

2007

Not in My Bank Yard - The Federal-Local Conflict over General Aviation Airports

Matthew Snyder Brysacz

Recommended Citation

Matthew Snyder Brysacz, *Not in My Bank Yard - The Federal-Local Conflict over General Aviation Airports*, 72 J. AIR L. & COM. 561 (2007)
<https://scholar.smu.edu/jalc/vol72/iss3/5>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

NOT IN MY BACK YARD! THE FEDERAL-LOCAL CONFLICT OVER GENERAL AVIATION AIRPORTS

MATTHEW SNYDER BRYSA CZ*

IN 2003, AS A culmination over the brewing dispute over what to do with the downtown-Chicago Meigs Field Airport, Mayor Richard Daley took matters into his own hands, nearly literally.¹ He ordered a construction crew to begin tearing up the runways at the abandoned airport in the middle of the night without seeking approval or providing notice to the Federal Aviation Administration (FAA).² This dispute recently finalized its progress through the courts, resulting in the City of Chicago reimbursing \$1 million to the FAA and paying a fine of \$33,000.³ This slap on the wrist paled in comparison to the tax revenues that Chicago can realize from the redevelopment of this valuable land. However, the City of Chicago lost a very valuable public-use, general aviation airport, which had been used for years as a port for corporate and private jet traffic bringing business into the heart of downtown Chicago. Furthermore, the nation lost a valuable reliever airport for the busiest airport in the nation, O'Hare International.⁴

Altercations like the Meigs Field dispute are being repeated, albeit not as surreptitiously, throughout the United States on a regular basis. From 2000 through 2004, an average of sixty public-use landing facilities were closed each year.⁵ Disputes over

* Matthew Snyder Brysacz is a JD candidate for the class of 2008 at Southern Methodist University Dedman School of Law.

¹ Nat'l Bus. Aviation Ass'n, Inc., Testimony of David Vornholt Before the Senate Illinois General Assembly (May 12, 2003), <http://web.nbaa.org/public/govt/testimony/20030512.pdf> [hereinafter Vornholt Testimony].

² *Id.*

³ David Esler, *Why Your Community Needs Its Airport*, BUS. & COM. AVIATION, Aug. 1, 2006, at 56.

⁴ FED. AVIATION ADMIN., NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (NPIAS), 2007–2011, REPORT TO CONGRESS 8 (2006) [hereinafter NPIAS].

⁵ AIRCRAFT OWNERS AND PILOTS ASS'N, AOPA'S GUIDE TO AIRPORT NOISE AND COMPATIBLE LAND USE 12 (1999) [hereinafter COMPATIBLE LAND USE].

redeveloping general aviation airports highlight a major weakness in our national air transportation system. Under the current regime, individual communities have the power to deplete a significant resource of the nation's air transportation system: airport capacity. Congress and the FAA, constrained by notions of federalism, and economically outmatched by the private development community, are not in a position to impede the destruction of valuable airport capacity in areas where it is most needed. Is this current balance legally proper? Does our current system of regulation encourage, rather than obstruct, the efforts of the local community to shutter its public-use airports?

This Comment will explore the growing need for airport capacity in the United States, and demonstrate how the legitimate actions of local governments and private individuals can hinder the FAA's long-term plan for this growth. I will give a brief overview of the economic scenario which makes airport redevelopment viable.⁶ I will review the federal efforts to enhance the airport system in the United States, through the Aviation Trust Fund, Airport Improvement Program Grants, and National Plan of Integrated Airport Systems (NPIAS), explaining both the present state of airport capacity in the United States and addressing several economic and technological factors that are driving that growth toward a need for additional capacity at reliever airports.⁷ Within this discussion, I will examine the FAA's leverage under its current system of regulations and initiatives.⁸ I will then outline the legal framework which allows a community to be the final arbiter of what happens to its airport facility, addressing recent developments which strengthen a local community's power to resist the federal government's initiatives.⁹ Finally, I will examine the initiatives at the federal, state, and local level to establish workable airport land-use policies and comment on the efficacy of these various initiatives.¹⁰ I will then propose a framework for changes that can shift power back to the FAA, so that it can meet our airport capacity needs now and in the future.¹¹

⁶ See Part I, *infra* text accompanying notes 12–44.

⁷ See Part II, *infra* text accompanying notes 45–150.

⁸ See Part II(c), *infra* text accompanying notes 113–150.

⁹ See Part III, *infra* text accompanying notes 151–252.

¹⁰ See Part IV, *infra* text accompanying notes 253–312.

¹¹ See Part V, *infra* text accompanying notes 313–315.

I. ECONOMIC FORCES OF REDEVELOPMENT

First, it is helpful to look at some of the economic forces giving rise to situations like Meigs Field. Many general aviation airports which were once in rural areas increasingly find themselves in the midst of suburban expansion.¹² In addition, there are a number of general aviation airports directly situated in urban areas, such as Meigs Field in Chicago or Burke Lakefront Airport in Cleveland.¹³ Real estate developers crave the contiguous open-space that an airport can provide, particularly in the midst of heavily-populated areas.¹⁴ In addition, many general aviation airports are not profitable for the agencies that operate them, and are a drain on a community's resources, whereas new residential and commercial developments can be a source of revenue for those communities.¹⁵

The economic forces pushing communities to look at redeveloping their general aviation airports are particularly strong in California, where land values have skyrocketed over the past several decades.¹⁶ Two examples are Buchanan Field in Concord, California and Oceanside Municipal Airport in Oceanside, California (near San Diego).¹⁷ Concord is a community on the east side of San Francisco Bay and home to satellite offices of several Fortune 500 companies.¹⁸ Buchanan Field is a 495-acre airport in the heart of Concord's business district.¹⁹ It is a base to 504 aircraft, including twenty-seven business jets, houses the aviation operations of several local law enforcement agencies, is home to thirty-eight aviation and non-aviation businesses, and supports 130,000 movements per year.²⁰ The proposal for redeveloping the airport was first put forward in January 2004 and included 6,000 tract houses or condos, a college campus, commercial property, and recreational facilities to support the new residents.²¹ The proposal would bring a \$2.6 billion

¹² David Esler, *How to Save Your Airport*, BUS. & COM. AVIATION, Mar. 1, 2005, at 69.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Chris Tribbey, *FAA Chief Says Oceanside Airport Should Stay Open*, N. COUNTY TIMES, Feb. 7, 2006, at A11.

¹⁶ Esler, *supra* note 12, at 69.

¹⁷ *Id.*; Tribbey, *supra* note 15, at A11.

¹⁸ Esler, *supra* note 12, at 69.

¹⁹ *Id.*

²⁰ *Id.* A movement at an airport is a take-off or landing. *Id.*

²¹ *Id.*

investment into Concord and Contra Costa County (which actually operates the airport).²²

While the Concord city council and many citizens are generally in favor of the development, the proposal faces opposition from not only the FAA, but also from several community groups.²³ Interestingly, some of the same community groups who had previously complained about the noise from Buchanan Field have now rallied around the airport voicing concerns about the additional congestion that such a large development would bring to downtown Concord.²⁴ For its part, the FAA likes Buchanan for the same reasons that private developers do – location, location, location.²⁵ Buchanan serves as a reliever airport for both Oakland International and San Francisco International Airports, and according to the FAA, the closure of Buchanan would shift general aviation traffic back to those airports and increase the congestion at those two busy airports.²⁶

In response to the FAA's concerns, the proponents have put forward two plans for relocating the airport.²⁷ One calls for re-investing in Byron Field, which is in a largely rural community twenty miles from Buchanan.²⁸ The FAA rejected this plan because the added distance reduces Byron's applicability as a reliever.²⁹ A second proposal is to move the airport to vacant land which had been a landfill a mere five miles from Buchanan.³⁰ Clean-up and structural stability concerns weigh against this option.³¹

A second example of the California onslaught on general aviation airports is taking place in Oceanside, California.³² In September 2005, the Oceanside city council voted 3-2 to conduct a study on the best use of several acres of airport land that it deemed unnecessary for the current aviation operations.³³ The

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* A reliever airport is defined as an airport which off-loads general aviation traffic from commercial service airports in major metropolitan areas. NPIAS, *supra* note 4, at 8 (2006).

²⁷ Esler, *supra* note 12, at 69.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Tribbey, *supra* note 15, at A11.

³³ *Id.*

Oceanside airport was losing \$50,000 annually and could not support additional revenue from aviation-based rents with its current facilities.³⁴ The study determined that a 14.7 acre plot on the northern edge of the airport property would bring \$20 million if used for residential development or \$6 million for commercial development.³⁵ During the course of the study, the retailer Costco came forth with a proposal to build a store on the north side of the airport that would require relocating a drainage pond onto the airport's property.³⁶ The Costco store would bring \$1 million in annual sales tax revenues to the city of Oceanside, and the proposal included a \$6 million investment by Costco into new hangar space at the airport, allowing the airport to increase its aviation-based revenues.³⁷

While it would seem that the FAA would have no reason to object to the Oceanside proposal, since it allows the airport to continue operating and arguably increases the availability of aviation services to the general aviation community, the FAA is resisting the planned development.³⁸ As it turns out, the airport land which is to be used as a drainage pond under the Costco proposal was purchased in 2003 with a \$2.5 million federal grant from the Airways and Aviation Trust Fund.³⁹ The grant came with a covenant that the land be used for "aviation purpose" in perpetuity.⁴⁰ The FAA's position is that if the land is to be used for anything other than aviation purposes, the airport operators (the city of Oceanside in this instance) would have to show a "net benefit to aviation," and would have to repay the federal grant money PLUS any increase in the value of the land.⁴¹ The Buchanan Field property also has the same restrictions since the land on which it sits was granted to the airport authority under the authority of the Surplus Property Act of 1944.⁴² The would-be Buchanan developers are perhaps in a worse situation since there is no precedent of the FAA releasing an entire airport sit-

³⁴ *Id.*

³⁵ David Sterrett, *Oceanside Airport Officials Question Costco Idea; Critics Say FAA Won't Allow Store Near Airfield*, N. COUNTY TIMES, Oct. 4, 2006, at A3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Tribbey, *supra* note 15, at A11.

