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

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

F. Joseph McMackin III, Esq.
City of Naples Airport Authority General Counsel
BOND, SCHOENECK & KING, PLLC
Northern Trust Building
4001 Tamiami Trail North, Suite 250
Naples, FL 34103-3555

March 2, 2011

Robert D. Pritt, Esq.
Naples City Attorney
ROETZEL & ANDRESS
850 Park Shore Drive
Trianon Centre, Third Floor
Naples, FL 34103-3587

Re: Request for Legal Opinion Concerning Preemption of City of Naples Code Provision

Dear Messrs. McMackin and Pritt:

This letter is in response to your June 10, 2010 joint letter in which you request a legal opinion addressing whether the City of Naples is preempted under federal law from requiring the City of Naples Airport Authority (NAA) to seek approval to expand Runway 5/23 at the Naples Municipal Airport (Airport).

The Federal Aviation Administration (FAA) appreciates the opportunity to provide our views concerning this issue. Based upon the information available, including your letter and attachments, we find that federal law preempts the City of Naples, a nonproprietor, from requiring the NAA, the airport proprietor, to obtain conditional use approval under section 58-691 of the Naples City Code, "Maximum declared distance of runway," for expanding Runway 5/23. The basis for this conclusion is explained in detail below.

Background

The Naples Municipal Airport, located on 732 acres in Naples, Florida, is a two-runway, public-use airport. It is located on land that is owned by the City but leased and operated by an independent body, the City of Naples Airport Authority. In early 1942, the City of Naples and Collier County, which had purchased property jointly for use as an airport, leased the property to the U.S. Government for improvements and use as a training facility for the U.S. Army Air Corps. This took place under the auspices of an AP-4 Agreement, under the Development of Landing Areas National Defense (DLAND) Program. This was an

agreement between the U.S. Government and the airport sponsor under which the sponsor provided the land and the U.S. Government planned and constructed the airport improvements. In 1948, the Air Force declared the facility to be surplus, cancelled the lease and quitclaim, and the facility was returned to civilian use.

Collier County and the City of Naples jointly operated the airport until the County sold its interests to the City in 1958. In 1969, the Naples City Council asked the Florida Legislature to create an independent authority whose members would be appointed by the City Council. Chapter 69-1326, Laws of Florida, as amended, created the NAA as an independent body for the purpose of operating and maintaining the Airport.

On December 3, 1969, the management and operation of the Airport was transferred from the City to the NAA under lease for 99 years. The Airport facility, classified as a primary airport, serves as the base of operations for 143 aircraft and accounts for approximately 112,903 operations each year, more than 73,449 of which are itinerant. Because the FAA has identified the Airport as part of the National Plan of Integrated Airport Systems (NPIAS), it is eligible to receive federal grants under the Airport Improvement Program (AIP). FAA records indicate that the planning and development of the Airport has been financed, in part, with funds provided by the FAA under the AIP, authorized by 49 U.S.C. 47101, et seq., (Chapter 471), the former the Airport and Airway Improvement Act of 1982, (AAIA), as amended. Since 1982, the Airport has received a total of $32,636,781.00 in federal airport development assistance.

The present length of the Airport's primary runway 5/23 is 5,290 feet. This length includes a 5,000 foot runway and a 290 foot displaced threshold (i.e., aircraft can use this 290 feet for takeoff and landing roll-out, but not for the touchdown portion of landing).

In about April 2010, the NAA requested FAA approval to amend its airport layout plan (ALP) to extend the pavement of Runway 5/23 to 6,600 feet runway within the bounds of existing airport property.[1] The purpose of the extension is to restore air carrier service;[2] noise reduction and enhancing safety are further potential benefits of the proposed extension. Specifically, NAA is proposing to:

1. Recognize the already existing 290' on the southwest end of the runway;

---

[1] The FAA is currently reviewing an updated ALP dated April 2010 that depicts the proposed improvements to Runway 5/23.

[2] See, NAA's Airport Layout Plan Update 2010: "The primary focus of the Airport Authority has been the restoration of dependable commercial airline service for our community. Consequently, the single most important improvement that we can make is the construction of displaced thresholds on our primary Runway 5–23 (510' on 5 and 800' on 23). This would allow the regional jets that once served Naples intermittently to leave here during hot summer months without restricting passengers or canceling flights." ALP Update at p.1. See also, Draft Environmental Assessment for the Naples Municipal Airport Runway 5-23 Threshold Improvements and Related Work (August 2010) prepared by City of Naples Airport Authority, Naples, FL and Kimley-Horn and Associates. As discussed in the EA, "commercial air carriers require more than the existing 5,290 feet to operate efficiently from [Naples Airport]."

