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ACHIEVING AIRPORT-COMPATIBLE LAND USES AND MINIMIZING HAZARDOUS OBSTRUCTIONS IN NAVIGABLE AIRSPACE

This report was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. The report was prepared by Jocelyn K. Waite, Waite & Associates, Reno, Nevada. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Applications

Federal law currently requires airport owners to provide for the safe overflight of property surrounding airports, as well as to restrict surrounding land uses to those that are airport-compatible. Potential tools for ensuring compatible land include comprehensive (or master) land-use planning, zoning, building and site design, and avigation and clearance easements. An airport sponsor's deployment of these tools is based on state and local, not federal, law. Airport attorneys must not only be cognizant of land-use compatibility requirements, but must be familiar with the range of options for complying with them and aware of the legal implications of implementing the various options. For example, in accordance with its exclusive jurisdiction over the navigable airspace of the United States, the Federal Aviation Administration (FAA) promulgated 14 C.F.R. Part 77, which places responsibility on persons erecting structures in the path of airways to give notice to the FAA of intent to build, thus giving the FAA the opportunity to review and evaluate whether the structure would constitute a hazard to air navigation.

While the FAA determination has no regulatory effect, and local governments have the option to restrict or not to restrict the structure, it may influence whether states will grant necessary permits and insurance companies will insure the structure.

This report discusses airport-compatible land-use requirements, the legal issues related to achieving airport-compatible land use, and legal issues particular to eliminating hazardous obstructions to airspace. The report concludes by reviewing the major legal issues of concern in achieving airport-compatible land use.

While general legal principles relevant to airport land use are well established, they are often applied on a case-by-case basis, particularly in the context of regulatory takings and inverse condemnation. This ad hoc analysis introduces, if not an element of unpredictability, at least some variation in the law by jurisdiction. The need for greater predictability highlights the significance of including airport zoning as part of comprehensive land-use planning.

This report should be helpful to airport administrators, attorneys, board members, financial officers, community members in the vicinity of airports, realtors, and city and county zoning officials.

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I. INTRODUCTION

Federal law currently requires airport owners to provide for the safe overflight of property surrounding airports, as well as to restrict surrounding land uses to those that are airport-compatible.[1] Land-use compatibility requirements are also included in noise compatibility planning requirements.[2] Potential tools for ensuring compatible land include comprehensive (or master) land-use planning, zoning, building and site design, and avigation and clearance easements.[3] An airport sponsor's deployment of these tools is based on state and local, not federal, law.

Airport attorneys must not only be cognizant of land-use compatibility requirements, but must be familiar with the range of options for complying with them and aware of the legal implications of implementing the various options. For example, some airports have zoning authority—their counsels need to understand the legal parameters for drafting defensible ordinances. Even those airport counsels who do not have direct responsibility for drafting such ordinances may have the opportunity to provide input into local ordinances, and need to understand legal parameters to provide meaningful input.

Ensuring airport-compatible land use first requires making numerous determinations concerning noise and safety impacts, such as what areas need to be protected and from what sources. However, once those determinations are made, airport sponsors—and hence their counsel—need to understand what methods are at their disposal for securing the desired compatible uses and avoiding incompatible uses and the legal ramifications of employing each of those various methods. The purpose of this digest is to provide guidance concerning those post-determination options: first by providing a brief general summary of federal, state, and local government requirements related to airport-compatible land use and hazardous obstructions, and then by discussing the various methods of complying with those requirements and legal issues that may arise from employing identified methods.

The balance of this Introduction briefly discusses the federal responsibility for regulation of airspace and the state and local responsibility for regulation of land use, as well as the fact that airports may or may not have regulatory authority to directly deploy various methods discussed in the digest. The main body of the digest discusses airport-compatible land-use requirements, the legal issues related to achieving airport-compatible land use, and legal issues particular to eliminating hazardous obstructions to airspace. Cases focused on limitations of airport sponsors' ability to carry out activities on airport property are discussed only to the extent they relate to promoting airport-compatible land use. The digest concludes by reviewing the major legal issues of concern in achieving airport-compatible land use; highlighting factors that influence an airport's ability to achieve compatible land use; offering some points for airport counsel to consider in evaluating the legal risk of various steps that can be taken to achieve such land use; and identifying a few notable potential pitfalls.

The digest primarily addresses compatible-land-use legal issues faced by public-use, civilian[4] airport sponsors. The analytical focus is on the legal ramifications of using various methods available to those sponsors to ensure airport-compatible land use. The intent is to provide a starting point for airport lawyers to conduct research on the law in their specific jurisdictions. The digest does not cover all statutes or cases for any one jurisdiction: in evaluating requirements concerning zoning, eminent domain, easements, and other land-use issues, further research on state and local law is advisable. Practitioners interested in a comprehensive discussion of operational fundamentals, including recommended planning practices, may refer to *Land Use*

[1] 49 U.S.C. 47107(a)(9) and (10).

[2] Aviation Safety and Noise Abatement Act, 49 U.S.C. 47501 *et seq.*, implemented through 14 C.F.R. Pt. 150; Airport Improvement Program Handbook, FAA Order 5100.38C (June 28, 2005), www.faa.gov/airports/resources/publications/orders/media/aip_5100_38c.pdf.

[3] One survey found that 75 percent of responding airports use avigation easements. MARY ELLEN EAGAN & ROBIN GARDNER, COMPILATION OF NOISE PROGRAMS IN AREAS OUTSIDE DNL 65, at 19 (Airport Cooperative Research Program, Transportation Research Board, Synthesis 16, 2009), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_syn_016.pdf.

[4] Land use requirements around military airports may differ. *See*, *e.g.*, WILLIAM V. CHEEK, RESPONSIBILITY FOR IMPLEMENTATION AND ENFORCEMENT OF AIRPORT LAND-USE ZONING RESTRICTIONS 4, 8 (Airport Cooperative Research Program, Transportation Research Board, Legal Research Digest No. 5, 2009); What has been done to protect the mission of Luke Air Force Base?, www.glendaleaz.com/lukeafb/documents/LukeAirForceBase_Brochure.pdf (accessed Jan. 5, 2012).

Fundamentals and Implementation Resources[5] and resources cited therein.

Rather than providing guidance concerning the details of the requirements for protecting navigable airspace (such as maintaining clearance of primary surfaces and what such clearance entails),[6] the digest is intended to discuss the means of ensuring that airport sponsors comply with such protection requirements, to the extent that such compliance is achieved through ensuring airport-compatible land use and to the extent that those means appear to raise major legal issues.[7] Other types of measures not directly related to compatible land use, such as limiting numbers of flights,[8] banning certain aircraft to achieve desired noise levels,[9] or installing sound barriers and insulation,[10] are also beyond the scope of the digest.

The digest identifies legal issues that airport authorities may want to consider in drafting airport zoning provisions, negotiating easements, and participating in eminent domain proceedings. However, it is beyond the scope of the digest to render legal opinions or recommend specific approaches to achieving compatible land use and eliminating hazardous obstructions. Operational considerations, such as how to determine which land uses are compatible or how to finance easements, are also beyond the scope of the digest.

A. Significance of Airport-Compatible Land Use[11]

The importance of achieving airport-compatible land use to protect both airports and people on the ground in the airport vicinity has been recognized for over half a century.[12] *The Airport and Its Neighbors—The Report of the President's Airport Commission*, commonly referred to as the "Doolittle Report," recommended numerous steps, including establishing effective zoning laws, integrating municipal and airport planning, and incorporating cleared runway extensions areas into airports.[13] To date, adoption of such measures vary from jurisdiction to jurisdiction; the legal tools at hand to achieve airport-compatible land use vary accordingly. Thus, incompatible land use remains one of the greatest concerns airports face.[14] In addition, being surrounded by

[5] STEPHANIE A.D. WARD, REGAN A. MASSEY, ADAM E. FELDPAUSCH, ZACHARY PUCHACZ, CHRISTOPHER J. DUERKSEN, ERICA HELLER, NICHOLAS P. MILLER, ROBIN C. GARDNER, GEOFFREY D. GOSLING, SHARON SARMIENTO & RICHARD W. LEE, LAND USE FUNDAMENTALS AND IMPLEMENTATION RESOURCES (Airport Cooperative Research Program Report 27: Enhancing Airport Land Use Compatibility, Vol. 1, Transportation Research Board, 2010), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_027v1.pdf. Case study details are included in the second volume of Report 27. STEPHANIE A.D. WARD, REGAN A. MASSEY, ADAM E. FELDPAUSCH, ZACHARY PUCHACZ, CHRISTOPHER J. DUERKSEN, ERICA HELLER, NICHOLAS P. MILLER, ROBIN C. GARDNER, GEOFFREY D. GOSLING, SHARON SARMIENTO & RICHARD W. LEE, LAND USE SURVEY AND CASE STUDY SUMMARIES (Airport Cooperative Research Program Report 27: Enhancing Airport Land Use Compatibility, Vol. 2, Transportation Research Board, 2010), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_027v2.pdf. *See also* MANUEL AYRES JR., HAMID SHIRAZI, REGIS CARVALHO, JIM HALL, RICHARD SPEIR, EDITH ARAMBULA, ROBERT DAVID, DEREK WONG & JOHN GADZINSKI, IMPROVED MODELS FOR RISK ASSESSMENT OF RUNWAY SAFETY AREAS (Airport Cooperative Research Program, Transportation Research Board, Report 50, 2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_050.pdf; JON M. WOODWARD, LISA LASSMAN BRISCOE & PAUL DUNHOLTER, AIRCRAFT NOISE: A TOOLKIT FOR MANAGING COMMUNITY EXPECTATIONS (Airport Cooperative Research Program, Transportation Research Board, Report 15, 2009), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_015.pdf; Steven H. Magee, *Protecting Land Around Airports; Avoiding Regulatory Taking Claims By Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243 (1996).

[6] For a discussion of these requirements and a variety of other issues such as noise standards and technical aspects such as descriptions of the surfaces of airspace required to be protected, see CHEEK, *supra* note 4, at 4; What has been done to protect the mission of Luke Air Force Base? www.glendaleaz.com/lukeafb/documents/LukeAirForceBase_Brochure.pdf (accessed Jan. 5, 2012).

[7] State law may require notice to buyers in an airport safety zone. E.g., N.J. STAT. 6:1-85.2, Sellers' notice to buyers. Such buyer awareness measures, while helpful in reducing community opposition to airport activities and theoretically available as a defense to inverse condemnation, nuisance, or trespass actions, do not in fact appear to play a significant role in airport land use litigation, and therefore are not discussed in any detail.

[8] *See*, *e.g.,* Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977 (9th Cir. 1990).

[9] *See*, *e.g.*, City of Naples Airport Auth. v. FAA, 409 F.3d 431 (D.C. Cir. 2005); Nat'l Bus. Aviation v. Naples Airport, 162 F. Supp. 2d 1343 (M.D. Fla. 2001). Note that airport use restrictions cannot create undue burdens on interstate commerce or unjustly discriminate between categories of airport users. British Airways Bd. v. Port Auth., 558 F.2d 75 (2d Cir. 1977). For a comprehensive discussion of legal parameters surrounding airport noise control, see Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1 (Winter 2002).

[10] *See* WILLIAM V. CHEEK, *supra* note 4, at 16; What has been done to protect the mission of Luke Air Force Base?, www.glendaleaz.com/lukeafb/documents/LukeAirForceBase_Brochure.pdf (accessed Jan. 5, 2012).

[11] *See* WARD ET AL., *supra* note 5, vol. 1.

[12] WARD ET AL., *supra* note 5, vol. 1, at 1.68, citing *The Airport and Its Neighbors—The Report of the President's Airport Commission* (Doolittle Report, D.C., 1952).

[13] *Id*. at 1.69.

[14] *See*, *e.g.*, U.S. GEN. ACCOUNTING OFFICE [then-titled], AIRPORT OPERATIONS AND FUTURE GROWTH PRESENT ENVIRONMENTAL CHALLENGES 30 (GAO/RCED-00-153, 2000), www.gao.gov/archive/2000/rc00153.pdf (accessed Jan. 5, 2012); Washington DOT, *Airports and Compatible Land Use Guidebook*, ch. 1, An Overview of Airport Land Use Compatibility Planning, at 1-1, www.wsdot.wa.gov/NR/rdonlyres/B156CFF7-DEE0-4549-95B7-A53954BDF1CE/0/GuidebookChap12.pdf.

incompatible land uses has been identified as a risk factor for closure of public-use airports.[15]

Incompatible land use affects safety and gives rise to noise problems. Safety and noise-related issues in fact have economic costs associated with them, such as the costs of fatalities, injuries, and property damage associated with aviation accidents, as well as reductions in adjacent property values due to airport noise. Such economic costs are relevant to cost-benefit analysis and economic impact analysis of enforcing zoning and other policies to ensure compatible land use, although discussion of these policy issues and methods of measuring economic costs[16] are beyond the scope of this digest.

1. Primary Issues

Incompatible land use around airports creates two primary problems: noise impacts for adjacent users and safety issues for adjacent users and airline passengers in the event of air carrier accidents. Obstructions, a specific type of incompatible use, exacerbate safety problems. In addition, concerns about air quality due to emissions are increasing in importance.

Aircraft noise can be extremely annoying to persons living or working near airports or under the flight path, and can create sleep disturbance and other health problems.[17] Opposition to airport noise is considered a major obstacle to airport development.[18] A Transportation Research Board survey on land-use issues found that more than 50 percent of 34 commercial airports reported being involved in litigation related to land use, and of those, more than 80 percent of the cases involved noise issues. The sensitivity of land uses surrounding an airport to noise is a significant factor in determining airport noise impacts. Thus, the best way to avoid noise-related litigation is to minimize the number of people in noise-sensitive areas.[19]

Airport safety is affected by hazardous uses that can cause aircraft accidents—such as tall structures and uses that attract wildlife—and uses that may increase (or decrease) the severity of accidents should they occur. Factors that can affect accident severity include high concentrations of people; frequency of use; high-risk sensitive uses (related to both building type and user mobility); and the presence of open spaces. Air navigation may be obstructed by structures that are tall enough to pierce various airport safety zones; visual obstructions such as dust, glare, light emissions, smoke, and smog; and electronic interference. [20]

2. Compatibility/Incompatibility of Common Uses; Consequences of Airport-Incompatible Land Use

Land uses are airport-compatible when airport operations do not create noise problems for the uses; the uses do not pose safety problems for the airport; and the uses are not likely to increase the severity of harm in the event of airport-related accidents. These outcomes can be assessed based on the noise sensitivity of the use; the concentration of people; the presence of tall structures and visual obstructions; and the existence of wildlife and bird attractants. Potentially incompatible uses include landfills; noise-sensitive uses, such as residences, schools, churches, child-care facilities, medical facilities, retirement homes, and nursing homes; and infrastructure such as radio towers, cell towers, water

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[15] THOMAS P. THATCHER, A GUIDEBOOK FOR THE PRESERVATION OF PUBLIC-USE AIRPORTS (Airport Cooperative Research Program Report 44, Transportation Research Board, 2011), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_044.pdf. *See also* Magee, *supr*a note 5, at 243. (FAA refused to fund expansion at Dallas's Love Field "because of limited expansion potential and homeowner opposition to increased noise levels.")

[16] *See* GRA, Inc., *Economic Values for FAA Investment and Regulatory Decisions*, Contract No. DTFA 01-02-C00200, Dec. 31, 2004, www.faa.gov/regulations_policies/policy_guidance/benefit_cost/media/050404%20Critical%20Values%20Dec%2031%20Report%2007Jan05.pdf. WARD ET AL., *supra* note 5, vol. 1, at ch. 5, Economic Costs of Airport Land Use Incompatibility.

[17] *See generally* WARD ET AL., *supra* note 5, vol. 1, at ch. 6, Aircraft Noise and Land Use Compatibility. *See also* Hales Swift, A Review of the Literature Related to Potential Health Effects of Aircraft Noise, PARTNER-COE-2010-003, July 2010, http://web.mit.edu/aeroastro/partner/reports/proj19/proj19-healtheffectnoise.pdf; Federal Interagency Committee on Noise, Federal Agency Review of Selected Airport Noise Analysis Issues, Aug. 1992, www.fican.org/pdf/nai-8-92.pdf; WOODWARD ET AL., *supra* note 5.

[18] U.S. GOV'T ACCOUNTABILITY OFFICE, AVIATION AND THE ENVIRONMENT: IMPACT OF AVIATION NOISE ON COMMUNITIES PRESENTS CHALLENGES FOR AIRPORT OPERATIONS AND FUTURE GROWTH OF THE NATIONAL AIRSPACE SYSTEM (GAO-08-216T, 2007), www.gao.gov/new.items/d08216t.pdf; WARD ET AL., *supra* note 5, vol. 1, at 1.17. *See*, *e.g.*, Cmtys. Inc. v. Busey, 956 F.2d 619 (6th Cir. 1992). These disputes can continue for many years. Leonard J. Honeyman, *Camp David Moment Paves Way For Tweed Pact*, NEW HAVEN INDEPENDENT, Mar. 16, 2009 (40 years), www.newhavenindependent.org/archives/2009/03/tweed_agree.php (accessed Jan. 5, 2012); Brittany Wallman, *Settlement Would Pay Neighbors of Fort Lauderdale Airport Runway*, SUN-SENTINEL, Sept., 6, 2011 (18-year dispute), http://articles.sun-sentinel.com/2011-09-06/news/fl-airport-broward-runway-20110902_1_airport-expansion-airport-director-kent-george-airport-revenues (accessed Jan. 5, 2012).

[19] *See generally* WARD ET AL., *supra* note 5, vol. 1, at ch. 6, Aircraft Noise and Land Use Compatibility.

[20] *See generally* WARD ET AL. *supra* note 5, vol. 1, at ch. 7, Aircraft Accidents and Safety Considerations. Chapter 7 discusses how to identify areas where accidents are likely to happen, as well as the risk analysis required to determine when restrictions are justified. That discussion is beyond the scope of this report, which focuses on what to do once determination has been made that restrictions are necessary. State aviation manuals may provide guidance concerning land use assessment for safety. *E.g.*, California Airport Land Use Planning Handbook (California Department of Transportation 2002). See in particular ch. 9, Establishing Airport Safety Compatibility Policies, http://www.dot.ca.gov/hq/planning/aeronaut/documents/ALUPHComplete-7-02rev.pdf.

towers, aboveground power lines, wind farms,[21] and meteorological evaluation towers (used to evaluate locations for wind farms).[22] Agriculture and open space uses are beneficial in terms of low impact in case of accidents, but may be problematic in terms of wildlife attraction. Determining whether or not specific land uses are airport-compatible requires a site-specific analysis. Factors to consider include building type, density of development, size of development, and geographic location of development.[23]

Incompatible land uses have consequences for airports, the surrounding communities, and local government, including the negative effect of incompatible land use in proximity to airports on investments made in those airports.[24] As discussed in Section IV.A, Ramifications of Hazard Determination, *infra*, the inability to remove obstructions may have significant negative effects on airport operations. For example, where the airport does not have the authority to remove or mitigate obstructions that pierce mandatory clear zones, the Federal Aviation Administration (FAA) may limit the types of aircraft authorized to use the airport. Once incompatible land use becomes established, the only alternative for modernizing an airport may be to relocate the airport.[25] Airport zoning is an essential tool in protecting airports from encroachment from incompatible land use.[26]

II. AIRPORT-COMPATIBLE LAND-USE REQUIREMENTS

The federal government is responsible for regulating airspace. However, that responsibility does not extend to regulation of ground facilities not affecting inflight safety.[27] FAA findings about airport development are merely advisory. Moreover, FAA regulatory action on obstructions is limited: FAA has issued regulations on wildlife hazard management and telecommunications towers.[28] (The U.S. Department of Transportation (USDOT) has issued a departmental order governing wetlands, which applies to the FAA.[29])

FAA imposes regulatory requirements that affect land use on airport sponsors, but does not—and really cannot—provide the legal authority to sponsors to enforce those requirements. In fact, FAA regulatory and guidance documents emphasize that land use is a state and local, not federal, issue.[30]

Section II briefly discusses FAA's regulatory authority and land-use requirements for federal grant recipients (including noise compatibility); identifies other federal stakeholders; and discusses state and local regulation of land use around airports. A list of FAA statutes, regulations, orders, and guidance related to airport-compatible land use issues is included as Appendix A to this digest. As is the case throughout the digest, links to citations are provided for convenience; readers should verify statutory and regulatory language from official sources.

A. FAA's Regulatory Authority[31]

By statute, the FAA has exclusive jurisdiction over the navigable airspace of the United States.[32] FAA

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[21] Curt Brown, *FAA Tells Dartmouth to Lower Height of South Turbine by 5 Feet*, SOUTHCOASTTODAY, Mar. 5, 2010, www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100305/NEWS/3050330 (accessed Jan. 15, 2011); Kathy Mellott, *FAA Approves Wind Farm*, THE TRIBUNE-DEMOCRAT, Feb. 25, 2010, http://tribune-democrat.com/local/x966814277/FAA-approves-wind-farm (accessed Jan 15, 2012).

[22] *A Towering Achievement*, AIRWARD NEWS, Jan./Dec. 2007, www.fs.fed.us/fire/av_safety/promotion/airwards/airwards_2007.pdf; Mark Lessor, *Meteorological Test Towers–the Invisible Threat*, 56 RUDDER FLUTTER, Winter 2010, http://itd.idaho.gov/aero/Rudder%20Flutter/2010/RF_Winter_2010_v5.pdf.

[23] WARD ET AL., *supra* note 5, vol. 1, at 1.15–1.23, http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_027v1.pdf.

[24] *Id*. at 1.40–1.51.

[25] *E.g.*, Jason Kauffman, *Friedman Airport Granted Eminent Domain*, IDAHO MOUNTAIN EXPRESS AND GUIDE, Aug. 30, 2006 (current facility did not meet safety standards for larger aircraft; expansion rejected in part because too disruptive to surrounding property), www.mtexpress.com/index2.php?ID=2005112008&var_Year=2006&var_Month=08&var_Day=30 (accessed Jan. 5, 2012).

[26] Port of Port Townsend, Protecting the Future of the Jefferson County International Airport as an Essential Public Facility: Statement of Legal and Factual Position, Sept. 7, 2004, www.portofpt.com/FinalISSUESANDIMPACTS8-04.pdf (accessed Jan. 5, 2012).

[27] City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 85 Cal. Rptr. 2d 28, 37, 72 Cal. App. 4th 366 (Cal. App. 2 Dist. 1999).

[28] Local requirements to camouflage cell towers may either limit color and lighting except as required by the FAA or may combine with FAA's lighting requirements to preclude the construction of certain telecommunication towers. *Compare* Joint City-County Planning Commission of Nelson County Zoning Regulations, § 9.12 (C)(5), Design Standards, www.ncpz.com/PDF/Section%209%2012%20-%20Cell%20Tower%20Regulations%20(pdf).pdf *with* Caldwell County Cell Tower Regulations, § 90G.21, Tower Lighting, www.caldwellcountync.org/caldwell-county-nc-departments/planning-and-development/cell-tower-regulations/.

[29] DOT Order 5660.1A, *Preservation of the Nation's Wetlands*, http://nepa.fhwa.dot.gov/renepa/renepa.nsf/docs/6749292d98e3c0cd85256fe400731adf?opendocument&currentcategory=natural%20environment.

[30] *See*, *e.g.*, FAA, Noise Exposure Maps—Ronald Reagan Washington National Airport, 72 Fed. Reg. 45294–45295 (Aug. 13, 2007), available at http://edocket.access.gpo.gov/2007/pdf/07-3920.pdf; 14 C.F.R. Pt. 150, App. A.

[31] *See* CHEEK, *supra* note 4, at 8; JOHN E. PUTNAM, AIRPORT GOVERNANCE AND OWNERSHIP 12–14 (Airport Cooperative Research Program, Transportation Research Board, Legal Research Digest No. 7, 2009).

[32] Air Commerce Act of 1926, 49 U.S.C. § 40103(a); City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 625–40, 93 S. Ct. 1854, 1855–63, 36 L. Ed. 2d 547, 549–59 (1973); San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), *cert. denied sub nom.* Dep't of Transp. of Cal. v. San

regulations promulgated in accordance with that authority[33] place responsibility on persons erecting covered structures to provide notification to the FAA of the intent to build, giving the FAA the opportunity to evaluate whether the structure would constitute a hazard to air navigation. The FAA hazard determination, in and of itself, has no regulatory effect, and local governments have the option to restrict, or not to restrict, the structure. However, the FAA's determination could affect whether states will permit, and insurance companies will insure, the structure.

The purpose of this section is to provide context for the discussion of legal issues in Section III by highlighting aspects of FAA regulations, grant assurances, and guidance that have a bearing on airport-compatible land use. More in-depth discussions of FAA regulations are available in previously published Airport Cooperative Research Program *Legal Research Digests*.

Statutory Basis: FAA's regulatory authority concerning airport development is based on the statutory Airport Improvement Program (AIP), authorized by 49 United States Code (U.S.C.) Chapter 471. The AIP includes provisions concerning conditioning receipt of grant funds on assurances concerning compatible land use[34] and compatible land-use planning and projects by state and local governments.[35] Chapter 447 provides the statutory basis for the notice requirement under FAA's hazardous-obstruction regulation, as well as for limiting construction or establishment of municipal solid-waste landfills near certain public airports.[36] In addition to FAA's regulation and guidance on this requirement,[37] the Environmental Protection Agency (EPA) regulates landfill locations in proximity to airports.[38] FAA's authority concerning noise is primarily provided under Chapter 475 of Title 49.

Regulations/Orders: FAA reviews the construction or alterations that may affect navigable airspace.[39] Part 77 establishes standards for providing notice to the FAA about proposed objects that may be hazards, but not requirements for removing them. As discussed in Section IV, Eliminating Hazardous Obstructions Affecting Navigable Airspace, *infra,* aside from moral suasion and the effects of the presence of hazards on obtaining financing and insurance, enforcement of Part 77 requirements relies on state and local governments imposing equivalent requirements. However, most states have not adopted laws enforcing Part 77 standards.[40]

FAA's regulation concerning certification of airports[41] includes requirements for maintaining runway safety areas[42] (which may require land acquisition), obstructions, and wildlife hazard management.

Participation in FAA-approved noise compatibility programs[43] is voluntary, but an airport sponsor must participate to get FAA funding for noise-abatement measures. The Part 150 Study develops a plan for mitigating noise impacts from airport operations, where practical, and limiting additional future impacts; the plan covers issues related to land use, such as reducing new noise-sensitive developments near the airport and being consistent, where feasible, with local land-use planning and development policies.[44]

FAA Order 5100.38C, the AIP Handbook, requires that the Project Evaluation Report and Development Analysis Checklist prepared for each project to be programmed include an item that identifies "any known non-compatible land use problems relating to the use of property adjoining the airport and the sponsor's actions to assure compatible land use. Include enactment date(s) of local ordinances and/or zoning restrictions."[45] This requirement is subject to the requirement that the

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Diego Unified Port Dist., 455 U.S. 1000. State law may declare the sovereignty of the state in the space above the land and waters of the state, with ownership of that space vested in property owners of the surface, subject to a lawful right of flight. *E.g.*, MINN. STAT. 2010, 360.012, Sovereignty; Liability; Effect of Other Law, www.revisor.mn.gov/data/revisor/statute/2010/360/2010-360.012.pdf.

[33] 14 C.F.R. Pt. 77.

[34] 49 U.S.C. § 47107(a)(10), Project grant application approval conditioned on assurances about airport operations: General Written Assurances. The statute requires that receipt of federal funds be conditioned on an assurance from the recipient that "appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations."

[35] Sec. 47141, added by § 160 of Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2511, Dec. 12, 2003.

[36] 49 U.S.C. § 44718(a); 49 U.S.C. § 44718(d), as amended by § 503 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181 (Apr. 5, 2000). This provision prohibits building municipal solid waste landfills within 6 mi of specified public use airports receiving grants under ch. 471.

[37] AC No. 150/5200-34A, Construction or Establishment of Landfills Near Public Airports, Jan. 26, 2006, www.faa.gov/documentLibrary/media/advisory_circular/150-5200-34A/150_5200_34a.pdf.

[38] Criteria for Municipal Solid Waste Landfills, 40 C.F.R. Pt. 258, Subpt. B—Location Restrictions.

[39] 14 C.F.R. Pt. 77; Safe, Efficient Use and Preservation of the Navigable Airspace, Final Rule, 75 Fed. Reg. 42296, July 21, 2010, http://edocket.access.gpo.gov/2010/pdf/2010-17767.pdf. *See also* Obstruction Evaluation/Airport Airspace Analysis (OE/AAA), https://oeaaa.faa.gov/oeaaa/external/portal.jsp.

[40] WARD ET AL., *supra* note 5, vol. 1, at 1.71, http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_027v1.pdf.

[41] 14 C.F.R. Pt. 139, Certification of Airports, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=72cab6190f53e33514bc508c50039668&rgn=div5&view=text&node=14:3.0.1.1.12&idno=14.

[42] 14 C.F.R. § 139.309. *See* Tweed-New Haven Airport v. Town of East Haven, 582 F. Supp. 2d 261 (D. Conn. 2008).

[43] 14 C.F.R. Pt. 150.

[44] *See*, *e.g.*, Tuscon Int'l Airport Part 150 Study, www.tuspart150.com/index.html.

[45] FAA Order 5100.38C, par. 1031.b(16).

project comply with local ordinances and other applicable requirements.[46]

The FAA also considers land use when it issues a Record of Decision for an Environmental Impact Statement.[47]

Grant Assurances: The Secretary has implemented the statutory and regulatory mandates concerning compatible land use by requiring the airport sponsor receiving federal funds under Title 49 to assure and certify that:

> It will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended.[48]

Although FAA recognizes that not all airport sponsors have direct jurisdictional control over land use, the agency expects even those sponsors who do not have such authority to participate in local zoning activities.[49] Moreover, certain development activities, such as residential through-the-fence access arrangements, present compliance issues with Grant Assurance 21.[50] Violation of that grant assurance jeopardizes eligibility to receive AIP grant funding.[51] However, Oregon's Land Use Board of Appeals has held that Grant Assurance 21 cannot be relied on to oppose municipal zoning, as the grant assurance does not impose any legal obligation on a nonproprietor municipality.[52]

In addition to the importance of airport zoning ordinances under Grant Assurance 21, enactment of airport zoning ordinances may affect the priority of airport grant applications under state aviation programs.[53]

Other relevant grant assurances include conditions for receiving FAA funding:

- Project must be "reasonably consistent with" local plans existing at the time of project application for development of the area surrounding the airport.[54]
- Sponsor removes and mitigates hazards to protect navigable airspace.[55]
- Sponsor keeps the airport layout plan up to date "at all times."[56] The airport layout plan is produced as part of the master planning process.[57]
- Sponsor disposes of land no longer needed for airport purposes subject to the retention or reservation of such interest or right necessary to ensure that such land will be used for purposes compatible with noise levels associated with airport operation.[58]

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[46] *Id.*, citing FAA Order 5100.38C, par. 1005.

[47] *E.g.*, Record of Decision for Proposed Replacement Runway, Runway Extension and Associated Development at Cleveland Hopkins International Airport, Cleveland, Ohio, Nov. 2000, www.faa.gov/airports/environmental/records_decision/media/rod_cleveland.pdf. See DONALD G. ANDREWS, DAVID J. FULL & MARY L. VIGILANTE, APPROACHES TO INTEGRATING AIRPORT DEVELOPMENT AND FEDERAL ENVIRONMENTAL REVIEW PROCESSES (Airport Cooperative Research Program, Transportation Research Board, Synthesis 17, 2009).

[48] Airport Sponsor Assurances, Sponsor Certification (Mar. 2011): C.21, Compatible Land Use, at 9, www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf. This requirement is also included in C.15, Sponsor Certification: Compatible Land Use [Noise Compatibility Assurances for] Non-Airport Sponsor Assurances (Mar. 2005), at 6, www.faa.gov/airports/aip/grant_assurances/media/nonairport_sponsor_assurances.pdf.

[49] M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, at 13 (FAA Docket 16-06-06, Jan. 19, 2007), http://part16.airports.faa.gov/pdf/16-06-06b.pdf.

[50] Compliance Guidance Letter 2011-1–FAA Implementation of Interim Policy Regarding Access to Airports From Residential Property and Review of Access Arrangements, Mar. 21, 2011, www.faa.gov/airports/airport_compliance/residential_through_the_fence/media/cgl_2011_01_rttf.pdf.

[51] FAA Docket 16-06-06, Jan. 19, 2007.

[52] Port of St. Helens v. City of Scappoose, LUBA No. 2008-114 (Or. LUBA Dec. 31, 2008).

[53] James Loewenstein, *Towanda Borough Might Adopt New Airport Zoning*, THE DAILY REVIEW, Oct. 7, 2009, http://thedailyreview.com/news/towanda-borough-might-adopt-new-airport-zoning-1.314229 (accessed Jan. 5, 2012).

[54] Airport Sponsor Assurances, Sponsor Certification (Mar. 2011): C.6, Consistency with Local Plans, at 6, www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf; C.6, Sponsor Certification: Compatible Land Use [Noise Compatibility Assurances for] Non-Airport Sponsor Assurances (Mar. 2005), at 4, www.faa.gov/airports/aip/grant_assurances/media/nonairport_sponsor_assurances.pdf.

[55] Airport Sponsor Assurances, Sponsor Certification (Mar. 2011): C.20, Sponsor Certification: Hazard Removal and Mitigation, at 9, www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf; C.14, Sponsor Certification: Hazard Prevention, [Noise Compatibility Assurances for] Non-airport Sponsor Assurances (Mar. 2005), at 6, www.faa.gov/airports/aip/grant_assurances/media/nonairport_sponsor_assurances.pdf. *See* Town of Fairview v. Dep't of Transp., 201 F. Supp. 2d 64 (D.D.C. 2002) (failure to meet Grant Assurance 20 one of grounds alleged as basis for injunction against airport expansion).

[56] Airport Sponsor Assurances, Sponsor Certification (Mar. 2011): C.29, Sponsor Certification: Airport Layout Plan, at 13, www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf.

[57] AC No. 150/5070-7, The Airport System Planning Process, Nov. 10, 2004, at 19, http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/448f20bc45582fc08625724100775e5a/$FILE/150_5070_7.pdf.

[58] Airport Sponsor Assurances, Sponsor Certification (Mar. 2011): C.31, Sponsor Certification: Disposal of Land, at 14–15, www.faa.gov/airports/aip/grant_assurances/media/airport_sponsor_assurances.pdf. Easements and deed restrictions are both acceptable methods of carrying out this assurance.

For purposes of Grant Assurance 31, the airport sponsor must release land subject to adequate restrictions and covenants to ensure airport-compatible land use consistent with safe, efficient airport operations and noise-compatibility requirements.[59]

The Supreme Court has held that claims against airports based on breach of FAA grant assurances must be decided under state law, not federal common law.[60]

FAA design standards concerning airport layout[61] contemplate the establishment of various areas, such as runway safety areas, runway object-free areas, and runway protection zones (RPZs), that may affect off-airport property.

B. Other Federal Stakeholders[62]

In addition to the FAA, other federal agencies—such as the EPA, U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service[63]—have responsibilities that affect airport land-use compatibility.[64] Issues that may require coordination, including compliance with requirements of other federal agencies, include wetlands mitigation,[65] relocation requirements,[66] landfills,[67] and noise analysis.[68]

Coordination with these agencies may be necessary to ensure that various measures undertaken to achieve airport-compatible land use do not violate other federal regulatory requirements. In addition, alleged lack of compliance with environmental requirements is an avenue of attack for opponents of airport expansion projects.[69]

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[59] FAA Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions [substantially updating and revising Order 5050.4A, "Airports Environmental Handbook," which was cancelled by issuance of Order 5050.4B], 207, Releases of Airport Land, at 2-9, www.faa.gov/airports/resources/publications/orders/environmental_5050_4/media/5050-4B_complete.pdf.

[60] Miree v. Kalb County, 433 U.S. 25, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977). In *Miree*, accident victims of a crash caused by bird strike asserted they were third party beneficiaries of the contract between the airport and the FAA that was allegedly breached by the county's failure to ensure compatible land use near the airport by maintaining a garbage dump near the airport. The Court held that the controlling law was state, not federal, and under Georgia law, those claims were barred by governmental immunity.

[61] FAA AC 150/5300-13, Airport Design, www.faa.gov/documentLibrary/media/Advisory_Circular/150_5300_13.pdf.

[62] For an extensive discussion of federal stakeholders, *see* WARD ET AL., *supra* note 5, vol. 1, at ch. 3, Roles and Responsibilities of Stakeholders.

[63] Wildlife management is the subject of a separate Legal Research Digest, and so is not discussed in this report. ACRP has already addressed operational methods for addressing bird safety issues. JERROLD L. BELANT & JAMES A. MARTIN, BIRD HARASSMENT, REPELLENT, AND DETERRENT TECHNIQUES FOR USE ON AND NEAR AIRPORTS (Airport Cooperative Research Program, Transportation Research Board, Synthesis 23, 2011).

[64] As noted in § I.A.3, *Introduction*, of this digest, DOD has responsibility for military airports, but issues relating to those airports are beyond the scope of this digest.

[65] *See* Port of Seattle v. PCHB, 151 Wash. 2d 568, 90 P.3d 659 (2004) (en banc). *See also* Indiana Bat and Wetland Mitigation: Environmental, conservation, and wildlife management program, www.indianapolisairport.com/files/contribute/03.29.09ECWcopy.pdf (accessed Jan. 5, 2012).

[66] 49 C.F.R. Pt. 24, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs, www.gpo.gov/fdsys/pkg/CFR-2010-title49-vol1/pdf/CFR-2010-title49-vol1-part24.pdf. The Federal Highway Administration is the lead agency for implementing this regulation. Final Rule, 70 Fed. Reg. 590, Jan. 4, 2005, www.fhwa.dot.gov/realestate/49cfr24fr.pdf.

[67] 40 C.F.R. § 258.10, Airport safety, www.gpo.gov/fdsys/pkg/CFR-2010-title40-vol24/pdf/CFR-2010-title40-vol24-part258.pdf.

[68] Cmtys., Inc. v. Busey, 956 F.2d 619 (6th Cir. 1992).

[69] *E.g.*, City of Olmsted Falls v. US EPA, 435 F.3d 632 (6th Cir. 2006) (issuance of § 404 permit upheld); Airport Cmtys. Coalition v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) (issuance of § 404 permit upheld); Port of Seattle v. PCHB, 151 Wash. 2d 568, 90 P.3d 659 (2004) (en banc) (certification of compliance with Clean Water Act upheld). The City of Olmsted Falls had already unsuccessfully challenged the FAA's approval of the Record of Decision for the Cleveland Hopkins International Airport runway improvement project. City of Olmsted Falls v. EPA, 292 F.3d 261 (D.C. Cir. 2002).

The Port of Seattle's Counsel cited the role of water quality challenges in what she characterized as substantial delays in the construction of a third runway at Sea-Tac Airport. Author's telephone conversation (Apr. 14, 2011) and email (Sept. 22, 2011) with Traci Goodwin, Port of Seattle Counsel. There have been some 23 legal actions (federal and state) regarding the Port of Seattle's construction of a third runway at Sea-Tac Airport. The legal controversy over the runway construction began in the mid-1990s and continued until 2004, with the runway finally opening in 2008. The major issues revolved around water quality (including wetlands mitigation) and quantity impacts, as well as construction impacts, noise, air quality, and other environmental impacts. The water quality issues were raised by the Airport Communities Coalition (ACC): the neighboring jurisdictions of Burien, Des Moines, and Federal Way, as well as the Normandy Park Highline School District and the Highline School District. There were also disputes concerning Washington's Growth Management Act and the definition of an "essential public facility," again involving the ACC. In addition, the Port of Seattle had a dispute with the host jurisdiction over whether the airport or the host had land use jurisdiction at the airport. A declaratory judgment action concerning land use jurisdiction was settled, with the settlement also covering the host jurisdiction's environmental challenge to the adequacy of the environmental review for the third runway.

A number of challenges to the runway involved the adequacy of water quality reviews. Because the runway construction required discharging fill material into U.S. waters, the project required a 404 permit (§ 404 of Clean Water Act, 33 U.S.C. § 1344). This in turn required a state § 401 water quality certification for the project (required under ch. 173-225 WAC, http://apps.leg.wa.gov/WAC/default.aspx?cite=173-225, to implement § 401 of the Clean Water Act, 33 U.S.C. § 1341). The project also required findings under the Coastal Zone

C. State and Local Regulation of Land Use Around Airports[70]

State stakeholders, which vary state to state, include state aviation agencies, state environmental quality agencies (wetlands mitigation), departments of agriculture, departments of community health and human resources, departments of economic development, departments of historic preservation, and departments of natural resources. Local stakeholders, which also vary by jurisdiction, include metropolitan planning organizations, county governments, cities, townships, planning/zoning agencies, local economic development agencies, and special commissions (such as the O'Hare Noise Compatibility Commission). Airport sponsors and managers must work with these various state and local stakeholders to ensure airport-compatible land use.

