U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel
800 Independence Ave., SW.
Washington, DC 20591

AUG 07 2009

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1311 Bedford Drive
Melbourne, Florida 32940

Re: Approved Town of Grant-Valkaria Ordinance

Dear Mr. Bohne:

This letter is in response to your letters of April 9, April 14, and June 4, 2009 to Mr. Rusty Chapman, the former Airports Division Manager in the Southern Regional Office of the Federal Aviation Administration (FAA). The current manager, Ms. Winsome A. Lenfert, asked me to respond to your letters. In your letters, you request an opinion from the FAA concerning a Town of Grant-Valkaria ordinance that would regulate aeronautical businesses and flight activities at the Valkaria Airport (X59). The County of Brevard owns and operates the Valkaria Airport but the Airport is located within the Town of Grant-Valkaria.

The FAA appreciates the opportunity to provide you with our views concerning the ordinance. By letter dated January 13, 2009, we advised Brevard County, as Airport owner and operator, that the Town would be prohibited from enforcing any ordinance restricting operations at the Airport, and that the Town had no authority to regulate air traffic. In your first two letters, you enclosed the current town ordinance and the draft amendment to the ordinance. In your third letter, you enclosed the amended ordinance as approved by the Town Council after its first reading on June 1, 2009. This opinion will address this June 1 ordinance. We understand from your letter that the ordinance will be considered for adoption at the next scheduled public hearing on the zoning amendment.

Based upon the information available, including your letters and attachments, the ordinance as approved by the Town Council on June 1 impermissibly regulates aviation noise and safety. As a result, it is preempted under Federal law and the Town lacks the power to enforce the ordinance. The basis for this conclusion is explained in detail below.

Background

The County of Brevard, Florida, owns and operates the Valkaria Airport, which is a public-use, federally-obligated airport. The Airport is located within the Town of Grant-Valkaria. The Town of Grant-Valkaria is located within the County of Brevard. The Airport was built during World War II as an auxiliary training field for the United States Navy. In a September 8, 1958 Quitclaim Deed, the United States transferred the Airport to Brevard County under the Surplus Property Act of 1944 (49 U.S.C. 47151, et seq.) subject to a

number of reservations, restrictions, and conditions, and the County's covenant to abide by and agree to reservations, restrictions, and conditions. For example, in section (1) of the Deed, the County is required to use the Valkaria Airport "for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport ...."[1]

In 1998, the County enacted ordinances that placed restrictions on the Airport's runways to address community concerns with airport noise, including noise associated with repetitive aircraft training operations.

In July 2006, the Town of Grant-Valkaria incorporated and adopted the County's code of ordinances, including the runway restrictions. At this time, the Airport had been in existence for over 60 years.

During 2007-2008, the FAA worked with the County on various grant compliance issues (e.g., easements). As part of that review, the FAA identified the runway restrictions as a compliance issue. As a result, in November 2008, the County repealed the runway restrictions. However, the Town has not repealed the July 2006 ordinances.

The FAA has identified the Valkaria Airport as part of the National Plan of Integrated Airport Systems (NPIAS), which identifies more than 3,400 existing and proposed airports that are significant to national air transportation and thus eligible to receive Federal grants under the AIP. The County recently submitted a pre-application for its first AIP grant – for $101,307 in AIP non-primary entitlement funds for several airport development projects. According to the County, the Airport receives Florida Department of Transportation grants, which require the Airport to maintain federal funding eligibility. The Airport has 67 based aircraft and about 33,000 operations per year.

In your June 4 letter, you state that on June 1, the Town approved on first reading an amendment that would amend and modify section 62-1572, Chapter 62, of the Town's land development regulations (Government Managed Lands (GML)), providing for limitations on activities conducted within the Town's local zoning district, and prohibiting (1) commercial flight training or instruction, and (2) commercial flight training or instruction schools, from being based within the Town's local zoning district. The Airport is located within the zoning district. You state in your letter that the ordinance provides a grandfather provision which protects existing current uses.

Specifically, the Town's June 1 ordinance provides:

> Section 1. Section 62-1572(3), Conditional Uses, is hereby amended by adding a new subsection (A) to read as follows:
>
> "(A). Additional limitations for Airports and aviation related activities.

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[1] Parallel requirements are found in the Airport Improvement Program (AIP) grant assurances. See 49 U.S.C. § 47107(a).

