertheless, actions for damages have not been preempted.[35]

There are of two types of nuisances, public and private. A *public nuisance* is an unreasonable interference with rights common to the

27. PROSSER & KEETON ON THE LAW OF TORTS 79 (5th ed. 1984); Hannabalson v. Sessions, 90 N.W. 93, 95 (Iowa 1902).

28. RESTATEMENT (SECOND) OF TORTS § 159 (1965). Brenteson Wholesale, Inc. v. Ariz. Pub. Serv. Co., 803 P.2d 930, 934 (Ariz. Ct. App. 1990).

29. Beatty v. Wash. Metro. Area Transit Auth., 860 F.2d 1117, 1122 (D.C. Cir. 1988)(quoting RESTATEMENT (SECOND) OF TORTS § 821D (1965).

30. RESTATEMENT (FIRST) OF TORTS § 194 (1934). Restatement (Second) of Torts § 159.

31. Atkinson v. Bernard, Inc., 355 P.2d 229, 233 (Or. 1960).

32. 42 U.S.C. §§ 4901-18 (1972); *see also* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 634, 633-34 (1973).

33. *See* Town of E. Haven v. E. Airlines, Inc., 331 F. Supp. 16 (D. Conn. 1971); *see also* J. Scott Hamilton, *Allocation of Airspace As a National Resource*, 22 TRANSP. L.J. 251, 262-63 (1994).

34. *See* Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932). While actions seeking damages have fared well, courts have held that enjoining flights from private airports has been preempted by federal law. *See e.g.*, Vorhees v. Naper Aero Club, 272 F.3d 398 (N.D. Ill. 2001).

35. Alevizos v. Metropolitan Airport Comm., 216 N.W.2d 651 (Minn. 1974).

general public, particularly those rights involving public health, safety, peace, comfort, or convenience.[36] A governmental body may seek judicial relief against such a nuisance, though individuals may bring an action against a public nuisance where they have suffered harm, different than the harm suffered by the public generally.[37]

A *private nuisance* constitutes a nontrespassory invasion of the private use and enjoyment of land. It may be intentional and unreasonable (in that the gravity of the harm outweighs the utility of the conduct).[38] It may also be negligent, reckless, or abnormally dangerous.[39] Under nuisance (as opposed to trespass), courts are generally more willing to engage in a balancing approach,[40] and focus on the reasonableness of one interest.[41] As one court observed, "The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable . . ."[42] In a nuisance case where the utility of the defendant's conduct outweighs the gravity of the plaintiff's harm, most courts will authorize damages but not an injunction.[43] Courts consider air transportation to have a high level of public utility. Moreover, since the federal government has preempted the field of air transportation, some courts have held that that local compliance with federal laws and regulations does not constitute a nuisance.[44]

### C. *Inverse Condemnation*

Inverse condemnation is a "cause of action against a governmental defendant to recover the value of property which has been taken in fact by [the governmental defendant], even though no formal exercise of the

36. RESTATEMENT (SECOND) OF TORTS § 821B (1965).

37. *Id.* at § 821C. As noted above, actions seeking injunctions against operating public airports have not been successful.

38. *Id.* § 826-28.

39. *Id.* § 822.

40. Fisher v. Capital Transit Co., 246 F.2d 666 (U.S. App. D.C. 1957).

41. Atkinson v. Bernard, Inc., 355 P.2d 229 (Ore. 1960).

42. Stevens v. Rockport Granite Co., 104 N.E. 371, 373 (Mass. 1914); Spur Industries, Inc. v. Del E. Webb Development Co., 494 P.2d 700 (Ariz. 1972) The court held that the plaintiff must indemnify the defendant for a reasonable amount of the cost of moving or shutting down since the plaintiff brought people to the nuisance by building homes in close proximity of defendant's cattle feedlot to defendant's foreseeable detriment.

43. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). Some courts have issued an injunction requiring that the nuisance be abated where damages will not adequately remedy the substantial and irremediable injury the plaintiff suffers. Crushed Stone Co. v. Moore, 369 P.2d 811 (Okla. 1962).

44. *See* Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975).

power of eminent domain has been attempted by the taking agency."[45] Property owners may allege that their property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.[46] Some courts, embracing the notion of inverse condemnation, have imposed equitable servitude on the property owners' land, forcing offenders to pay damages for past, present, and future harm caused by the nuisance.[47]

Flying an aircraft directly over private property can constitute a "takings," which requires just compensation under the Fifth or Fourteenth Amendments if the overflight noise and vibration significantly limits or decreases the land owners' property utility and property value.[48] Some state courts also have held that flights from airports may violate common law doctrines of trespass or nuisance.[49] Financial liability lies with the airport proprietor.[50]

The first major case to address the issue of physical invasion of property as it relates to aircraft noise pollution was in 1944, in *United States v. Causby*.[51] At that time, Congress had put navigable air space ("airspace above the minimum safe altitudes of flight prescribed" by the Civil Aeronautics Board) in the public domain.[52] In *Causby,* the U.S. Supreme Court concluded that continued, low-altitude military flights destroying the plaintiff's poultry business constituted a "takings," thus requiring compensation under the Fifth Amendment.[53] That

45. United States v. Clarke, 455 U.S. 253, 257 (1980).

46. United States v. Causby, 328 U.S. 256 (1946). Paul Stephen Dempsey, *Trade & Transport Policy in Inclement Skies – The Conflict Between Sustainable Air Transportation and Neo-Classical Economics,* 65 J. AIR L. & COM. 639, 680 (2000).

47. Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). *See* J. Scott Hamilton, *Allocation of Airspace As a National Resource*, 22 TRANSP. L.J. 251 (1994). Generally, temporary injuries, inconveniences, annoyances, and discomforts resulting from the actual construction of public improvements are not compensable, provided that such interferences are not unreasonable. It is often necessary to break up pavement, narrow streets, and block ingress and egress of adjoining property when airports are being repaired, improved, constructed, or expanded. As one court noted, "It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement." Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist., 80 Cal. App. 3d 863 (1978).

48. *See Causby*, 328 U.S. 256.

49. See e.g., Brenetson v. Ariz. Pub. Serv. Co., 803 P.2d 930 (Ariz. 1990); Vanderslice v. Shawn, 27 A.2d 87 (Del. 1942).

50. Griggs v. Allegheny County, 369 U.S. 84, 89 (1962).

51. *Causby*, 328 U.S. 256 (1946); Kristin Falzone, *Airport Noise Pollution: Is There a Solution in Sight?,* 26 B.C. ENVTL. AFF. L. REV. 769, 778 (1999).

52. *Causby*, 328 U.S. at 260.

53. Round-the-clock military flights with four 1200 horsepower engines flying 67 feet above the roof of plaintiff's house made sleeping impossible, and caused his

comprehensive federal regulation, however, made the airspace a public highway above a certain altitude for which no complaint could succeed on trespass grounds.[54] Noting the conflicting rights of landowners to the air space in the immediate reaches of their land and the need of overflying aircraft for access, Professors Prosser and Keeton have urged, "A privilege to use air space for overflight of any height could be recognized so long as the exercise of that privilege did not unreasonably interfere with the use and enjoyment of the land surface."[55]

After *Causby,* Congress redefined navigable airspace to mean, "airspace above the minimum altitudes of flight prescribed by regulations issued . . . [including] airspace needed to insure safety in take-off and landing of aircraft."[56] By 1962, when the Supreme Court again addressed the issue, minimum safe altitudes were defined by regulation as heights of 500 or 1000 feet, "except where necessary for take-off or landing."[57] Nonetheless, the court held that these provisions did not preempt inverse condemnation.[58]

In *Griggs,* the U.S. Supreme Court held Allegheny County, the proprietor of Greater Pittsburgh Airport, liable for the unconstitutional taking of the plaintiff's property as a result of the noise and vibration caused by low-flying aircraft from the airport.[59] The airport authority was liable because it decided where the airport was to be built, its layout, and runway configuration (and thereby, aircraft flight paths), and what land and navigation easements were necessary.[60] The airport had taken an avigation easement over the plaintiff's property via condemnation, and therefore owed him just compensation;[61] the airlines, however, were

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chickens to throw themselves hysterically against the walls and roof of their chicken coop, killing 150 chickens. J. Scott Hamilton, *Allocation of Airspace As a Scarce National Resource,* 22 TRANSP. L.J. 251, 254-55 (1994).

54. *Causby*, 328 U.S. at 264-65.; 49 U.S.C. §1301(24), amended by 49 U.S.C. §40102(30) (1994).

55. PROSSER & KEETON ON THE LAW OF TORTS 81 (5th ed. 1984).

56. 49 U.S.C. § 1301(29) (1972); 49 U.S.C. § 40102 (2002).

57. Federal Aviation Regulation § 91.79; Minimum Safe Altitudes Regulation, 14 C.F.R. § 60.17 (1960).

58. *Griggs*, 369 U.S. 84 (1962).

59. The flight path over plaintiff's home brought aircraft as close as eleven feet above his chimney. The vibration and noise cracked the plaster on his walls and ceilings, and toppled personal goods from shelves and china cabinets. J. Scott Hamilton, *Allocation of Airspace As a Scarce National Resource,* 22 TRANSP. L.J. 251, 257 (1994).

60. *Id.* at 89.

61. The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for operations of a dam . . . . Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough." *Id.* at 90. An avigational easement over a plaintiff's property may in some instances constitute a physical taking. Where the frequency and altitude of the flights prevent the property owner from using the

absolved of liability.[62]

Although lower courts have also held that local governmental institutions properly exercise their police power authority when building an airport when the government, uses its eminent domain powers to acquire private property for public use, however, the courts require that the government pay just compensation to the land owner for the taking of the property.[63] In the half-century since *Causby* was decided, federal courts have consistently held that private property may be converted to public use by the operation of aircraft.[64] Recovery, however, has generally been limited to instances where aircrafts usually flying at low altitudes have passed directly over the plaintiff's property; recovery has generally been denied where the complaint is only of noise from routine aircraft operations not directly passing overhead.[65] Additionally, the courts may not exact state common law remedies against an airport operator on certain issues governed by federal law.[66]

Though the courts have precluded state and local governments from regulating aircraft noise, courts generally have not precluded municipalities – acting in their capacity as owners and operators of airports[67] – from imposing noise restrictions "based on [their] legitimate interest in avoiding liability for excessive noise generated by the airports they own."[68] Such liability may be predicated on grounds of trespass,

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land for any purpose, the property owner's loss is complete as if the government had entered upon the land and taken exclusive possession of it.

