



Analysis of Federal Laws, Regulations, and Case Law Regarding Airport Proprietary Rights

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ISBN 978-0-309-43018-0 | DOI 10.17226/22928

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ANALYSIS OF FEDERAL LAWS, REGULATIONS, AND CASE LAW REGARDING AIRPORT PROPRIETARY RIGHTS

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I. INTRODUCTION

On a freezing cold day in December 1903, Orville Wright lifted off the ground at Kitty Hawk, North Carolina, into a headwind gusting to 27 mph. His craft was the first powered airplane—a wooden frame with a rudimentary fuel injected engine. As he sped through the sky at 6.8 mph, Orville set in motion a radical change in the law. At that time, anyone owning real property owned the sky above the property up to the heavens, and he had just trespassed. But the legal complexities of aviation converged when Orville landed. His success touched off scores of questions about the rights of the aircraft owner, the landowner, the surrounding community, and the proper role of government at every level.

This digest will provide an overview of the law regarding airport proprietary rights at United States airports. These rights have existed since the outset of aviation to empower the actions of local airport proprietors. The term “proprietary rights” might be applied in a variety of ways, such as to describe an airport operator’s authority to address noise, conduct fueling operations, or act as a landlord. However the term refers to the full range of powers that an airport operator has the right to exercise. Those powers are created under state law, and they are then modified over time as the federal government enacts aviation regulations or enters contracts with the operator. An airport operator’s proprietary rights are thus its core state law powers to act to the extent that they are not superseded by these federal obligations.

This digest will present an overview of airport proprietary rights beginning with a brief review of their basic parameters under the legal elements that create them—the principles of state empowerment, federal preemption, and federal contract obligations. It will then offer some context for understanding a proprietary rights analysis by reviewing some of the factors that shaped the historical development of these rights. Finally, this study will provide an overview of current proprietary rights analysis. It will begin with the threshold question in the analysis: who is a proprietor? It will then sample the complex scope of the current analysis by presenting an overview of three areas: an airport operator’s rights to address the local effects of flight, to determine rates and charges, and to manage lands.

II. THE GENERAL PARAMETERS OF AIRPORT PROPRIETARY RIGHTS

Section Summary: The specific legal rights of each airport proprietor may differ, but the general parameters of airport proprietary rights are shaped by a common set of legal elements. Most airport proprietors are initially empowered to operate by a broad grant of power that derives from state law, and as such they are subject to a common set of state law limitations. Federal law then further shapes these state law rights; federal regulations may supersede them under the doctrine of preemption, and federal contract obligations may modify them. Airport proprietary rights are thus any given proprietor’s collection of state law rights as they may be superseded by federal regulations or modified by federal contracts. This section briefly reviews each of these three elements.

A. Grants of State Power

Airport proprietary rights are created under state law, and these state powers constitute the first element shaping their parameters. Airport proprietors in the United States are generally government entities, and state law empowers them whether directly under state statutes, through an act of local government, or both. The basic legal principles governing this empowerment are consistent from state to state.

States grant broad delegations of authority to airport proprietors in support of their public mission.¹ That delegation generally includes the power to acquire, operate, maintain, and improve the airport;² to expend funds³ and incur indebtedness for airport purposes;⁴ to impose reasonable charges for use of the facilities;⁵ and

¹ *City of Atlanta v. Murphy*, 206 Ga. 21, 55 S.E.2d 573 (Ga. 1949); *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (Idaho 1970). See also T.C. Williams, *Annotation, Power to Establish or Maintain Public Airport, or to Create Separate Public Airport Authority*, 161 A.L.R. 733 (Cum. Supp. 2009).

² *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* 113 Cal. App. 4th 465, 6 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003).

³ *Goswick v. Durham*, 211 N.C. 687, 191 S.E. 728 (N.C. 1937).

⁴ *Ennis v. Kansas City*, 321 Mo. 536, 11 S.W.2d 1054 (Mo. 1928).

⁵ *City of Ord v. Biemond*, 175 Neb. 333, 122 N.W.2d 6 (Neb. 1963).

to enter airport contracts, including leases,⁶ concessions, and exclusive concessions.⁷ States typically give airports the power to “acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields....”⁸ Airports may also benefit from a “general welfare” clause that empowers a government entity to act broadly for the benefit of the public except as restricted by state law.⁹

The broad powers delegated to airports are often considered to fall into two categories that are essential to support the airport’s mission—“governmental” or “police” powers and “private” or “proprietary” powers.¹⁰ Governmental or police power is the regulatory power of an airport. This is the power to compel compliance, irrespective of private rights, to promote the public health, welfare, safety, and comfort.¹¹ This power is an attribute of state sovereignty,¹² and proprietors exercise this power when they do such things as condemn property,¹³ enact and enforce rules and regulations,¹⁴ and expend funds.¹⁵ The “private” or “proprietary” power of an airport is the power to engage in commercial activities as a private entity would. Courts typically find that a government entity’s functions are private in nature when they are not governmental, although distinctions about the nature of government power can vary.¹⁶ These

private powers allow an airport to conduct business for its own purposes,¹⁷ such as when determining charges for providing its own services.¹⁸

States vest the broad powers of an airport in an organizational structure that can also help promote its mission. A limited survey of airports at Appendix A demonstrates that states can provide for structuring airports in a variety of ways. Even among just these survey participants, airport operators identified that they were organized as a city department, a city department with an appointed governing board, a county department, a department of a combined city and county, a department of state government, an independent airport authority under state law, an airport authority created through an independent or dependent special district, a bi-state authority created with the consent of Congress, and a joint board organized by two cities.

These differing structures are variations of a few basic organizational formats. States typically provide for an airport to be organized under an authority structure or as a component of the state or a local government entity. State or local laws may then refine that format with other features. A given organizational format does not tend to reflect the attributes of an airport, such as passenger volumes, hub status, or the presence of low-cost carriers.¹⁹ The format and its refinements thus may be a function of local needs and preferences.²⁰ Refine-

⁶ Fox Valley Airport Auth. v. Dep’t of Revenue, 164 Ill. App. 3d 415, 517 N.E.2d 1200 (Ill. App. Ct. 1987).

⁷ Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (N.C. 1971). See also M.O. Regensteiner, *Annotation, Validity, Construction and Operation of Airport Operator’s Grant of Exclusive or Discriminatory Privilege or Concession*, 40 A.L.R. 2d 1060 § 3 (Cum. Supp. 2009); Ferdinand S. Tinio, *Annotation, Power of Municipal Corporation to Lease or Sublet Property Owned or Leased by It*, 47 A.L.R. 3d 19, § 2a (Cum. Supp. 2009).

⁸ Uniform Airports Act § 1 (1935) (available through the National Conference of Commissioners on Uniform State Laws).

⁹ Garel v. The Bd. of County Comm’rs of the County of Summit, 167 Colo. 351, 447 P.2d 209 (Colo. 1968); State v. Hutchinson, 624 P.2d 1116 (Utah 1980).

¹⁰ Fine Airport Parking, Inc. v. The City of Tulsa, 2003 OK 27, 71 P.3d 5 (Okla. 2003).

¹¹ Skallerup v. City of Hot Springs, Ark., 2009 Ark. 276, 2009 Ark. LEXIS 185 (Ark. 2009).

¹² State v. Harold, 74 Ariz. 210, 246 P.2d 178 (Ariz. 1952); Village of Chatham, Ill. v. The County of Sangamon, Ill., 216 Ill. 2d 402, 837 N.E.2d 29 (Ill. 2005).

¹³ Hedrick v. Graham, 245 N.C. 249, 96 S.E.2d 129 (N.C. 1957).

¹⁴ City of Fort Smith v. Dep’t of Public Util., 195 Ark. 513, 113 S.W.2d 100 (Ark. 1938).

¹⁵ Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (Utah 1932).

¹⁶ Ark. Valley Compress & Warehouse Co. v. Morgan, 217 Ark. 161, 229 S.W.2d 133 (Ark. 1950). See also Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981) (noting statutory scheme had now replaced difficulties in determining governmental immunity based on governmental and proprietary functions); North Bay Constr. Inc. v. City of Petaluma, 143 Cal.

App. 4th 552, 49 Cal. Rptr. 3d 455 (Cal. Ct. App. 2006) (public and governmental distinctions are without any real foundation when considering immunity); District of Columbia Water and Sewer Auth. v. Delon Hampton & Assoc., 851 A.2d 410 (D.C. 2004) (when determining applicability of statute of limitations, line between rights that accrue to the public’s benefit and those that are proprietary to government is a fine one, especially since any financial loss to the government is ultimately a loss to the public fisc); Fine Airport Parking, Inc. v. The City of Tulsa, 2003 OK 27, 71 P.3d 5 (Okla. 2003) (in connection with antitrust, airports were considered a proprietary function until state statute declared them governmental, and thus airports are now acting in governmental capacity as an arm of the state to meet a public need, and not solely for their own benefit).

¹⁷ Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975) (finding administrative hearing procedures were not applicable to setting airport landing fees since the city was charging for the use of its own services, a proprietary function).

¹⁸ Fine Airport Parking, Inc. v. The City of Tulsa, 2003 OK 27, 71 P.3d 5 (Okla. 2003) (finding airport had been declared a governmental function by the legislature and as such was exempt from antitrust laws even though when the airport fixed parking prices, it did not exercise police power to do so).

¹⁹ See Daniel S. Reimer and John E. Putnam, AIRPORT GOVERNANCE AND OWNERSHIP 5 (Transp. Research Bd., Airport Cooperative Research Program Legal Research Digest 7, 2009). This study also provides a compendium of state laws on airport governance structures at App. B.

²⁰ The survey at Exhibit A demonstrates some of the refinements that states can implement as they organize airports. For example, one survey participant reported that it can exercise the full power of the state when acting, but that specific

ments imposed by a state may become so specific that statutes address a single airport proprietor.²¹

Airport proprietors are not only governed by these common principles of state empowerment, their powers are also circumscribed by some common limitations. Among them, government power, whether governmental or proprietary in nature, must be exercised for a public purpose.²² The courts initially considered whether the act of owning and operating an airport itself constituted an exercise of power for a public purpose.²³ They uniformly found that airports are established for a public purpose or as a public enterprise within the meaning of the law.²⁴ Many did so initially by pointing to local government's statutory authority to operate parks or public utilities.²⁵ Subsequently states enacted specific statutes describing airports as a public governmental function.²⁶

The specific actions taken by an airport proprietor also must demonstrate a public purpose. Early challenges questioned the public purpose of airport proprietors' actions to finance infrastructure through taxes²⁷ and indebtedness,²⁸ determine airport sites,²⁹ and ac-

state legislation restricts many actions affecting general aviation activities. Some airport authorities reported that they have been granted operational jurisdiction over their land, but that they must rely on a local county to condemn property or approve real property transactions. To varying degrees, airports reported that local governments have claimed the ability to control zoning on the airport's property. Some airports have a broad authority under state law to engage in business transactions, while others must obtain their local government agency's consent for those transactions and must follow that entity's policies and procedures.

²¹ See 620 ILL. COMP. STAT. 65/5 (2009) (O'Hare Modernization Act); CAL. PUB. UTIL. Code § 170000 (2009) (San Diego County Regional Airport Authority Act).

²² *Fine Airport Parking, Inc. v. The City of Tulsa*, 2003 OK 27, 71 P.3d 5 (Okla. 2003) (determining that all functions of a municipality are public in nature, regardless of whether acting in a governmental or proprietary capacity).

²³ See *McClintock v. Roseburg*, 127 Or. 698, 700, 273 P. 331, 331 (1929)

(What is a public use is not capable of an absolute definition. A public use changes with changing conditions of society...We cannot close our eyes to the great growth in the use of flying machines during the past decade.... An airport owned by the city open to the use of all aeroplanes is for the benefit of the city as a community and not of any particular individuals therein. It is therefore a public enterprise).

See also *Fine Airport Parking, Inc. v. The City of Tulsa*, 2003 OK 27, 71 P.3d 5 (Okla. 2003).

²⁴ *Curren v. Wood*, 391 Ill. 237, 62 N.E.2d 809 (Ill. 1945). See also 161 A.L.R. 733 at § II(a)(1)(a).

²⁵ *Price v. Storms*, 191 Okla. 410, 130 P.2d 523 (Okla. 1942); *Wichita v. Clapp*, 125 Kan. 100 263 P. 12 (Kan. 1928).

²⁶ See *Fine Airport Parking, Inc. v. The City of Tulsa*, 2003 OK 27, 71 P.3d 5 (Okla. 2003) (what constitutes a public purpose is generally a legislative matter).

²⁷ *Dysart v. St. Louis*, 321 Mo. 514, 11 S.W.2d 1045 (1928).

²⁸ *Raynor v. King County*, 2 Wash. 2d 199, 97 P.2d 696 (1940). See also *Goswick v. Durham*, 211 N.C. 687, 191 S.E.

quire necessary lands³⁰ or enter leases.³¹ The courts found that these actions had a public purpose, and state legislatures formalized these powers by codifying them. State laws may also protect the principle of public purpose through requirements that provide public access or prohibit private benefits, such as laws addressing public meetings, public records, conflicts of interest, patronage, and the acceptance of gifts.

Airport proprietary powers are also inherently limited by the scope of the grant of power that creates them, whether directly from the state or through an act of local government. The subdivisions of a state have only the powers that are conferred to them by law or which are permissible under local "home rule" requirements. As noted above, these powers tend to be construed broadly,³² but if entities exceed their grant of power or violate stated limitations their actions are considered to be illegal or void.³³ The law defines the public purpose and range of permissible activities that are applicable to a given entity such as an airport proprietor.³⁴

The standard that courts use to review a proprietor's actions under state law reflects these legal limitations. When discretion is vested in a government entity, it must be exercised reasonably and in such a way as to further the purpose of the power granted.³⁵ The courts will not second guess the government entity's decisions unless its actions conflict with the law or are arbitrary and capricious or an abuse of discretion.³⁶ Thus the broad government powers of an airport proprietor are subject to limitations, but when the proprietor exercises

728 (N.C. 1937) (voter authorization required for airport indebtedness).

²⁹ *Denver v. Arapahoe County*, 113 Colo. 150, 156 P.2d 101 (1945) (questioning amount of land needed for airport purposes and location outside city boundaries).

³⁰ *Wentz v. Philadelphia*, 301 Pa. 261, 265, 151 A. 883, 885 (Pa. 1930) (proprietors could acquire land which might "be necessary and desirable for the purpose of establishing and maintaining municipal airdromes or aviation landing fields").

³¹ *Krenwinkle v. Los Angeles*, 4 Cal. 2d 611, 51 P.2d 1098 (1935) (leases could not exceed limitation on municipal indebtedness on a year to year basis).

³² See Frayda S. Bluestein, *Article: Do North Carolina Local Governments Need Home Rule?*, N.C. L. REV. (2006) (discussing the application of Dillon's Rule in North Carolina, a rule strictly construing grants of governmental power), <http://www.sog.unc.edu/pubs/electronicversions/pg/pgfal06/article2.pdf>.

³³ *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 90 P.3d 340 (Idaho 2004); *Ad-Ex, Inc. v. The City of Chicago*, 270 Ill. App. 3d 163, 565 N.E.2d 669 (Ill. App. Ct. 1990); *Varney Bus. Servs., Inc. v. Pottroff*, 275 Kan. 20, 59 P.3d 1003 (Kan. 2002).

³⁴ See *Fine Airport Parking, Inc. v. The City of Tulsa*, 71 P.3d 5 (Okla. 2003).

³⁵ *Sutphin v. Platt*, 720 S.W.2d 455 (Tenn. 1986).

³⁶ *Kingsley v. Dist. of Columbia Dep't of Consumer and Regulatory Affairs, Bd. of Accountancy*, 657 A.2d 1141 (D.C. 1995).

them properly, state courts will defer to the proprietor's decisions. These common principles and limitations regarding an airport proprietor's state empowerment constitute the first element shaping the parameters of airport proprietary rights.

B. Federal Preemption

Once state and local law establish an airport operator's core proprietary rights, federal law then has the power to supersede a specific right through the principle of federal preemption. As such, preemption constitutes the second element shaping the general parameters of airport proprietary rights. Federal preemption occurs through the operation of two provisions of the U.S. Constitution. The Supremacy Clause makes federal law the supreme law of the land,³⁷ and the Tenth Amendment provides that states retain their powers to act unless federal law removes them.³⁸ Under these provisions the courts invalidate state and local regulation that is inconsistent with federal law, and thus any federal aviation law can potentially preempt a proprietor's state law powers.³⁹

No federal aviation statutes existed at the outset of aviation; at that time a proprietor's actions were subject

to the requirements of the initial source of federal aviation law: the Commerce Clause of the Constitution.⁴⁰ Under a "dormant" Commerce Clause analysis, state and local actions are invalid when they place too great a burden on commerce moving between the states.⁴¹ The courts determine whether to uphold a local regulation by balancing the benefit that it creates against the degree to which it imposes a burden on interstate commerce.⁴² Thus a Commerce Clause analysis initially restricted the extent to which local airport proprietors could regulate, and that analysis continues to act as a federal tool that limits the scope of local proprietary action in some cases.⁴³

When the federal government began enacting aviation statutes, courts then determined whether these federal laws superseded an airport proprietor's rights using a preemption analysis. Under that analysis, the courts must find that Congress intended to supersede an airport proprietor's local powers to act. The courts look closely at "the language employed by Congress [in an aviation regulation] and [they make] the assumption that the ordinary meaning of the language accurately expresses the legislative purpose."⁴⁴ That purpose is

³⁷ U.S. CONST. art VI, cl. 2. This clause states,

[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, 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.

³⁸ U.S. CONST. amend. X. The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The U.S. Supreme Court has stated that this amendment "states but a truism that all is retained [by the states] which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124, 61 S. Ct. 451, 462, 85 L. Ed. 609, 622 (1941).

³⁹ See *Maryland v. Wirtz*, 392 U.S. 183, 195, 88 S. Ct. 2017, 2023, 20 L. Ed. 2d 1020, 1030 (1968) ("It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549, 105 S. Ct. 1005, 1017, 83 L. Ed. 2d 1016, 1033 (1985) (affirming that courts have rejected 'dual federalism' concepts, and noting that states have significant sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government"); *South Carolina v. Baker*, 485 U.S. 505, 512, 108 S. Ct. 1355, 1360, 99 L. Ed. 2d 592, 602 (1988) ("limits on Congress' authority to regulate state activities...are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity"). See also *New York City v. Miln*, 36 U.S. 102, 139, 9 L. Ed. 648 (1837) (originally supporting 'dual federalism' concepts); *McCulloch v. Maryland*, 17 U.S. 316, 436, 4 L. Ed. 579, 609 (1819) (originally rejecting 'dual federalism' concepts); *Gibbons v. Ogden*, 22 U.S. 1, 210–211, 6 L. Ed. 23, 73–74 (1824) (originally rejecting 'dual federalism' concepts).

⁴⁰ U.S. CONST. art. I, § 8, cl. 3. That clause reads, "[t]he Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

⁴¹ This clause also serves as the source of the federal government's power to adopt aviation laws.

⁴² *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S. Ct. 844, 848, 25 L. Ed. 2d 174, 178 (1970)

(Where the [state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities).

(citation omitted).

⁴³ Where Congress has specifically made an action legal, that action can no longer be held invalid under the Commerce Clause. See *Nat'l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81 (2d Cir. 1998).

⁴⁴ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383112 S. Ct. 2031, 2036, 119 L. Ed. 2d 157, 167 (1992) (Citations omitted). See also *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63, 123 S. Ct. 578, 526, 154 L. Ed. 2d 466, 477 (2002) (the "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.") (citations omitted); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 1257, 163 L. Ed. 2d 1079, 1087–88 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis").

“the ultimate touchstone of preemption analysis[,]”⁴⁵ since “the historic police powers of the States [are] not to be superseded by...[a] Federal Act unless that [is] the clear and manifest purpose of Congress.”⁴⁶

The courts can find a congressional intent to preempt in a number of ways. That intent may be express if there is an explicit statement to that effect in the language of a statute or an “express congressional command” asserting it.⁴⁷ Otherwise, courts can imply preemption from the structure and purpose of a federal statute. Under implied preemption, courts may determine that there is a conflict in the law such that “compliance with both federal and state regulations is a physical impossibility[,]” or that the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (conflict preemption).⁴⁸ If such a conflict exists, state and local governments cannot enact regulation to the extent of the actual conflict.⁴⁹ Under implied preemption, courts also may examine whether a “federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it” (field preemption).⁵⁰ In cases of field preemption, federal law so pervasively occupies the field of regulation that it leaves no room for state and local governments to exercise concurrent powers.