(i) No commercial flight training/instruction or commercial flight training/instruction schools shall be based in the GML zoning district;
(ii) For purposes herein the term *flight training/instruction* shall mean the giving or receiving of instruction in learning to pilot an aircraft;
(iii) For purposes herein the term *flight training/instruction school* shall mean any person, firm, corporation or other entity that provides *flight training/instruction*;
(iv) For purposes herein the word *commercial* means the sale, service or solicitation of any item or service, for a set fee or donation, tangible or intangible;
(v) The provisions of this ordinance shall not apply to any uses prohibited herein that were lawful before the effective date of this ordinance.

As a basis for the ordinance, the Town cites both noise and air safety concerns. In your April 9 letter, you state that "[m]ost of the complaints [concerning flight activity at the Airport] revolve around noise and nuisances created by aircraft, namely by flight schools of the Airport." You also state that homeowners "have been victimized and harassed by the noise associated with certain low flying aircraft over or near their property causing the following disturbances: (1) unsafe and dangerously low flights[2]; (2) noise, vibrations and prop-wash" causing interference with "telephone conversations," "homeowner's ability to enjoy out of doors activities," "ability to sleep," "television viewing," and causing "homeowners to suffer annoyance, loss of sleep, lost enjoyment of their property, physical discomfort, mental stress and emotional upset."

In the ordinance's introductory section, the Town states that:

- "the Town continues to receive complaints from its citizens concerning activity at the Valkaria Airport,"
- "there are increased safety concerns if commercial flight training/instruction schools are allowed to be based out of the Valkaria Airport," and
- the ordinance's limitations "will improve the quality of life of the general public as well as neighborhoods immediately surrounding GML zoned land; improve safety of the residents of the Town; and otherwise provide for the comfort, well being of the citizens of the Town...."
- "the Town Council in providing for the health, safety and welfare of its citizens finds that the Town should limit activities that occur in the GML zoning district."

Legal Framework

The Federal Government has preempted the areas of airspace use, management and efficiency, air traffic control, safety, navigational facilities, and the regulation of aircraft noise at its source. 49 U.S.C. §§ 40103, 44502, 44715, and 44721. This Federal regulatory

[2] If Town residents believe that certain aircraft are operating in an unsafe manner, they should immediately contact the FAA's North Florida Flight Standards District Office at 407-812-7700, 7701.

scheme is deemed to be pervasive, intensive and exclusive and vested solely in the FAA. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). The court left the door open to noise regulations imposed by municipalities acting as airport proprietors, however, based on such municipalities legitimate interest in avoiding liability for excessive noise generated by the airports they own. Thus, the task of protecting the local population from airport noise has fallen to the agency, usually the local government, that owns and operates the airport.

While the Federal Government's exclusive statutory responsibility for noise abatement through regulation of flight operations and aircraft design is broad, the noise abatement responsibilities of state and local governments, such as the Town of Grant-Valkaria, through exercise of their basic police powers, are circumscribed. The scope of their authority has been most clearly described in negative terms, arising from litigation over their rights to act.

The chief restrictions on state and local police powers arise from the exclusive Federal control over the management of airspace. Local, nonproprietor authorities have been long prevented by Federal preemption of authority in the area from prohibiting or regulating overflight for any purposes. American Airlines v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968). That principle was found in 1973 to include any exercise of police power relating to aircraft operations in City of Burbank. In two subsequent cases, courts determined that the constitutionality of state airport noise regulations depended upon whether they sought to directly control aircraft noise or mitigate its effects. See Air Transport Association v. Crotti, 389 F. Supp. 58 (N.D. Cal., 1975), and Minnesota Public Lobby v. Metropolitan Airport Commission, 520 N.W. 2d 388 (Minn. 1994).

In 1981, the Ninth Circuit Court of Appeals addressed a measure that the state required an airport proprietor to implement in order to comply with the airport noise standards upheld in Crotti. In San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982), the State of California sought to require the Port District, as owner of Lindbergh Field, to extend a curfew. The State made extension of the curfew a condition of the variance needed to continue to operate the airport, which was not in compliance with California noise standards. Like the curfew in Burbank, the court found that the State's curfew impinged on airspace management by directing when planes may fly in the San Diego area, and on Federal control of aircraft noise at its source by restricting the permissible flight times of aircraft solely on the basis of noise. The court explained that the Federal government has only preempted local regulation of the source of noise, not the entire field of aviation noise. The effects of noise may be mitigated by state and local government independently of source noise control. "Local governments may adopt local noise abatement plans that do not impinge upon aircraft operations." 651 F.2d at 1314. The court declined to interpret the 1976 Aviation Noise Abatement Policy as evidence that the Federal Government had abdicated its duties to regulate aircraft noise or for the proposition that states may use their police power to coerce political subdivisions to use proprietary powers. The court also found that the State of California was not a proprietor of Lindbergh Field, and thus could not rely upon Burbank's proprietor exception permitting airports utilizing their proprietary powers (rather than police powers) to enact reasonable,

nonarbitrary, and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport.