Garmella v. City of Bridgeport, 63 F. Supp. 2d 198, 202 (D. Conn. 1999) (citations omitted).

62. Young v. DHL Airlines, 1999 U.S. App. Lexis (6th Cir. 1999).

63. Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).

64. Argent v. United States, 124 F.3d 1277, 1281 (Fed. Cir. 1997).

65. *Argent*, 124 F.3d at 1284.

66. As one court noted:

> Bieneman's complaint suggests that damages should be awarded because [there are] too many flights per hour, or because the aircraft are older models not fitted with high-bypass turbofan engines, or because the planes do not climb at a sufficiently steep rate after takeoff. These subjects are governed by federal law, and a state may not use common law procedures to question federal decisions or extract money from those who will abide by them. There may be, on the other hand, aspects of O'Hare's operations that offend federal law, or that federal norms do not govern . . . . The essential point is that the state may employ damages remedies only to enforce federal requirements . . . or to regulate aspects of airport operation over which the state has discretionary authority.

Bieneman v. City of Chicago, 864 F.2d 463, 473 (7th Cir. 1988).

67. "Some courts have indicated that the determining factor in whether regulations are within a proprietor exception is potential liability." Pirolo v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983). "In part because of this assignment of liability, most courts have held that airport proprietors have primary responsibility to reduce airport noise." Diperri v. Fed. Aviation Admin., 671 F.2d 54, 57 (1st Cir. 1982).

68. City of Tipp City v. City of Dayton, 204 F.R.D. 388, 392 (S.D. Ohio 2001)

nuisance, or inverse condemnation. To avoid that liability, local airport proprietors often impose regulations designed to minimize local environmental harm, and courts uphold such efforts (if reasonable and nondiscriminatory) as necessary to satisfy a legitimate local interest.

## IV. State Police Power

Opposite the Supremacy Clause prohibitions against state action lies the inherent police power of the states. As one state court described it, "The police power is an attribute of sovereignty, possessed by every sovereign state and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written Constitution."[69] Another court stated, "The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government, is vested in the [L]egislatures of the several [S]tates of the [U]nion, the only limit to its exercise being that the statute shall not conflict with any provision of the [S]tate [C]onstitution, or with the Federal Constitution, or laws made under its delegated powers."[70] The U.S. Supreme Court described the police power as "the power of the State . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."[71]

Since the end of the *Lochner v. New York* era,[72] courts have been

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(citing Alaska Airlines v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991)).

69. *Ex Parte* Tindall, 229 P. 125, 131 (Okla. 1924) (citing 6 R.C.L. § 182, p.183).

> While the term 'police power' has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

*Id.*

70. Bagg v. Wilmington, Columbia & Augusta Railroad Co., 14 S.E. 79, 80 (N.C. 1891).

> So long as the [S]tate legislation is not in conflict with any law passed by [C]ongress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite, instead of hindering, the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the [C]onstitution . . .

*Id.*

71. Barbier v. Connolly, 113 U.S. 27, 31 (1884).

72. Lochner v. New York, 198 U.S. 45 (1905), a decision which struck down maximum hours regulations for bakers, inaugurated an aberrational period from 1905 until 1934, in which the Supreme Court invalidated approximately 200 economic regulations, principally under the due process clause of the Fourteenth Amendment. Under the doctrine of substantive or economic due process, the Supreme Court reviewed the Constitutionality of state and federal legislation against claims that it arbitrarily,

relatively deferential to legislative decisions in areas of local regulation, so long as the legislative decisions do not conflict with federal regulation exerted under the Commerce Clause.[73] Where neither a fundamental right nor a suspect class is involved, the legislative decision withstands Constitutional assault if the "classification is based on rational distinctions and bears a direct and real relation to the legislative object or purpose of the legislation."[74] Thus, the Supreme Court has held, "if our recent cases mean anything, they leave debatable issues as respects

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unnecessarily, or unwisely interfered with the "right of the individual to liberty of person and freedom of contract." *Id.* at 57. Justice Oliver Wendall Holmes dissented, saying:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the [S]tate or *of laissez faire.*

*Id.* at 75.

During the *Lochner* era, the Court upheld regulation if it subjectively believed the regulation truly necessary to protect the health, safety or morals of the public, but struck down the regulation if the Court perceived it designed to readjust the market in favor of one party over another. *Geoffrey Stone et al., Louis Seidman, Cass Sunstein & Mark Tushnet, Constitutional Law* (1986). By depriving the state legislatures of the freedom to adopt means suited to local needs, *Lochner* became "one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse." *B. Siegan, Economic Liberties and the Constitution* 23 (1980).

73. Beginning with *Nebbia v. New York,* 291 U.S. 502 (1934), the U.S. Supreme Court generally has been deferential to the exercise of police power by the states in regulating matters of local concern:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. Furthermore, the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained . . . *Id. at 525.* [The] Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases . . . *Id.* at 527.
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> So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. *Id.* at 537. [If] the legislative policy be to curb unrestrained and harmful competition . . . [it] does not lie within the courts to determine that the rule is unwise . . . [Times] without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

*Id.* at 537, 538.

74. Old South Duck Tours, Inc. v Mayor of Savannah, 535 S.E.2d 751, 755 (Ga. 2000) (citing Love v. State, 517 S.E.2d 53 (1999)).

business, economic, and social affairs to legislative decision."[75] Federal law is not to supercede historic police powers unless such was the clear and manifest intention of the Congress.[76]

The U.S. Supreme Court has upheld local regulation of public health, safety, and welfare where "any state of facts either known or which could reasonably be assumed supported the regulation."[77] The Court has resorted to wholly hypothetical facts to uphold the legislation, concluding that the "day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[78] Under the rational basis test, courts have upheld state or local regulation where any facts actually exist or would convincingly justify the classification if the facts did exist, or have been urged in the classification's defense by those who either promulgated the regulation or argued in support of the regulation.[79]

Applying the rational basis test, the Supreme Court has held that a statutory classification is to be struck down only if the means chosen by the legislature are "wholly irrelevant to the achievement of the State's objective."[80] Where a state has decided to regulate an activity, the judicial focus is on the application of the regulation—whether the regulation is reasonable and its decision is not arbitrary or capricious.[81]

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75. Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952).

76. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), *judgment rev'd. by* 331 U.S. 247 (1947).

77. United States v. Carolene Products Co., 304 U.S. 144, 154 (1938); *see also* McGowan v. Maryland, 366 U.S. 420, 426 (1961) and Hold Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978).

78. Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955). The Nevada Supreme Court has echoed this holding, concluding "[i]t is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action." Boulder City v. Cinnamon Hills Assocs., 871 P.2d 320, 327 (Nev. 1994).

79. Briscoe v. Prince George's County Health Dep't, 593 A.2d 1109 (Md. 1991); Dept. of Transp. v. Armacost, 474 A.2d 191, 201 (Md. 1984). Similarly, the Supreme Court has concluded:

> [I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy . . . [The *Lochner* doctrine] has long since been discarded . . . *Id.* at 730. It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition . . . *Id.* at 730, 731.

Furgeson v. Skrupa, 372 U.S. 726, 729-31 (1963).

80. *McGowan,* 366 U.S. at 425; *See* McDonald v. Bd. of Elections, 394 U.S. 802, 809 (1969).

81. *See* Bluefield Telephone Co. v. Pub. Serv. Comm'n, 135 SE 833 (W.Va.) and

"The exercise by a state of its police powers will not be interfered with by the Courts unless such exercise is of an arbitrary nature having no reasonable relation to the execution of lawful purposes."[82] Where a regulation is subject to rational basis review, most states accord it a "strong presumption of constitutionality and a reasonable doubt as to its constitutionality is sufficient to sustain it."[83]

Historically, the states have held certain inherent power to regulate activities designed to improve the health, safety, and welfare of their inhabitants.[84] As the U.S. Supreme Court has noted:

[While . . . a] state may provide for the security of the lives, limbs, health, and comfort of persons and . . . [property,] . . . yet a subject matter, which, has been confided exclusively to Congress . . . [is] not within . . . the [police] power of the State, unless placed there by congressional action. The power to regulate commerce among the States is [conferred by the Constitution to Congress,] but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs . . . The power to pass laws in respect to internal commerce [belongs] to the class of powers pertaining to the locality [and] to the [welfare] of society, originally belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of power confided to general government.[85]

In *South Carolina Highway Department v. Barnwell Brothers,*[86] the Supreme Court addressed state size and length restrictions on trucks:

> It found that "there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has for the most part been left to the states."[87]

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Long Motor Lines, Inc. v. S.C. Pub. Serv. Comm'n, 103 S.E.2d 762, 765 (S.C. 1958).

82. *Id.* (citing Jones v. City of Portland, 245 U.S. 217(1917)). *See also* Dakota Transp., Inc., 291 N.W. 589, 593 (S.D. 1940): "[the reviewing] court cannot substitute its judgment for that of the Commission and disturb its finding where there is any substantial basis in the evidence for the finding or where the order of the Commission is not unreasonable or arbitrary."

83. *Briscoe,* 593 A.2d at 1113.

84. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

85. Leisy v. Hardin, 135 U.S. 100 (1890).

86. 303 U.S. 177 (1938).

87. In *Barnwell,* the U.S. Supreme Court held that in determining whether a state regulation is Constitutional, the test is "whether the state legislature in adopting

States possess inherent power to protect the safety, health, and welfare of their citizens. Reflecting the democratic will of the people, state legislatures are deemed free to adopt whatever goals they believe will advance the safety, health, and welfare of the people. Health, welfare, and safety regulation of business (in this case, the transportation industry) typically does not impinge upon fundamental rights. The presumption against federal preemption of state and local regulation of the health and safety of their residents is a strong one.[88] As one court noted, "The goal of reducing airport noise to control liability and improve the aesthetics of the environment is a legitimate and permissible one."[89]

As a consequence, the means states chose to protect such interests are entitled to judicial deference unless:

1) The means chosen do not bear a rational relationship to the

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regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (quoting Stephenson v. Binford, 287 U.S. 251, 272 (1932)). In resolving the latter inquiry, "the courts do not sit as Legislatures [to weigh] all the conflicting interests. [Fairly] debatable questions as to [a regulation's] reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body." The court must assess "upon the whole record whether it is possible to say that the legislative choice is without rational basis."