The federal government thus has extensive power to supersede laws enacted by state and local governments using the power of preemption. That power is not boundless; the federal government must impose regulatory requirements directly,⁵¹ and it cannot commandeer state and local functions by compelling them to enact or

administer a federal program.⁵² If, however, a court finds that state powers have been preempted, the federal regulation “displace[s] all state laws that fall within its sphere, even including state laws that are consistent[,]”⁵³ and even if the effect of the state law on the federal action “is only indirect.”⁵⁴ This federal power thus acts to restrict the scope of airport proprietary rights when the federal government enacts requirements that do not permit local action under preemption principles.⁵⁵

⁴⁵ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 423 (1992) (citations omitted).

⁴⁶ *Id.* at 516. *See also* *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387, 396 (1993) (to avoid “unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption”) (citations omitted); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695, 705 (1995) (the defendant has the burden to demonstrate that it was Congress’s “clear and manifest purpose” to preempt a state from exercising its powers).

⁴⁷ *Cipollone*, 505 U.S. at 516 (citations omitted). *See also* *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 95, 103 S. Ct. 2890, 2899, 77 L. Ed. 2d 490, 500 (1983) (citations omitted).

⁴⁸ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383, 120 L. Ed. 2d 73, 84 (1992) (citations omitted).

⁴⁹ *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S. Ct. 1063, 1064, 134 (1996) (citations omitted).

⁵⁰ *Cipollone*, 505 U.S. at 516 (citations and internal quotation marks omitted). *See also* *Gade*, 505 U.S. at 98 (citations omitted).

⁵¹ *Reno v. Condon*, 528 U.S. 141, 150–51, 120 S. Ct. 666, 672, 145 L. Ed. 2d 587, 596 (2000).

⁵² *Printz v. United States*, 521 U.S. 898, 933, 117 S. Ct. 2365, 2383, 138 L. Ed. 2d 914, 943 (1997) (rejecting federal ability to commandeer administrative officers and resources in addition to legislative assistance when administering Brady Handgun Violence Prevention Act). *See also* *New York v. United States*, 505 U.S. 144, 188, 112 S. Ct. 2408, 2435, 120 L. Ed. 2d 120, 158 (1992) (the federal government may not compel the states to enact or administer a federal regulatory program).

⁵³ *Morales*, 504 U.S. 374, 387, 112 S. Ct. 2031, 2038, 119 L. Ed. 2d 157, 169 (1992) (original insertion, citation omitted).

⁵⁴ *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 370, 128 S. Ct. 989, 995, 169 L. Ed. 933, 939 (2008).

⁵⁵ *See also* Preemption, 74 Fed. Reg. 24693 (May 20, 2009) (presidential memorandum of Barack Obama advising that under the general policy of his administration, “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption”).

C. Federal Contract Obligations

The scope of an airport proprietor's state law powers can be modified by contract as well as by federal regulation, and federal contract obligations are the third element shaping the general parameters of airport proprietary rights. Most if not all major airports in the United States have accepted funding under a federal grant program. These programs are subject to grant assurances, or contractual conditions, under which the airport proprietor agrees to comply with specified federal policy objectives.⁵⁶ Grant assurance contracts contain the primary federal contract obligations of an airport proprietor. Some proprietors also assume obligations under property deeds from the federal government, but the majority of the obligations contained in those deeds are repeated in the grant assurances.⁵⁷

One of the obligations that these contracts impose on airport proprietors is an obligation to preserve and protect the airport's proprietary rights. The grant assurances are meant to be implemented through an exercise of these rights.⁵⁸ Thus they provide that a proprietor cannot "take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and as-

⁵⁶ See 49 U.S.C. § 47107 (requiring contractual grant assurances). The courts have affirmed that Congress has authority to ask states to participate in programs through such contracts. *Printz*, 521 U.S. at 916.

⁵⁷ Deeds may have been issued pursuant to the Surplus Property Act of 1944, ch. 479, 78 Pub. L. No. 457, 58 Stat. 765 (Oct. 3, 1944), 50 U.S.C., §§ 1611, *et seq.*; the Federal Airport Act of 1946, 49 U.S.C. §§ 1101, *et seq.*, (repealed 1970); the Airport and Airway Development Act of 1970, 91 Pub. L. No. 258, 84 Stat. 219 (May 21, 1970); or the Airport and Airway Improvement Act of 1982, 97 Pub. L. No. 248, 96 Stat. 324 (Sept. 3, 1982). See Airport Compliance Requirements, FAA Order 5190.6B § 1.9 (Sept. 30, 2009), available at http://www.faa.gov/airports/resources/publications/orders/compliance/5190_6/. All of these compliance obligations are construed in accordance with Order 5190.6B.

⁵⁸ See Order 5190.6B § 1.5

("The FAA Airport Compliance Program is contractually based; it does not attempt to control or direct the operation of airports. Rather, the program is designed to monitor and enforce obligations agreed to by airport sponsors in exchange for valuable benefits and rights granted by the United States in return for substantial direct grants of funds and for conveyances of federal property for airport purposes"),

See http://www.faa.gov/airports/resources/publications/orders/compliance/5190_6/media/5190_6b/chap1.pdf.

See also *Monaco Coach Corp. v. Eugene Airport and the City of Eugene, Oregon*, Final Agency Decision, FAA Docket No. 16-03-17, 2005 FAA LEXIS 195 (Mar. 4, 2005), at 24 (Order 5190.6A (now superseded by Order 5190.6B) "is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance").

surances in the grant agreement...."⁵⁹ Proprietors also must "act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance...."⁶⁰

These contracts further acknowledge that a proprietor has broad rights to manage its operations. For example, they recognize that proprietors may provide any aeronautical service to the public on an exclusive basis.⁶¹ They also provide that a proprietor may prohibit or limit a given type, kind, or class of aeronautical use at the airport to protect airport operations and public needs.⁶²

Yet while federal grant contracts support airport proprietary rights, they also impose obligations that limit those rights. For example, under these contracts airport proprietors assume an obligation to make the airport available "on reasonable terms and without unjust discrimination[,]"⁶³ and proprietors must make the airport as "self-sustaining as possible under the circumstances existing at the particular airport."⁶⁴ These and other obligations place limits on the proprietor's range of discretion when managing its facilities.⁶⁵

Grant contract obligations are generally enforced by the Federal Aviation Administration (FAA) through administrative actions.⁶⁶ Consistent with the general contractual policy to support these rights, the FAA's standard of review is often deferential to an airport proprietor's decisions. Under that standard, FAA seeks to determine

whether the airport owner is reasonably meeting the Federal commitments. It is the FAA's position that the airport owner meets commitments when: (a) the obliga-

⁵⁹ Grant Assurance No. 5 (proprietors may give up such rights with the written permission of the Secretary), http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

⁶⁰ *Id.*

⁶¹ Grant Assurance No. 22 (g) (proprietors may provide these services on an exclusive basis on the same conditions that would apply to others), http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

⁶² Grant Assurance No. 22 (i) (additional requirements may apply), http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

⁶³ Grant Assurance No. 22(a), http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

⁶⁴ Grant Assurance No. 24, http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

⁶⁵ FAA Updated Grant Assurances, Program Guidance Letter No. 05-03, Attachment 1: Airport Sponsor Assurances (June 3, 2005), http://www.faa.gov/airports/aip/guidance_letters/media/PGL_05-03.pdf.

⁶⁶ See 14 C.F.R. Part 16.1 (in some cases other agencies have authority to investigate, enforce, and adjudicate complaints).

tions are fully understood, (b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place, which in the FAA's judgment is adequate to reasonably carry out these commitments, and (c) the owner satisfactorily demonstrates that such a program is being carried out.⁶⁷

FAA has stated that under this "reasonableness"⁶⁸ standard it refrains from "managing airports or supplanting the airport owner's proprietary discretion[,]"⁶⁹ and it may do so even in an area as heavily regulated as airport safety.⁷⁰

Similarly, FAA does not pursue punitive measures against airport proprietors for grant assurance violations except when necessary to obtain compliance. Enforcement actions are "designed to achieve voluntary compliance with federal obligations accepted by owners."⁷¹ FAA also does not review past violations, but will only "make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations."⁷² If an airport proprietor is out of compliance, FAA will ask for a remedy,⁷³ but it otherwise will not intercede in the management decisions of an airport sponsor.⁷⁴

Administrative cases reflect FAA's deferential approach. For example, in 2007 FAA and the U.S. Department of Transportation (USDOT) issued 19 opinions reviewing claimed grant assurance violations. Only three cases found violations, and then only in part. If an administrative case is appealed, the courts generally uphold an agency's determinations. Under appellate principles, the courts defer to FAA's or USDOT's interpretations of their own regulations if their interpreta-

⁶⁷ Monaco Coach Corp., 2005 LEXIS 195 at 33, citing Order 5190.6A 5-6(a)(2) (now superseded by Order 5190.6B).

⁶⁸ FAA also expresses this standard as requiring that airport actions be "fair and reasonable to all on-airport aeronautical service providers and relevant to the aeronautical activity to which it is applied." See *Airborne Flying Serv., Inc. v. City of Hot Springs, Ark.*, Final Decision and Order, FAA Docket No. 16-07-06, 2008 FAA LEXIS 148 (May 2, 2008), at 35.

⁶⁹ Monaco Coach Corp., 2005 LEXIS 195, at 33.

⁷⁰ See *id.* at 34–35 ("Safety at airports is a primary function of the FAA; however, sponsors do maintain proprietary functions to oversee the safe and efficient operations at their airports that the FAA does not circumvent").

⁷¹ *AmAv, Inc. v. Md. Aviation Admin.*, Final Agency Decision, FAA Docket No. 16-05-12, 2006 FAA LEXIS 594 (Aug. 8, 2006), at 32.

⁷² *Id.* at 32.

⁷³ See *Platinum Aviation v. Bloomington-Normal Airport Auth.*, Final Decision and Order, FAA Docket No. 16-06-09 (Nov. 28, 2007).

⁷⁴ *Carey v. Afton-Lincoln County Mun. Airport Joint Powers Bd.*, Director's Determination, FAA Docket No. 16-06-06 (Jan. 19, 2007), at 54

(The FAA may advise, but does not monitor or control the management decisions of airport sponsors. Where the actions of the sponsor result in a violation of the sponsor's federal grant assurances, the FAA will step in to resolve the matter. Otherwise, the FAA does not intercede in the management decisions of the airport sponsor).

tions are based on a permissible construction of the regulations.⁷⁵

While an administrative review of these contract obligations is often deferential to an airport proprietor, a review can also impose limitations on the proprietor. For example, under the grant assurances, FAA makes a determination regarding whether an airport proprietor's actions are reasonable. If it finds that those actions are not reasonable, FAA is empowered by the assurances and federal law to require that the proprietor revise its course of action.⁷⁶ Appellate courts will defer to FAA's decision unless it is not within FAA's authority or is not supported by substantial evidence.⁷⁷ Thus while the grant assurances in general support a proprietor's rights, specific obligations can limit an airport proprietor's powers.

Airport proprietary rights are the state law rights held by any given airport proprietor as they may be superseded by federal regulations or modified by federal contracts. These three basic elements together create the general parameters of airport proprietary rights, and legal proceedings may examine any of these three elements if a specific right is challenged. In such a challenge, the historical development of these rights can provide a context for interpreting them.

III. HISTORICAL CONTEXT FOR PROPRIETARY RIGHTS ANALYSIS

Section Summary: Airport proprietary rights are the proprietor's state-granted powers to act to the extent that they are not superseded by federal law or modified by contract. The scope of these rights has developed over time in response to challenges that airport proprietors have faced, and the history of these rights illustrates why proprietors may exercise rights that nonproprietor entities cannot. That history thus provides context for a current analysis interpreting proprietary rights. This section will review some of the factors that historically shaped airport proprietary rights—not to present the current state of the law, but to illustrate how these rights became established in the law as the rights of nonproprietor entities were superseded.

A. INITIAL POWERS AND LIABILITIES

Airport proprietors originally helped establish aviation, and state law provided aviation's original source of regulation. As early as 1922, states began banding together to try to establish uniformity in aviation laws. The National Conference of Commissioners on Uniform State Laws promulgated an Aeronautics Act in 1922

⁷⁵ See *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 796 (5th Cir. 2000), citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (this deference is not granted if the agency is reviewing a statute that it is not charged with administering).

⁷⁶ 49 U.S.C. § 47107.

⁷⁷ See *City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431, 366 U.S. App. D.C. 161 (D.C. Cir. 2005).

that was adopted in many states, and by 1933, all 48 states had laws regarding aeronautics. The federal government, however, then began to address needs for uniformity at a national level. Over time many state measures thus became unnecessary or were preempted under the Supremacy Clause.⁷⁸

The federal government first began enacting aviation law to help aviation grow. It sponsored aviation's development through the U.S. Post Office by creating airmail routes, landing strips, and a fleet of planes, but it never intended to operate the industry. After fostering aviation to a certain point, Congress enacted the Kelly Act, or the Air Mail Act of 1925, authorizing the Post Office to contract for services with commercial air carriers.⁷⁹ Then, a year later, Congress began to regulate the industry through the Air Commerce Act of 1926. That Act created basic airspace infrastructure and required licensing and accident investigations, but it specifically prohibited the federal government from establishing and maintaining airports—leaving that task to local proprietors.⁸⁰

Congress continued to regulate as the industry developed. It addressed the growing complexity in the airmail industry under the Air Mail Act of 1934, and then revisited issues in a more comprehensive manner in 1938 under the McCarren-Lea Act, also known as the Civil Aeronautics Act. This Act established the Civil Aeronautics Authority (CAA, and later the Civil Aeronautics Board or CAB). It developed national aviation policy for passengers and cargo and regulated airline safety and economics in a more comprehensive way through certificates of convenience and necessity.

The Act also directed the CAA to survey the existing system of airports and determine how the federal government should participate in their development or operation as a national system. As a result of that survey, Congress adopted the Federal Airport Act of 1946 to provide the first peacetime program of financial aid enabling local governments to develop airports. The Act required the federal government to approve federal funding for airports, but it recognized that states possessed the power to construct airports without federal permission. Thus throughout this early regulatory period, Congress necessarily recognized the proprietary

rights that airports exercised as they participated in and helped establish the aviation system.⁸¹

The courts also recognized the role that airport proprietors played in the aviation system. As aviation developed, it increasingly affected surrounding communities, and communities looked to the courts for relief. Aviation subjected landowners near the airport to unwanted impacts, including low-level flights and drifting dust.⁸² Airport neighbors brought nuisance actions claiming that low-flying aircraft could “disturb and upset” residents, “frighten children,” and swoop down over guests “not necessarily, it seems, while taking off or landing.”⁸³ Despite these nuisance claims, the courts did not consider airports to be a nuisance *per se*.⁸⁴

Nuisance claims against proprietors soon began to develop into more costly concerns. The courts recognized early on that an invasion of unoccupied airspace at low altitudes was a technical trespass,⁸⁵ and they then found that under certain circumstances, this trespass could result in a government taking. In *United States v. Causby*,⁸⁶ the federal government had dramatically increased flights at an airport to conduct wartime training. These flights frequently passed over a neighboring poultry farm at extremely low altitudes, and the farmer claimed that the flights caused his chickens to destroy themselves and impaired the use of his property. The Court had to determine whether these circumstances had the effect of taking a property interest from the farmer.

The Court stated, “[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared.”⁸⁷ The Court found,

[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land...[thus when planes skim the surface] there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.⁸⁸

⁸¹ See *Town of New Windsor v. Ronan*, 329 F. Supp. 1286, 1289–90 (S.D.N.Y. 1971).

⁸² *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929 (N.D. Ohio 1930).

⁸³ *Gay v. Taylor*, 19 Pa. D. & C. 31, 38 (Pa. 1932).

⁸⁴ *Thrasher v. Atlanta*, 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158 (Ga. 1934).

⁸⁵ *Smith v. New England Aircraft Co. Inc.*, 270 Mass. 511, 525, 526, 170 N.E. 385, 391, 69 A.L.R. 300 (1930).

⁸⁶ *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

⁸⁷ *Causby*, 328 U.S. at 260–61. See also *Hyde v. Somerset Air Service, Inc.*, 1 N.J. Super. 346, 61 A.2d 645 (1948); *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929 (N.D. Ohio 1930) (discussing the use of this maxim back to Lord Coke from the Year Book: 22 Henry 6, 59; 10 Edw. 4, 14; 14 Hen. 8, 12).

⁸⁸ *Causby*, 328 U.S. at 265.

⁷⁸ Uniform Aeronautics Act (1922) (withdrawn) (available through the National Conference of Commissioners on Uniform State Laws). The National Conference of Commissioners on Uniform State Laws later abandoned many of its aviation acts due to the enactment of federal law.

⁷⁹ See U.S. Centennial of Flight Commission, *Airmail: the Air Mail Act of 1925 Through 1929*, http://www.centennialofflight.gov/essay/Government_Role/1925_29_airmail/POL.5.htm.

⁸⁰ See generally Federal Aviation Administration, *FAA Historical Chronology, 1926-1996*, <http://www.faa.gov/about/media/b-chron.pdf> (“FAA Historical Chronology”) (providing historical information regarding the development of aviation in the United States).

The Court determined for the first time that while a property owner could not expect to own the airspace into the universe, certain low-level flights over property could constitute a taking under the U.S. Constitution when they substantially impaired the use of the property. The Court thus established a cause of action for inverse condemnation against the federal government, and later established it against state government as well.⁸⁹

The impact of aviation on local communities not only led courts to assess damages against airport proprietors, it also led courts to consider a proprietor's affirmative responsibilities to prevent those impacts. For example, in one historical case, a court noted that where aviators frequently violated an airport's federally-approved flight rules and regulations, the court considered the city to be liable for the aviators' actions. "If the City is not responsible for and properly chargeable with enforcement of the rules and regulations, who can be?"⁹⁰ The court then required the city to implement additional air safety measures to meet its public duties as a proprietor. The court ordered the proprietor to erect a control tower, employ staff to enforce the rules, and refuse future use of the airport to any violator.

These early laws and court challenges thus established some fundamental concepts that shape the rights of airport proprietors. Governmental airport proprietors were necessary to establish and operate the aviation system locally, and federal law relied on that fact and instead focused on regulating interstate concerns. The courts looked to airport proprietors to address aviation's local impacts whether they occurred on or off of the airport's campus. If proprietors failed to address certain impacts, the courts might hold them responsible for liability despite the presence of federal law. Then changes in technology intensified these early roles.

B. Increasing Impacts, Legislation, and Litigation

The jet engine ushered in abrupt changes in aviation by dramatically increasing noise and aircraft operations. Congress responded to these rapid changes by increasing the federal government's regulatory reach. Congress replaced the Civil Aeronautics Act with the Federal Aviation Act in 1958 and established the FAA. The Act "retained the policy language of the Civil Aeronautics Act and maintained the CAB as the primary regulatory agency with respect to decisions on airfares and routes."⁹¹ It also gave the FAA broad authority to prescribe air traffic rules and regulations to govern the flight of aircraft for the protection of aircraft and persons and property on the ground.

However, when Congress amended that Act in 1968, it again recognized the historic role of airport proprietary rights. In the legislative history of the amendment, Congress stated,

the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.⁹²

The FAA similarly recognized those rights in regulations that it issued under the 1968 amendment.⁹³

Congress continued to defer to airport proprietary rights when it passed the Airport and Airway Development Act of 1970. That Act expanded federal roles beyond those contained in the Federal Airport Act of 1946, and it created new funding sources for airport development. However, as with the 1946 Act, it did not preempt a proprietor's authority to build and enlarge airports.

The jet engine also changed the nature of judicial challenges as communities struggled with the effects of additional noise. The courts continued to approve of an airport proprietor's traditional method for addressing noise impacts—by acquiring real property interests. Those purchases might include easements for navigation and flight as well as for necessary clearances and to remove obstructions near the airport.⁹⁴ Yet concerns for liability continued.

⁸⁹ *Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962).

⁹⁰ *Brooks v. Patterson*, 159 Fla. 263, 271, 31 So. 2d 472, 476 (Fla. 1947).

⁹¹ Luis G. Zambrano, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle of Noise*, 66 J. Air L. & COM. 445, 454 (2000).

⁹² S. REP. NO. 90-1353, 2 U.S. CODE CONG. & ADM. NEWS 2694 (1968).

⁹³ Under 14 C.F.R. pt. 36 regarding noise, FAA stated that "[r]esponsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport."