State requirements for airport-compatible land use vary considerably, from stringent regulation to guidance to virtually no involvement.[71] In addition, state requirements for comprehensive planning[72] may or may not comprehensively address airports[73] but are likely in any event to affect airport-compatible land use. State law may regulate construction within noise-sensitive areas and may define noise-sensitive uses or purposes.[74] Depending on the state enabling legislation, airport land-use authority may contain zoning authority[75] and may encourage or require the exercise of that authority.[76] State aviation authorities often publish guide-

Management Act. Opponents of the project challenged the issuance of the 404 permit in federal court and raised numerous objections to the 401 certification during the state administrative review and in state court.

While the water quality permit issues were ultimately resolved early in this decade, the project took years longer than anticipated because the state administrative review process had neither a time limit nor clear criteria for approval. Opponents of the project lobbied the state permit reviewers, and there was no institutional incentive to finalize the process. The third runway procedure demonstrated the need to institute a process to identify legitimate issues and to get them resolved in a reasonable amount of time. In the wake of the third runway permitting procedure, the Washington Department of Ecology has in fact instituted a process to try to address this problem. For additional information see Donald W. Tuegel, *Airport Expansions*: *The Need for a Greater Federal Role*, 54 J. URB. & CONTEMP. L. 291, 298, nn. 36, 37 (1998) (history of runway controversy); City of Des Moines v. Puget Sound Reg'l Council, 108 Wash. App. 836 (1999) (Growth Management Act dispute); Discharge of Dredge or Fill Material Into Water, Washington Dept. of Ecology Environmental Permit Handbook, http://apps.ecy.wa.gov/permithandbook/permitdetail.asp?id=37; and 401 Water Quality Certification, Washington Dept. of Ecology Environmental Permit Handbook, http://apps.ecy.wa.gov/permithandbook/permitdetail.asp?id=43.

[70] *See* WARD ET AL., *supra* note 5, vol. 1, at ch. 8, Tools and Techniques for Land Use Compatibility.

[71] *Id*. at 1.57. California, for example, requires each county where there is an airport served by a scheduled airline—through the Airport Land Use Commission (ALUC) or otherwise—to prepare an Airport Land Use Compatibility Plan, with a 20-year planning window. The ALUC determines whether proposed development around airports is compatible, although local governments may overrule such determinations. CAL. PUB. UTIL. CODE § 21675, Land Use Plan, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc051107.pdf. The California State Aviation Act also requires that local agencies whose general plans include areas covered by an airport land use compatibility plan submit the plan to the ALUC for review to determine whether the general plans are consistent with the airport land use compatibility plan. Again the local agency may overrule a determination of incompatibility by a two-thirds vote. CAL. PUB. UTIL. CODE § 21676, Review of Local General Plans. *See also* Airport Land Use Compatibility Planning Guidance, www.dot.ca.gov/hq/planning/aeronaut/landuse.html. Oregon also requires local governments to adopt airport compatibility requirements for public use airports. OR. REV. STAT. § 836.610, Local government land use plans and regulations to accommodate airport zones and uses, www.leg.state.or.us/ors/836.html; Oregon Airport Planning Rule, § 660-013-0080, Local Government Land Use Compatibility Requirements for Public Use Airports, www.sos.state.or.us/archives/pages/rules/oars_600/oar_660/660_013.html.

[72] *E.g.*, Pennsylvania Municipalities Planning Code, Article III—Comprehensive Plan, www.dep.state.pa.us/hosting/growingsmarter/MPCode%5B1%5D.pdf; Visconsi-Royalton, Ltd. v. City of Strongsville, 2004 Ohio 4908) [citing § 3180-26, General Code (R.C. 519.02), which requires township zoning regulations to be in accordance with comprehensive plan].

[73] *Compare* FLA. STAT. 163.3177(6)(a) [requires local governments, by June 30, 2012, to amend their Comprehensive Plans to include criteria and address compatibility of lands adjacent to certain airports specified under the statute, www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0163/Sections/0163.3177.html] *with* Pennsylvania Municipalities Planning Code, Article III—Comprehensive Plan, www.dep.state.pa.us/hosting/growingsmarter/MPCode%5B1%5D.pdf. Washington State is another jurisdiction that addresses airports in a comprehensive fashion. Under Washington statutes, airports are essential public facilities. WASH. REV. CODE 36.70A.200, Siting of essential public facilities—Limitation on liability, http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70A.200. The state Growth Management Act requires municipal governments with general aviation airports to discourage siting of incompatible land uses. WASH. REV. CODE 36.70.547, General aviation airports—Siting of incompatible uses, http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70.547. *See*, *e.g.*, PSRC Airport Compatible Land Use Program Scope of Services and Project Schedule, www.psrc.org/assets/2943/Scope.pdf.

[74] *E.g.*, Indiana: IND. CODE 8-21-10-2, Definitions, www.in.gov/legislative/ic/code/title8/ar21/ch10.html.

[75] *E.g.*, Indiana: IND. CODE 8-22-3, Local Airport Authorities, www.in.gov/legislative/ic/code/title8/ar22/ch3.html; Pennsylvania: Airport Zoning Act, Title 74, Transportation, §§ 5911 *et seq*. Power to adopt airport zoning regulations, www.legis.state.pa.us/WU01/LI/LI/CT/HTM/74/00.059.HTM; WIS. STAT. 59.69, Planning and zoning authority, http://legis.wisconsin.gov/statutes/Stat0059.pdf; WIS. STAT. 114.35, Airport and spaceport protection, 114.136, Airport and spaceport approach protection, http://legis.wisconsin.gov/statutes/Stat0114.pdf.

[76] In Wisconsin the exercise of airport zoning authority is a condition of receipt of state financial aid to an airport. WIS. ADMIN. CODE, Trans 55.06: Conditions of state aid, (4) Ordi-

books concerning airport-compatible land use,[77] which may review compatible land uses and strategies for achieving land-use compatibility, as well as applicable laws and legal issues (including state-specific issues and requirements), and may contain model zoning ordinances.[78] Where a state delegates planning power to local government, the effectiveness of airport planning will depend on the enactment of local ordinances.[79] State law may allow municipalities to annex municipal airports.[80] State law may also provide authority to avoid noise conflicts.[81]

Many state and local governments have adopted height restriction ordinances consistent with FAA guidance and regulatory standards. Sometimes these local standards are more stringent than those set forth by the FAA.[82]

State law may specifically address hazard elimination, including a grant of eminent domain power specifically for the purpose of ensuring airport safety.[83] The aviation statute may also regulate airport obstructions, including requiring permits for erecting or extending structures over a specified height and prohibiting obstructions that extend beyond heights specified in the FAA Part 77 standards.[84] State law may declare that airport hazards are a public nuisance.[85] States may have specific regulations governing notice and marking of wind power–related structures.[86]

State law may tie comprehensive planning to zoning.[87] However, such requirements may range from hortatory to prescriptive. For example, Montana requires that once a growth policy is adopted under state law, the governing body of the area covered by the growth policy must "be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the…adoption of zoning ordinances or resolutions." However, the statute also provides that a growth policy is not a regulatory document and a governing body "may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted [under the statute]."[88] The Montana Supreme Court has interpreted Section 605 as requiring local governmental units to substantially comply with growth policies in reaching zoning decisions.[89] New Jersey requires that planning and zoning be based on a master plan adopted by the planning board, and that zoning ordinances be substantially consistent with the

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nances, http://legis.wisconsin.gov/rsb/code/trans/trans055.pdf. Paragraph (4) (a) requires:

> A public airport owner shall adopt the following ordinances within 6 months after receipt of a sample ordinance from the secretary:
>
> 1. A height limitation zoning ordinance adequately restricting the height of objects near the airport in accordance with s. 114.136, Stats.
>
> 2. An ordinance to provide for the control of vehicular and pedestrian traffic on the surface of the airport.

[77] *E.g.*, Florida Airport Compatible Land Use Guidebook, www.dot.state.fl.us/aviation/compland.shtm; Pennsylvania Airport Land Use Compatibility Guidelines, ftp://ftp.dot.state.pa.us/public/bureaus/aviation/palanduse.pdf; Pennsylvania Transportation and Land Use Toolkit, ftp://ftp.dot.state.pa.us/public/PubsForms/Publications/PUB%20616.pdf.

[78] *E.g.*, Minnesota Airport Land Use Compatibility Manual, ch. 3: Compatible Airport Land Uses; ch. 4: Preventive and Corrective Strategies for Airport Land Use Compatibility; ch. 5: Applicable Laws/Statutes and Legal Issues; and ch. 6: Model Airport Safety Zoning Ordinance and Procedural Guide, www.dot.state.mn.us/aero/avoffice/planning/airportcompmanual.html, www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualch6.pdf.

[79] *See* WARD ET AL., *supra* note 5, vol. 1, at App. B, Airport Land Use Compatibility Model State Legislation; App. C, Airport Land Use Compatibility Model Local Zoning Ordinance, http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_027v1.pdf .

[80] Texas Local Government Code § 43.102. Annexation of Municipally Owned Airport, www.statutes.legis.state.tx.us/Docs/LG/htm/LG.43.htm.

[81] Maryland Aviation Administration Airport Zoning Permit (authorizes MAA to deny building permits within "Noise Zone" of airport), www.marylandaviation.com/content/permitsandforms/constructionzoning/index.html.

[82] *E.g.*, Clark County set a building height restriction more stringent than that required by the FAA. McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 672–73, 137 P.3d 1110, 1128 (2006); San Diego set a building height restriction in approach zones that exceeds that of the FAA by 50 ft. *See* Jeff Ristine, *Airport Authority Opposes Condo Plan*, THE SAN DIEGO UNION-TRIBUNE, Sept. 10, 2004, www.signonsandiego.com/uniontrib/20040910/news_1m10condos.html (accessed Jan. 5, 2012).

[83] *E.g.*, CAL. PUB. UTIL. CODE §§ 21652, Eminent Domain, and 21653, Removal of Hazards, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc030509.pdf.

[84] *E.g.*, CAL. PUB. UTIL. CODE, Regulation of Obstructions, §§ 21655–21660, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc030509.pdf.

[85] *E.g.*, MINN. STAT. 2010, § 360.062 Airport Hazard Prevention: Protecting Existing Neighborhood, https://www.revisor.mn.gov/statutes/?id=360&format=pdf.

[86] *E.g.*, WYO. STAT. ANN. 10-4–305–Marking Obstructions, http://legisweb.state.wy.us/statutes/dlstatutes.htm; Wyoming Aerial Obstruction Reporting Requirements, http://gf.state.wy.us/METTowers/images/chapt3aeroemerg.pdf.

[87] *See generally* Magee, *supra* note 5, at 243. Many state planning laws are based at least in part on the Standard State Zoning Enabling Act (SZEA). Standard State Zoning Enabling Act and Standard City Planning Enabling Act, American Planning Association, www.planning.org/growingsmart/enablingacts.htm. Section 3 of the SZEA provides that zoning regulations should be made in accordance with a comprehensive plan.

[88] Section 76-1-605, MONT. CODE ANN. (2006), http://data.opi.mt.gov/bills/mca/76/1/76-1-605.htm. *See* Lake County First v. Polson City Council, 218 P.3d 816, 2009 MT 322, 352 Mont. 489 (Mont. 2009).

[89] Heffernan v. Missoula City Council, 2011 MT 91, 255 P.3d 80 (2011) (approving a subdivision with five times the recommended density in the growth plan is not substantial compliance).

land-use and housing elements of the master plan or designed to effectuate such plan elements.[90] Some inconsistency is allowed "provided the ordinance does not materially or substantially undermine or distort the master plan."[91] In explaining the perils of arbitrary decision-making, the New Jersey Supreme Court stated:

> There are sound reasons for requiring that zoning decisions be based on broad, comprehensive plans for growth and development throughout the community at large. Much of our zoning and land use jurisprudence is based upon constitutional concerns, balancing vested property rights, protected by the takings clause, against the larger concerns for the general good and welfare of the public as expressed through their elected and appointed officials. See, e.g., Penn Cent. Transp., supra, 438 U.S. at 123-30, 98 S. Ct. at 2659–62, 57 L. Ed. 2d at 648–52. In that context, the broader view expressed through a comprehensive planning process ensures that zoning decisions do not violate property owners' constitutional rights.[92]

Even if a state law does not require zoning to be consistent with a comprehensive plan, lack of a comprehensive plan has been held to weaken the presumption of validity of zoning ordinances.[93] Consistency with a comprehensive plan is also a factor in defending against spot zoning challenges.[94]

Local regulatory tools include comprehensive plans, zoning ordinances, and subdivision regulations,[95] although local authority to develop airport-related planning requirements varies depending on state law. Ideally, local aviation planning should be integrated with overall transportation and land-use planning. For example, local governments may be required to adopt comprehensive plans that are consistent with metropolitan planning organization system plans, including aviation plans.[96] Zoning ordinances may include a range of provisions directed at ensuring airport-compatible land use and avoiding liability for impacts on noncompatible uses. County zoning ordinances may include airport-noise-impact overlay districts,[97] which set forth permitted uses within various noise-impacted areas.[98] Involvement of neighboring jurisdictions may be required to secure adoption of noise or other airport overlay districts.[99] The local airport zoning regulation may include a notice of use restrictions that attempts to preclude claims for noise and other airport-related damage by providing notice that such effects will occur in the specified zone.[100] The regulation may also require zoning officials to provide the airport sponsor with notice of applications and permits for land use within the airport overlay zone.[101] The feasibility of various measures to address airport-compatible land use is often addressed in Part 150 Noise Compatibility Studies.[102]

In addition to being used to ensure airport-compatible land use, local regulation may be used by one jurisdiction to prevent the expansion of an airport owned by another jurisdiction.[103] Attempts by a nonproprietor municipality to limit runway length or location through zoning may be preempted by federal or state law.[104]

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[90] N.J. STAT. ANN. 40:55D-62(a).

[91] Riya Finnegan v. S. Brunswick Tp., 197 N.J. 184, 192, 962 A.2d 484, 489 (2008). Moreover, in case of inconsistency, the governing body must recognize the inconsistency, and adopt by majority vote a resolution setting forth the reason for the inconsistency. These two requirements together preclude the governing body from arbitrarily adopting a zoning ordinance that is inconsistent with the master plan. *Id*.

[92] *Id*. at 493, 197 N.J. at 199.

[93] 350 Lake Shore Assocs. v. Casalino, 352 Ill. App. 3d 1027, 287 Ill. Dec. 708, 816 N.E.2d 675, 685 (2004) (citing Forestview Homeowners Ass'n, Inc. v. County of Cook, 18 Ill. App. 3d 230, 240, 309 N.E.2d 763 (1974).

[94] *See* Rocky Hill Citizens v. Planning Bd., 406 N.J. Super. 384, 967 A.2d 929 (2009).

[95] *See* WARD ET AL., *supra* note 5, vol. 1, at 1.61–1.63, http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_027v1.pdf,; CHEEK, *supra* note 4, at 15–16.

[96] *E.g.*, Minneapolis-St. Paul Metropolitan Council, Coordination of Local Comprehensive Plans, Chapter 4: Transportation and Land Use, Regional 2030 Transportation Policy Plan, www.metrocouncil.org/planning/transportation/TPP/2010/4_Landuse.pdf.

[97] For a discussion of the use of airport overlay districts, see Magee, *supra* note 5, at 269–71 (1996).

[98] Fairfax County, VA, Zoning Ordinance, Part 4, Airport Noise Impact Overlay District, www.fairfaxcounty.gov/dpz/zoningordinance/articles/art07.pdf.

[99] *E.g.*, Naples, Florida, established an airport overlay district (Naples, Florida, Code of Ordinances §§ 58-1071 to 58-1078, http://library.municode.com/index.aspx?clientID=13804&stateID=9&statename=Florida) pursuant to an Interlocal Agreement with the City of Naples Airport Authority.

[100] Taylor County, Wis., ch. 35 Airport Zoning, § 35.06, *Use Restrictions*, www.co.taylor.wi.us/code/Chapter35.pdf. Chapter 35 is authorized under Wis. Stat. § 59.69, Planning and Zoning Authority, http://docs.legis.wi.gov/statutes/statutes/59/VII/69, § 59.694, County zoning, adjustment board, http://docs.legis.wi.gov/statutes/statutes/59/VII/694, and § 114.136, Airport and spaceport approach protection, http://docs.legis.wi.gov/statutes/statutes/114/I/136.

[101] Boundary County, Idaho, Section 12: Notice of Land Use and Permit Applications, Ordinance No. 2006-2, Boundary County Airport Overlay Zoning Ordinance, www.boundarycountyid.org/planning/zoneord/airport_overlay_zone.htm.

[102] *E.g.*, Buffalo, N.Y., Pt. 150 Noise Compatibility Study, ch. 3, Land Use Assessment, www.buffaloairport.com/pdfs/150_study/BUF_150ch3.0_final_v1.pdf; Scottsdale, Ariz., Pt. 150 Noise Compatibility Study Update, ch. 6, Land Use Alternatives, www.scottsdaleaz.gov/Assets/Public+Website/airport/NCPReport_Chapter6.pdf (accessed Jan. 5. 2012).

[103] Tim Donnelly, *Hilton Head Council Approves Airport Zoning Over Objections*, THE ISLAND PACKET, Dec. 19, 2007, www.lowcountrynewspapers.net/archive/node/11649 (accessed Jan. 5, 2012).

[104] *E.g.*, Twp. of Tinicum v. City of Philadelphia, 737 F. Supp. 2d 367 (E.D. Pa. 2010), reconsideration denied, 2010 WL 4628700 (Nov. 12, 2010). *See* III.A, *Land Use Planning/Zoning*, *infra*.

III. LEGAL ISSUES RELATED TO ACHIEVING AIRPORT-COMPATIBLE LAND USE

Achieving airport-compatible land use in compliance with FAA grant assurances—or as a matter of policy for airports not receiving federal funds—requires a process of establishing the legal authority to act, identifying needed property rights, and exercising appropriate means of acquiring such property rights. Specifically, the legal basis for airport-compatible land-use requirements must be established by statute or by planning, zoning, or other police power regulations.[105] These exercises of governmental authority establish various protection zones on airport and adjacent properties. It may be necessary to acquire property rights, whether fee-simple ownership or lesser property interests, such as easements, sufficient to achieve compatible land use within designated protection zones. Necessary property rights may be acquired by voluntary purchase or eminent domain. In addition, excess-noise land (property that was acquired under a noise-compatibility program, but is no longer needed for noise-compatibility purposes) must be sold or leased subject to enforceable deed restrictions or easements to ensure that it is only used for purposes compatible with noise levels of airport operations. Such restrictions must be recorded.[106] In cases where airport activities affect neighboring properties but the airport has not acquired sufficient protective property rights, neighboring property owners may bring inverse condemnation, nuisance, or trespass actions, seeking compensation for the alleged interference. For simplicity of discussion, these various elements of this process are referred to in this digest as methods for achieving airport-compatible land use.

Achieving airport-compatible land use requires both preventing incompatible land use from occurring and mitigating the existence of existing incompatible land use. For purposes of this section, airport-compatible land use is considered to include elimination of hazardous obstructions to airspace.

While state and local governments have jurisdiction over land use, federally-funded airport land acquisition projects must also comply with requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Relocation Act).[107] Airport requirements are set forth in FAA orders and guidance.[108]

This section briefly describes each method and discusses the concomitant legal issues, including challenges that may be raised to employment of the methods.[109] The discussion includes examples of state and local law treatment of various approaches. For the most part, general legal principles are discussed under the major section headings, with specific airport issues addressed in the numbered subsections.

A. Land-Use Planning/Zoning[110]

As an exercise of police power,[111] zoning—and presumably enforceable comprehensive plans—must be reasonable, not be arbitrary, and bear a substantial relation to public health, safety, and welfare.[112] This requirement does not mean that a regulation must be certain to achieve its stated purpose, merely that the enacting governmental body could rationally conclude that the regulation would do so.[113] Zoning is also subject to the requirement that government act as neutral arbiter in exercising police power, which is not to be used to keep land values low in anticipation of future government acquisition. Thus zoning used to reduce the value of land to be acquired for public use is generally considered invalid.[114]

The Supreme Court has established several overarching legal principles related to land-use planning and zoning that inform the legal parameters for the use of land-use planning and zoning to achieve airport-compatible land use. These principles concern the limitations of the use of planning and zoning power, federal

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[105] "Police Power in the land-use control context encompasses zoning and all other government regulations which restrict private owners in their development and use of land." 1 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING, 4TH (2005), § 1:2, Police power regulation of land use.

[106] Rick Etter, *Management of Acquired Noise Land*, 31st Annual Airport Conference, Mar. 18, 2008, available at http://www.docstoc.com/docs/70651965/Exhibit-a-Grant-Deed (accessed Jan. 11, 2012).

[107] 42 U.S.C. § 4601 *et seq.*; 49 C.F.R. Pt. 24.

[108] Order 5100.37B, Land Acquisition and Relocation Assistance for Airport Projects, Aug. 1, 2005, www.faa.gov/airports/resources/publications/orders/media/environmental_5100_37b.pdf; Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects, AC No. 150/5100-17, Nov. 7, 2005, www.faa.gov/documentLibrary/media/advisory_circular/150-5100-17/150_5100_17_chg6.pdf.

[109] For a discussion of jurisdictional issues concerning FAA orders related to airport development, see JAYE PERSHING JOHNSON, CASE STUDIES ON COMMUNITY CHALLENGES TO AIRPORT DEVELOPMENT 37–42 (Airport Cooperative Research Program, Legal Research Digest No. 9, 2010), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_009.pdf.

[110] *See generally* 5 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING, 4TH (2005), ch. 85—Zoning for Airports and Adjacent Lands, §§ 85:1 to 85:15.

[111] Note: *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963).

[112] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); Tomasek v. City of Des Plaines, 64 Ill. 2d 172, 179, 354 N.E.2d 899, 903 (Ill. 1976).

[113] Harris v. City of Wichita, 862 F. Supp. 287, 292 (D. Kan. 1994) (holding that airport overlay district restrictions on development were reasonably related to goal of minimizing impact of plane crashes) (citing Allright Colo., Inc. v. City and County of Denver, 937 F.2d 1502, 1511 (10th Cir.)).

[114] ZIEGLER, *supra* note 105, § 6:65, Precondemnation conduct; Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. LAND USE & ENVTL. L. 156 (Spring 2006), www.law.fsu.edu/journals/landuse/vol21_2/Romero.pdf (accessed Jan. 5, 2012).

preemption, when land use regulation amounts to an unconstitutional taking of property, and exactions.

Legitimacy of municipal zoning: The Supreme Court recognized the legitimacy of municipal zoning authority in the seminal 1926 case of *Euclid v. Ambler Realty*.[115] The Court reviewed a variety of state cases upholding similar zoning ordinances as related to health, safety, and general welfare, finding the cases that upheld such laws to be the broader trend. The Court noted that the zoning ordinance held to be reasonable in the abstract could be found clearly arbitrary and unreasonable in a specific application, but that the case presented did not provide the basis for the Court to analyze the application of specific provisions of the ordinance.[116] Indeed, planning and zoning undertaken pursuant to police power do not constitute a taking requiring compensation.[117] As the Supreme Court noted, if an ordinance "is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional," although at some point a regulation may become so onerous as to constitute a taking requiring just compensation.[118]

Preemption: State laws are reviewed with a presumption of constitutionality.[119] Moreover, there is a presumption against federal preemption of state law in areas traditionally regulated under state law,[120] such as land use. Nonetheless, because zoning ordinances may actually impinge on areas of federal interest, such as regulation of flight,[121] federal preemption can be a significant issue in cases related to airport land use. Of course, whether a particular ordinance regulates flight or land use is often at the heart of the controversy.

The United States Constitution provides that laws of the United States are the supreme law of the land;[122] the Supremacy Clause provides the basis for the doctrine of preemption. The Supreme Court has used a variety of formulations in describing preemption,[123] but, regardless, the initial inquiry is whether Congress intended to preempt state law. Absent an express intent to preempt or an actual conflict between federal and state law, courts consider whether there is congressional intent to "pre-empt the specific field covered by the state law."[124] There are several indications of Congress's intent to occupy the field: the pervasiveness of the federal scheme of regulation, the dominance of the federal interest in the regulated field, or inconsistency

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[115] 272 U.S. 365, 387–88, 47 S. Ct. 114, 118, 71 L. Ed. 303, 310 (1926). The Court cited the nuisance maxim, "sic utere tuo ut alienum non laedas" [Use your property so as not to injure another's, Black's Law Dictionary (8th ed. 2004)] as useful in resolving doubts as to the legitimacy of the application of a zoning ordinance. *Id*. The case involved Fourteenth Amendment due process and equal protection challenges to the existence of residential zoning requirements in the Village of Euclid, Ohio, a suburb of Cleveland. Ambler Realty alleged that the residential zoning requirements so restricted its land as to "confiscate and destroy a great part of its value" and constituted "a cloud upon the land," reducing and destroying the land's value.[115] In its review, the Court noted that a zoning ordinance must be justified as an exercise of police power "asserted for the public welfare," the legitimacy of which is assessed in a fact-specific manner, depending on the circumstances and locality.

[116] *Id*. at 395–97 (1926). Two years later a case did present the basis for analysis of the constitutionality of a zoning ordinance as applied. Nectow v. City of Cambridge, 277 U.S. 183 (1928) (application of zoning to particular property—where circumstances precluded practical use of land for zoned purposes and where special master found including property in contested zone would not promote "health, safety, convenience, and general welfare of the inhabitants of that part" of Cambridge—violated the due process clause).

[117] JULIUS L. SACKMAN, 2A NICHOLS ON EMINENT DOMAIN § 6.01[2] (3d ed.).

[118] Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 592–94, 82 S. Ct. 987, 989, 8 L. Ed. 2d 130, 133 (1962).

[119] Air Transp. Ass'n of Am. v. Crotti, 389 F. Supp. 58, 63 (N.D. Cal. 1975) (three-judge court).

[120] California v. ARC Am. Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 1665, 104 L. Ed. 2d 86, 94 (1989).

[121] For example, the California Single Event Noise Exposure Level (SENEL) regulations issued under the California Public Utilities Code were held to regulate noise levels of aircraft in direct flight and accordingly to be preempted by the Noise Control Act, while the Community Noise Equivalent Level (CNEL) regulations issued under the same code provisions were held not to regulate direct flight and so were held, on their face, to be valid exercises of police power. Air Transp. Ass'n of America v. Crotti, 389 F. Supp. 58, 64–65 (N.D. Cal. 1975) (three-judge court). The court described the differences between the CNEL and SENEL regulations as follows:

> (a) CNEL (Community Noise Equivalent Level) standards prescribed for continued operation of airports with monitoring requirements, which focus upon the arrival of a prescribed ultimate maximum noise level and limiting the land uses subjected thereto around airport facilities; and (b) SNEL [sic] (Single Event Noise Exposure Levels) prohibitions applied to the inseparable feature of noise generated by an aircraft directly engaged in flight.

Id. at 62.

[122]

> This 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.

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

[123]

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368–69, 106 S. Ct. 1890, 1898, 90 L. Ed. 2d 369, 382 (1986).

[124] Wardair Canada v. Fla. Dep't of Revenue, 477 U.S. 1, 6, 106 S. Ct. 2369, 2372, 91 L. Ed. 2d 8 (1986) (no preemption of state sales tax on aviation fuel) (citations omitted).

between the federal statute and the result of state regulation.[125] Federal preemption of local ordinances[126] is governed by the same principles as preemption of state law.[127]

Regulatory taking: The Supreme Court has described the bases for regulatory taking claims as follows: "a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."[128]

Land-use regulations are subject to constitutional challenge even when the government has not physically occupied the property in question.[129] The primary constitutional objection to zoning restrictions is that they violate the Takings Clause of the Fifth Amendment, which prohibits the taking of private property for public use without just compensation.[130] The Takings Clause is made applicable to the states through the Fourteenth Amendment.[131] State constitutions may have more stringent requirements concerning taking than those of the Fifth Amendment,[132] and may specifically cover damage to property as well as taking.[133] The takings analysis is very fact-specific.[134]

Pennsylvania Coal Co. v. Mahon[135] was the first Supreme Court case to recognize the possibility of regulatory taking, as opposed to taking based on physical seizure or occupation of property. Justice Holmes framed the tension between governmental regulation and private property rights in evaluating the limits of police power as follows:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.* The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.[136] (Emphasis added)

After holding a taking had occurred, the Court stated: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[137] It was left to subsequent cases to define more fully what constituted "too far."

Penn Central Transportation Co. v. New York City[138] involved Fifth and Fourteenth Amendment challenges to the designation of Grand Central Terminal as a pro-

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[125] The Supreme Court stated:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1449 (1947) (citations omitted).

[126] *See* ZIEGLER, *supra* note 110, § 85:4, Federal preemption and local zoning.

[127] Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991) (citing Wardair Canada v. Fla. Dep't of Revenue, 477 U.S. 1, 6 (1986)).

[128] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548, 125 S. Ct. 2074, 2087, 161 L. Ed. 2d 876, 893 (2005) (substantially advances legitimate state interest test of Agins v. Tiburon, 447 U.S. 255 (1980), not appropriate for determining whether regulation effects Fifth Amendment taking).

[129] Case law concerning physical occupation cases is discussed in III.D, *Inverse Condemnation*, *infra* this digest.

[130] U.S. CONST. amend. V.

[131] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239, 17 S. Ct. 581, 585, 41 L. Ed. 979, 985 (1897).

[132] Jankovich v. Ind. Toll Road Comm'n, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965) (dismissing writ of certiorari as improvidently granted because state Supreme Court decision of unlawful taking was based on independent ground of Indiana Constitution); Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902 (9th Cir. 2007); DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006); McShane v. City of Faribault, 292 N.W.2d 253, 258–59 (Minn. 1980).

[133] *E.g.*, TEX. CONST. art I, § 17 (requires compensation for property taken, damaged, or destroyed for or applied to the public use). However, damage to marketability does not meet the requirement for compensation; a property owner must establish damage different than that suffered by the community at large. Wilkinson v. Dallas/Fort Worth Int'l Airport Bd., 54 S.W.3d 1 (Tex. App. 2001).

[134] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332, 122 S. Ct. 1465, 1484, 152 L. Ed. 2d 517, 547 (2002).

[135] 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). The case involved a Pennsylvania statute that forbade mining coal so as to cause subsidence of homes, which if enforced would have denied the coal company its contractual right to mine under the plaintiffs' property. The Court found that the statute exceeded the appropriate scope of police power. Distinguishing the case from a previous case allowing safety regulation of coal mining, the Court found that the appropriate way to protect streets and homes from subsistence due to mining would have been to purchase or condemn rights of support along with surface rights, rather than attempting to obtain the rights of support through regulation without compensation.

[136] *Id.* at 413.

[137] *Id.* at 415. Justice Brandeis, dissenting, argued that the statute in question merely regulated a noxious use and should have been upheld.

[138] 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

tected landmark under the New York City Landmarks Law.[139] This case set the modern framework for regulatory takings analysis and is widely cited in regulatory takings cases, including those involving challenges to airport zoning.

Before considering Penn Central's specific arguments, the Court noted that it had previously recognized that the "Fifth Amendment's guarantee…[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"[140] but that the Court had not been able to develop "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons," instead engaging in ad hoc factual analyses.[141] The Court then reviewed the factors that previous decisions had found significant in engaging in that ad hoc analysis:[142]

- Economic impact on the claimant, including the extent to which regulation has interfered with distinct investment-backed expectations.
- Character of the government action: physical taking versus "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."
- Presence of bona fide property interest, i.e., whether the affected interests were "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." [As is made clear later in the opinion, the effect on the entire property, not just a portion, must be considered].
- Reasonable conclusion by a state agency that the complained of regulation promotes "health, safety, morals, or general welfare" by prohibiting certain land uses, even beneficial uses.

The Court reviewed several past cases upholding land-use regulations that "destroyed or adversely affected recognized real property interests" where such regulations had been reasonably found to promote "health, safety, morals, or general welfare" by prohibiting certain land uses, even beneficial uses. On the other hand, a use restriction may constitute a taking where the restriction is not reasonably necessary to effectuate a substantial public purpose or where it is unduly harsh as applied to a particular property.[143]

The Court noted that the validity of the Landmark Law itself was not in question, but whether its operation in this case constituted a taking. The Penn Central appellants made several broad arguments, all of which the Court rejected, and the first of which is most relevant in the context of airport-compatible land use: that appellants owned the airspace over Grand Central Terminal; the Landmark Law deprived them of any gainful use of that superadjacent airspace; and that taking entitled them to just compensation. The Court rejected out of hand the argument that the appellants could segment their property rights and argue that the loss of each must be treated separately, noting that such a rule would have prevented the Court from ever upholding restrictions on development of air rights.[144]

Having established that the lack of a just compensation requirement in the Landmark Law did not render the law invalid, the Court then considered the question of whether the interference with appellant's property was such as required an exercise of eminent domain and just compensation. To that end, the Court examined the specific impact of the Landmark Law on the Grand Central Terminal. The Court found that the Landmark Law did not interfere with any present uses of the Terminal, thus not interfering with the primary expectation concerning use of the property. Moreover the record did not support the conclusion that appellants would be denied any right to occupy the airspace

[139] Penn Central challenged the designation of Grand Central Terminal as a protected landmark under the New York City Landmarks Law (and the block on which it was located a landmark site) and the consequent limitation on building over the existing terminal. The prohibited addition to Grand Central Terminal would have complied with existing zoning other than the requirements of the Landmarks Law. In reviewing the facts of the case, the Court noted that Penn Central had not sought judicial review of the landmark designation nor of the Landmark Commission's rejection of its plan to build a large building over the terminal, instead challenging the application of the Landmarks Law in state court as having effected an unconstitutional taking of property under the Fifth and Fourteenth Amendments and a due process violation of the Fourteenth Amendment. In its review of the provisions of the Landmarks Law, the Court noted that the law allowed owners of designated landmarks additional opportunities to transfer development rights not used on landmark properties. Although Penn Central presented two issues—whether the landmarks regulation constituted a taking under the Fifth Amendment and whether if a taking had occurred the transferrable development rights constituted "just compensation"—the Court determined that it needed to address only the first issue. *Id*. at 115–22 (1978).

[140] *Id*. at 123 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[141] *Id* at 124 (citations omitted).

[142] *Id.* at 124–25.

[143] *Id*. at 125–27.

[144] *Id*. at 128–31. Appellants' second argument was that the Landmarks Law regulates individual landmarks, and thus should be distinguished from cases that rejected the notion of establishing a taking through showing of diminution of value. The Court rejected this argument as well. The Court likewise rejected the argument that the Landmarks Law requires just compensation because it does not impose identical or even similar restrictions on all structures, both on the law and the facts. The Court also rejected the argument that the Landmarks Law effected a taking for a governmental purpose, *Id*. at 131–35, specifically distinguishing *Causby* on the grounds that the New York City law did not appropriate property for a government purpose but merely "prohibit[ed] appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion." *Id*. at 135.

above the terminal. The Court also noted the availability of transferable air rights to nearby property owned by the appellants. The Court held that there was no taking, in that the regulatory restrictions were reasonably related to promotion of the general welfare, and the regulation allowed appellants reasonable beneficial use of their property, with the opportunity to enhance the site and other related properties.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[145] examined the question of whether temporary moratoria on development (32 months in one portion and 8 months in another) during the process of devising a comprehensive land-use plan constituted a per se compensable taking under the Takings Clause.

The Supreme Court affirmed the Ninth Circuit decision, holding that the *Penn Central* framework, rather than a per se rule, was the appropriate analytical approach. The Court drew a sharp distinction between physical takings, which impose a categorical duty of compensation even for temporary acquisitions, and regulatory takings, which do not.[146] The Court stated that this "longstanding distinction" makes it "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."[147] To allow the property interest during the moratorium to be considered separately from the entire property interest would fly in the face of the Penn Central requirement to "consider the parcel as a whole."[148] Thus under the Court's regulatory jurisprudence, a property interest cannot be segmented temporally for takings purposes anymore than it can be segmented physically for such purposes. To effect a complete loss of value for takings purposes—and thus be subject to a per se rule—a regulatory restriction must be permanent.[149]

The Court then considered whether the Fifth Amendment interest identified in *Armstrong*, *supra*, justified creating a new rule.[150] The Court rejected a per se rule that a development moratorium constitutes a taking, but did not foreclose the possibility that a temporary land-use restriction could be held to be a taking under the *Penn Central* analysis.

The Supreme Court has held that *Lucas* may not be sidestepped by leaving the landowner with a "token interest."[151] Nonetheless, the requirement for a complete destruction of value in order for the per se rule to apply may be strictly construed. The Federal Circuit has held that an alleged 98.8 percent loss of value due to the denial of a Section 404 permit precluded an application of *Lucas* and required a fact-based *Penn Central* analysis.[152]

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[145] 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). The District Court had found that there was no taking under the *Penn Central* framework, and the landowners had not appealed that holding. The District Court also held that the total deprivation of the use of their land during the moratoria constituted categorical takings under Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (regulation that denies all economically beneficial or productive use of land requires compensation under takings clause). The Ninth Circuit Court of Appeals had reversed, holding that the temporary moratoria were not total takings under *Lucas*. The appellate court also disagreed that First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), supported a finding of taking, finding that case concerned the question of just compensation, not whether or when a taking had occurred. *See* Laurel A. Firestone, *Case Comment, Temporary Moratoria and Regulatory Takings Jurisprudence After: Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 27 HARV. ENVTL. L. REV. 277 (2003).

[146] *Tahoe-Sierra Pres.*, 535 U.S. at 321–22.

[147] *Id*. at 323 (citation omitted). Recognizing that *Lucas* was in fact a regulatory taking case, the Court reviewed regulatory takings cases leading up to *Lucas* to explain why that case was inapposite. In particular, the Court distinguished *First English*, emphasizing that that case was limited to the question of compensation, not addressing that of determining the existence of taking *vel non*, and that *First English* in fact implicitly rejected the categorical taking argument being advanced by the *Tahoe-Sierra* petitioners. The Court also distinguished *Lucas* as being limited to the "extraordinary circumstance when no productive or economically beneficial use of land is permitted," which, the Court held, did not apply to the temporary moratorium in question.

[148] *Id*. at 329–31.

[149] *Id*. at 331–32.

[150] *Id*. at 334. The Court explained that on the facts, three categorical theories were available: a broad *per se* rule covering any temporary but complete deprivation of economic use of property; a narrower rule that would not cover delays normal to the permitting, zoning, variance, and similar processes; and a rule that allowed a short fixed period of time for land use deliberations before requiring just compensation. The Court then posited "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a Penn Central inquiry into all of the relevant circumstances in particular cases." From that perspective the Court easily rejected the broad rule due to the havoc it would play with normal governmental processes. While either of the narrower rules would be less destructive to the planning process, the Court found that they would still undermine the planning process.

[151] Palazzo v. Rhode Island, 533 U.S. 606, 631, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592, 616 (2001) (application of wetlands regulations resulting in $200,000 remaining in development value does not qualify as total taking under *Lucas*). *But cf.,* DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011) (reduction of value of $179,000—less than 7 percent of property value—constituted taking under Minnesota Constitution).

[152] Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003). *Cooley* also raised the question of whether the permit denial was final. The court noted: "A permit denial is final when the applicant has no appeal mechanism available and the denial is based on an unchanging fact." *Id*. at 1302. As to finality, the Court held that legal maneuvering after the permit had been denied on substantive grounds did not undercut the finality of the original permit denial. *But see* DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011), discussed in III.A.4, *Land Use Regulation as Taking*, *infra*.