Lower federal court decisions are consistent after Burbank in concluding that local noise control regulations are preempted. See, e.g., Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F. Supp. 678 (N.D.N.Y. 1989), aff'd., 621 F.2d 227 (local ordinance regulating noise levels and flight paths is preempted); Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983) (non-proprietor imposed curfew preempted); United States v. City of Blue Ash, 487 F. Supp. 135 (S.D. Ohio 1978) (local ordinance prescribing aircraft flight patterns preempted); Price v. Charter Township of Fenton, 909 F. Supp. 498, 505 (E.D. Mich. 1995)(horsepower of aircraft and frequency of flights); Burbank-Glendale Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1339 (9th Cir. 1992)(nonproprietor jurisdictions may not abuse their land use powers by delaying a safety project and withholding a building permit); and Command Helicopters, Inc. v. City of Chicago, 691 F. Supp. 1148 (N.D. Ill. 1988)(helicopter flight restrictions). See also Country Aviation, Inc. v. Tinicum Township, 1992 WL 396782 (E.D. Pa. 1992). The cases continue to confirm that state and local police power regulation of aircraft noise and safety is Federally preempted when it impinges on airspace management, aircraft flight, and operations.

A case involving the Dillant-Hopkins Airport, owned and operated by the City of Keene, New Hampshire, but located within the Town of Swanzey, is instructive. The United States Attorney for the District of New Hampshire had requested authority from the United States to intervene but the case settled so intervention was not necessary. City of Keene v. Town of Swanzey, Civil No. 00-242-JD, U.S.D.C, D.N.H. (2000-2001); see also Green River Aviation, Inc. v. Town of Swanzey, Docket Nos. 99-E-069 and 99-E-076, Sullivan County Superior Court, State of New Hampshire, Order of Judge Robert E.K. Morrill (July 3, 2000). Here, Green River Aviation, a lessee of the Keene Airport, requested site plan approval from Swanzey to operate a helicopter flight school at the Keene Airport. The Town denied the application due in large part to concerns over helicopter noise. Green River appealed Swanzey's denial of a site plan application to the New Hampshire Superior Court. On April 24, 2000, the Court initially upheld the decision of Swanzey's Planning Board denying Green River's application. Subsequently, Keene sued Swanzey in Federal district court, raising federal preemption concerns. On May 25, 2000, Federal Magistrate Judge James R. Muirhead issued a Report and Recommendation concluding that Swanzey should be enjoined from taking any action to restrict Green River's or Keene's flight operations at the Airport, because Swanzey's denial of Green River's site plan application on the basis of helicopter noise was preempted by federal law. On July 3, 2000, the Superior Court then reversed itself and held that the Swanzey Planning Board's denial of Green River's application based on helicopter noise was void because of federal preemption ("...Green River merely sought to use a building at the Airport to facilitate its helicopter flight training. Therefore, the Town of Swanzey could not use its police powers to hinder approval of Green River's site plan..."). Swanzey did not appeal this order and it became final.

In January 2001, Keene, Swanzey, and the New Hampshire Department of Transportation entered into a Consent Decree settling Keene's lawsuit against Swanzey. Judge Morrill's July 3, 2000 Order (finding preemption) and Judge Muirhead's May 25, 2000 Report and

Recommendation were incorporated into the Consent Decree. The parties to the Consent Decree acknowledged that subject to the laws of the United States, Keene, acting in its capacity as owner and operator of the Airport, shall have authority to control and regulate flight operations at the Airport, and that the flight operations are exempt from Swanzey's zoning ordinances, subdivision regulations, site plan regulations, and any other Swanzey ordinance, rule, or regulation. The parties also acknowledged that Keene has sole and exclusive zoning and land-use authority to control the siting of any new or the expansion or relocation of any existing ground facilities at the Airport. All ground facilities (i.e., facilities used in air navigation, including airports, landing areas, any airport structures) were exempt from Swanzey's regulation.