⁹⁴ See *United States v. Brondum*, 272 F.2d 642, 644-45 (5th Cir. 1959); *United States v. 64.88 Acres of Land*, 244 F.2d 534, 535-36 (3d Cir. 1957); *Western v. McGehee*, 202 F.Supp. 287, 289-90 (D. Md. 1962); and *United States v. 4.43 Acres of Land*, 137 F. Supp. 567, 572 (N.D. Tex. 1956).

In one historical case, a proprietor argued that it should not be liable for a taking in connection with aircraft glide paths because, according to *Causby*, the airways were in the public domain.⁹⁵ However the court found that “[t]he government simply cannot arbitrarily declare that all of the airspace over a person’s land is public domain and then, cavalierly, claim absolute immunity against property owners’ claims for any and all possible damages.”⁹⁶ Under the circumstances of that case, the court determined that “an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed”⁹⁷ to prevent the private airspace of adjacent landowners from being invaded.

The U.S. Supreme Court also found that, as in *Causby*, under some circumstances an airport proprietor could be liable for failing to obtain air easements near an airport. In *Griggs v. Allegheny County*,⁹⁸ a county proprietor

decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed.... We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.⁹⁹

As in the *Causby* case, in *Griggs*, takeoffs and landings were “so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”¹⁰⁰

Growing concerns for liability led proprietors to look for solutions in a variety of measures. In many instances they found that zoning changes could provide for compatible land uses near the airport.¹⁰¹ These strategies might be effective regardless of whether they were adopted by an airport proprietor or nonproprietor,¹⁰² and courts recognized that local actions were generally best able to address local noise concerns.¹⁰³ However, on occasion courts found that zoning measures

⁹⁵ *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (Wash. Sup. Ct. 1960) (this action arose before the Civil Aeronautics Board established minimum safe altitudes of flight and Congress placed airspace above those altitudes in the public domain).

⁹⁶ *Id.* at 671.

⁹⁷ *Id.*

⁹⁸ *Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962).

⁹⁹ *Id.* at 89.

¹⁰⁰ *United States v. Causby*, 328 U.S. 256, 266, 66 S. Ct. 1062, 1068, 90 L. Ed. 1206, 1213 (1946).

¹⁰¹ *See Smith v. County of Santa Barbara*, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966) (airport-related zoning change from residential to industrial use imposed prior to construction was valid exercise of county police power to protect against residential exposure to noise).

¹⁰² *See id.*

¹⁰³ *See generally* J. Scott Hamilton, Allocation of Airspace as a Scarce National Resource, 22 *TRANSP. L.J.* 251, 254–63 (1994); Zambrano, *supra* note 91, at 445.

could also result in liability for a taking if height restrictions were found to constitute an aviation easement.¹⁰⁴

At a few airports, community concerns about these new levels of noise became so intense that proprietors sought to address them by regulating how aircraft could use their facilities. In the 1966 case of *New York Port Authority v. Eastern Airlines*,¹⁰⁵ a federal court considered whether the Port Authority could implement rules and regulations governing the use of certain runways by jet aircraft. The Port Authority adopted these rules and regulations, and the airlines agreed to them through correspondence. The airlines then asked to use the restricted runways, and the Port Authority sought an injunction.

The court first analyzed these issues using the traditional test applicable to municipal actions—reasonableness. Under this standard, courts defer to municipal decisions unless an action is unreasonable in light of its purpose, or is arbitrary, in bad faith, or similarly abusive. The court determined that

“[r]easonableness” is an elastic term and can only be appraised in the light of the particular circumstances of each case. When dealing with a quasi-public corporation charged with the duty of operating and managing a number of airports in the public interest and for the benefit of the entire public, including residents of the neighboring communities as well as the airlines, any doubt as to the reasonableness of its regulations should be resolved in its favor.¹⁰⁶

The court noted that the Port Authority had particular expertise and experience with the airport. Therefore, “[i]t is not for the Court to substitute its judgment for that of the Port Authority or decide what regulations should be adopted. Its function is only to determine, in the light of all the circumstances, whether the particular regulation is so unreasonable as to violate the understanding between the parties.”¹⁰⁷ Under that standard, the court found that the Port Authority’s regulations would substantially abate aircraft noise over a particular neighborhood and that the regulations did not have a substantial effect on airport use since the Port Authority could make runways available at other airports. The court therefore found the regulation to be reasonable and allowed the Port Authority to enforce it.

The court then considered whether this airport proprietor’s requirements interfered with federal law, specifically, with the FAA’s right to control air traffic under the Federal Aviation Act of 1958. The court noted that “[t]here can be no question that under the Federal Aviation Act of 1958...FAA has the power and authority to regulate the flight of aircraft through the navigable airspace of the United States and to assign the use of

¹⁰⁴ *See Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

¹⁰⁵ *N.Y. Port Auth. v. E. Airlines*, 259 F. Supp. 745 (E.D.N.Y. 1966).

¹⁰⁶ *Id.* at 751.

¹⁰⁷ *Id.*

airspace upon such terms and conditions as may be necessary to insure the safety of aircraft.”¹⁰⁸ It then also noted “[o]n the other hand, the Port Authority also has power and authority to regulate land structures and the use of its runways at its airports.”¹⁰⁹

While the court recognized these competing powers and rights, it concluded that

[i]t is unnecessary to decide in this case whether the FAA possesses the power and authority to pre-empt the area of regulating the use of the runways for purposes of air traffic control into and out of LaGuardia Airport. The issue here is whether the FAA has actually attempted to exercise such power and authority in opposition to the Port Authority’s regulations and has thus frozen the area.¹¹⁰

The court claimed not to perform a preemption analysis in this case, but it analyzed this issue based on whether there was a conflict between the proprietor’s rights and federal law. In this instance, it found no conflict. FAA had stated, “while the FAA believes that runways 4–22 can be safely used, it is not prepared at the present time to direct their use in the interest of safety or to pre-empt the regulation of its use in contradiction of Port Authority’s rules and regulations.”¹¹¹ Thus there was no specific conflicting federal action, and as a result the airport proprietor’s actions were not preempted.

Cases from this era illustrate the difficulties that airport proprietors faced as they tried to respond to the impacts of jet noise in the community. Federal law continued to recognize the historic rights and responsibilities of the proprietor. Yet the measures that proprietors turned to during this period in an effort to address noise impacts—such as zoning, rights of public domain, and actions affecting aircraft—offered them no clear means of avoiding legal action.

These historic cases also illustrate another important factor involved in determining proprietary rights. These courts generally analyzed whether federal law had superceded a proprietor’s rights under the law existing at that time by applying a conflict preemption analysis to specific circumstances rather than a field preemption analysis. One court specifically rejected field preemption when it refused to enjoin a public airport’s operations based on noise and vibration complaints from nearby residents.¹¹² It found that state law and policy supported the airport’s operations and rejected both conflict and field preemption.¹¹³ The court found a lack of field preemption based on the traditional

legal presumption against preemption, and a savings clause in the Federal Aviation Act of 1958 that preserved common law remedies.¹¹⁴ The court found “[t]hus, it is clear that the federal legislation [of aviation activities] was not intended to be exclusive,”¹¹⁵ and it found the presence of a conflict to be the determinative factor.¹¹⁶

During this same period, courts also began to highlight another important factor in a proprietary rights analysis—that nonproprietor entities do not have similar rights. For example, when a nonproprietor town attempted to prohibit flights lower than 1,000 ft based on a taking argument under *Causby*, the court found that the town’s action was preempted. The town lay under the flight path of Idlewild (JFK) airport, and the court found that as such the town’s ordinance interfered with federal air traffic rules. It determined that these flights did not affect the town to such a degree as to constitute a taking under *Causby*, and it held that Congress had preempted the regulation of air traffic generally under field preemption and thus had precluded any local regulations to the contrary.¹¹⁷

A number of years later, another nonproprietor town in this same flight path prohibited the operation of any mechanism (including an aircraft) that created noise above specified levels. The court found that this nonproprietary ordinance would be determinative of altitudes for aircraft flying in or out of the airport and thus was incompatible in large part with traffic patterns and FAA procedures. It found that as such the ordinance was in direct conflict with applicable federal regulation under a conflict analysis; the regulation in question governed airspace and it did not contemplate competing local action.¹¹⁸ Thus the law increasingly recognized that proprietors and nonproprietors should not be treated in the same manner, and as federal law continued to develop, it formalized that concept.

C. Supreme Court Establishment of Proprietary Rights

During the 1970s, both the U.S. Supreme Court and Congress formally recognized and established airport proprietary rights in the law, and noise concerns again primarily drove that recognition. Early in the decade, national concerns led Congress to pass the Noise Control Act of 1972, which placed noise regulation in the hands of the Environmental Protection Agency and the

¹⁰⁸ *Id.* at 752.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 753.

¹¹² *Loma Linda Portal Civic Club v. Am. Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548 (1964).

¹¹³ *Id.* at 592 (“Only a compelling federal interest, e.g., where the state-created liability would clearly frustrate federal purposes, justifies our implying an intent on the part of Congress to nullify common-law rights normally in the state-law sphere”).

¹¹⁴ *Id.* at 592–93 (citing 49 U.S.C. § 1506) (“Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies”).

¹¹⁵ *Id.* at 593.

¹¹⁶ The court also found supporting precedence for this approach. See *id.* at 593 (citing *City of Newark, N.J. v. E. Airlines, Inc.*, 159 F. Supp. 750 (D. N.J. 1958)).

¹¹⁷ *Allegheny Airlines, Inc. v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956).

¹¹⁸ *Am. Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967).

FAA. As new legislation, this Act threw into question the extent to which local communities could concurrently regulate aircraft noise. The Supreme Court soon addressed that question.

In *City of Burbank v. Lockheed Air Terminal, Inc.*,¹¹⁹ the Supreme Court considered whether, in light of the Noise Control Act of 1972, a city as a regulator rather than a proprietor could impose a curfew on jet aircraft at the Hollywood-Burbank Airport. The Court noted that the Act required FAA to provide for the control and abatement of aircraft noise,¹²⁰ and that there was “no express provision of pre-emption in the 1972 Act.”¹²¹ The Court thus analyzed the issue under implied preemption and determined that “the pervasive nature of the scheme of federal regulation of aircraft noise...leads us to conclude that there is pre-emption.”¹²² As with other nonproprietary cases, the Court used implied field preemption to reach its conclusion. In so finding, however, the Court expressly limited this holding to nonproprietors.

The Court found that under the legislative history of the 1972 Act, the Act was not

intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed...prior to the enactment of the bill.... States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators...and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered...prior to the enactment of the bill.”¹²³

The Court thus determined that nonproprietors were preempted from enforcing noise standards under the Act. However, in recognition of the legislative history, the Court expressly limited its holding to government units that do not own airports, and stated that it did “not consider here what limits, if any, apply to a municipality as a proprietor.”¹²⁴

In a dissent written by Justice Rehnquist, four justices pointed out that Congress had found local airport operators to be “closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air

commerce.”¹²⁵ It noted the congressional intent to allow local proprietary regulation, and opined that these cases should be determined on a case-by-case basis in light of their effect on interstate commerce.¹²⁶

Subsequent courts applied this proprietary distinction. In *Air Transport Association v. Crotti*,¹²⁷ the court considered whether a state could set noise standards at all of its state-permitted airports. The court found that where the state had imposed requirements to monitor noise in the community and to develop compatible land uses, it was clearly acting within the authority of its police power and this did not conflict with any congressional intent. However, the court found that some of the state’s noise standards intruded on “the avowed exclusive domain of federal power under the Noise Control Act of 1972 in the control of noise emitted by aircraft during flight operations and generally air space management.”¹²⁸ Regulations attempting to address aircraft noise levels in flight were “a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce.”¹²⁹ Thus these actions by a nonproprietor state were preempted under field preemption.

The *Crotti* court considered this case in 1975, just after the Supreme Court issued its decision in *City of Burbank*. It noted:

[i]t is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative. That correlating right of proprietorship control is recognized and exempted from judicially declared federal pre-emption by [*City of Burbank*].... Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities. The intent of Congress not to interfere with such basic airport control is made clear in the legislative history....¹³⁰

A subsequent case then considered the actions of a proprietor. In *National Aviation v. City of Hayward, California*,¹³¹ a court considered whether the Noise Control Act of 1972 preempted a proprietor from prohibiting all landings and takeoffs exceeding 75 dB between the hours of 11:00 p.m. and 7:00 a.m. The court noted the precedent established in *City of Burbank* and *Crotti* and in the legislative history. It also noted that FAA’s regu-

¹¹⁹ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973).

¹²⁰ *Id.* at 629.

¹²¹ *Id.* at 633.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 635 n.14 (“Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory...authority that a municipality may have as a landlord is not necessarily congruent with its police power”).

¹²⁵ *Id.* at 645 (citation omitted).

¹²⁶ *Id.* at 653–54.

¹²⁷ *Air Transport Ass’n v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975).

¹²⁸ *Id.* at 62.

¹²⁹ *Id.* at 65.

¹³⁰ *Id.* at 63–64 (citations omitted) (citing as legislative history § 611 of the Federal Aviation Act of 1958. S. REP. NO. 90–1353, at 7).

¹³¹ *Nat’l Aviation v. City of Hayward, Cal.*, 418 F. Supp. 417 (N.D. Cal. 1976).

lations under 14 C.F.R. Part 36 emphasized that local airport owners are responsible for determining the permissible noise levels for aircraft using their airport. Based in particular on the legislative history's intent to preserve proprietary rights, the court upheld the city's curfew. "[A]t the present time, Congress and the FAA do not appear to have preempted the area[.]"¹³² The court went on to find that the curfew also was not prohibited under the Commerce Clause.¹³³

In another case involving a proprietor, *British Airways Board v. Port Authority of New York and New Jersey*,¹³⁴ a proprietor imposed a temporary ban on operations by the Concorde to first study whether the proprietor's noise criteria would permit the Concorde's noise levels. The court noted that in supporting briefs the federal government had "continued the traditional policy of refusing to preempt the local airport operator's responsibility for establishing permissible levels of noise."¹³⁵ However, as the court considered how to evaluate proprietary rights concerning noise at that time, it also determined that "[i]mplicit in the federal scheme of noise regulation, which accords to local airport proprietors the critical responsibility for controlling permissible noise levels in the vicinity of their airports, is the assumption that this responsibility will be exercised in a fair, reasonable and nondiscriminatory manner."¹³⁶ The court found that "[a]ny other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster."¹³⁷

The court also reflected the developing state of federal noise regulation by noting that "[t]he regulation of excessive aircraft noise has traditionally been a cooperative enterprise, in which both federal authorities and local airport proprietors play an important part."¹³⁸ Yet it noted that protecting local populations from noise fell to the agency "charged with operating the airport," and the court pointed to the proprietor's local control and exposure to liability as the reason.¹³⁹

[T]he inherently local aspect of noise control can be most effectively left to the operator, the unitary local authority who controls airport access. It has always seemed fair to assume that the operator will act in a rational manner in

¹³² *Id.* at 425.

¹³³ *Id.* at 425.

¹³⁴ *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F.2d 75 (2d Cir. 1977) (reversing order of summary judgment). See also *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 564 F.2d 1002 (2d Cir. 1977) (upholding injunction but modifying order to permit broader consideration of noise impacts).

¹³⁵ *British Airways*, 558 F.2d at 82.

¹³⁶ *Id.*

¹³⁷ *Id.* at 84. See also *Global Int'l Airways v. Port Auth. of N.Y. and N.J.*, 727 F.2d 246 (2d Cir. 1984) (Port enacted restrictions reducing number of operations by Stage 2 and 3 aircraft, and court held that airport proprietor retained the power to enact nondiscriminatory restrictions on airport noise).

¹³⁸ *Id.* at 83.

¹³⁹ *Id.*

weighing the commercial benefits of proposed service against its costs, both economic and political.¹⁴⁰

Later that same year, this court struck down the Port Authority's temporary ban on the Concorde. In the court's view, the Port Authority had not acted with "reasonable dispatch" while studying the issue and could not "stall indefinitely."¹⁴¹ Excessive delay would not meet the court's standard for fair and reasonable action. To determine whether a delay was unreasonable, the court would "scrutinize the nature and character of the problems before the agency to assess whether the path it has chosen to pursue will resolve those issues in the reasonably foreseeable future."¹⁴²

While the court struck down the Port Authority's temporary ban, it again acknowledged that

[t]he task of protecting the local population from airport noise...has fallen to the agency, usually of local government, that owns and operates the airfield.... Congress has consistently reaffirmed its commitment to this two tiered scheme, and both the Supreme Court and executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions.¹⁴³

The court's opinion in the *British Airways* cases reflected the developing state of noise regulation, and acknowledged that Congress's noise measures had not removed proprietary rights to control noise based on the same historic factors traditionally raised—control and liability. It noted the proprietor's powers and responsibilities, including the proprietor's ability to determine the airport's location, acquire property and air easements, assure compatible land use, and assume liability for local aviation impacts, and the fact that the airport proprietor was simply in a better position to take these actions.¹⁴⁴ It then determined that "Congress has reserved to proprietors the authority to enact reasonable noise regulations, as an exercise of ownership rights in the airport, because they are in a better position to assure the public weal."¹⁴⁵

Thus the 1970s began with new noise legislation for the courts to interpret. Consistent with factors developed under earlier cases, the courts found that this legislation affected proprietors and nonproprietors differently. Nonproprietors were subject to field preemption, and under the new legislation their local powers to regulate noise had been superseded. Yet the courts continued to establish a different set of rights for proprietors based on their historic functions. Congress recognized that same analysis when it formally established proprietary rights.

¹⁴⁰ *Id.*

¹⁴¹ *British Airways*, 564 F.2d at 1012.

¹⁴² *Id.*

¹⁴³ *Id.* at 1010–11 (footnote omitted).

¹⁴⁴ *Id.* at 83–85.

¹⁴⁵ *Id.* at 85.

D. Further Establishment of Proprietary Rights

Congress formalized statutory recognition of airport proprietary rights when it passed the Airline Deregulation Act (ADA) in 1978. Under that Act, Congress determined to change the nature of aviation by removing airline economic regulations and opening aviation to the forces of competition. Congress made this change after determining that “maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality...of air transportation services.”¹⁴⁶ However, “[t]o ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier.”¹⁴⁷

While Congress sought to protect air carriers from state regulation, it also expressly allowed airport operators to exercise their proprietary rights. Its enactment, 49 U.S.C. § 41713, states,

[e]xcept as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 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 airport transportation under this part.¹⁴⁸

However, “[t]his subsection does not limit a State, political subdivision of a State, or political authority of at least 2 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.”¹⁴⁹

This congressional act had the effect of preserving an airport proprietor’s longstanding role as Congress sought to prohibit state interference with a deregulated aviation industry. As subsequent cases demonstrate, without this express preservation the preemptive effect of 49 U.S.C. § 41713 is wide-sweeping. For example, in *Morales v. Trans World Airlines, Inc.*,¹⁵⁰ the U.S. Supreme Court interpreted the phrase “relating to” in 49 U.S.C. § 41713 to mean that “[s]tate enforcement actions having a connection with or reference to air carrier ‘rates,¹⁵¹ routes, or services’ are pre-empted under [49 U.S.C. § 41713.]”¹⁵² Thus actions such as state deceptive practices laws could not be enforced against air carrier advertising practices. The Court found that

¹⁴⁶ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S. Ct. 2031, 2034, 119 L. Ed. 2d 157, 164 (1992) (internal quotation marks removed) citing 49 U.S.C. §§ 1302(a)(4), 1302(a)(9).

¹⁴⁷ *Id.* at 378-79 (internal quotation marks removed), citing 49 U.S.C. § 1305(a)(1).

¹⁴⁸ 49 U.S.C. § 41713(b)(1).

¹⁴⁹ 49 U.S.C. § 41713(b)(3).

¹⁵⁰ *Morales*, 504 U.S. at 374 (interpreted in accordance with similar language under ERISA).

¹⁵¹ At the time of *Morales* this provision referred to a “rate” rather than a “price.”