2. Add an additional 510' to the southwest end of the runway for a total extension of 800'; and
3. Add 800' to the northeast end of the runway.

The distance between thresholds would remain at 5,000 feet but the runway pavement would extend out 800 feet on either side (for a total of 1,600 feet). The additional runway pavement on either end of the runway could be used for takeoff and landing roll-out, but not for the touchdown portion of landing.

The FAA's approval to amend the ALP to depict the extension of Runway 5/23 is a federal action subject to the National Environmental Policy Act of 1969 (NEPA). The FAA is currently reviewing a draft Environmental Assessment (EA),[3] which assesses the environmental impacts of the proposed action. Based upon the EA, the FAA will determine whether the proposed federal action is consistent with existing national environmental policies and objectives of section 101(a) of NEPA. The FAA will integrate compliance with other applicable federal environmental laws with NEPA as part of the EA. The FAA will then determine whether to adopt the EA and issue a Finding of No Significant Impact or prepare an environmental impact statement.

The NAA realized that the requirement for a conditional use approval under section 58-691 created a potential obstacle if it applied to NAA as part of the City's approval to update the airport master plan. Section 58-691 provides:

> **Sec. 58-691. Maximum declared distance of runway.**
>
> The maximum declared distance of each runway shall be 5,000 feet. For purposes of this provision, "declared distance" shall mean the distance the Naples Airport Authority declares for an aircraft's (1) take-off run (the runway length declared available and suitable for the ground run of an airplane taking off), and (2) landing distance available (the runway length declared available and suitable for a landing airplane). **Any increase to declared distance shall require city council approval. Extension of the existing stop way or additional stop ways, or the additional paving of runways or safety zones, shall require conditional use approval.** (Emphasis added).

Thus, if the NAA wants to increase the declared runway distance (i.e., runway length), the NAA is required to obtain "conditional use approval" from the City Council. The NAA proceeded with its planned runway extension by submitting to the City a Utilization Plan Update (Site Plan Petition 10-SP1) pursuant to section 58-682(b) of the City of Naples Code of Ordinances. The City treated NAA's petition as a Site Plan Amendment, specifically an amendment to the Airport's Master Plan as contemplated by the City's Airport Zoning Regulations. However, according to your letter, the NAA declined to apply for conditional

[3] NAA issued a Draft EA for public and agency review in August 2010. A public hearing was held on September 8, 2010. The FAA is currently reviewing a Preliminary Final EA, which includes public and agency comments and responses prepared by NAA.

use approval under section 58-691 on the ground that the code provision is federally preempted.

The initial public hearing on the Utilization Plan Update was held on June 2, 2010, when the City Council voted in a regular meeting to adopt NAA's Site Plan Petition 10-SP1 relating to the 2010 Utilization Plan for the City of Naples Airport pursuant to section 58-682(b) of the Code of Ordinances. At that time, the City Council adopted Resolution No. 10-12689, which had the effect of approving portions of the 2010 Utilization Plan Update, but continuing the runway extension/displaced threshold portion of the Plan pending receipt of a legal opinion from the FAA on the preemption issue. The City's vote was intended to enforce its ordinance requiring City approval for any extension of a runway beyond 5,000 feet. The City Council deferred action on and "excepted" that portion of the resolution pertaining to runway thresholds, stating,

> [t]hat as to #2, Runway 5/23 (displaced thresholds), this portion of the Petition is continued in order to allow the city attorney and airport legal counsel to seek an opinion from the Federal Aviation Administration (FAA) as to whether it is preempted to Congress/FAA by federal law.
>
> Resolution 10-12689, City of Naples, June 2, 2010, p. 1.

Thereafter, the City and the NAA submitted their joint request for a legal opinion on whether section 58-691 is preempted.

The FAA appreciates the opportunity to provide its views concerning this issue. Based upon the information available, including your letter and attachments, we find that federal law preempts the City of Naples, a nonproprietor, from requiring the NAA, the airport proprietor, to obtain conditional use approval under section 58-691 of the Naples City Code for expanding Runway 5/23.