Although a facial challenge to a zoning ordinance may be decided as a matter of law, the Supreme Court has described facial takings claims as difficult to demonstrate.[153]

Exactions: Of particular interest in the airport context is the ability to obtain property rights, notably avigation or clearance easements, as a condition of receiving a municipal permit. The Supreme Court addressed the parameters of permit conditions to obtain property rights in two seminal cases: *Nollan v. California Coastal Commission*[154] and *Dolan v. City of Tigard*.[155]

Nollan involved a challenge to a condition placed on a building permit: the regulatory agency conditioned its grant of a coastal development permit on the property owners granting a public easement across their beachfront property. After reviewing the facts and lower court decisions,[156] the Supreme Court first held that a simple requirement to grant an easement would have clearly constituted a permanent physical occupation, and therefore a taking. The Court then considered whether requiring the easement as a condition for a land-use permit was constitutional. The Court accepted *arguendo* that the Coastal Commission's asserted public purposes in fact met the standard for public purpose in the context of acceptable regulatory restrictions on property, and proceeded to evaluate whether under the facts requiring the easement furthered the proffered public purposes. The Court agreed with the Coastal Commission that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[157] However, the Court explained that if the required condition to the permit fails to advance the end that would have been accomplished by an outright denial of the permit, the condition is not constitutional: the lack of nexus converts the purpose to "quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[158] On the facts at issue the Court found that the required easement did not advance the public purpose of alleviating the alleged reduction in public access to the beach.

***Practice Aid*:** To be a constitutional regulatory action rather than a taking requiring compensation, a condition on a permit must serve the same purpose as would be served by a legitimate denial of the permit, i.e., there must be an essential nexus between the condition and the state interest asserted.

Dolan: The Supreme Court revisited the permit question in *Dolan*, framing the analysis of permit conditions as two parts: determining whether an essential nexus exists between the legitimate state interest and the permits condition, as required under *Nollan*, and deciding "the required degree of connection between the exactions and the projected impact of the proposed development," a question not reached under *Nollan*.[159] In this case the property owner seeking permission to redevelop her site, increasing both its business activity and paved surfaces, challenged the requirement that she dedicate portions of her property to a city greenway due to its location within the floodplain and to a city pedestrian and bicycle pathway due to increased traffic contributing to traffic congestion. The Court found that the public purposes asserted were legitimate, and that a nexus existed between those purposes and the condition to be imposed on the permit. The question remained whether the supporting findings were constitutionally sufficient to justify the conditions on the building permit. In discussing the appropriate test for judging supporting findings for this purpose, the Court rejected a generalized statement standard as too lax, and the specific and uniquely attributable test as excessive under the federal constitution. Instead the Court adopted a "rough proportionality" test under which a municipality must make individualized findings that a required dedication of property is related "both in nature and extent to the impact of the proposed development."[160]

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[153] Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736, 117 S. Ct. 1659, 1666, 137 L. Ed. 2d 980, 991, n.10 (1997).

[154] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[155] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[156] The property in question was not the only access to nearby public beaches, but the Coastal Commission had found that the new structure the Nollans proposed would contribute to impeding public access and therefore the easement was required to offset that increase in burden. The District Court found that the state statute authorized the Coastal Commission to impose public access conditions on a coastal development permit needed when a new single family home replaced an existing one, provided that the permitted property would have an adverse impact on public access to the sea. The Court of Appeals had a different interpretation of the California Coastal Act, limited to the size difference of the new structure compared with the existing structure and not requiring a showing of adverse impact. The Court of Appeals found the statute was constitutional under California case law, and that there was no taking, merely a diminution of value. 483 U.S. 825, 827–31, 107 S. Ct. 3141, 3143, 97 L. Ed. 2d 677, 683 (1987).

[157] *Id*. at 836.

[158] *Id* at 837.

[159] 512 U.S. 374, 386, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304, 317 (1994).

[160] *Id*. at 391 (1994). In then applying that standard to the facts of the case, the Court examined separately the requirement that property be dedicated to a recreational easement and the requirement for dedication of property for a pedestrian/bicycle pathway. The Court found that the requirement that the property owner dedicate property to the public greenway, as opposed to merely leaving the property undeveloped, exceeded the state interest in flood control. The Court rejected the city's argument that the property owner of commercial property has already compromised her ability to exclude others from the property, noting that under the permanent recreational easement sought by the city the property owner would "lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regu-

***Practice Aid*:** If the scope exceeds the asserted legitimate state interest, a conditional easement may be rendered unconstitutional.

The *Nollan/Dolan* test does not apply to a facial challenge to a land use regulation.[161] At least one state has codified the *Nollan/Dolan* tests for regulatory taking.[162]

The balance of this section of the digest discusses the major legal issues related to land-use planning and zoning that arise in the context of airport-compatible land use: reasonableness of airport zoning; federal preemption of state and local law; state preemption of local zoning ordinances; circumstances under which land-use planning and zoning may amount to taking; and conflicts between airport zoning ordinances and other local ordinances. The section also briefly discusses the relationship between land-use planning/zoning and permit requirements; the relationship between land-use planning/zoning and fee-simple acquisition; eminent domain; resorting to litigation; and the need for legislative solutions. Specific procedural requirements,[163] such as notice and filing requirements, vary from jurisdiction to jurisdiction and are not discussed here. Airport counsels are, of course, advised to determine and follow such requirements.

1. Reasonableness of Airport Zoning

Numerous courts have upheld the reasonableness of zoning ordinances requiring airport-compatible land uses.[164] Examples of state and local requirements that have been upheld include city and county airport overlay districts,[165] New Jersey's Air Safety and Hazardous Zoning Act (which required the Commissioner of Transportation to adopt regulations delineating airport safety zones for all covered airports and required municipalities with airport safety zones within their boundaries to adopt ordinances incorporating the Commissioner's standards);[166] a Wisconsin statute providing municipalities with the authority to enact zoning ordinances to protect airport approach areas;[167] and a Wisconsin local zoning ordinance issued under Section 114.136 that restricted residential development in Zone 3 of the airport overlay district to 1-acre minimums.[168] A dearth of recent cases is perhaps a testament to the fact that the facial validity of airport zoning is largely considered settled law.

2. Federal Preemption of State and Local Law[169]

Preemption can be a significant issue in resolving disputes over airport-compatible land use. The existence of federal preemption is often the deciding issue in whether or not an airport sponsor must follow, for example, local land-use regulation in carrying out runway expansion projects or other local regulations in taking steps to eliminate hazardous obstructions.

There are several issues of particular interest in the context of preemption cases related to airports: noise, safety, and the proprietary/nonproprietary distinction. Objections to airport noise may be raised through local ordinances that attempt to regulate airport operations to reduce noise or by direct challenges to airport operations under state laws concerning nuisance or trespass. Safety may be implicated in challenges to runway construction or expansion projects and in conflicts over airport sponsor efforts to clear hazardous obstructions. In particular, obstruction efforts may conflict with state or local environmental requirements.

The Supreme Court addressed the question of federal preemption of local ordinances affecting airport operations in 1973 in *City of Burbank v. Lockheed Air Terminal, Inc.*,[170] decided less than a year after the

lated, it would be eviscerated." *Id*. at 394. The Court noted that if the new development were going to encroach on an existing greenway, then requiring some dedication to make up for that would have been reasonable, but that was not the case. As to the pathway, the Court found that while dedications for public ways are generally reasonable exactions to avoid excessive congestion, the city had not met its burden of showing that the additional traffic from the proposed redevelopment reasonably relate to the pedestrian/bicycle path dedication. The Court found that some quantifiable finding, not just a general conclusory statement, was required.

[161] Action Apartment Ass'n v. City of Santa Monica, 166 Cal. App. 4th 456, 469–70, 82 Cal. Rptr. 3d 722 (Cal. Ct. App. 2008 (regulation relating to affordable housing requirements upheld).

[162] Regulatory Impairment of Property Rights Act (Colorado): COLO. REV. STAT. §§ 29-20-201 to -205 (2009). *See* Wolf Ranch, LLC v. City of Colorado Springs, 220 P.3d 559 (Colo. 2009).

[163] *See*, *e.g.*, CHEEK, supra note 4, at 15.

[164] ZIEGLER, *supra* note 110, § 85:6, Reasonable zoning regulation upheld. The reasonableness of airport zoning is also discussed in § III.A.4, *Land Use Regulation as Taking*, *infra*.

[165] Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994).

[166] Patzau v. N.J. Dep't of Transp., N.J. Super. 294, 638 A.2d 866, 271 (1994).

[167] Schmidt v. City of Kenosha, 214 Wis. 2d 527, 571 N.W.2d 892 (1997) (upholding WIS. STAT. § 114.136 as limited grant of power to carry out valid state police power to promote public safety along airport approaches).

[168] Nw. Properties v. Outagamie County, 223 Wis. 2d 483, 589 N.W.2d 683 (1998) (upheld as rationally related to public safety).

[169] ZIEGLER, *supra* note 110, § 85:4, Federal preemption and local zoning.

[170] 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973). The City Council of Burbank had adopted an ordinance that purported to regulate the times at which certain aircraft could take off and land at the Hollywood-Burbank Airport. Both lower federal courts had—before enactment of the Noise Control Act—found the ordinance unconstitutional under the Supremacy Clause. The *Burbank* holding applies "to both large and small airports, and to privately owned as well as publicly owned airports." ZIEGLER, *supra* note 110, § 85:4, Federal preemption and local zoning, n.4.

adoption of the Noise Control Act of 1972. The Supreme Court considered whether the Federal Aviation Act,[171] as amended by the Noise Control Act,[172] and the implementing regulations preempted the ordinance in question. The Court found that the Noise Control Act, despite the lack of a preemption provision, supported the conclusion that "FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting [sic] state and local control."[173] The Court's preemption holding was based on the pervasive scheme of federal regulation of aircraft noise.[174] In a much-cited footnote, however, the Court differentiated between noise regulations enacted by municipalities acting as airport proprietors and those enacted by nonproprietor municipalities.[175]

Congress explicitly protected the proprietary powers of airport owners in Section 105 of the Airline Deregulation Act of 1978, which also contains an express federal preemption of laws related to prices, routes, or service.[176] The proprietary right has been held to include "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."[177]

The scope of the express preemption provision has been an issue in subsequent cases. Several cases have held that state or local requirements preventing runway extensions do not fall within the express preemption provision.[178]

In an ongoing dispute with the City of Burbank over acquisition of adjoining property as part of an airport layout plan, the Burbank-Glendale-Pasadena Airport Authority challenged the California statute requiring the authority to seek local plan approval before the authority acquired land to enlarge the airport. The airport authority argued that the provision was preempted and violated the Supremacy, Commerce, and Due Process Clauses of the U.S. Constitution, and that the City of Burbank had delegated to the authority all its powers under Section 21661.6.[179] The California Courts of Appeal, however, held that Section 21661.6 was facially valid. The court rejected the argument that the requirement that the airport authority submit development plans to the City of Burbank before property acquisition was inconsistent with the airport authority's eminent domain power. The court also rejected the argument that Section 21661.6 was preempted on its face

[171] 49 U.S.C. § 40101 *et seq.*

[172] 42 U.S.C. §§ 4901–4918.

[173] *Burbank*, 411 U.S. at 633.

[174] *Id.*

[175] *Id.* at 635–36 n.14 (1973). The Ninth Circuit has held that the criteria for proprietorship for federal preemption purposes are ownership, operation, promotion, and the ability to acquire necessary approach easements. San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1317 (9th Cir. 1981), *cert. denied sub nom.* Dep't of Transp. v. San Diego Unified Port Dist., 455 U.S. 1000 (1982). The San Diego Unified Port District, which operated the San Diego International Airport, had already imposed a curfew to address noise concerns. However, the California Department of Transportation (Caltrans) attempted to impose a more restrictive curfew under the State Public Utilities Code. The state regulation set noise levels and required a variance for operations exceeding those noise levels. The airport applied for a variance and was granted one, subject to six conditions, the fourth of which was an extended curfew for aircraft exceeding FAA noise requirements. *Id.* at 1308–09. The Ninth Circuit held that the curfew requirement was preempted under *City of Burbank*, *supra*, and that Caltrans did not fall under the *Griggs* rationale for allowing a proprietor to regulate airport noise—liability for excessive noise—nor meet the criteria for proprietorship for federal preemption purposes.

[176] 49 U.S.C. § 41713, Preemption of authority over prices, routes, and service. Subsection (b) provides specifically for federal preemption of state or local laws concerning prices, routes, or service of air carriers providing air transportation under the economic regulation subpart of Title 49. Paragraph (3) of that subsection, however, states "This 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."

If a municipality contracts away its proprietor rights over an airport, it loses the right to regulate airport noise. Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983) (en banc); Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1992).

[177] Air Transp. Ass'n of America v. Crotti, 389 F. Supp. 58, 64 (N.D. Cal. 1975) (three-judge court).

[178] Tweed-New Haven Airport v. Town of East Haven, 582 F. Supp. 2d 261 (D. Conn. 2008) (denial of permit to carry out wetlands mitigation on airport property as part of runway safety project not shown to definitely affect routes and service at airport).

[179] City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 85 Cal. Rptr. 2d 28, 32, 72 Cal. App. 4th 366 (1999). The provision in question, CAL. PUB. UTIL. CODE § 21661.6 provides:

> (a) Prior to the acquisition of land or any interest therein, including tide and submerged lands or other lands subject to the public trust for commerce, navigation, or fisheries, by any political subdivision for the purpose of expanding or enlarging any existing publicly owned airport, the acquiring entity shall submit a plan of that expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.
>
> (b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.
>
> (c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on the plan, and shall thereafter approve or disapprove the plan.
>
> (d) Upon approval of the plan, the proposed acquisition of property may begin.
>
> (e) The use of property so acquired shall thereafter conform to the approved plan, and any variance from that plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.
>
> (f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=21001-22000&file=21661-21669.6.

by federal airport noise and safety law. After discussing and distinguishing the cases relied upon by the airport authority, the court stressed

> local governments retain their power to regulate land use, even with regard to safety and noise control, so long as it does not touch upon the control of aircraft or airspace, or any aspect of aviation navigation. Nothing in the language of Public Utilities Code section 21661.6 permits or requires review of development plans which relate to noise or safety matters regulated exclusively under federal law.[180]

Even where express preemption is lacking, safety issues may result in implied preemption.[181] Several circuits have held that the Federal Aviation Act occupies the field of aviation safety, preempting state and local regulations that intrude on that field.[182] Although some of these decisions are not related to land use, their holdings have been applied in the land-use context.[183]

Local regulation of safety-related projects within an airport boundary is clearly preempted; even local regulation of safety-related activities outside the existing airport boundary may be preempted.[184] However, in applying the field preemption rule to specific facts, the courts have not always found that state laws in question actually intruded so as to be preempted. For example, the Second Circuit recently held that Congress has established its intent to occupy the entire field of air safety, thus preempting state regulation.[185] However, the court held that in addition to determining whether Congress intended to preempt the field, the court must determine the scope of that preemption. In *Goodspeed*, a private airport sought to establish that it did not have to get a permit to cut obstructive trees in nearby wetlands, arguing the Federal Aviation Act preempted the permit requirement. The Second Circuit agreed with the district court that the state permit requirements did not interfere with federal safety requirements sufficiently to be preempted. Whether the court would allow the state to deny the permit and require obstructive trees to remain was not yet at issue. The Second Circuit also noted that the district court had correctly distinguished *Tweed-New Haven Airport Authority v. Town of East Haven, Connecticut*,[186] in which the regulations under which the municipality had sought to prevent the construction of a safety-related runway project were held to be preempted by the Federal Aviation Act.

In some cases, resolving the preemption issue may turn on whether safety is in fact involved. *Tinicum*, *supra*, involved voluntary land acquisition in the Township of Tinicum by the City of Philadelphia. The purpose was to acquire a parcel needed for a Philadelphia airport capacity enhancement project (CEP) approved by the FAA.[187] At issue in *Tinicum* was the preemption of a Pennsylvania law requiring local approval before voluntary acquisition of property for an airport project. The court reviewed the Federal Aviation Act, as amended by the Vision 100–Century of Aviation Reauthorization Act,[188] to determine that CEPs in general are safety-related. The court also found that the Philadelphia CEP in particular was safety-related and that the disputed land acquisition was required to execute

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[180] *City of Burbank*, 85 Cal. Rptr. 2d at 37.

[181] *E.g.*, Tweed-New Haven Airport v. Town of East Haven, 582 F. Supp. 2d 261 (D. Conn. 2008).

[182] Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206 (2d Cir. Feb. 10, 2011) (state law in question did not intrude on field of safety, not preempted), *aff'g* Goodspeed Airport, LLC, v. East Haddam Inland Wetlands and Watercourses Comm'n, 681 F. Supp. 2d 182 (D. Conn. 2010), www.ca2.uscourts.gov/decisions/isysquery/dd6425b7-3b7d-4e78-8f91-30953ae1bb75/5/doc/10-516_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/dd6425b7-3b7d-4e78-8f91-30953ae1bb75/5/hilite/; http://caselaw.findlaw.com/us-2nd-circuit/1555129.html; Elassaad v. Independence Air, Inc., 613 F.3d 119 (3d Cir. 2010) (federal preemption does not apply to disembarkation from completely stopped airplane); Montalvo v. Spirit Airlines, 508 F.3d 464, 471 (9th Cir. 2007) (federal law preempted application of California tort law); Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6th Cir. 2005) (federal law preempts any state-imposed duty to warn in realm of aviation), *cert. denied*, 547 U.S. 1003 (2006); Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999) (federal law preempts Pennsylvania tort law for inflight injuries); French v. Pan Am Express, Inc., 869 F.2d 1, 4 (1st Cir. 1989) (Rhode Island statute regulating drug testing of pilots preempted by federal law). *See* Sarah Gogal, *Second Circuit Holds Federal Aviation Act Occupies Field of Aviation Safety*, AVIATION CENTERLINE,™ Mar./Apr. 2011, www.hklaw.com/default.aspx?id=24660&PublicationId=3109&ReturnId=31&ContentId=55492&pdf=yes.

[183] Twp. of Tinicum v. City of Philadelphia, 737 F. Supp. 2d 367 (E.D. Pa. 2010) (citing Burbank–Glendale–Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992)). *See* Michael J. Holland, *Federalism in the Twenty-First Century: Preemption in the Field of Air*, 78 DEF. COUNSEL J. 11 (2011).

[184] *See* Tweed-New Haven Airport, 582 F. Supp. 2d at 270 ("the court is not convinced that construction on land outside of airport property would necessarily fail a preemption challenge if it related to airport safety").

[185] Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206 (2d Cir. Feb. 10, 2011), www.ca2.uscourts.gov/decisions/isysquery/dd6425b7-3b7d-4e78-8f91-30953ae1bb75/5/doc/10-516_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/dd6425b7-3b7d-4e78-8f91-30953ae1bb75/5/hilite/; http://caselaw.findlaw.com/us-2nd-circuit/1555129.html.

[186] 582 F. Supp. 2d 261, 267 (D. Conn. 2008).

[187] The 2010 district court case was one in a series of conflicts between Tinicum and the Philadelphia airport. *See*, *e.g.*, Twp. of Tinicum v. DOT, 582 F.3d 482, 488 (3d Cir. 2009) (invalidating head tax levied by Tinicum on flights landing within Tinicum's borders); County of Delaware, Pa. v. DOT, 554 F.3d 143 (D.C. Cir. 2009) (dismissing challenge to FAA regulations for lack of standing); Country Aviation, Inc. v. Tinicum Twp., 1992 U.S LEXIS 19803, at *7 (No. 92-3017, E.D. Pa., Dec. 23, 1992) (finding Tinicum's noise control ordinance to be preempted).

[188] Pub. L. No. 108-176 (2003), 117 Stat. 2490.

the Philadelphia CEP. The court found that "the nexus between air safety and the construction and reconstruction of airport runways and adjacent areas, including taxiways, is at the heart of federal preemption."[189] The court held that the state law was accordingly preempted. The court also held that the state law was preempted on conflict grounds. The court granted the airport's motion to permanently enjoin Tinicum from "taking any action to defeat, interfere with, or impair in any way the City's ability to purchase land within the Township of Tinicum for the CEP at the Philadelphia International Airport that is approved by the Federal Aviation Administration."[190] In responding to the plaintiff's motion for reconsideration, the court ruled that the fact that most of the airport in fact was located in Tinicum was immaterial to its preemption holding.[191] On appeal, a central issue is whether the disputed purchase—which concerns land to be used for the relocation of a UPS facility that would be displaced by the new runway, not for the new runway itself—is in fact safety-related.[192] Tinicum argued in its brief that "the district court erred in holding that the presumption against preemption was overcome…when the land sought by the City was strictly intended for the convenient relocation of an auxiliary use and was not necessary for 'aviation safety' or any other federally-regulated area."[193] Philadelphia responded that the UPS relocation is an integral part of the CEP, which must be considered as a whole for preemption analysis purposes; moving the UPS facility is "associated with" the new runway. Philadelphia noted that UPS is "a major aeronautical user of the Airport" and that FAA had indicated that if UPS relocated elsewhere, FAA would have to analyze the effect on air traffic before allowing the airport project to proceed.[194] In addition, Philadelphia argued that the state statute at issue is not a land-use statute, nor does it apply to Philadelphia's acquisition of land from willing sellers.[195]

Applying the foregoing preemption principles, a general line of demarcation in airport-related ordinances is whether the ordinances govern flight operations or ground operations. The line is not always easy to draw, however. As the Vermont Supreme Court explained in reviewing a claim that federal aviation law preempted a Vermont environmental statute: "Appellant frames the question as whether federal law has fully occupied the field of aircraft operation. The appropriate and narrower question is whether the federal government has fully occupied the field of land use as it relates to aircraft operation."[196]

Where the ordinance is found to be directed at ground operations, a holding of no preemption is more likely.[197] For example, the following local ordinances have been held to be local land-use measures not preempted by either the Federal Aviation Act or the Noise Control Act: an ordinance prohibiting sea plane landings on a lake;[198] an ordinance affecting the siting of an airfield but not interfering with existing air traffic;[199] and a zoning ordinance governing intensity of airport use, type of aircraft allowed, clear zones required, operation locale, and type of aircraft operations found not related to noise control or the use of navigable airspace.[200] Conversely, state or local ordinances directed at airport land use related to aircraft landings and takeoffs at an existing facility will be preempted. Local ordinances that have been held to be preempted include local ordinances that prohibited night flying and required certain air traffic patterns for takeoffs and landings[201] and limited the number of landings and takeoffs of jets.[202] A local requirement for a special-use permit has been held to be preempted as applied to FAA construction of a radar tower.[203]

When local planning ordinances conflict with airport construction,[204] there is a significant difference between a zoning ordinance that controls the original airport location and an ordinance that purports to control land use at an existing airport. The former is considered a traditional land-use issue within the purview of the

[189] *Twp. of Tinicum*, 737 F. Supp. 2d at 378.

[190] *Id*. at 379–80.

[191] Twp. of Tinicum v. City of Philadelphia, No. 09-2872, slip op. at 5 (E.D. Pa. Nov. 12, 2010).

[192] Oral argument took place Sept. 13, 2011. Timothy Logue, *Federal Appeals Court Still Considering PHL-Tinicum Dispute*, THE DELAWARE COUNTY DAILY TIMES, Sept. 16, 2011, www.delcotimes.com/articles/2011/09/16/news/doc4e72b93fe0678753715491.txt (accessed Jan. 5, 2012).

[193] Brief of Appellant/Cross-Appellee at 2, Twp. of Tinicum v. City of Philadelphia, Nos. 10-4576, 10-4701 (3d Cir. Mar. 15, 2011).

[194] Brief of Appellee/Cross-Appellant 8, 23-24 Twp. of Tinicum v. City of Philadelphia, Nos. 10-4576, 10-4701 (3d Cir. Apr. 15, 2011).

[195] *Id*. at 8–10, 26–31.

[196] *In re Commercial Airfield*, 170 Vt. 595, 752 A.2d 13, 14 (2000).

[197] *See* JOHNSON, *supra* note 109, at 29; ZIEGLER, *supra* note 110, § 85:4, Federal preemption and local zoning, n.5; Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN. ST. ENVTL. L. REV. 40–41 (2002).

[198] Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996).

[199] Hoagland v. Town of Clear Lake, Ind., 415 F.3d 693, 697 (7th Cir. 2005).

[200] Faux-Burhans v. County Comm'rs of Frederick County, 674 F. Supp. 1172 (D. Md. 1987).

[201] Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983) (en banc).

[202] Price v. Charter Twp. of Fenton, 909 F. Supp. 498 (E.D. Mich. 1995).

[203] United States v. City of Berkeley, 735 F. Supp. 937 (E.D. Mo. 1990).

[204] City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D. Ohio 1995) (local zoning ordinance not preempted by FAA regulations because it did not directly regulate flight operations); City of Lake Angelus v. Aeronautics Comm., 260 Mich. App. 371, 676 N.W.2d 642 (2004).

host jurisdiction, while the latter is an exercise of police power that may be preempted by federal law.[205]

Courts have split on how to categorize local regulation of the placement of runways in terms of preemption.[206] The Ninth Circuit emphasized that runways are used exclusively for landings and takeoffs, thus affecting navigable airspace, whereas the Ohio District Court noted that although "it is certainly true that runway placement will have some tangential effect on flight operations, the question of whether and where to construct a runway does not substantially affect the use of airspace."[207] Other courts have rejected the Ninth Circuit's holding on the scope of the Aviation Act, distinguishing between occupying the field of aviation safety (preempted) and occupying the field of land-use regulations related to aviation (not preempted).[208]

Preemption issues may also arise when a property owner brings a nuisance or intentional or willful misconduct challenge to airport operations under state law. For example, in *Broadbent v. Allison*,[209] the plaintiffs had filed a state law action based on nuisance and intentional or willful misconduct, seeking an injunction to permanently shut down a private airport next to their property. The defendants sought to remove the action to federal court, alleging that the state action was preempted by the Federal Aviation Act. The district court held that the plaintiffs' action was aimed not at regulating the airspace and flight patterns, but at a land-use issue properly the purview of state courts, and therefore not preempted. The Seventh Circuit reached a similar result in holding that federal aviation law did not preempt all state common law remedies for airport noise and pollution, although the court noted that state damages could not be awarded for conduct that is consistent with federal aviation regulations. The court held that damage remedies could only be used to enforce federal requirements or to "regulate aspects of airport operation over which the state has discretionary authority."[210] However, where a plaintiff sought to use a state trespass claim to prevent overflights, the Seventh Circuit cautioned the plaintiff that his state law claim was likely to be found preempted by the Federal Aviation Act.[211] California has held that tort actions for personal injury and emotional distress from airport noise are not preempted by federal aviation law.[212] In 2010 the Third Circuit, in holding that a state tort claim for injuries suffered disembarking from an airplane was not preempted, noted that the Aviation Act's safety provisions appeared "principally concerned with safety in connection with operations associated with flight."[213]

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[205] *See* Gustafson v. City of Lake Angelus, 76 F.3d 778, 783–89 (6th Cir.). (federal preemption does not bar local regulation of seaplane or other aircraft landing sites); Garden State Farms, Inc. v. Bay II, 77 N.J. 439, 446–49, 390 A.2d 1177 (1978) (local zoning ordinance barring heliports is not preempted and must be considered by DOT before acting on heliport application).

[206] *See* Tuegel, *supra* note 69, at 291, 298, nn. 36, 37 (1998). *Compare* Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338, 1340 (9th Cir. 1992) (nonproprietor municipalities preempted from regulating airports in any manner that directly interferes with aircraft operations; local regulation of placement of runways directly affects airspace and is thus preempted by federal law) *with* City of Cleveland, Ohio v. City of Brook Park, Ohio, 893 F. Supp. 742 (N.D. Ohio 1995) (local regulation of placement of runways is purely a land use matter that merely tangentially affects use of airspace, and thus is not preempted).

[207] City of Cleveland, 893 F. Supp. at 751 (upholding validity of Oak Park ordinance that required Cleveland Airport to follow special use permit requirements before constructing new runway in Oak Park).

[208] *In re Commercial Airfield*, 170 Vt. 595, 752 A.2d 13, 16 (Vt. 2000) (citing City of Cleveland v. City of Brook Park, 893 F. Supp. 742, 751 (N.D. Ohio 1995)) (Ninth Circuit's "view of the scope of the Aviation Act is simply broader than that implied in any reasonable reading of the statute.").

[209] 155 F. Supp. 2d 520, 522 (W.D. N.C. 2001).

[210] Bieneman v. City of Chicago, 864 F.2d 463, 472–73 (7th Cir. 1988), overruling Luedtke v. Milwaukee County, 521 F.2d 387 (7th Cir. 1975).

[211] Vorhees v. Naper Aero Club, Inc., 272 F.3d 398 (7th Cir. 2001). The plaintiff wanted to prohibit overflights from a small private airport so that he could commercially develop his farm, which had heretofore coexisted with the airport. Vorhees had first sued for declaratory judgment that an anti-obstruction prohibition in the Illinois Aeronautics Act effected a taking requiring just compensation and for an injunction preventing various state and local authorities from enforcing the prohibition against him. That argument was rejected on the grounds that the plaintiff had failed to show that the state provision in fact prevented him from developing his property. In the instant case, plaintiff again sought an injunction arguing that the overflights were a trespass. The defendants removed the case to federal court on federal question grounds (complete preemption); the plaintiff sought remand, arguing that the Federal Aviation Act did not preempt state trespass laws. *Id*. at 400–01. The court held that for jurisdictional purposes—the issue before it—the Federal Aviation Act did not completely occupy the field, as necessary for federal jurisdiction, but rather could be a source for conflict preemption, a defense and not a basis for subject matter jurisdiction. In dicta, however, the court cautioned that it was unlikely that a state court would find that under these facts the trespass claim would not interfere with federal aviation regulation: "Most issues of airflight and navigable airspace, probably including take-offs and landings, are within the sovereign regulatory powers of the federal government." *Id*. at 405.

[212] *E.g.*, Greater Westchester Homeowners Ass'n v. City of Los Angeles, 160 Cal. Rptr. 733, 26 Cal. 3d 86, 603 P.2d 1329 (1979); Andrews v. County of Orange, 182 Cal. Rptr. 176, 130 Cal. App. 3d 944 (Cal. Ct. App. 1982).

[213] Elassaad v. Independence Air, Inc., 613 F.3d 119, 128 (3d Cir. 2010). For a discussion of preemption in aviation safety regulation see Michael J. Holland, *Federalism in the Twenty-First Century: Preemption in the Field of Air*, 78 DEFENSE COUNSEL J. 11 (2011).

***Practice Aid*:** It is a legitimate exercise of police power to determine where an airport may be located, but once an airport is in operation, police power cannot be used to determine how flight operations will be conducted unless that power is exercised by a proprietor municipality.

Preemption issues may also arise in the context of takings claims, discussed in Section II.A.4, Land Use Regulation as Taking, *infra*. In general, federal statutes do not preempt claims brought under state constitutions. The Federal Aviation Act has specifically been held not to preempt takings claims under state constitutions.[214]

3. State Law Preemption of Local Zoning Ordinances[215]

Absent a clear indication of preemptive intent, state courts may presume there is no preemption in the case of an exercise of local regulation in an area over which the locality traditionally has exercised control.[216] However, as a creature of state law, a local government is likely to be precluded from challenging state law under the federal or state constitutions.[217] In addition, state law may preempt local ordinances based on specific preemption language;[218] where the local ordinance conflicts with state law;[219] or where the eminent domain power derives from the state constitution and the zoning power does not.[220]

State statutes may also either indirectly or specifically prohibit local ordinances from interfering with various airport activities. For example, an Ohio statute exempts the location, construction, alteration, etc., of a public utility from municipal zoning, and a regional airport has been held to be a public utility for purposes of the statutory exemption.[221] New Jersey state law requires municipalities to recognize airports as permitted land uses and to incorporate the standards of the Air Safety and Zoning Act (ASZA) into local ordinances.[222] Washington state law prohibits local comprehensive plans or development regulations from precluding the siting of essential public facilities, which under state law includes airports.[223] In *Solberg*, the court explained that state law preempts local ordinances when such ordinances conflict with the statute or constitute an obstacle to state policy. In the case of ASZA:

> A municipality's ability to regulate land use within an airport safety zone is not entirely preempted by the ASZA. It is, however, narrowly circumscribed because it must conform to the requirements imposed by the regulations. Further, the Commissioner has the ultimate authority to override any local zoning decision if it is contrary to the purposes of the ASZA or the Aviation Act.[224]

A closely-related issue is whether state law exempts an airport sponsor from local land-use regulation. Michigan makes the determination of whether a state agency is immune from local land-use control based on legislative intent. In *Capital Region Airport Authority v. Charter Township of DeWitt*,[225] a Michigan appellate court held that the Michigan aeronautics statutes conferred on the airport authority exclusive authority over aeronautical operations at the airport, free from local zoning control. However, the court held that nonaeronautical operations were subject to local zoning ordinances.

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[214] Jankovich v. Ind. Toll Road Comm'n, 379 U.S. 487, 492–95, 85 S. Ct. 493, 496, 13 L. Ed. 2d 439, 444 (1965); Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902 (9th Cir. 2007). In *Jankovich* the Court rejected that argument that the Indiana Supreme Court decision amounted to a total nullification of airport zoning, emphasizing that the state court found the regulation to be a taking rather than a reasonable exercise of police power because the 18-ft height limit in question amounted to a taking of "ordinarily usable air space." The Court also found that since the Federal Airport Act was not meant to remove state law restrictions on zoning power or to control any state law concerning right to compensation, the state court decision was compatible with the Federal Airport Act, not preempted by it. *Jankovich*, 379 U.S. at 492–95.

[215] *See* ZIEGLER, *supra* note 110, § 85:3, Statutory authority and state preemption.

[216] Citizens for Planning Responsibly v. County of San Luis Obispo, 176 Cal. App. 4th 357, 97 Cal. Rptr. 3d 636 (Cal. Ct. App. 2009) (citizens group claimed that State Aeronautics Act (SAA) preempted the field of land use regulation in the subject area, thus preempting an initiative action allowing specific development project; held, initiative was valid legislative action, not preempted by SAA). The *Citizens* court distinguished City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 113 Cal. App. 4th 465, 6 Cal. Rptr. 3d 367 (2003), based on the more specific language at issue in the 2003 case, indicating legislative intent to preempt the local ordinance.

[217] *See* City of Irving v. Dallas/Fort Worth Int'l Airport Bd., 894 S.W.2d 456, 465 (Tex. App. 1995).

[218] Village of Bensenville v. City of Chicago, 389 Ill. App. 3d 446, 906 N.E.2d 556 (2009).

[219] *E.g.*, City of Irving v. Dallas/Fort Worth Int'l Airport Bd., 894 S.W.2d at 468 (ample authority exists for assertion that state law is superior to zoning ordinances of home rule cities to the extent they conflict, and that local ordinances are at all times subject to limitations prescribed by the Legislature).

[220] City of Washington v. Warren County, 899 S.W.2d 863 (Mo. 1995).

[221] Reynolds v. Akron-Canton Reg'l Airport Auth., 2009 Ohio 567 (Ohio Ct. App. 2009). *See also* ZIEGLER, *supra* note 110, § 85:15, Public utility (citing Swanton Twp. Bd. of Trustees v. Toledo-Lucas Cty. Port Auth., 585 N.E.2d 871, 66 Ohio App. 3d 555 (6th Dist. Lucas County 1990)).

[222] Readington Tp. v. Solberg Aviation, 409 N.J. Super. 282, 307, 976 A.2d 1100, 1114 (2009) (citing N.J. STAT. ANN. 6:1-85; N.J. ADMIN. CODE 16:62-1.1 to -11.1).

[223] WASH. REV. CODE 36.70A.200, Siting of essential public facilities—Limitation on liability, http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70A.200.

[224] *Readington*, 976 A.2d at 1115, 409 N.J. Super. at 308.

[225] 236 Mich. App. 576, 601 N.W.2d 141 (1999). The Washington Supreme Court also adopted the legislative intent test. City of Everett v. Snohomish County, 112 Wash. 2d 433, 772 P.2d 992 (Wash. 1989).

4. Land Use Regulation as Taking[226]

The Supreme Court has yet to address the issue of regulatory taking in the context of airport-compatible land use requirements. Nonetheless, the principles established by the Supreme Court regulatory takings cases discussed above apply to challenges to airport land-use regulations on the grounds of taking.

Where a regulation allows the physical invasion of airspace that is considered to belong to the property owner under state law, that regulation may constitute a per se regulatory taking under state law. For example, in *McCarran Int'l Airport v. Sisolak*,[227] the Nevada Supreme Court considered whether an ordinance placing a limit on the height of buildings within specified airport zones constituted a taking. The court held that Nevada property owners had a property interest in the useable airspace up to the 500-ft height at which U.S. navigable airspace is recognized under FAA regulations.[228] The court held the right of overflight is subordinate to the ownership of the 500 ft of space above the land. Thus, should planes fly below 500 ft over a property and interfere with the current or future use of the property, such flight would constitute a taking. Moreover, the court held that the avigation easement encumbering the property did not abrogate the property interest. Since the easement did not contain any height restrictions, the court interpreted it as an overflight easement protecting against noise liability. Furthermore, the court held that since the easement was extracted as an uncompensated condition of development, it could not constitute a defense to the inverse condemnation claim. Finally, the court held that because the ordinance preserved the right of aircraft to fly over the property at altitudes below 500 ft, the county was using the airspace as and when it chose. Thus "the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion. As a result, the County has appropriated private property for public use without compensating Sisolak and has effectuated a Loretto-type per se regulatory taking."[229] The Nevada Supreme Court subsequently held that the regulatory taking occurs when the offending ordinance is enacted, which is when the statute of limitations on actions alleging regulatory taking begins to run.[230]

The Ninth Circuit disagreed with the holding in *Sisolak* concerning federal takings law. Nonetheless, since *Sisolak* was based on the Nevada constitution and state statutes, its holding was binding on state inverse condemnation claims. Thus the Ninth Circuit held the same ordinance constituted a per se taking.[231] However, the Ninth Circuit also held that a second Clark County ordinance that restricted development in an airport overlay district did not constitute a per se taking, as the overlay district did not constitute a permanent physical invasion nor did it completely deprive the property owner of all economical beneficial use of the property. In fact, because of the minimal economic impact of the overlay ordinance on the property (the ordinance affected only 5 percent of the property, and the affected portion could still be used) and minimal interference with reasonable investment backed expectations (the ordinance furthered an important public safety goal, and airport development predated the plaintiff's acquisition of the property), there was no taking of any kind.

The level of diminution in value that results from the application of a regulation may be critical in determining whether a compensable taking has occurred. The Minnesota Supreme Court has held that "where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations."[232] The Minnesota Supreme Court recently considered whether a diminution of value of $170,000—less than 7 percent of the value of the entire parcel—constituted a "substantial and measurable decline" in property value that constituted a taking requiring just compensation.[233] *DeCook* involved a rezoning that increased the size of an RPZ and increased restrictions for use within the safety zone. The DeCooks alleged that the rezoning constituted a taking or damaging of property for public use and that they should be compensated for the diminution of value. Whether a diminution had occurred, and if so the diminution's extent, was held to be a question of fact, while whether

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[226] 11 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 32:31, 32:32 (3d ed. rev. 2010); 1 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING, 4TH (2005), ch. 6, Constitutional Taking Claims in Land Use Regulation (4th ed. 2005); ZIEGLER, *supra* note 110, §§ 85:9, *Inverse condemnation claims–Regulatory taking claims*, and 85:10, *Inverse condemnation claims–Precondemnation zoning*.

[227] 122 Nev. 645, 137 P.3d 1110 (Nev. 2006).

[228] Minimum safe altitudes: General, 14 C.F.R. § 91.119 (2006), www.gpo.gov:80/fdsys/pkg/CFR-2011-title14-vol2/pdf/CFR-2011-title14-vol2-sec91-119.pdf.

[229] *McCarran*, 137 P.3d at 1125. *See also* Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964) (both height ordinance and airport land use ordinance held to be unlawful takings); Ind. Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963) (airport zoning ordinance constituted taking without just compensation); Yara Eng'g Corp. v. City of Newark, 132 N.J. Laws 370, 40 A.2d 559 (1945) (airport zoning ordinance restricting building height held to be taking for public use without just compensation).

[230] Dvorchak v. McCarran Int'l Airport, No. 53852 slip op., 2010 WL 4117257, at 5–6 (Nev. Oct. 19, 2010).

[231] Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902 (9th Cir. 2007). *See also* Harris v. City of Wichita, 862 F. Supp. 287, 291 (D. Kan. 1994) (facially airport overlay restrictions constitute neither physical invasion nor easement: no *per se* taking).

[232] McShane v. City of Faribault, 292 N.W.2d 253, 258–59 (Minn. 1980).