"[T]he Court has been most reluctant to invalidate under the Commerce Clause state regulation in the field of safety where the propriety of local regulation has long been recognized[citing cases]." Raymond Motor Transp. v. Rice, 434 U.S. 429, 443 (1978).

In *Southern Pacific Co. v. Ariz. ex. rel Sullivan,* 325 U.S. 761 (1945), a case in which the Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce, the Court nevertheless observed "the states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." The Court noted that in *Barnwell* "The fact that [the regulation of highways] affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuse." *Id.* In *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662 (1981), though the Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce, the Court nevertheless acknowledged that a "State's power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety . . . are those that 'the Court has been most reluctant to invalidate.' Indeed 'if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with the related burdens on interstate commerce.' Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of validity.'" (citing *Raymond Motor Transp.*, 434 U.S. 429, 443 (1978), and Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959)).

88. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989); Bizzard v. Roadrunner Trucking, 966 F.2d 777, 780 (3d Cir. 1992).

89. Alaska Airlines v. City of Long Beach, 951 F.2d 977, 984 (9th Cir. 1991).

ends the state seeks to achieve;[90]

2) The regulation impermissibly affects interstate commerce;[91] or
3) The regulation discriminates against non-residents.[92]

We now turn to a discussion of how state regulation may impermissibly affect interstate commerce. Federal regulation of the nation's airspace poses a significant obstacle to local regulation.

V. Federal Preemption

As the preceding section notes, with the gradual recognition of the legitimacy of state police powers, and deferential "rational basis" analysis, the Supreme Court began to retreat from dormant Commerce Clause preemption. Nevertheless, three circumstances exist under which state police power regulation of a matter of local concern will be deemed preempted by federal law:

1) Where Congress explicitly preempted the states;[93]
2) Where the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it;[94] or
3) Where the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.[95]

As one commentator observed, "The power of the federal government to displace state law in those areas in which Congress has the ability to legislate is a potent one; it divests states of the ability to regulate in an area within the state's domain."[96] With respect to the pervasive role of the federal government in civil aviation, U.S. Supreme Court Justice Jackson wrote:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of

90. *See e.g.*, Dallas v. Stanglin, 490 U.S. 19 (1989).
91. *See e.g.*, Camps Newfound/Owatonna v. City of Harrison, 520 U.S. 564 (1997).
92. *See e.g.*, Turner v. Maryland, 107 U.S. 38 (1882).
93. *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977).
94. Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218(1947).
95. Pacific Gas & Electric v. State Energy Resources Conservation Commission, 461 U.S. 190, 204 (1983).
96. Susan Stabile, *Preemption of State Law By Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 88, 90 (1995).

> federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.[97]

For the past half-century, courts have struggled with the issue of how to balance the federal government's plenary jurisdiction over interstate and foreign commerce, with the states' police power to regulate matters of local concern. Federal preemption of state and local law arises out of the Supremacy Clause of the U.S. Constitution: "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[98] The Commerce Clause of the Constitution also vests in the Congress the power to regulate interstate commerce;[99] inconsistent state or local laws are struck down as preempted by federal law. The preemption doctrine significantly circumscribes the ability of state and local governments to regulate airport operations.[100]

The United States government vested plenary power in itself over navigable airspace in the Air Commerce Act of 1926. The law provides, "The United States Government has exclusive sovereignty of airspace of the United States."[101] But that legislation left airports under the jurisdiction and control of local municipalities.[102] With the creation of the FAA in 1958, that agency was given broad authority to control the use of navigable airspace.[103] The overall purpose of that legislation was to centralize in a central governmental authority the power to establish rules and regulations for the safe and efficient use of the nation's airspace.[104]

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97. Quoted in Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1994). Justice Jackson, however, wrote Act of 1978, which significantly reduced federal oversight of commercial aviation.

98. U.S. CONST. art. VI cl. 2.

99. U.S. CONST. art. I, § 8.

100. Luis Zambrano, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise,* 66 J. AIR L. & COM. 445, 461 (2000).

101. 49 U.S.C. § 40103(a) (2002). Under the Federal Aviation Act of 1958, navigable airspace includes areas more than 1000 feet above land as well as the airspace in the vicinity of airports needed to ensure safety in aircraft take-off and landing.

102. Kristin L. Falzone, *Airport Noise Pollution: Is There a Solution in Sight?,* 26 B.C. ENVTL. AFF. L. REV. 769, 781 (1999).

103. 49 U.S.C. § 40103 (2002).

104. Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 672 (9th Cir. 1972) (stating that there is no single objective to which the FAA Administrator must address himself, except a set of complex goals, including safety, efficiency, technological progress, common defense, and environmental protection); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 894 n.1 (2d Cir. 1960).

Congress passed the Airline Deregulation Act of 1978 [ADA] in order to end federal economic regulation and to prohibit the states from regulating commercial aviation.[105] The ADA provides an explicit preemption provision:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least two States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.[106]

The ADA, however, also included a proprietary powers exception providing that "This subsection does not limit a State, political subdivision of a State, or political authority of at least two States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights."[107]

This distinction between what a state, county, or municipality may do in regulating an airport in its regulatory, as opposed to its proprietary, function is an important one in the law. A city that owns and operates an airport as a division of the municipality has far more discretion to control airport operations than does a city that does not. Congress intended that municipal proprietors enact fair, reasonable, and nondiscriminatory regulations to reduce the adverse environmental impact of aircraft noise.[108] Even a city that owns an airport, however, may lose the right to regulate the airport's operations if it contracts away its proprietorship rights.[109] Hence, it is sometimes difficult to determine whether a city qualifies for the proprietary powers exemption. As one court noted:

> [I]t is frequently difficult to distinguish between a municipality

105. "In reducing federal economic regulation of the field . . . Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." New England Legal Foundation v. Massachusetts Port Auth., 883 F.2d 157, 173 (1st Cir. 1989).

106. 49 U.S.C. § 41713(b)(1) (2002).

107. 49 U.S.C. § 41713(b)(3) (2002). *See* Susan J. Stabile, *Preemption of State Law By Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 55-56 (1995).

108. Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1981); British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75, 84-85 (2d Cir. 1977).

109. Ala. Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991); Pirolo v. City of Clearwater, 711 F.2d 1006, 1009-1010 (11th Cir. 1983). In *Alaska Airlines*, the city entered into a 30-year lease with a third party for operation of the airport, and approved a sublease with no curfews or air traffic restrictions. Ownership, operation, promotion and the ability to acquire the required approachment easements constitute airport proprietorship. Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1316-17 (9th Cir. 1981).

> imposing noise restrictions while acting in the capacity of owner or operator of an airport and a municipality imposing restrictions in an exercise of police power. A governmental entity, acting as an owner or operator, may do things that a governmental entity, acting as a governmental entity, cannot .... For example, a municipality may not impose curfews on a private airport to reduce noise. On the other hand, as an operator, [a municipality] may restrict noisier aircraft from using its airport during certain hours.[110]

Hence, the ability of a municipality as proprietor to regulate noise is far greater than that of a non-proprietor municipality.

## VI. Federal Environmental Law & Regulation

Federal environmental law has been the source of implicit preemption of local airport regulation. The United States has promulgated an extensive body of legislation dealing with aircraft noise and emissions that has a profound influence on airport planning, design and operation, and on aircraft engine noise.[111]

### *A. Airport Planning & Development*

Environmental factors must be considered carefully in the expansion of an existing airport or the development of a new one. Studies ordinarily must be made of the impact of airport construction and operation on air and water quality, noise levels, industrial waste, and wildlife, and efforts made to mitigate the adverse environmental consequences wherever possible.[112]

Comprehensive federal environmental regulation began with the National Environmental Policy Act (NEPA) of 1969[113] (signed into law on January 1, 1970), which required preparation of an environmental assessment [EA], or an environmental impact statement [EIS], the latter for any "major federal action significantly affecting the quality of the human environment."[114] If the FAA concludes that no significant

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110. City of Tipp City v. City of Dayton, 204 F.R.D. 388, 393 n.2 (S.D. Ohio 2001).

111. *See* PAUL STEPHEN DEMPSEY, AIRPORT PLANNING & DEVELOPMENT: A GLOBAL SURVEY 235-69 (McGraw Hill 2000); Lyn Lyod Creswell, *Airport Policy in the United States: The Need for Accountability, Planning, and Leadership*, 19 TRANSP. L.J. 1 (1990).

112. INTERNATIONAL CIVIL AVIATION ORGANIZATION, AIRPORT PLANNING MANUAL I-43 (2d ed. 1987).

113. 42 U.S.C. § 4321 (2002).

114. 42 U.S.C. § 4332(c) (2002). The EA determines whether potential impacts are significant, explores alternatives and mitigation measures, and provides essential information as to whether an EIS must be prepared. The EA focus attention on potential mitigation measures during the planning process, at a time when they can be incorporated without significant disruption and at lower cost. The EIS must include an assessment of

adverse environmental impacts exist, or that with appropriate prevention or mitigation efforts they will be minimized, it issues a "finding of no significant impact" [FONSI]. If, however, the FAA concludes the impacts are significant (which is sometimes the case in a major airport project), the FAA prepares an EIS.[115] The EIS must include an assessment of the environmental impacts, evaluated reasonable alternatives, and suggestions for appropriate mitigation measures.[116] It must review such issues as the impact of the project on noise, air quality, water quality, endangered species, wetlands, and flood plains.[117] The thrust of the statute, however, is process; there is no mandatory obligation to implement mitigation measures, even if they are feasible.[118] Nonetheless, the failure to fulfill these procedural obligations may be litigated, thereby delaying inauguration or completion of the project.