Legal Framework

Federal law preempts 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 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). In Burbank, the court struck down a curfew imposed by the City in the exercise of its police power at an airport not owned by it. The court stated that, "... the pervasive nature of the scheme of Federal regulation of aircraft noise leads us to conclude that there is Federal preemption." 411 U.S. at 633. The national character of the subject matter also supported preemption. 411 U.S. at 625. "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." 411 U.S. at 639. Although control of noise is deep-seated in the police power of the states

(411 U.S. at 638), the Court found that Congress unequivocally intended that the Federal Government have "... full control over aircraft noise, preempting state and local control." 411 U.S. 625, 627-28, 639.

The Court, however, left the door open to noise regulations imposed by municipalities acting as "airport proprietors" 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.

Traditionally, airport proprietors own and operate the airport; promote the airport; and have the power and authority to control airport noise, including the power to acquire airport land, assure compatible land use, and control airport design, scheduling, and operations. However, these powers are subject to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, and unreasonable, arbitrary, and unjust discriminatory rules that advance the local interest, other statutory requirements, and interference with exclusive federal regulatory responsibilities over safety and airspace management.

Because nonproprietors have no proprietary interest in an airport, they may not rely upon the proprietor exception. Nonproprietors may only mitigate the effects of airport noise independently of source noise control. Nonproprietors may protect their citizens through land use controls and other police power measures not affecting airspace management or aircraft operations. For example, nonproprietors may use their zoning and land use control authority in areas surrounding airports to adopt zoning and land use measures to assure land uses are compatible with airport noise.

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 certain airport noise standards. 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 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) (nonproprietor 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)(plaintiffs challenged township's regulation of frequency of certain noisy flights at plaintiff's airport; court held township ordinance to be federally preempted because it attempted to regulate the horsepower of aircraft and frequency of warbird 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.

In City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D. Ohio 1995), the court addressed nonproprietor ordinances designed to impede airport development. To meet projected traffic increases and to continue operating safely, Cleveland Hopkins International Airport proposed construction of a new runway, much of which would be located on land within neighboring Brook Park. Soon thereafter, Brook Park enacted ordinances that required Cleveland to obtain a conditional use permit for any new runway construction within Brook Park. Cleveland challenged the ordinances seeking a declaratory judgment that the ordinances violated the Supremacy Clause, arguing that the Federal Aviation Act of 1958, as amended, and the Airport and Airway Improvement Act of 1982, as amended, preempted Brook Park's land use and zoning laws. The district court held that there was no conflict preemption, no field preemption, and that compliance with the ordinances would not frustrate any federal purpose. The City of Cleveland appealed to the Sixth Circuit Court of Appeals.

The United States disagreed with the court's holding and filed an amicus curiae brief, a reply brief, and a supplemental brief in the Sixth Circuit Court of Appeals in support of Cleveland's attempt to overturn the lower court decision. The United States argued that contrary to the district court's belief, the Federal Government has a comprehensive role in both airspace regulation and public airport development, and that the court erred in its analysis of federal noise control law and Brook Park's noise ordinance. However, the case was settled and no appeals court decision was issued.

In its amicus brief, the United States took the position that the expansion of an airport is a matter within the FAA's jurisdiction and interest.[4] This was based upon the statutory scheme in the former Airport and Airway Improvement Act of 1982, now recodified at 49 U.S.C. 47101, et seq. (Chapter 471). Chapter 471 provides the federal government substantial oversight responsibilities in all aspects of airport planning and development, even where federal funding is not provided. For example, the highest priority among Chapter 471's enumerated policies is "the safe operation of the airport and airway system." 49 U.S.C. 47101(a)(1). Congress has also directed Chapter 471 to "be carried out consistently with a comprehensive airspace system plan ... to maximize the use of safety facilities, including numerous runway enhancements. 49 U.S.C. 47101(f). Proposed airport development under Chapter 471 must comply with numerous FAA standards, set forth in FAA regulations and policies governing, among other things, runway placement and design. See, e.g., FAA Order 5100.38C, Airport Improvement Program (AIP) Handbook. In addition, Congress intended the extensive FAA review process to be the forum in which state and local communities are to express their views on airport development projects. See, e.g., 49 U.S.C. 47106(c). If a grant is approved under Chapter 471, the sponsor must provide numerous assurances to the FAA requiring, among other things, that the sponsor maintain an ALP and will not make any alteration of the airport without FAA's prior approval. 49 U.S.C. 47107(a)(16).