[233] DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011).

the diminution was substantial was held to be a question of law. That question turned on whether the correct legal analysis under Minnesota law was that of *Penn Central* or of *McShane*. Under *McShane*, the Minnesota Supreme Court had drawn a distinction between zoning regulations benefitting and burdening all landowners (such as those implementing comprehensive land-use plans), and zoning regulations that benefit a specific public or governmental enterprise (such as airport zoning). The court held that substantial and measurable declines in market value due to "enterprise" regulations must be compensated. The *DeCook* court held that the *McShane* standard applies when relief is sought under the Minnesota Constitution in airport zoning cases. Turning to the question of substantiality, the court rejected the argument that a 6.4 percent reduction in value is *de minimis*, finding that a $170,000 reduction in value is substantial, both because by any definition the amount itself is substantial and because the amount exceeded what the DeCooks paid for the entire parcel when they purchased it less than 15 years before the ordinance in question was enacted.

As a result of the financial impact of the holding, the Rochester International Airport Joint Airport Zoning Board has decided that it should amend its airport zoning ordinance. As of September 22, 2011, the Board was in the process of amending the ordinance so as to remove Mr. DeCook's property from Safety Zone A and return the property to the position it was in prior to the adoption of Ordinance No. 4 (the ordinance that was held to effect a taking of the DeCook property). The Board has set this matter for a public hearing, after which it is expected the Board will submit the revised ordinance to the Minnesota Department of Transportation Commissioner for approval. If the Commissioner rejects the zoning ordinance amendment, state law allows the Zoning Board to demonstrate to the Commissioner "that the social and economic costs of restricting land uses in accordance with the [state's] standards outweigh the benefits of a strict application of the standards."[234] It is anticipated that the Zoning Board would make such a showing should the Commissioner disapprove the ordinance.[235]

Requirements for just compensation may be set by statute or case law. For example, the Delaware aviation statute requires that when property is taken for state airport purposes, "there shall be paid either the value of the property and facilities taken or the cost of any changes in or relocation of the property and facilities, whichever is higher."[236] State law will also govern how to measure fair market value, the nominal measurement for just compensation. For example, state courts may require that zoning ordinances be taken into account when determining what a reasonable businessman might pay for a commercial property.[237]

5. Conflicts Between Airport Planning/Zoning and Other Ordinances[238]

Airport zoning regulations may conflict with other ordinances of the same jurisdiction or with ordinances of neighboring jurisdictions. For example, the requirements of overlay zoning may conflict with base zoning in the same jurisdiction. The state or municipal code may specify that should overlay and base zoning conflict, the overlay zoning requirements prevail.[239] State or local law often provides that in the event of conflict between overlay zoning and other applicable ordinances, the more stringent requirement prevails.[240]

Frequently conflicts arise in the case of jurisdictional disputes, where the airport is located in a jurisdiction other than the one that owns the airport.[241] Such conflicts may relate to requirements that a county airport be subject to site plan review by the city in which it is located,[242] or that a city owning an airport in an unincorporated area of its county apply for a special use permit in accordance with county zoning requirements.[243]

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[234] MINN. STAT. § 360.065, subd. 2.

[235] Email to author from Terry Adkins, Rochester City Attorney (Sept. 22, 2011).

[236] DEL. CODE ANN. § 704, Condemnation, http://delcode.delaware.gov/title2/c007/index.shtml.

[237] *See* Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902, 918 (9th Cir. 2007).

[238] *See* Luis G. Zambrano, *Balancing Rights of Landowners with the Needs of Airports: The Continuing Battle over Noise*, 66 J. AIR L. & COM. 445 (2000).

[239] *E.g.*, City of Kokomo Zoning Ordinance, § 2.4 Overlay Zoning District Permitted and Special Exception Land Uses, www.in.gov/idem/files/continental_kokomo_Article_2.pdf; Orlando, Florida, Zoning Code, § 58.371. Purpose of the District, www.wyle.com/PDFs/archive/OrlandoZO.pdfPCC33.700. 070(E), Hierarchy of Regulations, www.portlandonline.com/bps/title33_complete_print.pdf; Seger v. City of Portland, LUBA No. 92-056 (Or. LUBA 1992).

[240] *E.g.*, California: Airport Approaches Zoning Law, Government Code § 50485.4, www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=50001-51000&file=50485-50485.14; Hawaii: HAW. REV. STAT., § 262-4, Relation to comprehensive zoning regulations, www.capitol.hawaii.gov/hrs2008/Vol05_Ch0261-0319/HRS0262/HRS_0262-0004.htm, § 262-4.5, Outdoor lighting, www.capitol.hawaii.gov/hrs2008/Vol05_Ch0261-0319/HRS0262/HRS_0262-0004_0005.htm; Boundary County, Idaho: § 17, Ordinance No. 2006-2, Boundary County Airport Overlay Zoning Ordinance, www.boundarycountyid.org/planning/zoneord/airport_overlay_zone.htm.

[241] ZIEGLER, *supra* note 110, § 85:5, Intermunicipal disputes and zoning immunity.

[242] Matter of County of Monroe [City of Rochester], 72 N.Y.2d 338, 530 N.E.2d 202 (N.Y. 1988) (expansion of Monroe County Airport free of land use oversight from City of Rochester).

[243] City of Apopka v. Orange County, 299 So. 2d 657 (Fla. Dist. Ct. App. 1974) (original citing of airport subject to county special use permit requirements; ruling on special use permit must be based on findings of fact rather than arbitrary decision). A more recent example of jurisdictional conflict is taking place in Indiana. The Town of Zionsville, Indiana, has tried to assert control over the Indianapolis Executive Airport, which is

In addition, actions of one governmental entity concerning airport land use may conflict with another, regardless of whether there are two conflicting ordinances. For example, the Kansas Supreme Court recently reviewed a state airport zoning statute in a case that essentially pitted the City of Olathe, which had not adopted the county airport comprehensive compatibility plan, against Johnson County, which had adopted the plan, in reviewing a rezoning by the city that had been opposed by the airport commission.[244] At issue was the county's right of review of the rezoning under a state statute covering city approval of rezoning of property located within 1 mi of certain airports. The court held that both the city and county were required to make independent determinations concerning the rezoning, each entitled to a presumption of reasonableness. The burden of establishing that either determination is unreasonable rests with the property owner.

Florida's airport-zoning-enabling legislation addresses possible jurisdictional conflicts related to airport hazards. Under the airport zoning statute, where an airport is owned by one jurisdiction and the hazard area related to the airport is located wholly or in part outside that jurisdiction, the two jurisdictions must either enter into an interlocal agreement concerning zoning for the hazard area or create a joint airport zoning board to adopt, administer, and enforce airport zoning for the hazard area.[245] Pennsylvania allows, but does not require, the creation of a joint airport zoning board in such a situation.[246]

However, state law may also allow certain local zoning ordinances to be inconsistent with airport zoning. The Michigan Zoning Enabling Act,[247] for example, provides that zoning ordinances adopted before March 28, 2001, are not required to be consistent with airport zoning regulations, layout plans, or approach plans, although amendments or variances granted after that date cannot increase any inconsistencies.[248] A Michigan appellate court held that the fact that state law forbids rezoning that is inconsistent with airport zoning precluded a taking action against local government defendants that denied a rezoning request that would violate state law.[249]

6. Other Land-Use Planning/Zoning Issues

Other issues related to airport planning and zoning include permit requirements, fee simple acquisition, eminent domain, litigation to enforce zoning authority, and legislative action.

Relationship to Permit Requirements: State law may connect zoning and permit requirements, either by waiving permit requirements based on the existence of airport zoning or conditioning the issuance of permits on zoning compliance. For example, Florida ordinarily requires a state airspace obstruction permit.[250] However, the permit is not required when the local government has adopted an adequate airport zoning ordinance and placed its regulations on file with the Florida Department of Transportation.[251]

State law may prohibit the issuance of permits that violate zoning laws or conflict with impacted noise zones, although such prohibitions may be subject to variance.[252] For example, the Maryland aviation statute prohibits the establishment or construction of any new structure within an airport overlay noise zone without a permit from the political subdivision or, in the case of the Baltimore-Washington International Airport noise overlay zone, without a permit from the Maryland Aviation Administration (MAA). The political subdivision or the MAA may not grant a permit if the proposed action would enlarge the size of or create an impacted land-use area (an area in a noise zone with a land-use whose noise exposure limit is less than the actual noise exposure). The MAA also may not grant the permit if the proposed action would violate local land-use and zoning laws.[253]

Fee-Simple Acquisition: Fee-simple acquisition may be subject to planning approval by local jurisdictions.

located entirely in Zionsville but owned by the Hamilton County Airport Authority. The trial court found that: 1) Under Indiana law, Zionsville's zoning authority is limited to exercise of power not explicitly granted to another entity, and the Indiana Airport Authority Act clearly provides land use authority over the airport to the Airport Authority; and 2) The general zoning authority of municipalities under Indiana law did not control over the explicit grant of zoning authority to the airport authority. Accordingly, Zionsville could not exercise zoning over the airport. Hamilton County Airport Auth. v. Town of Zionsville, No. 49D07-1006-PL-035761 (Marion Sup. Ct. June 28, 2011). The saga continues, however, as Zionsville has filed an appeal. Andrea Cline, *Town Appeals Airport Land Use Decision*, ZIONSVILLE TIMES SENTINEL, Aug. 3, 2011, http://timessentinel.com/local/x1533017762/Town-appeals-airport-land-use-decision (accessed Jan. 5, 2012).

[244] 143rd St. Investors, LLC v. Bd. of County Comm'rs of Johnson County, No. 102,350 (Kan. Aug. 5, 2011).

[245] FLA. STAT. § 333.03 (2010), www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0333/Sections/0333.03.html.

[246] 74 PA. CONS. STAT. § 5712, www.legis.state.pa.us/WU01/LI/LI/CT/PDF/74/74.PDF; Commonwealth v. Rogers, 430 Pa. Super. 253, 634 A.2d 245 (1993).

[247] Act 110 of 2006, MICH. COMP. LAWS 125.3101 *et seq.*, www.legislature.mi.gov/(x3eqqx2ix0ez34nsk1zysl45)/documents/mcl/pdf/mcl-Act-110-of-2006.pdf.

[248] MICH. COMP. LAWS 125.3203(4).

[249] Frenchtown Charter Twp. v. City of Monroe, 275 Mich. App. 1, 737 N.W.2d 328 (2007).

[250] FLA. STAT. § 333.025 (2010), www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0333/Sections/0333.025.html. See Airspace Obstructions Construction Notification and Permitting, www.dot.state.fl.us/Aviation/pdfs/Airspace_Obstructions.pdf.

[251] *Id*. (4).

[252] Md. Aviation Admin. v. Newsome, 337 Md. 163, 652 A.2d 116 (1995) (upholding noise overlay district required under state law).

[253] MD. TRANSP. CODE ANN. §§ 5-812, 5-821 (2011).

The California Public Utilities Code, for example, requires a plan for expansion or enlargement to be presented to the governmental body of the host jurisdiction before property is acquired for airport expansion or enlargement of an existing publicly owned airport.[254] As noted, *supra*, a California appellate court has held this provision not preempted by federal law.[255]

Eminent Domain: Police power is generally considered distinct from eminent domain,[256] although the Supreme Court's discussion of public use has arguably blurred the distinction.[257] Zoning regulation and the exercise of eminent domain may conflict.[258] Depending on the jurisdiction, the conflict may be resolved by application of traditional governmental immunity doctrines, a balancing of interests test, or an exclusive intent test.[259] Some jurisdictions still apply the governmental-proprietary-function test: if the object being furthered by the exercise of eminent domain is within the governmental capacity, the eminent domain power is not subject to zoning regulation; if the object being furthered is proprietary, the eminent domain power is subject to zoning regulation.[260] Two other tests for determining whether governments are immune from zoning regulations are the "power of eminent domain test" and the "balancing of interests" tests.[261] Some courts continue to hold that the power of eminent domain is inherently superior to the power of zoning, so that an entity with eminent domain authority is immune from zoning regulation.[262] In *City of Bridgeton*, the Missouri appellate court upheld the trial court's application of the balancing of interest test, in which the trial court considered the following as factors in determining whether the host jurisdiction's zoning could prevent airport expansion: the airport's capacity; the airport's ability to accommodate traffic in bad weather; savings to passengers because of reduced delays; and the statewide and regional economic importance of the airport.[263] Zoning restrictions may be a factor in determining compensation required for taking.[264]

Litigation as Strategy: Where the local jurisdiction has zoning authority and refuses to enforce it, litigation—or at least the threat of litigation—may be necessary. For example, in one chapter of the ongoing saga of the Tweed-New Haven Airport, the Town of East Haven granted a zoning variance for a condominium to be built at a height that would pierce the airport safety zone

[254] The provision reads:

> (a) Prior to the acquisition of land or any interest therein, including tide and submerged lands or other lands subject to the public trust for commerce, navigation, or fisheries, by any political subdivision for the purpose of expanding or enlarging any existing publicly owned airport, the acquiring entity shall submit a plan of that expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.
>
> (b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.
>
> (c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on the plan, and shall thereafter approve or disapprove the plan.
>
> (d) Upon approval of the plan, the proposed acquisition of property may begin.
>
> (e) The use of property so acquired shall thereafter conform to the approved plan, and any variance from that plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.
>
> (f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

CAL. PUB. UTIL. CODE § 21661.6 (2010), www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=21001-22000&file=21661-21669.6.

[255] City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 85 Cal. Rptr. 2d 28, 72 Cal. App. 4th 366 (1999).

[256] MCQUILLIN, *supra* note 226, § 32:3. *E.g.*, St. John's United Church v. City of Chicago, 502 F.3d 616, 640 (7th Cir. 2007) (Illinois courts have long recognized police power and eminent domain are distinct powers of government) (citing Sanitary Dist. of Chi. v. Chi. & Alton R.R. Co., 267 Ill. 252, 108 N.E. 312, 314 (1915)); Com. v. Rogers, 430 Pa. Super. 253, 259, 634 A.2d 245, 248 (Pa. Super. Ct. 1993) ("Police power should not be confused with that of eminent domain."). *See also* Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 49–50 (2008), http://lawdigitalcommons.bc.edu/ealr/vol35/iss1/3 (accessed Jan. 5, 2012).

[257] *See* Trent Christensen, *From Direct "Public Use" to Indirect "Public Benefit": Kelo v. New London's Bridge from Rational Basis to Heightened Scrutiny for Eminent Domain Takings*, 6 BRIGHAM YOUNG U. L. REV. 16169 (2005); Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. 1505 (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458070.

[258] City of Scottsdale v. Mun. Court of Tempe, 641, 90 Ariz. 393, 397, 368 P.2d 637, 641 (1962); Pinetop Lakes Ass'n v. Ponderosa Domestic Water Improvement Dist., 1 CA-CV 09-0395 (Ariz. Ct. App. May 27, 2010).

[259] 4 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING, 4TH (2005), §§ 76:4–76:7. Chapter 76, *Governmental Uses and Zoning*, contains an extensive discussion of local intergovernmental disputes, including statutory immunity from zoning, the traditional and modern governmental immunity doctrines, and remedies (nuisance and inverse condemnation).

[260] *City of Scottsdale*, 90 Ariz. at 397, 368 P.2d at 641 (1962); Pinetop Lakes Ass'n v. Ponderosa Domestic Water Improvement Dist., 1 CA-CV 09-0395 (Ariz. Ct. App. May 27, 2010).

[261] Town of Fenton v. Town of Chenango, 2011 NY Slip Op. 50508, at 5 (N.Y. Sup. Ct. 2011) (citing Matter of County of Monroe [City of Rochester], 72 N.Y.2d 338, 343 (N.Y. 1988)); City of Bridgeton v. City of St. Louis, 18 S.W.3d 107 (Mo. Ct. App. 2000).

[262] Seward County Bd. of Comm'rs v. City of Seward, 196 Neb. 266, 242 N.W.2d 849 (Neb. 1976) (city and city airport authority power of eminent domain rendered them immune from county zoning regulation), cited by *In re Condemnation of Certain Rights*, 666 N.W.2d 137 (Iowa 2003).

[263] *City of Bridgeton*, 18 S.W.3d at 114.

[264] Vacation Village, Inc. v. Clark County, Nevada, 497 F.3d 902, 918 (9th Cir. 2007).

recognized in the town's own zoning ordinance. The airport authority appealed the issuance of the zoning variance, in essence threatening to sue to force the town to enforce its zoning ordinance. On the eve of trial the parties settled, agreeing that only part of the planned development would be completed and certain trees would be trimmed, in exchange for which the airport authority agreed to drop its appeal.[265]

Legislative Action: Sometimes statutory changes are required to assure adequate land use authority.[266] For example, after a Texas Court of Appeals held that local zoning ordinances enacted by the cities of Irving, Euless, and Grapevine were not preempted by federal or state law and in fact applied to the Dallas/Fort Worth International Airport Board,[267] but before an appeal was heard by the Texas Supreme Court, the Texas legislature enacted an amendment to the Texas Municipal Airports Act to settle the issue. The amendment provided municipal airport authorities the power to make land-use decisions for property within the geographic boundaries of the airport, including providing eminent domain power to the airport authorities. The constitutionality of the legislation was upheld.[268] Similarly, after the appellate court of Illinois held that certain property acquisition for expansion of O'Hare International Airport required approval from the state Department of Transportation,[269] the City of Chicago successfully lobbied for enactment of the O'Hare Modernization Act (OMA).[270] OMA amended the state statute that had provided the basis for the injunction issued in *Philip v. Daley* as part of the sweeping authority for land acquisition provided to further the O'Hare Modernization Plan. As the Seventh Circuit noted, the "OMA amends many statutes—indeed, as counsel for the City argued, it seems to have amended every statute that someone thought might stand in the way of the OMP."[271]

B. Avigation/Clearance/Conservation Easements

An easement is a nonpossessory servitude[272] that allows the holder of the easement to enter and use land possessed by another. The easement obligates the possessor not to interfere with uses authorized by the easement.[273] A subdivision of a state may acquire an easement through several means (depending on statutory authorization), including purchase, eminent domain, or prescription. The exact requirements for prescription vary by state, but the general requirements are that the prescriptive use be open or notorious and continued without effective interruption for the period required for prescription under state law. Unlike adverse possession, prescriptive use need not be exclusive.[274] The party asserting the prescriptive easement bears the burden of establishing its existence. Whether the elements are established is a question of fact.[275]

All of these methods of acquisition are available to governmental bodies.[276] A conservation easement held by a governmental body or conservation organization may be enforced by others.[277] State law may provide that delay or failure to enforce a conservation easement does not preclude or waive the right of enforcement.[278]

It is critical to observe recording requirements to maintain the ability to enforce easements.[279]

The balance of this section discusses issues related to easements in the airport context: the need for avigation easements, differences between right of flight and clearance easements, means of obtaining avigation easements, prescriptive avigation easements, and conservation easements.

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[265] Melissa Bailey, *Airport Zoning Battle Settled*, NEW HAVEN INDEPENDENT, June 25, 2007, http://newhavenindependent.org/index.php/archives/entry/airport_zoning_battle_settled/ (accessed Jan. 5, 2012).

[266] JOHNSON, *supra* note 109, at 4.

[267] Dallas/Fort Worth Int'l Airport Bd. v. City of Irving, 854 S.W.2d 161 (Tex. App. 1993) (airport board with no separate governmental authority required to follow comprehensive zoning requirements of host jurisdictions, including submission of site plan for construction to obtain required permits; no federal or state preemption).

[268] City of Irving, Tex. v. Dallas/Fort Worth Int'l Airport Bd., 894 S.W.2d 456 (Tex. App. 1995); City of Euless v. Dallas/Fort Worth Int'l Airport Bd., 936 S.W.2d 699 (Tex. App. 1996).

[269] Philip v. Daley, 339 Ill. App. 3d 274, 790 N.E.2d 961 (Ill. Ct. App. 2003).

[270] Public Act 93-0450, www.ilga.gov/legislation/publicacts/93/093-0450.htm; 620 ILL. COMP. STAT. 65/5, www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2488&ChapterID=48.

[271] St. John's United Church v. City of Chicago, 502 F.3d 616, 621 (7th Cir. 2007) (exercise of eminent domain not an act of zoning or a land use regulation under Religious Land Use and Institutionalized Persons Act).

[272] "A servitude is a legal device that creates a right or an obligation that runs with land or with an interest in land." 1 AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, THIRD, PROPERTY: SERVITUDES § 1.1 (2000).

[273] *Id*. § 1.2(1).

[274] *Id*. §§ 2.16, 2.17; Comment a to § 2.17. *See*, *e.g.*, Kayfirst Corp. v. Wash. Terminal Co., 813 F. Supp. 67, 73 (D.D.C. 1993) (use must be open and notorious, for period of time established under state statute).

[275] Leung v. Mayorga, No. RG07310410, slip op. at 5 (Cal. Ct. App. 2010) (citing Taormino v. Denny, 1 Cal. 3d 679, 686 (Cal. 1970)).

[276] AMERICAN LAW INSTITUTE, *supra* note 272, § 2.18.

[277] *Id*. § 8.5.

[278] MONT. CODE ANN. § 76-7-211, Easement enforcement (2011), http://data.opi.mt.gov/bills/mca/76/7/76-7-211.htm.

[279] *E.g.*, Marketable Title Record Act, FLA. STAT., ch. 712, Marketable Record Titles to Real Property, www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0712/0712ContentsIndex.html&StatuteYear=2010&Title=%2D%3E2010%2D%3EChapter%20712; H & F Land, Inc. v. Panama City-Bay County Airport and Indus. Dist., 736 So. 2d 1167 (Fla. 1999).

1. Need for Avigation Easements

United States v. Causby[280] was the first case to recognize that frequent overflights at low altitudes constituted the taking of an avigation easement, although the court did not use the term "avigation easement." In *Causby*, the glide path to one of the runways at a nearby airport passed directly over Causby's property.[281] Based on the disruption to use of the property, the U.S. Court of Claims found that the United States took an easement in 1942 when the overflights began. The United States asserted that the Air Commerce Act of 1926[282] provided a right of freedom of transit in navigable airspace, and that since the flights in question were within the prescribed minimum safe altitudes, they were an exercise of that right. The government argued that 1) there is no taking without physical invasion provided the flights are within the navigable airspace; 2) a landowner does not possess the "superadjacent airspace"; and 3) no compensable damage was shown in this case. Writing for a 5-2 majority, Justice Douglas rejected the government's arguments, finding that if the frequency and altitude of the overflights made the land unusable, the loss would be as complete as if the United States had taken exclusive possession of the surface of the land, and that a permanent easement of flight under the circumstance of the case would be equivalent to a fee interest. Justice Douglas distinguished the case from that of *Richards v. Washington Terminal Co.*, and specifically found that the fact that the use of the land was not completely destroyed was not controlling.[283] Thus the Court held that flights over private land so low and frequent "as to be a direct and immediate interference with the enjoyment and use of the land" constitute a compensable taking.[284] The case is also notable for its finding that navigable airspace under the Air Commerce Act is the minimum safe altitudes for flight, not for the glide path for takeoff and landing.[285] Under *Griggs*, easements protecting the right of flight are needed for low-level flights; in general, the Air Commerce Act of 1926[286] protects higher-level flights.[287]

The Court returned to the concept of avigation easement in *Griggs v. Allegheny County*, this time to address which party was responsible for providing compensation for an avigation easement.[288] In *Griggs*, the airport had agreed to comply with approach standards set by the Civil Aeronautics Administration (CAA) and to acquire easements or other interests in land and airspace required to comply with its agreement with the CAA. The Court noted that, despite amendments to the definition of "navigable airspace" in the wake of *Causby*, *supra*, to include "airspace needed to insure safety in take-off and landing of aircraft," for purposes of takings analysis, a property owner was entitled to some use of the airspace above the property.[289] The Court rejected the argument that either the CAA or the airlines were responsible for the taking at issue, holding that the airport's owner, which determined the location and layout of the airport, was responsible for compensating a property owner for taking an avigation easement. The Court found that an easement to clear the approach to the runway was necessary for the operation of the airport, and should have been paid for by the airport, which the Court noted had not acquired sufficient property rights to begin with.[290]

As jets became more prevalent, noise and vibration became more common grounds for complaint, and courts began to allow compensation either where planes did not fly below the 500-ft threshold for navigable airspace or where the planes flew adjacent to but not over the property in question, but produced particularly burdensome effects on the property in question. For example, in *Argent v. United States*,[291] the Federal Circuit held that where "plaintiffs complain of a peculiarly burdensome pattern of activity, including both intrusive and non-intrusive flights, that significantly impairs their use and enjoyment of their land, those plaintiffs may state a cause of action."[292]

When an avigation easement has not been purchased, but is alleged to have been taken, the date of the alleged taking may be dispositive as to whether a cause of action in fact exists. The *Argent* court noted that in the case of military flights, taking of an aviga-

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[280] 328 U.S. 256, 259, 66 S. Ct. 1062, 1065, 90 L. Ed. 1206, 1209 (1946).

[281] Military aircraft passed 67 ft above Causby's house and 67 ft above the barn. The noise destroyed the use of the property as a chicken farm and severely disturbed the family's use of the house. *Id*.

[282] 49 U.S.C. § 171 *et seq*.

[283] *Causby*, 328 U.S. at 261–62 (1946).

[284] *Id*. at 266.

[285] *Id*. at 264. *See* III.D.3, *Physical Taking Analysis*, *infra* this digest.

[286] 49 U.S.C. § 40103 (1994).

[287] *See* David Casanova, *Comment*: *The Possibility and Consequences of the Recognition of Prescriptive Avigation Easements by State Courts*, 28 B.C. ENVTL. AFF. L. REV. 399, 402 (2001).

[288] 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962).

[289] *Id*. at 88–89.

[290] *Id*. at 89–90. The Court noted:

> We see no difference between [the airport owner's] responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. …A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? …The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. …Without the "approach areas," an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

Id. (Footnotes omitted).

[291] 124 F.3d 1277 (Fed. Cir. 1997).

[292] *Id*. at 1284.

tion occurs when flights begin to operate regularly and frequently at a low altitude with the intention of continuing the flights indefinitely, and that an additional taking may occur if the number of flights increases or noisier aircraft are introduced.[293] Thus in that case, the timeframe for measuring the scope of the easement, considering both number of flights and noise level of operations, was held to be a question of fact, and sufficient to defeat the government's motion for summary judgment.

Inverse condemnation claims regarding avigation easements are discussed in Section III.D, Inverse Condemnation, *infra* this digest.

2. Right of Flight v. Clearance Easements

The exact statutory formulation for easements protecting the right of flight will vary under state and local law. For example, the Escambia, Florida, Code of Ordinances defines an avigation easement as "A form of right-of-way, i.e., an agreement that gives the owner of the easement a clear property right to maintain flight operations in the airspace above the property, running with the land and in perpetuity."[294]

Minnesota's aeronautics statute defines "airport protection privileges" as:

> …easements through or other interest in air space over land or water, interest in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports and restricted landing areas and the safe and efficient operation thereof.[295]

There is a difference between avigation or flight easements and clearance or obstruction easements: the avigation easement provides a right to fly through the airspace over the property for which the easement is granted without liability for the effects of the flight as described in the easement; the clearance easement provides the right to remove obstructions as described in the easement.[296] An avigation easement may also include clearance rights, thus combining the two types of easements.[297] The Wisconsin Department of Transportation advises including an avigation easement whenever an airport takes a clear-zone easement (a type of clearance easement).[298]

One importance of this distinction is that when the government condemns an easement, the valuation of the easement will be affected by its scope. Thus, where the government did not describe, and in fact did not need, an avigation easement, the Fifth Circuit held that the courts may not require the government to take an easement not described in the declaration of taking, and thus that it was error to value a clearance easement as including an avigation easement.[299] Where, however, an easement is described as being "for airport purposes…to protect the approaches to said airport," the easement may be held to include an avigation easement.[300]

3. Obtaining Avigation Easements

Generally the statutory power to obtain property for airport use will encompass the power to obtain various air easements. Statutory authorization for obtaining such easements may be expansive: "by purchase, gift, devise, lease, condemnation, or otherwise."[301]

In addition, local governments may require avigation easements as a precondition for receiving various municipal approvals or for participation in government programs. Avigation easements may be required for the issuance of building permits within airport overlay or noise zones, for issuance of variances for nonconforming uses in such zones, or for rezoning.[302] Although the Supreme Court has yet to specifically address the issue of whether such a requirement is permissible or constitutes a regulatory taking, the principles established in *Nollan v. California Coastal Commission* and *Dolan v.*

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[293] *Id*. at 1285.

[294] Escambia County, Florida, Land Development Code, § 11.00.02, Definitions, as pertain to Airport/Airfield Environs: Avigation easement, http://search.municode.com/html/10700/level2/PTIIILADECO_ART11AIAIEN.html.

[295] MINN. STAT. 2010, 360.013 Definitions: Subd. 42. Airport protection privileges, www.revisor.mn.gov/data/revisor/statute/2010/360/2010-360.013.pdf.

[296] *See* County of Westchester v. Comm'r of Transp. of State of Connecticut, 9 F.3d 242, 244–45 (2d Cir. 1993) (citing United States v. Brondum, 272 F.2d 642, 644–45 (5th Cir. 1959)) (distinguishing between avigation easements and clearance easements); United States v. 64.88 Acres of Land, 244 F.2d 534, 535 (3d Cir. 1957).

[297] *E.g.*, Wisconsin Bureau of Aeronautics, Avigation Easements, www.dot.wisconsin.gov/library/publications/topic/air/avigation-easements.pdf.

[298] WISCONSIN DEPARTMENT OF TRANSPORTATION. DIVISION OF TRANSPORTATION INFRASTRUCTURE DEVELOPMENT, BUREAU OF AERONAUTICS, AIRPORT OWNER'S GUIDE TO LAND ACQUISITION 21, 32 (1997), www.dot.wisconsin.gov/library/publications/topic/air/landguide.pdf.

[299] *Brondum*, 272 F.2d 642, 646 (5th Cir. 1959).

[300] City of Oakland v. Nutter, 13 Cal. App. 3d 752, 92 Cal. Rptr. 347 (Cal. Ct. App. 1970).

[301] *E.g.*, § 21652, Eminent Domain, CAL. PUB. UTIL. CODE § 21001 *et seq.*, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc030509.pdf.

[302] MD. TRANSP. CODE ANN. § 5-822 (2011) (providing avigation easement is one of conditions for receiving variance from prohibition against structures that would create or enlarge impacted land use area [area in noise zone with land use whose noise exposure limit is less than actual noise exposure]); City of Colorado Springs, 7.3.506: AO–Airport Overlay District (conditioning new development, rezoning, or subdivision plat within airport navigation subzone on grant and recording of avigation easement for Colorado Springs airport), www.sterlingcodifiers.com/CO/Colorado%20Springs/11003005000006000.htm; Orlando, Florida, Zoning Code, § 58.384. Avigation Easement and Waiver of Claims (avigation easement and/or waiver of claim must be required as condition of development approval for certain developments in specified Aircraft Noise Zones; may be required as condition of granting variance within Aircraft Noise Zones), www.wyle.com/PDFs/archive/OrlandoZO.pdf.

City of Tigard, *supra*, will apply to certain regulatory schemes to obtain avigation easements. The standard under *Nollan* and *Dolan* for determining whether such regulatory requirements survive a taking claim is that 1) there be an "essential nexus" between a legitimate governmental objective and the condition imposed on the developer, and 2) the exaction demanded by the condition has "rough proportionality" to the impact of the proposed development that is sought to be alleviated. Thus, requiring an avigation easement as a condition for an activity unrelated to the easement's purpose—e.g., requiring an avigation easement in exchange for a building permit—is more likely to be considered a taking than is requiring the easement for a related purpose—e.g., requiring an avigation easement in exchange for participating in a noise-reduction program.

Conditioning development or similar permits on the grant of avigation easements has been held invalid by the Nevada Supreme Court and (in part) by Oregon's Land Use Board of Appeals. For more than 30 years, Clark County, Nevada, has required a flight-and-noise avigation easement as a precondition for development approval anywhere within the county, regardless of its relation to the airport.[303] The Nevada Supreme Court has, without much explanation, held this method improper.[304]

More recently and with somewhat more discussion, LUBA held invalid a municipal ordinance that required a grant of an avigation easement as a condition of recording land division plats or issuing certificates of occupancy within the Airport Safety and Compatibility Overlay zone.[305] The avigation easement had five elements: right to overflight; right to subject the property to noise, fumes, and other normal effects of airport activity; right to prohibit obstructions; right of entry to mark or light obstructions; and right to prohibit electrical interference and visual interference.[306] In sustaining a facial constitutional challenge to Ordinance 5926, LUBA held that while reducing land use conflicts with the airport is a legitimate governmental objective, the overflight and noise elements did not further that objective. LUBA noted that those elements did not reduce the conflict, which would exist with or without the easement, but rather furthered another purpose:

> The only arguable effect of requiring property owners to grant such an easement as a condition of land use approval is to make it more difficult for property owners to advance a successful inverse condemnation or other legal action against the Port, based on trespass or the externalized impacts of the airport operations on surrounding uses. We think it highly doubtful that taking private property for that purpose constitutes a legitimate government objective.[307]

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[303] McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 653, 137 P.3d 1110, 1116 (Nev. 2006). The easement provided:

> a perpetual right of flight, for the passage of aircraft in the air space above the surface of said premises, together with the right to cause in said air space such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air, using said air space or landing at, or taking-off from or operating at, or on the premises known as McCarran International Airport.

Id.

[304] *Id*. at 1121. The Nevada court held that the easement was unavailable as a defense against an inverse condemnation claim under state law, apparently because it was improperly obtained: "Although similar avigation easements are recorded against property throughout Clark County as a condition of building permits, requiring an uncompensated easement as a condition to development is improper and cannot be used by the County as a defense to the taking of a landowner's airspace without compensation." *Id.* (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987)). However, the Ninth Circuit, in holding that the same type of avigation easements were not a defense to an inverse condemnation claim under *Sisolak*, described the rationale for the *Sisolak* holding as the fact that the purpose of the avigation easements was to preclude noise liability, and thus was too narrow to provide a defense against a taking claim. Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902, 917 (9th Cir. 2007).

[305] Barnes v. City of Hillsboro (Or. LUBA 2010) (citing McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006)). *See* Nick Bjork, *Neighbors Win Fight Against Hillsboro Zoning*, DAILY J. COMMERCE, OREGON, Nov. 30, 2010, http://djcoregon.com/news/2010/11/30/neighbors-win-fight-against-hillsboro-airport-zoning/ (accessed Jan. 5, 2012). The plaintiff in the LUBA case went on to sue the FAA, alleging that FAA's issuance of a Finding of No Significant Impact (for construction of a runway at the Hillsboro Airport) was unreasonable, and that FAA had not complied with the public hearing requirements of 49 U.S.C. § 47106. Barnes v. FAA, No. 10-70718 (9th Cir. Aug. 25, 2011) (remanding to FAA to consider environmental impact of increased demand resulting from Hillsboro expansion project, if any, pursuant to 40 C.F.R. § 1508.8(b)).

[306] Barnes v. City of Hillsboro, 243 P.3d at 140. (Or. LUBA 2010. Section 135B(C)(6) of the challenged ordinance defined an avigation easement as:

> A type of easement which conveys the following rights:
>
> [1] A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).
>
> [2] A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.
>
> [3] A right to prohibit the erection or growth of any structure, tree, or other object that would penetrate the imaginary surfaces as defined in this ordinance.
>
> [4] A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.
>
> [5] A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property.

Id.

[307] *Id*. at 143. LUBA also held that portions of Ordinance 5926 constituted prohibited delegations of legislative authority.

LUBA further noted that the remaining three elements "arguably function to actually reduce airport/land use conflicts, have some bearing on the city's presumed objective in reducing land use conflicts, and could have, at least in some cases, some relationship to the impacts of developing property." Thus, if the easement only included those elements, it might survive a facial challenge.[308] After an Oregon appellate court affirmed the LUBA decision, the Hillsboro City Council decided not to appeal the decision further and instead to revise its ordinance to address LUBA's holdings. The Hillsboro Planning Commission concluded that the potential for as-applied challenges was an unacceptable liability, and recommended deleting the easement requirement, substituting a requirement that verification be provided that some level of contact has occurred between the applicant and airport sponsor.[309]

***Practice Aid*:** LUBA distinguished between easements aimed at limiting liability and easements aimed at directly preventing land-use conflicts. Under some circumstances this distinction would narrow the usefulness of exaction easements.

In what may perhaps provide a clearer nexus between government purpose and exaction, an avigation easement may be required as a component of an environmental mitigation program.[310] The Cleveland soundproofing program requires the homeowner to execute an agreement that describes the work to be carried out and references the avigation easement to be provided, as well the avigation easement itself.[311] In some states, constitutional prohibitions against the government making gifts generally require that the government receive something in return for providing something of value to anyone. The avigation easement provides a quid pro quo for receiving sound insulation at no cost.[312] Nonetheless, property owners may resent providing easements even in exchange for sound insulation. Substantial waiver of the easement requirement of noise mitigation was one of the conditions of the settlement reached on challenges to the Los Angeles International Airport Master Plan Program.[313]

Avigation easements may also be required in exchange for obstruction mitigation. For example, in the case of a church whose steeple slightly penetrated the approach zone to Midway Airport, the City of Chicago received an avigation easement from a local church in exchange for paying for retrofitting the steeple to remove the obstruction.[314]

Deed restrictions may be used to enforce avigation easements (and other property limitations) required to ensure airport-compatible land use. Certain behavior can constitute a waiver of a deed restriction. For example, an airport authority that places an aviation-use deed restriction on a structure, but fails to enforce the restriction and then advertises the structure for nonconforming uses may be held to have waived its deed restriction.[315] The presence of a nonwaiver clause is not necessarily dispositive.[316]

4. Prescriptive Avigation Easements[317]

There are two principal reasons that airports may assert the existence of a prescriptive avigation ease-

[308] *Id*. at 142.

[309] Hillsboro Airport Use and Safety and Compatibility Overlay Zoning, www.ci.hillsboro.or.us/Planning/AirportZoning/Hillsboro_Airport_Zoning.aspx (accessed Aug. 25, 2011); Airport Zoning Revisions March 9, 2011, www.ci.hillsboro.or.us/Planning/AirportZoning/documents/PC_HAIR_WS_March_9_Airport_Zoning_ZOAs.pdf (accessed Jan. 5, 2012).

[310] *E.g.*, Cleveland Department of Sound Control Residential Sound Insulation Program, www.clevelandsound.com/; Wyndham Boutique Hotel/High-Rise Residential Project Draft EIR No. 1054, at 1–23, www.ci.costa-mesa.ca.us/departments/wyndham-project/Executive%20Summary.pdf (accessed Dec. 22, 2010); Rosa Jurjevics, *Life Under the Flight Path*, SAN DIEGO READER, Aug. 20, 2008, www.sandiegoreader.com/news/2008/aug/20/life-under-flight-path/ (accessed Jan. 5, 2012) (noise-related avigation easement required as condition of participating in Quieter Home Program of noise retrofits).

[311] Homeowner Agreement, www.clevelandsound.com/pdf/HOAgreement1.pdf; Avigation Easement, www.clevelandsound.com/pdf/SampleAvigationEasement.pdf.

[312] King County, Frequently Asked Questions About an Avigation Easement, http://yourkingcounty.gov/airport/noise/FAQ_avigation_easement.pdf.

[313] Section X, Avigation Easements, Stipulated Settlement, Jan. 6, 2006 [link available at www.ourlax.org/LAXMPSettlement.aspx].

[314] Journal–City Council–Chicago, 117471, May 4, 2011, www.chicityclerk.com/journals/2011/may4_2011/may4_2011_part2.pdf (accessed Jan. 5, 2012). The Avigation Easement Agreement runs approximately three pages. The Grant of Easement provides:

> In consideration of the Settlement Payment, Risen Savior hereby grants the City an easement restricting Risen Savior's ability to hereafter erect or modify any structure on the Property such that it would violate the FAA Airspace Regulations, whether such regulations are currently existing or have been established or modified subsequent to the date of this Easement Agreement. Such restriction is intended to apply to the existing Church Building and to such other structures as may be built on the Property in the future. Such restriction shall be appurtenant to the Property, and shall run with the land, and be binding upon Risen Savior and its successors and assigns in title to the Property. Risen Savior covenants to complete the Corrective Work within one year of the date of this Easement Agreement.

Id.

[315] Beck v. West Houston Airport Corp., No. 14-09-00471-CV (Tex. App. Aug. 12, 2010).

[316] *Id*.