³⁹ *Id.*

⁴⁰ Sterrett, *supra* note 35, at A3.

⁴¹ Tribbey, *supra* note 15, at A11.

⁴² 49 U.S.C.A. §§ 47151-53 (West 2007); Esler, *supra* note 12, at 69.

ting on a federal land grant to close an airport.⁴³ This same conflict between proponents of private development on one side and the FAA and advocates of general aviation on the other is taking place at numerous airports throughout California and the rest of the United States.⁴⁴

II. FEDERAL AUTHORITY OVER AIRPORTS

So what is truly keeping the Concord and Oceanside projects from going forward? The answer lies in the FAA-administered Airport Improvement Program (AIP) and the National Plan of Integrated Aviation System (NPIAS). This section addresses those federal programs, providing background for each.

A. AIRPORT IMPROVEMENT PROGRAM AND SIMILAR FEDERAL GRANTS

As World War II drew to a close, Congress shifted its focus from building the national war engine toward projects designed to enhance the competitive infrastructure of the American homeland.⁴⁵ The Surplus Property Act of 1944 authorized the conveyance of surplus federal property to state and municipal agencies for a number of supported purposes, including building airports.⁴⁶ This Act was the primary vehicle for redistributing federal lands into the hands of airport authorities

⁴³ Nat'l Bus. Aviation Ass'n, Inc., Statement of Pete West on The Preservation and Promotion of General Aviation Airports Before the House Aviation Subcommittee (June 9, 1999), <http://www.nbaa.org/testimony/hr1000.htm> [hereinafter Statement of Pete West]. The only situation where a land grant airport was closed occurred in the Kansas City area. *Id.* The Richards-Gebaur Memorial Airport sat on a decommissioned military field. See Global Security.org., Richards-Gebaur Air Reserve Station, <http://www.globalsecurity.org/military/facility/richards-gebaur.htm> (last visited Oct. 31, 2007). However, the Richards-Gebaur airport did not serve as a reliever airport; rather, the downtown Kansas City airport was seen as the sole necessary reliever for the newly-built Kansas City International (MCI) airport. See Perry A. Trunick, *International Connections Take Off*, LOGISTICS TODAY, Mar. 2007, available at http://www.kcsmailport.com/sec_news/media/articles/IntermodalConnections.htm.

⁴⁴ Phil Boyer, *Tough Medicine?*, AOPA PILOT, June 2006, at 4. The Aircraft Owners and Pilots Association and the National Business Aviation Association are both actively working to keep open general aviation airports in Bakersfield, CA; Sacramento, CA; Rialto, CA; Naples, FL and many other locations. Statement of Pete West, *supra* note 43, at 2.

⁴⁵ FED. AVIATION ADMIN., LAND USE COMPATIBILITY AND AIRPORTS 24 (1999) [hereinafter LAND USE COMPATIBILITY].

⁴⁶ FED. AVIATION ADMIN., ORDER 5190.6A: AIRPORT COMPLIANCE REQUIREMENTS 47 (1989) [hereinafter AIRPORT COMPLIANCE REQUIREMENTS].

throughout the nation.⁴⁷ This legislation was closely followed by the Federal Airport Act of 1946,⁴⁸ which provided a mechanism for the federal government to funnel money for the construction of runways, hangars, and other aviation facilities by establishing a program of federal airport grants-in-aid known as the Federal Aid to Airport Program (FAAP).⁴⁹ In 1970, the 1946 Act was revamped through the Airport and Airway Development Act,⁵⁰ which replaced the FAAP with the Airport and Airways Trust Fund,⁵¹ commonly known as the Aviation Trust Fund.⁵² The Aviation Trust Fund was partially government funded and partially funded through aviation-oriented taxes and surcharges, such as the Passenger Facilities Charges (PFC).⁵³

In 1982, the Airport and Airway Development Act was replaced by the Airport and Airway Improvement Act of 1982,⁵⁴ which established both the current Airport Improvement Program (AIP) and the National Plan of Integrated Aviation System (NPIAS).⁵⁵ The AIP encompassed an explicit set of regulations and requirements for the dispersal of the Aviation Trust Fund, and sought to expand the benefactors of those funds to a larger number of airports.⁵⁶ Historically, airports serving major air carriers have had many sources of financing for capital improvements and aviation operations.⁵⁷ For instance, these commercial service airports have been guaranteed an amount set aside from the annual FAA budget.⁵⁸ In addition, they can collect passenger facilities fees from the sale of airline tickets, collect rent from airlines in the form of landing fees and gate

⁴⁷ *Id.*

⁴⁸ Pub. L. No. 79-377, 60 Stat. 170-80 (1946) (codified at 49 U.S.C.A. §§ 1107 *et seq.* (West 2007)).

⁴⁹ LAND USE COMPATIBILITY, *supra* note 45, at III-4.

⁵⁰ Pub. L. No. 91-258, 84 Stat. 219-53 (1970) (repealed 1982).

⁵¹ 26 U.S.C.A. § 9502 (West 2002 & Supp. 2007).

⁵² GERALD DILLINGHAM, GOV'T ACCOUNTING OFFICE, GAO-05-6S7T AIRPORT AND AIRWAYS TRUST FUND: PRELIMINARY OBSERVATIONS ON PAST, PRESENT, AND FUTURE (2005), *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-05-6S7T>.

⁵³ Nat'l Ass'n of State Aviation Officials, NASAO National Legislative Agenda, Reauthorization Provides Congress With an Opportunity to Strengthen America's Air Transportation System (Mar. 29, 2006), *available at* http://www.nasao.org/Publications/pdf_files/03_2006_NASAO_Leg_Agenda_electronic_II.pdf [hereinafter Reauthorization].

⁵⁴ 49 U.S.C.A. §§ 47101-47134 (West 2007).

⁵⁵ LAND USE COMPATIBILITY, *supra* note 45, at III-5.

⁵⁶ AIRCRAFT OWNERS AND PILOTS ASS'N, AOPA'S GUIDE TO FAA AIRPORT COMPLIANCE 5 (2000) [hereinafter GUIDE TO FAA AIRPORT COMPLIANCE].

⁵⁷ Boyer, *supra* note 44, at 4.

⁵⁸ *Id.*

leases, and can generate income through revenue taxes on the restaurants and other retailers in the terminals as well as car rental agencies both on and off terminal grounds.⁵⁹ Furthermore, major capital improvements can be supported through revenue bonds or other lending mechanisms and can, in some instances, be supported by taxes levied at the local level on businesses that stand to benefit by a more efficient airport such as hotels and conference centers.⁶⁰

General aviation airports, on the other hand, have depended on hangar leases, tie-down fees, taxes from fuel sales, and rentals from businesses operating on the airport grounds to fund operating budgets.⁶¹ Large municipally-backed revenue bonds have not been a source of financing for capital programs, and therefore, general aviation airports have become dependent on federal grant money to finance any such capital improvements.⁶² In fact, since its inception in 1982, AIP grants have funded more than 90% of capital project costs at general aviation airports nationwide.⁶³ AIP funding has increased rapidly over the past decade, growing from \$1.5 billion in 1998 to \$3.6 billion in 2005.⁶⁴ AIP funding was targeted at \$3.6 billion in 2006.⁶⁵

A large part of this growth in funding came as a result of the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century,⁶⁶ more commonly known as AIR-21, passed just prior to federal fiscal year 2001.⁶⁷ AIR-21 increased the amount guaranteed to be set aside for general aviation airports from the AIP by 1.5%, to 20% of total AIP expenditures.⁶⁸ In addition, AIR-21 authorized new, non-primary entitlements for the na-

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ GUIDE TO FAA AIRPORT COMPLIANCE, *supra* note 56, at 5.

⁶⁴ DILLINGHAM, *supra* note 52, at 5.

⁶⁵ Nat'l Ass'n of State Aviation Officials, NASAO 2005 National Legislative Agenda (Mar. 2005), *available at* http://nasao.org/Publications/pdf_files/2005%20NASAO%20Leg%20Agenda%20electronic.pdf.

⁶⁶ Pub. L. No. 106-81, 114 Stat. 61 (2000) (codified in scattered sections of 49 U.S.C.).

⁶⁷ WASH. STATE DEPT. OF TRANSP., FEDERAL FUNDS FOR GENERAL AVIATION AIRPORTS 1 [hereinafter FEDERAL FUNDS] *available at* <http://www.wsdot.wa.gov/NR/rdonlyres/A3650AD2-D84E-4FDB-B069-105CF53137C2/0/FAQonAIR21forweb.pdf> (last visited Oct. 31, 2007).