These environmental requirements were explicitly affirmed for airports in the Airport and Airway Development Act of 1970. Such legislation required that environmental factors be considered in both airport site selection and design.[119] Airport master plans ordinarily must consider the following:

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the environmental impacts, evaluate reasonable alternatives, and suggest appropriate mitigation measures. It must review such issues as the impact of the project on noise, air quality, water quality, endangered species, wetlands and flood plains. However, the thrust of the statute is procedural and not substantive regulation. *See* Stryckers Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980); Joint FHWA/FTA regulations, Environmental Impact and Related Procedures, 23 C.F.R. § 771 (1999) and 49 C.F.R. § 622 (1999). FEDERAL AVIATION ADMINISTRATION, AIRPORT MASTER PLANS 49-50 (1985).

115. James Spensley, *Airport Planning, in* AIRPORT REGULATION, LAW & PUBLIC POLICY 76 (R. Hardaway ed. 1991).

116. 49 U.S.C. § 4332(c) (2002).

117. *See e.g.*, Suburban O'Hare Comm. v. Dole, 787 F.2d 186 (7th Cir. 1986).

118. *See* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980). The U.S. Supreme Court has held that "NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan .... [I]t is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed – rather than unwise – agency action ... [I]t would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed mitigation plan before the agency can act." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989).

119. As an example of the regulatory labyrinth through which airports must pass to proceed toward development, consider this single sentence from Salt Lake City Airport Authority regarding a major terminal and air field expansion: "The current expansion has been in the planning process for nearly fifteen years and has included two Master Planning efforts, an FAR Part 150 document (an airport noise compatibility planning study), a Capacity Task Force Document, a Draft Environmental Assessment, and Expanded Environmental Assessment, and an Environmental Impact Statement as well as numerous smaller studies and documents." *Salt Lake City International Airport, Airport Development* (1998).

1) Changes in ambient noise levels;
2) Displacement of significant numbers of people;
3) Aesthetic or visual intrusion;
4) Severance of communities;
5) Effects on areas of unique interest or scenic beauty;
6) Deterioration of important recreational areas;
7) Impact on the behavioral pattern of a species or other interferences with wildlife;
8) Significant increases in air or water pollution; and
9) Major adverse effects on the water table.[120]

Airport site selection requires an in-depth analysis of alternative locations, considering such features as physical characteristics of the site, the nature of surrounding land use development and flight path obstructions, atmospheric conditions, land availability and its cost, ground access, the compatibility of surrounding air space, and the site's proximity to aeronautical demand.[121] Each potential site should be systematically evaluated, deleting those with clear deficiencies in areas of construction cost, topography, airspace, ground access, and environmental impacts.[122]

Airport siting decisions have two primary, sometimes conflicting, dimensions—avoiding blasting land inhabitants in the flight paths with politically intolerable levels of noise, and finding suitable undeveloped land within reasonable distance of the central business district [CBD] of the city it will serve so that it can conveniently be used by its inhabitants. Paradoxically, airports need to be located near population centers and surface transportation corridors so that people (including passengers, shippers of air freight, airline and airport employees) can use them conveniently. Yet, the runways should be aligned so the flight paths do not cross over heavily populated areas. This decision requires

120. Mark Bouman, *Cities of the Plane*, in *Building for Air Travel* 189 (John Zukowsky ed., 1995).

121. James Spensley, *Airport Planning, in* AIRPORT REGULATION, LAW & PUBLIC POLICY 72 (R. Hardaway ed., 1991); *Robert Horonjeff & Francis McKelvey, Planning & Design of Airports* 193 (4th ed. 1994).

122. *Federal Aviation Administration, Airport Master Plans* 42 (1985). Specifically, the following criteria should be considered:

1)Operational Capability;
2)Capacity Potential;
3)Ground Access;
4)Development Costs;
5)Environmental Consequences;
6)Socio-Economic Implications; and
7)Consistency with Areawide Planning.

Federal Aviation Administration, Airport Master Plans 44 (1985).

compromise between these two conflicting principles. Building an airport too far from an urban area defeats the objective of reducing door-to-door transit times and increases pollution by surface transport modes. Therefore, it is important to obtain sufficient land at the runway ends, or regulate the land use under the flight paths via zoning, so as to mitigate adverse noise impacts on the human population.

### *B. Noise Pollution*

The most common environmental problem posed by airports and aircraft is noise. Noise and other environmental impacts influence siting decisions. Adverse noise impacts may be minimized with land acquisition, realigning runway, or changing runway extension from one end to the other.[123]

Congress first dealt with aircraft noise in the Aircraft Noise Abatement Act of 1968,[124] which authorized the FAA to set noise control and abatement standards for aircraft. The FAA was required to promulgate standards "consistent with the highest degree of safety" and "economically reasonable, technologically practicable, and appropriate for the applicable aircraft . . ."[125]

Congress amended the Federal Aviation Act in 1958 to require the FAA to prescribe standards for noise measurement and abatement.[126] The FAA promulgated regulations thereunder for aircraft certification.[127] The Noise Control Act of 1972 gave the EPA the mandate to take an active role in the formulation and evaluation of noise standards including aircraft noise and coordinating noise regulation with the FAA.[128] The statute explicitly allows citizen suits against any person alleged to be in violation of any noise control requirement. The EPA also regulates aircraft emissions, though the Act gave the FAA veto power over any aircraft emission standards that might jeopardize safety. The Act also gave the FAA authority to review flight and operational procedures to determine how they might be molded to mitigate adverse noise impacts.[129]

The Quiet Communities Act of 1978[130] provided for federal funding

123. James Spensley, *Airport Planning*, in AIRPORT REGULATION, LAW & PUBLIC POLICY 79 (R. Hardaway ed., 1991).

124. 49 U.S.C. §§ 1301-55.

125. 49 U.S.C. § 44715(b) (1994).

126. Pub. L. 90-411(1968).

127. 14 C.F.R. §§ 21 & 36 (2002).

128. 49 U.S.C. §§ 4901-18 (1972). *See* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

129. James Gesualdi, *Gonna Fly Now: All the Noise About the Airport Access Problem*, 16 HOFSTRA L. REV. 213, 237 (1987).

130. Pub. L. No. 95-609 (1978); 92 Stat. 3079 (1978).

and technical assistance for a noise control program administered by state and local governments. The Aviation Safety and Noise Abatement Act of 1979[131] focused on reducing the impact of noise by establishing a system for airport noise compatibility land use planning.[132] Under the Act, the FAA promulgated extensive Airport Noise Compatibility Planning Regulations.[133]

In 1969, the FAA adopted regulations requiring the implementation of noise abatement technology on aircraft.[134] Under these regulations, all Stage 1 aircraft were phased out from the U.S. fleet by 1988. [135] The Airport Noise and Capacity Act of 1990[136] shifts authority away from airports and more towards the FAA; thus, requiring that airlines phase-out Stage 2 aircraft by December 31, 1999.[137] In 1991, the FAA promulgated regulations requiring airlines to reduce (by modification or retirement) the number of Stage 2 aircraft operated by 25% by December 31, 1994, by 50% by December 31, 1996, by 75% by December 31, 1998, and by 100% by December 31, 1999, though waivers could extend compliance to 2003.[138]

The Airport Noise and Capacity Act circumscribed the ability of airport operators to limit the operations of Stage 2 and 3 aircraft. An

131. Pub. L. No. 96-193 (1980); 94 Stat. 50 (1980).

132. 49 U.S.C. § 2101-24 (1979).

133. 14 C.F.R. § 150 (2002). The Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. § 2102 (1988), and the Clean Air Act of 1963, 77 Stat. 392 (1963), confer jurisdiction on the EPA and FAA to monitor and regulate aircraft engine noise and exhaust emissions. Airlines are required to comply with all applicable noise control regulations and exhaust emission standards.

134. *See* Noise Standards: Aircraft Type and Airworthiness Certification, 14 C.F.R. § 36 (2002).

135. But the problem of mandating less noise from jet engines is that it may result in worse emissions, for the technology which reduces the decibel rate of engines requires higher temperature burn, which produces more pollution. Conversely, some technological improvements can reduce both noise and emissions. For example, Air Traffic Control modernization, particularly including satellite navigation, will result in less circuity in flight paths, less congestion, and therefore less fuel burn and noise. *See* Paul Stolpman, Environmental Impacts of Aviation Emissions (paper presented before the ABA Forum on Air & Space Law, San Francisco, CA, July 10, 1998).

136. The Airport Noise and Capacity Act of 1990, Pub. L. No 101-508, § 9308, 104 Stat. 382 (1990) (codified as amended at 49 U.S.C. § 47528 (1994)).

137. John Jenkins, Jr., *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?,* 59 J. AIR L. & COM. 1023, 1045 (1994).

138. *Airport Noise: A Guide to the FAA Regulations Under the Airport Noise and Capacity Act* (Cutler & Stanfield, L.L.P., *Washington, D.C.), Feb.* 1992. A carrier, however, could apply for a waiver from these requirements if 85% of its fleet was compliant by the July 1, 1999, and it had a plan for becoming fully compliant by December 31, 2003. 49 U.S.C. § 2157. The European Union also adopted a program for phasing out Stage 2 aircraft over seven years, beginning on April 1, 1995. *See* Paul Dempsey, *Competition In the Air: European Union Regulation of Commercial Aviation,* 66 J. AIR L. & COM. 979, 1141-44 (2001).

operator may impose an airport noise or access restriction on the operation of Stage 2 aircraft if , after publication and public comment, the restriction includes:

1) An analysis of the anticipated costs and benefits of the existing or proposed restrictions;
2) A description of alternative restrictions;
3) A description of the alternative measures considered that do not involve aircraft restrictions; and
4) A comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction.[139]

The ability to limit operations of Stage 3 aircraft is severely circumscribed. Airport noise and access restrictions on the operations of Stage 3 aircraft (including restrictions on noise levels, the number or hours of aircraft operations, or a noise budget or allocation program) may be imposed only if agreed to by the airport operator and all aircraft operators and submitted to the Secretary of Transportation for approval.[140] The Secretary may approve each of the restictions only if he concludes:

1) The restriction is reasonable, nonarbitrary, and nondiscriminatory;
2) The restriction does not create an unreasonable burden on interstate or foreign commerce;
3) The restriction is consistent with maintaining safe and efficient use of navigable airspace;
4) The restriction does not conflict with a law or regulation of

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139. 49 U.S.C. § 47524(b) (2002). Airport Noise and Access Restriction Review Program, 14 C.F.R. § 161.205(a) (2002):

> (a) Each airport operator proposing a noise or access restriction on Stage 2 aircraft operations shall prepare the following and make it available for public comment:
>
> 1. An analysis of the anticipated or actual costs and benefits of the proposed noise or access restriction;
> 2. A description of alternative restrictions; and
> 3. A description of the alternative measures considered that do not involve aircraft restrictions; and
> 4. A comparison of the costs and benefits of such alternative measures to costs and benefits of the proposed noise or access restriction.