[317] Casanova, *supra* note 287, at 399; Howard Beckman, *Can Avigation Easements Be Acquired by Prescription?* AVIATION NOISE LAW, Nov. 13, 2004, http://airportnoiselaw.org/av-ease2.html.

ment:[318] defending against inverse condemnation or nuisance actions[319] or seeking the authorization to remove obstructions without going through the condemnation process.[320] Prescriptive easements are not compensable.[321] Whether avigation easements in particular are recognized is a matter of state law. These state law holdings are binding in federal court.[322]

Connecticut has recognized prescriptive avigation easements, provided that the requisite adversity is present.[323] However, to defeat a trespass claim, the conduct asserted must not expand upon the easement that was prescriptively obtained.[324] In *Westchester v. Greenwich*, the Connecticut Supreme Court considered whether the Westchester County Airport had obtained a prescriptive avigation easement, allowing the airport to top or cut down trees in an adjoining area in Greenwich, Connecticut. The trees in question penetrated the clear zone of the airport, resulting in the FAA reducing the usable length of the airport's alternative runway by 1,350 ft. The United States District Court held that the airport had acquired a prescriptive easement. The Second Circuit certified the question to the Connecticut Supreme Court,[325] which reserved the question of whether Connecticut would ever recognize a prescriptive avigation easement, holding only that the Westchester County Airport had not acquired an avigation easement. The Connecticut court explained that under Connecticut law, an easement may only be acquired by prescription if 1) the use is adverse, such as to give a right of action to the party against which the easement has been exercised; 2) the use is "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right"; and 3) there is no recognition, express or implied, of the right to stop the use.[326] The court held that the use could not be considered adverse because under federal law the property owners could not obtain injunctive relief to stop the overflights and thus reclaim the exclusive use of airspace over their properties. The court disagreed with the United States District Court that the right to seek compensation for low and frequent overflights was sufficient to satisfy the adversity requirement under Connecticut law, noting that the overflights had not harmed the property owners' trees or otherwise interfered with the use and enjoyment of their properties.

Returning to the question of avigation easements some 12 years later, the Connecticut Supreme Court recognized a prescriptive clearance easement under Connecticut law.[327] *Ventres* also involved an airport's attempts to clear trees on neighboring property that posed an obstruction to aircraft. However, unlike the *Westchester* case, in which the airport sought the right to remove obstructions, in *Ventres* the airport went ahead and cleared approximately 2.5 acres of obstructing vegetation without the permission of the property owner, a land trust. The court distinguished the *Westchester* case on the grounds that the *Ventres* defendants' use clearly constituted an interference with the property owner's land entitling the owner to seek compensation, and thus met the requirement of adversity. The court also held that the *Ventres* defendants' use was open, visible, continuous, and uninterrupted for 15 years and made under claim of right, as the previous owner of the airport had periodically trimmed or removed trees within the disputed area over a period of 20 years. The question raised was whether the vertical dimensions of the claimed prescriptive easement were defined sufficiently. The court found that:

> the purpose of the easement was to maintain a maximum tree height over the land, not to eliminate the trees altogether, and that was the actual result of the airport defendants' use of the property. (citation omitted)…the cutting of a tree when the trimming of the tree would have been sufficient to maintain the ceiling was a deviation from the easement and neither destroyed it nor created a prescriptive right to cut trees to the ground when trimming them would suffice.[328]

The court held that the trial court's determination that the definition was sufficient was not clearly erroneous.

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[318] For purposes of this discussion of prescriptive easements, the term "avigation easement" is used to refer to any airport-related easement, unless otherwise specified.

[319] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 270 Cal. Rptr. 337 (1990).

[320] Shipp v. Louisville and Jefferson County Air Bd., 431 S.W.2d 867 (Ky. 1968). *See* Casanova, *supra* note 317, at 399, 408–10 (2001).

[321] Petersen v. Port of Seattle, Wash. 2d 479, 618 P.2d 67, 94 (1980) (en banc).

[322] County of Westchester v. Comm'r of Transp. of State of Conn., 9 F.3d 242, 246–47 (2d Cir. 1993).

[323] Westchester v. Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993).

[324] Ventres v. Goodspeed Airport, 275 Conn. 105, 881 A.2d 937 (2005).

[325] The specific questions certified by the Second Circuit were:

> 1. Can an avigation easement be acquired by prescription in the State of Connecticut?
>
> 2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?
>
> 3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use the easement?

Westchester County Airport 629 A.2d at 1085, 227 Conn. at 497. The Connecticut Supreme Court did not answer these specific questions.

[326] *Id*. at 1087, 227 Conn. at 500.

[327] Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 881 A.2d 937 (2005). The clear cutting dispute engendered six legal actions, perhaps now finally ended by the Connecticut Supreme Court's decision holding that the airport's claims of violations of substantive and procedural due process, retaliation in violation of the First Amendment, and abuse of process are all barred by either res judicata or collateral estoppel. Ventres v. Goodspeed Airport, SC 18260 (Conn. June 14, 2011).

[328] *Ventres*, 881 A.2d at 953.

The court also held that the fact that the predecessors in interest had entered into a boundary agreement did not constitute notice of the property owner's intent to prevent the airport from acquiring a prescriptive easement, as the agreement had merely been intended to resolve a property line dispute.

Finally, the court addressed a question concerning the scope of the easement. The trial court had found that by clear-cutting the land the airport had exceeded the scope of its prescriptive easement. The airport argued that federal law preempted any state or local law limitations concerning the easement. The court concluded that it was unnecessary to address the preemption claim, holding that absent a right under state law to clear-cut the trees, state and local environmental laws applied to the airport's actions concerning the trees.[329] The airport owner, who had directed that the clear-cutting take place, was found personally liable for the clear-cutting.

The specific elements of a prescriptive avigation easement are of course dependent on state law. Generally, however, state law may be expected to require substantial interference with the use of the servient estate,[330] open and notorious uninterrupted hostile use,[331] under a claim of right,[332] and compliance with the state statute of limitation.[333] The burden of proof may vary by state.[334] The requisite period of time varies by state.[335] Some courts have held that either federal law[336] or state statutory right of overflight[337] preclude the finding of adversity required for a prescriptive avigation easement. California has held otherwise, finding the possibility of nuisance or takings claims to provide the requisite adversity.[338] In addition, cooperative activity by an airport toward surrounding property owners has been held as evidence of lack of requisite hostility.[339]

The adverse use describes the prescriptive easement. A change such as increased volume of traffic or increased noise due to change in aircraft will mark the beginning of a new easement, subject to a new statute of limitations period for establishing the easement.[340] In addition, unless a new prescriptive easement is established, the airport is potentially liable for nuisance, inverse condemnation, injunction, and declaratory relief actions for any activity exceeding the established prescriptive easement.[341] An avigation easement may be extinguished through counter-prescription, that is by the owner of the servient estate occupying and using the area in question in a manner inconsistent with the easement, without opposition or interference, for the requisite statutory period.[342] Some courts recognize the ability to transfer a prescriptive easement.[343]

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[329] The court also addressed issues concerning potential violations of Connecticut environmental statutes, concluding that clear-cutting was a regulated activity under General Statutes § 22a-38 (13).

[330] Drennen v. County of Ventura, 38 Cal. App. 3d 84, 88, 112 Cal. Rptr. 907, 910 (1974); City of Statesville v. Credit and Loan Co., 58 N.C. App. 727, 294 S.E.2d 405 (1982).

[331] Petersen v. Port of Seattle, 94 Wash. 2d 479, 618 P.2d 67 (Wash. 1980).

[332] Westchester v. Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993).

[333] Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 169 Cal. Rptr. 174 (1980).

[334] Connecticut, for example, requires that the party claiming the prescriptive easement prove all elements by a preponderance of the evidence. *Ventres*, 881 A.2d at 952. *See also* Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010) (discussing requirements for meeting elements of prescriptive easement).

[335] *E.g.*, California requires 5 years of continuous open and notorious use, hostile, and under claim of right, CIV. CODE, § 1007, www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=01001-02000&file=1006-1009; CODE CIV. PROC., § 321, www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=00001-01000&file=315-330; Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609, 270 Cal. Rptr. 337, 340 (1990). Rhode Island requires "actual, open, notorious, hostile, and continuous use of the property under a claim of right for ten years," R.I. GEN. LAWS 1956 § 34-7-1, www.rilin.state.ri.us/Statutes/TITLE34/34-7/34-7-1.HTM; Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 829 (R.I. 2001). Connecticut requires 15 years of uninterrupted use for the acquisition of an adverse easement. CONN. STAT., ch. 822, § 47-37, When acquired by adverse use, http://www.cga.ct.gov/2011/pub/chap822.htm#Sec47-37.htm.

[336] Westchester v. Greenwich, 227 Conn. 495, 503, 629 A.2d 1084, 1088 (1993); Fiese v. Sitorius, 247 Neb. 227, 526 N.W.2d 86 (1995) (statutory right of freedom of transit through navigable airspace of United States is in effect a license, preventing prescriptive easement).

[337] Drennen v. County of Ventura, 38 Cal. App. 3d 84, 88, 112 Cal. Rptr. 907, 910 (1974) (indirectly recognizing prescriptive avigation easements in theory, but holding none acquired under facts at issue); City of Statesville v. Credit and Loan Co., 58 N.C. App. 727, 294 S.E.2d 405 (1982).

[338] Institoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14, 258 Cal. Rptr. 418, 420 (1989); Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10, 270 Cal. Rptr. 337, 340 (1990).

[339] Petersen v. Port of Seattle, 94 Wash. 2d 479, 618 P.2d 67 (Wash. 1980) (en banc) (payment by airport for full value of neighboring land, i.e., unaffected by airport use, and participation by airport in community committee designed to find alternative remedies for land adversely affected by airport activity constituted nonhostility).

[340] *See* Argent v. United States 124 F.3d 1277, 1285 (Fed. Cir. 1997) (taking of easement occurs when regular and frequent low altitude flights begin; increasing number of flights or introducing noisier aircraft may effect a second taking). *See also* Casanova, *supra* note 317, at 420–21 (2001).

[341] Highline Sch. Dist. No. 401, King County v. Port of Seattle, 548 P.2d 1085, 87 Wash. 2d 6 (Wash. 1976).

[342] Strother v. Pac. Gas & Elec. Co., 94 Cal. App. 2d 525, 528–30, 211 P.2d 624, 627–28 (Cal. Ct. App. 1949).

[343] Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609, 270 Cal. Rptr. 337, 341 (1990).

5. Conservation Easements

Conservation easements may be used to prevent incompatible development in the vicinity of an airport. For example, the Truckee Tahoe Airport District has partnered with conservation interests to purchase land near the airport to prevent housing development. The airport district helped a land trust purchase, subject to a conservation easement held by the airport district, a 122-acre parcel that had been zoned for up to 250 housing units. The airport board contributed to the purchase of another 1,500-acre parcel (otherwise open for substantial housing development) by conservation groups, which then transferred title to the airport board, subject to a conservation easement held by the Truckee Donner Land Trust.[344]

Conservation easements may also be used to mitigate environmental effects of airport development.[345] In addition, existing conservation easements may affect new airport development.[346]

C. Eminent Domain[347]

The courts afford wide latitude to legislatures in determining the extent of public purpose necessary for exercising the power of eminent domain. In upholding the constitutionality of condemnation under the District of Columbia Redevelopment Act of 1945, the Supreme Court noted the "extremely narrow" role of the judiciary in determining whether police power is being exercised for a valid public purpose, which determination is fact-specific.[348] After finding that it was well within Congress's power to determine that redressing housing conditions served a public purpose, the Court stated: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[349]

In 2005, the Supreme Court upheld a definition of public use in *Kelo v. City of New London* that allowed condemnation of private property for economic development.[350] Although some commentators have argued that *Kelo* was not a drastic departure from existing Supreme Court precedent,[351] the decision resulted in an outcry against expansion of the use of eminent domain.[352] In the wake of *Kelo*, numerous state legislatures enacted statutes or constitutional amendments to restrict the use of eminent domain, [353] for example by requiring that condemned property be "blighted" and establishing a high threshold for blight.[354]

Various airport activities, such as expansion[355] or removal of obstructions,[356] may require acquisition of property interests. Where voluntary purchase is not available, eminent domain proceedings may be required. Even where buyers are willing, eminent domain proceedings may be required under state law.[357] This

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[344] *Placer County Approves $5.6 Million for Waddle Ranch Purchase*, ROCKLIN & ROSEVILLE TODAY, Oct. 8, 2007, www.rocklintoday.com/news/rosevilletoday.asp?a=5557&print=yes (accessed Jan. 5, 2012); Sierra Watch Celebrates Preservation of Martis Creek Estates, May 10, 2011 (Truckee Tahoe Airport District contributed $1.8 million of $2.6 million purchase price and holds conservation easement on property), http://test.sierrawatch.org/2011/05/sierra-watch-celebrates-preservation-of-martis-creek-estates/; Welcome to Waddle Ranch Preserve, www.tdlandtrust.org/sites/default/files/file/Welcome%20to%20Waddle%20Ranch(1).pdf.

[345] Northwest Florida Beaches International Airport, Designed as Country's First LEED® Certified Airport, to Start Passenger and Freight Service May 2010, www.prnewswire.com/news-releases/northwest-florida-beaches-international-airport-designed-as-countrys-first-leedr-certified-airport-to-start-passenger-and-freight-service-may-2010-78152507.html.

[346] Community Input Shapes Methow Valley State Airport Layout Plan, July 20, 2009, www.wsdot.wa.gov/News/2009/07/MethowALPAlternative.htm.

[347] *See generally* SACKMAN, *supra* note 117, at ch. 6, Taking for Public Use; ch. 7, The Public Use.

[348] Berman v. Parker, 348 U.S. 26, 32, 75 S. Ct. 98, 102, 99 L. Ed. 27, 37 (1954). The Court stated that:

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.

Id. (citations omitted).

[349] *Id*. at 32–33.

[350] Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[351] *E.g.*, SACKMAN, *supra* note 117, § 7.09.

[352] Christensen, *supra* note 257, available at http://www.allbusiness.com/legal/4071406-1.html.

[353] SACKMAN, *supra* note 117, § 7.10. A number of proposed statutes or constitutional amendments either failed or were vetoed. *Id*. § 7.11.

[354] *E.g.*, Wisconsin Legislative Reference Bureau, New Eminent Domain Restrictions and Zoning Notice Laws, Legislative Brief 06–5 (May 2006, http://legis.wisconsin.gov/lrb/pubs/Lb/06Lb5.pdf).

[355] *E.g.*, David Snyder, *Philadelphia Airport Planning $5.2 Billion Expansion*, Eminent Domain and Real Estate Litigation Blog, May 22, 2010, http://eminentdomain.foxrothschild.com/2010/05/articles/eminent-domain-1/philadelphia-airport-planning-52-billion-expansion/ (accessed Jan. 5, 2012); Mark Rollenhagen, *Cleveland Finds Money to Buy Brook Park Homes Near Airport*, CLEVELAND PLAIN DEALER, Oct. 16, 2003, www.cleveland.com/indepth/airport/index.ssf?/indepth/airport/more/106629703236801.html (accessed Jan. 5, 2012).

[356] Emily Donohue, *Tree Stands in Flight Path*, THE RECORD, Jan. 14, 2010 (use of eminent domain to obtain clearance easement), www.troyrecord.com/articles/2010/01/14/news/doc4b4e8784683f0540834863.txt?viewmode=fullstory (accessed Jan. 5, 2012).

[357] Hank Hayes, *TCRA to Seek Grande Harbor Lots Through Eminent Domain*, KINGSPORT TIMES-NEWS, Aug. 27, 2009, www.timesnews.net/article.php?id=9016409 (accessed Jan. 5, 2012). [Discussion of friendly eminent domain action.]

section discusses a number of issues in the context of airport sponsor activities: statutory authorization of eminent domain power, procedural requirements of eminent domain, public purpose, jurisdictional conflicts, the effects of precondemnation activity, and requirements for compensation.

1. Statutory Authorization

The power of eminent domain is inherent in states, but generally municipalities and other political subdivisions of a state require statutory authority for the exercise of eminent domain,[358] unless there is an express constitutional basis for such authority.[359] Moreover, the authority to delegate eminent domain powers may be limited.[360]

For any political subdivision of a state, eminent domain authority is a right accorded by state statute. Authority must be provided to specific entities to exercise eminent domain power, and the specific powers to be exercised must be denominated. A political subdivision accorded eminent domain authority must comply with the statutory requirements in the exercise of that authority. The statutory grant of eminent domain authority may also grant acquisition authority through other means, such as a grant, purchase, or lease. [361] The scope of statutory eminent domain authority cannot exceed state constitutional requirements, so if a property is not necessary for a public project, an eminent domain statute cannot confer constitutional authority to take that property.[362] On the other hand, statutory language specifying that acquisition of land to maintain airport protection privileges is a public purpose will fortify an airport sponsor's defense against a claim that a particular taking is excess.[363]

Statutes conferring home rule powers are not sufficient in and of themselves to provide the authority for one municipality to acquire land in another municipality for airport purposes.[364]

2. Public Purpose; Necessity

A valid exercise of eminent domain requires that the purpose or use be "public" under the state constitution or relevant state statute. Various public purposes, such as safety,[365] may be sufficient to support the use of eminent domain by airport sponsors to acquire property interests needed to ensure airport-compatible land use. The statutory or constitutional grant of eminent domain may specify the required threshold for public purpose. In addition, the land taken by eminent domain must in fact be related to the asserted public use. Illinois courts, for example, have construed the takings clause as placing a restriction of necessity on the power of eminent domain, which relates to public use as follows:

> In a condemnation action at least four issues concerning necessity may be readily distinguished: (1) whether the declared public use is necessary, (2) whether some property of the general type being condemned is necessary to serve the declared public use, (3) whether the property condemned is necessary as opposed to neighboring or similar properties, and (4) whether it is necessary to acquire the subject property by eminent domain as opposed to voluntary sale or lease.[366]

Taking of property that is not actually needed for a public project may be denominated an excess taking. However, state law is likely to require that courts accord substantial deference to a finding by a governmental entity that an exercise of eminent domain is necessary, rather than second-guessing the decision. Rather, a property owner asserting that a taking is not necessary may have to provide overwhelming evidence to that effect. Thus a Minnesota appellate court recently declined, albeit in an unpublished decision, to find that the Metropolitan Airports Commission had exceeded its

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[358] *E.g.*, WASH. REV. CODE 14.07.020, empowering municipalities to acquire land by eminent domain for airport purposes, http://apps.leg.wa.gov/rcw/default.aspx?cite=14.07.020.

[359] City of Fargo, Cass County v. Harwood Tp., 256 N.W.2d 694, 697 (N.D. 1977), citing MCQUILLIN, *supra* note 226, § 32.12. *See also* Town of Telluride v. San Miguel Valley, 185 P.3d 161, 164 (Colo. 2008), citing COLO. CONST. art. XX, which grants home rule municipalities the power to condemn property for any lawful, public, local, and municipal purpose.

[360] Spokane Airports v. RMA, Inc., 149 Wash. App. 930, 206 P.3d 364 (2009).

[361] *E.g.*, CAL. PUB. UTIL. CODE, §§ 21652–21653, www.leginfo.ca.gov/cgi-bin/calawquery?codesection=puc&codebody=&hits=20; CAL. CODE CIV. PROC., Tit. 7, § 1240.130, www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1240.110-1240.160; MINN. STAT. 2010, 360.021, State Airport, https://www.revisor.mn.gov/data/revisor/statute/2010/360/2010-360.021.pdf; MINN. STAT. 2010, 360.032 Municipality May Acquire Airport, https://www.revisor.mn.gov/data/revisor/statute/2010/360/2010-360.032.pdf.

[362] Village of Bensenville v. City of Chicago, 389 Ill. App. 3d 446, 478, 906 N.E.2d 556, 582 (2009).

[363] Metro. Airports Comm'n v. Brandon Square III, No. A06-661 (Minn. Ct. App. May 8, 2007) (citing City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn. Ct. App. 1984)). Minnesota law declares acquisition of airport protection privileges or of land to secure airport protection privileges by the state and municipalities under the airport and aeronautics chapter "to be acquired and used for public, governmental, and municipal purposes and as a matter of public necessity." MINN. STAT. § 360.033, https://www.revisor.mn.gov/statutes/?id=360&format=pdf. MINN. STAT. § 360.013 Subd. 42. Defines "airport protection privileges" as

> easements through or other interest in air space over land or water, interest in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports and restricted landing areas and the safe and efficient operation thereof.

[364] MCQUILLIN, *supra* note 226, § 11.03 n.28.20 (citing Philip v. Daley, 790 N.E.2d 961, 339 Ill. App. 3d 274, 274 Ill. Dec. 188 (Ill. App. Ct. 2003)).

[365] *See* Donohue, *supra* note 356.

[366] People *ex rel*. Director of Finance v. Young Women's Christian Ass'n of Springfield, 86 Ill. 2d 219, 233, 427 N.E.2d 70, 76 (Ill. 1981).

authority in taking a property in fee simple for noise-abatement and safety-zone compliance purposes, rather than merely taking the buildings in question and leaving the ownership of the underlying land with the current property owner. The court cited an earlier Minnesota appellate case, in which the court had ruled—relying on the public necessity declaration in the Minnesota aviation statute, *supra*—that a municipality's condemnation of property in fee simple, rather than just taking clear zone or transitional zone easements, was not more than necessary for public use.[367] The Minnesota Supreme Court has held that the standard under the Minnesota statute is merely that the taking is a reasonable means to an end, rather than the best possible alternative.[368]

3. Jurisdictional Conflicts

Jurisdictional conflicts may complicate, or even preclude, the exercise of eminent domain. For example, where an airport is located in one state, and an obstruction to navigation in another, the airport's jurisdiction may not have the power to exercise eminent domain to secure a needed clearance easement,[369] although some states provide for reciprocal exercise of eminent domain with adjoining states.[370] State law may also preclude one municipality from exercising eminent domain authority against another municipality in that state, although air rights may be excluded from such a prohibition.[371]

Conflicts may arise over which entity has controlling authority. For example, in *Dallas/Fort Worth International Airport Board v. City of Irving*, [372] the Dallas/Fort Worth International Airport Board, a joint board of Dallas and Fort Worth, attempted to exercise eminent domain within Irving, Euless, and Grapevine, Texas, in furtherance of the airport's redevelopment plan, without complying with the host cities' zoning requirements. The Texas Court of Appeals held that the eminent domain power conferred on the joint airport board under Texas' Municipal Airports Act was not sufficient to confer eminent domain power over a home rule city under Texas law.[373] The court also found that the board had not shown that airport redevelopment to increase air-traffic capacity was a public benefit, as opposed to a benefit to the airport. As noted under Section III.A, Land Use Planning/Zoning, *supra*, this holding led to the passage of state legislation to provide the eminent domain power held in this case to be lacking.[374]

In addition, the host or neighboring jurisdiction may attempt to exercise eminent domain to prevent airport expansion[375] or even to exercise eminent domain to close the airport. Although *Solberg* does not technically involve a jurisdictional conflict, the legal issues raised in the case—a pretextual exercise of eminent domain to gain de facto zoning control and conflict with state aviation policy—are relevant to that topic.[376]

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[367] Metro. Airports Comm'n v. Brandon Square III, No. A06-661 (Minn. Ct. App. May 8, 2007) (citing City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn. Ct. App. 1984)). The court also rejected the argument that the taking was speculative, finding that the fact that ensuring land-use conformity for the new (operational) runway constituted a specific, immediate need for the property.

[368] City of Pipestone v. Halbersma, 294 N.W.2d 271, 274 (Minn. 1980). The Minnesota Supreme Court has held that 2006 amendments to the definitions of public use and public purpose have not changed this standard. State of Minnesota v. Kettleson, A09-1894, slip op. at 10 (Minn. Aug. 10, 2011).

[369] County of Westchester v. Comm'r of Transp. of State of Connecticut, 9 F.3d 242 (2d Cir. 1993).

[370] *E.g.*, N.D. CENT. CODE § 2-06-20, Out-of-state airport jurisdiction authorized—Reciprocity with adjoining states and governmental agencies, www.legis.nd.gov/cencode/t02c06.pdf.

[371] *E.g.*, PA. STAT., Tit. 26, Eminent Domain, § 206, Extraterritorial takings, www.legis.state.pa.us/WU01/LI/LI/CT/HTM/26/00.002.HTM. The general rule under § 206 is that a political subdivision may not exercise eminent domain authority against land situated in another political subdivision without the approval of the governing body of the political subdivision in which the land is located. However, the exercise of eminent domain to acquire air rights under Pennsylvania's Airport Zoning Act is exempt from the general rule.

[372] 854 S.W.2d 161 (Tex. App. 1993).

[373] As discussed in § III.A.1., *Federal Preemption of State and Local Law*, *supra*, even a clear grant of eminent domain power does not necessarily exempt an airport authority from local planning approval. City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., 85 Cal. Rptr. 2d 28, 72 Cal. App. 4th 366 (1999) (court held that eminent domain power did not exempt airport authority from planning review; rejected argument that joint powers agreement delegated planning approval to airport authority).

[374] Wilkinson v. Dallas/Fort Worth Int'l Airport Bd., 54 S.W.3d 1 (Tex. App. 2001).

[375] Cleveland v. Brook Park, 103 Ohio App. 3d 275, 659 N.E.2d 342 (1995); *Brook Park IX Center Vote Set*, Aug. 3, 2001, http://www.ideastream.org/news/feature/6960 (accessed Jan. 5, 2012); *Cleveland and Brook Park Reach Settlement after Years of Litigation over Airport Expansion*, Feb. 6, 2001, http://airportnoiselaw.org/news/feb-6a.html (accessed Jan. 5, 2012).

[376] Readington Twp. v. Solberg Aviation, 976 A.2d 1100, 409 N.J. Super. 282 (N.J. Super. 2009); Thor Solberg, *Another Side of Eminent Domain*, AIRPORT BUSINESS MAGAZINE, Sept. 2006, www.airportbusiness.com/print/Airport-Business-Magazine/Another-Side-of-Eminent-Domain/1$7911 (accessed Jan. 5, 2012). Readington Township had long opposed expansion at a privately owned general aviation reliever airport located within the Township. The Township finally authorized a condemnation of development rights at the airport property and fee simple acquisition of land within the airport safety zone, ostensibly for open space purposes. The owners of the airport contended that the condemnation was pretextual, really meant to gain unlawful, de facto zoning control over airport operations, and therefore invalid. The appellate court held that there was no support for finding that the proposed condemnation would achieve its asserted purposes. Moreover, the court considered the history of conflict between the Township and the airport in concluding that the real purposes of the condemnation were to secure greater control over airport land use and airport operations. Those purposes were improper "in that they subvert the Commissioner's ultimate authority over aeronauti-

4. Procedural Requirements

Strictly Construed: The statutory requirements for condemnation must be strictly observed.[377] For example, the Nebraska Supreme Court held that an eminent domain proceeding by an airport authority constituted an unlawful taking in part because statutory notice requirements had not been observed.[378]

Standing: A neighboring jurisdiction may object to the exercise of eminent domain by the airport sponsor to obtain property in that jurisdiction. However, state law may provide that to intervene in an eminent domain proceeding, a party must have a direct property interest in the property to be acquired, since the purpose of the eminent domain law is to protect the property owner from taking without just compensation. Thus the neighboring jurisdiction, alleging only consequential harm, may be held to lack standing to object to the eminent domain acquisition.[379]

Offer to Purchase: State law may require that an agency make a good faith offer to purchase property before beginning condemnation proceedings.[380]

Proper Venue: An eminent domain statute may limit objections that may be raised to a proposed appropriation under eminent domain. The statute (or case law) may also delimit whether allowed objections to an eminent domain proceeding must be raised in the court with jurisdiction over the appropriation.[381]

5. Effects of Precondemnation Activity[382]

Numerous government activities may reduce fair market value prior to condemnation: planning, project publicity, delay in regulatory action, zoning activity, enforcement of building and safety regulations, restricting improvement and rehabilitation on the subject property, and making government improvements and other conduct offsite.[383] Ordinary activity that results in such reduction in fair market value generally does not require compensation for the loss. However, abuse of the eminent domain power specifically directed against a particular property may amount to de facto taking.[384] Where, for example, an airport files an airport layout plan that requires property acquisition, agrees to condemn a particular piece of property, condemns some of the surrounding property, and makes it impossible for the owner of the agreed-to-be-condemned-but-not-yet-condemned property to expand its business, the airport may be liable for taking the property that was not formally condemned.[385] However, where an airport expansion project affected a wide range of properties, allegations of, *inter alia*, bad faith and premature announcement of the project and delay in carrying out the expansion were held not to constitute a taking under the Texas constitution.[386] The *Wilkinson* court noted that the plaintiffs had failed to allege that their properties were damaged in some unique way, so based on the community damage principle, the injuries were not compensable. The premature announcement claim was based on the argument that the airport did not have condemnation authority at the time it announced the expansion. The court rejected this claim as meritless.

Ordinary delay in condemning property will not support an inverse condemnation claim. However, extraordinary delay or other oppressive conduct has been held to support an inverse condemnation claim.[387] For example, California has held that excessive delay in instituting eminent domain action, after a public entity indicates a firm intention to acquire a property—where such delay results in a diminution of property value—may support an inverse condemnation claim, provided that the public entity's conduct is a prelude to acquisition for a public purpose.[388] In determining whether

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cal facilities." 976 A.2d at 1119, 409 N.J. Super. at 315. The court reached similar conclusions concerning acquisition of land within the safety zone. However, the court did not reach the same conclusion concerning land outside the safety zone, because the Township's zoning control over those parcels did not conflict with state regulation of aviation. Moreover, the New Jersey court found that not only establishment, but also the preservation, of the airport served an important public purpose, and ordered the trial court on remand to review the airport's claim that the condemnation was arbitrary.

[377] Alewine v. City of Houston, 309 S.W.3d 771 (Tex. App. 2010).

[378] Greeley Airport Auth. v. Dugan, 259 Neb. 860, 612 N.W.2d 913 (Neb. 2000).

[379] Village of Bensenville v. City of Chicago, 389 Ill. App. 3d 446, 483, 906 N.E.2d 556, 586 (2009), citing Illinois Eminent Domain Act, 735 ILL. COMP. STAT. 30/10-5-75 (West 2006).

[380] OHIO REV. CODE, § 163.04, Notice of intent to acquire—purchase offer—inability to agree, http://codes.ohio.gov/orc/163.04.

[381] Cleveland v. Brook Park, 103 Ohio App. 3d 275, 659 N.E.2d 342 (1995).

[382] *See* Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. LAND USE 153 (2006), www.law.fsu.edu/journals/landuse/vol21_2/Romero.pdf (accessed Jan. 5, 2012).

[383] *Id*. at 156–62.

[384] Johnson v. City of Minneapolis, 667 N.W.2d 109, 115 (Minn. 2003) (cumulative effect of misleading property owners about status of project requiring their property, targeting their property for acquisition, and proceeding in bad faith concerning development amounted to taking in violation of Minn. Const. art. I, § 13). The court specifically noted that it was not adopting a rule requiring compensation for any diminishment in value due to the possibility of future condemnation but limited its holding to the facts at issue.

[385] Merkur Steel Supply, Inc. v. City of Detroit, 261 Mich. App. 116, 680 N.W.2d 485 (2004).

[386] Wilkinson v. Dallas/Fort Worth Int'l Airport Bd., 54 S.W.3d 1 (Tex. App. 2001).

[387] W.J.F. Realty Corp. v. Town of Southhampton, 351 F. Supp. 2d 18 (E.D.N.Y. 2004) (moratoria either imposed in bad faith or not furthering legitimate government purpose may support inverse condemnation claim).

[388] *See* City of Los Angeles v. Superior Court of Los Angeles County, No. B225082, slip op. at 15–17 (Cal. Ct. App. Apr. 12, 2011) (citing Klopping v. City of Whittier, 8 Cal. 3d 39 (1972)

such excessive delay was at issue, a California appellate court recently held that a voluntary program to acquire property in an area near Los Angeles International Airport did not constitute condemnation by blight of property whose owners had not participated in the program.[389] The court held that the purpose of the program, which included relocation assistance, was to assist property owners who were disturbed by airport noise. Thus there was no future public purpose for the land, a necessary element in a claim for inverse condemnation by blight. Missouri has recognized actions for condemnation blight as inverse condemnation claims, requiring the property owner to establish the existence of "aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue."[390]

An assessment of whether delay is ordinary requires a determination of when the condemnation process actually begins. For example, under Colorado law, the eminent domain proceeding begins not with a notice of intent to acquire the property, but with the filing of a petition and service of a summons. Moreover, although the condemning authority is required to provide the notice of intent to condemn as soon as it determines it intends to condemn the property, the authority is not required to proceed without delay in actually condemning the property.[391]

6. Requirements for Compensation

In establishing that low, frequent overflights may amount to a taking, the Supreme Court noted that the value of the easement taken is measured by the owner's loss, not the taker's gain.[392] Moreover, the airport owner, not the airlines, is responsible for providing compensation.[393] Determination of compensation owed is generally a question of fact, and may be required to be determined by a jury.[394]

Requirements for how specific the description must be of the property to be condemned may vary. For instance, South Dakota requires an explicit description, meaning not "meticulous accuracy, but substantial accuracy."[395]

Compensation requirements may depend on the difference in the value of adjacent land before and after condemnation. For example, state law may require that a condemning agency pay just compensation for an entire parcel if the acquisition of a portion would destroy the practical value of the remainder of the parcel.[396] Moreover, if a portion of a property is taken for airport expansion, the value of the remaining property could be diminished by subsequent airport activity. However, such activity should be more than speculative to support a claim for damages to the property.[397]

Property acquisitions that are required to accommodate federally-funded airport projects are subject to the Uniform Relocation Act. In addition to meeting the statutory requirements and departmental requirements that all transportation projects must comply with, such airport projects must comply with FAA's specific requirements.[398] These requirements cover just compensation, negotiations procedure, and condemnation. Thus even where state law does not require it, an airport sponsor must make a written offer to purchase and engage in negotiations before moving to exercise its power of eminent domain for an AIP project. Projects that fall under the voluntary transaction exemption of Part 24 are exempt from USDOT's land acquisition requirements.[399] The Uniform Relocation Act does not create a private right of action for monetary damages.[400]

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and Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110) (1973)).

[389] *See id*. at 21–22 (Cal. Ct. App. Apr. 12, 2011).

[390] Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859, 869 (Mo. 2008).

[391] City of Colorado Springs v. Andersen Mahon Enters., LLP, No. 09CA1087, slip. op. at 17–18 (Colo. App. Apr. 1, 2010).

[392] United States v. Causby, 328 U.S. 256, 261, 66 S. Ct. 1062, 1065–66, 90 L. Ed. 1206, 1210 (1946).

[393] Griggs v. County of Allegheny, 369 U.S. 84, 89, 82 S. Ct. 531, 534, 7 L. Ed. 2d 585, 589 (1962).

[394] *E.g.*, Metro. Water v. Campus Crusade, 62 Cal. Rptr. 3d 623, 41 Cal. 4th 954, 161 P.3d 1175 (2007); ILL. CONST. art. I, § 15: "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law."

[395] Lawrence County v. Miller, 786 N.W.2d 360, 371, 2010 SD 60 (at 29)(2010), citing S.D. CODIFIED LAWS 21-35-2.

[396] MICH. COMP. LAWS 213.54(1); M Civ JI 90.18. The burden of proof is on the owner to show by a preponderance of the evidence that such destruction has occurred.

[397] Thus when a county condemned a portion of a property in order to allow runway expansion needed to accommodate the use of Class BII Large aircraft at the county airport, the Supreme Court of South Dakota ruled it was speculative to consider the reduction in value of the remaining portion that might occur if height restrictions were imposed on that portion of the property, and that such potential reduction in value could not be considered in valuing the compensation damages. Accordingly, the dismissal of the claim for damages based on restrictions that might be imposed in the future could not bar the property owners from bringing an inverse condemnation action in the future, should such restrictions actually be imposed. *Miller*, 786 N.W.2d 360.

[398] Ch. 7 of the AIP Handbook, FAA Order 5100.38; Order 5100.37B, Land Acquisition and Relocation Assistance for Airport Projects, Aug. 1, 2005, www.faa.gov/airports/resources /publications/orders/media/environmental_5100_37b.pdf; Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects, AC No: 150/5100-17, Nov. 7, 2005, www.faa.gov/documentLibrary/media/advisory_ circular/150-5100-17/150_5100_17_chg6.pdf.

[399] 49 C.F.R. § 24.101(b). FAA AC No. AC 150/5100-17 CHG 6 explains that all of the following conditions must be met for a transaction to be deemed voluntary, and thus exempt from relocation assistance and payment benefit requirements:

> a. The acquisition and possession of the property is not a necessity to complete the airport project (e.g. Airport purchase of a

D. Inverse Condemnation

Inverse condemnation is "a landowner's action to recover just compensation for a taking by physical intrusion."[401] In addition, such an action may be brought for a de facto taking achieved through a "government intrusion of an unusually serious character"[402] or an abuse of the exercise of eminent domain.[403] Thus an inverse condemnation action may be sustained even though there is no physical possession by the governmental entity.[404] However, to bring an action for inverse condemnation, the plaintiff must have a legally-protected property right. Should a developer proceed without a valid permit and then be required to alter its development project, an inverse condemnation claim cannot be maintained because of the lack of the required element of a legally-protected property right.[405]

An inverse condemnation action may be based on constitutional or statutory grounds.[406] The constitutional basis is either the Takings Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment,[407] or an equivalent provision of a state constitution. Texas, for example, requires that to state a cause of action under the state constitution, "a plaintiff must allege (1) an intentional governmental act, (2) that resulted in his property being taken, damaged, or destroyed, (3) for public use."[408] California requires a showing of "an invasion or appropriation (a 'taking' or 'damaging') of some valuable property right which the property owner possesses by a public entity and the invasion or appropriation directly and specially affected the property owner to his injury."[409] However, there is no general right to recover for a decline in value due to an adjacent public project of property not slated for condemnation.[410]

To the extent that state takings provisions are considered to be consistent with the Fifth Amendment Takings Clause, state courts may look to federal cases for guidance.[411] However, state constitutions may afford more extensive protection than afforded under the Fifth Amendment. For example, the language of the Minnesota takings clause is broader than that of the Fifth Amendment[412] and has been held to provide greater protection, so that even if a takings claim fails under the Fifth Amendment based on a *Penn Central* analysis, compensation may be required under the Minnesota Constitution.[413] The Nevada constitution protects "a landowner's inalienable rights to acquire, possess and protect private property,"[414] and has been held to provide greater protection than the Fifth Amendment Takings Clause.[415] Statutory bases for inverse condemnation under state law will vary. For example, in California, inverse condemnation is determined by case law, not state statute;[416] Wisconsin provides a statutory basis for inverse condemnation.[417]

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home under a Sales Assurance program). When the sponsor purchases more than one property for such project, all selling property owners are to be treated similarly.

b. The owner's property is not part of an intended, planned, or within a designated project area where all or substantially all of the property within the areas is eligible and proposed for purchase within specific time limits. An owner's sale to the airport for an airport expansion or noise buy-out project does not meet this qualification criterion.

c. The sponsor informs the property owner in writing that should negotiations fail to result in an amicable agreement for the purchase the airport will not purchase the owner's property.

d. The sponsor informs the property owner in writing of the market value of the property.

Id. at 2.

[400] Delancey v. City of Austin, 570 F.3d 590 (5th Cir. 2009).

[401] United States v. Clarke, 445 U.S. 253, 255, 100 S. Ct. 1127, 1129, 63 L. Ed. 2d 373, 376 (1980).

[402] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433, 102 S. Ct. 3164, 3175, 73 L. Ed. 2d 868, 881 (1982) (even minimal physical occupation constitutes taking requiring compensation) (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)) (navigational servitude requiring public access to private property constituted taking).

[403] Merkur Steel Supply, Inc. v. City of Detroit, 495, 261 Mich. App. 116, 680 N.W.2d 485 (2004).

[404] City of Colorado Springs v. Andersen Mahon Enters., LLP, No. 09CA1087, slip op. at 7 (Colo. App. Apr. 1, 2010). The term "inverse condemnation" is also used in the context of regulatory takings. *See* Palazzo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

[405] City of San Diego v. Sunroad Centrum, L.P., No. GIC 877054, slip op. at 8 (Cal. Super. Ct. May 14, 2009). This case is discussed in more detail in IV.B.1., *Enforceability of Hazard Determinations*, *infra* this digest.

[406] Baker v. Burbank-Glendale-Pasadena Airport Auth., 868–69, 39 Cal. 3d 862, 866–67, 705 P.2d 866, 218 Cal. Rptr. 293, 295–96 (1985).

[407] Bieneman v. City of Chicago, 864 F.2d 463, 467 (7th Cir. 1988) (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233–41 (1897)); Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs, 38 P.3d 59, 63 (Colo. 2001).

[408] City of Houston v. Norcini, 317 S.W.3d 287, 292 (Tex. App. 2009); Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 552 (Tex. 2004).

[409] Beaty v. Imperial Irrigation Dist., 186 Cal. App. 3d 897, 903, 231 Cal. Rptr. 128, 130 (1986).