⁶⁸ Nat'l Bus. Ass'n, Inc., Press Release, NBAA Calls House Approval of AIR-21 Legislation "Historic Opportunity" (June 16, 1999), <http://web.nbaa.org/public/news/pr/1999/19990616-023.php>.

tion's non-primary airports.⁶⁹ Under these entitlements, the nation's smallest airports may receive up to \$150,000 per year for projects which preserve and extend the useful life of general aviation runways.⁷⁰ Since AIR-21 was implemented in 2000, nearly \$2 billion has been funneled to airports through the non-primary entitlements.⁷¹ These programs have had the effect of enhancing the nation's general aviation capabilities over the past two decades.⁷²

Two problems threaten the viability of AIP funding for general aviation airports. First, because of the current economic problems facing the commercial airline industry, such as reduced demand for global passenger aviation and escalating prices for jet fuel, less money has been going into the Aviation Trust Fund from sources such as fuel taxes and passenger facility charges.⁷³ The 2005 Government Accountability Office report on the Aviation Trust Fund shows that the end of year "uncommitted balance" in the Fund has declined from \$7.3 billion at the end of 2001, to \$2.4 billion at the end of 2004.⁷⁴ If the uncommitted balance falls below \$0, the FAA will have to suspend some AIP programs.⁷⁵

Secondly, because of the slump facing the airline industry, the emphasis in Washington, D.C. has turned toward bolstering the nation's domestic air carriers.⁷⁶ The latest federal aviation legislative package, VISION 100, which was passed in December 2003, included a rollback provision for the AIR-21 programs benefiting general aviation.⁷⁷ If the annual AIP budget falls be-

⁶⁹ 49 U.S.C.A. § 47114(d) (West 2007). Prior to AIR-21, the FAA budget only included entitlements earmarked for primary, commercial services airports. See *FEDERAL FUNDS*, *supra* note 67, at 1. AIR-21 added a new category of entitlements for non-primary airports which are in need of runway improvements. *Id.* Prior to AIR-21, these runway enhancement projects had to compete for AIP funds with other airport projects. Primary airports are those enplaning more than 10,000 passengers annually; non-primary airports enplane less than 10,000 passengers annually. FED. AVIATION ADMIN., ORDER 5090.3C, FIELD FORMULATION OF THE NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (NPIAS) 11 (2000) [hereinafter *FIELD FORMULATION OF THE NPIAS*].

⁷⁰ *FEDERAL FUNDS*, *supra* note 67 at 1.

⁷¹ Boyer, *supra* note 44, at 4.

⁷² DILLINGHAM, *supra* note 52, at 2.

⁷³ *Id.* at 4.

⁷⁴ *Id.* at *intro.*

⁷⁵ *Id.*

⁷⁶ Reauthorization, *supra* note 53.

⁷⁷ Aircraft Owners and Pilots Ass'n, President's Budget Threatens GA Airports, Boyer Tells Airport Conference (Mar. 16, 2005), <http://www.aopa.org/what-snew/newsitems/2005/050316conference.html>.

low \$3.2 billion, the general aviation set-aside would decrease to its pre-AIR-21 level of 18.5% of the AIP.⁷⁸ In addition, the non-primary entitlements added by AIR-21 would be eliminated.⁷⁹ The initial 2006 budget proposals from the White House reduced AIP funding to \$2.7 billion, well below the rollback triggers.⁸⁰ While the 2006 budget maintained current AIP funding to avoid triggering the rollback provisions, it is clear that the current economic pressures may affect these programs favorable to general aviation in the future.

B. NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (NPIAS) AND AIRPORT CAPACITY

The NPIAS traces its history to the same legislative acts that established the AIP. The Federal Airport Act of 1946⁸¹ required the formulation of a five-year National Airport Plan (NAP).⁸² The Airport and Airway Development Act of 1970⁸³ replaced the NAP with the National Airport System Plan (NASP), which included provisions for the redevelopment and enhancement of the air traffic control systems in the United States.⁸⁴ The NASP transformed into its present form with the Airport and Airway Improvement Act of 1982,⁸⁵ which required a biennial publication of the NPIAS.⁸⁶

The NPIAS lists public-use airports and development projects that are considered to be in the national interest.⁸⁷ For an airport project to receive federal funding through an AIP grant, both the airport and the project must be included in the latest five-year NPIAS plan.⁸⁸ The five-year NPIAS plan is produced with four guiding principles in mind.⁸⁹ First, the national airport system must be safe, affordable, flexible, and expandable.⁹⁰ Second, the plan must seek to provide assurances that the

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Reauthorization, *supra* note 53.

⁸¹ Pub. L. No. 79-377, 60 Stat. 170-80 (1946) (codified at 49 U.S.C.A. §§ 1107 *et seq.* (West 2007)).

⁸² FIELD FORMULATION OF THE NPIAS, *supra* note 69, at 1.

⁸³ Pub. L. No. 91-258, 84 Stat. 219-53 (1970) (repealed 1982).

⁸⁴ *Id.*

⁸⁵ 49 U.S.C.A. §§ 47101-47134 (West 2007).

⁸⁶ *Id.* at 1-2.

⁸⁷ LAND USE COMPATIBILITY, *supra* note 45, at V-1.

⁸⁸ *Id.*

⁸⁹ NPIAS, *supra* note 4, at 3.

⁹⁰ *Id.*

funded projects will remain dedicated to aviation purposes for the long-term.⁹¹ Third, the airports and projects on the national plan must be compatible with the needs of the surrounding communities.⁹² Finally, the national aviation infrastructure should provide not only efficient air travel for citizens, but also support the national defense, postal, and cargo delivery, emergency medical transport, and disaster relief services.⁹³

The FAA includes 3,364 airports in its 2007-2011 NPIAS report.⁹⁴ Of these, 517 are commercial service airports, which include all publicly-owned airports that receive commercial passenger service.⁹⁵ Commercial service airports that support 100% of commercial passenger enplanements, are the primary base of operation for 22% of the nation's 219,000 general aviation aircraft, and account for 74% of the federal fund expenditures under the NPIAS.⁹⁶ The remainder of the airports on the NPIAS are general aviation airports, which are divided into two major categories.⁹⁷ Two hundred seventy-four general aviation airports located in major metropolitan areas are designated as reliever airports, in that they off-load significant business and general aviation traffic from major commercial service airports.⁹⁸ Reliever airports are home to 29% of general aviation aircraft but account for only 7% of the NPIAS expenditures.⁹⁹ The remaining 2,573 general aviation airports on the NPIAS account for 19% of NPIAS expenditures and are home to 41% of the general aviation fleet.¹⁰⁰

Because of their proximity to metropolitan areas, the reliever airports are perhaps under the greatest amount of strain from the forces of redevelopment.¹⁰¹ However, redistribution of traffic among airports in metropolitan areas is a primary tactic in the FAA's strategy to optimize the nation's airport capacity and reduce delays in the system.¹⁰² As mentioned above, reliever airports reduce general aviation traffic at commercial service air-

⁹¹ *Id.*

⁹² *Id.*

⁹³ Reauthorization, *supra* note 53.

⁹⁴ NPIAS, *supra* note 4, at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 5, 8.

⁹⁸ *Id.* at 8.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 5.

¹⁰¹ Esler, *supra* note 12, at 69.

¹⁰² NPIAS, *supra* note 4, at 23.

ports.¹⁰³ In addition, the presence of relievers in the system also leads *carriers* to redistribute traffic away from chokepoints to outlying airports with excess capacity.¹⁰⁴ Examples of carrier-initiated redistribution include: Manchester, New Hampshire and Providence, Rhode Island offloading traffic from Boston Logan; Baltimore-Washington International offloading traffic from both Dulles and Reagan National in the Washington, D.C. area; Midway Airport offloading from O'Hare; Ft. Lauderdale offloading Miami; and Islip on Long Island offloading both JFK and LaGuardia traffic in New York City.¹⁰⁵

In addition, sufficient general aviation capacity near a major commercial service airport can reduce the capital needed for expansion projects at that commercial service airport.¹⁰⁶ In San Diego, where the airport authority is evaluating options for relocating San Diego International Airport, the availability of ten general aviation airports within sixty miles of the city have allowed the airport authorities to eliminate substantial general aviation capacity from its relocation plans.¹⁰⁷

Furthermore, the need for capacity in the nation's air transport system is growing at a rapid rate. The National Association of State Aviation Officials predicts that by 2025 there will be a three-fold increase in air transport demand from the levels of 2004.¹⁰⁸ A large percentage of this increase will come from the general aviation fleet, which is currently comprised of 219,000 aircraft.¹⁰⁹ Even though corporate aircraft comprise only 15,000 of these aircraft, they account for a substantial share of the general aviation operations in the nation, logging 7.6 million of the roughly 25 million flight hours for the general aviation sector in 2004.¹¹⁰ Furthermore, corporate aircraft will experience tremendous growth driven primarily by the popularity of fractional ownership of aircraft, and more recently by the feasibility of

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Jennifer Michels, *Site Selection Blues*, AIRPORT MAG., 2006 Annual Conference, at 21.

¹⁰⁷ *Id.*

¹⁰⁸ Reauthorization, *supra* note 53.

¹⁰⁹ Aircraft Owners and Pilots Ass'n, AOPA Calls For Investigation of FAA Decision Permitting Closure of Kansas City's Richards-Gebaur Airport (Sept. 25, 1998), <http://www.aopa.org/whatsnew/newsitems/1998/98-3-056.html>.

¹¹⁰ David Collogan, *Old Business Jets Targeted for Extinction*, BUS. & COM. AVIATION, Apr. 2005, at 90.

Very Light Jet (VLJ) aircraft.¹¹¹ VLJs represent massive potential for increase in corporate jet operations because they are relatively inexpensive (\$1 to \$2 million for a new VLJ seating six people versus \$5 million for a similarly equipped corporate jet), and can operate at airports with runways as short as 3,500 feet.¹¹² This exponential increase in traffic and operations can best be handled by increased capacity at general aviation, and in particular, reliever airports.

C. FEDERAL LEVERAGE THROUGH AIP AND SURPLUS PROPERTY GRANTS

Eligibility of an airport for AIP grant money depends both on the classification of the airport requesting the grant as well as the type of project contemplated.¹¹³ The airport must be on the NPIAS and the project must be related to a broad list of aviation-related improvements including planning, noise compliance, improvements to paving, lighting or navigational aids, land acquisition, and noise compatibility projects.¹¹⁴

In addition, any airport authority receiving an AIP grant is required to agree to a list of thirty-six contractual assurances which limit the use of the property.¹¹⁵ At the heart of these assurances is a promise to keep the airport open and operational for twenty years from the grant date.¹¹⁶ During this twenty-year period, the airport must comply with the contractual obligations of the AIP grant.¹¹⁷ Several of these assurances give the FAA considerable leverage over AIP grant airports.¹¹⁸ Assurance 22 requires that the field remain open to general aviation on a non-discriminatory basis; that is, it cannot unreasonably favor the use of the airport by one classification of aircraft over another (e.g. helicopter versus fixed wing versus glider).¹¹⁹ Assurance 23 requires that the airport owner will not permit an exclusive right for use of the airport by any person providing

¹¹¹ NPIAS *supra* note 4, at 45.