Aviation safety is similarly preempted. The Federal Aviation Act of 1958, as amended and recodified, 49 U.S.C. 40101, et seq., was enacted to create a "uniform and exclusive system of federal regulation" in the field of air safety. Burbank, 411 U.S. at 639. The FAA Act was "passed by Congress for the purpose of centralizing in a single authority-indeed, in one administrator-the power to frame rules for the safe and efficient use of the nation's airspace." Air Transport Association of America, Inc. v. Cuomo, 520 F.3d 218, 224 -225 (2d Cir. 2008), citing Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960); see also British Airways Bd. v. Port Auth. of N.Y. & N.J., 558 F.2d 75, 83 (2d Cir. 1977) ("[The FAA] requires that exclusive control of airspace management be concentrated at the national level."). Congress and the FAA have used this authority to enact rules addressing virtually all areas of air safety. These regulations include a general standard of care for operating requirements, see, e.g., 14 C.F.R. § 91.13(a) ("No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.") and extend to grounded planes and airport runways. See id. § 91.123 (requiring pilots to comply with all orders and instructions of air traffic control); id. § 139.329 (requiring airlines to restrict movement of pedestrians and ground vehicles on runways). The intent to centralize air safety authority and the comprehensiveness of these regulations pursuant to that authority have led Federal courts to conclude that Congress intended to occupy the entire field and thereby preempt state regulation of air safety. See, e.g., Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007) ("[T]he FAA preempts the entire field of aviation safety through implied field preemption. The FAA and regulations promulgated pursuant to it establish complete and thorough safety standards for air travel, which are not subject to supplementation by ... state laws."); Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6th Cir.2005), cert. denied, 547 U.S. 1003 (2006); Abdullah v. American Airlines, Inc., 181 F.3d 363, 367-68 (3d Cir. 1999).

Analysis

The Town's ordinance, based upon its police powers, prohibits commercial flight training/instruction and commercial flight training/instruction schools from being "based" at the Valkaria Airport. The ordinance would prohibit the County, the lawful owner and operator of the Airport, from leasing aeronautical space to any flight school and/or any flight instructor desiring to provide commercial flight training or instruction at the Airport. A direct effect of enforcement of the ordinance would be to restrict the type and level of flight operations (i.e., pilot training, flight instruction, etc.) that could be conducted at the Airport. It is clear from the record that through its ordinance as approved, the Town is attempting to

regulate aircraft noise, safety, and flight operations – activities that are preempted by federal law.

The Town is on the record for favoring transient aircraft operations over flight operations associated with flight schools and flight instruction. For example, according to the mayor of Grant-Valkaria, Del Yonts, "[t]he biggest concern I have, if you have the large type of flight school, rather than transient, like they have now, it would be a huge impact on the community." "Town Council opposes flight schools at Valkaria Airport: second vote to decide issue," Kimberly C. Moore, FloridaToday.Com (June 3, 2009), p.1, accessed June 3, 2009. Also, according to the ordinance's preamble, if commercial flight training/instruction schools are not allowed to be based out of the Valkaria Airport, this "will improve the quality of life of the general public as well as neighborhoods immediately surrounding GML zoned land; improve safety of the residents of the Town; and otherwise provide for the comfort, well being of the citizens of the Town...." The purpose for the Town to enforce its ordinance would be to regulate the Airport's aeronautical businesses and flight operations associated with pilot training.

However, the Town, as a nonproprietor, has no legal authority to use its police powers to regulate the type of aeronautical businesses that may be permitted to lease space at the Airport nor may the Town regulate the types of flight operations that can be conducted at the Airport, including determining whether airport users are based or transient.

The FAA considers flight instruction and pilot training to be a legitimate "aeronautical activity." FAA Order 5190.6A, "Airport Compliance Requirements," (Aug. 2, 1989), Appendix 5. Recipients of FAA grants and assistance (which includes airports transferred to civilian agencies by the Surplus Property Act) are obligated to reasonably accommodate all aeronautical activities on their public use airports. According to paragraph 4-15 of the Order, "Availability of Leased Space," the prime obligation of a federally-assisted airport is "to operate it for the use and benefit of the public." As a result, "[the airport] has the obligation to make available suitable areas or space on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public (i.e., air carrier, air charter, flight training ...) or support services (e.g., fuel storage, tie down ...) to aircraft operators. Unless the airport owner undertakes to provide these services itself, the owner has a duty to negotiate in good faith for the lease of such premises as may be available for the conduct of aeronautical activities." If adequate space is available on the airport, the airport owner is required to negotiate on reasonable terms for the lease of space needed by those activities offering flight services to the public.