[410] City of Los Angeles v. Superior Court of Los Angeles County, No. B225082, slip op. at 12 (Cal. Ct. App. Apr. 12, 2011) (citing Hecton v. People *ex rel*. Dep't of Transp., 58 Cal. App. 3d 653, 656–57 (Cal. Ct. App. 1976)).

[411] *E.g.,* Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs, 38 P.3d 59, 64 (Colo. 2001).

[412] DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299, 305 (Minn. 2011).

[413] Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003).

[414] NEV. CONST. art. 1, § 1.

[415] McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006).

[416] Mt. San Jacinto v. Superior Court, 11 Cal. Rptr. 3d 465, 470, 117 Cal. App. 4th 98, 104 (Cal. Ct. App. 2004).

[417] WIS. STAT. § 32.10, Condemnation proceedings instituted by property owner, https://docs.legis.wisconsin.gov/

A taking under a formal condemnation proceeding and a taking by physical intrusion or de facto taking differ as to the burden of moving forward and valuation of the property taken. In the case of condemnation, the onus is on the governmental entity to bring the action, and the taking is considered to take place during the condemnation proceedings, so that the valuation is relatively current. In the case of taking by physical intrusion, the private property owner must discover the intrusion and bring the inverse condemnation proceeding; the time of the physical taking is the time fixed for the valuation.[418] In the case of a de facto taking, "the form, intensity, and the deliberateness of the government actions toward the property must be examined"[419] to determine whether (and when) a taking has occurred.

As noted in *Lucas*, *supra*, taking by physical intrusion is subject to a different analysis than taking by regulation. If a physical intrusion is found, there is a per se requirement for just compensation, regardless of the public interest served, the portion of property that is taken, or the time period for which it is taken.[420] Thus, rather than the issues raised in a regulatory taking case, an inverse condemnation action based on physical intrusion is likely to turn on the issue of whether the complained-of action in fact constituted physical intrusion sufficient to amount to a taking. For example, in *Tuthill,* the property owner challenged what it characterized as the government's unauthorized expansion of an easement (adding fiber optic cables within power lines for which the government had an easement and leasing some of those cables to third parties) as amounting to a physical occupation, and thus an unconstitutional taking. The lower federal court had found that the property owner may have had an action for misuse of an easement [which it did not bring], but not for a taking. In reviewing the history of physical taking cases, the appellate court explained that the Supreme Court has distinguished between "a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property," with only the first category constituting a physical taking.[421] The appellate court then quoted from its own decision of *Boise Cascade Corp. v. United States*[422] to explain the narrowness of "physical occupation" under *Loretto*:

> A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owners [sic] right to possession, use, and disposal of the property. The Court defined the destruction of these interests as follows: (1) possession, "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space;" (2) use, "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property;" and (3) disposal, "even though the owner may retain the bare legal right to dispose of the occupied space…the permanent occupation of that space…will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property."[423]

Because the so-called expansion of the *Tuthill* easement did not increase the physical occupation of space of the easement, there was no physical taking, and thus the inverse condemnation claim failed.

States may recognize a de facto taking on broader grounds than physical intrusion. Colorado, for example, recognizes a de facto taking where there is "a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property."[424] A duty to disclose possible condemnation to tenants of property that is the subject of a notice of intent to condemn does not constitute such legal interference, nor does securing project funding and environmental approval constitute dominion or control over the property or legal interference with use of the property.[425]

Ripeness and exhaustion of administrative remedies are potential procedural defenses against inverse condemnation actions. For example, if a zoning ordinance allows a property owner to apply for a variance, failure to obtain a final decision on the variance will make a claim challenging the ordinance unripe. However, there is a futility exception to the ripeness requirement. Moreover, if the ordinance effected a permanent and unconditional taking, for example by physical occupation, exhaustion of administrative remedies may not be required.[426] In addition, an action that is first brought in federal court may be denied jurisdiction on the ground that the plaintiff has not yet exhausted its state remedies.[427]

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statutes/statutes/32/I/10. *See* E-L Enters. Inc. v. Milwaukee Metro. Sewerage Dist., 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409 (2010).

[418] United States v. Clarke, 445 U.S. 253, 258, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373, 378 (1980).

[419] Merkur Steel Supply, Inc. v. City of Detroit, 261 Mich. App. 116, 132, 680 N.W.2d 485, 496 (2004).

[420] Tuthill Ranch, Inc. v. United States, 381 F.3d 1132, 1135–36 (Fed. Cir. 2004) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22, 122 S. Ct. 1465, 1478, 152 L. Ed. 2d 517, 539–40 (2002).

[421] Tuthill Ranch, Inc. v. United States, 381 F.3d 1132, 1138 (Fed. Cir. 2004) (citations omitted).

[422] 296 F.3d 1339, 1353 (Fed. Cir. 2002).

[423] *Tuthill Ranch*, 381 F.3d 1132, at 1138.

[424] City of Colorado Springs v. Andersen Mahon Enters., LLP, No. 09CA1087, slip op. at 7 (Colo. App. Apr. 1, 2010) (citing City of Northglenn v. Grynberg, 846 P.2d 175, 178–79 (Colo. 1993)).

[425] *Id*. at 15 (Colo. App. Apr. 1, 2010) (citing City of Northglenn v. Grynberg, 846 P.2d 175, 178–79 (Colo. 1993)).

[426] MCQUILLIN, *supra* note 226, § 32.

[427] SACKMAN, *supra* note 117, § 6.03[9].

In addition, the statute of limitations may vary depending on whether the claim is for a physical taking or a regulatory taking.[428] For example, the California Supreme Court has held that a takings challenge to a rent-control ordinance was subject to the 90-day statute of limitations for challenging zoning ordinances, rather than the 5-year limitation on claims "arising out of the title to real property, or to rents or profits out of the same."[429]

The balance of this section discusses several inverse condemnation issues in the context of airport cases: determining whether inverse condemnation has occurred; the difference between an action for inverse condemnation and actions for nuisance or trespass; the elements of a physical taking analysis for purposes of inverse condemnation; and limitations on liability for inverse condemnation. Discussion of inverse condemnation in a regulatory takings context was covered in Section III.A.4, Land Use Regulation as Taking, *supra*, and is not revisited in this section.

1. Whether Inverse Condemnation Has Occurred

Whether a taking has occurred is a question of law.[430] The standard for the required showing may vary. The Texas Supreme Court, for example, has held that for a taking by overflight to occur, the property must be rendered unusable for its intended purpose. Accordingly, for homeowners to establish a taking, they must show that overflights "directly, immediately, and substantially impacted the land so as to render their property unusable for its intended purpose as a residence."[431] Thus, where overflight effects complained of included difficulty with conversation, television reception, sleep, entertaining, and conducting telephone conversations, but no evidence that the homeowners could not live in their homes, the Texas appellate court held that the showing was as a matter of Texas law insufficient to constitute a de facto taking.[432] The Minnesota Supreme Court has held that the deprivation of the use and enjoyment of property without unduly irritating noise, vibrations, and gaseous fumes is compensable when such diminution in enjoyment and use of property results in definite and measurable diminution in market value.[433]

State law may provide a statutory basis for an inverse condemnation claim.[434] For example, the Wisconsin inverse condemnation statute is based on the Wisconsin Constitution, and provides legislative direction as to how the just compensation clause is to be implemented when the government takes property without condemning it and paying just compensation. The Wisconsin Supreme Court has held that to state a cause of action under the inverse condemnation statute, plaintiff must establish either an actual physical occupation or legal restraint that deprives the property owner of all—or substantially all—of the beneficial use of the property.[435] A Wisconsin appellate court has recently held that the language of an avigation easement taken over a portion of a plaintiff's property may be relevant in determining whether a physical taking of a portion of the property not covered by the easement has occurred.[436]

Absent a specific statutory basis for an inverse condemnation claim, a state court may consider that its state constitutional prohibition against taking without just compensation provides a right to compensation enforceable through an implied contract action,[437] or merely as an inherent corollary of the state constitutional protection against taking for public use without just compensation.[438]

California has held that a public entity that does not have eminent domain power may nonetheless be liable for inverse condemnation.[439]

2. Distinguishing Between Inverse Condemnation and Other Possible Claims

An inverse condemnation claim essentially seeks the same remedy as a claim for damages for a Fourteenth Amendment taking claim. Accordingly a federal court may decline to exercise jurisdiction on a taking claim when a state claim for inverse condemnation has al-

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[428] *Id*. § 6.03[9][d].

[429] Travis v. County of Santa Cruz, 33 Cal. 4th 757, 94 P.3d 538, 16 Cal. Rptr. 3d 404 (Cal. 2004). In addition, the plaintiffs' claim of preemption by later-enacted state statutes was subject to a 3-year statute of limitations under the California Code of Civil Procedure.

[430] Alewine v. City of Houston, 309 S.W.3d 771 (Tex. App. 2010). *See also* Brenner v. City of New Richmond, No. 2010AP342, slip op. at 4 (Wis. Ct. App. May 10, 2011).

[431] *Alewine*, 309 S.W.3d at 778 (citing City of Austin v. Travis County Landfill Co., 73 S.W.3d 234, 244 (Tex. 2002)).

[432] *Id*. at 778–79.

[433] Interstate Cos. Inc. v. City of Bloomington, 790 N.W.2d 409, 415–16 (Minn. Ct. App. 2010) (citing Alevizos v. Metro. Airports Comm'n, 298 Minn. 471, 486–87, 216 N.W.2d 651, 662 (1974) and Alevizos v. Metro. Airports Comm'n, 317 N.W.2d 352, 358–59 (Minn. 1982)).

[434] WIS. STAT. § 32.10, Condemnation proceedings instituted by property owner.

[435] E-L Enters. Inc. v. Milwaukee Metro. Sewerage Dist., 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409 (2010).

[436] Brenner v. City of New Richmond, No. 2010AP342, slip op. at 6 (Wis. Ct. App. May 10, 2011).

[437] Richmond, Fredericksburg & Potomac Rail Co. v. Metro. Wash. Airports Auth., 251 Va. 201, 468 S.E.2d 90 (1996).

[438] Baker v. Burbank-Glendale-Pasadena Airport Auth., 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985). The Baker court stated that "mere failure of the Legislature to enact a statute authorizing an inverse condemnation suit did not entitle the state to disregard the constitutional imperative" and the "authority for prosecution of an inverse condemnation proceeding derives from article I, section 19, of the California Constitution." 39 Cal. 3d at 867 (citations omitted).

[439] *Baker*, 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293.

ready been filed, although it may also retain jurisdiction pending resolution of the state claim.[440]

Plaintiffs alleging inverse condemnation may also allege tort claims such as nuisance and trespass.[441] Such tort claims are traditionally decided under state law.[442] As a constitutional violation, inverse condemnation requires greater interference with property than do tort claims. In addition, available damages and availability of the sovereign immunity defense may be different for inverse condemnation and tort claims. Moreover, temporary interference with property may not give rise to a constitutional taking, unless deprivation of all use of the property takes place.[443] Thus although plaintiffs barred by sovereign immunity from filing nuisance claims may allege inverse condemnation,[444] the higher standard for a taking may preclude recovery. Where government activity promoting a legitimate state interest poses a widely distributed burden that is not substantial, liability for inverse condemnation should be avoided.[445] Nonetheless, courts have held that what is essentially a nuisance constitutes a taking.[446]

The statute of limitations and the acquisition of an avigation easement may both affect causes of action for inverse condemnation and nuisance.[447] In *Institoris*, the noise caused by aircraft landings over or near the property in question was considered sufficient to constitute a taking of the property. The question at issue was when the cause of action had accrued. The court explained that an inverse condemnation action for overflight noise accrues when flights "interfered with the use and enjoyment of plaintiffs' properties and resulted in a diminution of their market value," that is "when the aircraft noise jumps markedly."[448] The *Institoris* court also held that property damage resulting from airport operations may give rise to an inverse condemnation claim, while personal injuries from airport operations may give rise to a nuisance claim. The *Baker* court, which held that the prescriptive avigation easement acquired by the airport authority's predecessor in interest precluded plaintiffs' inverse condemnation claims, noted that the plaintiffs could have brought nuisance actions objecting to the airport activity, which would have interrupted the prescriptive use.[449]

Within the category of nuisance claims, the showing required and the statute of limitations may vary depending on whether the nuisance claimed is public or private, continuous or permanent.[450] In *Baker*, the California Supreme Court held that an ongoing or repeated disturbance caused by noise, vibration, or foul odor constitutes a continuing nuisance for which plaintiffs may bring successive actions until the nuisance is abated. The court also held that where the permanency of the nuisance is in doubt, the plaintiff should be able to elect whether to treat the nuisance as permanent or continuing. Recovery for public nuisance requires a showing that the plaintiff suffered special injury beyond that of the general public. Greater noise levels from overflights do not support public nuisance claims under California law. Moreover, a prescriptive avigation easement can preclude a public nuisance claim.[451]

Whether the existence of an avigation easement constitutes a good defense to an inverse condemnation action will depend in part on the scope of the easement, which is interpreted according to state law.[452] In addition, the manner in which the easement was obtained may preclude it being held to provide a defense against an inverse condemnation claim for taking of airspace.[453]

3. Physical Taking Analysis

Types of interference that may give rise to a taking assertion include physical encumbrance, noise, vibration, fumes, dust, and fuel particulates emissions.[454]

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[440] Luedtke v. Milwaukee County, 521 F.2d 387, 390 (7th Cir. 1975) (overruled on other grounds, Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988)).

[441] *E.g.*, Blue Harvest, Inc. v. Dep't of Transp., 288 Mich. App. 267, 792 N.W.2d 798 (2010) (trespass and nuisance claims dismissed on basis of governmental immunity). *See also* E-L Enters. Inc. v. Milwaukee Metro. Sewerage Dist., 2010 WI 58, 326 Wis. 2d 82 (Wis. 2010) (nuisance complaint dismissed on basis of governmental immunity).

[442] *Bieneman*, 864 F.2d at 466.

[443] Pande Cameron and Co. of Seattle, Inc. v. Central Puget Sound Reg. Transit Auth., 610 F. Supp. 2d 1288, 1301, 1302 (W.D. Wash. 2009).

[444] Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 821 (2006), www.bu.edu/law/central/jd/organizations/journals/bulr/documents/BALL.pdf (accessed Jan. 5, 2012).

[445] *See id*. at 823 (citing Richards v. Wash. Terminal Co., 233 U.S. 546 (1914)), www.bu.edu/law/central/jd/organizations/journals/bulr/documents/BALL.pdf (accessed Jan. 5, 2012).

[446] Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962) (held noise constituted taking even though flights were not directly over affected property).

[447] Institoris v. City of Los Angeles, 258 Cal. Rptr. 418, 422, 210 Cal. App. 3d 10 (Cal. Ct. App. 1989); Baker v. Burbank-Glendale-Pasadena Airport Auth., 270 Cal. Rptr. 337, 220 Cal. App. 3d 1602 (Cal. Ct. App. 1990).

[448] *Institoris*, 258 Cal. Rptr. at 422–23, 210 Cal. App. 3d at 18.

[449] *Baker*, 270 Cal. Rptr. at 341.

[450] Baker v. Burbank-Glendale-Pasadena Airport Auth., 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985); Institoris v. City of Los Angeles, 258 Cal. Rptr. 418, 210 Cal. App. 3d 10 (1989).

[451] *Baker*, 270 Cal. Rptr. at 341. *See also* Betterview Investments, LLC v. Pub. Serv. Co. of Colo., 198 P.3d 1258 (Colo. App. 2008) (structure or physical object on or over property constitutes continuing tort so long as object remains; cause of action not foreclosed by transfer of property ownership).

[452] Vacation Village, Inc. v. Clark County, Nevada, 497 F.3d 902, 917 (9th Cir. 2007).

[453] McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (Nev. 2006) (avigation easement obtained as condition of development approval improperly obtained, not available as defense to inverse condemnation action).

[454] Richmond, Fredericksburg & Potomac Rail Co. v. Metro. Wash. Airports Auth., 251 Va. 201, 468 S.E.2d 90 (1996); In-

The Supreme Court has held that property owners have an interest in the immediate space over their property, whether or not they actually use that space.[455] Thus regular and frequent flights over private land at altitudes of less than 500 ft that constitute "a direct, immediate, and substantial interference with the use and enjoyment of the property" amount to a taking of an avigation easement.[456] The flights must be regular, frequent, and below the navigable airspace *and* interfere with the use of the property. More recent cases have found that in addition to occurring through low altitude overflights, physical occupation may occur due to extremely loud and frequent flights in the navigable airspace and such flights over adjacent property, where the overflights impose a peculiar burden on the property owners affected by the overflights.[457] Even where an avigation easement has already been acquired, a new taking may occur if the intrusion is increased by flying substantially noisier planes or by flying at a lower altitude than specified in the first easement. [458]

As noted in the discussion of precondemnation activity, *supra*, the mere decline in value of property due to government acquisition of neighboring property is not sufficient in and of itself to sustain a claim for inverse condemnation.

4. Procedural Issues

The applicable timeframe for bringing an inverse condemnation action varies by state. There may be a statute of limitations for inverse condemnation itself, or states may apply the statute of limitations for adverse possession, recovery of real estate, implied contract, or general civil statutes to inverse condemnation actions. The real estate-based limitations are generally longer than the contract and civil litigation limitations.[459] Whether the property is merely injured or in fact taken may also affect the statute of limitations.[460] Finally, a court may consider whether equity requires that an action in inverse condemnation be allowed even though the applicable statute of limitations has expired.[461]

There is no violation of the U.S. Constitution until adequate state remedies have been exhausted. The Fifth Amendment does not prohibit taking, only taking without just compensation. [462] Thus if adequate state procedures for seeking compensation are available, there can be no federal denial of just compensation until those procedures have been followed and compensation denied. [463]

E. Interlocal Agreements

Depending on state authorizing statutes, interlocal agreements may be used to establish airport authorities,[464] to establish airport zoning regulations,[465] and to resolve jurisdictional disputes concerning airport compatible land use. Miami and Dade County, Florida, for instance, entered into an interlocal agreement concerning zoning for Miami International Airport. Under the agreement, the County agreed to consider relaxation of height restrictions to the extent safety permits to allow development in Miami's urban core, while the City agreed to require applicants for construction permits that meet review requirements under the airport zoning regulation to present "No Hazard" determinations before the City will issue construction permits.[466] Interlocal agreements may be required under state law[467] or

terstate Cos. Inc. v. City of Bloomington, 790 N.W.2d 409 (Minn. Ct. App. 2010).

[455] United States v. Causby, 328 U.S. 256, 264, 66 S. Ct. 1062, 1068, 90 L. Ed. 1206, 1212 (1946). The Court stated "The landowner owns at least as much of the space above the ground as the [sic] can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material." (citation omitted). *Id*. at 264.

[456] *See* Persyn v. United States, 32 Fed. Cl. 579, 1995 U.S. Claims LEXIS 10 (Fed. Cl. 1995). This case involved a Fifth Amendment taking claim, but the same principle applies to claims under the Fourteenth Amendment against municipally owned airports.

[457] *E.g.*, Argent v. United States, 124 F.3d 1277 (Fed. Cir. 1997).

[458] *See Persyn*, 32 Fed. Cl. at 583.

[459] *See* Klumpp v. Borough of Avalon, 977, 202 N.J. 390, 997 A.2d 967 (2010).

[460] *In re Flowers*, 734 A.2d 69 (Pa. Commw. Ct. 1999) (deprivation of beneficial use and enjoyment of property by definition de facto taking of air easement, 21-year statute of limitation of 42 PA. CONS. STAT. § 5530(a)(3) applied).

[461] *Klumpp*, 997 A.2d 967, 202 N.J. 390 (holding that 6-year statute of limitations of trespass and injury to real property applies to inverse condemnation where government takes property for public use and provides adequate notice of taking; cause of action accrues when landowner becomes aware or through exercise of reasonable diligence, should have become aware, of deprivation of all reasonably beneficial use of property; where governmental entity took position that no taking had occurred, it cannot then plead adverse possession to assert bar to inverse condemnation action).

[462] Tuthill Ranch, Inc. v United States, 381 F.3d 1132, 1135 (Fed. Cir. 2004), citing Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003); Hoagland v. Town of Clear Lake, Ind., 415 F.3d 693, 699 (7th Cir. 2005), citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[463] *Hoagland*, 415 F.3d at 699.

[464] *E.g.*, Interlocal Agreement to form Sharp County Regional Airport Authority, www.cherokeevillage.org/Ordinances 1999-9.PDF (accessed Jan. 5, 2012).

[465] Territorial jurisdiction of joint airport zoning board, Florida AGO 2001-08 (2001), citing § 333.03(1)(b)1. and 2., FLA. STAT., http://myfloridalegal.com/ago.nsf/printview/ BBA5BAAB9AC73A0B852569F300580DE8 (accessed Jan. 5, 2012).

[466] Interlocal Agreement by and between Miami-Dade County, Florida, and the City of Miami, Florida, regarding Miami International Airport (Wilcox Field) Zoning, Feb. 28, 2008, www.miami-airport.com/pdfdoc/InterlocalAgreement MDAD_CityofMIA.pdf.

[467] Where an airport hazard area exists wholly or partly outside the political jurisdiction of the political subdivision that

facilitated by state authorizing legislation, such as Washington's Interlocal Cooperation Act.[468] For example, after engaging in litigation concerning jurisdiction over airport land use and the legal requirements concerning mitigation of safety improvements,[469] the Port of Anacortes and the City of Anacortes entered into an interlocal agreement concerning safety fences and tree removal, including mitigation.[470] After further negotiations and input from the FAA, the Port and the City then entered into a development agreement covering a more substantial subarea plan,[471] which covered fencing, Part 77 tree removal, and a landscape and wetland mitigation plan.[472]

Also in Washington State, the Port of Seattle and the City of SeaTac resolved a longstanding dispute of land-use authority related to the Seattle-Tacoma International Airport through an interlocal agreement.[473] Under the agreement, the Port and the City both agreed to adopt mutually-agreed-upon planning, land use, and zoning provisions, as well as surface water management provisions. The parties also adopted interagency cooperation and development commitments concerning projects included in the Port's 1996 Airport Master Plan Update and in the Port's September 2005 Draft Comprehensive Development Plan. The agreement includes provisions for dispute resolution and arbitration.

Interlocal agreements may also become bargaining chips in disputes over airport issues.[474] Where a neighboring jurisdiction sees no advantage to entering into a zoning agreement, however, there may be no means under state law to force an agreement.[475]

F. Designation of Protection Zones

Lack of an adequate protection zone, for example, at the end of a runway, remains a significant problem at many airports. Airports certificated under 49 U.S.C. § 44706 must bring their runway safety areas into compliance with FAA design standards by 2015. Designating a protection zone helps ensure airport-compatible land use, but only if further measures are taken to secure appropriate land use within the protection zone.

The FAA Model Zoning Ordinance suggests establishing 11 protection zones, including RPZs, Utility Runway Visual Approach Zones, and Precision Instrument Runway Approach Zones. The FAA recommends that the airport sponsor acquire a fee-title interest in property within the RPZ, with acquisition of a comprehensive easement required where fee-title acquisition is not "practical." However, acquisition of an avigation easement is an acceptable alternative, even though the property owner may prefer that the airport sponsor acquire the property in fee simple.[476]

What constitutes a compatible use may vary depending on the type of protection zone in question. For example, designation of RPZ limits development within the zone to compatible uses such as parking lots, water areas, or landscaping. State or local requirements may provide for the establishment of specific zones. State and local law may also provide authority for achieving compatibility within protection zones, such as through land acquisition or purchase of avigation easements. Zoning ordinances that establish protection zones may provide that building in violation of protection zone requirements constitutes a waiver of damages for the use.

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owns or controls the airport, Florida law requires the two jurisdictions to either enter into an interlocal agreement concerning airport zoning or create a joint airport board to adopt such zoning. FLA. STAT. § 333.03, www.myfloridahouse.gov/FileStores/Web/Statutes/FS09/CH0333/Section_0333.03.HTM.

[468] WASH. REV. CODE 39.34, http://apps.leg.wa.gov/rcw/default.aspx?cite=39.34.

[469] *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for a Writ of Mandate at 10, Anacortes Airport Coalition v. Port of Anacortes, No. 05-2-00058-1 (Wash. Sup. Ct. Mar. 29, 2005):

> While the Port and the City may continue to respectfully disagree concerning the legal requirements to mitigate safety improvements, the Port and the City have chosen to leave that issue for other litigants in another jurisdiction recognizing that proving the legal point would not serve the best interests of the citizens they serve.

[470] Interlocal Agreement Regarding Consideration of a Sub-Area Plan and Associated Permits for the Anacortes Airport Between the Port of Anacortes and the City of Anacortes, Nov. 24, 2004, www.portofanacortes.com/pdf/Interlocal%20Agreement%20Sub%20Area.pdf. Even absent state law or other requirements, airports may wish to offer to provide mitigation of noise and privacy issues when obstructive trees are removed. *See* Michael Cignoli, *Trees Replaced at Saratoga County Airport; No Additional Cost to Replace Winter Damaged Plantings at Milton Facility*, THE SARATOGIAN, June 5, 2011, www.saratogian.com/articles/2011/06/05/bspalife/doc4de7ea9dcd23f048452404.txt.

[471] Anacortes Airport Sub-Area Plan, Mar. 29, 2005, www.portofanacortes.com/pdf/FINAL_SUBAREA_PLAN_2005-03-29.pdf; Anacortes Airport Development Agreement, Mar. 29, 2005, www.portofanacortes.com/pdf/FINAL_SIGNED_DA_2005-03-29.pdf.

[472] www.portofanacortes.com/r_subarea.shtml.

[473] Port of Seattle and City of SeaTac 2005 Interlocal Agreement (ILA-2), Feb. 16, 2006, www.ci.seatac.wa.us/Modules/ShowDocument.aspx?documentid=512.

[474] Sherry Youngquist, *Mount Airy Threatens to Cut Runway Support*, WINSTON-SALEM JOURNAL, Aug. 23, 2008, http://www2.journalnow.com/news/2008/aug/23/mount-airy-threatens-to-cut-runway-support-ar-119767/ (accessed Jan. 5, 2012).

[475] Suzanne West, *Joint-Airport Ordinance Rejected*, THE HOUSTON CHRONICLE, Nov. 17, 2008, www.chron.com/disp/story.mpl/nb/humble/news/6117514.html (accessed Jan. 5, 2012).

[476] Lenawee County v. Wagley, No. 268819, slip op. at 5–6 (Mich. Ct. App. Mar. 22, 2007), http://coa.courts.mi.gov/documents/opinions/final/coa/20070322_c268819_58_268819.opn.pdf. After remand, the county remained in litigation over eminent domain proceedings for easements. Dennis Pelham, *Commission OKs Additional $100K for Airport Legal Battle*, DAILY TELEGRAM, Mar. 17, 2010, www.lenconnect.com/news/local_government/x427972859/Commission-OKs-additional-100K-for-airport-legal-battle.

G. Failure to Take Action

Failure to take action to enforce airport zoning ordinances may result in the period allowed for enforcement to expire.[477]

Failure to take action to prevent airport noise and other activities deemed disruptive by neighboring property owners may subject airport sponsors to litigation, if not ultimately to liability.[478] Failure to take safety-related actions concerning obstructions may also subject airport sponsors to litigation.[479]

Obstruction-related accidents can give rise to litigation in at least three circumstances: where a municipality has failed to enact an airport zoning ordinance;[480] where the airport has failed to remove obstructions from neighboring property;[481] and where the airport has failed to comply with an alleged duty to maintain safe conditions, including runways.[482] The *Catchings* court held that failure to comply with Part 77 standards did not constitute *per se* negligence. In the second circumstance, the court may take into account whether the accident occurred on takeoff or landing, as federal regulations only cover approach paths, not departure paths.[483] The *Walsh* court also rejected arguments that the private airport had a common-law duty to require neighboring landowners to prune their trees and a duty to acquire an easement over the property where the allegedly offending trees were located.[484]

IV. ELIMINATING HAZARDOUS OBSTRUCTIONS AFFECTING NAVIGABLE AIRSPACE

Section IV discusses the ramifications of an object being deemed a hazard and various legal issues related to actions taken to eliminate hazardous obstructions. The discussion of legal issues includes a description of two recent obstruction cases. While neither case can be cited as precedent (one is unpublished and the other was settled), the factual situations and legal issues raised should be of considerable interest.

A. Ramifications of Hazard Determination

Under 14 Code of Federal Regulations (C.F.R.) Part 77, the FAA determines whether covered objects constitute "obstructions to air navigation that may affect the safe and efficient use of navigable airspace and the operation of planned or existing air navigation and communication facilities." Once that determination is made, the obstruction is a presumed hazard to air navigation unless an aeronautical study concludes that the object is not a hazard.[485] For purposes of this discussion, unless otherwise specified, the term "hazardous obstruction" refers to an object that FAA has determined to be an obstruction to air navigation that affects the safe and efficient use of navigable airspace and the operation of planned or existing air navigation and communication facilities.

Given that the airport sponsor often does not have the authority to directly set limitations on hazardous obstructions, one of the more useful points of leverage is the consequences of the FAA issuing a hazard determination under Part 77. While a hazard determination does not have any enforceable effect,[486] such a determination "promotes air safety through 'moral suasion' by encouraging the voluntary cooperation of sponsors of potentially hazardous structures,"[487] and, perhaps more forcefully, can nevertheless "hinder the project sponsor in acquiring insurance, securing financing or obtaining approval from state or local authorities."[488] In 2006, the FAA issued hazard determinations for 6,000 projects. Only one of those, discussed *infra*, proceeded to construction without first settling the issue of FAA's hazard determination.[489]

1. FAA Notice Requirement

Under 14 C.F.R. Part 77, the sponsor of certain constructions or alterations, most notably any that are more than 200 ft above ground level at their site or that pierce specified imaginary surfaces, must provide notice of such construction or alteration to the FAA at least 45 days before the start date of the proposed construction or alteration or the date an application for a construction permit is filed, whichever is earliest. If the FAA

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[477] Bryan v. City of Shreveport, 519 So. 2d 328 (La. Ct. App. 1988).

[478] Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962); Kagy v. Toledo–Lucas Cty. Port Auth., 126 Ohio App. 3d 675, 711 N.E.2d 256 (Ohio App. 6 Dist. 1998).

[479] Emily Donohue, *Lawsuit Targets County, Airport Operator*, THE SARATOGIAN, Mar. 10, 2010, www.saratogian.com/articles/2010/03/10/news/doc4b9706379a3e0846520159.txt (accessed Jan. 5, 2012); Maria McBride Bucciferro, *Cleared for Landing: Trees Coming Down Near Saratoga County Airport*, THE SARATOGIAN, Sept. 5, 2010, www.saratogian.com/articles/2010/09/05/news/doc4c8306db644ad546058773.txt?viewmode=fullstory (accessed Jan. 5, 2012).

[480] James Loewnstein, *Towanda Borough Might Adopt New Airport Zoning*, THE DAILY REVIEW, Oct. 7, 2009, http://thedailyreview.com/news/towanda-borough-might-adopt-new-airport-zoning-1.314229 (accessed Jan. 5, 2012).

[481] Walsh v. Avalon Aviation, 125 F. Supp. 2d 726 (D. Md. 2001) (no duty to remove obstruction).

[482] Catchings v. City of Glendale, 154 Ariz. 420, 743 P.2d 400 (1987).

[483] *Walsh*, 125 F. Supp. 2d at 728.

[484] *Id*. at 729.

[485] 14 C.F.R. § 77.15.

[486] BFI Waste Systems of North America, Inc. v. FAA, 293 F.3d 527 (D.C. Cir. 2002); Aircraft Owners and Pilots Ass'n v. FAA, 600 F.2d 965 (D.C. Cir. 1979); Air Line Pilots' Ass'n Int'l v. FAA, 446 F.2d 236, 240 (5th Cir. 1971).

[487] *Aircraft Owners*, 600 F.2d at 966, 967.

[488] *BFI Waste*, 293 F.3d at 530.

[489] David Hasemyer, *How Sunroad's Building Was Cleared for Takeoff*, THE SAN DIEGO UNION-TRIBUNE, May 14, 2007, www.signonsandiego.com/uniontrib/20070514/news_1n14goingup.html (accessed Jan. 5, 2012).

needs additional information, comments may be sought from interested parties,[490] such as pilots' associations.[491] This provision offers such parties an opportunity to present arguments in favor of the issuance of a hazard determination.[492] Moreover, failure to provide the FAA with the required notice under Part 77 may provide a basis for challenging the legitimacy of any building permit issued for a structure for which such notice was required.[493]

2. Effects of Hazard Determination

Although the FAA's direct authority to keep airspace free of hazardous obstructions is limited, the issuance of a Determination of Hazard may affect FAA funding and airport operations, insurance, and liability, as well as the activities of other government agencies, principally the Federal Communications Commission (FCC).

FAA Funding: Recipients of federal aviation funding must ensure that each obstruction within recipients' authority is "removed, marked, or lighted, unless determined to be unnecessary by an FAA aeronautical study."[494] Failure to do so may imperil receipt of FAA funding.

Airport Operations: While the FAA does not have direct authority to enforce a hazardous obstruction determination by requiring the owner of such an obstruction to remove it, FAA certainly has authority to require the airport that is obstructed to make adjustments to prevent dangers in navigable airspace. Thus, a hazard determination may affect airport operations in at least one of two ways: First, the airport license may be conditioned on removing obstructions. Second, once a hazardous obstruction is identified, failure to address it (either by removal or lighting, depending on the height and location of the obstruction) may lead to the loss of FAA authority for certain types of service at the airport—types of aircraft and/or times of service—either because the obstruction requires the runways to be shortened or because it precludes instrument landings.[495]

Insurance: Issuance of an FAA hazard determination may make it difficult to secure insurance for a project[496] or lead to cancellation of existing insurance. For example, one small airport was notified by its insurance carrier that it would cancel the airport's insurance because the FAA had issued a Determination of Hazard due to a dog-park fence and shelter being too close to an airport runway.[497] In addition, state or local law may require airport hazard insurance for uses within specified airport zones.[498] Even FAA reservations about construction (short of an actual hazard determination) may create difficulties in obtaining insurance and development financing.[499]

Liability: Failure to comply with Part 77 requirements concerning obstructions may be raised as an indication of negligence in a lawsuit, but mere noncompliance may not be sufficient for a finding of negligence.[500] However, a court could find that regulations such as Part 77 do give rise to a duty to comply, for example by lighting objects as required under the regulation.[501] Moreover, breach of a regulatory standard may be deemed negligence per se.[502] Of course, to result in liability, the breach of the duty would have to be the proximate cause of the injury complained of.

Activities of FCC: The FCC is required to consult with the FAA before approving new radio or cell towers. The FCC generally authorizes construction only when

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[490] 14 C.F.R. § 77.25(c), http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=ac742bc2d0d6c52ee64f8662e0e2e20b&rgn=div8&view=text&node=14:2.0.1.2.9.4.1.1&idno=14.

[491] *Air Line Pilots' Ass'n Int'l*, 446 F.2d at 240.

[492] *Id*. The predecessor provision concerning public comment (14 C.F.R. § 77.35(b)) has been interpreted to require the FAA to solicit comments concerning aeronautical studies. *BFI Waste*, 293 F.3d at 533.

[493] *See* discussion of City of San Diego v. Sunroad Centrum, L.P., No. GIC 877054 (Cal. Super. Ct. May 14, 2009), *infra* at IVB Actions to Eliminate Hazardous Obstructions.

[494] 14 C.F.R. § 139.331.

[495] County of Westchester, N.Y. v. Comm'r of Transp. of the State of Conn., 9 F.3d 242 (2d Cir. 1993) (trees piercing mandatory clear zone required shortened runways); Jason Kauffman, *Friedman Airport Granted Eminent Domain*, IDAHO MOUNTAIN EXPRESS AND GUIDE, Aug. 30, 2006 (failure to light trees precluded instrument landings), www.mtexpress.com/index2.php?ID=2005112008&var_Year=2006&var_Month=08&var_Day=30 (accessed Jan. 5, 2012); Drew Kerr, *Saratoga County Officials Seek to Expand Airport*, THE POST-STAR, Jan. 6, 2011 (trees piercing approach space prevent nighttime and instrument-based landings that occur in low visibility weather), http://poststar.com/news/local/article_d26d5f32-19d8-11e0-ac8e-001cc4c002e0.html (accessed Jan. 5, 2012).

[496] Don Hopey, *Somerset Wind Turbines Seen as Aviation Hazard*, PITTSBURGH POST-GAZETTE, Jan. 6, 2010, www.post-gazette.com/pg/10006/1026076-455.stm (accessed Jan. 5, 2012).

[497] Sauk Prairie Airport Minutes, Oct. 17, 2002, www.saukprairieairport.com/minutes10-17-02.htm (accessed Jan. 5, 2012); Sauk Prairie Airport Minutes, Nov. 20, 2002, www.saukprairieairport.com/minutes11-20-02.htm (accessed Jan. 5, 2012).

[498] *E.g.*, City of Farmington Unified Development Code, at 4–7, www.fmtn.org/pdf/community_development/280/udc_adopted_ordinace_article_4.pdf (accessed Jan. 5, 2012).

[499] *See* Richmond, Fredericksburg & Potomac Rail Co. v. Metro. Wash. Airports Auth., 251 Va. 201, 209, 468 S.E.2d 90, 95 (1996).

[500] Catchings v. City of Glendale, 154 Ariz. 420, 743 P.2d 400 (Ariz. Ct. App. 1987). *See also* Roberts v. Delmarva Power & Light Co., 2 A.3d 131, 137 (Del. Super. Ct. 2009) (recommendation by FAA to mark and light object that is not deemed hazard does not give rise to legal duty to do so).

[501] *See* 2 A.3d at 137. While the court held that a recommendation by the FAA to mark and light an object that is not deemed a hazard does not give rise to a legal duty to do so, the discussion suggests that if the object in question had exceeded 100 ft, Pt. 77 would have given rise to a duty to light it.

[502] *Id*. at 139.

FAA makes a "no hazard" determination.[503] Although the FAA's lighting and marking standards are advisory in nature, the FCC incorporates those standards into its own regulations, thus making them mandatory for antenna towers.[504]

B. Actions to Eliminate Hazardous Obstructions

Whether or not the FAA has issued a hazard determination, airport sponsors may have to deal with hazardous obstructions, notably—although not exclusively—trees. This section discusses the enforceability of hazard determinations, objections to "no hazard" determinations, state and local law issues concerning hazardous obstructions, and the perils of undertaking unilateral action to address hazardous obstructions.

1. Enforceability of Hazard Determinations

Hazard determinations are not directly enforceable by the FAA.[505] Moreover, although recipients of federal aviation assistance are obligated under their grant agreements to protect the airspace of assisted airports, there is no cause of action under federal law to allow an airport to proceed against adjacent property owners to remove obstructions.[506] Such regulation is left to the states, as enforcement of the standards is more appropriate to local regulation.[507] For example, the California State Aeronautics Act prohibits the construction or alteration of a structure at a height that exceeds FAA obstruction standards, unless Caltrans issues a permit allowing the construction or alteration.[508] Pennsylvania has a similar requirement concerning construction that may penetrate an approach area or violate FAA Part 77 requirements.[509] However, the Pennsylvania Bureau of Aviation may issue a waiver for obstructions that have received a no-hazard determination.[510] The Pennsylvania statute also authorizes the airport sponsor, in the event that airport zoning is not sufficient to deal with an obstruction, to acquire necessary air rights to do so, and requires the payment of damages.[511]

A North Carolina appellate court has held that a local determination that a structure is a hazard to air navigation is not preempted by the FAA's regulation of navigable airspace.[512] In *Davidson*, the FAA had issued a no-hazard determination concerning the effect of a proposed radio tower on public-use airports. However, the no-hazard letter itself stated that the letter "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body."[513] The no-hazard determination did not consider private airports; Rowan County's denial of the radio tower conditional use permit was based on the obstructive effect of the radio tower on a private airport. The state court found that there was no conflict between the local action and federal aviation regulation, and thus no preemption.

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[503] Goodspeed Airport, LLC, v. East Haddam Inland Wetlands and Watercourses Comm'n, 681 F. Supp. 2d 182, 195, n.8 (D. Conn. 2010), www.ca2.uscourts.gov/decisions/isyquery/dd6425b7-3b7d-4e78-8f91-30953ae1bb75/5/doc/10-516_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/dd6425b7-3b7d-4e78-8f91-30953ae1bb75/5/hilite/; http://caselaw.findlaw.com/us-2nd-circuit/1555129.html; Big Stone Broadcasting, Inc. v. Lindbloom, 161 F. Supp. 2d 1009, 1011 (D. S.D. 2001).