¹¹² *Id.* at 45–46.

¹¹³ LAND USE COMPATIBILITY, *supra* note 45, at IB–1.

¹¹⁴ *Id.* at IV–3.

¹¹⁵ GUIDE TO FAA AIRPORT COMPLIANCE, *supra* note 56, at 6.

¹¹⁶ Boyer, *supra* note 44, at 4.

¹¹⁷ Aircraft Owners and Pilots Ass'n, Future for Palo Alto Gets Brighter (July 15, 2005), <http://www.aopa.org/whatsnew/region/2005/050715ca.html> [hereinafter Palo Alto].

¹¹⁸ GUIDE TO FAA AIRPORT COMPLIANCE, *supra* note 56, at 6.

¹¹⁹ *Id.* at 47.

aeronautical services to the public.¹²⁰ These two assurances demonstrate the FAA's commitment to provide open, accessible, and affordable aviation capabilities through its system of airports.¹²¹

Several additional assurances deal with the airport's relations with the surrounding community. Assurance 20 requires the airport owner to maintain surrounding property so as to minimize hazards and interferences with the terminal airspace.¹²² This requires airport owners to work with surrounding property owners to eliminate uses which may interfere with the airport's airspace by implementing height restriction and locating landfills and other wildlife attractants away from standard lines of flight.¹²³ Assurance 21 goes further by requiring the airport owner to "take appropriate action, including the adoption of zoning laws, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purpose compatible with normal airport operations."¹²⁴ Assurances 6 and 7 require that all projects, particularly noise reduction projects, must be consistent with the zoning plans of the surrounding localities, and must take local interests into consideration when planning and constructing the project.¹²⁵ These assurances require an airport owner to work closely with the leaders of the surrounding communities to ensure that there is a balance between the needs of the airport for safe and efficient operation, and the needs of the community for its development.

Additionally, for AIP grants used for land acquisition and for land grants authorized by the Surplus Property Act of 1944,¹²⁶ the airport operator agrees to these contractual obligations, not just for twenty years, but in perpetuity.¹²⁷ This perpetual use

¹²⁰ *Id.* at 48. The AIP grant assurances provide that the assurance against airport monopolies remain in effect for the useful life of the airport property, among other conditions. Fed. Aviation Admin., Grant Assurances (obligations), http://www.faa.gov/airports_airtraffic/airports/aip/grant_assurances (last visited Oct. 31, 2007).

¹²¹ Palo Alto, *supra* note 117.

¹²² COMPATIBLE LAND USE, *supra* note 5, at 13.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ LAND USE COMPATIBILITY, *supra* note 45, at 41-42.

¹²⁶ Pub. L. No. 457, 58 Stat. 765 (1944) (repealed 1949).

¹²⁷ Aircraft Owners and Pilots Ass'n, FAA to Port Authority: Keep Bowerman Airport Open (Dec. 1, 2006), <http://www.aopa.org/whatsnew/region/2006/061201wa.html>.

assurance relates to all the property described in the land grant deed or grant application regardless of whether it is being used for actual aviation purposes.¹²⁸

Property obligated for "airport purposes" may be released from the obligations by application to the Regional FAA Airport Division Manager.¹²⁹ Federal Aviation Regulation Part 155 contains the procedures for releasing property from its grant or deed obligations.¹³⁰ There are generally three requirements for releasing property from its aviation obligations and allowing it to be redeveloped or sold. First, the airport owner must prove that the property is not needed for present or foreseeable airport operations.¹³¹ Second, the airport owner must demonstrate that any land disposed of by the airport authority will retain sufficient rights, through restrictive covenants or other deed restrictions, to ensure that airport operations will not be encumbered by any future use of the land.¹³² Last, and perhaps most importantly, the airport owner must show that the overall project will result in a net benefit to civil aviation.¹³³

The first threshold for showing a net benefit for civil aviation is met by committing the proceeds of the disposal of the airport property, at fair market value, to additional airport purposes.¹³⁴ The FAA will require reinvestment of the federal government's proportionate share back into airport uses.¹³⁵ Thus, if 90% of the purchase price of property was financed by an AIP grant, 90% of the fair market value of the property on disposal must be reinvested in airport resources for the community.¹³⁶ This reinvested money can be used to build additional hangars, repave runways, or implement noise reduction technologies in the surrounding community.¹³⁷

However, this first threshold only ensures that the proposed disposal of airport land will be benefit-neutral. Beyond this threshold, the airport owner must demonstrate that the project is justified because it will *increase* the value of the aviation assets

¹²⁸ AIRPORT COMPLIANCE REQUIREMENTS, *supra* note 46, at 52.

¹²⁹ *Id.* at 47.

¹³⁰ *Id.*

¹³¹ *Id.* at 52.

¹³² *Id.* at 52-53.

¹³³ *Id.* at 48-49.

¹³⁴ *Id.* at 49.

¹³⁵ GUIDE TO FAA AIRPORT COMPLIANCE, *supra* note 56, at 52-53.

¹³⁶ *Id.*

¹³⁷ *Id.*

in the community.¹³⁸ One such justification exists where the proceeds from the sale of land are necessary to finance airport expansion.¹³⁹ The FAA must agree not only that the expansion is needed, but also that the expansion is being accomplished in the correct manner.¹⁴⁰ Another viable justification is that the land proposed for disposal is in excess of current aeronautical needs, and does not generate adequate revenues from its current rentals and leases.¹⁴¹ Under this justification, the proceeds from the sale of the land should, if invested at current market yields, generate more revenue than can be achieved by leasing the land for its best compatible use in its current state.¹⁴² For instance, the FAA recently agreed to release almost four acres of property owned by the Sarasota Manatee Airport (Florida) from restrictions because its only available use in airport hands was for grazing land, whereas in the hands of private developers it could be converted to light industrial use.¹⁴³ The sale to the developer will bring \$4 million, which the airport will reinvest in hangar and terminal space.¹⁴⁴

The FAA's power to enforce these grant assurances is primarily concentrated in the reverter provisions of land and AIP grant instruments.¹⁴⁵ This provision gives the federal government the right to gain title to the land if the airport authority breaches one of the assurance provisions.¹⁴⁶ This right to revert must be specified in an instrument of conveyance and is generally used only as a last resort.¹⁴⁷ In addition, any questions of default must be adjudicated through FAA administrative procedures and applicable appeals through the federal courts, before the right to revert may be exercised.¹⁴⁸ Even though this remedy provides the FAA with significant leverage to enforce the provisions of the grant assurances and covenants, the FAA is dis-

¹³⁸ AIRPORT COMPLIANCE REQUIREMENTS, *supra* note 46, at 49.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Notice of Intent to Release Certain Properties From All Terms, Conditions, Reservations, and Restrictions of a Quitclaim Deed Agreement Between the Sarasota Manatee Airport Authority and the Federal Aviation Administration for the Sarasota Bradenton International Airport, 72 Fed. Reg. 176, 176 (Jan. 3, 2007).

¹⁴⁴ *Id.*

¹⁴⁵ AIRPORT COMPLIANCE REQUIREMENTS, *supra* note 46, at 48.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 59.

¹⁴⁸ *Id.* at 60.

couraged from using this remedy because of the lengthy litigation process.¹⁴⁹

However, what leverage does the FAA have with airports on the NPIAS that are not beholden to the federal government through either Surplus Property or AIP grants? This was the case in Meigs Field. Its grant assurance had expired just a year prior to Daley's midnight bulldozing of the runway.¹⁵⁰ Considering the issue from the other side of the dispute, what can general aviation airport owners, such as those in Concord and Oceanside, do to combat the FAA's resistance to redevelopment projects? The primary tactical weaponry in this airport battleground is local land use provisions and federal preemption efforts.

III. THE CONFLICT BETWEEN LOCAL LAND USE AND AIRPORT COMPATIBILITY

When a community allows incompatible land uses within the areas affected by the airport operations, it undermines the viability of its airport.¹⁵¹ Many general aviation airports were located in rural pasture lands when they were originally conceived and built decades ago.¹⁵² However, as growth extends ever widening rings of suburbia away from a city's epicenter, development of incompatible land uses surrounding an airport's property can lead to noise nuisance or inverse condemnation lawsuits against the airport authority.¹⁵³ These encroaching uses can also lead to substantial public and political pressure to limit the airport's operations or close the airport altogether.¹⁵⁴ While residential encroachment is the most serious of these incompatible uses, since it generates the most complaints (mostly noise-related), there are a host of other uses that encroach on airport operations.¹⁵⁵ These uses include grounds for public congregations (such as sports fields or outdoor amphitheatres), man-made and natural structures that interfere with flight, commercial sectors with extensive light emissions, and wildlife attractants (such as certain agricultural uses and landfills).¹⁵⁶

¹⁴⁹ *Id.* at 59–60.

¹⁵⁰ Boyer, *supra* note 44, at 4.

¹⁵¹ Esler, *supra* note 3, at 56, 59.

¹⁵² COMPATIBLE LAND USE, *supra* note 5, at 23.

¹⁵³ *Id.* at 24.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 12.

¹⁵⁶ *Id.* at 14.