As indicated above, Federal aviation law preempts local ordinances regulating flight activities (including type of aeronautical use that can be accommodated at the airport) on airport property as a means of controlling aircraft noise or safety, and to otherwise control flight operations and impede safe and efficient airspace management. Nonproprietor jurisdictions such as the Town of Grant-Valkaria have no role in determining the legal requirements affecting the operation of the airport or airport development. This would include prohibiting the basing of commercial flight schools and flight instruction at the Airport for purposes of controlling aircraft noise and safety. The Burbank court made clear

that Congress unequivocally intended that the federal government have "full control over aircraft noise, pre-empting state and local control," 411 U.S. at 633, and that this congressional intent left "no room for local curfews or other local controls." 411 U.S. at 638. As in Burbank, the nonproprietor Town is attempting to impose its will upon the airport proprietor in the form of a mandatory prospective prohibition of airport-based flight instruction and/or flight schools at the Airport. Federal law does not permit nonproprietors to use their police powers to control aircraft noise or safety. As pointed out in Gianturco, "[t]he proposition that the federal government has preempted the area of flight control regulation to eliminate or reduce noise has been accepted without contrary authority by numerous courts which have addressed the subject." 651 F.2d at 1315 (citing 13 Federal and state cases). Under the law, the airport proprietor (Brevard County) is vested with the power to promulgate reasonable, nonarbitrary, and nondiscriminatory regulations establishing acceptable noise levels for the airport and its immediate environs that do not impede the Federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce.

In addition to restricting flight activity, the Town's ordinance would have a negative impact on the County. Not only would enforcement of the ordinance interfere with the County's relationship with future aeronautical tenants, but it also could lead to the County becoming ineligible for AIP grants and placing the County in violation of its Surplus Property Act deed covenants, leading to the possibility of the United States reverting the airport. The County has an obligation to ensure that its facilities are available under equitable conditions, that the airport is available for public use on fair and reasonable terms and without unjust discrimination, and that no restriction results in the establishment of an exclusive right. For example, flight schools or instructors desiring to be accommodated on the Airport could file formal complaints against the County under 14 C.F.R. Part 16 alleging that the County was unjustly discriminating against pilot training and unlawfully creating an exclusive right by permitting grandfathered flight instruction but prohibiting any new pilot training initiated subsequent to the enforcement of the ordinance.

In various materials you have submitted to us, you have presented several arguments. First, you state that when the Town was incorporated in 2006, it adopted all existing County codes and ordinances by charter, including a County ordinance restricting 'touch and go' and 'stop and go' landings on certain runways at certain times at Valkaria Airport. You state that the County later repealed the runway restriction but that the Town kept the restriction on its books. Your argument appears to be that since it remains a Town law, the Town may enforce the provision. However, as the Town lacks authority to regulate airport operations, it is irrelevant that the Town adopted the County's runway restrictions when it became incorporated in July 2006. Although that ordinance, repealed by the County in November 2008, may still be on the Town's books, the Town lacked the power to adopt restrictions on flights and similarly lacks the power to enforce such restrictions. It may not assume the role of the County in enforcing proprietary regulations. See Gianturco, 651 F.2d 1306 (9th Cir. 1981). Only the airport proprietor has authority to propose noise abatement runway use programs for approval and implementation by the FAA. The airport proprietor further has

limited authority to adopt and enforce reasonable, nondiscriminatory restrictions on airport access.[3]

Second, your April 9 letter states that local land use regulations that regulate the intensity of use, type of aircraft, runway clear zones, set-backs, and type of operations "are all valid local regulatory concerns not federally preempted." The FAA disagrees with your assertion. Please see the legal framework section above and our discussion below of In re Commercial Airfield, 170 Vt. 595 (2000), Faux-Burhans v. County Commissions of Frederick County, 674 F. Supp. 1172 (D.Md. 1987), and City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D.Ohio 1995).