¹⁵² *Morales*, 504 U.S. at 384.

nonproprietary action was preempted whether state law addressed air carrier activities directly or indirectly, and whether or not state law was consistent with federal requirements.¹⁵³ States could only regulate where a law was “too tenuous, remote or peripheral” in how it affected air carriers.¹⁵⁴

Similarly, in *American Airlines, Inc. v. Wolens*,¹⁵⁵ the Court interpreted a different phrase from the Act and invalidated state tort actions such as state consumer fraud laws when asserted against air carriers. The Court found that such a law is “prescriptive; it controls the primary conduct of those falling within its governance.”¹⁵⁶ However, state contract actions alleging similar issues were permissible, since they only allow an individual to seek “recovery solely for the airline’s alleged breach of its own, self-imposed undertakings.”¹⁵⁷ A variety of decisions have allowed¹⁵⁸ or disallowed¹⁵⁹ various state actions against air carriers under the Act. Recently the U.S. Supreme Court reaffirmed its broad preemptive interpretation under 49 U.S.C. § 41713, finding “pre-emption occurs [for non-proprietary actions] at least where state laws have a ‘significant impact’ related to Congress’ deregulatory and pre-emption-related objectives.”¹⁶⁰

As with these more distant state actions, it is also “settled law that non-proprietor municipalities are preempted from regulating airports in any manner that directly interferes with aircraft operations.”¹⁶¹ Thus in

¹⁵³ *Id.* at 386–87.

¹⁵⁴ *Id.* at 390 (the Court “expressed no views about where it would be appropriate to draw the line”).

¹⁵⁵ *Am. Airlines v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995).

¹⁵⁶ *Id.* at 234, 227.

¹⁵⁷ *Id.* at 228 (private contractual obligations involving an airline “do not amount to a State’s enactment or enforcement of any law, rule, regulation, standard or other provision having the force and effect of law within the meaning of [the Act]”).

¹⁵⁸ See *Charas v. TWA*, 160 F.3d 1259, 1261 (9th Cir. 1998) (considering “services” to be matters such as “the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo or mail, but not the provisions of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities”); accord *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998).

¹⁵⁹ The Fifth, Fourth, and Seventh circuits interpret a more expansive list of activities to constitute prohibited “services” under the Act. See *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996). See also *N.W. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 121 S. Ct. 650, 148 L. Ed. 2d 571 (2000) (Justice O’Connor noted this split among the circuits when the Court denied certiorari to a similar case).

¹⁶⁰ See *Rowe v. N.H. Motor Transport Ass’n*, 552 U.S. 364, 371, 128 S. Ct. 998, 995, 169 L. Ed. 2d 933, 939 (considering identical language adopted under a different act).

¹⁶¹ *Burbank-Glendale-Pasadena Airport Auth. v. City of L.A.*, 979 F.2d 1338, 1341 (9th Cir. 1992) (citing *City of Burbank*).

Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles,¹⁶² when a nonproprietor required an airport to obtain prior approval for plans to develop airport landing areas, the court found that federal law preempted the ordinance. A nonproprietor municipality or entity “may not exercise its police powers to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport.”¹⁶³ Likewise, in *San Diego Unified Port Dist. v. Gianturco*,¹⁶⁴ a state could not enact certain noise restrictions affecting aircraft as the source of the noise because it was a nonproprietor. In *Air Transport Association of America, Inc. v. Cuomo*,¹⁶⁵ a nonproprietor state enacted a passenger bill of rights requiring that airlines provide for the needs of passengers during lengthy ground delays, but the court had “little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier.”¹⁶⁶

However, 49 U.S.C. § 41713 does allow some nonproprietor actions when they affect airport activities more generally. For example, in *DiFiore v. American Airlines, Inc.*,¹⁶⁷ an airline argued that under preemption principles the plaintiff should not be able to rely on the Massachusetts Tip Law to prevent the airline from diverting tip revenue to itself. The court found that this law’s requirements were too tenuous under 49 U.S.C. § 41713 to apply preemption. The court also noted that there is a presumption against preemption, and that employee claims, as an area of traditional state regulation, were generally not found preempted under § 41713.¹⁶⁸ Similarly, in *Air Transport Association of America v. City and County of San Francisco*,¹⁶⁹ the court found that a city ordinance could prohibit the city from contracting with companies when their employee benefits plans discriminated between employees with spouses and employees with domestic partners. As written the ordinance applied to hundreds of different industries. It did not just affect airline concerns even though the city could refuse to lease airport property to air carriers for noncompliance.

¹⁶² *Id.* at 1341.

¹⁶³ *Id.*

¹⁶⁴ *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1316–17 (9th Cir. 1981).

¹⁶⁵ *Air Trans. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008).

¹⁶⁶ *Id.* at 221. *See also* Enhancing Airline Passenger Protections, 74 Fed. Reg. 68983 (Dec. 30, 2009) (adopting passenger bill of rights).

¹⁶⁷ *DiFiore v. Am. Airlines, Inc.*, 483 F. Supp. 2d 121 (D. Mass. 2007) (subsequent questions raised under Massachusetts statute).

¹⁶⁸ *Id.* at 125–26. *See also* *SeaAir NY, Inc. v. City of N.Y.*, 250 F.3d 183 (2d Cir. 2001) (operator of seaplane sightseeing tours was not engaged in interstate air transportation as defined in 49 U.S.C. § 41713, and therefore that section did not preempt a city regulation prohibiting these tours).

¹⁶⁹ *Air Transp. Ass’n of Am. v. City and County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001).

Thus by the end of the 1970s, Congress and the courts had formally recognized and established that airport proprietors could exercise a scope of state-granted rights based on the longstanding purpose and function of an airport proprietor. By contrast, the law broadly preempted nonproprietary rights in aviation under field preemption. The factors involved in this historical development provide context for interpreting current questions about these rights since the longstanding purpose and function of an airport proprietor continue to drive its actions. In a current proprietary rights analysis, a proprietor’s scope of rights may thus be influenced by how courts interpret the need to exercise these longstanding powers. This study will conclude by sampling the complex scope of current proprietary rights analysis through an overview of how it determines rights in several common areas.

IV. OVERVIEW OF CURRENT PROPRIETARY RIGHTS ANALYSIS

Section Summary: As their historical development demonstrates, a current analysis of proprietary rights begins with a threshold question: who is a proprietor? That status initially must be confirmed to properly determine what rights may be exercised. Once a proprietor has been identified, a proprietary rights analysis then may consider any of the elements that can shape those rights—state law issues, the effect of preemption, and contractual modifications. This study will sample the diverse scope of the current analysis by providing a brief overview of three areas: proprietary rights to address the local effects of flight, to impose rates and charges, and to manage lands. In general, when aviation interests compete with nonaviation interests, a proprietary rights analysis will support the proprietor’s efforts to participate in the system. When several aviation interests assert overlapping rights, however, a proprietary rights analysis can produce complex results as it attempts to distinguish among those interests.

A. Federal Law's Threshold Question: Who Is a Proprietor?

The legal development of airport proprietary rights makes clear that as a threshold question, courts must establish the identity of a proprietor. Under *City of Burbank*, the U.S. Supreme Court distinguished airport proprietors from nonproprietors based on which party owned the airport, controlled its operations, and was responsible for airport liability.¹⁷⁰ By statute Congress has described an airport proprietor as being the political entity that “owns or operates an airport,” and it refers to that entity as “carrying out its proprietary powers and rights.”¹⁷¹ The law often views these factors as being essential attributes of proprietorship, but ownership alone is generally not sufficient to establish an entity as a proprietor.

Airport owners that transfer control of the airport to another entity, such as through a lease, may lose proprietary status. In *Pirola v. City of Clearwater*,¹⁷² the court determined that

before deciding whether a city's potential liability justifies the exercise of its proprietary power...we must determine whether the city in fact possessed a proprietary power to regulate. In this case the city contracted away its right to impose the desired restrictions. Therefore, we need not decide whether the proprietor exception is applicable and whether the city faces potential liability for excessive noise.¹⁷³

Thus control, not just ownership, was found to be a key proprietary attribute. By leasing the airport, the government owner was not considered to be the proprietor.¹⁷⁴

At least one court reached this same outcome due to a city's internal transfer. In *Air Cal, Inc. v. City and County of San Francisco*,¹⁷⁵ when one city vested its “limited proprietary powers” for an airport in an airports commission, the court found that the city could no longer act as a proprietor to control airport decisions.¹⁷⁶ The city had lawfully circumscribed its own powers,¹⁷⁷ and thus the parent entity could not act in a proprietary capacity.

¹⁷⁰ *City of Burbank*, 411 U.S. at 635.

¹⁷¹ 49 U.S.C. § 41713(b)(3).

¹⁷² *Pirola v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983).

¹⁷³ *Id.* at 1009. See also *City and County of San Francisco v. W. Air Lines, Inc.*, 204 Cal. App. 2d 105, 132, 22 Cal. Rptr. 216, 233 (1962); *Coleman v. City of Oakland*, 110 Cal. App. 715, 295 P. 59, 61 (1930).

¹⁷⁴ *Pirola v. City of Clearwater*, 711 F.2d at 1010 (11th Cir. 1983).

¹⁷⁵ *Air Cal, Inc. v. City and County of San Francisco*, 865 F.2d 1112 (9th Cir. 1989).

¹⁷⁶ *Id.* at 1115.

¹⁷⁷ *Id.* at 1118–19. See also *Citizens for Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 917 F.2d 48, 286 U.S. App. D.C. 334 (D.C. Cir. 1990) (separation of powers concerns apply to airport actions).

While ownership, control of operations, and exposure to liability are important attributes of proprietorship, they are not exclusive. For example, one court considered whether an airline indemnity agreement removed a city's “right to claim the proprietor exemption...[by shifting] liability to airport users.”¹⁷⁸ It found that the “rationale for the [proprietor's] exemption extends beyond purely financial concerns. The [proprietor] should be allowed to define the threshold of its liability, and 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 the City's human environment.”¹⁷⁹ Thus a proprietor also has a responsibility and an ability to protect the local environment. Another court noted that an airport proprietor has responsibility for ownership, operation, and promotion of an airport, and the ability to acquire necessary approach easements.¹⁸⁰

The four dissenting justices in *City of Burbank* also pointed to a proprietor's ability to address aviation concerns in the local community. They noted that Congress found local government is “closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce.”¹⁸¹ The dissent also noted that airport owners are responsible for a variety of conditions that impact aviation locally, such as determining runway length and obtaining noise easements, and that “the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements.”¹⁸²

Courts have also recognized that an airport proprietor is a participant in the aviation industry. A proprietor is “the unitary local authority who controls airport access.”¹⁸³ In this role the proprietor can make decisions that mediate between the interests of the community and the industry—“[i]t has always seemed fair to assume that the operator will act in a rational manner in weighing the commercial benefits of proposed service against its costs, both economic and political.”¹⁸⁴ As the court noted, a proprietor is in a position to mediate between the needs of the industry and the community when making decisions.

Judicial review has thus identified a variety of proprietary attributes, including ownership, control over airport operations, responsibility for airport liability, legal capacity to act, responsibility for the human envi-

¹⁷⁸ *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1992).

¹⁷⁹ *Id.* at 982. See also *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 n.5 (9th Cir. 1981).

¹⁸⁰ See also *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981).

¹⁸¹ *City of Burbank*, 411 U.S. 624, 645, 93 S. Ct. 1854, 1865, 36 L. Ed. 2d 547, 560 (1973) (citation omitted).

¹⁸² *Id.* at 649–50.

¹⁸³ *British Airways Bd.*, 558 F.2d 75, 83 (2d Cir. 1977).

¹⁸⁴ *Id.*

ronment around the airport, the ability to purchase easements, the ability to respond to local public concerns about aviation, the ability to promote the airport, the legal right to exercise proprietary/private powers, having political accountability for the airport, the ability to manage real property decisions, and being in a position to decide between local concerns for aviation impacts and the need for aviation services. These attributes collectively reflect the nature of an airport proprietor's traditional role; the proprietor provides a necessary local component for a nationally-based transportation system, and it thus has responsibilities toward both. The proprietor must have the legal tools that it needs to fulfill that mission, and federal law has always recognized those tools as proprietary rights.

Once a proprietor's identity is established, rights can then be determined in a given circumstance. Depending on the area of law involved, proprietary rights analysis can raise a diverse scope of issues. The following brief overviews are offered to illustrate that scope.

B. Overview: The Right to Address the Local Effects of Flight

The right to address the local effects of flight may be the most contested area of proprietary rights analysis. As an aircraft approaches an airport and lands, it raises concerns beyond matters affecting air navigation. The aircraft can now create excessive noise on the ground. Its presence may generate congestion that threatens airport operations, or by landing it may raise questions about safety under conditions present at the airport. The law has struggled to determine appropriate regulatory responsibilities to address these effects and prioritize competing interests. A proprietary rights analysis in this area thus might consider a variety of different regulatory measures. This section first briefly reviews the significant regulations that may arise in this area, and it then provides examples of how those measures may be combined and applied in a given setting.

1. Overview of Significant Regulation

Courts and agency processes may consider a variety of different laws as they review a proprietor's rights to address the local effects of flight. At times they might focus on the flight aspects of these cases and discuss regulatory responsibilities for air navigation itself. Congress has stated that "[t]he United States Government has exclusive sovereignty of airspace of the United States."¹⁸⁵ This provision creates exclusive federal control over the airspace, and the courts have interpreted this to create express preemption over air navigation activities precluding concurrent local regulation.¹⁸⁶ The courts have consistently preempted the actions of nonproprietor entities in this area through field

preemption, and in a recent opinion, FAA reaffirmed that position.¹⁸⁷

Notwithstanding exclusive federal sovereignty over the airspace, Congress has also expressly exempted airport proprietary rights from preemption when they affect air carrier routes and services.¹⁸⁸ Courts have upheld a variety of proprietor actions addressing the effects of flight without relying on questions of sovereignty over the airspace.¹⁸⁹ On occasion, the federal government has also argued that this statutory sovereignty provision was "'an assertion of exclusive national sovereignty' that 'did not expressly exclude the sovereign powers of the states.'"¹⁹⁰ For example, in *Skysign International, Inc. v. City and County of Honolulu*, the court considered whether a city's general ordinances could prohibit aerial advertising. It found that Congress had acted to exclude states from regulating certain aspects of air travel, but the court determined "we agree with the United States that § 40103(a)(1) does not in and of itself exclude any state regulation of aerial advertising."¹⁹¹

In other cases, a legal review may focus on the proprietary exemption contained in 49 U.S.C. § 41713 to determine whether an airport operator's actions are "proprietary" in nature, meaning taken to advance a local proprietary interest. If a court finds that the operator's action was not taken for such a reason, the court may then determine that the operator's action was nonproprietary and thus preempted under the terms of 49 U.S.C. § 41713 just as the action of a nonproprietor entity would be. While the Act allows an airport operator's proprietary actions to affect the prices, routes, or services of an air carrier, courts may find that the operator's reason for acting is insufficient under the statute. This might occur if an airport operator's action is not considered to be adequately justified,¹⁹² or if the

¹⁸⁷ See opinion regarding Approved Town of Grant-Valkaria Ordinance, Federal Aviation Administration, Office of the Chief Counsel, Aug. 7, 2009 (Valkaria Opinion), available through AOPA cite, <http://download.aopa.org/epilot/2009/090827gvord.pdf> or <http://aopa.org/advocacy/articles/2009/090827gvord.html>, "Grant-Valkaria can't restrict flight training, FAA says." (click "the FAA wrote" and link to letter).

¹⁸⁸ 49 U.S.C. § 41713.

¹⁸⁹ See *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *Nat'l Helicopter Corp. of Am. v. City of N.Y.*, 137 F.3d 81 (2d Cir. 1998); *City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431, 366 U.S. App. D.C. 161 (D.C. Cir. 2005).

¹⁹⁰ *Skysign Int'l, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002) (quoting *Braniff Airways v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 595, 74 S. Ct. 757, 760, 98 L. Ed. 967, 974 (1954)).

¹⁹¹ *Id.* (finding city could prohibit this advertising). See also *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996).

¹⁹² *Arapahoe County Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213 (10th Cir. 2001) (ban of scheduled service due to safety and public needs not found to be supported by substantial evidence).

¹⁸⁵ 49 U.S.C. § 40103(a).

¹⁸⁶ See *Allegheny Airlines, Inc.*, 238 F.2d 812 (2d Cir. 1956).

operator's reason for acting is not recognized as advancing a local interest and as such lacks a sufficient proprietary basis to be permitted under the Act's exemption.¹⁹³

A legal review may also consider noise regulations when evaluating proprietary measures to address the local effects of flight. Congress facilitated local noise mitigation efforts by adopting the Airport Safety and Noise Abatement Act of 1979 to promote compatible land use planning through Noise Exposure Maps and Noise Compatibility Programs.¹⁹⁴ Subsequently, Congress adopted the Airport Noise and Capacity Act of 1990 (ANCA) to address local efforts to mitigate noise that impose restrictions on aircraft access. ANCA established national noise policy in the areas that it addresses, including a policy to expedite the retirement of Stage 2 aircraft.¹⁹⁵ For matters affecting airport proprietary rights, ANCA requires a procedural process "for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft."¹⁹⁶ Under ANCA, airport proprietors can restrict Stage 2 aircraft if they follow statutory procedures to demonstrate that their proposed measures create benefits with an awareness of the impacts that they also create. For Stage 3 restrictions, the airlines or USDOT must agree with the proprietor's restrictions.¹⁹⁷

ANCA only applies to aircraft certificated as Stage 2 or 3, and it does not apply to noise measures within FAA's control, to grandfathered arrangements, or to restrictions created under airline agreements as provided in 14 C.F.R. Part 161.¹⁹⁸ ANCA expressly provides that it does not invalidate existing law with respect to airport noise and access restrictions except to the extent required by the application of the provisions of the Act.¹⁹⁹ While ANCA restricts a variety of airport proprietary actions, it does provide a limited immunity to airport proprietors. If the proprietor has submitted a Noise Exposure Map, noise damages against the proprietor are limited to certain circumstances involving traffic changes.²⁰⁰ ANCA also provides that if the federal government disapproves a proprietor's proposed restriction, it assumes subsequent liability to the extent that a taking occurs as a direct result of the disapproval.²⁰¹

When an airport proprietor's efforts to address the local effects of flight focus on airport congestion, the courts and administrative agencies will consider other areas of regulation. Proprietors may wish to discourage flights during congested periods through pricing measures that impose higher charges during those periods. USDOT endorsed the use of certain congestion pricing measures at qualifying airports in an amendment to its Rates and Charges Policy in 2008.^{202*} These so-called "peak pricing" efforts are not a recent development,²⁰³ but the federal government has pursued proprietors that attempt to take such measures without federal approval.²⁰⁴

FAA has also endorsed the use of "slot" systems to limit landings at certain airports during congested periods.²⁰⁵ These systems may raise questions as to how slots are allocated. In a recent controversy, FAA sought to auction slots at an airport without the proprietor's consent. It later withdrew this proposed action due to litigation and for economic reasons.²⁰⁶ To date slot systems have been imposed at airports that are part of a multi-airport system and justified on the basis that the

²⁰² Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40,430 (July 14, 2008).

* See Appendix C.

²⁰³ For example, in 1969, the court in *Aircraft Owners and Pilots Ass'n v. Port Auth. of N.Y.*, 305 F. Supp. 93 (E.D.N.Y. 1969), upheld a proprietor's right to impose a \$25.00 minimum landing and takeoff fee on general aviation operations during peak hours at three airports. The fee was imposed "for the professed purpose of relieving congestion and achieving maximum efficient operation at the three major airports, and with the professed intention of influencing General Aviation operators to transfer their operation where possible away from the runways and traffic control patterns at the three major airports during peak traffic periods." *Id.* at 98. The court found that the "fee schedule draws a perfectly rational line in separating mass transportation and its ancillaries from other aviation." *Id.* at 107.

²⁰⁴ See *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157 (1st Cir. 1989). The airport proprietor imposed a base landing fee irrespective of aircraft size, and then imposed an additional charge per 1,000 lbs. This had the effect of increasing the landing costs of smaller aircraft and decreasing those of large aircraft in an effort to address congestion. USDOT rejected this methodology in an administrative challenge as being "not scientifically derived." *Id.* at 170. The court found that it must defer to USDOT's conclusions, and that this methodology constituted an attempt to control rates, routes, or services that was preempted by federal law. The court noted that FAA had enacted a High Density Rule to address congestion at certain airports, and this proprietor did not operate one of those airports.

²⁰⁵ See 14 C.F.R. § 93.121 *et seq.* (FAA's high density rule imposing a slot system at five highly congested airports).

²⁰⁶ Congestion Management Rule for LaGuardia Airport, 74 Fed. Reg. 52132 (Oct. 9, 2009); Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 74 Fed. Reg. 52134 (Oct. 9, 2009) (rescinding 2008 slot rules at these airports due to legal actions and state of the economy).

¹⁹³ *Am. Airlines Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir. 2000) (economic support for DFW Airport not considered to be advancing a local interest sufficient to support placing restrictions on access to Love Field).

¹⁹⁴ 49 U.S.C. §§ 47503 and 47504. FAA implemented ANSA under 14 C.F.R. pt. 150.