However, even though the grant assurances require the promotion of airport-compatible land use in communities surrounding the airport, the federal government is generally left without the ability to enforce these provisions for the simple reason that land use regulation is the domain of the states, on which the federal government has no right to tread.¹⁵⁷

A. LOCAL CONTROL OF LAND USE AND THE PROMOTION OF
FEDERAL LAND USE PREEMPTION

It is widely held that the control of land use and zoning is the domain of the states, and if so granted by state statute, the local jurisdictions within the states.¹⁵⁸ Only within the last few decades has federal law begun to encroach on this traditionally state-regulated area, often through environmental and safety regulations.¹⁵⁹ Federal law has preempted local authority on issues of airport and airspace regulation.¹⁶⁰ In addition, federal law preempted local authority in areas of noise regulation through the United States Supreme Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*¹⁶¹ The dispute in *City of Burbank* centered on a local ordinance imposing a nighttime flight curfew on the Burbank, California airport.¹⁶² In holding that the city's right to implement zoning regulations to control noise was preempted by federal law, the Court looked to the "pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."¹⁶³

The Ninth Circuit, building on the *City of Burbank* decision, has gone so far as to find preemption of a local government's authority to regulate the use of the land near the airport.¹⁶⁴ In 1985, Burbank Airport began planning an extension of Taxiway B, which stopped just short of the border of Los Angeles.¹⁶⁵ The taxiway extension was intended to improve the safety for aircraft on the ground by providing more room on the end of the taxiway so that airplanes waiting to take off could park farther from

¹⁵⁷ *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 788-89 (6th Cir. 1996).

¹⁵⁸ See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 653 (1973).

¹⁵⁹ *Id.* at 628-30.

¹⁶⁰ 49 U.S.C.A. § 40103(a)(1) (West 2007).

¹⁶¹ *City of Burbank*, 411 U.S. at 626, 640.

¹⁶² *Id.* at 625-26.

¹⁶³ *Id.* at 633.

¹⁶⁴ *Burbank-Glendale-Pasadena Airport Auth. v. City of L.A.*, 979 F.2d 1338, 1339 (9th Cir. 1992).

¹⁶⁵ *Id.*

the runway as other airplanes came in for landings on that runway.¹⁶⁶ Just prior to construction beginning on the taxiway extension in 1990, the Los Angeles City Council enacted ordinance 165 requiring that "prior to . . . the construction or reconstruction of runways or taxiways, a complete and detailed development plan . . . shall be submitted to and approved by the City Planning Commission."¹⁶⁷ Los Angeles argued that the ordinance was adopted on an emergency basis because it was "required for the immediate protection of the public peace, health and safety."¹⁶⁸ The Ninth Circuit rejected this argument by reading *City of Burbank* as pre-empting any municipality that was not the airport owner "from regulating airports in any manner that directly interferes with aircraft operation."¹⁶⁹ The court reasoned that the proper placement of runways and taxiways is critical to the safety of take-offs and landings; thus any local regulation of runways or taxiways would interfere with aircraft operations.¹⁷⁰ Therefore, the Ninth Circuit found that certain zoning ordinances dealing only with the use of the land, not with noise or environmental concerns, have been preempted by federal law.¹⁷¹

In this respect, the Ninth Circuit stands alone. Other jurisdictions have universally held that local zoning power outside of noise regulation has not been preempted.¹⁷² In fact, the FAA

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1339–40 (quoting Los Angeles City Ordinance No. 165).

¹⁶⁸ *Id.* at 1340.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1341.

¹⁷¹ *Id.* at 1342.

¹⁷² See *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 219 (8th Cir. 1990) (finding city zoning ordinance prohibiting initial siting of heliport not preempted by federal law); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1314 (9th Cir. 1981) (stating that local governments' noise abatement plans that do not impinge on aircraft operations are not preempted), *cert. denied*, 455 U.S. 1000 (1982); *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 748, 751 (N.D. Ohio 1995) ("the FAA does not possess zoning authority merely by virtue of its broad mandate to regulate matters relating to aviation;" state or local zoning or land use laws are not preempted); *Harrison v. Schwartz*, 572 A.2d 528, 535 (Md. 1990) (stating that a zoning ordinance that does not regulate aircraft noise emissions, or the actual conduct of flight operations may withstand a preemption argument), *cert. denied*, 498 U.S. 851 (1990); *Wood v. City of Huntsville*, 384 So. 2d 1081, 1083 (Ala. 1980) ("Congress . . . has extensively and exclusively regulated use of the navigable airspace of the United States, . . . state and local governments retain substantial control over ground usage"); *Wright v. County of Winnebago*, 391 N.E.2d 772, 777–78 (Ill. App. Ct. 1979) (finding that the FAA

acknowledges within its regulations that land use matters within the federal aviation framework are extrinsically local affairs:

While determinations consider the effects of the proposed action on the safe and efficient use of airspace by aircraft and the safety of persons and property on the ground, the determinations are only advisory *A determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts.*¹⁷³

B. FEDERAL REGULATION OF NOISE

As the above discussion points out, the federal government has exercised its power over municipalities in the areas of safety, noise, and environmental issues. Possibly the most significant regulatory provisions affecting the airports in these are in the area of noise control and abatement.

In 1979, Congress passed the Aviation Safety and Noise Abatement Act (ASNA).¹⁷⁴ This Act directed the Secretary of Transportation to establish a "single system of measuring noise" so as to define a national standard to regulate noise exposure caused by airports and aircraft.¹⁷⁵ Under these new national standards, an airport operator could prepare "noise exposure maps" which detailed the noise exposure levels around the airport.¹⁷⁶ The airport operator can work with the surrounding communities to develop airport compatible land uses based in part on the noise exposure levels outlined on these noise contour maps.¹⁷⁷ ASNA makes federal funds available to implement a noise-compatibility program which would reduce or prevent non-airport-compatible land uses surrounding the airport property.¹⁷⁸ The procedures for undertaking a noise study and noise compatibility program were encompassed in 14 C.F.R. § 150.¹⁷⁹ Such a study is known in the industry as a Part 150 study.¹⁸⁰

does not preempt local zoning authority from determining appropriate use of land; the right not to have an airport in the first place is local).

¹⁷³ 14 C.F.R. § 157.7(a) (2007) (emphasis added).

¹⁷⁴ 49 U.S.C.A. §§ 47501–47510 (West 2007).

¹⁷⁵ 49 U.S.C.A. § 47502.

¹⁷⁶ 49 U.S.C.A. § 47503.

¹⁷⁷ 49 U.S.C.A. § 47504.

¹⁷⁸ *Id.*

¹⁷⁹ 14 C.F.R. §§ 150.1–150.35 (2007).

¹⁸⁰ Nat'l Bus. Aviation Ass'n, Inc. v. City of Naples Airport Auth., 162 F. Supp. 2d 1343, 1351 (M.D. Fla. 2001).

The basic building block of a Part 150 study is the noise contour map.¹⁸¹ A noise contour map will show a bird's eye view of the area surrounding an airport and will have contour lines representing various levels of noise exposure.¹⁸² For the purposes of the noise contour maps, noise exposure levels are measured as day-night average sound levels (DNL).¹⁸³ DNL is the amount of noise in a given location, measured in decibels (dB), across an entire twenty-four-hour period.¹⁸⁴ Noise measurements taken during the night are given a ten dB penalty.¹⁸⁵

The FAA, under the authority given it by ASNA, also developed compatible use guidelines.¹⁸⁶ Under the FAA guidelines, all land uses, including residential, are compatible with noise levels below sixty-five DNL.¹⁸⁷ In addition, all public uses (other than schools – which are characterized as a residential use) are compatible with noise levels of up to seventy-five DNL, and manufacturing, agricultural, and mining operations are compatible with noise levels up to eighty-five DNL.¹⁸⁸

To further elucidate these standards, it is important to note that a normal conversation generates noise at a sixty dB level.¹⁸⁹ Every ten dB increase in noise level is a doubling of the noise level.¹⁹⁰ A quiet library generates thirty-five dB of noise, or approximately one-seventh as much noise as a normal conversation.¹⁹¹ Heavy truck traffic generates noise levels of ninety dB, or eight times as loud as a normal conversation.¹⁹² However, DNL measures consistent noise exposure levels; therefore, a DNL of sixty is equivalent to a consistent twenty-four-hour expo-

¹⁸¹ *Id.*

¹⁸² *Id.* at 1346 n.3. VISION 100, the aviation legislation package passed in 2003, requires that the FAA begin performing Part 150 studies for various airports and make the resulting noise contour maps available on the Internet in hopes that this will promote compatible land use around airports. Kerry Lynch, *Vision 100 Why It Matters So Much*, BUS. & COM. AVIATION, Apr. 2004, at 50.

¹⁸³ *City of Naples Airport Auth.*, 162 F. Supp. 2d at 1346 n.3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 14 C.F.R. § 150, app. A (2007).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ COMPATIBLE LAND USE, *supra* note 5, at 4.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

sure to a normal conversation.¹⁹³ As a benchmark, exposure to a constant noise level of eighty-five dB for an eight hour period is sufficient to cause permanent hearing loss.¹⁹⁴ In the aviation arena, on take-off, a Concorde generated 112.9 dB, a 747-100 (which is the oldest model of 747 still flying) generates 100.5 dB, and a Cessna 152 (a common, propeller-driven, general aviation aircraft) generates fifty-five dB – less than conversation level.¹⁹⁵

An FAA study in 2000 found that there were 500,000 people in the United States living in areas with noise exposure levels of greater than sixty-five DNL.¹⁹⁶ Based on this study, the FAA set a goal to reduce this number by 62,500 between fiscal years 2003 and 2007.¹⁹⁷ The FAA is ahead of schedule on this goal, reducing this number by 30,000 in 2003 and 2004 combined and another 25,000 in 2005, but this still leaves over 400,000 citizens living in areas that are incompatible with airport operations.¹⁹⁸

Furthermore, in the Part 150 regulations, the FAA has explicitly rejected the notion that its land use compatibility determinations are meant to supplant local responsibility for undertaking appropriate zoning.¹⁹⁹ “FAA determinations under Part 150 are not intended to substitute federally determined land uses for those determined to be appropriate *by local authorities in response to locally determined needs and values in achieving noise compatible land use.*”²⁰⁰

Therefore, while ASNA does not overturn the *City of Burbank* decision, it gives local communities significant power to regulate noise through the use of a Part 150 study and compatibility program.²⁰¹ While a local community can use a Part 150 study to implement more restrictive zoning ordinances or to purchase land rights that will prevent non-compatible uses, the community could also use a the study to restrict and regulate the opera-

¹⁹³ *Id.* at 4, 6; Nat’l Inst. on Deafness & Other Common Disorders, Noise-Induced Hearing Loss, <http://www.nidcd.nih.gov/health/hearing/noise.asp> (last visited Oct. 31, 2007) [hereinafter Noise-Induced Hearing Loss].