Thus, the expansion of a federally-obligated airport is a matter within the FAA's jurisdiction and interest. See e.g., Burbank Glendale Pasadena Airport Authority, (local regulation of placement of taxiways and runways at Burbank Airport federally preempted); Tweed-New Haven Airport Authority v. Town of East Haven, 582 F. Supp. 2d 261, 270-271 (D. Conn. 2008) (construction of runway safety areas at Tweed New Haven Airport federally preempted); 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 (implied and conflict preemption discussed)).

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 Federal Aviation 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 CFR § 91.13(a) ("No

[4] See, e.g., Dallas-Fort Worth Int'l Airport Board v. City of Irving, 854 S.W.2d 161, 168 (Tex. Ct. App.) ("[n]o one disputes that federal laws preempt local regulation within the boundaries of an airport"), vacated as moot, 868 S.W.2d 750 (Tex. 1993).

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 airports 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

At issue is whether section 58-691 of Naples City Code, "Maximum declared distance of runway," is federally preempted. On June 2, 2010, the City Council found that the criteria for granting NAA's site plan petition 10-SP1 (relating to the 2010 Utilization Plan and proposed runway extension) "have been met as to all portions of the application except for #2, Runway 5/23 displaced thresholds...." Resolution 10-12689 (June 2, 2010), p. 1. As to #2, this portion of NAA's petition was continued in order to allow for the City and NAA to seek an opinion from the FAA on whether section 58-691 is federally preempted.

Section 58-691 provides that

> [t]he maximum declared distance of each runway shall be 5,000 feet[,]" [that] [a]ny increase to declared distance shall require city council approval [, and that] the additional paving of runways or safety zones, shall require conditional use approval.

Due to its concerns that section 58-691 is preempted, the NAA declined to apply for conditional use approval as contemplated in the provision.

Simply stated, the code provision provides that the nonproprietor City, as opposed to the proprietor NAA, has the authority to decide whether runway 5/23 may be expanded (and, apparently, any taxiway, displaced threshold, stop ways, or Runway Safety Area as well) beyond 5,000 feet, even though such actions would occur within the boundary of the existing airport property.

A direct effect of the City's enforcement of the provision is to restrict the type and level of flight operations that can be conducted at the Airport. It is axiomatic that shorter runways restrict larger and/or faster aircraft. Therefore, a limitation on the length of a runway is also a limitation on the types of operations and the types of aircraft that can be operated at the Airport. The record indicates that through its ordinance, as approved, the City is attempting to regulate aircraft noise, safety, and flight operations with its police powers. For example, the stated policy of the City is to "protect the quality of life in the community by implementing and enforcing appropriate and legal noise abatement procedures . . .." City of

Naples Policy 7-3. In addition, the City proposed a policy in 1997 to "[m]anage the airport to maintain the "status quo" with respect to numbers of based aircraft and the number and type of aircraft operations." November 10, 1997 Memo from Kenneth B. Cuyler, City Attorney, to Mayor Bill Barnett and the City Council, p. 9. Such regulation, however, is federally preempted.

Under federal law, the City, as a nonproprietor, has no legal authority to use its police powers to regulate the conditions, including prescribing runway length, that limit the type of aeronautical activity at the Airport, nor may the City regulate the types of flight operations that can be conducted at the Airport, directly or indirectly. Under federal law, only the airport proprietor may regulate the airport in this manner and it must do so consistent with federal law.

The Supreme Court in Burbank held that Congressional intent of the Federal Aviation Act of 1958 left "no room for local curfews or other local controls." 411 U.S. at 638. As in Burbank, the nonproprietor City of Naples is attempting to enforce a police power measure that requires NAA, the airport proprietor, to obtain conditional use approval for the runway expansion. 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, only the airport sponsor, in this case the NAA, may determine the types of aeronautical activities that will be conducted at the airport, the runway configuration and length, and so forth.[5]

As stated in Gianturco, "[l]ocal governments may adopt local noise abatement plans that do not impinge upon aircraft operations." 651 F.2d at 1314. The problem here, of course, is that the City's ordinance does just that – it reaches inside the Airport boundaries and would prevent the expansion of the existing primary runway, which would better accommodate scheduled service by regional jet aircraft.[6]