¹⁹⁵ 49 U.S.C. § 47528(a) (ANCA only requires that Stage 2 aircraft be phased out when they exceed 75,000 lbs.).

¹⁹⁶ 49 U.S.C. § 47524(a).

¹⁹⁷ 49 U.S.C. § 47524(b) and (c).

¹⁹⁸ 14 C.F.R. §§ 161.7, 161.101. Part 161 implements ANCA's statutory requirements.

¹⁹⁹ 14 C.F.R. § 161.7.

²⁰⁰ 49 U.S.C. § 47506.

²⁰¹ 49 U.S.C. § 47527.

proprietor can make other airport facilities available.²⁰⁷ Congestion issues relate to the physical constraints of a proprietor's facilities, and they thus touch on questions that are central to a proprietor's function and purpose.

Judicial and agency processes may also consider safety regulations as proprietors address the local effects of flight. Congress has directed FAA to develop policies for use of the airspace in part to "ensure the safety of aircraft"²⁰⁸ and for "protecting individuals and property on the ground..."²⁰⁹ FAA regulates safety under various provisions, including by providing standards for airfield facilities under 14 C.F.R. Part 139. The courts frequently find broad preemption in this area in nonproprietary cases; one such case determined "it is clear that Congress intended to invest the Administrator of the Federal Aviation Administration with the authority to enact exclusive air safety standards."²¹⁰ When proprietors are involved, FAA has stated that "no court has yet found that the proprietor exception applies in a case involving a local authority's determination regarding aviation safety."²¹¹

While the federal government regulates many safety issues, airport proprietors also have responsibilities for conditions at their facilities that affect safety. The courts have upheld some proprietary actions affecting flight due to safety concerns. For example, in *Tutor v. City of Hailey, Idaho*,²¹² the court found that an airport proprietor's action was reasonable when it banned dual-wheel aircraft with a certificated gross maximum take-off weight over 95,000 lbs based on the condition of its runways. It found "the access restriction imposed by the Airport promotes the safety of the Airport for its users by preventing the deterioration of the runway and pro-

motes the financial stability of the Airport by delaying the need for repairs to the runway."²¹³

At times nonproprietor entities may also act to address safety concerns, such as when a nonproprietor city banned seaplanes from landing on a lake to "protect the public health, safety, and general welfare[.]"²¹⁴ The court concluded "there is a distinction between the regulation of the navigable airspace and the regulation of ground space to be used for aircraft landing sites."²¹⁵ The city's safety prohibition against landings in this location was "control over ground space" and a matter of local control.²¹⁶

Some proprietary measures to address the local effects of flight may raise issues under the Commerce Clause. In general, proprietary acts that affect air carrier prices, routes, or services are not subject to a Commerce Clause analysis when considered under 49 U.S.C. § 41713. As noted in *National Helicopter Corp. of America v. City of New York*,²¹⁷ "Congress approved the proprietor exception [to preemption under 49 U.S.C. § 41713]. Consequently, any action the City properly conducted pursuant to its powers as a proprietor cannot violate the Commerce Clause."²¹⁸ However, by its express terms, ANCA made a Commerce Clause analysis applicable to access restrictions affecting Stage 3 aircraft.²¹⁹

When considering the right to address the local effects of flight, judicial and agency actions may also review an airport proprietor's contractual obligations. Grant Assurance No. 22(a) requires that the proprietor "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport."²²⁰ Grant Assurance 23 provides that proprietors may "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the

²⁰⁷ See *W. Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 658 F. Supp. 952 (S.D.N.Y. 1986); *N.Y. Port Auth. v. E. Airlines*, 259 F. Supp. 745 (E.D.N.Y. 1966).

²⁰⁸ 49 U.S.C. § 47524(b)(1).

²⁰⁹ 49 U.S.C. § 47524(b)(2)(B).

²¹⁰ *Montalvo v. Spirit Airlines*, 508 F.3d 464, 472 (9th Cir. 2007) (considering the historical impetus for the FAA, its legislative history, and the language of the Act in a case involving whether passengers needed to be warned of deep vein thrombosis).

²¹¹ In the Matter of the City of Santa Monica, Final Agency Decision and Order, FAA Docket No. 16-02-08, 2009 (FAA July 8, 2009), at 15; Modified in Part by In the Matter of the City of Santa Monica, Final Decision and Order (Sept. 3, 2009). The initial administrative decision declined to rule on the preemption claim, determining that the preemption doctrine does not provide an independent basis for FAA administrative actions under 14 C.F.R. pt. 16 but is the province of the federal courts. The Final Agency Decision determined that administrative agencies are not required to consider constitutional claims, but are entitled to do so.

²¹² *Tutor v. City of Hailey, Idaho*, 2004 U.S. Dist. LEXIS 28352 (U.S.D.C. Idaho 2004) (decided on constitutional grounds).

²¹³ *Id.* at 21. See also *Weight-Based Restrictions at Airports: Proposed Policy*, 68 Fed. Reg. 39,176 (July 1, 2003) (noting restrictions must be consistent with and reflect the pavement's physical weight-bearing capacity and condition).

²¹⁴ *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 781 (6th Cir. 1996) (quotation marks omitted).

²¹⁵ *Id.* at 789.

²¹⁶ *Id.* at 787.

²¹⁷ *Nat'l Helicopter Corp. of Am. v. City of N.Y.*, 137 F.3d 81 (2d Cir. 1998).

²¹⁸ *Id.* at 92 citing *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 103 S. Ct. 1042, 1047, 75 L. Ed. 2d 1, 9 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce").

²¹⁹ 49 U.S.C. § 47524(c)(2)(B).

²²⁰ Grant Assurance No. 22(a), and 49 U.S.C. § 47107(a)(1). See http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurance.pdf.

public.²²¹ The FAA recently provided additional guidance to interpret these obligations in an updated order regarding compliance actions.²²² As previously noted, FAA administrative actions are aimed at obtaining compliance with these obligations.²²³

A variety of regulations may apply as an aircraft transitions from the air to the ground and an airport proprietor seeks to address the local effects of that act. Judicial and agency reviews often examine the areas summarized above, but other laws may apply in a given setting.

2. Overview of Applications

Regulatory measures may be combined and applied in complex ways in legal proceedings to review proprietor actions affecting flight. FAA recently summarized some of its views regarding how these various regulations affect local rights in a legal opinion responding to a request from the town of Grant-Valkaria, Florida. In this opinion, FAA considered whether a nonproprietor town could impose runway restrictions at a county-owned airport within its boundaries to address noise.²²⁴

FAA's opinion outlined its view of the legal framework prohibiting nonproprietary actions. It relied heavily on field preemption based primarily on federal sovereignty over the airspace, the regulation of safety, and noise regulation.²²⁵ The opinion noted the town's nonproprietor status, the threshold question in a proprietary rights analysis, and cited previous noise cases as precedent to establish that "nonproprietor authorities have been long prevented by Federal preemption of authority in the area from prohibiting or regulating overflight for any purposes."²²⁶

FAA also commented on how an airport proprietor can address noise when its actions affect flight locally, stating "[o]nly the airport proprietor has authority to propose noise abatement runway use programs for approval and implementation by the FAA. The airport proprietor further has limited authority to adopt and enforce reasonable, nondiscriminatory restrictions on airport access."²²⁷ This standard reflects the requirements of Grant Assurance No. 22(a), and FAA noted

that a proprietor, to maintain grant eligibility, would have to comply with Grant Assurance Nos. 22(a) and 23 when taking such actions. It also noted that the proprietor would have to comply with ANCA as implemented by 14 C.F.R. Part 161.²²⁸

In general, when airport proprietors want to address the local effects of flight, legal principles require that they consider substantive and procedural concerns.²²⁹ Numerous cases have evaluated whether substantive proprietary measures were reasonable when they affected flight. These cases have involved both measures short of a flight ban and those implementing such a ban. The case law reflects a variety of outcomes, but noise measures that were addressed before the enactment of ANCA should also be evaluated in light of ANCA's procedural requirements when Stage 2 and Stage 3 aircraft are affected and ANCA is otherwise applicable.

For example, in *Santa Monica Airport Association v. City of Santa Monica*,²³⁰ in an effort to address noise, a proprietor imposed a night curfew on takeoffs and landings, prohibited certain low aircraft approaches on weekends, prohibited helicopter flight training, established a maximum single event noise exposure level of 100 dB, prohibited jets at the airport, and imposed a fine for any jet landings or takeoffs. The court upheld all but the actions imposing a jet ban.²³¹ The court noted that a city "should be allowed to define the threshold of its liability, and 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 the city's human environment."²³² It also determined that "Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels...and intended to allow a municipality flexibility in fashioning its noise regulations."²³³

Most of the proprietor's noise measures in *Santa Monica Airport Association* were reasonable for the airport at that time. However, a recent administrative determination illustrates the current effect of ANCA on

²²⁸ See *id.*, n.3, at 13.

²²⁹ See also *Global Int'l Airways Corp. and United States of Am. v. Port Auth. of N.Y. and N.J.*, 727 F.2d 246, 251 (2d Cir. 1984) ("limitations on cumulative noise exposure are a valid goal of local airport proprietors as a matter of federal policy....").

²³⁰ *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981).

²³¹ *Id.* at 102.

²³² *Id.* at 104 n.5. See also *Alaska Airlines v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1992) (the rationale for the proprietary exemption to preemption extends beyond purely financial concerns).

²³³ *Santa Monica Airport Ass'n*, 659 F.2d at 104–05. The court noted that the principles of evaluating municipal regulation require this result. "The principles of comity and federalism militate against our invalidating a state or local regulation unless it is written in unlawful terms, or because, on its face, it is preempted." *Id.* at 105.

²²¹ Grant Assurance No. 23, and 49 U.S.C. § 47107(a)(1), http://www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurance.pdf.

²²² Order 5190.6B § 13.13.

²²³ Order 5190.6B § 1.1.

²²⁴ See opinion regarding Approved Town of Grant-Valkaria Ordinance, Federal Aviation Administration, Office of the Chief Counsel, Aug. 7, 2009 (Valkaria Opinion), available through AOPA cite, <http://download.aopa.org/epilot/2009/090827gvord.pdf> or <http://aopa.org/advocacy/articles/2009/090827gvord.html>, "Grant-Valkaria can't restrict flight training, FAA says." (Click "the FAA wrote" and link to letter).

²²⁵ FAA relied for authority on 49 U.S.C. §§ 40103, 44502, 44715, and 44721.

²²⁶ Valkaria Opinion, at 4.

²²⁷ *Id.* at 8–9.

such a process when Stage 3 aircraft are affected. FAA recently considered an application from the Burbank-Glendale-Pasadena Airport Authority to impose a full nighttime curfew affecting these aircraft. Under ANCA, actions affecting Stage 3 aircraft now must be imposed either by agreement with the affected airlines, or with FAA's approval after a request for approval as provided in 14 C.F.R. Part 161. After considering such a proposal from the proprietor, FAA rejected the proprietor's application to impose a curfew on the grounds that the proprietor had only provided evidence supporting two of the six statutory conditions required for approval of this curfew under ANCA.²³⁴ Thus a proprietor must now provide detailed evidence supporting its compliance with the Act before it can affect Stage 3 aircraft.

In a separate case, the courts ultimately upheld a proprietor's action to impose a Stage 2 aircraft ban under ANCA. In *National Business Aviation Association, Inc. v. City of Naples Airport Authority*,²³⁵ a proprietor acted in part to address concerns for areas near the airport that experienced noise averaging 60–65 dB over the course of a day. While this noise level falls below levels that typically raise legal issues, the proprietor determined the area to be a uniquely quiet community.²³⁶ Initially the proprietor's requirements were challenged under federal preemption and the Commerce Clause,²³⁷ and the court determined that ANCA did not preempt the proprietor from considering noise levels below 65 dB (day-night average sound level). It found that ANCA expressly permitted airport operators to ban Stage 2 aircraft if they followed ANCA's procedural requirements,²³⁸ and that the proprietor's ban was not unreasonable or discriminatory. It also found that the proprietor's decision could not violate the Commerce Clause, since these actions were expressly authorized by Congress.²³⁹

In subsequent administrative proceedings,²⁴⁰ FAA took the position that ANCA not only gave FAA the authority to approve compliance with ANCA's proce-

dures, it also allowed FAA to conduct a substantive review of the airport's Stage 2 restrictions under the grant assurances. FAA's proceedings then determined that the proprietor's Stage 2 ban was not consistent with Grant Assurance No. 22 and that the proprietor was in violation, although the proprietor submitted extensive evidence in support of its action.²⁴¹

The Court of Appeals granted review of the administrative decision, and first considered whether ANCA gave FAA the authority to review both a proprietor's procedural compliance with ANCA and the substantive restrictions themselves under the grant assurances. The court decided to defer to FAA's determination about the scope of its powers under principles of statutory interpretation.²⁴² However, it then found that FAA's determination that the proprietor acted unreasonably was not supported by substantial evidence, and that ample evidence had been introduced. It thus vacated FAA's order. The proprietor ultimately succeeded in this case, but the case also illustrates that ANCA can raise a variety of legal complexities that may be costly and time consuming to resolve.

ANCA did not apply in *National Helicopter Corp. of America v. City of New York*.²⁴³ In this noise case, a proprietor required a heliport to observe weekday and weekend curfews, phase out weekend operations, and reduce operations by at least 47 percent. It also barred specific large helicopters, prohibited sightseeing flights over certain areas, and required helicopter markings that could be identified from the ground. When challenged, the court considered the case under 49 U.S.C. § 41713 and determined that federal preemption did not extend to "acts passed by state and local agencies in the course of carrying out their proprietary powers and rights."²⁴⁴

Under this proprietary exemption, the court determined that most of the city's actions were reasonable and not preempted. While the city's specific methodology was not scientific, "[its Environmental Impact Statement] adequately supports the conclusion

²³⁴ See Application of Burbank-Glendale-Pasadena Airport Authority, FAA Decision, Oct. 30, 2009 (referencing 49 U.S.C. § 47524(c)(2)), http://www.nbaa.org/ops/airports/BUR/2009/1030_FAA_Letter_BUR.pdf.

²³⁵ Nat'l Bus. Aviation Ass'n, Inc. v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

²³⁶ *Id.* at 1346. Before pursuing the ban, the Naples Airport Authority had implemented a variety of measures to reduce the effects of aircraft noise over a period of years. Those measures included encouraging quieter operating procedures by landing jets, instituting a preferential use of airport runways to reduce flight operations over residents, and imposing a ban on nighttime run-ups.

²³⁷ *Id.* at 1346.

²³⁸ See 49 U.S.C. § 47524(b); 14 C.F.R. pt. 161.

²³⁹ National Business, 162 F. Supp. 2d at 1352, 1354.

²⁴⁰ FAA determined that the court proceedings were not binding on the administrative proceeding. See *In re the Naples Airport Authority, Naples, Florida, Director's Determination*, FAA Docket No. 16-01-15, 2003 (Mar. 10, 2003).

²⁴¹ See *id.*; Affirmed in Part, Reversed in Part by *In re the Naples Airport Authority, Naples, Florida, 2003* (June 30, 2003) (No. 16-01-15); Appeal Denied, Judgment Affirmed by *In re the Naples Airport Authority, Naples, Florida, Final Agency Decision and Order* (Aug. 25, 2003); Review Granted, Order Vacated by *City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431, 366 U.S. App. D.C. 161 (D.C. Cir. 2005) (finding that the FAA's use of a 65 dB DNL level constituted a guideline that may not always address local needs).

²⁴² *City of Naples Airport Authority*, 409 F.3d 431 (D.C. Cir. 2005) (noting that Congress had not provided for a substantive review in ANCA); see also Thomas R. Devine, *The Naples Decision: Sound Public Policy?*, THE AIR AND SPACE LAWYER 4 (2005); Peter D. Irvine, *The Future of Stage 2 Airport Noise Restrictions: A Matter of Substantive Versus Procedural Review by the Federal Aviation Administration*, 11 GEO. MASON L. REV. 179 (2002).

²⁴³ Nat'l Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81 (2d Cir. 1998).

²⁴⁴ *Id.* at 88 (citation omitted).

that...[reductions] will improve the environmental quality of the Heliport's surrounding areas...."²⁴⁵ When considering the proprietor's ban on specific helicopters, however, the court considered this to be an effort to regulate airspace rather than a proprietary action. It thus found that "the law controlling flight paths through navigable airspace is completely preempted."²⁴⁶

Under any regulatory measures affecting flight, a court is likely to consider whether a proprietor's actions reflect the least restrictive alternatives available to address a concern. For example, in the 1983 case of *U.S. v. Westchester County*,²⁴⁷ an airport imposed a curfew between midnight and 7:00 a.m. regardless of the noise emitted by the aircraft. The court found that the county enacted the curfew without adequate supporting noise data, and without a study that determined the location of noise-affected areas or that quantified the noise level from any source. The court found that lesser measures could have achieved the county's objectives, such as requiring reduced power during landings and takeoffs, implementing preferential runway use, and altering approach routes.²⁴⁸ The court thus found that the county's curfew was unreasonable, arbitrary, discriminatory, and an overbroad exercise of power.²⁴⁹ ANCA's procedural requirements also now obligate proprietors to specifically consider less restrictive alternatives to their proposals.

Flight bans present difficult challenges under these laws, whether they are implemented based on noise or for other reasons. When bans are temporary, some courts have found support in the law for a proprietor's ability to impose them to study potential flight impacts. In *Midway Airlines v. County of Westchester*,²⁵⁰ the proprietor deferred an airline's application to commence service while the proprietor completed a study to develop nondiscriminatory slot rules under safety and environmental regulations. In this congestion case, the court found that

nothing prohibits a local airport operator from issuing reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise [or other level of danger] which can be created by an aircraft using the airport....local governmental airport proprietors are entitled

²⁴⁵ *Id.* at 91.

²⁴⁶ *Id.* at 92 (emphasis added). See also *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1992) (city could adopt extensive noise provision requiring compliance with certain noise limits despite requiring airlines to indemnify airport for noise liability, but had to provide due process if it reduced airline flights based on noise under the ordinance).

²⁴⁷ *United States v. Westchester County*, 571 F. Supp. 786 (S.D.N.Y. 1983).

²⁴⁸ *Id.* at 796.

²⁴⁹ *Id.* at 796. See also *United States v. State of N.Y.*, 552 F. Supp. 255 (N.D.N.Y. 1982) (curfew was overbroad, unreasonable, and arbitrary because it extended to all aircraft regardless of the degree of accompanying noise emitted and for other reasons).

²⁵⁰ *Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

to a 'reasonable' period in which to develop such criteria.²⁵¹

The court found no evidence of unreasonable delay, and it upheld the airport proprietor's deferral until it completed the slot rules. The proprietor in the *British Airways* cases received similar treatment when considering unique noise circumstances.²⁵² However, the current effect of ANCA on a temporary action based on noise concerns has not been determined.

A proprietor proposed a temporary ban in *Arapahoe County Public Airport Authority v. Federal Aviation Administration*,²⁵³ but the proprietor then revised its action and permanently banned scheduled service.²⁵⁴ In this case the court considered whether this action to address safety and public needs could avoid preemption under the proprietary exception contained in 49 U.S.C. § 41713. Based on *Morales* and *Wolens*, the court determined that "the ban is permissible only if it constitutes an exercise of the Authority's proprietary power."²⁵⁵ It noted that "in defining the permissible scope of a proprietor's power to regulate under § 41713(b)(3)...an airport proprietor can issue only reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest."²⁵⁶ The court then deferred to administrative findings that the proprietor had failed to demonstrate substantial evidence in support of its ban, and struck the ban as unreasonable and preempted under 49 U.S.C. § 41713.²⁵⁷

Courts will not uphold a flight ban that cannot be adequately justified, and they may make such a determination based on the proprietor's grant assurance obligations. For example, in *City and County of San Fran-*

²⁵¹ *Id.* at 441 (original insertion, quotation marks omitted).

²⁵² See also *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F.2d 75 (2d Cir. 1977) (upholding temporary ban on Concorde landings); *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 564 F.2d 1002 (2d Cir. 1977) (finding unreasonable delay in adopting rules).

²⁵³ *Arapahoe County Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213 (10th Cir. 2001).

²⁵⁴ See *Centennial Express Airlines v. Arapahoe County Pub. Airport Auth.*, Final Agency Decision and Order, FAA Docket No. 16-98-05, 1999 FAA LEXIS 805 (Feb. 18, 1999); *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998); *Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1217, 1221. The proprietor's ban initially lead to an administrative action before FAA, and a state court action under which the Colorado Supreme Court found the ban was not preempted and did not violate the airport's grant assurances. The Tenth Circuit found that it was not obligated to recognize the state court's decision on federal issues of law.