¹⁹⁴ Noise-Induced Hearing Loss, *supra* note 193.

¹⁹⁵ FED. AVIATION ADMIN., AC NO. 36-3H, ESTIMATED AIRPLANE NOISE LEVELS IN A-WEIGHTED DECIBELS 1T, 33T (2002). These noise levels are measured at an overhead distance of 500 feet. *Id.*

¹⁹⁶ NPIAS, *supra* note 4, at 30.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.*

¹⁹⁹ 14 C.F.R. § 150, app. A (2007).

²⁰⁰ 14 C.F.R. § 150, app. A, note A (emphasis added).

²⁰¹ LAND USE COMPATIBILITY, *supra* note 45, at V-23.

tions of aircraft at its local airport.²⁰² Furthermore, ASNA does not give the FAA unlimited discretion in approving or rejecting requests for funding assistance for a local community's noise abatement programs under a Part 150 study.²⁰³ Approval only requires that the program create no undue influence on interstate or foreign commerce, is reasonably consistent with the goal of reducing existing incompatible land uses, and is not unjustly discriminatory.²⁰⁴ There is no requirement that the locally-proposed noise abatement project be the best of a variety of alternatives.²⁰⁵

One significant area where local authorities have possibly begun to step over the line established by *City of Burbank* is in implementing operation restrictions on certain types of older, louder aircraft. In 1990, Congress passed the Airport Noise and Capacity Act (ANCA).²⁰⁶ This legislation created a new program to regulate the operation of Stage 2 and Stage 3 aircraft.²⁰⁷ ANCA required that by January 1, 2000, all Stage 2 aircraft were either to be hushed to Stage 3 noise levels, relocated permanently out of the country, or retired from service.²⁰⁸ However, ANCA also left a loophole exempting aircraft under 75,000 pounds from the January 2000 retirement requirement.²⁰⁹ The majority of these aircraft fall within the business jet segment of the general aviation market.²¹⁰ Since the majority of these aircraft (78%) fly into general aviation airports and, of that a substantial percentage (29%) use reliever airports, it is reliever airports that will feel the greatest impact from the ANCA 75,000 pounds loophole.²¹¹

ANCA also gave local authorities an additional tool for regulating noise and aircraft operations at their local airports.²¹² An

²⁰² Nat'l Bus. Aviation Ass'n, Inc. v. City of Naples Airport Auth., 162 F. Supp. 2d 1343, 1351 (M.D. Fla. 2001).

²⁰³ LAND USE COMPATIBILITY, *supra* note 45, at 65.

²⁰⁴ *Id.* at V-23, 24.

²⁰⁵ *Id.*

²⁰⁶ 49 U.S.C.A. §§ 47521-33 (West 2007).

²⁰⁷ 49 U.S.C.A. § 47524(a). Noise limits on aircraft are rated Stage 1, 2, 3, or 4 with Stage 1 being the loudest and Stage 4 being the most quiet. David Esler, *Stage 2 Aircraft Drive Noise Policy*, BUS. & COM. AVIATION, Nov. 2002, at 54 [hereinafter *Stage 2 Aircraft*].

²⁰⁸ *Stage 2 Aircraft*, *supra* note 207, at 54.

²⁰⁹ *Id.*

²¹⁰ *Id.* Of the 15,000 corporate jets registered in the United States at the end of 2004, 1,200 still use Stage 2 engines. Collogan, *supra* note 110, at 90.

²¹¹ NPIAS, *supra* note 4, at 5, 8.

²¹² *Stage 2 Aircraft*, *supra* note 207, at 54.

airport may implement a complete or partial ban on Stage 2 operators by conducting a Part 161 study.²¹³ A Part 161 study will provide (1) an analysis of the anticipated costs and benefits of the proposed restriction, (2) a description of the alternative measures considered that do not involve aircraft restrictions, and (3) a comparison of the cost and benefits of the alternative measures to those of the proposed restriction.²¹⁴ If the airport operator intends to restrict or prohibit Stage 2 traffic, it is required to publish notice of the restriction for 180 days and provide an opportunity for comment from the general public.²¹⁵ However, there is no language in the statute which requires FAA approval of the airport's restrictive measures.²¹⁶ The ANCA apparently cedes responsibility for the regulation of Stage 2 aircraft under 75,000 pounds completely into the hands of the municipal agencies which run the majority of the general aviation airports in the United States.

C. THE NAPLES DISPUTE

At least one such airport operator has seized upon this authority granted by the ANCA Part 161 provision to implement a complete ban of Stage 2 aircraft.²¹⁷ In 2001, the Naples Airport Authority (Florida) undertook both a Part 150 study to develop noise contour maps and a Part 161 study to reduce noise exposure in the vicinity of the airport.²¹⁸ During the past several years, the manager of the Naples Municipal Airport had received a steady flow of noise complaints from the residents in this resort and retirement community.²¹⁹ The airport manager determined that over 90% of these complaints were the result of Stage 2 aircraft operations, even though these operations represented only 1% of the airport's 145,000 annual operations.²²⁰ In August 2001, after conducting the Part 161 analysis, the Naples Airport Authority implemented a complete ban on operations of Stage 2 aircraft under 75,000 pounds, pursuant to the ANCA.²²¹ The stated purpose behind the ban was to bring noise

²¹³ 49 U.S.C.A. § 47524(a) (West 2007).

²¹⁴ 49 U.S.C.A. § 47524(b).

²¹⁵ *Id.*

²¹⁶ *Nat'l Bus. Aviation Ass'n, Inc. v. City of Naples Airport Auth.*, 162 F. Supp. 2d 1343, 1350 (M.D. Fla. 2001).

²¹⁷ *Stage 2 Aircraft*, *supra* note 207, at 54.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *City of Naples Airport Auth.*, 162 F. Supp. 2d at 1346.

exposure levels in certain residential and open space areas below the sixty DNL level, even though these areas were currently mapped in the sixty to sixty-five DNL range, which is acceptable under the FAA standards published in Part 150.²²²

The National Business Aviation Association (NBAA), representing the business aviation community, who would feel the greatest impact from this ban, brought suit against the Naples Airport Authority in a federal district court in Florida, seeking injunctive relief to stop the airport from implementing the ban.²²³ NBAA argued that because the FAA has declared that all land uses are compatible with noise levels below sixty-five DNL, the ban was an unconstitutional exercise of municipal regulatory power in an area that had been preempted by federal law.²²⁴ The court rejected this argument ruling that the FAA declaration cannot be a basis for federal preemption, since the question of preemption hinges on the intent of Congress.²²⁵ In addition, the court held that, although *City of Burbank* recognized preemption for all manners of noise regulation, ASNA and ANCA had explicitly carved out authority for local regulation.²²⁶ The Naples Airport Authority was granted summary judgment and the ban went forward.²²⁷

Rather than appeal the district court's decision, the NBAA joined in a subsequent complaint brought by the FAA against the Naples Airport which asserted that the Naples had defaulted on its AIP assurances.²²⁸ Specifically, the FAA argued that the Stage 2 ban at Naples violated Assurance 22, which required airports to be available for public use on a reasonable and non-discriminatory basis, since the ban focused its impact on business aviation operators.²²⁹ The administrative court agreed with the federal district court's decision that the ban was not preempted by federal law.²³⁰ However, since neither ASNA nor ANCA superseded the statutory provision allowing Grant Assur-

²²² *Id.*

²²³ *Id.* at 1344.

²²⁴ *Id.* at 1351.

²²⁵ *Id.* at 1347.

²²⁶ *Id.* at 1349–50.

²²⁷ *Id.* at 1354.

²²⁸ *In re Compliance With Fed. Obligations by the Naples Airport Auth.*, FAA Order No. 2003-1, No. 16-01-15, 2003 WL 22257716, at *1 (Aug. 25, 2003).

²²⁹ *Id.*

²³⁰ *Id.* at *2 (ruling that the prior federal action was not binding on the agency's decision, the administrative court came to the same conclusion as the district court nonetheless).

ance 22 to be included in AIP grant instruments, the question of the reasonableness of the ban was still at issue.²³¹ Since the stated purpose of Naples Airport in enforcing the ban was to reduce noise exposure levels below the sixty-five DNL minimum requirements outlined in Part 150, the ban was unreasonable and discriminatory.²³² The administrative court found that Naples Airport Authority was in default under its AIP grant provisions and that the FAA could withhold any further disbursements of AIP funds.²³³ However, since the administrative court had no authority to provide injunctive relief, Naples Airport continued the Stage 2 ban.²³⁴

The Naples Airport Authority appealed the FAA's decision to the District of Columbia Court of Appeals and focused its arguments on the legality of basing regulations on noise levels below sixty-five DNL.²³⁵ Naples Airport relied heavily on the opening that the FAA left within its Part 150 regulation which allows a local community to factor in "local needs" when implementing its noise restrictions.²³⁶ Naples pointed to the surrounding community's needs as a resort and retirement community, with a substantial amount of its economy tied to outdoor activities, and argued that the goal of moving noise exposure levels beneath sixty DNL were reasonably based on these local characteristics and considerations.²³⁷ The court accepted this argument, overturning the administrative court's ruling, and ordering the FAA to pay Naples \$3.2 million in withheld apportionments and block grants.²³⁸ This reversal of the FAA's decision on the Naples ban is the first time that a complete Stage 2 ban by a general aviation airport was upheld.²³⁹

Proponents of general aviation airports view the outcome of the Naples dispute with concern because it allows local communities to lower the bar for noise exposure levels to levels that are

²³¹ *Id.* at *15.