According to the NAA's EA, on warm days, predominant in the Naples area, the current limiting runway length at the Airport caused air carriers in the past to reduce their payload (i.e., passengers) in order to meet the operational safety standards of the newer regional jet aircraft. Consequently, the new regional jets were reassigned to serve airports which could provide adequate runway length and the Naples Municipal Airport lost its air carrier service. The proposed extension – allowing additional takeoff length – would allow larger aircraft, including commercial regional jet aircraft and business jets, to increase their payloads and thus avoid weight penalties during the hot summer months. By preventing the lengthening

---

[5] See April 25, 2010 Memo from Robert D. Pritt, City Attorney, to A. William Moss, City Manager, discussing whether the City may regulate NAA's runway with its zoning powers. "As to runway length and configuration, the final decision would be that of the Federal Aviation Administration ... [t]he City is not the decision-maker." See also May 11, 2010 Memo from Robert D. Pritt, City Attorney, to Hon. Bill Barnett, Mayor: "... it would appear that the conditional use ordinance is preempted by federal law and regulations."

[6] According to the NAA's Draft EA, commercial air carriers require more than the existing 5,290 feet to operate efficiently from the Naples Municipal Airport.

of the primary Airport runway, the City Council appears to be attempting to ensure that scheduled air carrier service, and its associated noise, not return to the Airport. The City Council is essentially dictating the types of aircraft that may serve the Naples Municipal Airport. This, however, it cannot do. Burbank, Gianturco, Burbank Glendale Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992), Tweed-New Haven Airport Authority, 582 F. Supp. 2d 261, 270-271 (D. Conn. 2008), and United States v. City of Berkeley, 735 F.Supp. 937, 938, 941 (E.D.Mo.1990).

In short, in the words of the court in Price v. Charter Township of Fenton, "[n]obody denies that [the City of Naples] has the ability to create zoning laws so that airports are not placed snugly between hospitals, churches, schools, cemeteries, and the like ... Faced with the ongoing operations of [the Naples Airport], however, [the City of Naples] may not, under the pretense of its zoning power, attempt to regulate those flight operations to quell airplane noise. The power to create such restrictions, regardless of whether they are called zoning laws, is relegated exclusively to the federal government under Burbank." Price, 909 F.Supp. at 503-504.

The attachments to your letter include a submission by Mr. William May, who argues in favor of the City's powers to regulate aeronautical activities. Mr. May cites City of Cleveland 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."

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 or control operations, then the FAA respectfully disagrees. As noted above, 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.

Finally, the attachments also include a June 9, 2010 legal opinion from Joseph Karaganis, Esq. It appears that the City of Naples requested Mr. Karaganis to provide comments on its proposed draft letter to FAA counsel concerning the authority of the City and the FAA in relation to the proposed runway expansion. Mr. Karaganis questions whether there is any evidence – express or implied – that Congress intended to preempt state law authority and control over the decision whether to build a runway extension. Mr. Karaganis opines that "there is no such evidence of a Congressional intent to preempt the sovereign authority of the State of Florida (and its political subdivisions ...) to make the decision whether or not to build the runway extension." Mr. Karaganis then cites National Helicopter Corp. v. City of New York, 137 F.3d 81 (2d Cir. 1998), as holding that the city as proprietor of a heliport was not preempted from imposing noise and curfew restrictions on operations of a lessee helicopter operator. However, National Helicopter has no relevance here since the entity attempting to regulate airport development is not the proprietor, NAA, but the nonproprietor City of Naples. This case is actually consistent with FAA's views.

In addition, based upon the case law discussed and cited above, the FAA respectfully disagrees with Mr. Karaganis' opinion that "[t]he decision as to whether to allow (or not

allow) the expansion of the runway at Naples airport is strictly a matter of state law and is clearly within the authority of the Naples City Council."

Conclusion

Based upon the information available, including your letter and attachments, the City of Naples is preempted from enforcing section 58-691 to prevent NAA from expanding runway 5/23.

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

I hope that this response will be helpful to you. If you have any questions, please do not hesitate to contact me at 202-267-3199.

Sincerely,

Jonathan W. Cross
Manager, Airport Law Branch
Airport and Environmental Law Division