Public notice and an opportunity for comment must be completed not less than 180 days prior to the effective date of the restriction. 14 C.F.R. § 161.203 (a) (2002). Such notice must be provided to each federal, state and local agency with land-use control jurisdiction within the airport noise study area. 14 C.F.R. § 161.203 (b)(3) (2002).

140. Notice and Approval of Airport Noise and Access Restrictions, 14 C.F.R. § 161.103 (b)(3) (2002) (requiring that an invitation for public comment must be made to every federal, state, and local agency with land use jurisdiction within the airport's vicinity, with a minimum of 45 days for comment).

the United States;

5) An adequate opportunity has been provided for public comment on the restriction; and
6) The restriction does not create an unreasonable burden on the national aviation system.[141]

The Airport and Airway Safety and Capacity Expansion Act of 1987[142] and the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992[143] amended the Airport and Airway Improvement Act to require that the Secretary of Transportation develop a regulatory program for measuring noise impacts and identifying incompatible land uses.[144] An airport operator may submit noise exposure maps identifying noncompatible uses prepared in consultation with regional public agencies and planning authorities.[145] After consulting with public agencies and planning authorities in the area, the FAA, and air carriers, and giving public notice and an opportunity for hearing, the airport operator may submit a noise compatibility program for approval by the Secretary of Transportation.[146] The purposes of such a program are:

1) To promote a planning process through which the airport operator can examine and analyze the noise impact created by the operation of an airport, as well as, the costs and benefits

141. 49 U.S.C. § 47524(c)(2) (2002).

142. Airport and Airway Improvement Act of 1992, Pub. L. 100-223, 101 Stat. 1486 (1987).

143. Airport and Airway Safety, Capacity, Noise Improvement, and Intermodel Transportation Act of 1992, Pub. L. 102-581, 106 Stat. 4872 (1992).

144. 49 U.S.C. § 47502 (2002) provides:

> After consultation with the Administrator of the Environmental Protection Agency and United States Government, State, and interstate agencies that the Secretary of Transportation considers appropriate, the Secretary shall by regulation—
>
> 1) establish a single system of measuring noise that—
> 2) has a highly reliable relationship between projected noise exposure and surveyed reactions of individuals to noise; and
> 3) is applied uniformly in measuring noise at airports and the surrounding area;
> 4) establish a single system for determining the exposure of individuals to noise resulting from airport operations, including noise intensity, duration, frequency, and time of occurrence; and
> 5) identify land uses normally compatible with various exposures of individuals to noise.

145. 49 U.S.C. § 47503 (2002). Additionally, once a map has been submitted to DOT, and a landowner acquiring property after February 18, 1980, has actual or constructive notice of it, recovery for damages for airport noise is significantly circumscribed. *See* Airport Noise and Compatibility Planning, 14 C.F.R. § 150.21(f) (2002).

146. 14 C.F.R. § 150.23 (2002).

associated with various alternative noise reduction techniques, and through which the responsible impacted land use control jurisdictions can examine existing and forecast areas of noncompatibility and consider actions to reduce noncompatible uses.

2) To bring together through public participation, agency coordination, and overall cooperation, all interested parties with their respective authorities and obligations, thereby facilitating the creation of an agreed upon noise abatement plan especially suited to the individual airport location while at the same time not unduly affecting the national air transportation system.
3) To develop comprehensive and implementable noise reduction techniques of land use controls which, to the maximum extent feasible, will confine severe aircraft DNL values 75 dB or greater to areas included within the airport boundary and will establish and maintain compatible land uses in the areas affected by noise between the Ldn 65 and 75 contours.[147]

Thus, local governmental participation and local land use planning is an integral part of the process. The dominant role, however, is reserved for the airport proprietor. Noise compatibility programs "shall state the measures the operator has taken or proposes to take to reduce existing noncompatible uses and prevent introducing additional noncompatible uses in the area covered by the map."[148] Such measures may include:

- Establishing a preferential runway system;
- Restricting the use of the airport by a type or class of aircraft because of the noise characteristics of the aircraft;
- Constructing barriers and acoustical shielding and soundproofing public buildings;
- Using flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding the airport; and
- Acquiring land, air rights, easements, development rights, and other interests to ensure that the property will be used in ways compatible with airport operations.[149]

The Secretary of Transportation may approve the local noise compatibility program if it:

147. 14 C.F.R. § 150 *et seq.* (2002). *See generally* City of Bridgeton v. Slater, 212 F.3d 448 (8th Cir. 1999).
148. 49 U.S.C. § 47504(a)(2) (2002).
149. *Id.*

- Does not place an unreasonable burden on interstate commerce;
- Is reasonably consistent with achieving the goal of reducing noncompatible uses and preventing the introduction of additional noncompatible uses; and
- Provides for necessary revisions because of a revised map submitted.[150]

The Secretary of Transportation may issue a grant to the sponsor of an airport to develop a noise exposure map or a noise compatibility program;[151] he may also make a grant of up to 80% of the cost of soundproofing and acquisition of certain residential property to the airport operator submitting the program or to a local government in the area.[152] An airport sponsor or a state may also seek federal grants for airport development.[153] The Secretary may approve a proposal involving the location of an airport or runway or a major runway extension only if the airport sponsor certifies that "the airport management board has voting representation from the communities in which the project is located or has advised the communities that they have the right to petition the Secretary about a proposed project."[154] Hence, local communities are guaranteed a say in major airport development.

### *C. Air Pollution*

The Clean Air Act of 1963 was Congress' first effort to address the problem of air pollution. The 1977 Clean Air Act Amendments established the National Ambient Air Quality Standards. The combined impact of this legislation, the 1990 Clean Air Act Amendments, and the Intermodal Surface Transportation Efficiency Act of 1991, is that non-attainment can mean ineligibility to receive federal matching funds for new transportation projects such as airports. One source noted that "To the extent that the growth of an airport leads to growth in flights, and the emissions from those flights, the administrative provisions of the Clean Air Act may act as a *de facto* limit on the size and operations of an airport in a given district that has not yet attained its air quality goals."[155]

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150. 49 U.S.C. § 47504(b) (2002).
151. 49 U.S.C. § 47505 (2002).
152. 49 U.S.C. § 47504(c) (2002).
153. 49 U.S.C. § 47105 (2002).
154. 49 U.S.C. § 47106(c) (2002).
155. Barbara Lichman, From Confrontation to Collaboration: Opportunities for "Hushing" Airport Noise (address before the Conference on Aviation & Airport Infrastructure, Denver, Colorado, December 11, 1993).

Beyond federal noise regulation, Section 404 of the Clean Water Act gives the U.S. Army Corps of Engineers jurisdiction over wetlands management. Since 1989, the U.S. government has embraced a "no-net-loss" policy toward wetlands, requiring wetland

## VII. Local Airport Regulation

On occasion, local governments and airport proprietors have attempted to regulate airport operations or airport development. These efforts have been inspired by local political opposition to airports and in some instances by a desire to avoid nuisance and inverse condemnation litigation. They have been met with varying levels of success depending upon what is regulated, how it is regulated, and who is regulating it.

A review of the cases reveals four major categories of activities for which local regulation has been attempted:

1. prohibition of new airline service,
2. regulation of air space,
3. regulation of noise, and
4. restriction on land use.

### *A. Prohibition of New Airline Service*

When Dallas/Fort Worth Airport [DFW] was contemplated, in 1968, the cities of Dallas and Fort Worth passed ordinances requiring a phase-out of the existing regional airports including Love Field. Litigation seeking to extricate Southwest Airlines from Love and force it to fly out of DFW failed with the Fifth Circuit ruling that Southwest had "a federally declared right to the continued use of and access to Love Field so long as Love Field remains open."[156]

In 1980, Congress passed the Wright Amendment,[157] restricting large jet service at Love Field to points in Texas and its adjacent states (New Mexico, Oklahoma, Arkansas, and Louisiana). In 1997, Congress passed the Shelby Amendment,[158] which authorized large jet service from Love Field to three additional states (Kansas, Mississippi, and Alabama) and authorized service to states beyond in aircraft having fewer than 57 seats.

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loss be mitigated by upgrading wetlands elsewhere. This policy helped derail Chicago's proposed new airport at Lake Calumet, and will likely drive other U.S. airport projects upland. Mark Bouman, *Cities of the Plane*, in *Building for Air Travel* 189 (John Zukowsky ed., 1995).

One relatively obscure piece of legislation that may impact older airport development is the Historic Preservation Act of 1966, 16 U.S.C. §470, which requires that before federal funds are spent, account must be taken on the effect the project will have on any "district, site, building, structure, or object that is included in or eligible for inclusion in the National Register," 16 U.S.C. § 471; 36 CFR § 800. Some airport facilities, such as the Marine Terminal at New York LaGuardia Airport, are on the National Register.

156. Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 103 (5th Cir. 1977).

157. Pub. L. 96-192, 29 Stat. 35 (1980).

158. Pub. L. 105-66, 111 Stat. 1447 (1997).

In the late 1990s, the city of Fort Worth brought suit to enforce the 1968 ordinance against Legend Airlines, a new entrant seeking to take advantage of the Shelby Amendment and inaugurate 56-seat jet service out of Love Field. The U.S. Department of Transportation (DOT) issued a Declaratory Order holding that Fort Worth could not enforce the ordinance and also holding that "the City of Fort Worth may not enforce any commitment by the City of Dallas . . . to limit operations at Love Field, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law."[159]

Reviewing the DOT Order in *American Airlines v. Department of Transportation,*[160] the Fifth Circuit U.S. Court of Appeals concluded that the Ordinance operated as limitations "relating to . . . routes" within the preemption provisions of the ADA, quoted above.[161] Nonetheless, since the city of Dallas owned and operated Love Field, the question was whether the Ordinance fell under the proprietary powers exception.