Third, in a June 2, 2009 electronic mail message to Mr. Milo M. Zonka, you provided him with legal arguments in support of the Town's position that its ordinance is not preempted by Federal law. You provided In re Commercial Airfield, 170 Vt. 595 (2000), and a three-paragraph paper, "Airport Land-use Regulation." In re Commercial Airfield, however, is distinguishable from the facts at Valkaria and has no precedential value. Here, the airport owner made certain improvements to his airport and flight activities. A crop-dusting company servicing local farms operated out of the airport. A local environmental district then advised the owner that he was required to apply for an "Act 250 permit" under a Vermont statute addressing land use and development plans. The owner objected, did not apply for a permit, and argued that the permit requirement was preempted by Federal law. The court held that the FAA has not preempted land use issues such as zoning and that there was no evidence that the mere requirement of a license is preempted by Federal law. The court first acknowledged Federal preemption of aircraft noise and safety. The court then noted that "there has been no attempt by the Environmental Board to regulate air safety or aircraft noise. The Environmental Board is simply requiring that appellant apply for an Act 250 permit." 170 Vt. At 597. The court also noted that

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[3] Under its Surplus Property Act deed covenants, the County is required to operate the Airport "for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport." Consistent with FAA Order 5190.6A, paragraph 4-8 (a)(1), (a)(2), the FAA makes "the final determination of the reasonableness of the airport owner's restrictions which denied or restricted use of the airport." As noted, the County has applied for its first AIP grant and is required as a condition of state funding to maintain its eligibility for AIP grants. In order to maintain that eligibility, the County would have to comply with the grant assurance obligation to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport" (49 U.S.C. §47107(a)(1) and Grant Assurance No. 22(a)), and "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public" (49 U.S.C. §47107(a)(1) and Grant Assurance No. 23). The grant provisions are essentially identical to the Surplus Property Act covenants. To maintain its AIP eligibility, the County would also have to comply with the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. §47521 et seq., as implemented by 14 C.F.R. Part 161. Under these authorities, if an airport desires to implement a runway use program that limits numbers or hours of operation at the airport by aircraft certificated as Stage 2 or Stage 3, then the proposed restriction must be adopted in accordance with the national program for review of airport noise and access restrictions set forth in ANCA and Part 161.

> certain conditions stipulated by an Act 250 permit may be preempted. Because Appellant has not yet taken the first step of applying for an Act 250 permit, this question is premature.
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> 170 Vt. At 597.

As discussed elsewhere, the Valkaria ordinance would restrict the types of aeronautical businesses and uses that the proprietor could permit at its airport and restrict the types of flight operations that could be conducted at the Airport. In re Commercial Airfield addresses only state permitting, not restrictions such as Valkaria's that are based on aircraft noise and safety.

The paper states that land use regulations remain in the control of local government. However, when local land use or zoning powers are utilized in such a manner as to have an effect on a preempted area, those powers are not being validly applied. You cite Faux-Burhans v. County Commissions of Frederick County, 674 F. Supp. 1172 (D.Md. 1987), in which the court held that certain zoning ordinances were not preempted by the FAA Act or the Noise Control Act. Here, Frederick County granted a special exception in 1980 under the zoning laws to the plaintiff's father-in-law to operate a private airstrip in accordance with certain restrictions on use and operation as set forth in a County zoning ordinance. Plaintiff inspected and repaired planes on the land and the strip was presumably used only by those planes being serviced. In 1983, plaintiff's father-in-law conveyed the land to plaintiff, who then improved the airport by paving the runways, upgrading a hangar that he had previously built, and registering the facility with the FAA and the state as a private airport. When plaintiff was informed in 1985 by County authorities that his use of the improved facility was still subject to the zoning restrictions, he applied for, but was denied, a public airport special exception (which would have allowed a more expanded use of the field than permitted under the zoning restrictions). He also proposed an amendment to the county zoning ordinance, which was rejected. The plaintiff did not challenge the denial of the special exception but the use restrictions that his father-in-law had agreed to years earlier. The County stated that the airstrip, in spite of the improvements, was still subject to the zoning restrictions (e.g., number and type of aircraft, setbacks, clear zones, prohibition on flight instruction).