²³² *Id.* at *18–19.

²³³ *Id.* at *24.

²³⁴ *Naples To Press Stage 2 Battle Despite FAA Rejection*, BUS. & COM. AVIATION, Sept. 9, 2003, at 3.

²³⁵ *City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431, 423, 433–34 (D.C. Cir. 2005).

²³⁶ See 14 C.F.R. § 150, app. A (2007).

²³⁷ *Naples Airport Auth.*, 409 F.3d at 435.

²³⁸ *Id.*; Kerry Lynch, *U.S. Appeals Court Overturns FAA's Decision Against Naples*, AVIATION WK. & SPACE TECH., June 13, 2005.

²³⁹ *Court Upholds Ban On Stage 2 Aircraft*, AVIATION WK. & SPACE TECH., June 7, 2005, at 1.

not reasonably tied to the safety, health, or well-being of the community.²⁴⁰ These proponents fear that the decision will open the door to further encroaching, non-compatible land uses by the local community, straining the community's public and political support of its local airport.²⁴¹ Challenges similar to the Naples situation are in the works at the airports in Scottsdale, Arizona; Morristown, New Jersey; Santa Barbara, California; Santa Monica, California; Key West, Florida; Reno, Nevada; the Ohio State University Airport in Columbus, Ohio; Centennial Field in Denver, Colorado; Hanscomb Field in Massachusetts, and Pompano Beach Air Park in Florida.²⁴² Burbank Airport is even considering a total night curfew on Stage 3 aircraft, which comprise a much broader portion of the general and commercial aviation fleet.²⁴³

There is one bright spot for the FAA in the Naples decision. The court held that the FAA had statutory authority to withhold AIP grant money if it determines that local regulation of the airport is unreasonable or unjustly discriminatory.²⁴⁴ This judicially-approved authority will increase the FAA's leverage in pushing for local airport-compatible land use. However, this additional leverage will be of little value in the face of a potential airport closure.

D. CALL YOUR LOCAL CONGRESSMAN

Some communities seeking to restrict airport operations have successfully used another tactic: specific Congressional intervention.²⁴⁵ When the Jackson Hole Airport Board decided it wanted to ban Stage 2 aircraft in 2003, it convinced Senator Craig Thomas to insert Section 825 into the VISION 100 legislative package.²⁴⁶ Section 825 allowed broad discretion in Stage 2 restrictions for an airport that "does not own the airport land and is a party to a long-term lease agreement with a federal agency."²⁴⁷ Jackson Hole Airport is situated on National Forest

²⁴⁰ See Collogan, *supra* note 110, at 90.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Stage 2 Aircraft*, *supra* note 207, at 54.

²⁴⁴ *City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431, 434–35 (D.C. Cir. 2005).

²⁴⁵ Lynch, *supra* note 182, at 50.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

land leased from the Department of the Interior.²⁴⁸ In a similar vein, residents of Teterboro convinced its Congressman to insert language in VISION 100 restricting traffic at Teterboro Airport to 100,000 pounds or less.²⁴⁹

So, are we likely to see a provision in the next round of aviation legislation allowing Concord and Oceanside to implement their respective closure and redevelopment plans? It is likely. Senator Dianne Feinstein has come out against the effort to close Concord²⁵⁰ and Representative Darrel Issa has voiced opposition to the redevelopment efforts at Oceanside.²⁵¹ But there is nothing to say that they cannot be persuaded to change their minds before the next round of aviation legislation in 2007, particularly when billions of dollars of local investment are at stake.²⁵²

IV. COOPERATIVE EFFORTS

As has been shown throughout this paper, the FAA has *some* leverage to enforce its plan for a healthy and robust national system of airports. But the FAA's power only extends in two directions – one to the extent of its funding capabilities and the other to the extent of its preempted portion of the noise regulation arena. Local communities are too often able to establish non-compatible land uses around airports which can then lead to further flight restrictions under the guise of a Part 150 noise study and eventually precipitate the closure of the entire airport.²⁵³

Recognizing the limitations of their authority, the FAA has partnered with various state aviation authorities to establish cooperative land use programs.²⁵⁴ The FAA Southern Region Airports Division has published an airport land use compatibility guide which provides a guide for local jurisdictions that must deal with a nearby airport.²⁵⁵

²⁴⁸ *Id.*

²⁴⁹ Esler, *supra* note 12, at 69.

²⁵⁰ *Id.*

²⁵¹ Tribbey, *supra* note 15, at A11.

²⁵² Esler, *supra* note 12, at 69. The Concord redevelopment plan will bring \$2.6 billion into the local economy. *Id.*

²⁵³ Esler, *supra* note 3, at 56.

²⁵⁴ See, e.g., LAND USE COMPATIBILITY, *supra* note 45, at ii; WASH. STATE DEPT. OF TRANSP., AVIATION DIV., AIRPORT LAND USE COMPATIBILITY PROGRAM 14 (2005).

²⁵⁵ LAND USE COMPATIBILITY, *supra* note 45, at ii.

A. COMPATIBLE LAND USE PLANNING TACTICS

Compatible land use planning guides point out that there are land use tactics that can find an effective balance between an airport's need to restrict land uses and the need of a growth-minded municipal government to attract investment and economic development. At the center of these land use strategies is the notion that zoning, by itself, does not necessarily solve everything.²⁵⁶ Variances and special exceptions, which can be granted at the whim of a city's zoning commission, can skirt the zoning laws to the detriment of the entire zoning plan.²⁵⁷ For instance, in the early 1980's, while the city of San Francisco was suing its airport over noise concerns, its city council was approving additional residential developments that would clearly be affected by the noise of the airport because of their location within the typical take-off lanes of the airport.²⁵⁸

In addition to strong, consistent enforcement of existing zoning ordinances, airport compatibility guides suggest several additional land use tactics that can be used to enforce the overall compatibility plan.²⁵⁹ First, a city can modify its building codes to require the use of noise reduction technologies in airport-affected zones.²⁶⁰ Since the FAA will make noise contour maps available on the Internet, developers have access to sufficient information to make fully-informed investment decisions and would not be unduly hampered by such building requirements.²⁶¹ In addition, this would spread the cost of noise abatement more accurately to those who develop in areas that are most affected.²⁶²

A second tactic is to require notice and disclosure in the residential real estate sales process.²⁶³ This tactic requires each affected residential lot to record with its deed an "Airport Disclosure Agreement" which would describe the location of the airport, as well as land use controls in the airport area.²⁶⁴ However, while this tactic gives notice that may keep potential homeowners from purchasing a specific lot, it would not prevent

²⁵⁶ COMPATIBLE LAND USE, *supra* note 5, at 18.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 19.

²⁶⁰ *Id.* at 18-19.

²⁶¹ Lynch, *supra* note 182, at 50.

²⁶² COMPATIBLE LAND USE, *supra* note 5, at 19.

²⁶³ *Id.* at 18.

²⁶⁴ LAND USE COMPATIBILITY, *supra* note 45, at VII-18.

those who decided to buy anyway from lodging complaints against the airport for noise violations.²⁶⁵

A third land use planning tactic is the creation of avigation easements.²⁶⁶ An avigation easement can come in two forms.²⁶⁷ First, it can be a negative easement which will prevent the creation or continuation of unprotected noise-sensitive uses on a particular property.²⁶⁸ Alternatively, an avigation easement can be an affirmative easement, for instance, it can give the municipality or airport authority the right to produce a certain level of noise over the property.²⁶⁹ These easements can be acquired through outright purchase, condemnation, or dedication.²⁷⁰ Purchase can be achieved by the municipality, the airport authority, or by a private group, such as an organization of pilots that use the airport.²⁷¹ Dedication occurs when a developer promises to limit his development rights as a condition of approval of a subdivision, and can be implemented only through the municipality with jurisdiction.²⁷²

Condemnation is a more complicated matter, as was seen in the early 1990's in the dispute over expansion of DFW airport.²⁷³ In 1988, the Dallas/Fort Worth International Airport Board proposed a \$3.5 billion redevelopment plan, which called for the expansion of the airport onto private lands located within the cities of Irving, Euless, and Grapevine.²⁷⁴ Shortly thereafter, these three cities altered their comprehensive zoning plans to require the Airport Board to submit site plans, to conduct environmental impact studies, and to get special permits from the cities in order to continue its expansion.²⁷⁵ The Airport Board sued (in an action known as "DFW I") and asserted, among other arguments, that since the Texas Municipal Airport Act (TMAA) had given it eminent domain power that trumped that of the cities, it did not have to comply with the zoning regula-

²⁶⁵ *Id.* at VII-18 to 19.

²⁶⁶ COMPATIBLE LAND USE, *supra* note 5, at 19.

²⁶⁷ LAND USE COMPATIBILITY, *supra* note 45, at VII-19.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ COMPATIBLE LAND USE, *supra* note 5, at 20.

²⁷² LAND USE COMPATIBILITY, *supra* note 45, at VII-20.

²⁷³ See generally *City of Euless v. Dallas/Fort Worth Int'l Airport Bd.*, 936 S.W. 2d 699 (Tex. App.—Dallas 1996, writ denied); *Dallas/Fort Worth Int'l Airport Bd. v. City of Irving*, 854 S.W. 2d 161 (Tex. App.—Dallas 1993, writ granted).

²⁷⁴ *City of Irving*, 854 S.W. 2d at 164.