²⁵⁵ *Id.* at 1222.

²⁵⁶ *Id.* at 1223 (quotation marks omitted), citing *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 78, 806 (5th Cir.); *W. Air Lines v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 958 (S.D.N.Y. 1986).

²⁵⁷ *Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1223-24.

cisco v. F.A.A.,²⁵⁸ a proprietor was not allowed to ban certain retrofitted aircraft for noise reasons. In administrative proceedings under Grant Assurance No. 22(a), FAA found the proprietor to be in violation because the proprietor had not factually supported its action and its determinations about aircraft noise were mistaken. Those determinations prohibited some aircraft but allowed equally noisy aircraft to use the airport. The court deferred to the administrative decision and denied the proprietor's appeal on that basis. Courts may address a lack of justification under other regulations as well. In *Santa Monica Airport Association*, the court found that the city's ban on jets could not be justified for noise and safety reasons. It found no evidence that small jets using the airport were not as safe as piston-engine aircraft, and it determined that both generated essentially the same noise.²⁵⁹

Bans that involve safety regulations have produced varying results in legal proceedings. Where pavement strength or landing areas are at issue, some courts have applied the law to support bans on aircraft that present safety concerns.²⁶⁰ Yet other actions to address safety in airfield areas have not been upheld. In a recent case, *In the Matter of the City of Santa Monica*,²⁶¹ a proprietor attempted to ban aircraft in Categories C and D from landing at the Santa Monica Airport out of concerns for the configuration of the airport's runway safety area. In an administrative action, FAA did not agree that the proprietor's action was reasonable. It determined that the proprietor had violated Grant Assurance No. 22, and that FAA's authority over safety preempted the city's ordinance. It therefore ordered the city to cease and desist from banning operations of those aircraft.

Proprietary actions involving congestion may trigger specific regulations as previously noted, but when challenges arise, the courts support actions that comply with these regulations under standards derived from the grant assurances. For example, in *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*,²⁶² a case involving a perimeter rule, the airline held several regulated landing slots at a New York airport and sought to use one of them to operate a flight to Salt Lake City. The proprietor denied this request because the city lay outside a 1,500-mi permissible flight distance established by the proprietor to maintain the facility for short-and medium-haul flights and thereby reduce groundside congestion. The court found that this action was proper to manage congestion in a multi-

airport system, since it diverted air traffic "from one airport to another within the respective systems...[without] clos[ing] down metropolitan area runways to all air traffic to or from points outside the perimeter."²⁶³ The court thus found that this action was "reasonable, nonarbitrary and nondiscriminatory."²⁶⁴

Similarly, in *City of Houston v. FAA*,²⁶⁵ the court found that a perimeter rule was acceptable when it banned flights beyond a 1,000-mi perimeter from flying to Washington National Airport to reduce congestion. This rule had the effect of diverting long-haul traffic to Dulles Airport to try to address a congestion problem by limiting National Airport to short-haul business travel. The FAA was the airport proprietor at that time, and the court supported the action as being proprietary.²⁶⁶

At times the courts have questioned to what extent actions taken by a proprietor may be considered to be proprietary in nature, and thus exempt from preemption under 49 U.S.C. § 41713. Those questions sometimes arise in connection with air navigation issues, such as in *National Helicopter*. For other reasons, in *American Airlines Inc. v. Department of Transp.*,²⁶⁷ the court of appeals found that a proprietor's actions to restrict access at Love Field were not proprietary and thus were preempted by 49 U.S.C. § 41713.

In the Love Field cases, two cities as a joint proprietor constructed the Dallas-Fort Worth Airport in response to federal requirements, and adopted a bond ordinance agreeing to restrict service at nearby Love Field with the intent of phasing out its use by certificated carriers. When deregulation removed constraints on carrier routes, a carrier sought to implement additional service. Congress responded with specific legislation permitting flights at Love Field that were in conflict with the bond ordinance restrictions,²⁶⁸ and one of the cities sued to enforce the restrictions. The court noted that "perimeter rules" such as those under the bond ordinance had previously been upheld,²⁶⁹ but "[t]he precise scope of an airport owner's proprietary powers

²⁶³ *Id.* at 957–58, citing *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982) (allowing perimeter rule at Washington National Airport, and stating that FAA's proprietary interest was sufficient to justify the rule).

²⁶⁴ *W. Air Lines, Inc.*, 658 F. Supp. at 958.

²⁶⁵ *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982).

²⁶⁶ See also Congestion Management Rule for LaGuardia Airport, 74 Fed. Reg. 52132 (Oct. 9, 2009); Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 74 Fed. Reg. 52134 (Oct. 9, 2009) (rescinding 2008 slot rules at these airports due to legal actions and state of the economy).

²⁶⁷ *Am. Airlines Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir. 2000).

²⁶⁸ See Wright Amendment, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48–49 (1980); Shelby Amendment, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

²⁶⁹ *Am. Airlines Inc. v. Dep't of Transp.*, 202 F.3d at 805 n.13, citing Jonathan Whitman Cross, *Airport Perimeter Rules: An Exception to Federal Preemption*, 17 TRANSP. L.J. 101, 102 (1988).

²⁵⁸ *City and County of San Francisco v. F.A.A.*, 942 F.2d 1391 (9th Cir. 1991).

²⁵⁹ *Santa Monica Airport Ass'n v. Santa Monica*, 481 F. Supp. 927, 943–44 (C.D. Cal. 1979).

²⁶⁰ See *Tutor v. City of Hailey*, 2004 U.S. Dist. LEXIS 28352 at 21; *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 781.

²⁶¹ In the Matter of the City of Santa Monica, Final Agency Decision and Order, FAA Docket No. 16-02-08 (FAA July 8, 2009), at 15.

²⁶² *W. Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 658 F. Supp. 952 (S.D.N.Y. 1986).

has not been clearly articulated by any court...[and] local proprietors play an ‘extremely limited’ role in the regulation of aviation...[Under Section 41713(b)(3)] an airport proprietor can issue only ‘reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest.’²⁷⁰

The court noted that courts “have upheld route restrictions as within proprietary powers when they are targeted at advancing a specific local interest”²⁷¹ such as noise, environmental concerns, and congestion. However, the court in this case found that under 49 U.S.C. § 41713 it would be overly broad to allow such an action to protect a proprietor’s economic interest in a newly constructed airport from low-cost operations nearby.²⁷² The court noted that:

The fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive of this issue. We do not limit the scope of proprietary rights to those which have been previously recognized....we are open to assessing whether the restrictions in the Ordinance are reasonable and nondiscriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor’s powers under § 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exception beyond its intended limited reach.²⁷³

As these cases illustrate, when airport proprietors act to address the local effects of flight they may trigger review under a variety of federal regulations, and the courts and agency proceedings may combine and apply those regulations with varying outcomes. An analysis of proprietary rights in this area can thus be uncertain and complex. At a minimum, legal principles require that proprietors consider factors such as the reasonableness of their substantive measures, the availability of less restrictive alternatives, whether procedural requirements apply under ANCA’s noise provisions, and how proprietors have identified the local interests that they are trying to advance by taking the action. The courts and agency proceedings may evaluate any or all of these factors, and that analysis can be informed by the historical context supporting proprietary rights in the law. Actions addressing the local effects of flight are likely to remain the most contested area of proprietary rights analysis.

C. Overview: The Right to Determine Rates and Charges

If the right to address the local effects of flight illustrates the complexity of prioritizing interests that affect a landing aircraft, the right to determine rates and charges addresses a subject that is only slightly less

complex. Airport rates and charges require aviation users to pay for their use of airport facilities, and rate-making methodologies can reflect a wide range of cost concerns. Federal law protects from preemption a proprietor’s right to collect rates and charges, and it also imposes requirements on how they may be determined to promote federal goals. Those requirements demonstrate the challenge of applying broad policy goals to highly detailed financial arrangements. However, the general standard by which a proprietor’s acts are measured in this area is one of reasonableness.

Under the Anti-Head Tax Act, 49 U.S.C. § 40116, an airport proprietor may charge “reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.”²⁷⁴ This statute also prohibits states and airport proprietors from charging a head tax on passengers, their transportation, the sale of air transportation, or the gross receipts from that transportation. States and their political subdivisions are also subject to a variety of other restrictions as nonproprietors, both expressly under the Act and through judicial interpretation. For example, nonproprietors may not assert taxing authority over the landing of aircraft on the nonproprietor’s lands.²⁷⁵ However, nonproprietors have the ability to impose some taxes and charges under the express terms of the Act.

This Act was adopted after the U.S. Supreme Court approved a state’s ability to charge an aviation head tax. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*,²⁷⁶ the Supreme Court found that the Commerce Clause does not prohibit states or municipalities from charging commercial airlines a “head tax” on passengers boarding flights at airports within the jurisdiction to defray the costs of airport construction and maintenance. Congress enacted the Anti-Head Tax Act in response to this case to allow an airport proprietor to impose reasonable rental and service charges, but to prohibit a head tax and other charges,²⁷⁷ whether direct or indirect,²⁷⁸ except as otherwise permitted by Congress.²⁷⁹

The Supreme Court first considered what constituted a “reasonable” airport charge under the Anti-Head Tax Act in *Northwest Airlines, Inc. v. County of*

²⁷⁴ 49 U.S.C. § 40116(e)(2).

²⁷⁵ *Township of Tinicum v. U.S. Dep’t of Transp.*, 582 F.3d 482 (3d Cir. 2009).

²⁷⁶ *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972).

²⁷⁷ See 49 U.S.C. § 40116(b).

²⁷⁸ See *Aloha Airlines, Inc. v. Dir. of Taxation of Haw.*, 464 U.S. 7, 12–13, 104 S. Ct. 291, 294, 78 L. Ed. 2d 10, 15 (1983).

²⁷⁹ See 49 U.S.C. § 40117; 14 C.F.R. pt. 158 (Congress enacted an exception to the Anti-Head Tax Act when it permitted proprietors to collect passenger facility charges to pay for airport improvements under specific, authorized circumstances).

²⁷⁰ *Id.* at 806 (citations omitted).

²⁷¹ *Id.* at 806.

²⁷² *Id.* at 807.

²⁷³ *Id.* at 808.

Kent, Michigan.²⁸⁰ The Court noted that the Anti-Head Tax Act “does not set standards for assessing reasonableness.”²⁸¹ It further noted that USDOT could assess what constituted reasonableness because it is “charged with administering the federal aviation laws, including the AHTA...[and] is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances.”²⁸² However, at that time USDOT had not yet commented on what constituted a reasonable charge, and so the Court provided its own analysis.

The Court made this determination based on the test that it had developed in *Evansville*.²⁸³ It found that an airport charge is reasonable if it “(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.”²⁸⁴ The *Evansville* test was based initially on state municipal concerns, which require that the amount of a fee be reasonable for the privilege granted.²⁸⁵ If a fee is based on some fair approximation of use or privilege it will be “neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred.”²⁸⁶

Prior to *Northwest Airlines*, the courts had already determined that a variety of specific airport rates and charges practices were reasonable. For example, in *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*,²⁸⁷ a court determined that airport proprietors could use a “two cash register” system, could use certain methods of depreciation for property placed in service, could include a periodic maintenance reserve, and could include the proprietor’s historic costs when calculating landing fees. In *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Authority*,²⁸⁸ a state court found that

²⁸⁰ *Nw. Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994).

²⁸¹ *Nw. Airlines, Inc.*, 510 U.S. at 366. See also *Air Canada v. DOT*, 148 F.3d 1142, 1150–51, 331 U.S. App. D.C. 288 (D.C. Cir. 1998) (DOT has broad discretion to establish what constitutes reasonable conditions and unjustly discriminatory rates under § 47129, providing for the resolution of air carrier rate disputes over airport fees).

²⁸² *Nw. Airlines, Inc.*, 510 U.S. at 367.

²⁸³ *Id.* (referencing *Evansville-Vanderburgh Airport Auth.*, and noting that while the result in that case no longer applied under the Anti-Head Tax Act, its reasonableness standards could be adopted.)

²⁸⁴ *Id.* at 369.

²⁸⁵ *Evansville-Vanderburgh Airport Auth. Dist.*, 405 U.S. at 716.

²⁸⁶ *Id.* at 717; *Nw. Airlines*, 510 U.S. at 378 (by including the term “reasonable,” “Congress ensured that the Act would not be understood to displace the dormant Commerce Clause or to exempt user fees on aircraft operators per se from [the AHTA]).”

²⁸⁷ *Raleigh-Durham Airport Auth. v. Delta Air Lines, Inc.*, 429 F. Supp. 1069 (E.D.N.C. 1976).

²⁸⁸ *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth.*, 288 N.C. 98, 215 S.E.2d 552 (1975).

state administrative hearing processes for setting fees were not applicable to a proprietary airport activity that set charges for the airport’s own services.

In *Southern Airways, Inc. v. City of Atlanta*,²⁸⁹ a state court found that a proprietor need not take into account where specific gates were located when determining rates, and could properly charge common use fees for certain areas when its methodology took into account both the space an airline rented and its number of passengers. Significantly, in *Indianapolis Airport Authority v. American Airlines, Inc.*,²⁹⁰ the court found that an airport proprietor had the right to require an airline fee that disregarded the airport’s concession revenues, and thus specifically determined that airlines had no right to a “crediting” of concession revenues against the fees that they paid. During this period, *City and County of Denver v. Continental Air Lines, Inc.*²⁹¹ also determined that airport fees could not include costs that a proprietor expended to construct a new airport before it was placed in service.

In *Northwest Airlines*, the Supreme Court’s determination of reasonableness made clear that an airport proprietor could create a fee that required airlines to pay the break-even cost of the areas they used.²⁹² This decision also made clear that airport proprietors can charge an airline fee that has the effect of allowing airport concessions to generate surpluses for the airport.²⁹³ It also found that airport fees could allow general aviation users to pay less than 100 percent of their allocated costs.²⁹⁴

After the Court decided *Northwest Airlines*, Congress determined that USDOT should adopt policy guidance for use in determining whether airport rates and charges were reasonable. It imposed this requirement by adopting 49 U.S.C. § 47129, and the law also created an expedited process under which airlines can challenge the reasonableness of airport fee decisions.²⁹⁵ USDOT then issued policy guidance to implement the law through an Interim Policy in February of 1995, and a Final Policy Regarding Airport Rates and Charges on June 21, 1996.²⁹⁶

The law and the policy prioritize voluntary agreements among the parties consistent with the economic nature of the interests involved.²⁹⁷ Agreements cannot be challenged under the expedited process created un-

²⁸⁹ *S. Airways, Inc. v. City of Atlanta*, 428 F. Supp. 1010 (N.D. Geo. 1977).

²⁹⁰ *Indianapolis Airport Auth. v. Am. Airlines, Inc.*, 733 F.2d 1262, 1265 (7th Cir. 1984).

²⁹¹ *City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 836 (D. Colo. 1989).

²⁹² *Nw. Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994).

²⁹³ *Id.* at 371.

²⁹⁴ *Id.* at 372.

²⁹⁵ See 14 C.F.R. pt. 302.

²⁹⁶ Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996).

²⁹⁷ *Id.* at 32017 (June 21, 1996).

der 14 C.F.R. Part 302.²⁹⁸ However, if the parties cannot reach an agreement, the policy allows the airport proprietor to act subject to USDOT review.²⁹⁹ The policy notes that federal law does not require a single approach to setting rates and charges, such as a residual or compensatory methodology.³⁰⁰ It goes on to provide more detailed information regarding what constitutes a fair and reasonable fee, and discusses requirements regarding unjustly discriminatory fees, financially self-sustaining requirements, and revenue application and use. However, USDOT's policy was promptly challenged, and portions of it have now been invalidated.

Under USDOT's policy, airport proprietors were limited to historic costs when determining airfield fees, but were permitted to use any reasonable methodology for nonairfield fees. In *Air Transport Association of America v. Department of Transportation*, (LAX 1)³⁰¹ the proprietor of Los Angeles International Airport (LAX) attempted to impose, among other things, new landing fees that included fair market value costs for airfield land. The airlines challenged LAX's fees under the new expedited process, and USDOT did not uphold this methodology. However, the court subsequently determined that USDOT's decision on this issue was not adequately justified to receive the court's deference.

The court remanded this question of fee methodology to USDOT's process for "fuller consideration of the respective merits of the historic cost and fair market value methodologies here at issue."³⁰² For similar reasons, the court also remanded issues under USDOT's policy that prevented airports from charging imputed interest when funds generated by the airfield were reinvested in the airfield. The court, however, agreed with USDOT in upholding LAX's allocation of terminal costs. On remand USDOT concluded that the proprietor's claim that it was entitled to recover opportunity costs was unreasonable because the use of this property as an airport did not permit other opportunities; it again rejected the proprietor's fees, and the court denied a petition for review.³⁰³

After commencing this review of the proprietor's actions under LAX 1, the airlines and the proprietor then challenged the validity of USDOT's Final Policy Regarding Airport Rates and Charges in *Air Transport Association of America v. Department of Transportation*³⁰⁴ (LAX 2). In LAX 2, the proprietor asserted that

the policy's disparate treatment of airfield and non-airfield fees was arbitrary and capricious, and the court agreed. The court noted that airlines had to use both airfield and nonairfield services at an airport, and USDOT's "explanation for the distinction drawn between airfield and non-airfield fees is internally inconsistent."³⁰⁵ The court thus vacated provisions of the policy and remanded it to USDOT.³⁰⁶

In LAX 2, the court also noted that while airport proprietors had previously relied on individual court decisions to define the parameters of reasonable rates and charges, the directive of 49 U.S.C. § 47129 likely required a change to that approach. It noted that the statute may have placed USDOT under an obligation to "set forth a full quasilegislative standard rather than developing those standards through a case-by-case approach."³⁰⁷ To date USDOT has not issued an amended policy addressing these concerns.

In the meantime, courts have continued to consider and issue opinions regarding the reasonableness of airport practices. In *Air Canada v. Department of Transportation*,³⁰⁸ the court determined that airport proprietors can impose equalized terminal rental rates on carriers using different terminal facilities where the comparability of those facilities will be assessed over time, and not at any given moment. In *Port Authority of New York and New Jersey v. Department of Transportation*,³⁰⁹ the court noted that USDOT had not yet revised its rates and charges policy, but the parties agreed to use some standards from the policy that had been vacated to determine issues regarding cancelled capital project costs. The court also determined in accordance with the policy that airports can make reasonable distinctions among aeronautical users, such as by distinguishing signatory carriers from nonsignatory carriers in rate practices.

In a recently decided case, *Alaska Airlines, Inc. v. United States Department of Transportation*,³¹⁰ the courts considered new terminal rates at LAX. The court noted that in USDOT's administrative consideration of the case, it had again drawn a distinction between airfield and nonairfield space when it allowed LAX to include an appraised fair market value in its terminal rates. The court determined to "again remand the matter to the DOT to either justify or abandon its disparate treatment of airfield and non-airfield space."³¹¹ The court found that USDOT's position on the appraisal process itself—refusing to allow the process to consider

²⁹⁸ See 49 U.S.C. § 47129(e)(1) (14 C.F.R. § 302 is not available when fees are imposed on carriers pursuant to a written agreement).

²⁹⁹ Policy Regarding Airport Rates and Charges, § 1.1.4, 61 Fed. Reg. at 32018.

³⁰⁰ *Id.* at 32019.

³⁰¹ *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 103 F.3d 1027, 322 U.S. App. D.C. 321 (D.C. Cir. 1997).

³⁰² *Id.* at 1032.

³⁰³ *City of L.A. v. U.S. Dep't of Transp.*, 165 F.3d 972, 334 U.S. App. D.C. 185 (D.C. Cir. 1999).

³⁰⁴ *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 119 F.3d 38, 326 U.S. App. D.C. 239 (D.C. Cir. 1997).

³⁰⁵ *Id.* at 43.

³⁰⁶ See *Air Transport Ass'n of Am. v. Dep't of Transp.*, 129 F.3d 625, 327 U.S. App. D.C. 133 (D.C. Cir. 1997).

³⁰⁷ *Id.* at 43.

³⁰⁸ *Air Canada v. Dep't of Transp.*, 148 F.3d 1142, 331 U.S. App. D.C. 288 (D.C. Cir. 1998).

³⁰⁹ *Port Auth. of N.Y. and N.J. v. Dep't of Transp.*, 479 F.3d 21, 375 U.S. App. D.C. 203 (D.C. Cir. 2007).

³¹⁰ *Alaska Airlines, Inc. v. U.S. Dep't of Transp.*, 575 F.3d 750 (D.C. Cir. 2009).