Faux-Burhans, however, is distinguishable from the facts at Valkaria Airport and has no precedential value. Faux-Burhans involved land use regulations governing the development of land in the construction of an airport – the *creation* of a private airport from a landing strip, not an airport "otherwise open to air traffic in general." Id. at 1174. Here, the county was merely attempting to enforce the zoning requirements that had always applied to the landing strip and were conditions of its conception. In contrast, the Valkaria ordinance regulates the type of aeronautical businesses and uses that may be based at the Airport and restricts the type of flight operations that can be conducted as well; it would prohibit newly-based flight schools or flight instructors from offering flight instruction and operating aircraft for purposes of flight instruction at the Airport. The ordinance would apply a new restriction to a pre-existing (for 60 years), federally-obligated, public-use airport. Faux-

Burhans did not involve an ordinance that directly regulated aircraft businesses or flight operations. Moreover, Faux-Burhans actually held that there *is* preemption when local noise regulations "infringe [] upon the federally pre-empted regulation of navigable airspace, by directly affecting the manner in which, and the type of aircraft by which, flight operations were to be conducted from airports that were otherwise open to air traffic in general." Id. at 1174. See Price v. Charter Township of Fenton, 909 F. Supp. 498, 504-505 (E.D.Mich., 1995).

You also cite City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D.Ohio 1995) for the proposition that nonproprietor local governments may "regulate the land use within their borders, even where the land use regulation may have some tangential impact on the use of the airspace." However, your reliance upon City of Cleveland as authority for the Valkaria ordinance is misplaced. The federal district court in City of Cleveland acknowledged that local ordinances are preempted when they attempt to regulate directly the flight operations of aircraft or when they intrude on a specific grant of statutory authority to the FAA. 893 F. Supp. at 751. Because the Valkaria ordinance regulates flight operations at an existing federally-obligated airport, it cannot be characterized as having "some tangential impact on the use of the airspace." As discussed, out of concern for airport noise and safety, the ordinance regulates the type and level of flight operations (i.e., pilot training, flight instruction, etc.) that can be conducted at the Airport through prohibiting the basing of flight schools and flight instructors at the Airport.

Ordinances like Valkaria's, which seek to directly control flight operations, are governed by City of Burbank, supra, and its progeny. These cases hold that Congress unequivocally intended that the federal government have "full control over aircraft noise, pre-empting state and local control," City of Burbank, 411 U.S. at 633, and that this congressional intent left "no room for local curfews or other local controls." Id. at 638.

As the Federal magistrate judge reasoned in the Keene v. Swanzey case, although Swanzey argued that it neither enacted nor enforced an aviation noise regulation, and instead was merely applying its land use regulation to review plans to use an existing building for a helicopter school, "[i]t is quite clear from the record that through its Ordinances Swanzey has attempted to regulate aircraft noise and flight operations." City of Keene v. Town of Swanzey, Civil No. 00-242-JD, U.S.D.C, D.N.H., Report and Recommendation of Magistrate Judge James R. Muirhead (May 25, 2000), p. 11, 18-19 (citing, e.g., Swanzey's concerns with helicopter training and increasing noise levels and frequency of air traffic; and fact that there was no new construction or land use).

City of Cleveland is factually distinguishable from the present case because City of Cleveland involved not regulation of use of existing runways but regulation of proposed new runway development. In City of Cleveland, Brook Park enacted ordinances to prevent Cleveland from adding or extending runways within the existing airport boundaries unless it first obtained a conditional use permit to do so or obtained immunity from zoning ordinances. City of Cleveland is more akin to cases involving local regulation to prevent the creation of an airport, "which is a quintessential land use issue." Tweed New Haven Airport Authority v. Town of East Haven, 582 F. Supp. 2d 261, 271 (D. Conn. 2008).

To the extent that City of Cleveland stands for the proposition that nonproprietor local governments may regulate land use even where the regulation may restrict flights, then the FAA respectfully disagrees. Particularly within the boundaries of federally-obligated and regulated airports, pervasive federal regulation of aircraft noise and air safety leaves no room for local land use regulation that has the effect of limiting flights. See, e.g., Burbank Glendale Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992)(local regulation of placement of taxiways and runways at Burbank Airport federally preempted); Tweed New Haven, 582 F. Supp. 2d 261, 270-271(construction of runway safety areas at Tweed New Haven Airport federally preempted). See also United States v. City of Berkeley, 735 F.Supp. 937, 938, 941 (E.D.Mo.1990) (comprehensive federal regulation of air navigation facilities and air safety, and a specific statutory grant of authority permitted court to conclude that local regulation of the construction of air navigation facilities on land located within the confines of Berkeley was preempted).