The court noted that the scope of an owner's proprietary powers exemption had never been clearly articulated by the courts. The court attempted to specify some perimeters for the exemption. The court noted that "local proprietors play an 'extremely limited role' in the regulation of aviation."[162] In addition, the court also noted that federal courts consistently have held that "an airport proprietor can impose only 'reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest.'"[163] In each case where proprietary efforts to regulate issues (such as noise or congestion) have been upheld, "the proposed restriction was targeted at alleviating an existing problem at the airport or in the surrounding neighborhood."[164]

Fort Worth argued that the prohibition on new service at Love Field was necessary in order to allocate traffic between that airport and DFW so as to preserve the short-haul nature of Love Field.[165] The court observed that this prohibition was a novel rationale, one not embraced by any court as within the proprietary exemption.[166] The court noted that it did "not limit the scope of proprietary rights to those which have been

159. Robert B. Gibreath & Paul C. Watler, *Perimeter Rules , Proprietary Powers, and the Airline Deregulation Act: A Tale of Two Cities and Two Airports*, 66 J. AIR L. & COM. 223, 241 (2000).

160. 202 F.3d 788 (5th Cir. 2000).

161. Gibreath, *supra* note 159.

162. American Airlines, Inc. v. Dep't. of Transp., 202 F.3d 788, 806 (Tex. 2000) (quoting British Airways Bd. v. Port Auth., 654 F.2d 1002, 1010 (2d Cir. 1977)).

163. *Id.* (quoting Webster Airlines, Inc. v. Port Auth., 658 F.Supp. 952, 958 (S.N.D.Y. 1986).

164. *Id.*

165. *Id.* at 793-95.

166. *Id.* at 803-05.

previously recognized," and that other non-discriminatory rules, which advance a previously unrecognized local interest, might qualify under the exemption.[167] But this one did not. The court concluded that Fort Worth failed to offer "a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's power" under the statutory exemption because it would extend that exemption beyond its "intended limited reach."[168] The court held that not only was the Ordinance preempted but cities and airlines's contractual use agreements that attempted to restrict service at Love also were preempted.[169]

Only in one case, that being a state court decision, was the right of the airport proprietor to prohibit commercial service at a regional airport upheld. In *Arapahoe County Airport v. Centennial Express Airlines,* the Colorado Supreme Court upheld a municipal proprietor's ban on all commercial service at Centennial Airport, which theretofore had been used exclusively for private aircraft.[170] The county proprietor proffered no rationale to support its restriction other than that failing to uphold its discretion would strip the proprietor "of its ability and authority to manage the airport."[171] The Colorado court stated that "the power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated."[172] The FAA responded by cutting all federal funds to Centennial Airport.[173]

The Fifth Circuit in *American Airlines* took a swing at the Colorado Supreme Court:

> To the extent that *Arapahoe* holds that it is within an airport owner's proprietary powers to restrict service at a local airport without articulating a viable purpose for the restriction, we view that case as deviating from the generally accepted rule that we adopt here . . . We fear that under the rationale of *Arapahoe*, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception. This would expand the regulatory role of municipal owners far beyond the 'extremely limited role' envisioned

167. *Id.* at 808.
168. *Id.*
169. *Id.* at 810-11.
170. *See* Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc., 959 P.2d 587 (Colo. 1998).
171. *Id.* at 590.
172. *Id.* at 595.
173. *See* City and County of San Francisco v. FAA, 942 F.2d 1391, 1394-95 (9th Cir. 1991) (holding "airport proprietors who exceed their regulatory authority risk having federal funds withheld by the Federal Aviation Administration".

by the ADA.[174]

Hence, there is a limit to the regulatory power of a municipality as proprietor.

### *B. Regulation of Airspace*

In United States v. City of New Haven,[175] the Second Circuit U.S. Court of Appeals struck down the efforts of the Town of East Haven to use the Connecticut courts to enjoin use by the City of New Haven to use a newly constructed runway at Tweed New Haven Airport whose flight approach was over East Haven. East Haven argued that the runway had been built in violation of state law. The court held that "State legislation purporting to deny access to navigable airspace would therefore constitute a forbidden exercise of the power which the federal government has asserted."[176]

Also preempted were efforts by the Village of Cedarhurst to regulate flights at New York City's airports. Arguing that the aircraft constituted a public nuisance and were trespassing over public property, the Village attempted to prohibit flights at less than 1000 feet in altitude. The court concluded that there was a "sufficient question of the validity of the Cedarhurst ordinance as against the supremacy of national power so that we are in no way justified in now declaring it valid."[177]

Similarly, the courts preempted the efforts of the Town of Hempsted in its Unnecessary Noise Ordinance to regulate noise at New York John F. Kennedy International Airport on grounds that it was preempted by pervasive federal regulation of airspace. The purpose of the Ordinance was to prohibit aircraft from flying over the town and to significantly restrict their take-off and landing patterns.[178]

It is now settled law that state and local governments are precluded from regulating aircraft in flight, as airspace allocation and use falls within the exclusive province of the federal government.[179]

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174. American Airlines, Inc. v. Dept. of Transp., 202 F.3d 788, 807 (Tex. 2000).

175. *See* United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1973).

176. United States v. City of New Haven, 447 F.2d 972, 973 (C.A. Conn. 1971).

177. All American Airways v. Village of Cedarhurst, 201 F.2d 273, 276 (2d Cir. 1953).

178. *See* American Airlines v. Town of Hempstead, 272 F. Supp. 226 (D.C.N.Y. 1966).

179. J. Scott Hamilton, *Allocation of Airspace As a Scarce National Resource,* 22 TRANSP. L.J. 251, 261 (1994). Numerous courts have accepted the proposition that the federal government has preempted the area of flight control regulation to eliminate or reduce noise. *See* San Diego Unified Port District v. Gianturco, 651 F.2d 1306, 1315 n. 22 (9th Cir. 1981).

### C. *Noise Regulation*

So as to minimize legal liability and political discomfort, numerous local airports have taken action to reduce aircraft noise or mitigate its effects, including access or use regulations or restrictions.[180] Local governments, however, have been preempted from exercising their police powers to promulgate noise abatement requirements, which affect aircraft flight patterns, or to impose curfews on unwilling airport proprietors.[181]

Certain local governments and airport proprietors have imposed curfews on airport operations in an attempt to eliminate aircraft noise during the night. Efforts by local governments that do not own and operate their airports to regulate noise have fared poorly.[182] The seminal case is *City of Burbank v. Lockheed Air Terminal.*[183]

In *Burbank,* the U.S. Supreme Court struck down a city ordinance placing an 11:00 p.m. to 7:00 a.m. curfew on flights from Hollywood-Burbank Airport as implicitly preempted by federal law.[184] The City of Burbank did not own or operate the airport but was merely a municipality imposing regulations.[185] Writing for the court, Justice Douglas quoted from the legislative history of the Noise Control Act of 1972: "States and local governments are preempted from establishing or enforcing noise emission standards . . . unless such standards are identical to standards prescribed in the bill."[186] Douglas stated that:

> [I]f [the court]were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.[187] The FAA's

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180. James Gesualdi, *Gonna Fly Now: All the Noise About the Airport Access Problem,* 16 HOFSTRA L. REV. 213, 221 (1987).

181. *Id.* at 246.

182. *See e.g.,* San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981).

183. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); *See* Mary Jo Soenksen, *Airports: Full of Sound and Fury and Conflicting Legal Views,* 12 TRANSP. L.J. 325 (1982).

184. *City of Burbank,* 411 U.S. 640.

185. *Id.* at 625.

186. *Id.* at 634, *quoted in* S.Rep. No. 92-1160 at 9 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4663.

187. 411 U.S. at 639. *Burbank* was a 5-to-4 decision. Writing the dissent for four Justices, Justice Rehnquist quoted from the House committee report, which said, "The authority of State and local government to regulate use, operation, or movement of products is not affected at all by the bill." *Id.* at 641 (Rehnquist, J., dissenting) (*quoted in* H.R.Rep.No. 92-842 at 9 (1972). According to Rehnquist:

> need to balance safety and efficiency in air transportation required a "uniform and exclusive" system of federal regulation.[188]

But in a footnote, Douglas drew a distinction between a city that owns an airport, vis-à-vis a city that does not, saying:

> [W]e are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power . . . Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.[189]

In dissent, Justice Rehnquist emphasized what the majority had not held:

> A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from . . .closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility.[190]

Because, under *Burbank,* airport proprietors or operators bear liability for excessive airport noise, they have been given special leeway in controlling the sources of airport noise.[191] Before a municipality may abate airport noise, it must be exposed to potential or actual liability for excessive airport noise.[192]

Numerous efforts of non-proprietor municipalities have been preempted, including the following:

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> [B]ecause noise regulation has traditionally been an area of local, not national, concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactments 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'

Id. at 643 (Rehnquist, J., dissenting) (quoting Rice v. Santa Fe Elevators Corp., 331 U.S. 218, 230 (1947)).

Rehnquist argued that "because noise regulation traditionally has been" a matter of local concern, federal statutes should not supersede the exercise of local police power unless Congress expressed a "clear and manifest" intent to do so. *Id.* He noted that the "control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of police power possessed by states and local governing bodies." *Id.* at 643.

188. *Id.* at 638-39.

189. *Id.* at 635 n.14.

190. *Id.* at 653 (Rehnquist, J., dissenting).

191. *Id.*

192. United States v. New York, 552 F. Supp. 255, 263 (N.D.N.Y. 1982) (stating that "[t]he threat of commercial ruin from large, adverse monetary judgments [underlies] the 'fairness' rationale for the proprietor exemption . . . .") *Id.* at 264.