[504] Antenna Tower Lighting and Marking Requirements (citing 47 C.F.R. §§ 17.21–17.58), http://transition.fcc.gov/mb/policy/dtv/lighting.html.

[505] Aircraft Owners and Pilots Ass'n v. FAA, 600 F.2d 965, 967 (D.C. Cir. 1979). Because of the lack of enforceability the federal regulations cannot constitute a taking. Commonwealth v. Rogers, 430 Pa. Super. 253, 263, 634 A.2d 245, 250 (1993).

[506] *Goodspeed Airport*, 681 F. Supp. 2d at 186; Westchester v. Greenwich, 745 F. Supp. 951, 955 (S.D.N.Y. 1990) (federal law does not create private cause of action in favor of owner of airport to institute action against neighboring landowner whose trees are encroaching on navigable airspace); Leppla v. Sprintcom, Inc., 2004 Ohio 1309, 156 Ohio App. 3d 498 (2004).

[507] Commonwealth v. Rogers, 430 Pa. Super. 253, 263, 634 A.2d 245, 250 (1993).

[508] Hazards Near Airports Prohibited, CAL. PUB. UTIL. CODE § 21659, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc050308.pdf.

[509] 74 PA. CONS. STAT. § 5701, www.legis.state.pa.us/WU01/LI/LI/CT/PDF/74/74.PDF; Commonwealth v. Rogers, 430 Pa. Super. 253, 634 A.2d 245 (1993).

[510] Airport Licensing Waivers, www.dot.state.pa.us/Internet/Bureaus/pdBOA.nsf/$$ViewTemplate%20for%20LicensingWaiverRequest?OpenForm. *E.g.*, Grove City Regional Airport Request for Waiver, ftp://ftp.dot.state.pa.us/public/bureaus/aviation/WaiverRequests/RequestforWaiver-GroveCity-Trees-May11.pdf (accessed Jan. 5, 2012).

[511] The statute provides:

> In any case in which it is desired to remove, lower or otherwise terminate a nonconforming structure or use, or the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations, or it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the municipality within which the property or nonconforming use is located, or the municipality or municipal authority owning the airport or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law under which municipalities are authorized to acquire real property for public purposes, such air right, aviation easement or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purpose of this subchapter. In the case of the purchase of any property or any easement or estate, or interest therein, or the acquisition thereof by the power of eminent domain, the municipality making the purchase or exercising the power shall, in addition to the damages for the taking, injury or destruction of property, also pay the cost of the removal and relocation of any structure or any public utility which is required to be moved to a new location.

74 PA. CONS. STAT. § 5720, www.legis.state.pa.us/WU01/LI/LI/CT/PDF/74/74.PDF.

[512] Davidson County Broadcast. v. Rowan County, 186 N.C. App. 81, 649 S.E.2d 904 (N.C. App. 2007); Commonwealth v. Rogers, 430 Pa. Super. 253, 634 A.2d 245 (1993); Aeronautics Comm'n of Ind. v. State *ex rel*. Emmis Broadcasting Corp., 440 N.E.2d 700, 704 (Ind. App. 1982).

[513] *Davidson*, 649 S.E.2d at 911.

The court also cited a letter from the FAA advising Rowan County of its obligation to protect the terminal airspace at the Rowan County Airport.[514]

In addition, a municipal code requirement concerning permit compliance with federal and state law may be used as a mechanism to enforce FAA obstruction standards.[515] What turned out to be a politically controversial development project in San Diego[516] led to a successful action by the City of San Diego to require the developer Sunroad to remove 20 ft from a building, Centrum 12, that penetrated protected airspace within 1 mi of the Montgomery Airfield, one of two reliever airports for the San Diego International Airport. The case illustrates not only various issues that may arise in preventing hazardous obstructions, but also the problems that can arise when airport land-use compatibility planning is not integrated with local planning requirements.[517]

[514] *Id*. at 912.

[515] City of San Diego v. Sunroad Centrum, L.P., No. GIC 877054 (Cal. Super. Ct. May 14, 2009). *See* David Hasemyer, *Sunroad Lawsuit Against City Could be Thrown Out*, SAN DIEGO UNION-TRIBUNE, May 14, 2009, www.signonsandiego.com/news/2009/may/14/bn14sunroad105033/ (accessed Jan. 5, 2012); Greg Gross & David Hasemyer, *Sunroad's Suit Against San Diego is Officially Tossed*, SAN DIEGO UNION-TRIBUNE, May 18, 2009, www.signonsandiego.com/news/2009/may/18/bn18sunroad-suit-tossed/. *Sunroad Enterprises' Lawyer Says There is No Basis for Stop-Work Order*, NORTH COUNTY TIMES, June 21, 2007, www.nctimes.com/news/local/sdcounty/article_285de93c-c96e-5fde-8e17-e846e6c84ad4.html (accessed Jan. 5, 2012).

[516] *See* California Attorney General Sunroad Report (investigating allegations of corruption), http://ag.ca.gov/cms_attachments/press/pdfs/n1558_sunroadreport.pdf. [Unless otherwise indicated, the descriptions of the project timeline are taken from this report. Other sources report slightly different dates.] The AG report indicates substantial disagreement between the Offices of City Attorney on the one hand and Land Use and Economic Development on the other. While the City Attorney was pursuing a nuisance action, the Office of Land Use and Economic Development discussed with Sunroad various approaches that would allow the building to be built to 180 ft, including asking the FAA to make permanent a Notice to Airman that had been issued to accommodate the 330-ft construction crane at the building. *See also Sunroad Timeline*, THE SAN DIEGO UNION-TRIBUNE, June 22, 2007, www.signonsandiego.com/uniontrib/20070622/news_1n22sunroabx.html (accessed Jan. 5, 2012); Matthew T. Hall & David Hasemyer, *As Fight Over Tower's Height Ends, Battle Over Bill Begins,* THE SAN DIEGO UNION-TRIBUNE, June 28, 2007, www.signonsandiego.com/uniontrib/20070628/news_1n28sunroad.html (accessed Jan. 5, 2012).

[517] The details of the permitting process, including FAA and Caltrans involvement, are of interest. Unless otherwise specified, filings referred to are available online, Sunroad Timeline and Archive, www.sdairfields.org/SunroadLawsuit/SunroadTimelineandArchive/tabid/96/Default.aspx (accessed Jan. 5, 2012).

Initial Permitting Process: Centrum 12 was part of a development approved under a 1997 Master Plan that did not include any height restrictions. The permit planner who reviewed the proposal for the 180-ft Centrum 12 in 2005 was not aware of FAA airspace regulations. City planners had not yet implemented the tentative Airport Land Use Compatibility Plan, so compliance with FAA Part 77 regulations was not part of the planning and approval process. Also, the building was not within the existing airport influence area. Initial building permits were issued in February of 2006 for the plan for a 182-ft structure.

FAA Hazard Determinations: On April 3, 2006, the FAA, having been alerted to the project (apparently outside of the notification procedure), advised Sunroad that it was required to file for an aeronautical study. On April 24, 2006, the FAA issued a "Notice of Presumed Hazard." On June 20, 2006, the FAA advised Sunroad it would issue a Determination of Hazard within 60 days unless the building's planned height was changed. Sunroad then filed an aeronautical study request advising the FAA that the building would be 160 ft. A week later the FAA issued a determination of no hazard based for the structure at 160 ft. However, on July 26, 2006, Sunroad advised the FAA and the City that Sunroad would build the structure to the 180 ft allowed under its building permit—and in fact did so. Various proposals were made by Sunroad and the City to slightly reconfigure the building (but still have some portions of the structure above 160 ft) and change approaches to the airfield. Ultimately, however, in May of 2007, the FAA made clear that no intrusion over 160 ft would be acceptable unless the airspace around Centrum 12 were totally cleared, which would require an exclusive bad weather pattern south of the airfield over a residential area.

Stop Work Orders: After some internal debate about the City's potential liability for issuing a stop work order, stop work orders were issued on Oct. 27, 2006, Dec. 13, 2006, May 18, 2007, and June 21, 2007. The May 18 stop work order covered the top 20 ft of the structure. The notice, which indicated that corrections were required, stated "This is a stop work notice regarding the top twenty feet of this structure. No work is to be done in this section of the structure until authorized by this department. FAA regulation must be clarified prior to continuing construction of the structure previously mentioned above."

The June 21 stop work order covered the entire building, requiring Sunroad to submit a building permit application for a structure that has received an FAA no hazard determination or a Caltrans permit authorizing construction despite the requirements of California Public Utilities Code § 21659 [Hazards Near Airports Prohibited, CAL. PUB. UTIL. CODE § 21659, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc050308.pdf], which prohibits construction of structures that exceed FAA Part 77 standards unless Caltrans issues a permit. The June 21 stop work order noted that San Diego building permits require compliance with federal, state, and local law, and that until a no hazard determination or a Caltrans permit is issued, the structure was in noncompliance with federal and state law. The City also issued a June 21, 2007, restoration and mitigation order under the City code [Restoration and Mitigation as a Remedy, § 121.0312, San Diego Municipal Code (Nov. 2005), http://docs.sandiego.gov/municode/MuniCodeChapter12/Ch12Art01Division03.pdf] requiring Sunroad to restore the structure to below 160 ft. On June 26, 2007, Sunroad agreed to lower the building height, and in fact did so.

Caltrans Warnings: Caltrans notified Sunroad six times in 2006 and once in 2007 that the structure was an airport hazard if it exceeded 160 ft in height. [June 27, 2007, City of San Diego letter to Sunroad.] Caltrans requested the City Attorney

The City approved a building permit for Centrum 12, despite the fact that the required notice had not been filed with the FAA. In addition, Caltrans initially failed to flag the problem with the proposed height of the building. The developer, despite objections from Caltrans and the FAA, moved forward with constructing the building to a height that constituted a hazardous obstruction. The City, after some delay, issued a series of stop-work orders and finally a restoration-and-mitigation order requiring the developer to restore the building to a height that would eliminate the hazardous obstruction. The City also filed a nuisance action, seeking to abate the nuisance by requiring the developer to lower the height of the building. The nuisance action was dismissed as moot once the top 20 ft of Centrum 12 were removed.[518]

Sunroad alleged that it had proceeded in good-faith reliance on the City's permit and that Sunroad had a vested property interest in the 180-ft structure, such that injunctive relief was appropriate. Sunroad also asserted an inverse condemnation claim for the top 26 ft of the building. The City argued that the building permit required that Sunroad be in compliance with federal, state, and local law, and as such could not provide a vested right to construct a structure in violation of law. The City also argued that it had police power authority to abate a nuisance without giving rise to an inverse condemnation claim.

In May 2009, a California Superior Court ruled on Sunroad's cross-complaint. The court found that Sunroad had not in fact secured a vested property right to build a structure that penetrated federally-regulated airspace. The court explained that a developer cannot acquire a vested right to complete a particular development unless "all of the appropriate governmental agencies have reviewed, approved and issued a valid grant of authority or permit."[519] The court found that to have a fully-vested right to build to 180 ft, Sunroad needed more than the city building permit—it also needed to notify the FAA of the planned construction and to obtain a no-hazard determination from the FAA. The court, noting that the developer was required to learn the federal requirements, held Sunroad's building permit was void *ab initio*. The court also held that the FAA's notice of presumed hazard, issued before Sunroad built above 160 ft, precluded any claim of good-faith reliance on the permit on Sunroad's part. The court distinguished *Kissinger v. City of Los Angeles*,[520] an airport case in which the developer did in fact proceed in good faith. In *Kissinger*, the city decided to acquire property after construction had begun under a valid building permit. The city then rezoned the property and demanded that construction cease. Under those circumstances, the *Kissinger* court held that the rezoning was invalid spot zoning and the stop-work order constituted an invalid taking without due process and just compensation.

The court also noted that the City was not authorized to grant a protectable property interest in the airspace above 160 ft:

> The Supremacy Clause of the United States Constitution (Art. VI) precludes the argument underlying Sunroad's opposition that a building permit and other "entitlements" issued under local law may create a property interest when the same is forbidden under federal law where the mandatory notice under 14 CFR Part 77 was admittedly not given in a timely fashion by Sunroad."[521]

The court found that despite the fact that the FAA does not have land-use authority, it does have "general police power to keep the airspace safe for general avia-

to take action concerning the Sunroad construction, in particular to enforce the stop work notice and revoke the building permit. [Oct. 25, 2006, Caltrans letter to City attorney.] Caltrans also notified the City's Land Use and Economic Development Office that the failure to enforce the stop work order by allowing weatherization measures violated state law. [Jan. 19, 2007, Caltrans letter to City of San Diego.]

Nuisance: On Aug. 7, 2006, the City Attorney's Office notified the City development office that the City could order work halted on Centrum 12 under a nuisance theory. On Dec. 15, 2006, the City filed an action seeking abatement of public nuisance; a writ of mandate compelling Caltrans to enforce the State Aeronautics Act; an injunction prohibiting Sunroad from constructing any other structures at or near the airport without providing the required notice to the FAA; and a complaint for violation of the Unfair Practices Act [California Business and Professions Code, §§ 4380–4382, www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=04001-05000&file=4380-4382]. The City argued that in addition to posing a safety risk, the existence of a hazard to navigation posed a threat to receipt of federal and state aviation grant funds.

On Jan. 30, 2007, the City Attorney notified Sunroad that the structure's lack of compliance with federal recommendations and state law constituted a nuisance, with failure to take corrective action constituting a misdemeanor. Under the California Penal Code, each day such a nuisance exists constitutes a separate and distinct offense. In Feb. 2007 Sunroad cross-claimed for inverse condemnation, seeking $40 million in damages.

Sunroad Nov. 28, 2006, Appeal of Stop Work Order: Sunroad argued that: 1) An FAA Hazard Determination requires airlines to avoid the structure, which eliminated any threat to navigation; 2) California's Airport Approaches Zoning Law only provides authorization for airport zoning, not for individual nuisance findings; and 3) California's Public Utilities Code prohibition against airport hazards can only be applied in designated airport zones.

[518] Telephone interview with Carmen Sandoval, San Diego City Attorney's Office (Mar. 10, 2011).

[519] City of San Diego v. Sunroad Centrum, L.P., No. GIC 877054, slip op. at 3–4 (Cal. Super. Ct. May 14, 2009), citing Miller & Starr, Cal. Real Estate 3d § 25:68 at 25-300.

[520] 161 Cal. App. 2d 454, 327 P.2d 10 (1958) (zoning amendment downzoning property city intended to condemn for runway extension and approach zone to prevent further improvement when permits had been issued and work commenced invalid).

[521] City of San Diego v. Sunroad Centrum, L.P., No. GIC 877054, slip op. at 9 (Cal. Super. Ct. May 14, 2009).

tion and had the authority to issue the Notice of Presumed Hazard and the notices which followed it."[522]

2. Objections to FAA No-Hazard Determination

In some cases, the airport sponsor or other aviation stakeholders may disagree with an FAA no-hazard determination. If so, the sponsor may challenge the determination under the Administrative Procedure Act (APA).[523] The Circuit for the District of Columbia has held that such challenges are ripe for review even though plans for an airport that would be affected by the alleged hazard are not complete.[524] In the Clark County case, the appellate court held that an FAA no-hazard determination failed to provide a reasoned explanation for purposes of the APA where the FAA dismissed the evidence supporting a hazard determination ("40:1 Reports" concerning exceeding Part 77 obstruction standards, a consultant's report concerning interference with airport radar, and internal FAA staff objections) and did not put any factual explanation for the no-hazard determination in the record.

3. State and Local Law Issues

A hazard determination may raise several state or local law issues. First, state or local law may preclude construction of a structure that the FAA has determined to be a hazard.[525] Second, state aeronautics statutes may contain separate provisions concerning hazards to navigation. California's State Aeronautics Act covers hazard elimination, flight disturbance, and regulation of obstructions.[526] The State of Washington has declared the creation or establishment of an airport hazard to be a public nuisance, with such nuisances to be prevented to the extent legally possible through police power without compensation.[527] Depending on their application, however, such statutes may be preempted by federal law. For example, a South Dakota statute that protected the airspace above state trunk highways was held preempted by the Federal Aviation Act, at least as the state statute applied to the construction of radio towers.[528] The district court cited in particular the fact that Congress had charged the FAA and FCC to coordinate over the placement of radio towers that might present a hazard to air navigation and that FAA took the position that the Federal Aviation Act preempts the field regarding placement of radio towers. However, while enjoining the state from enforcing its own hazard determination in the face of an FAA no-hazard determination, the court declined to rule the state statute unconstitutional, finding that it could be necessary to allow the state to enforce FAA hazard determinations.

Third, avoidance of airport hazards may be a justification for airport zoning authority. The California Airport Approaches Zoning Law,[529] for example, declares that the creation or establishment of an airport hazard is a public nuisance and authorizes cities and counties that have adopted comprehensive zoning ordinances regulating the height of buildings to incorporate airport zoning into such ordinances. Exercise of such authority may give rise to inverse condemnation claims.[530]

4. Other Actions to Address Hazardous Obstructions

Federal law preserves a right of free transit through navigable airspace,[531] but does not provide a remedy for enforcing that right.[532] However, an airport sponsor may seek to compel neighboring properties to remove hazardous obstructions based on the theory of common-law nuisance. The elements of such a claim are that:

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[522] *Id*.

[523] Clark County, Nev. v. Fed. Aviation Admin., 522 F.3d 437 (D.C. Cir. 2008) (FAA found wind turbines did not present hazard, airport sponsor disagreed; court found agency decision did not meet reasoned decision-making requirement).

[524] *Id*. at 441.

[525] For example, the Clark County, Nevada, Code provides:

> No building or structure shall be permitted if the Federal Aviation Administration (FAA) determines that the building or structure constitutes a hazard or obstruction to the operation of aircraft, unless the hazard can be mitigated per the FAA. This requirement cannot be waived or varied.
>
> 1. If required by Chapter 30.48 Part B, the applicant shall submit FAA Form 7460-1, Notification of Proposed Construction to the FAA, prior to submitting any application required for the approval of any structure that intrudes into the Airport Airspace Overlay District.
>
> 2. For any proposed structure that intrudes into the Airport Airspace Overlay District per Chapter 30.48 Part B and is not excepted, the applicant shall submit evidence that the FAA has determined whether the structure constitutes a hazard to air navigation two weeks prior to final action on any related land use application.
>
> 3. If the FAA determines that mitigation for a proposed structure intruding into the Airport Airspace Overlay District would impact airport operations, the proposed height intrusion shall not be approved. See 30.16.210(12)(d).

Clark County Code, § 30.56.070–Height, subsec. (c), http://library.municode.com/HTML/16214/level3/TIT30UNDECO_30.56SIDEST_PTALOARYASE01.html#TIT30UNDECO_30.56SIDEST_PTALOARYASE_30.56.070HE01.

[526] Article 2.6. Hazard Elimination; Flight Disturbance, Article 2.7. Regulation of Obstructions, CAL. PUB. UTIL. CODE § 21001 *et seq.* , www.dot.ca.gov/hq/planning/aeronaut/documents2/puc030509.pdf.

[527] WASH. REV. CODE 14.12.020, Airport hazards contrary to public interest, http://apps.leg.wa.gov/rcw/default.aspx?cite=14.12.020.

[528] Big Stone Broadcasting, Inc. v. Lindbloom, 161 F. Supp. 2d 1009 (D. S.D. 2001).

[529] *E.g.*, Airport Approaches Zoning Law, CAL. GOV'T CODE § 50485.2, www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=50001-51000&file=50485-50485.14.

[530] City of Oakland v. Nutter, 13 Cal. App. 3d 752, 92 Cal. Rptr. 347 (Cal. Ct. App. 1970).

[531] 49 U.S.C. App. § 1304.

[532] Fiese v. Sitorius, 247 Neb. 227, 233–34, 526 N.W.2d 86, 90 (1995).

• The condition complained of has a natural tendency to create danger and inflict injury upon persons or property.

• The danger is a continuing one.

• Use of the land is unreasonable or unlawful, a determination that requires balancing of competing interests of the plaintiff and defendant landowner.

• The existence of the nuisance is the proximate cause of plaintiff's injuries and damages.

In addition, if the nuisance claim is predicated on the existence of a public nuisance, the plaintiffs must show that the obstructive condition interferes with a common public right. In *County of Westchester v. Town of Greenwich, Connecticut*,[533] the Second Circuit found that the nuisance claim of Westchester County—against Connecticut landowners whose trees were obstructing the approach for one of the airport's runways—failed on the element of unreasonableness. The court found that growing trees is presumptively reasonable and outweighed the County's interests in increasing airport operations. The court observed: "We believe that the County's interest is of little weight because the County acquired and operates an airport without having secured the property rights necessary to the desired level of operation."[534] Citing *Griggs*, *supra*, the court held that the burden was on the airport to acquire necessary easements, and noted that the possibility for restraints on future flight operations was evident when the County acquired the airport.

Should an airport prevail on a public nuisance claim to eliminate an obstruction to navigation, the property owner may raise an inverse condemnation claim as a cross-claim.[535]

Taking action to clear obstructions without a property right—such as an easement—to do so or without required permits may result in liability.[536] Both state cases involved the same controversy: an agent of Timothy Mellon (the owner of Goodspeed Airport), at the direction of Mellon, proceeded without a permit to clear cut trees and vegetation on land trust property that Mellon deemed an obstruction to air navigation at the airport. In *Ventres*, the Connecticut Supreme Court upheld the trial court's holding that the clear-cutting exceeded the airport's prescriptive clearance easement, and that therefore the airport was guilty of trespass on the land trust property. The court also held that the airport's clear-cutting had caused unreasonable pollution in violation of Connecticut environmental law.[537] As noted by the district court in subsequent federal litigation involving the airport's attempts to avoid compliance with the Connecticut environmental statutes, trimming or removing trees without a permit required under Connecticut environment laws would have subjected the airport authority to civil liability and "substantial fines."[538]

Where state and local environmental requirements require a permit before removal of hazardous obstructions that are either themselves environmentally sensitive or in environmentally-sensitive locations, denial of a permit could pose safety problems. However, the permit requirement in and of itself may be found to have only a tangential effect on air safety.[539] The *Goodspeed* court appeared particularly reluctant to allow the airport to circumvent environmental mitigation requirements associated with the tree trimming in question.

In addition, failure to take action to remove obstructions may result in litigation. In Anacortes, Washington, a coalition of airport users sued both the Port of Anacortes (owner and operator of the Anacortes Airport) and the City of Anacortes over the alleged failure to remove obstructive trees surrounding the airport.[540] The Anacortes Airport Coalition argued that in failing to remove trees that had been identified as penetrating the navigable airspace, the Port violated state law, recorded avigation easements, and the Port's statutory duty to protect public safety.[541] The City countered that the requested writs would be inconsistent with an existing interlocal agreement between the Port and the FAA concerning tree removal and mitigation, as well as with a Development Agreement between the Port and the City concerning land use at the airport, including hazard removal, and raised a number of procedural objec-

[533] 76 F.3d 42 (2d Cir. 1996).

[534] *Id*. at 45.

[535] *Id* at 42.

[536] Goodspeed Airport, LLC v. East Haddam Inland Wetlands and Watercourses Comm'n, 681 F. Supp. 2d 182 (D. Conn. 2010); Rocque v. Mellon, 275 Conn. 161, 881 A.2d 972 (2005); Ventres v. Goodspeed Airport, LLC, 881 A.2d 937, 275 Conn. 105 (2005).

[537] A similar claim against the airport was upheld in Rocque v. Mellon, 275 Conn. 161, 881 A.2d 972 (2005).

[538] *Goodspeed Airport*, 681 F. Supp. 2d at 184.

[539] *Id*. at 213.

[540] The various court pleadings have been posted by the City of Anacortes, www.cityofanacortes.org/Legal/airport.htm (accessed Jan. 5, 2012).

[541] Complaint for Writ of Mandate; Writ of Prohibition; and to Enjoin Public Nuisance, Anacortes Airport Coalition v. Port of Anacortes, No. 05-2-00058-1 (Wash. Sup. Ct. Jan. 11, 2005); Plaintiffs' Brief, Anacortes Airport Coalition v. Port of Anacortes, No. 05-2-00058-1, Request for Issuance of Writ to Mandate Removal of Airspace Trespasses (Wash. Sup. Ct. Feb. 25, 2005). The relief sought was a writ of mandate, writ of prohibition, and order of abatement of public nuisance. The first writ requested was to mandate that the Port abate all trees on Port property, provide notice to private property owners of their obligation under recorded easements and state and federal law to abate hazard trees, and proceed with abating the private trees if the private owners do not do so within the specified notice period. The second writ requested was to prohibit the City of Anacortes from interfering in any way with the tree abatement. The abatement of public nuisance request was for an order to the county Sheriff's office to remove and abate the hazard trees if the defendants did not comply with the writs of mandate and prohibition.

tions to the complaint.[542] The Port also emphasized that the interlocal agreement would address the tree-hazard issue in a comprehensive way, and that it had taken action to address the tree intrusions. In addition, the Port argued that the trees intruding into Part 77 airspace do not constitute a public nuisance: Part 77 does not constitute the minimum acceptable safety standards for airports and is not the same as the airport protection privileges covered by Revised Code of Washington Section 14.08.030.[543] However, the court found that the trees did in fact violate the state statute and constitute a public nuisance, that the Port had a duty to top the trees, and that the court could in fact issue a writ of mandamus.[544] The court then held that the Port had exercised its discretion by entering into agreements with the City that would address the tree issues, if implemented. Therefore, the court held open the proceedings for several months to give the Port the opportunity to in fact top or remove the trees and the plaintiffs the opportunity to renew their request for *mandamus* should the Port fail to do so.[545]

V. CONCLUSIONS

While general legal principles relevant to airport land use are well-established, they are often applied on a case-by-case basis, particularly in the context of regulatory takings and inverse condemnation. This ad hoc analysis introduces, if not an element of unpredictability, at least some variation in the law by jurisdiction. Moreover, it is too early to tell whether positions taken in recent decisions such as *Sisolak*, *Hillsboro*, and *DeCook* will become the majority view. Those decisions do highlight the significance of including airport zoning as part of comprehensive land-use planning (which in some jurisdictions may require changes in state enabling statutes) and of emphasizing the public benefits of airport zoning, including hazard regulation.

Section V 1) reviews major legal issues of concern in achieving airport-compatible land use; 2) highlights factors that influence an airport's ability to achieve compatible land use; 3) offers some points for airport counsel to consider in evaluating the legal risk of various steps that can be taken to achieve such land use; and 4) identifies a few notable pitfalls.

A. Summary of Legal Issues

This section highlights key legal issues related to planning and zoning, easements, eminent domain, regulatory takings and exactions, inverse condemnation, and elimination of hazardous obstructions.

1. Planning and Zoning

A good understanding of state and local planning and zoning law is important both to draft (or advocate for) airport zoning requirements that will be upheld and to defend against local zoning that may stand in the way of achieving airport-compatible land use. Important issues—some just emerging—include:

- *State law requirements for comprehensive/master planning*: Does state law require that zoning be based on comprehensive/master planning? Does the law require that a separate plan exist for zoning to be valid? Does state law require or preclude the integration of airport zoning with comprehensive land-use planning and zoning?
- *Preemption*: Whether local ordinances requiring special use permits for runway construction are preempted varies by jurisdiction. However, federal law is more likely to be held to preempt a local zoning ordinance that would otherwise stand in the way of a runway expansion or similar project if the airport project is clearly related to safety, such as an airport capacity project that the FAA has deemed necessary to the national air network. One issue still to be fully litigated is whether courts will consider CEP projects as a whole, or separate out portions that arguably are in and of themselves not safety-related. State statutes should be quite specific to be held to preempt local zoning ordinances. However, local ordinances that conflict with state aviation law or otherwise pose an obstacle to state policy may be preempted. Environmental permitting requirements are not necessarily preempted, even though they may affect hazard elimination.
- *Arbitration v. enterprise regulation*: Has the state court adopted the Minnesota court's distinction between "arbitration" and "enterprise" regulations? If so, is it possible to integrate airport zoning with comprehensive planning or otherwise to establish that airport zoning is in fact an "arbitration" regulation, rather than regulation just benefiting the airport?
- *Conflict prohibition*: Does state law require protection of airport siting or airport zoning ordinances?

2. Easements

- *Role of type of easement*: The constitutionality of requiring a grant of an easement as a condition of receiving a construction permit (or other government authorization) may depend on the type of easement in

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[542] City of Anacortes Response to Plaintiff's Request for Issuance of Writ to Mandate Removal of Airspace Trespasses, and Motion to Dismiss at 2-4, Airport Coalition v. Port of Anacortes, No. 05-2-00058-1 (Wash. Sup. Ct. Mar. 21, 2005).

[543] Defendant's Memorandum in Opposition to Plaintiff's Motion for a Writ of Mandate at 7–11; 13–15, Anacortes Airport Coalition v. Port of Anacortes, No. 05-2-00058-1 (Wash. Sup. Ct. Mar. 29, 2005).

[544] Court's Ruling on Motion at 7–12, Airport Coalition v. Port of Anacortes, No. 05-2-00058-1 (Wash. Sup. Ct. Apr. 1, 2005).

[545] *Id*. at 12–14; Order Denying City's Motion to Dismiss, Dismissing Individual Port Commissioners and Substituting the Port Commission, Dismissing All Individual Defendants, Striking Allegations of Criminal Violations, and Denying Plaintiff's Request for Writ of Mandate Without Prejudice, ¶ 11, Airport Coalition v. Port of Anacortes, No. 05-2-00058-1 (Wash. Sup. Ct. June 30, 2005).

question (see Subsection 4, Regulatory Takings and Exaction, *infra*).

• *Waiver*: Easements may be enforced by deed restrictions. Failure to enforce either deed restrictions associated with an easement or the easement itself may result in loss of the easement.

• *Prescription*: Prescriptive avigation easements constitute a defense against inverse condemnation/trespass/nuisance claims and an independent basis for removing obstructions but are not recognized in all jurisdictions. In particular, courts may refuse to recognize prescriptive overflight easements or clearance easements based on overflights. Prescriptive easements may be extinguished by counter-prescription, such as by filing of nuisance or trespass actions.

3. Eminent Domain

• *Public purpose*: Eminent domain must be exercised for a public purpose. In light of state reactions to the *Kelo* decision, any eminent domain action that includes taking of property for economic development purposes may be subject to additional scrutiny. Safety-related acquisitions are far more likely to be found to further a legitimate public purpose, although opponents of an airport project are likely to challenge the safety-relatedness of the project (*Tinicum*).

• *Reasonableness*: A taking does not necessarily have to be the best means for affecting a public purpose, just a reasonable one.

• *Abuse*: Abusive precondemnation activity, including willful delay, may constitute a de facto taking.

4. Regulatory Takings and Exactions

• *Diminution of value*: Jurisdictions differ over the role of diminution of value. Some jurisdictions take the position that mere diminution of value, in and of itself, does not establish taking, rather requiring control over the use of the property or restriction on the right to dispose of the property to establish a taking.[546] Nonetheless, the extent of reduction in value is often a key issue in regulatory taking cases, both as a question of fact (the extent of the reduction in value) and of law (whether the established reduction is sufficient to constitute a taking). The answer to the question of fact will vary according to the individual case; the answer to the question of law will vary by jurisdiction, with Minnesota airports in particular on notice that airport zoning may become expensive (*DeCook*). A closely-related issue is whether the regulatory restriction precludes the reasonable and ordinary use of the property in question. For example, in rejecting the contention that the Indiana Supreme Court decision in *Jankovich* constituted a nullification of airport zoning, the U.S. Supreme Court emphasized that the effect of the zoning regulation in question was to limit development on the subject property to a height of 18 ft, surely a taking of "ordinarily usable air space."[547]

• *Token interest*: A government entity cannot sidestep the requirement of *Lucas*—that a regulation that denies all economically beneficial or productive use of land requires compensation under the takings clause—by leaving a token interest. Thus the question of what constitutes a "token interest" under state law may determine in some cases whether a regulatory restriction amounts to a taking requiring just compensation. Clearly this question may overlap with the question of whether a regulation as applied to a particular piece of property still allows sufficient beneficial use to not be considered a taking under *Penn Central* (*Vacation Village*).

• *Exactions*: For a requirement that an avigation easement be provided as a condition of receiving governmental approval of a construction permit or other governmental authorization (exaction) not to amount to a taking, the exaction must meet the essential nexus (*Nollan*) and rough proportionality (*Dolan*) tests. Moreover, recent state decisions have raised additional questions about easement exactions. With minimal reference to *Nollan* and no mention of *Dolan*, the Nevada Supreme Court held that requiring a grant of avigation easement in exchange for any building permit in the county was improper. The Oregon Land Use Board of Appeals held that avigation easements that limit airport liability do not further a legitimate government purpose in the context of regulatory takings analysis.

5. Inverse Condemnation

An understanding of inverse condemnation requirements under state law is important to avoid actions that give rise to such claims and to defend against the claims when they perhaps inevitably do arise. Important issues include:

• *State constitutional requirements*: Has your state constitution been construed as providing more protection than the Fifth Amendment? Does your state recognize broader grounds for de facto takings than under the Fifth Amendment?

• *Showing required to establish inverse condemnation*: What is the state requirement for physical intrusion/occupation to constitute a taking requiring just compensation? Has the state held under what circumstances overflights may constitute a taking requiring just compensation? Are there any cases holding what level of interference is required?

• *Defending against inverse condemnation claims*: Does the plaintiff in fact have a legally-protected property right? If the plaintiff is asserting that its development rights were abrogated, was the underlying permit valid? Can an entity without eminent domain power be liable for inverse condemnation? Does your state recog-

[546] Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. 1185, 1195, 135 P.3d 1221, 1229 (Kan. 2006).

[547] Jankovich v. Ind. Toll Road Comm'n, 379 U.S. 487, 493, 85 S. Ct. 493, 497, 13 L. Ed. 2d 439, 444 (1965).

nize prescriptive easements as a defense to inverse condemnation claims? If so, can easements acquired by a predecessor in interest be asserted? To the extent that land-use restrictions—including easements—can be written into subdivision plat requirements, providing notice to property owners in subdivision deeds should reduce takings claims by homeowners. The trick is to survive takings challenges by the subdivision owners concerning the restrictions in the first place.

6. Elimination of Hazardous Obstructions

- *Easements*: Prescriptive easements can be used both by and against airport sponsors in the arena of hazard elimination. In either case it is important to be aware of the statute of limitations for establishing a prescriptive easement. For example, if an airport sponsor is able to establish a prescriptive easement to remove obstructions, such as by entering onto a neighboring property to trim trees, continued use of the easement is required to maintain it. The property owner can also extinguish the easement by prescription by acting contrary to the easement for the prescriptive period.
- *Problems with taking action*: Taking action to remove obstructions without a concomitant property right to do so is likely to result in liability. The need to remove obstructions does not obviate the need to observe state and local environmental permitting requirements.
- *Problems with not taking action*: Failure to take action to remove obstructions (off airport property) to navigable airspace may result in legal action should an accident occur involving those obstructions. Whether a duty of care has been violated will depend on the facts of the case and state tort law. However, any liability on the part of the airport sponsor is more likely to be based on continuing to allow the air traffic in question despite the existence of the obstructions, rather than any sort of duty to remove the obstructions.

B. Factors That Affect an Airport's Ability to Achieve Airport-Compatible Land Use and Minimize Hazardous Obstructions

A number of factors may limit an airport sponsor's ability to employ the methods discussed in Section III, Legal Issues Related to Achieving Airport Compatible Land Use, *supra*. Airport sponsors may wish to consider these factors when discussing needed changes in enabling legislation or coordinating land-use requirements with state and local authorities. Note that some of the factors may be overlapping in their effect.

1. Location and Size

An airport's ability to take action is more limited when the surrounding area is in a different jurisdiction than the airport itself. This is particularly true if the airport is in one state and hazardous obstructions are in another, although state law may specifically allow for the exercise of eminent domain by a municipality in an adjoining state.[548] Moreover, whether the airport is in a congested urban area or a more remote area will influence both the type of property to be acquired (which in turn affects the number of potential opponents to acquisition) and the cost of property acquisition. In any case, the particular conditions surrounding individual airports will influence to some extent the ease of deploying various compatible land-use methods.

In terms of arguing that safety requires taking measures to ensure compatible land use (e.g., by acquiring property required for expansion projects or removing obstructions), large airports that are critical to the national system may be in a better position than are small regional airports.

2. Timing

Perhaps one of the most important factors in whether airport-compatible land use can be ensured in a cost-effective manner is whether the airport sponsor had the forethought (and ability) to secure adequate property rights for future airport growth (both airside and in approach areas).[549] Being there before surrounding areas develop will not only reduce the cost of property acquisition, but will make airport zoning that comprehensively protects right of flight and right to clear obstructions more defensible under a *Penn Central* analysis. This is true because investment-backed expectations should be limited to uses allowed under the zoning regulations in effect when the property was purchased. Similarly, if residential subdivisions or other properties are subject to recorded covenants or easements prior to building construction, notice of such servitudes greatly diminishes the chances of taking claims asserted by property owners who purchased subject to the servitudes being upheld.

Rezoning may be more susceptible to legal challenge, as investment expectations were set under the prior zoning regulations.

3. State Enabling Legislation

Where enabling legislation does not provide authority to zone, the airport authority can take an active posture in monitoring land development proposals in its vicinity.[550] In some cases, the best solution to overcoming challenges to airport expansion or other measures required to ensure airport-compatible land use is to amend state law. If enactment of airport zoning powers appears politically infeasible, a provision requiring the

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[548] MINN. STAT. 2010 § 360.201, Acquisition by Municipality in Adjoining State, www.revisor.mn.gov/statutes/?id=360&format=pdf.

[549] Magee argued in 1996 that even then to a great extent it was "too late to protect land around major United States airports from development and use that is either inconsistent or incompatible with airport operations." Magee, *supra* note 5, at 243, 276 (1996).

[550] Tucson Airport Authority Avigation Easement and Disclosure Policy, http://gis.pima.gov/data/layers/avi_esmt/AvigationEasementPolicy.pdf.

exercise of airport zoning authority as a condition of state aid might prove useful.

4. Organizational Structure

The relationship of the airport sponsor to municipal zoning and permitting authorities may affect opportunities to provide input to planning and zoning decisions in a way to encourage airport-compatible land-use planning. In addition, the legal structure under state law of the entity controlling the airport may affect the entity's powers.

The airport sponsor's organizational structure will also affect whether it has eminent domain authority (*Spokane Airports*). If not, organizational structure may also affect the airport sponsor's ability to persuade state or local government to exercise eminent domain authority on the airport's behalf.

5. State Case Law

Courts may have held, applying the balancing-of-interests test, that airport zoning authority should take precedence over local zoning on public policy grounds, despite lack of exclusive statutory control.

The threshold for regulatory takings in the airport context may be so low as to undermine the cost advantage of airport safety zoning. The Minnesota Supreme Court has adopted a distinction between "arbitration" regulations, such as regulations adopting a comprehensive land-use plan, and "enterprise" regulations, such as airport zoning ordinances, and has held that in the case of the latter, compensation must be paid to landowners whose property suffers "a substantial and measureable decline in market value" as a result of the enterprise regulation. To the extent that state courts adopt this distinction and agree that airport zoning regulations constitute "enterprise" rather than "arbitration" regulations, the cost-effectiveness of zoning regulations as opposed to purchase of easements or fee-simple interests in property may decline, if not disappear.

6. Financial Resources

Zoning is perhaps the most cost-effective way to achieve airport-compatible land use.[551] However, not all airport authorities have the benefit of adequate airport zoning (either through direct zoning authority or with the cooperation of local governments). Moreover, zoning does not prevent all incompatible use without cost to the airport sponsor.[552] Thus, the availability of funding to purchase property interests, in fee simple or otherwise, will affect an airport sponsor's ability to achieve airport-compatible land use.

C. Points for Airport Counsel to Consider in Evaluating Legal Risk of Various Methods

1. Limits on Establishing Safety Zones by Regulation

One of the key factors under *Penn Central* is whether the regulation is reasonably necessary to effectuate a substantial public purpose. Consider whether your jurisdiction has already ruled on what constitutes a substantial public purpose in the airport context, ideally directly ruling on whether establishing a safety zone is a substantial public purpose. If not, consider whether the jurisdiction has ruled on substantial public purpose in any regulatory context.

Another particularly relevant *Penn Central* factor is whether the regulation is unduly harsh as applied to a particular property. In that regard, it is important to determine whether the regulation allows reasonable beneficial use of the property. If the airport zoning regulation limits the development of a portion of a property to a use that is reasonably beneficial for the property in question, a finding of taking is less likely (*Vacation Village*). If, on the other hand a building height limitation is unreasonably low (*Jankovich*), the regulation is likely to be held to effect a taking.