³¹¹ *Id.* at 754.

nonaeronautical uses—was also not justified, and it remanded that issue as well.³¹² The court noted USDOT's finding in the case that the proprietor acted in a discriminatory manner when the proprietor changed some of its lease formulas to a "rentable space" requirement; upon consideration, the court determined that USDOT had improperly placed the burden of proof on the proprietor for this issue.

The airlines also claimed that LAX's fee changes were unjustly discriminatory because the proprietor exercised monopoly power when setting them. The Administrative Law Judge in the case found that the proprietor did have monopoly power, but USDOT disregarded that finding as not being within the scope of the Instituting Order. However the court noted that this issue was clearly within the matters that the Policy Statement provided USDOT would consider. The court found that

[i]t was arbitrary and capricious for the DOT, having invited airlines to raise the monopoly power issue, when it was raised to ignore it without good and sufficient reason. On remand DOT must explain why this case does not present the "extraordinary situation" in which alleged monopoly power is relevant to a fee dispute, or if it cannot, then go on to consider whether LAX had monopoly power in a relevant geographic market.³¹³

Some airport rates and charges measures seek to implement "peak pricing" to increase airport fees during congested hours. However, USDOT has not allowed these measures to be used to generate revenue. Under USDOT's recently issued policy,³¹⁴ proprietors at certain congested airports may include the costs of secondary airports in fees that they charge at the congested airport during peak times, and may include the cost of airfield facilities under construction in those fees. They also may increase landing fees during peak periods of congestion under a two-part landing fee structure consisting of both an operation charge and a weight-based charge if overall fees are limited to the recovery of historic costs. Thus, while these measures involve the use of rates and charges, they are imposed to affect flight rather than to generate revenue and are further addressed in the preceding section.

Efforts to define the reasonableness of airport rates and charges illustrate the diverse range of factors involved in that analysis even at a single airport. The detailed nature of this area may create challenges for regulators as they work to craft broad policy statements that can avoid placing unnecessary restrictions on proprietor and airline business decisions. Case law and the existing policy as currently in effect address a variety of

³¹² *Id.* at 756 (however, the court agreed with USDOT that the airport should have conducted the appraisal using an independent appraiser rather than the proprietor's staff members).

³¹³ *Id.* at 761.

³¹⁴ Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40,430 (July 14, 2008). *See also* Notice of Proposed Rule Making, Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 3310 (Jan. 17, 2008).

issues, but many matters are left to a proprietor's discretion and are subject to challenge under specific circumstances. Such a format may give the parties flexibility in negotiations, and thus is consistent with the law's general policy to honor negotiated agreements. The complexities involved in airline rates and charges, and the need to allow creative bargaining among the parties, may leave this area of proprietary rights analysis unsettled.

D. Overview: The Right to Manage Property

In general, federal law strongly supports airport proprietary rights to pursue land-use measures. It tends to affirm proprietor actions to manage the use of an airport campus. It also can help a proprietor protect its property from constraints that nonproprietary agencies might seek to impose. In this area, federal preemptive powers support and even expand a proprietor's rights. But when nonproprietary actions affect aviation in locations off of the airport's property, they generally are not governed by federal law. In those matters federal law relies on the proprietor's powers to protect aviation interests.

1. Federal Law Supports On-Campus Actions

Federal law supports a proprietor's land-use decisions on its campus primarily through an airport's contractual grant assurances. Standard land-use and property management practices will not violate federal requirements when they are properly administered. In fact, the federal administrative review of these actions generally defers to them. While tenants may raise a challenge, a review by FAA will not give preference to a tenant's interests over the proper decisions of a proprietor.

For example, administrative cases generally defer to proprietary decisions about the process that the proprietor will use to develop or redevelop land. Under federal requirements, proprietors may decide to redevelop through a Request for Proposals process rather than accept a tenant's offer to enter a new lease; they are not required to develop land consistent with the wishes of a particular tenant; they can develop in phases with interim arrangements to accommodate aeronautical uses; and consistent with lease terms, they can force current hangar tenants out rather than accept proposals to continue to lease in the same or comparable hangar space.³¹⁵ Proprietors can change their airport master plans and airport layout plans over time without making special accommodations for existing tenants.³¹⁶

³¹⁵ *See* Thermco Aviation, Inc. v. L.A., Director's Determination, FAA Docket No. 16-06-07 (June 21, 2007); Thermco Aviation, Inc. v. L.A., Final Agency Decision, FAA Docket No. 16-06-07 (Dec. 17, 2007).

³¹⁶ Jimsair Aviation Servs. Inc. v. S.D. County Regional Airport Auth., Director's Determination, FAA Docket No. 16-06-08 (Apr. 12, 2007).

An airport proprietor's rights also allow it to use a wide variety of commercial leasing practices. A proprietor may refuse to allow a tenant to expand facilities, and under federal law a proprietor may enter tenant arrangements without a public solicitation process.³¹⁷ The proprietor may refuse to agree to a tenant's preferred terms, and may refuse to enter long-term arrangements when contemplating redevelopment.³¹⁸ Tenants that are not similarly situated do not require similar facilities or similar use rights,³¹⁹ and leases can be subject to different terms over time or among different users.³²⁰

Airport proprietors can change their leasing practices and Minimum Standards over time even though tenants end up with different compliance obligations.³²¹ Proprietors may also choose among competing interests for a given lease based on accommodating the best use for the available space.³²² Proprietors can enforce Minimum Standards differently where different tenants warrant that distinction; they can also evict tenants for failing to comply with Minimum Standards.³²³ FAA does not intervene in contract disputes among proprietors and tenants, and in fact it has no jurisdiction to do so.³²⁴

Other kinds of property management decisions receive similarly deferential treatment in FAA's administrative processes. For example, when determining fees for general aviation uses, proprietors can charge fees to locally-based aircraft without imposing fees on transient aircraft.³²⁵ Fee schedules can differ where activities are not similarly situated; establishing appropriate fee schedules is an airport business decision.³²⁶

A proprietor's decisions concerning fueling activities at its facilities are also treated as proprietary business

decisions. Proprietors can require that tanks be above-ground, that they be placed in a fuel farm, and that fuel be trucked from a fuel farm.³²⁷ "The airport proprietor retains the right to determine where fuel tanks will be placed on its airport."³²⁸ Proprietors can terminate fueling rights for defaults under Minimum Standards or rental agreements.³²⁹ They can accommodate self-fueling without permitting the use of on-site fuel tanks by requiring tenants to truck fuel to their leaseholds using tenant equipment.³³⁰ They can also prohibit trucking from off-airport locations and require that tenants conduct all self-fueling activities on site.³³¹ The proprietor can also exercise an exclusive right to provide fueling or other aeronautical activities despite prohibitions on granting exclusive rights.³³²

In other words, an airport proprietor is free to conduct business on its property as long as its activities are properly administered, and proper administration essentially requires that the proprietor act in a nondiscriminatory way. Proprietors cannot manipulate standards,³³³ work in an unequal manner with tenants pursuing development proposals,³³⁴ or favor one tenant through airport business practices such as by not collecting assessed rentals.³³⁵ Proprietors cannot selectively apply³³⁶ or selectively enforce Minimum Standards³³⁷ or grant exclusive or partially exclusive rights to conduct fueling or other aeronautical activities.³³⁸ The proprietor must treat similarly situated parties in a similar way, and cannot demonstrate favoritism with respect to airport opportunities. Otherwise, federal review processes generally give proprietary rights wide latitude as proprietors manage an airport campus.

Even when federal law gives an airport tenant specific rights, those rights do not supersede the rights of

³¹⁷ *Bisti Aviation, Inc. v. City of Farmington, N.M., Director's Determination*, FAA Docket No. 16-07-01 (Dec. 4, 2007).

³¹⁸ *Thermco Aviation, Inc. v. L.A., Final Agency Decision*, FAA Docket No. 16-06-07 (Dec. 17, 2007).

³¹⁹ *Platinum Aviation v. Bloomington-Normal Airport Auth., Final Decision and Order*, FAA Docket No. 16-06-09 (Nov. 28, 2007).

³²⁰ *Rick Aviation, Inc. v. Peninsula Airport Comm'n, Final Decision and Order*, FAA Docket No. 16-05-18 (Nov. 6, 2007).

³²¹ *Id.*

³²² *Skydive Monroe, Inc. v. City of Monroe, Ga., Director's Determination*, FAA Docket No. 16-06-02 (Mar. 30, 2007).

³²³ *Rick Aviation, Inc., Final Decision and Order*, FAA Docket No. 16-05-18 (Nov. 6, 2007) (eviction, terms not identical); *Jimsair Aviation Servs. Inc. v. S.D. County Regional Airport Auth., Director's Determination*, FAA Docket No. 16-06-08 (Apr. 12, 2007) (nonenforcement); *Carey v. Afton-Lincoln County Mun. Airport Joint Powers Bd., Director's Determination*, FAA Docket No. 16-06-06 (Jan. 19, 2007), at 54 (selective enforcement).

³²⁴ *Rick Aviation, Inc., Final Decision and Order*, FAA Docket No. 16-05-18 (Nov. 6, 2007).

³²⁵ *Wadsworth Airport Ass'n, Inc. v. City of Wadsworth, Director's Determination*, FAA Docket No. 16-06-14 (Aug. 8, 2007).

³²⁶ *Jimsair Aviation Servs. Inc., Final Decision and Order*, FAA Docket No. 16-06-08 (April 12, 2007).

³²⁷ *Airborne Flying Service, Inc. v. City of Hot Springs, Ark., Final Decision and Order*, FAA Docket No. 16-07-06, 2009 FAA LEXIS 148 (May 2, 2008), at 35.

³²⁸ *Id.*

³²⁹ *Rick Aviation, Inc., Final Decision and Order*, FAA Docket No. 16-05-18 (Nov. 6, 2007).

³³⁰ *Skydive Monroe, Inc., Director's Determination*, FAA Docket No. 16-06-02 (Mar. 30, 2007).

³³¹ *AmAv, Inc., Final Decision and Order*, FAA Docket No. 2006, FAA LEXIS 594, at 32.

³³² FAA Order 5190.6A, 3-9(d).

³³³ *Carey v. Afton-Lincoln County Mun. Airport Joint Powers Bd., Director's Determination*, FAA Docket No. 16-06-06 (Jan. 19, 2007), at 54.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Jimsair Aviation Servs. Inc., Director's Determination*, FAA Docket No. 16-06-08 (Apr. 12, 2007) (nonenforcement); *Carey v. Afton-Lincoln County Mun. Airport Joint Powers Bd., Director's Determination*, FAA Docket No. 16-06-06 (Jan. 17, 2007), at 54 (selective enforcement).

³³⁷ *Jimsair Aviation Servs. Inc., Director's Determination*, FAA Docket No. 16-06-08 (Apr. 12, 2007).

³³⁸ *Platinum Aviation, Final Decision and Order*, FAA Docket No. 16-06-09 (Nov. 28, 2007).

the proprietor. For example, aircraft owners have the right to self-fuel when using their own employees and equipment,³³⁹ but this right does not override the prerogative of the airport owner to control the sources of providing fuel and other aeronautical services.³⁴⁰ Self-fueling tenants do not have discretion to give airport access to fueling companies, since the fuel company has only such rights as the airport owner may confer. The airport owner “is under no obligation to permit aircraft owners to introduce onto the airport any equipment, personnel or practices which would be unsafe, unsightly, detrimental to the public welfare, or that would affect the efficient use of airport facilities by others.”³⁴¹ In fact, FAA approves a proprietor’s use of reasonable rules and regulations to govern these activities.³⁴² The law thus recognizes that the proprietor has a right to exercise substantial control over its facilities.³⁴³

The law also recognizes that a proprietor need not allow a tenant to take the same actions that the proprietor takes. For example, an airport

is under no Federal obligation to allow [a tenant] to park its unattended fuel truck on Federally funded public aircraft ramp, even though the Authority parks its fuel truck on the same [ramp]...The Authority, as the airport proprietor, is providing aircraft fueling services to the public. All profits received by the authority from its fuel sales must be used for the capital and operating costs of the airport as required by Federal law...The Director agrees with the Airport Authority that airport sponsors can restrict fueling or certain other types of equipment to specific locations.³⁴⁴

In a challenge, FAA examines a proprietor’s actions to determine whether its property management decisions are reasonable. A proprietor’s willingness to negotiate with a tenant and offer alternatives will help establish reasonableness. For example, in *Monaco Coach Corp. v. Eugene Airport and the City of Eugene, Ore-*

gon,³⁴⁵ a tenant asked to lease property for a fuel tank when an airport had followed a longstanding policy of consolidating fuel storage facilities. The proprietor considered the tenant’s proposal and rejected it, but offered several alternatives to the tenant. Among those alternatives, the proprietor offered to assist the tenant by negotiating a larger price discount for the tenant from the FBO (fixed base operator). It also offered to allow the tenant to truck its fuel from off-airport if the fuel and equipment were not stored on the airport. Subsequently, the proprietor offered to let the tenant place a tank in the airport’s centralized fuel farm. In this case, FAA found that the record did not “establish that the Respondent’s proposed alternatives are unreasonably expensive, nor that the Respondent’s interest in the safe and prudent management of the airfield is unreasonable.”³⁴⁶

A proprietor’s internal process for considering a tenant request will also help establish that its proprietary decisions are reasonable. In the foregoing case, FAA found that the proprietor’s actions were sufficient where it had considered the tenant’s proposal, discussed it with airport users and the airport’s governing board, and then made a determination and communicated it. If a proprietor engages in “unreasonably confounding, vague or uncooperative behavior,” FAA may find that this amounts to an unreasonable denial of access.³⁴⁷

A proprietor’s justification for acting can also provide support for the reasonableness of its decisions. For example, FAA has found many justifications sufficient to support decisions about fuel tank locations, such as a desire to restrict fuel tanks to past locations; concerns that past tenants left underground tanks that the airport had to remove; a desire to use locations that accommodate future reversionary interests; taking actions based on the proprietor’s custodial view of the airport rather than just a private interest in tank locations; a history of past contamination resulting in expensive cleanup; concerns that bankruptcy might leave the proprietor the only solvent party; concerns that any contamination could divert airport staff time; desires to centralize fuel capacity and minimize the risk of contamination; desires to prevent a proliferation of private tanks from reducing available hangar space; concerns that tank locations would interfere with airport development plans; and concerns that proposed tanks could be hit by aircraft.³⁴⁸

³³⁹ Order 5190.6B § 11.1.

³⁴⁰ Order 5190.6B § 11.5.

³⁴¹ Order 5190.6 B § 11.7.

³⁴² Order 5190.6 B §§ 11.5, 11.6.

³⁴³ FAA administrative decisions mirror this deference even when proprietary decisions are costly for a tenant. For example, one case found that an airport could deny a tenant request to install a fuel tank even though this forced the tenant to purchase two fuel trucks. FAA found,

[t]he airport proprietor retains the right to determine where fuel tanks will be placed on its airport...[it was] neither unusual nor unreasonable to require fuel tanks to be located in a central or common fuel farm...[and a] refusal to approve the Complainant’s preferred method and location of self fueling is not tantamount to denying the Complainant the opportunity to self-fuel.

Airborne Flying Service, Inc., Final Agency Decision, FAA Docket No. 16-07-06, 2008 FAA LEXIS 148, 42–43 (May 2, 2008).

³⁴⁴ *Scott Aviation, Inc. v. Dupage Airport Auth.*, Director’s Determination, Docket No. 16-00-19, 2002 FAA LEXIS 398 (July 19, 2002), at 49–50.

³⁴⁵ *Monaco Coach Corp. v. Eugene Airport and the City of Eugene, Or.*, Final Agency Decision Docket No. 16-03-17, 2005 FAA LEXIS 195 (Mar. 4, 2005).

³⁴⁶ *Id.* at 38 (FAA “reviews the facts presented in the case and determines whether or not there is sufficient evidence to determine that the Respondent’s program unreasonably denies access to the aeronautical activity”).

³⁴⁷ *Airborne Flying Service, Inc.*, Final Agency Decision, FAA Docket No. 16-07-06, 2008 FAA LEXIS 148, at 35.

³⁴⁸ *Id.*; *Thermco Aviation, Inc. v. L.A.*, Final Agency Decision, FAA Docket No. 16-06-07 (Dec. 17, 2007); *Jimsair Aviation Servs. Inc.*, Director’s Determination, FAA Docket No. 16-

A proprietor's consideration of other business factors can also help establish the reasonableness of its actions. In addition to offering alternatives to tenants and giving their proposals respectful consideration, proprietors can consider the need for revenues to fund the airport; consider land-use needs, such as efforts to avoid constraining other tenants; consider legal constraints, such as violations of state and local fire codes; and consider the potential for unsafe conditions.³⁴⁹ FAA assesses reasonableness by examining the evidence of the proprietor's actions, and a proprietor's use of good business practices can form the basis for FAA's deference in support of its business decisions.

Proprietors thus have wide latitude to take actions managing the use of their property. When their actions are challenged under the grant assurances, FAA defers to those proprietary actions unless they are discriminatory in some manner, and the proprietor's business practices will help establish that its actions are reasonable. Federal law's substantial support for a proprietor's land-use and management decisions will generally override conflicting tenant demands, and it can override the nonproprietary actions of local government as well.

2. Protection From Nonproprietor Constraints

In some cases federal law can preempt the nonproprietary actions of local government from constraining an airport proprietor's use of its property. For example, in *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*,³⁵⁰ the court considered whether a nonproprietor city could pass an ordinance forcing the proprietor to submit development projects for prior approval by the city's Planning Commission, including runway and taxiway construction and reconstruction projects. The court found that the city could not condition airfield construction on the city's prior approval.

The court determined that

[t]he proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace. The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law.... Stated simply, a non-proprietor municipality may not exercise its police power to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport.³⁵¹

The court then found that the nonproprietor's ordinance was invalid on its face.³⁵²

06-08 (Apr. 12, 2007); *Rick Aviation, Inc.*, Final Decision and Order, FAA Docket No. 16-05-18 (Nov. 6, 2007).

³⁴⁹ See *Airborne Flying Service, Inc.*, Final Decision and Order (May 2, 2008), FAA Docket No. 16-07-06, 2009 FAA LEXIS 148; *Scott Aviation, Inc.*, Director's Determination, FAA Docket No. 16-00-19, 2002 FAA LEXIS 398 (July 19, 2002), at 49–50.

³⁵⁰ *Burbank-Glendale-Pasadena Airport Auth.*, 979 F.2d 1338, 1341 (9th Cir. 1992).

³⁵¹ *Id.* at 1341.

³⁵² See also *Township of Tincum v. U.S. Dep't of Transp.*, 582 F.3d 482 (3d Cir. 2009) (nonproprietor may not assert tax-

In *City of Keene v. Town of Swanze*y,³⁵³ an airport tenant wanted to use an existing airport building to operate a helicopter flight school. The tenant submitted an application for site plan approval to the nonproprietor town where the airport was located. The town denied the application, and the New Hampshire Superior Court upheld the denial; the proprietor then sued the town over preemption concerns in Federal District Court. A federal magistrate's report determined that the town's denial was preempted by federal law, and the state Superior Court then voided its earlier determination on preemption grounds. It found that the tenant merely sought to use a building at the airport to facilitate its helicopter flight training. Therefore, the town could not use its police powers to hinder approval of the tenant's site plan. The parties subsequently incorporated the federal and state court determinations into a consent decree.

In *Tweed-New Haven Airport Authority v. Town of East Haven, Connecticut*,³⁵⁴ an airport was commencing the construction of runway safety areas when a nonproprietor town issued a cease and desist order under the authority of its local wetlands commission. The court found that the Supremacy Clause "invalidates state laws that interfere with, or are contrary to, federal law."³⁵⁵

[T]he FAA Act [the Federal Aviation Act of 1958] impliedly preempts the East Haven defendants' regulations because Congress intended to regulate, i.e., to fully occupy, the field of airline safety within which field the Runway Project lies. Therefore, any regulation of the East Haven defendants which acts to prevent the work provided for in the Runway Project...and any cease and desist order stopping that Project is preempted by Federal law.³⁵⁶

Consistent with nonproprietor actions affecting airspace, these courts found that nonproprietor actions are preempted when they interfere with a proprietor's management of land used for aeronautical activities. Also consistent with other nonproprietor cases, the courts looked to field preemption to invalidate these nonproprietary actions. Federal preemption principles thus help protect airport proprietary rights in this context. Airport proprietors may be able to take better ad-

ing authority over the landing of aircraft on the nonproprietor's lands).