- The City of Audubon Park attempted to regulate noise at Louisville's airport;[193]
- The Town of Gardiner sought to regulate parachute jumping, flight paths, and attendant aircraft noise;[194]
- The City of Clearwater tried to impose flight curfews;[195]
- The City of Blue Ash attempted to prescribe flight patterns;[196] and
- Tinicum Township sought to regulate noise at privately-owned Van Zant Airport.[197]

Though airport proprietors may regulate use of the airports they control, as we have seen, local municipalities's efforts to regulate the flight of aircraft have been struck down as preempted by federal law.[198] Local governmental noise abatement plans that do not restrict operations, however, have been upheld.[199]

In *British Airways Board v. Port Authority of New York and New Jersey*,[200] the U.S. Court of Appeals for the Second Circuit, in concluding local restrictions on the flight of the supersonic Concorde aircraft were unlawful, summarized the dividing lines between federal and local jurisdiction in this area:

> Common sense . . . required that exclusive control of airspace allocation be concentrated at the national level, and communities were therefore preempted from attempting to regulate planes in flight. The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. It seemed fair to assume that the proprietor's intimate knowledge of local conditions, as well as his

193. American Airlines, Inc. v. City of Audubon Park, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).

194. Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678 (N.D.N.Y. 1989). The court, however, found the following requirements of the town ordinance were not preempted: (1) a requirement that operators have a license; (2) the effort of the Town to hold the airport in violation of the ordinance if they fail to follow state or county law; (3) efforts to regulate land use; and (4) provisions of the ordinance seeking to impose penalties or revocation or suspension of the license if the law were violated.

195. Pirolo v. Clearwater, 711 F.2d 1006 (11th Cir. 1983).

196. United States v. Blue Ash, 487 F. Supp. 135 (S.D. Ohio 1978), *aff'd*, 621 F.2d 277 (6th Cir. Ohio 1998).

197. Country Aviation, Inc. v. Tinicum Township, 1992 U.S. Dist. Lexis, 19803, 1992 WL 396782 (E.D. Pa. 1992), *aff'd*, 9 F.3d 1539 (3d Cir. 1993).

198. United States v. Blue Ash, 487 F. Supp. 135 (S.D. Ohio 1978), *aff'd*, 621 F.2d 277 (6th Cir. Ohio 1998).

199. San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981); City of Tipp City v. City of Dayton, 204 F.R.D. 388, 2001 U.S. Dist. Lexis 23016 (S.D. Ohio 2001).

200. British Airways Bd. v. Port Auth. of N.Y., 564 F.2d 1002, 1010-11 (2d Cir. 1977).

> ability to acquire property and air easements and assure compatible land use, would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme, and both the Supreme Court and the executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions.
>
> The maintenance of a fair and efficient system of air commerce, of course, mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise, which can be created by aircraft using the airport. We must scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals. And, of course, our task [includes] monitoring the proprietor's observance of the strict statutory obligation to make his facility available for public use on fair and reasonable terms, and without unjust discrimination . . . .[201]

Thus, though local governments have fared poorly in their attempts to regulate airport noise, airport proprietors have fared much better. The exposure of airport proprietors to trespass, nuisance, and inverse condemnation legislation forces them to attempt to reduce negative environmental impacts. As a consequence, it is generally accepted that airport proprietors may exercise their proprietary powers to control noise by promulgating noise abatement and curfew regulations, provided that such regulations are fair, reasonable, non-discriminatory, and do not unduly affect the free flow of interstate commerce.[202] For example, some airports impose flight curfews (prohibiting takeoffs and landings during certain late evening hours), prohibit the landing of Stage 2 aircraft, or establish perimeter rules prohibiting nonstop flights beyond a specified radius.[203]

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201. 564 F.2d at 1010-1011 (citations and footnotes omitted). The court found that the Port Authority had failed to promulgate reasonable, nonarbitrary, and nondiscriminatory noise regulations at Kennedy International Airport expeditiously. *See also* United States v. New York, 552 F. Supp. 255 (N.D.N.Y. 1982), which found a proprietor's curfew "overbroad, unreasonable, and arbitrary." *Id.* at 264.

202. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). *See also* National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976) (stating that city airport proprietor prohibition of night operation of aircraft at noise above a specified level deemed only an incidental burden on interstate commerce); Arrow Air, Inc. v. Port Auth., 602 F. Supp. 314 (S.D.N.Y. 1985) (stating that airport proprietors may establish "fair, even-handed and nondiscriminatory regulations" to limit noise).

203. *See e.g.*, 184 Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J., 817 F.2d 222

For example, the City of Long Beach, which owned and operated Long Beach Municipal Airport, adopted a noise control ordinance that limited airlines to fifteen flights per day and required the use of quieter equipment. In *Alaska Airlines v. City of Long* Beach,[204] the Ninth Circuit U.S. Court of Appeals held the ordinance was not preempted, and that the proprietor should be permitted "to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of a City's human environment."[205] The ordinance was also challenged on grounds that it impermissibly burdened interstate commerce. The court held that the ordinance could have been struck down on Commerce Clause grounds if its purpose was "to disfavor interstate commerce or its benefits were illusory or insignificant, but neither is the case."[206] The ordinance was not found to be arbitrary, capricious, or unrelated to a legitimate governmental purpose.[207] The court found that "the goal of reducing airport noise to control liability and improve the aesthetics of the environment is a legitimate and permissible one."[208]

Similarly, in *Santa Monica Airport Association v. City of Santa Monica*,[209] the Ninth Circuit upheld several city ordinances imposed on a city-owned and -operated airport including night curfews on takeoffs and landings, prohibitions on low aircraft approaches on weekends, prohibitions on helicopter flight training, and maximum levels on noise of 100 dB; it struck down, however, a prohibition against jets and a fine for jet operations on grounds that they would constitute an unreasonable burden on interstate commerce.[210] The court held that "the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation . . . Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs."[211]

Among the categories of restrictions designed to reduce noise by airport proprietors that have been upheld as not preempted under federal law are:

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(2d Cir. 1987).

204. 951 F.2d 977 (9th Cir. 1992).

205. 951 F.2d at 982 (quoting Santa Monica Airport Ass'n, v. City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1981).

206. 951 F.2d at 984.

207. *Id.*

208. *Id.*

209. 659 F.2d 100 (9th Cir. 1981).

210. 659 F.2d at 102. Donald Harper, *Regulation of Airport Noise at Major Airports: Past, Present & Future,* 17 TRANSP. L.J. 117, 135 (1988).

211. "Congress intended to allow a municipality flexibility in fashioning its noise regulations." 659 F.2d at 104-05.

- Reasonable and nondiscriminatory noise control regulations;[212]
- Restrictions on the type of air service and type of aircraft serving the airport;[213]
- Limitations on the cumulative level of noise exposure at the airport;[214]
- Aircraft takeoff and landing fees as a means of controlling airport growth;[215] and
- Airport perimeter rules (restricting flights beyond a specified radius) designed to divert traffic to another regional airport at least when imposed by a multi-airport authority.[216]

"Overbroad, unreasonable and arbitrary" regulations, however, may be struck down by the courts as imposing an unreasonable burden on interstate commerce.[217] The likelihood of running afoul of the

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212. Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

213. Air Transport Ass'n of America v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975).

214. Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J., 727 F.2d 246 (2d Cir. 1984).

215. Aircraft Owners & Pilot's Ass'n v. Port Auth. of N.Y., 305 F. Supp. 93 (E.D.N.Y. 1969).

216. Jonathan Cross, *Airport Perimeter Rules: An Exception to Federal Preemption*, 17 TRANSP. L.J. 101 (1988). However, perimeter rules imposed by a single airport not a part of a multi-airport system stand on shakier legal ground. *Id.* at 110.

> Proprietary restrictions which have been upheld by the courts include: a night curfew on all aircraft takeoffs and landings, a prohibition against low approaches and 'touch and go' landings on weekends, a prohibition against helicopter training flights, and the establishment and enforcement of maximum single event noise exposure levels against aircraft using the airport.

J. Scott Hamilton, *Allocation of Airspace As a Scarce National Resource*, 22 TRANSP. L.J. 251, 265 (1994). Among the types of regulations imposed by airport proprietors, with some success, have been:

> setting noise standards, both overall standards and those that apply to individual flight operations; banning or limiting flights at certain hours; regulating ground operations to reduce the amount of noise produced; banning or limiting [training] flights by aircraft operators; barring certain aircraft from using an airport; limiting growth in the total number of flights by a specific operator and/or requiring that an increase be accomplished only with a certain kind of aircraft; banning certain noisy aircraft entirely; requiring new airlines serving an airport to meet certain noise standards; and requiring gradual phase out of noisy aircraft.

Donald Harper, *Regulation of Airport Noise At Major Airports: Past, Present & Future*, 17 TRANSP. L.J. 117, 139 (1988).

217. *See e.g.*, United States v. New York, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (curfew banning all flights from 11:00 p.m. to 7:00 am held overbroad because it banned "all aircraft regardless of the degree of accompanying emitted noise"); United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983) (similar curfew preempted as "unreasonable, arbitrary, discriminatory and overbroad").

Commerce Clause, as well as, the ADA's explicit preemption provision, is heightened when the airport restrictions fall upon commercial airlines as opposed to general aviation aircraft.[218] Moreover, the courts have emphasized that noise restrictions must be fair, reasonable, and nondiscriminatory, and intended to serve a legitimate public purpose.[219]

*D. Land Use Regulation*

Nearly every state has passed laws conferring authority to local governments to promulgate special airport zoning regulations and prohibit incompatible land uses.[220] Typically, zoning challenges fall into seven categories:

1) challenges by landowners of ordinances that designate "airport hazard areas" wherein development inconsistent with the hazard designation is prohibited;
2) allegations by landowners that the ordinances violate the Equal Protection guaranteed by the U.S. and state Constitutions;
3) allegations that the ordinances constitute a taking without just compensation and therefore violate the Due Process protections of the U.S. and state Constitutions;
4) challenges by landowners of ordinances that prohibit them from developing private airports or helipads;
5) allegations that non-conforming uses existing prior to the ordinance should be "grandfathered" in;
6) challenges by landowners that the zoning ordinances conflict with coordinated planning processes such as the airport development plan or the state or metropolitan regional master plan; and
7) allegations that the ordinances are preempted by federal control of air transportation.[221]

Zoning is an area that appears relatively, though not totally, free from the federal preemption problems that local governments face in other air transportation contexts. Though the federal government has preempted navigable airspace, state and local governments retain

218. Donald Harper, *Regulation of Airport Noise At Major Airports: Past, Present & Future,* 17 TRANSP. L.J. 117, 135 (1988).
219. James Gesualdi, *Gonna Fly Now: All the Noise About the Airport Access Problem*, 16 HOFSTRA L. REV. 213, 256 (1987).
220. Luis Zambrano, *Balancing the Rights of Landowners With the Needs of Airports: The Continuing Battle Over Noise*, 66 J. AIR L. & COM. 445, 468 (2000).
221. *Id.* at 470-71.