Of course, it is possible for a state to have held that *Penn Central* is not the relevant analysis under the state constitution for regulatory-taking claims arising from airport safety-zone ordinances (*DeCook*). In that case, safety zones may become a more expensive means of achieving airport-compatible land use.

2. Obtaining Easements Through Exactions

If an airport authority relies on exactions to obtain avigation or clearance easements, at a minimum counsel should be aware of the requirement under *Dolan* to make individualized findings that the easement being required relates both in nature and extent to the impact that is targeted. Any avigation or clearance easement obtained through an exaction should allow the property owner to retain the right to exclude others from the property except as required to allow the airport to exercise its rights under the easement.

Counsel may also want to determine whether courts in its jurisdiction have followed either *Sisolak* in invalidating easements acquired through exactions or requiring compensation for them or *Hillsboro* in distinguishing between easements that merely limit liability (not a legitimate government purpose) and easements that directly affect incompatible land use (arguably reasonable exaction), clearly disallowing the former.

3. Fee-Simple Property Acquisition

When an airport plans to acquire property, for example, to expand a runway or enlarge a safety zone, community opposition is possible. When the acquisition is in a jurisdiction other than that of the airport sponsor, opposition is likely. Being able to frame the acquisition in terms of safety (*Tinicum*) will greatly enhance the possibility that conflicting law, whether local zoning

[551] *See* Magee*, supra* note 5, at 276–77.

[552] DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011).

ordinances or state law requiring local approval of land acquisition by another jurisdiction, will be held federally preempted. In some cases, the only alternative is to seek a change in state law to allow the acquisition (*Dallas/Fort Worth International Airport*; O'Hare).

D. Notable Potential Pitfalls

• *Planning*—Failure to consider possible airport expansion before agreeing to limitations on airport development. Possible future needs should also be considered, within any limitations under state law, in acquiring property rights. For example, while possibly more expensive in the short run, acquiring property in fee simple rather than acquiring easements may in the long run better protect future needs,[553] provided such acquisition is allowed under state law. The future need, however, should be more than speculative to survive challenges to exercise of eminent domain or zoning.
• *Coordination*—Failing to coordinate with the local planning department concerning FAA requirements. Gaps in local knowledge may result in the permitting of obstructions. To the extent feasible it is advisable to induce local authorities to require that the process of issuing local building permits integrate compliance with FAA requirements, including any required state aviation department review. A provision that permitted construction must be in compliance with federal, state, and local law may provide useful leverage in the event a permit is issued for a structure that violates FAA standards. Removing obstructions once built is not impossible (*Sunroad*) but is likely to be difficult and expensive.
• *Relying on exactions to obtain avigation or clearance easements*—Obtaining an avigation easement in exchange for participation in a noise-mitigation program is likely to withstand challenges, as the purpose of the program and the easement are closely related, and the property owner has the option of not participating. However, obtaining avigation or clearance easements as a condition of issuing building permits or other more general government authorizations is more susceptible to legal challenge, particularly if in Nevada (*Sisolak*) or—at least in the case of easements that limit liability rather than directly controlling land use—Oregon (*Hillsboro*).

[553] City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn. Ct. App. 1984) (City condemned property in fee simple rather than taking clear zone or transitional zone easements in part to facilitate future airport expansion).

APPENDIX A—FAA STATUTES, REGULATIONS, AND GUIDANCE

N.B.: Links to citations are provided for convenience; readers should verify statutory and regulatory language from official sources.

Statutes

- 49 U.S.C. § 40103, Sovereignty and use of airspace.
- Safety Regulation, Chapter 447 of Title 49, United States Code.
- 49 U.S.C. § 44706, Airport operating certificates.
- 49 U.S.C. § 44709, Amendments, modifications, suspensions, and revocations of certificates.
    - 49 U.S.C. § 44718, Structures interfering with air commerce.
- Airport Development, Chapter 471 of Title 49, United States Code.
    - Airport Improvement, 49 U.S.C. §§ 47101–47142.
    - Aviation Development Streamlining, 49 U.S.C. §§ 47171–47175.
- Noise, Chapter 475 of Title 49, United States Code.
    - Noise Abatement, 49 U.S.C. §§ 47501–47510.
    - National Aviation Noise Policy, 49 U.S.C. §§ 47521–47533.

FAA Regulations

- 14 C.F.R. Part 77, Safe, efficient use, and preservation of the navigable airspace, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=72cab6190f53e33514bc508c50039668&rgn=div5&view=text&node=14:2.0.1.2.9&idno=14.
- 14 C.F.R. Part 139, Certification of airports, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=73ffea5aa14378e3202f9986ec274693;rgn=div5;view=text;node=14%3A3.0.1.1.14;idno=14;cc=ecfr.
- 14 C.F.R. § 139.309, Safety areas.
    - 14 C.F.R. § 139.331, Obstructions.
    - 14 C.F.R. § 139.337, Wildlife hazard management.
- 14 C.F.R. Part 150, Airport noise compatibility planning, http://www.access.gpo.gov/nara/cfr/waisidx_03/14cfr150_03.html.
- 14 C.F.R. Part 151, Federal aid to airports, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?type=simple;c=ecfr;cc=ecfr;sid=73ffea5aa14378e3202f9986ec274693;idno=14;region=DIV1;q1=151;rgn=div5;view=text;node=14%3A3.0.1.3.22.

FAA Orders

- Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions [substantially updating and revising Order 5050.4A, "Airports Environmental Handbook," which was cancelled by issuance of Order 5050.4B], www.faa.gov/airports/resources/publications/orders/environmental_5050_4/media/5050-4B_complete.pdf.
- Order 5100.37B, Land Acquisition and Relocation Assistance for Airport Projects, Aug. 1, 2005, www.faa.gov/airports/resources/publications/orders/media/environmental_5100_37b.pdf.
- Order 5100.38, Airport Improvement Program Handbook, June 28, 2005, www.faa.gov/airports/resources/publications/orders/media/aip_5100_38c.pdf.

• Order 5190.6B, FAA Airport Compliance Manual, Sept. 30, 2009, www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b.pdf.

• Order 5190.6B, Chapter 13, Airport Noise and Access Restrictions, www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b_chap13.pdf.

• Order 5190.6B, Airport Compliance Requirements, Chapter 20, Compatible Land Use and Airspace Protection, www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b_chap20.pdf.

• Order 5200.8, Runway Safety Area Program, Oct. 1, 1999, www.faa.gov/airports/resources/publications/orders/media/Construction_5200_8.pdf.

• Order 7400.2, Procedures for Handling Airspace Matters, www.faa.gov/air_traffic/publications/atpubs/AIR/INDEX.HTM.

FAA Guidance

• AC No. 70/7460-1K, Obstruction Marking and Lighting, Feb. 1, 2007, http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/B993DCDFC37FCDC486257251005C4E21/$FILE/AC70_7460_1K.pdf.

• AC No. 150/5020-1, Noise Control and Compatibility Planning for Airports, www.faa.gov/documentLibrary/media/advisory_circular/150-5020-1/150_5020_1.pdf.

• AC 150/5020-2, Guidance on the Balanced Approach to Noise Management, http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/8e17c23e2f26e8018625726d006ce776/6e0aa56559a057d686256f1e0072b8f4/$FILE/AC150-5020-2.pdf.

• AC No. 150/5070-6B, Airport Master Plans, www.faa.gov/documentLibrary/media/advisory_circular/150-5070-6B/150_5070_6b_chg1.pdf.

• AC No. 150/5070-7, The Airport System Planning Process, Nov. 10, 2004, http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/448f20bc45582fc086257241000775e5a/$FILE/150_5070_7.pdf.

• AC No. 150/5100-17, Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects, Nov. 7, 2005, www.faa.gov/documentLibrary/media/advisory_circular/150-5100-17/150_5100_17_chg6.pdf.

• AC No. 150/5190-4A, Model Zoning Ordinance to Limit Height of Objects Around Airports, Dec. 14, 1987, www.faa.gov/documentLibrary/media/advisory_circular/150-5190-4A/150_5190_4A.PDF.

• AC No. 150/5200-33B, Hazardous Wildlife Attractants On or Near Airports, 8/28/2007, http://wildlife-mitigation.tc.faa.gov/wildlife/downloads/150_5200_33b.pdf.

• AC No. 150/5200-34A, Construction or Establishment of Landfills near Public Airports, Jan. 26, 2006, www.faa.gov/documentLibrary/media/advisory_circular/150-5200-34A/150_5200_34a.pdf.

• AC No. 150/5210-22, Airport Certification Manual (ACM), Apr. 26, 2004, www.faa.gov/documentLibrary/media/advisory_circular/150-5210-22/150_5210_22.pdf.

• AC No. 150/5300-13, Airport Design, www.faa.gov/documentLibrary/media/Advisory_Circular/150_5300_13.pdf.

• FAA AC No. 150/5190-4A, Model Zoning Ordinance to Limit Height of Objects Around Airports, www.faa.gov/documentLibrary/media/advisory_circular/150-5190-4A/150_5190_4A.PDF.

• Development of Obstruction Lighting Standards for Wind Turbine Farms.[554]

[554] James W. Patterson, Jr., *Development of Obstruction Lighting Standards for Wind Turbine Farms*, Nov. 2005, DOT/FAA/AR-TN05/50, www.airporttech.tc.faa.gov/safety/downloads/TN05-50.pdf.

- Guidance developed by FAA Southern Region Compatible Land Use Planning Task Force, http://www.faa.gov/about/office_org/headquarters_offices/apl/noise_emissions/planning_toolkit/media/III.B.pdf.
- Obstruction Evaluation/Airport Airspace Analysis (OE/AAA), https://oeaaa.faa.gov/oeaaa/external/portal.jsp.

APPENDIX B—STATE AVIATION STATUTES[555]

N.B.: Links to citations are provided for convenience; readers should verify statutory language from official sources.

• *Alabama*: Code of Alabama, Title 4—Aviation [includes Chapter 6, Airport Zoning], http://alisondb.legislature.state.al.us/acas/ACASLoginFire.asp (select chapter and applicable article).

• *Alaska*: Alaska Aeronautics Act of 1949, Alaska Stat. 02.15.010 to Alaska Stat. 02.15.270, http://touchngo.com/lglcntr/akstats/Statutes/Title02/Chapter15.htm; Airport Zoning Act, Alaska Stat. 02.25.010 to Alaska Stat. 02.25.120, http://touchngo.com/lglcntr/akstats/Statutes/Title02/Chapter25.htm.

• *Arizona:* Title 28, Transportation, Chapter 25, Aviation [In particular, Airports in General, Ariz. Rev. Stat. Ann. §§ 28-8411 to 28-8428; Airport Zoning and Regulation, Ariz. Rev. Stat. Ann. §§ 28-8461 to 28-8486], www.azleg.gov/ArizonaRevisedStatutes.asp?Title=28.

• *Arkansas*: Airport Facilities Generally—Ark. Code Ann. §§ 14-356-101 to 14-364-102; Aeronautics, Ark. Code Ann. §§ 27-114-101 to § 27-117-105 (2010), www.lexisnexis.com/hottopics/arcode/Default.asp (select chapter and applicable article).

• *California*: State Aeronautics Act, California Public Utilities Code §§ 21001 *et seq.*, www.dot.ca.gov/hq/planning/aeronaut/documents2/puc030509.pdf.

• *Colorado*: Public Airport Authority Act, Colo. Rev. Stat. §§ 41-3-01 to 41-3-108; Title 41, Article 4, Airports (County Airports, Colo. Rev. Stat. §§ 41-4-101 to 41-4-113; Airports—Cities and Towns, Colo. Rev. Stat. §§ 41-4-201 to 41-4-205).

• *Connecticut*: Conn. Gen. Stat. Ann. § 15-34 to 15-101a–Aeronautics, www.cga.ct.gov/2011/pub/chap266.htm.

• *Delaware*: Uniform State Aeronautics Law, Del. Code Ann. §§ 301-311, http://delcode.delaware.gov/title2/c003/index.shtml; Obstructions in Airport Approach Areas, Del. Code Ann. §§ 601–603, http://delcode.delaware.gov/title2/c006/index.shtml; State Airports, Del. Code Ann. §§ 701 to 708, http://delcode.delaware.gov/title2/c007/index.shtml; Airports of Political Subdivisions, §§ 901 to 948, http://delcode.delaware.gov/title2/c009/index.shtml.

• *Florida*: Florida Statutes, Chapter 333, Airport Zoning, www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0300-0399/0333/0333.html; Fla. Admin. Code (FAC), Chapter 14-60, Airport Licensing, Registration, & Airspace Protection, https://www.flrules.org/gateway/ChapterHome.asp?Chapter=14-60.

• *Georgia*: Ga. Code Ann. § 6-2-5, Lawful flight over lands and waters of state; Powers of Local Governments as to Air Facilities, Ga. Code Ann. § 6-3-20 to 6-3-28; Georgia Airport Development Authority, Ga. Code Ann. §§ 6-4-1 to 6-4-16.

• *Hawaii*: Haw. Rev. Stat. 262, Airport Zoning Act: § 262-3—Power to adopt airport zoning regulations, www.capitol.hawaii.gov/hrs2008/Vol05_Ch0261-0319/HRS0262/HRS_0262-0003.htm, § 262-6—Airport zoning regulations, www.capitol.hawaii.gov/hrs2008/Vol05_Ch0261-0319/HRS0262/HRS_0262-0006.htm, § 262-11—Acquisition of air rights, www.capitol.hawaii.gov/hrs2008/Vol05_Ch0261-0319/HRS0262/HRS_0262-0011.htm Chapter 19-12, Administrative Rules for Airports Division—Airport Zoning, http://hawaii.gov/dot/airports/library/admin-rules/12-AirportZoning.pdf.

• *Idaho:* The Airport Zoning Act, Idaho Code, § 21-501 *et seq*., www.legislature.idaho.gov/idstat/Title21/T21CH5.htm

[555] Many of these provisions are described in JOHN E. PUTNAM, AIRPORT GOVERNANCE AND OWNERSHIP 42–57 (Airport Cooperative Research Program, Transportation Research Board, Legal Research Digest No. 7, 2009).

• *Illinois*: 620 Ill. Comp. Stat. 25/Airport Zoning Act, www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1807&ChapterID=48; 620 Ill. Comp. Stat. 30/Zoning to Eliminate Airport Hazards Act, www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1808&ChapterID=48; Administrative Code, Title 92: Transportation, Chapter 1: Department of Transportation, Subchapter b: Aeronautics, Part 16 Airport Hazard Zoning, www.ilga.gov/commission/jcar/admincode/092/09200016sections.html.

• *Indiana:* Regulation of Tall Structure, Ind. Code § 8-21-10, www.in.gov/legislative/ic/code/title8/ar21/ch10.html [Covers "location and height of structures and the use of land related to those structures and near public-use airports"]; Airports, Ind. Code §§ 8-22-1-1 to 8-22-5-4, www.in.gov/legislative/ic/code/title8/ar22/.

• *Iowa:* Airport Zoning §§ 329.1 to 329.15 Iowa Code Ann.; Airports §§ 330.1 to 330.24, Iowa Code Ann.

• *Kansas*: Kan. Stat., Article 3, Aircraft and Airfields: Zoning Regulations, 3-701 et. seq; Article 8, Cooperation with Adjoining States, § 3-801 *et seq.* [Accessible from http://kansasstatutes.lesterama.org/Chapter_3/Article_3/, select applicable article].

• *Kentucky*: Ky. Rev. Stat. 183.122, Condemnation—Effect on zoning of adjacent property, www.lrc.state.ky.us/KRS/183-00/122.PDF; Ky. Rev. Stat. 183.861, Establishment of Airport Zoning Commission—Jurisdiction over land use issues, www.lrc.state.ky.us/KRS/183-00/861.PDF; 183.867, Zoning jurisdiction—Regulations—Public files, www.lrc.state.ky.us/KRS/183-00/867.PDF; 183.868, Factors to be considered in zoning, www.lrc.state.ky.us/KRS/183-00/868.PDF; 183.869, Variance permits, www.lrc.state.ky.us/KRS/183-00/869.PDF; 183.870, Maximum building height regulation, www.lrc.state.ky.us/KRS/183-00/870.PDF; 183.872, Acquisition of property rights, www.lrc.state.ky.us/KRS/183-00/872.PDF; Ky. Rev. Stat. 183.990 Penalties, www.lrc.state.ky.us/KRS/183-00/990.PDF.

• *Louisiana*: La. Rev. Stat., Title 2, Chapter, Airport zoning, www.lawserver.com/law/state/louisiana/la-laws/louisiana_revised_statutes_title_2_chapter_3.

• *Maine*: Me. Rev. Stat., Title 6, Aeronautics, www.mainelegislature.org/legis/statutes/6/title6ch0sec0.html

• *Maryland*: Airport Zoning Act, Md. Code Ann. § 5-501 *et seq.*, www.michie.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp=; Title 11, Department of Transportation, Subtitle 03, Maryland Aviation Administration, Chapter 05, Obstructions to Air Navigation Authority, www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=11.03.05.* (select chapter and applicable article).

• *Massachusetts*: Mass. Gen. Law Ch. 90, §§ 35–44; 51D-51N, www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXIV/Chapter90.

• *Michigan*: Aeronautics Code of the State of Michigan, http://legislature.mi.gov/doc.aspx?mcl-Act-327-of-1945; Tall Structure Act, www.legislature.mi.gov/documents/mcl/pdf/mcl-act-259-of-1959.pdf; Airport Zoning Act, www.legislature.mi.gov/documents/mcl/pdf/mcl-act-23-of-1950-ex-sess-.pdf; General Rules of the Michigan Aeronautics Commission, www.state.mi.us/orr/emi/admincode.asp?AdminCode=Single&Admin_Num=25900201&Dpt=TP&RngHigh=.

• *Minnesota*: Minn. Stat., Airports and Aeronautics, §§ 360.011 *et seq.*, www.revisor.mn.gov/data/revisor/statute/2010/360/2010-360.pdf ; Minn. Admin. R., Chapter 8800, Aeronautics, www.revisor.mn.gov/rules/?id=8800.

• *Mississippi*: Airport Authorities Law, Miss. Code. Ann. §§ 61-3-1 to 61-3-85; Municipal Airport Law, Miss. Code. Ann. §§ 61-5-1 to 61-5-49; Chapter 9, Incorporation of Airport into Corporate Boundaries of Municipality, Miss. Code. Ann. §§ 61-9-1 to 61-9-9.

• *Missouri:* Aircraft and Airports, Mo. Rev. Stats. §§ 305.010- 305.630, www.moga.mo.gov/statutes/C305.HTM.

• *Montana*: Airport Compatibility Act, Mont. Code Ann. §§ 67-7-101 to 67-7-305, http://data.opi.mt.gov/bills/mca_toc/67_7.htm; Municipal Airports Act, Mont. Code Ann. §§ 67-10-101 to 67-

10-104, 67-10-201 to 67-10-231, 67-10-301 to 67-10-303, http://data.opi.mt.gov/bills/mca_toc/67_10.htm; Airport Authorities Act, §§ 67-11-101 to 67-11-106, 67-11-201 to 67-11-241, 67-11-401, http://data.opi.mt.gov/bills/mca_toc/67_11.htm.

• *Nebraska*: Neb. Rev. Stat. § 3-144, Department; right of eminent domain; procedure, http://nebraskalegislature.gov/laws/statutes.php?statute=3-144; Revised Airports Act, Neb. Rev. Stat. §§ 3-201 to 3-238, 18-1502; Neb. Rev. Stat. §§ 3-239, Airport authorities or municipalities; project applications under federal act; approval by department; required; department, act as agent; direct receipt of federal funds; when, http://nebraskalegislature.gov/laws/statutes.php?statute=3-239; Extraterritorial Airports Act, Neb. Rev. Stat. §§ 3-240 to 3-244; Airport Zoning Act, Neb. Rev. Stat. §§ 3-301 to 3-333; [Obstructions], Neb. Rev. Stat. §§ 3-401 to 3-409; Cities Airport Authorities Act, Neb. Rev. Stat. §§ 3-501 to 3-514; [County Airport Authorities], Neb. Rev. Stat. §§ 3-610 to 3-621; Joint Airport Authorities Act, Neb. Rev. Stat. §§ 3-701 to 3-716; Nebraska State Airline Authority Act, Neb. Rev. Stat. §§ 3-801 to 3-806, http://nebraskalegislature.gov/laws/browse-chapters.php?chapter=03.

• *Nevada*: Uniform State Law for Aeronautics, Nev. Rev. Stat. 493.010 to 493.120, www.leg.state.nv.us/nrs/NRS-493.html#NRS493Sec010; State Airports Act, Nev. Rev. Stat. 494.010 to 494.160, www.leg.state.nv.us/nrs/NRS-494.html#NRS494Sec010; City and County Airports; Acquisition of Property, Nev. Rev. Stat. 495.010 to 495.210, www.leg.state.nv.us/nrs/NRS-495.html#NRS495Sec070; Municipal Airports Act, Nev. Rev. Stat. 496.010 to 496.290, www.leg.state.nv.us/nrs/NRS-496.html; Airport Zoning Act, Nev. Rev. Stat. 497.010 to 497.270, www.leg.state.nv.us/nrs/NRS-497.html#NRS497Sec010.

• *New Hampshire*: New Hampshire Aeronautics Act, N.H. Rev. Stat. Chapter 422, www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXXIX-422.htm; N.H. Rev. Stat. Chapter 422-B: Control of Tall Structures, www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXXIX-422-B.htm; N.H. Rev. Stat. Chapter 423: Municipal Airports, www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXXIX-423.htm; N.H. Rev. Stat. Chapter 424: Airport Zoning, www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXXIX-424.htm.

• *New Jersey*: N.J. Stat. Title 6, Aviation [includes Air Safety and Zoning Act of 1983], http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=442943&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.nfo&record={338C}&softpage=Doc_Frame_PG42 ; N.J. Admin. Code, Chapter 62, Air Safety and Zoning, www.state.nj.us/transportation/about/rules/pdf/chapter62.pdf.

• *New Mexico*: Municipal Airports, N.M. Stat. Ann. §§ 3-39-1 to 3-39-27, www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0; Airports, N.M. Stat. Ann. §§ 64-2-1 to 64-2-2, www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0. (select chapter and applicable article).

• *New York*: N.Y. Gen. Mun. Law § 350 to 357—Airports and Landing Fields, http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@SLGMU0A14+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=16929935+&TARGET=VIEW.

• *North Carolina*: Municipal Airports, N.C. Gen. Stat. §§ 63-1 to 63-9; State Regulation [Sovereignty in space; Ownership of space; Lawfulness of flight], N.C. Gen. Stat. §§ 63-11 to 63-13; Model Airport Zoning Act, N.C. GEN. STAT. §§63-29 to 63-37.1; Public Airports and Related Facilities, N.C. GEN. STAT. §§ 63-48 to 63-58; State and Federal Aid; Authority of Department of Transportation, N.C. GEN. STAT. §§ 63-65 to 63-73; North Carolina Special Airport Districts Act, N.C. GEN. STAT. §§ 63-78 to 63-89, www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0063.

• *North Dakota:* Airports and Landing Fields, N.D. Cent. Code §§ 2-02-01 to 2-02-09, www.legis.nd.gov/cencode/t02c02.pdf; Substantive and Jurisdictional Provisions, N.D. Cent. Code Chapter 2-03 [§ 2-03-02, Sovereignty in space; § 2-03-03, Ownership of space; § 2-03-04, Lawfulness of flight and landing; § 2-03-11, Notice; § 2-03-12, Obstructions near runway approaches],

www.legis.nd.gov/cencode/t02c03.pdf; Airport Zoning, N.D. Cent. Code §§ 2-04-01 to 2-04-14, www.legis.nd.gov/cencode/t02c04.pdf; Airport Authorities Act, N.D. Cent. Code §§ 2-06-01 to 2-06-23, www.legis.nd.gov/cencode/t02c06.pdf.

• *Ohio*: Chapter 4561, Aeronautics, Ohio Rev. Code, §§ 4561.01 *et seq.*, http://codes.ohio.gov/orc/4561; Chapter 5501:1-10, Ohio Airport Protection Act, Ohio Admin. Code, §§ 5501:1-10-01 *et seq.*, http://codes.ohio.gov/oac/5501:1-10.

• *Oklahoma*: Okla. Stat., Title 3, Aircraft and Airports [downloadable from] www.lsb.state.ok.us/osstatuestitle.html; Aircraft Pilot and Passenger Protection Act [adding new § 120 to Title 3], www.ok.gov/OAC/documents/Official%20Version%20-%20Aircraft%20Pilot%20&%20Passenger%20Protection%20Act.pdf (select chapter and applicable article).

• *Oregon*: Or. Rev. Stat. 836—Airports and Landing Fields, www.leg.state.or.us/ors/836.html; Or. Admin. R. Chapter 660, Division 13—Airport Planning Rule, http://arcweb.sos.state.or.us/rules/OARS_600/OAR_660/660_013.html; Or. Admin. R. Chapter 660, Division 13—Exhibits, www.aviation.state.or.us/Aviation/docs/rules/660-013_Exhibits.pdf.

• *Pennsylvania*: The Aviation Code, 74 Pa. Cons. Stat. § 5101 *et seq.*, www.legis.state.pa.us/WU01/LI/LI/CT/PDF/74/74.PDF; Act 164, Chapter 59, Airport Operation and Zoning, www.dot.state.pa.us/Internet/Bureaus/pdBOA.nsf/AviationHomepage?openframeset; Chapter 479—Obstruction to Aircraft (74 Pa. Cons. Stat. §§ 5101–6169), www.dot.state.pa.us/Internet/Bureaus/pdBOA.nsf/AviationHomepage?openframeset (select chapter and applicable article).

• *Rhode Island*: Airports and Landing Fields, R.I. Gen. Laws §§ 1-2-1 to 1-2-21, www.rilin.state.ri.us/Statutes/TITLE1/1-2/INDEX.HTM; Airport Zoning, R.I. Gen. Laws §§ 1-3-1 to 1-3-33, www.rilin.state.ri.us/Statutes/TITLE1/1-3/INDEX.HTM.

• *South Carolina*: South Carolina Code of Laws, Title 55—Aeronautics, http://www.scstatehouse.gov/code/title55.php ; Uniform Airports Act, §§ 55-9-10, Protection of Airports and Airport Property, §§ 55-13-10 (select cite, then applicable article).

• *South Dakota*: Chapter 50-9, Air Navigation Hazards, South Dakota Codified Laws, http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=50-9&Type=Statute; Chapter 70:02:03, Structures Affecting Aviation, South Dakota Admin. R., http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=70:02:03.

• *Tennessee*: Aeronautics—General Regulations, Tenn. Code Ann. [§ 42-1-102, Sovereignty in space above lands and waters; § 42-1-103, Ownership in space above lands and waters is in surface owners beneath; § 42-1-104, Air flights lawful—Exceptions—Forced landing—Liability for damages; § 42-1-111, Damaging or extinguishing beacons—Penalty; 42-1-112. Uniformity of state laws—Harmony with federal requirements]; TENN. CODE ANN. § 42-2-103, Public purpose of activities—Immunity; Aeronautics—State Administration, TENN. CODE ANN. § 42-2-101 to 42-2-227; Airport Authorities, Tenn. Code Ann. § 42-3-101 to 42-3-205; Metropolitan Airport Authorities, Tenn. Code Ann. §§ 42-4-101 to 42-4-117; County and Municipal Airport Authorities, Tenn. Code Ann. §§ 42-5-101 to 42-5-204; Airport Zoning, Tenn. Code Ann. §§ 42-6-101 to 42-6-116.

• *Texas*: Airport Zoning Act (AZA), Chapter 241 of the Texas Local Government Code, www.statutes.legis.state.tx.us/Docs/LG/htm/LG.241.htm ; Airport Hazard Zoning and Compatible Land Use, 43 Tex. Admin. Code § 30.215, http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=43&pt=1&ch=30&rl=215.

• *Utah*: Aeronautics Act, 72 Utah Code, Chapter 10, http://le.utah.gov/UtahCode/section.jsp?code=72-10.

• *Vermont*: 24 Vt. Stat. Ann. § 4411, Zoning bylaws, www.leg.state.vt.us/statutes/fullsection.cfm?Title=24&Chapter=117&Section=04411; 24 Vt. Stat. Ann.

§ 4414(1)(C) [Zoning; permissible types of regulations], Airport hazard area, www.leg.state.vt.us/statutes/fullsection.cfm?Title=24&Chapter=117&Section=04414.

• *Virginia*: Aviation, Code of Virginia, Title 5.1, http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC0501000; Airport safety zoning, Code of Virginia, § 15.2-2294, http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+15.2-2294; Regulations Governing the Licensing and Operation of Airports and Aircraft and Obstructions to Airspace in the Commonwealth of Virginia, Va. Admin. Code, Title 24, Agency 5, Chapter 20, http://leg1.state.va.us/000/reg/TOC24005.HTM (select article).

• *Washington*: Title 14 Wash. Rev. Code, Aeronautics, http://apps.leg.wa.gov/rcw/default.aspx?Cite=14; Chapter 14.12 Wash. Rev. Code Airport zoning, http://apps.leg.wa.gov/rcw/default.aspx?cite=14.12; Wash. Rev. Code 36.70.547

• General aviation airports—Siting of incompatible uses, http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70.547; Chapter 47.68 Wash. Rev. Code.

• Aeronautics, http://apps.leg.wa.gov/rcw/default.aspx?cite=47.68.

• *West Virginia:* Intergovernmental Relations—Airports and Avigation, W. VA. CODE §§ 8-28-1 to 8-28-9, www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=08&art=28; Intergovernmental Relations—Regional Airports, W. Va. Code §§ 8-29-1 to 8-29-20, www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=08&art=29; County Airport Authorities, W. Va. Code §§ 8-29A-1 to 8-29A-11, www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=08&art=29A.

• *Wisconsin*: Aeronautics and Astronautics, Wis. Stat. Chapter 114, http://legis.wisconsin.gov/statutes/Stat0114.pdf; Wis. Admin. Code, Chapter Trans 55, Conditions of State Aid for Airport Improvement, http://legis.wisconsin.gov/rsb/code/trans/trans055.pdf.

• *Wyoming*: Uniform State Law for Aeronautics, Wyo. Stat. §§ 10-4-101 through 10-4-304 [§ 10-4-301, Sovereignty in space above state; § 10-4-302, Ownership of space; 10-4-303, Low or dangerous flight; landing on land or water of another; 10-4-305, Marking obstructions] ; Municipal and County Airports, Wyo. Stat. §§ 10-5-101 through 10-5-302, http://legisweb.state.wy.us/statutes/titles/Title10/Title10.htm.

APPENDIX C— STATE AVIATION AUTHORITIES

N.B.: Links to citations are provided for convenience; readers should verify statutory language from official sources.

- *Alabama*: Department of Transportation, Aeronautics Bureau, www.dot.state.al.us/aerweb/index.htm.
- *Alaska*: Department of Transportation and Public Facilities, Aviation and Airports www.dot.state.ak.us/airport-portal.shtml.
- *Arizona*: Department of Transportation, Aeronautics Group and Airport Development, www.azdot.gov/MPD/Airport_Development/about/contact.asp.
- *Arkansas*: Department of Aeronautics, www.fly.arkansas.gov/.
- *California*: Department of Transportation, Division of Aeronautics, www.dot.ca.gov/hq/planning/aeronaut/index.html.
- *Colorado*: Department of Transportation, Division of Aeronautics, www.coloradodot.info/programs/aeronautics.
- *Connecticut*: Department of Transportation, Bureau of Aviation and Ports, www.ct.gov/dot/cwp/view.asp?a=1402&q=259246&dotPNavCtr=.
- *Delaware:* Department of Transportation, Division of Planning, Office of Aeronautics, http://deldot.gov/information/community_programs_and_services/aviation_svcs/index.shtml.
- *Florida:* Department of Transportation, Aviation Office, www.dot.state.fl.us/aviation/.
- *Georgia*: Department of Transportation, Aviation Programs, http://www.dot.state.ga.us/localgovernment/intermodalprograms/aviation/Pages/default.aspx.
- *Hawaii:* Department of Transportation, Airports Division, http://hawaii.gov/dot/airports.
- *Idaho:* Department of Transportation, Division of Aeronautics, http://itd.idaho.gov/aero/.
- *Illinois:* Department of Transportation, Division of Aeronautics, www.dot.il.gov/aero/index.html.
- *Indiana*: Department of Transportation, Aviation, http://www.in.gov/indot/2395.htm.
- *Iowa*: Department of Transportation, Office of Aviation, www.iowadot.gov/aviation/index.html.
- *Kansas:* Department of Transportation, Aviation, www.ksdot.org/divaviation/.
- *Kentucky:* Department of Aviation, www.transportation.ky.gov/aviation/.
- *Louisiana*: Department of Transportation, Aviation, www.dotd.la.gov/intermodal/aviation/.
- *Maine:* Department of Transportation, Airports and Aviation, http://www.maine.gov/mdot/aviation/.
- *Maryland:* Maryland Aviation Administration, Office of Regional Aviation Assistance, www.marylandregionalaviation.aero/content/oraamission/index.html.
- *Massachusetts:* Department of Transportation, Aeronautics Division, www.massdot.state.ma.us/Aeronautics/.
- *Michigan:* Department of Transportation, Aeronautics, www.michigan.gov/aero.
- *Minnesota:* Department of Transportation, Aeronautics and Aviation, www.dot.state.mn.us/aero/.
- *Mississippi*: Department of Transportation, Division of Aeronautics, www.gomdot.com/Divisions/IntermodalPlanning/Aeronautics/Home.aspx.
- *Missouri*: Department of Transportation, Multimodal: Aviation, www.modot.org/Multimodal/.
- *Montana*: Department of Transportation, Aviation, www.mdt.mt.gov/aviation/.
- *Nebraska*: Department of Aeronautics, www.aero.state.ne.us/.
- *Nevada:* Department of Transportation, Aviation Planning Section, http://www.nevadadot.com/About_NDOT/NDOT_Divisions/Planning/Aviation/Aviation_Home.aspx.
- *New Hampshire*: Department of Transportation, Bureau of Aeronautics, www.nh.gov/dot/org/aerorailtransit/aeronautics/index.htm.

- *New Jersey*: Department of Transportation, Division of Aeronautics, www.state.nj.us/transportation/airwater/aviation/.
- *New Mexico*: Department of Transportation, Aviation Division, www.nmshtd.state.nm.us/main.asp?secid=10871.
- *New York*: Department of Transportation, Aviation Bureau, https://www.nysdot.gov/modal/aviation.
- *North Carolina*: Department of Transportation, Division of Aeronautics, www.ncdot.gov/aviation/.
- *North Dakota*: Aeronautics Commission, www.nd.gov/ndaero/.
- *Ohio*: Department of Transportation, Office of Aviation, www.dot.state.oh.us/Divisions/TransSysDev/Aviation/Pages/default.aspx.
- *Oklahoma*: Aeronautics Commission, www.ok.gov/OAC/.
- *Oregon:* Department of Aviation, www.aviation.state.or.us/.
- *Pennsylvania*: Department of Transportation, Bureau of Aviation, www.dot.state.pa.us/Internet/Bureaus/pdBOA.nsf/AviationHomepage?openframeset.
- *Rhode Island*: RI Airport Corporation, www.pvdairport.com/main.aspx?sec_id=15.
- *South Carolina*: Aeronautics Commission, www.scaeronautics.com/.
- *South Dakota*: Department of Transportation, Office of Aeronautics, www.sddot.com/fpa/aeronautics/.
- *Tennessee*: Department of Transportation, Aeronautics Division, www.tdot.state.tn.us/aeronautics/.
- *Texas*: Department of Transportation, Aviation Division, www.txdot.gov/business/aviation/default.htm.
- *Utah*: Department of Transportation, Division of Aeronautics, www.udot.utah.gov/main/f?p=100:pg:3007774426337342:::1:T,V:190.
- *Vermont*: Department of Transportation, Aviation Program, http://airports.vermont.gov/.
- *Virginia*: Department of Aviation, www.doav.virginia.gov/.
- *Washington*: Department of Transportation, Aviation, www.wsdot.wa.gov/aviation.
- *West Virginia*: Department of Transportation, Aeronautics Commission, www.transportation.wv.gov/aeronautics/Pages/default.aspx.
- *Wisconsin*: Department of Transportation, www.dot.state.wi.us/modes/air.htm.
- *Wyoming*: Department of Transportation, Aeronautics Division, www.dot.state.wy.us/wydot/aeronautics.

Appendix D—Examples of Interlocal and Model Agreements

N.B.: Links to citations are provided for convenience; readers should verify statutory language from official sources.

Destin, Florida: Interlocal Agreement between City of Destin and Okaloosa County, concerning airport zoning regulations, Feb. 20, 2007, www.flydts.com/resources/ACAC-Interlocal-Agreement.pdf.

Miami-Dade County: Interlocal Agreement by and between Miami-Dade County, Florida, and the City of Miami, Florida, regarding Miami International Airport (Wilcox Field) Zoning, Feb. 28, 2008, www.miami-airport.com/pdfdoc/InterlocalAgreementMDAD_CityofMIA.pdf.

Minneapolis: Indemnification and Cooperation Agreement Regarding the Wold-Chamberlain Field Joint Airport Zoning Board and the Minneapolis-St. Paul International Airport Zoning Ordinance [agreement concerning zoning ordinance amendments],
www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualappendices.pdf.

Lincoln, Nebraska: Interlocal Agreement by and between the Airport Authority of the City of Lincoln, Nebraska, and the City of Lincoln, Nebraska, concerning establishment of avigation easements as part of the City's subdivision, community unit plan, special permit, use permit, or building permit process,
http://lincoln.ne.gov/city/council/agenda/2004/071904/04r182a.pdf.

Oregon: Airport Land Use Compatibility Guidebook, Appendix I Sample Agreements and Easements: Hold Harmless Agreement; Fair Disclosure Statement; Suggested Disclosure to Real Estate Buyers (January 2003), www.oregon.gov/Aviation/docs/resources/AppendixI.pdf.

Seattle: Port of Seattle and City of SeaTac 2005 Interlocal Agreement (ILA-2), Feb. 16, 2006, www.ci.seatac.wa.us/Modules/ShowDocument.aspx?documentid=512.

Appendix E—Issues to Consider for Avigation/Clearance Easements

N.B.: Links to citations are provided for convenience; readers should verify statutory language from official sources.

Easements must comply with the real property law requirements of the specific jurisdiction in which they are recorded. Although the following issues generally should be covered, additional points may also be required in a particular jurisdiction. Review of the easement by a local real property attorney is advisable.

Examples of easements are readily available. A small number are referenced at the end of this appendix.

Issues to Cover:

- Describe subject property as required by state and local law.
- Specify all relevant restrictions, such as height.
- Clearly describe rights afforded by easement, whether easement is for avigation, clearance, or both. Wording matters. Cover future needs to the extent allowed by law.
- Clearly describe any obligations of grantor under easement, such as refraining from engaging in activities that would interfere with or be a hazard to flight at the airport in question.
- Consider required duration of the easement. Duration may be expressed by a date certain or subject to a condition subsequent.
- Cover appropriate parties to easement [airport authority/municipality/county/state].
- Include consideration provided.
- Include appropriate references under state law to ensure easement survives transfer of ownership of subject property.
- Observe recording requirements.
- Specify type of aircraft covered, including those developed in the future.
- Failure to enforce.
- Extensive waiver of damages by grantor, except from injury due to aircraft accidents.
- Indemnification by grantor in the event title to the property is challenged.

Sample Easements:

California: Sample avigation easements, www.dot.ca.gov/hq/planning/aeronaut/documents/ALUP/CT%20ALUPH%20Appendix%20D.pdf.

Cleveland: Sample Avigation Easement for Residential Sound Insulation Program, www.clevelandsound.com/pdf/SampleAvigationEasement.pdf.

Dallas: Airport avigation easement, release, indemnification, and disclosure agreement, www.dallascityattorney.com/deed_restrictions/Maps/Map%20No.%20H-6/Z045-235%20(Avigation%20Esmt).pdf.

Minneapolis: Sample Avigation & Noise Easement: City of South St. Paul, Minnesota, www.dot.state.mn.us/aero/avoffice/pdf/airportcompmanualappendices.pdf.

Oregon: Airport Land Use Compatibility Guidebook, Appendix I Sample Agreements and Easements: Noise Easement; Avigation and Hazard Easement; (January 2003), www.oregon.gov/Aviation/docs/resources/AppendixI.pdf.

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