²⁷⁵ *Id.*

tions in order to expand onto the adjacent land.²⁷⁶ The court rejected this argument, reasoning that since Texas was a “home-rule” state, each city naturally has the full power of self-government and looks to state legislative acts not for a grant of power, but rather for limitations of its power of self-government.²⁷⁷ Since there was no explicit indication in the TMAA that limited the eminent domain power of these cities, the power of eminent domain rested solely in the city government, not within the Airport Board’s authority.²⁷⁸

No effective quasi-governmental organization will rest its entire legal strategy solely on a judicial solution to its problems; therefore, while DFW I was pending, the Airport Board lobbied the Texas Legislature to amend the TMAA to give it eminent domain power.²⁷⁹ The legislature overturned the decision in DFW I and withstood a subsequent challenge in *City of Euless v. Dallas/Fort Worth International Airport Board* (DFW II).²⁸⁰ The dispute at DFW indicates the difficulty an airport authority can have in implementing a navigation easement program, even in a state as friendly to economic development as Texas.

A fourth land use planning tactic is the use of transferable development rights (TDR).²⁸¹ TDRs involve the relocation of development rights from one location (the sending property) to another location (the receiving property).²⁸² When development rights are transferred, the sending property is rezoned to whatever rights, other than development rights, remained in the property.²⁸³ The receiving property also might have to be rezoned so as to accommodate the type and intensity of use that was abandoned in the sending property.²⁸⁴ To implement a system of TDRs as a land use tactic, a state’s enabling statute must

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 169.

²⁷⁸ *Id.* at 174.

²⁷⁹ *City of Euless v. Dallas/Fort Worth Int’l Airport Bd.*, 936 S.W. 2d 699, 701 (Tex. App. – Dallas 1996, writ denied). The TMAA was amended to include the following provision: “If the constituent public agencies of a joint board are populous home-rule municipalities, [these eminent domain powers are] exclusively powers of the board regardless of whether all or part of the airport, air navigation facility, or airport hazard area is located within or outside the territory of any of the constituent public agencies.” Tex. Transp. Code Ann. § 22.074(d) (Vernon 1999 & Supp. 2006).

²⁸⁰ *City of Euless*, 936 S.W. 2d at 704.

²⁸¹ LAND USE COMPATIBILITY, *supra* note 45, at VII–26.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

authorize the creation of TDRs, and each affected local government would have to adopt and include the use of TDRs in its comprehensive zoning plan.²⁸⁵ Therefore, this tactic will encounter the same issues as any other condemnation activity, that is, whether the condemning authority has been granted eminent domain power.²⁸⁶

B. BARRIERS TO EFFECTIVE COMPATIBILITY PROGRAMS

As suggested throughout this paper, there are several barriers to an effective implementation of a cooperative land use compatibility program. In a study of sixteen airports that had completed Part 150 studies and obtained approval to implement the resultant projects, the FAA found that only six airports had completed the approved projects.²⁸⁷ Of the remaining ten airports, only three had projects in process.²⁸⁸ The remaining seven had taken no step toward implementation.²⁸⁹

In the same study, the FAA determined that ten of these sixteen airports had land use compatibility programs in effect.²⁹⁰ Of these ten, six had allowed non-compatible development to move forward after implementing the compatibility program.²⁹¹ In each of these six cases, it was overwhelmingly non-sponsor jurisdictions that had allowed the non-compatible development to go forward.²⁹² In these six cases, twenty-six non-sponsor jurisdictions approved non-compatible development and twenty-eight non-sponsors had vacant land zoned for non-compatible use.²⁹³ In only one case did the sponsor organization have any instances of encroaching non-compatible land use.²⁹⁴ Furthermore, the noise contour maps of the six airports showed that noise from airport operations affected anywhere from two to

²⁸⁵ *Id.*

²⁸⁶ *See id.*

²⁸⁷ COMPATIBLE LAND USE, *supra* note 5, at 23.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* A sponsor jurisdiction is the governmental or quasi-governmental agency that has direct control over the airport, whereas a non-sponsor has some connection to the airport (e.g. adjacent land) but no authority over the operations of the airport. For instance, Buchanan Field is located in the city of Concord, CA (non-sponsor) but is controlled by Contra Costa County (sponsor). Esler, *supra* note 12, at 69.

²⁹³ COMPATIBLE LAND USE, *supra* note 5, at 23.

²⁹⁴ *Id.*

twenty-five separate jurisdictions.²⁹⁵ This study clearly indicates that a significant barrier to an effective compatibility program is the multiplicity of jurisdictions that each airport has to deal with.²⁹⁶

C. STATE BLOCK GRANT PROGRAM

As shown from the events surrounding DFW I and DFW II, it is possible for a state to clear up the jurisdictional problems that can lead to non-compatible use encroachment.²⁹⁷ However, very few states have been willing to legislate around the problem.²⁹⁸ One manner to promote action on behalf of state legislatures is to provide incentives in the form of federal grant money.²⁹⁹

The FAA, with authorization from Congress, has experimented over the last decade with state block grant programs.³⁰⁰ The block grant programs allow authorized states to administer both grants and entitlements to non-primary, general aviation and reliever airports.³⁰¹ In addition to ceding the funding decisions to block grant states, the FAA has delegated significant enforcement power to these states.³⁰² Most notably, the states are responsible for assuring that sponsors comply with the grant assurances.³⁰³ These block grants allow the FAA to concentrate on larger commercial airports.³⁰⁴ In addition, block grant states are better able to direct their own aviation funds, in conjunction with the federal funds, to projects that will benefit their constitu-

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See *City of Euless v. Dallas/Fort Worth Int'l Airport Bd.*, 936 S.W. 2d 699, 699 (Tex. App.—Dallas 1996, writ denied); *Dallas/Fort Worth Int'l Airport Bd. v. City of Irving*, 854 S.W. 2d 161, 161 (Tex. App.—Dallas 1993, writ granted).

²⁹⁸ See Vornholt Testimony, *supra* note 1. The Illinois legislature is apparently unwilling to reign in the power of the City of Chicago, as evidenced by the Meigs Field debacle. Esler, *supra* note 3, at 56.

²⁹⁹ FIELD FORMULATION OF THE NPIAS, *supra* note 69, at 12.

³⁰⁰ 49 U.S.C.A. § 47128 (West 2007) (authorizing the Department of Transportation to turn over the administration of AIP grants to individual states). This program is regulated through Part 156 of the Federal Aviation Regulations (FAR). 14 C.F.R. Pt. 156 (2007).

³⁰¹ LORI LEHNERD, NAT'L ASS. OF STATE AVIATION OFFICIALS, AIRPORT IMPROVEMENT PROGRAM: BLOCK GRANT IMPACTS 9 (2002).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 11.

encies.³⁰⁵ For instance, as a block grant state, Missouri was able to complete the construction of six entirely new airports over the last decade.³⁰⁶ Under FAA direction, it can take a decade to add a single runway to an existing airport.³⁰⁷

However, even in states where the state aviation authority is proactive in its compatibility planning, the programs run into roadblocks.³⁰⁸ The State of Washington recently published an evaluation of its land use compatibility program.³⁰⁹ Its survey of airport managers and city leaders revealed that two of the three largest problems facing the effectiveness of the compatibility program were lack of incentives and multiplicity of jurisdictions (Washington is not a block grant state).³¹⁰ The jurisdictional problem was a substantial barrier even though Washington had passed legislation requiring municipalities to *discourage* incompatible land use around its general aviation airports.³¹¹ Yet, 58% of the surveyed municipalities had not incorporated any airport-compatible land use provisions in its zoning laws.³¹² Perhaps, a “discouragement” requirement is not strong enough language?

V. A WAY FORWARD

It is a well-known maxim that moving a horse forward often requires both a “carrot” and a “stick.” When it comes to enforcing its vision for a robust national airport system, the FAA’s “stick” is simply not strong enough to overcome the land use planning powers of the local governments and the economic development engine that drives local action. However, since the *Naples* decision allows the FAA to withhold future grant funds for an airport’s “bad behavior,” the FAA’s “stick” just got larger.³¹³ Yet the FAA’s ability to enforce compatible land use provisions in AIP grants is still hampered by the multitude of jurisdictions that can enact zoning provisions affecting a single

³⁰⁵ *Id.* at 5. States spend \$400 million annually on airport capital improvements. *Id.*

³⁰⁶ *Id.* at 11.

³⁰⁷ *Id.*

³⁰⁸ AIRPORT LAND USE COMPATIBILITY PROGRAM, *supra* note 254, at 14.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 27. The third problem was a lack of understanding of the program. *Id.*

³¹¹ *Id.* at 7.

³¹² *Id.* at 3.

³¹³ See *City of Naples Airport Auth. v. Fed. Aviation Admin.*, 409 F.3d 431, 434–35 (D.C. Cir. 2005).

airport.³¹⁴ Is the solution to give the FAA a bigger “stick” by enacting legislation that further preempts land use planning around an airport? Or should we enlarge the “carrot” by increasing federal funding of airports?

I would suggest that neither solution will truly address the problem. Rather, I propose a solution that, to maintain the metaphor, breaks the “stick” and “carrot” into many smaller sticks and carrots by bolstering the State Block Grant Program. The FAA should distribute block grant funds to a greater number of states than it currently does, allowing these states to distribute the funds as they see fit. However, in return, each block grant state should be required to enact enabling legislation that ensures, rather than merely encourages, the enforcement of compatible land use programs. I do not suggest that all states should enact legislation that grants broad zoning and eminent domain powers to airport authorities, as Texas has done in the case of the DFW airport authority.³¹⁵ However, these state legislative measures should go beyond the suggestive language of the Washington State statute and enforce real cooperative planning among airport-affected jurisdictions. Perhaps then the loss of general aviation airports will be arrested.

³¹⁴ See Part IV, *supra* notes 253–312.

³¹⁵ See *City of Euless v. Dallas/Fort Worth Int'l Airport Bd.*, 936 S.W. 2d 699, 701 (Tex. App.—Dallas 1996, writ denied).