³⁵³ *City of Keene v. Town of Swanze*y, Civil No. 00-242-JD, U.S. D.C., D.N.H. (2000–2001). See also *Green River Aviation, Inc. v. Town of Swanze*y, Docket Nos. 99-E-069 and 99-E-076, Sullivan County Superior Court, State of New Hampshire, Order of Judge Robert E.K. Morrill (July 3, 2000).

³⁵⁴ *Tweed-New Haven Airport Auth. v. Town of East Haven*, 582 F. Supp. 2d 261 (D. Conn. 2008).

³⁵⁵ *Id.* at 226 (citations omitted).

³⁵⁶ *Id.* at 267 (finding that express preemption under § 41713 did not apply because the airport could not show that the town's actions would definitely result in the FAA withdrawing the airport's operating certificate, and thus affect prices, routes, and services at the airport.)

vantage of these principles to protect their land use decisions from nonproprietary interference.³⁵⁷

Another recent case illustrates that these principles can apply in other areas of the airfield as well. In *Montara Water and Sanitary District v. County of San Mateo*,³⁵⁸ the court found that airport property was not subject to condemnation by a nonproprietor entity under state law because while the power of eminent domain is a core attribute of state sovereignty, “it is well-settled that a state’s power of eminent domain must yield where its exercise would frustrate the purposes of a federal statute.”³⁵⁹ Thus federal preemption power protected airport lands from a nonproprietary condemnation.

In this case, the airport and the FAA sought to protect disputed water wells located near the perimeter of the airfield. The FAA ultimately exercised its reversionary right under the property deed conveying the airport property to prevent the disputed wells from transferring to the condemnor. However, the court noted that this action may not have been necessary, and that the Surplus Property Act likely gives FAA the authority to block a proposed condemnation without resorting to its reversionary interest. Under a preemption analysis, the court found that FAA’s objection to the transfer in this context supported a preemption of state condemnation laws.

The *Montara* court found FAA is vested with the sole responsibility for determining and enforcing compliance with the terms, conditions, reservations, and restrictions upon or subject to which surplus property is disposed of pursuant to the Surplus Property Act...FAA therefore is the agency intended by Congress to determine the appropriate course of conduct to accomplish the [Act’s] legislative purpose, and its reasonable views must prevail.³⁶⁰

The court also noted that airports have an obligation to be self-sustaining under their grant assurances and that property was granted to airports under the Surplus Property Act in the first place in part to assist in meeting that obligation. Both legal requirements thus worked to prevent a nonproprietor from taking the property.

At times airport proprietors may face concerns under federal preemption when they impact other aeronautical activities while managing their local facilities. However, these same preemptive powers can assist them

³⁵⁷ A recently filed case is again considering whether state law requirements may impede airport development. In *Township of Tinicum, Delaware County, Pa. and County of Delaware v. City of Philadelphia*, Court of Common Pleas, Delaware County, Pennsylvania, Case No. 09-006999, the plaintiffs filed suit on May 26, 2009, seeking a declaratory judgment that the city must obtain their consent pursuant to a Pennsylvania statute before it can purchase any land in their jurisdictions to expand the airfield of the Philadelphia International Airport.

³⁵⁸ *Montara Water and Sanitary Dist. v. County of San Mateo*, 598 F. Supp. 2d 1070 (N.D. Cal. 2009).

³⁵⁹ *Id.* at 1085.

³⁶⁰ *Id.* at 1089 (original insertion, quotation marks omitted).

when they are defending against local nonproprietary actions. Federal law strongly supports a proprietor’s ability to manage its facilities, and in a land-use context, it can provide assistance against nonproprietary actions directed at the airport.

3. Off-Campus Protections Rely on Proprietary Rights

Federal law can prevent a nonproprietor entity’s land-use measures from disrupting an airport’s operations and can protect against a loss of airport property. Federal law recognizes, however, that local government has the right to enact land-use measures that affect aviation when they do not affect an existing airport’s campus. For example, in *Hoagland v. Town of Clear Lake, Indiana*,³⁶¹ the court found that 49 U.S.C. § 41713 did not preempt a town zoning ordinance regulating the location of aircraft landing strips, pads, and spaces. This court reviewed other preemption cases and determined that preempted issues are those which

reach far beyond a single local jurisdiction and which cannot sensibly be resolved by a patchwork of local regulations. It would be unmanageable—say nothing of terrifying—to have local control of flight routes or of flight times. Such things require nationwide coordination. But the issue of where a local governing body chooses to site an airport is different...the agency [FAA] leaves the decision not to allow a landing strip to the discretion of the local government.³⁶²

The court noted that when an airport location is being determined, federal regulations under 14 C.F.R. § 157.7(a) discuss the FAA’s role in conducting an aeronautical study and considering matters relating to the airfield and airspace. However, the FAA’s determination

does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation...if the FAA has no objection, before it can build an airfield the proponent must comply with local laws. In other words, the FAA leaves land use issues primarily to local governments.³⁶³

When nonproprietary actions affect lands where no airport has been established, federal law looks to the role and powers of the local proprietor to protect aviation interests. The local proprietor is the party responsible to find a location and establish an airport. Federal law also relies on the proprietor to mitigate aviation impacts in the community and to protect airspace and other aviation needs locally. For example, in *Davidson County Broadcasting, Inc. v. Rowan County Board of Commissioners*,³⁶⁴ the court found that local government was responsible to properly zone to accommodate radio

³⁶¹ *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693 (7th Cir. 2005).

³⁶² *Id.* at 698.

³⁶³ *Id.* at 698. See also *Emerald Dev. Co. v. McNeill*, 82 Ark. App. 193, 120 S.W.3d 605 (2003) (court not preempted by Federal Aviation Act from enjoining private airport development).

³⁶⁴ *Davidson County Broad., Inc. v. Rowan County Bd. of Comm’rs*, 186 N.C. App. 81, 649 S.E.2d 904, 911 (2007).

towers in the airspace. It determined that the majority of courts have held that “federal aviation law does not preempt all local or state land use regulations which may affect aviation.”

As a part of its inquiry in this case, the court examined FAA’s statements regarding zoning for radio towers. In a letter from the Airports District Office to the county, FAA stated that the county

is obligated, through...federal grant agreements, to protect the terminal airspace of the Rowan County Airport. This is control that must be exercised at the local and/or state level as the federal government does not have the power to protect that airspace for you.... It is important that local communities recognize these assets [airspace] and provide the necessary protection both in terms of land usages and height restrictions.³⁶⁵

Because the federal government did not have this power, the court found that federal law did not preempt local zoning ordinances.

Federal law thus strongly supports a proprietor’s actions to manage its own lands. It also can support an airport proprietor’s rights when the proprietor defends against some actions by nonproprietary entities that might constrict the use of the airport. But the federal government must rely on local proprietary rights to protect aviation in the larger community. In general, federal preemptive powers will not preempt local land-use decisions that affect aviation when they do not impact existing airport facilities.

The three overviews presented in this study illustrate the scope of current proprietary rights analysis. When proprietors address the local effects of flight, they may face a variety of legal challenges and complex processes. Airport rates and charges favor voluntary agreements, but guidance on the reasonableness of a proprietor’s actions remains in flux. Yet when proprietors manage an airport campus, their actions are met with substantial deference under a proprietary rights analysis, and that analysis can help protect the airport from nonproprietor actions. Federal law even relies on proprietary rights to protect aviation interests more generally in the community. These wide-ranging results are the product of how different laws affect aviation and nonaviation interests as proprietors exercise their state-granted powers, to the extent not superseded by federal law or modified by federal contract, and in light of the proprietor’s longstanding purpose and function.

V. CONCLUSION

The task of airport proprietors across the country over the past century has been to establish aviation in the community and to protect the legal framework that makes that act possible. That framework was already in existence at the outset of aviation in the traditional municipal powers that airport proprietors held. Over time federal law and contracts have shaped airport proprietary rights, but they have also recognized the need

for those rights and have firmly established them in the law. Thus the proprietor’s core state rights, to the extent not superseded by federal law or modified by contract, continue to support its role as a participant in the aviation system.

³⁶⁵ *Id.* at 911.

APPENDIX A

SURVEY—CURRENT PROPRIETARY RIGHTS ISSUES

1. Organizational Structures of Responding Airport Proprietors

Number of Respondents	Type of Organizational Structure
4	City Department (with or without governing board)
15	Authority or Independent/Dependent Special District
5	County Department
1	City and County Department
1	State Department
1	Bi-State Authority (consented to by Congress)
1	Joint Board of two cities

2. Unusual State Law Rights or Limitations of Responding Proprietors

General Aviation
By statute, general aviation tenants own the permanent improvements that they construct on airport leaseholds and have a right to sell them to successor tenants.
Statutes establish a policy that facilitates tenant lease extensions and successor leases with existing tenants and their assignees.
Land Use
Untested statutes allow a proprietor to impose compatibility zoning around the airport, but the state is negotiating with a nonproprietor municipality to allocate zoning authority on airport property.
State law gives a proprietor an exclusive right to determine the use of airport land, and it is not required to comply with local land use or zoning ordinances.
An airport authority on county-owned land has only operational jurisdiction, and can only dispose of land with the county's consent and deed of conveyance.
An airport authority on city-owned land controls the airport.
An airport authority that operates seven airports is "detached" from its surrounding municipal and tax jurisdictions.
Special legislation allows a joint board to exclusively control an airport's land use even when property is located in the jurisdiction of a nonproprietor entity.
An airport authority must have county approval to condemn property and must proceed in the county's name.
A county proprietor can only convey real property through a competitive process.
General Governance
An intergovernmental agreement entered into with an adjoining county to annex land for airport expansion imposes contractual limitations on the airport proprietor.
A Board of County Commissioners has all significant decision-making authority for a proprietor, and the Airport Director's authority to enter contracts is limited.
A proprietor's use and lease agreements impose strong contractual restrictions on the proprietor's actions.
An airport authority leases the airport's property from FAA, the property owner, but the authority is the operator and sponsor.

State statutes provide a proprietor broad authority to act as a proprietary entity, not just a proprietary airport.
A city-owned airport with a governing board must follow city policies and procedures, and the city charter allows the City Council to obtain jurisdiction and review the board's decisions.
Procurement and Contracting
Nevada Revised Statute 496.090 allows a proprietor to directly negotiate agreements rather than requiring it to conduct an RFP or RFQ process.
An airport authority has broad contracting powers that allow awards directly by the proprietor, awards without board approval for some consulting contracts, and alternative contracting awards for construction.
State statutes require that a proprietor's duty-free concession be exclusive, and be awarded by competitive bid or RFP.
A county proprietor is subject to higher operating expenses under a county charter that prohibits hiring contractors to perform work that county employees can do or have previously done, unless otherwise justified.
Finance and Revenue Use
Two proprietors reported having a grandfathered ability to use airport revenues for non-airport purposes.
State regulations limit a proprietor's tenant rent increases to 10 percent per year, cumulative since the last increase.
An airport authority's budget is subject to review and approval by a city/county council even though the council lacks real authority because the proprietor receives no tax revenue.
State statutes prohibited a proprietor from imposing any new percentage fee for off-airport parking businesses after the proprietor increased fees.

3. Proprietor's Rights Issues that Responding Airports Experienced in the Past Several Years

Number of Respondents	Type of Issue Reported / Additional Comments
1	Advisory Board—Scope of board authority
7	Air Service Incentives—Ability to offer incentives
6	Air Service Restrictions—Ability to impose restrictions <ul style="list-style-type: none"> • <i>One proprietor sought to enforce contractual covenants to phase out service at one airport to support the economic viability of another; after extensive litigation and administrative proceedings, DOT and the courts did not outright prohibit the power to act to protect economic viability at an airport, but they found there was not adequate justification shown in this case to expand proprietor's rights for this reason.</i>
1	Aircraft Movement Requirements—Allowable practices
0	Aircraft Parking Requirements—Allowable practices
2	Airfield Regulations—Allowable practices
4	Airline Use Agreements or Permits—Allowable terms <ul style="list-style-type: none"> • <i>Airlines challenged whether a proprietor could equalize its rates during a lengthy construction process to build and update facilities. The courts allowed equalization.</i>
11	Airport Expansion and Development—Permissible requirements or practices <ul style="list-style-type: none"> • <i>A new ordinance resolved questions about a proprietor's ability to develop a golf course under city zoning requirements.</i>

	<ul style="list-style-type: none"> • A proprietor was questioned about its ability to develop revenue-generating concessions at a proposed FasTracks station 10 mi from the terminal. • A proprietor amended all Fixed Base Operator (FBO) leases after disputes over its exclusive leasing of FBO ramp space led to an FAA IG complaint.
4	<p>Airspace Issues and Obstructions—Permissible airport actions</p> <ul style="list-style-type: none"> • Local communities wanted a proprietor to restrict aircraft operations, establish specific flight tracks, or redirect aircraft to other airports.
2	Antitrust—Permissible airport actions
4	<p>Business Decision-Making Authority of the Airport</p> <ul style="list-style-type: none"> • A city sponsor disputed requirements for medical benefits under city living wage laws, but only at the airport. • A lawsuit challenged a proprietor's formation, claiming it was created by unconstitutional special legislation, and the state Supreme Court confirmed the formation was legal.
1	Civil Rights—Allowable practices
2	Competition Plans—Allowable practices
2	<p>Congestion Management—Allowable practices</p> <ul style="list-style-type: none"> • FAA contacted the proprietor to set hourly limits on flights at LaGuardia airport, resulting in a lawsuit.
0	Contracting Authority—Allowable practices
2	Curb Management Requirements—Allowable practices
4	First Amendment Restrictions—Allowable practices
3	Flight Bans—Allowable practices
3	<p>Fueling Activities—Allowable practices</p> <ul style="list-style-type: none"> • A proprietor successfully protected its exclusive right to sell fuel after a tenant pursued a lawsuit and a Part 16 action.
9	<p>Ground Transportation—Allowable practices</p> <ul style="list-style-type: none"> • An RFP limited an airport's number of providers. • A proprietor's state transportation agency and attorney general complained that it should impose alternative fuel vehicle requirements on ground transportation vehicles. • A proprietor faced questions regarding the scope of its right to regulate taxi activity as a proprietor versus a city's right to regulate under licensing ordinances.
7	<p>Land Use and Planning—Practices allowed on airport</p> <ul style="list-style-type: none"> • A county claimed that it had the ability to impose zoning requirements on a proprietor's land for nonaviation uses located on the proprietor's property.
9	<p>Land Use and Planning—Practices allowed surrounding the airport</p> <ul style="list-style-type: none"> • Lawsuits challenged a proprietor's zoning requirements supporting Runway Protection Zone and Part 77 requirements. • An airport authority proprietor explored whether its enabling legislation permitted it to adopt zoning ordinances affecting surrounding communities in an effort to prevent a local city from building wind turbines. • A proprietor was involved in litigation over a neighboring city's ability to use land for a football stadium. • Local governments forced a proprietor to conduct a comprehensive analysis of future airport development on and off of the airport for high speed rail, train services, a multimodal transportation center, a consolidated rental car facility, etc. • A proprietor worked with neighboring cities to adopt airport compatible zoning. • A proprietor faced zoning issues with its municipality.
4	Leasing Practices Allowed—Airlines
3	Leasing Practices Allowed—Concessions

4	Leasing Practices Allowed—General aviation <ul style="list-style-type: none"> • <i>A proprietor frequently experiences Part 16 actions involving general aviation leasing practices.</i> • <i>A proprietor faced questions regarding whether companies not affiliated with an FBO can maintain and repair general aviation aircraft at the airport.</i>
3	Leasing Practices Allowed—Other government tenants
3	Local Liability Issues—Airport-related immunities or rights
0	Maintenance Requirements and Practices Allowed
6	Minimum Standards—Allowable practices <ul style="list-style-type: none"> • <i>Proprietors faced political interference when adopting new minimum standards.</i>
8	Noise Measures—Allowable practices <ul style="list-style-type: none"> • <i>A neighboring city objected to a proprietor's sound insulation / noise mitigation program.</i>
2	Operations Requirements—Allowable practices
3	Permitting Practices Allowed <ul style="list-style-type: none"> • <i>A prior FBO engaged in litigation over whether the airport must have agreements with ground handlers (a Part 16 case went to decision, but the proprietor voluntarily entered these agreements as part of the Part 16 action).</i>
2	Pollution Control—Allowable practices
6	Rate Making—Allowable practices <ul style="list-style-type: none"> • <i>Proprietors faced concerns over potential new rate-making processes.</i>
5	Regulatory Efforts by Other Governmental Entities—Allowable practices <ul style="list-style-type: none"> • <i>A neighboring city objected to a proprietor's sound insulation / noise mitigation program.</i>
11	Revenue Diversion—Allowable practices <ul style="list-style-type: none"> • <i>An FAA audit asked a proprietor to change certain practices (minor).</i> • <i>A local transportation agency believed a proprietor was legally obligated to mitigate off-airport traffic congestion on adjacent streets under state environmental law.</i> • <i>A proprietor entered negotiations to amend its police services contract to make more transparent the services received and costs incurred.</i> • <i>A proprietor faced disputes over who had the right to contract for and take revenues from potential gas drilling activities under airport property.</i> • <i>A proprietor faced disputes when the city that owns its real property wanted to use portions of it.</i> • <i>Proprietors faced questions from nonprofits seeking charitable contributions.</i>
3	Rules and Regulations—Ability to govern internal airport matters
3	Rules and Regulations—Ability to govern use of the airport
1	Safety Requirements—Allowable practices <ul style="list-style-type: none"> • <i>State legislation resolved the authority of the airport police to take action on property surrounding the airport.</i>
2	Security Requirements—Allowable practices
1	Technology Implementation—Allowable practices
1	Temporary Restrictions on the Proprietor—Imposed to permit a review period
5	No Proprietary Rights Issues Reported. In general, smaller airports reported fewer issues.

4. Issues of Interest to Responding Proprietors

Area	Issues of Interest to Responding Proprietors
Land Use/Planning Surrounding the Airport	<p>A proprietor's general ability to impose height limitations through zoning.</p> <p>How proprietors can extend a runway without zoning approval from the city.</p>
Leasing	<p>The appropriate duration for various leases.</p> <p>How proprietors can lease their property for nonaeronautical uses when there is no aeronautical demand.</p> <p>How proprietors can measure the fair market value of land when a tenant has made substantial site improvements.</p> <p>How a proprietor can work under interim leases when the proprietor anticipates development, such as how arrangements can eliminate claims for relocation costs under the Uniform Relocation Act at the time when the tenant must vacate, and the proprietor's ability to limit lease term.</p>
Generally	<p>Areas that relate to how proprietors interact with other governmental units.</p> <p>All areas are of interest.</p>
Air Service	<p>How to generate air service without violating revenue diversion rules.</p>

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Thermco Aviation, Inc. v. L.A., Final Agency Decision, FAA Docket No. 16-06-07 (Dec. 17, 2007).

Tweed-New Haven Airport Auth. v. Town of East Haven, Connecticut, 582 F. Supp. 2d 261 (D. Conn. 2008).

Wadsworth Airport Ass'n, Inc. v. City of Wadsworth, Director's Determination, FAA Docket 16-06-14 (Aug. 8, 2007).

APPENDIX C CASE UPDATE

The amended Rates and Charges Policy permits certain airports to charge “peak hour pricing” when overall fees do not exceed historic costs and to include costs for secondary airports and for airfield facilities under construction, and it was recently upheld in a facial challenge. In response to claims that these landing fees violated prohibitions against unreasonable and unjustly discriminatory fees under 49 U.S.C. § 40116(e)(2) and 49 U.S.C. § 47107(a)(1), the court deferred to USDOT's determinations. The court also found that these fees are not preempted under the Airline Deregulation Act as local regulations, stating that the ADA expressly exempts the acts of airport proprietors from preemption when they are carrying out their proprietary powers and rights. *Air Transp. Ass'n v. United States Dep't of Transp.*, No. 08-1293, 2010 U.S. App. LEXIS 14258, at *26–27 (D.C. Cir. July 13, 2010).

ACKNOWLEDGMENTS

This study was performed under the overall guidance of the ACRP Project Committee 11-01. The Committee was chaired by BARRY MOLAR, Unison Consulting, Inc., Wheaton, Maryland. Members are PATRICIA A. HAHN, Patricia A. Hahn Consulting, Washington, DC; TIMOTHY KARASKIEWICZ, General Mitchell International Airport, Milwaukee, Wisconsin; CARLENE MCINTYRE, Port Authority of New York & New Jersey, New York, New York; E. LEE THOMSON, Clark County, Las Vegas, Nevada; and KATHLEEN YODICE, Yodice Associates, Aircraft Owners and Pilots Association, Washington, DC.

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ISBN 978-0-309-15497-0



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