substantial control over ground usage.[222] The locational decision of where airports or aircraft operations will be allowed to be remains a particularly local decision.[223] Local governments retain significant authority over land use; the right not to have an airport in the first instance is a local decision.[224]

Generally speaking, local governments may regulate the land use around an airport so long as such zoning ordinances constitute a reasonable and legitimate exercise of local police powers. The ordinance must:

1) substantially relate to public health, safety, and general welfare; and
2) must be supported by a public interest sufficient for the reasonable imposition of restrictions on surrounding land without having to compensate the property owner for loss of value.[225]

Local governments may exercise their police, land use, and zoning powers to regulate the location, height, and size of structures (for example, to prohibit the erection of a skyscraper at the end of a runway), so long as the regulation is imposed for a health or safety purpose unrelated to the regulation of noise or the use of navigable airspace.[226] Reasonable zoning ordinances that merely regulate or restrict airport location[227] or ground operations, or assure compatible land uses within

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222. Wood v. City of Huntsville, 384 So.2d. 1081 (Ala. 1980). "[T]here is a distinction between the regulation of the navigable airspace and the regulation of ground space to be used for aircraft landing sites. Although the regulation of the airspace of the United states has been preempted by Congress, . . ." the regulation of the location aircraft landing sites is not. Gustafson v. City of Lake Angelus, 76 F.3d. 778, 789 (6th Cir. 1996).

> Gustafson suggests that local governing bodies have exclusive control over air transportation up until the moment that the plane lifts off of the ground and enters airspace. . . . Gustafson seems to indicate that although local planning bodies can regulate every aspect of land development, the same governing bodies must stop regulating the moment a plane enters airspace, although the noise continues to impact the land.

Luis Zambrano, *Balancing the Rights of Landowners With the Needs of Airports: The Continuing Battle Over Noise,* 66 J. AIR L. & COM. 445, 464 (2000).

223. Bethman v. City of Ukian, 216 Cal. App. 3d. 1395 (1989).

224. Wright v. County of Winnebago, 73 Ill. App. 3d. 337, 344 (1979).

225. Luis G. Zambrano, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise,* 66 J. AIR L. & COM. 445, 469-70 (2000).

226. Paul Stephen Dempsey, Robert M. Hardaway & William E. Thoms, *1 Aviation Law & Regulation* §§ 8.03-8.14 (Butterworth 1992). *See also* Pamela Corrie, *An Assessment of the Role of Local Government in Environmental Regulation,* 5 UCLA J. ENVTL L. & POL'Y 145 (1986).

227. *Gustafson,* 76 F.3d 778 (6th Cir. 1996) (stating that a city ordinance prohibiting seaplanes landing on lakes not preempted); Condor Corp. v. City of St. Paul, 912 F.2d

the vicinity of the airport, have been deemed not federally preempted and within the police power of the government as appropriately related to health, safety, or general welfare goals. [228] For example, owners of private landing strips seeking to create private airports have failed in their attempt to secure federal preemption of zoning prohibitions.[229] Paradoxically, without zoning, land around the airport perimeter may become high-density development because the land is not suitable from a market perspective for low-density use. Airport zoning may restrict land use so as to, for example, limit the height of structures in the aircraft approach paths to assure safety.[230]

Other means of avoiding inverse condemnation litigation include land use planning and zoning around airport perimeters. Airport planners must project the "noise footprint" that will fall on surrounding land by virtue of aircraft operations, with an assumption that an impact above 65 Ldn is incompatible with the reasonably quiet use of residential real estate. Zoning such land for industrial or agricultural use, for example, can ameliorate legal and political problems. Zoning can be the most cost-effective means of avoiding inverse condemnation litigation.[231] An even more effective, albeit expensive, means of accomplishing the same goal is an outright purchase of all land that falls within the 65 Ldn noise footprint, using condemnation powers under eminent domain, if necessary, or purchasing "avigation easements" over surrounding land.[232]

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215 (8th Cir. 1990) (city zoning ordinance prohibiting siting of heliport not preempted).

228. Congress did not attempt to preempt the right of a local government to designate and regulate aircraft landing areas. "We find no purpose manifested in the Federal Aviation Act to preempt local law concerning the designation of landing sites for aircraft, including seaplanes. . . . The federal government, rather than 'preempting the field,' has not entered the field and exerts no control over the location of seaplane landing sites. . ." *Gustafson*, 76 F.3d at 787-88.

229. "[T]hese are all areas of valid local regulatory concern, none of which is federally pre-empted, and none of which inhibits in a proscribed fashion the free transit of navigable airspace. And, just as certainly, no federal law gives a citizen the right to operate an airport free of local zoning control". Faux-Burhans v. County Comm'rs of Frederick County, 674 F. Supp. 1172, 1174 (D. Md. 1987), *aff'd,* 859 F.2d 149 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989). "[A]s a policy matter, if federal preemption were found, . . . state and local governments, which are the only bodies that currently license privately operated helistops and heliports, would be shorn of this regulatory responsibility. Congress could not have intended to create a governmental vacuum with respect to privately operated helistops." Garden State Farms, Inc. v. Bay, 390 A.2d 1177, 1182 (N.J. 1978).

230. *Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning* § 60.01 (4th ed. 1997).

231. J. Scott Hamilton, *Allocation of Airspace as a Scarce National Resource,* 22 TRANSP. L.J. 251, 266 (1994).

232. Scott Hamilton, *Planning for Noise Compatibility, in* AIRPORT REGULATION, LAW, & PUBLIC POLICY 85-86 (R. Hardaway ed., 1991); Luis G. Zambrano, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise*, 66 J. AIR L. & COM. 445, 469 (2000).

As one commentator noted, zoning is a "two-edged sword which local governments may use not only to protect airports from the encroachment of noise-sensitive residential developments, but also to protect residential communities from the encroachment of noise-generating airports".[233]

## VIII. Conclusion

Because of widespread federal regulation of aircraft operations, the circumstances under which a local government may lawfully regulate an operating airport are severely circumscribed. Efforts by a local authority to regulate airport operations or aircraft noise take on an entirely different complexion depending upon whether the regulating authority is a local government seeking to exert its police power, or whether the municipality is exercising its powers as proprietor of the airport.[234] Unless a state or local government owns and operates an airport, any effort by it to regulate or control the hours of operation, the number of flights per day, or the flight patterns of aircraft will likely be held preempted under federal law. Congress has exercised its authority under the Commerce Clause of the U.S. Constitution to exert plenary jurisdiction over navigable airspace and aircraft noise. Inconsistent state law is preempted under the Supremacy Clause.

Under certain circumstances, however, an airport operator may impose restrictions on aircraft operations. In developing aircraft flight restrictions or a noise compatibility program, the airport operator must notify local jurisdictions with land-use jurisdiction, and offer them an opportunity to comment. Under federal law, however, such restrictions must be approved by the U.S. Department of Transportation. A proposed noise compatibility program will be scrutinized by DOT principally to determine whether it places an unreasonable burden on interstate commerce and is consistent with avoiding noncompatable land uses. Local jurisdictions are encouraged to develop land use regulations that minimize residential development in the 65 Ldn aircraft footprint. DOT may approve proposed aircraft restrictions if it determines that the restrictions: (1) will not unreasonably burden interstate commerce or the national aviation system, (2) are reasonable, nonarbitrary and nondiscriminatory, (3) do not impinge safety or efficiency or aircraft operations, (4) do not conflict with federal law, and (5) have been provided with an adequate opportunity for public comment.

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233. J. Scott Hamilton, *Allocation of Airspace As a Scarce National Resource,* 22 TRANSP. L.J. 251, 260 (1994).

234. Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 691 n. 14 (N.D.N.Y. 1989).

A local government could enter into an intergovernmental agreement with a local airport proprietor, whereby the government agreed to use its police power to impose height restrictions to protect the airport approaches and limit flight approach zoning to agricultural and industrial uses, while the proprietor agreed to restrict noise by prohibiting noisier aircraft and imposing night curfews of flights, for example.[235] Such a reciprocal arrangement provides protection to the local government's constituents from egregious levels of noise, while protecting the airport proprietor against trespass, nuisance, and inverse condemnation litigation.

Failing conclusion of such an agreement, an aggrieved municipality could, if the facts warranted, bring a trespass, public nuisance, and/or inverse condemnation action against the airport operator,[236] seeking damages, though an injunction would likely not be issued. If municipal or county real estate were not under the flight paths, local residents whose land was under the flight path could join in such a lawsuit seeking damages for a private nuisance and inverse condemnation.

If a municipality could extend its boundaries so as to annex the airport, it might be able to use its zoning powers to restrict future expansion of the airport.[237] Alternatively, state law permitting, the municipality could use its eminent domain authority to acquire a privately-owned airport (paying just compensation, of course), and then step into the shoes of the airport proprietor, under which it would have significantly greater power to regulate its operations. If the airport, however, were owned by another local governmental enterprise, acquisition through eminent domain would likely be precluded, and the enterprise would have to negotiate with the government for a transfer of ownership. If a municipality owned the airport, beyond the possibility of imposing flight path and curfew restrictions and a noise compatibility program (if developed under federally-prescribed procedures, and approved by DOT),[238] the municipality, likely, could also examine the alternative of completely closing the facility, and converting the property to an alternative use.[239]

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235. J. Scott Hamilton, *Allocation of Airspace as a Scarce National Resource,* 22 TRANSP. L.J. 251, 265 n. 71 (1994).

236. Such actions are not unprecedented. *See e.g.,* City of Tipp City v. City of Dayton, 204 F.R.D. 388, 2001 U.S. Dist. Lexis 23016 (S.D. Ohio 2001).

237. John J. Jenkins, Jr., *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?,* 59 J. AIR L. & COM. 1023, 1030 (1994).

238. Limitations on the operation of Stage 3 aircraft, however, may only be imposed if agreed to by the airport operator and all air carriers serving the airport.

239. Justice William Rehnquist explicitly endorsed this alternative in his dissent in *Burbank,* quoted above.