Finally, you indicate in your June 4 letter that the ordinance includes a grandfather provision that would permit current flight schools and instructors to remain based on the Airport. However, the grandfathering of current uses does not save the provision from being Federally preempted. Any flight schools or instructors desiring to be based at the Airport for purposes of providing flight instruction on the Airport subsequent to the enactment of the ordinance would be prohibited from conducting this legitimate aeronautical activity. It makes no difference that some flight instructors may be permitted under the grandfather provision to continue to offer their services at the Airport. Because the County owns and operates a federally-obligated airport, if adequate space is available on the airport, the County is required to negotiate on reasonable terms for the lease of space needed by those activities offering flight services to the public.

In your April 9, 2009 letter, you present a series of additional questions. Those questions appear below and are followed by a response.

Question: Is Chapter 18, "Aviation," of the Brevard County Code (Attachment 1 of your April 9, 2009 letter) in compliance with FAA rules and regulations?

Answer: The version of Chapter 18 enclosed with your letter states that the County owns and operates Valkaria Airport, and that United States' "air traffic rules" shall be "deemed a controlling part of this article," and that all Congressional "laws and regulations" relating to the operation of aircraft are adopted by reference. It further states that "[i]f any provision of this article or any other ordinance of the county or any regulations promulgated under such ordinance shall be repugnant to such federal law or regulation, such federal law or regulation shall be controlling."

Section 18-83, "Aircraft Operations," subsection (3), indicating that aircraft weighing more than 12,500 pounds must have prior approval of the County to land, must be consistent with the FAA's "Weight-Based Restrictions at Airports: Proposed Policy," 68 Fed. Reg. 39,176-02 (July 1, 2003) (i.e., the restriction must be consistent with and reflect the pavement's physical weight-bearing capacity and condition).

Section 18-83, subsection (5), restricts aircraft operations by prohibiting and limiting 'touch and go' and 'stop and go' landings. Please see the response below under "May the Town regulate runway use?"

The remaining provisions of Chapter 18 appear to be consistent with FAA rules and regulations.

Question: What zoning/land use regulations may the Town impose on airports, "including a zoning restriction on the types of activities that may be restricted or prohibited from be[ing] operated out of or on airport property? For instance if flight schools are not compatible with zoning, may we prevent them from operating from airport property?

Answer: Non-proprietors such as the Town of Grant-Valkaria may only mitigate the effects of noise *independently* of source noise control. For example, local governments with zoning and land use control authority in areas surrounding airports should adopt zoning and land use measures to assure land uses that are compatible with airport noise. Non-proprietary governments lack authority to use their police powers to control aircraft noise or aviation safety and therefore may not prohibit types of aeronautical activities at existing airports that constitute part of the NPIAS. The Town may adopt zoning and land use regulations to prevent establishment of new airports.

Question: May the Town regulate runway use?

Answer. No. As discussed above, only the airport proprietor may propose noise abatement runway selection plans to the FAA for approval and implementation. As discussed, the Valkaria Airport is federally-obligated. Under its Surplus Property Act deed covenants, the County is required to operate the Airport "for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport." Consistent with FAA Order 5190.6A, paragraph 4-8 (a)(1), (a)(2), the FAA makes "the final determination of the reasonableness of the airport owner's restrictions which denied or restricted use of the airport." As noted, the County has applied for its first AIP grant and is required as a condition of state funding to maintain its eligibility for AIP grants. In order to maintain that eligibility, the County would have to comply with the grant assurance obligation to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport" (49 U.S.C. §47107(a)(1) and Grant Assurance No. 22(a)), and "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public" (49 U.S.C. §47107(a)(1) and Grant Assurance No. 23). The grant provisions are essentially identical to the Surplus Property Act covenants. To maintain its AIP eligibility, the County would also have to comply with the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. §47521 et seq., as implemented by 14 C.F.R. Part 161. Under these authorities, if an airport desires to implement a runway use program that limits numbers or hours of operation at the airport by aircraft certificated as Stage 2 or Stage 3, then the proposed restriction must be adopted in

accordance with the national program for review of airport noise and access restrictions set forth in ANCA and Part 161.

Conclusion

Based upon the information available, including your letters and attachments, the ordinance as approved by the Town Council on June 1 impermissibly regulates aviation noise and safety. As a result, it is preempted under Federal law. The Town therefore lacks the power to enforce the ordinance.

This is not a final appealable order of the Administrator within the meaning of 49 U.S.C. § 46110.

The FAA is available to discuss the contents of this letter. If you have any questions, please contact Jonathan Cross of my staff at (202) 267-3199.

Sincerely,

Daphne A. Fuller

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