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Aviation Law - D.C. Circuit Allows Stage 2 Noise Restriction Yet Defers to FAA's Interpretation of ANCA: *City of Naples Airport Authority v. Federal Aviation Administration*

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AVIATION LAW—D.C. CIRCUIT ALLOWS STAGE 2 NOISE RESTRICTION YET DEFERS TO FAA'S INTERPRETATION OF ANCA: *CITY OF NAPLES AIRPORT AUTHORITY V. FEDERAL AVIATION ADMINISTRATION*

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THE CITY OF NAPLES is a quiet retirement community in southern Florida. But the daily games of croquet and bridge are frequently interrupted by the loud engine roar of airplanes landing at the local Naples airport. In order to create a uniform process for airport proprietors to restrict such noise, Congress passed the Airport Noise and Capacity Act ("ANCA" or "the Act").[1] The Act was the product of significant compromise. To appease airport proprietors and local residents of airport cities, Congress provided a permanent phase-out of Stage 2 aircraft weighing more than 75,000 pounds by the end of 1999.[2] To appease airlines, trade groups, unions, and plane and engine builders, Congress placed significant procedural requirements on Stage 2 restrictions and significant procedural and substantive requirements on Stage 3 restrictions.[3]

With its passage, however, two issues have arisen: (1) whether the Federal Aviation Administration ("FAA") can review the substance of Stage 2 restrictions, even if the airport has complied with all the procedural requirements of ANCA, and (2) whether the FAA can still withhold grants for unreasonable Stage 2 restrictions under the Airport and Airway Improvement Act ("AAIA"). The FAA, as the federal agency in charge of implementing ANCA, has attempted to answer these questions. To

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[1] 49 U.S.C. § 47521 (1990).

[2] *Id.* § 47528. The FAA classifies the noise emitted by aircraft into one of three categories: Stage 1 (the loudest aircrafts, which were banned in 1987), Stage 2, and Stage 3 (the quietest aircrafts).

[3] *Id.* § 47524(b).

the first issue, the FAA believes that its role is not only to ensure that the procedural requirements of ANCA are met, but also to provide a detailed review of the substance of the restriction.[4] Thus, it believes that it can review Stage 2 restrictions for substance. To the second issue, the FAA believes that ANCA does not supersede other laws.[5] In other words, the FAA believes it can still withhold grants under AAIA, even if the airport has complied with the procedural requirements. However, since the adoption of ANCA and the FAA's interpretation, not one local airport authority has been able to pass a noise restriction—until the D.C. Circuit Court of Appeals decided *City of Naples Airport Authority v. FAA*.[6]

In 1999, the Naples Airport Authority, after receiving several complaints a month from residents, examined noise exposure in the area.[7] The study found that, by restricting all Stage 2 aircraft, only 1% of aircraft operations would be affected, and the number of people exposed to 60 decibels (dB) of noise or more would diminish considerably.[8] Thus, the Airport Authority completed the extensive procedural requirements for a Stage 2 restriction and began enforcing the ban on January 1, 2001.[9]

This ban faced numerous challenges—by airlines, trade groups, cargo haulers, unions, and plane and engine builders—all of whom desired a less regulated air industry. First, the FAA initiated an enforcement action against Naples, claiming that the Stage 2 ban violated ANCA because of defects in the economic study required by ANCA.[10] Once Naples corrected those defects by a supplemental study, however, the FAA stated that the airport had satisfied the procedural requirements of ANCA and dropped its enforcement action.[11] Second, the National

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[4] Peter Irvine, Note, *The Future of Stage 2 Airport Noise Restrictions: A Matter of Substantive Versus Procedural Review by the Federal Aviation Admiistration*, 11 GEO. MASON L. REV. 179, 203 (2002) (citing Letter from Louise E. Maillett, FAA Acting Associate Administrator for Airports, to Rebecca Zwart, Minneapolis Metropolitan Airport Commission (June 9, 1999)).

[5] *Id.* at 206 (citing Letter from Frederick M. Isaac, FAA Regional Administrator of the Nortwest Mountain Region, to Francesca Hammer, President of the Jackson Hole Airport board (Jan. 19, 1996)).

[6] City of Naples Airport Auth. v. FAA, 409 F.3d 431 (D.C. Cir. 2005).

[7] *Id.* at 433.

[8] *Id.*

[9] *Id.*

[10] Aimee Kratovil, Comment, *The Airport Noise & Capacity Act of 1990: Superfluous Hurdle for Airport Proprietors Who Have Assured Federal Grants*, 12 PENN ST. ENVTL. L. REV. 499, 510-11 (2004).

[11] *Id.*

Business Aviation Association ("NBAA") and the General Aviation Manufacturers Association ("GAMA") sued Naples, claiming that the Stage 2 restriction was preempted by federal law under the Supremacy Clause and that it violated the reasonableness and nondiscrimination requirements of the Commerce Clause.[12] The court ruled in favor of Naples, holding that the Stage 2 ban was not preempted by federal law and was not unreasonable or discriminatory.[13] In October of 2001, the FAA initiated a second enforcement action to terminate the Airport Authority's ability to receive federal grants under AAIA.[14] The FAA found that (1) the FAA was not bound to the prior court decision in *NBAA* under the doctrine of *res judicata*, (2) ANCA has no effect on grant assurance obligations under AAIA, and (3) the Stage 2 restriction is unreasonable.[15] The Airport Authority appealed this decision.[16]

The D.C. Circuit Court of Appeals only commented on the latter two holdings of the FAA.[17] First, the court deferred to the FAA's interpretation of ANCA—that the FAA may still withhold grants under AAIA when an airport operator imposes an unreasonable Stage 2 noise restriction.[18] The court found that ANCA was ambiguous on this issue and that the FAA's interpretation of the relationship between the two laws was permissible.[19] Second, the court held that the restriction on Stage 2 aircraft was reasonable.[20] In response to the FAA's claim that Naples does not believe that 60 dB is a significant noise level, the court pointed to a city ordinance forbidding noise in excess of 60 dB.[21] In response to the FAA's claim that Naples is not uniquely quiet, the court discovered that the FAA did not define uniquely quiet, did not visit Naples as part of its investigation, and did not conduct its own sound analysis.[22] On the other hand, Naples offered evidence that the community is a quiet retirement neighborhood and that its economy is based upon that particu-

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[12] Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343, 1346 (M.D. Fla. 2001).

[13] *Id.* at 1353-54.

[14] Kratovil, *supra* note 10, at 515-22.

[15] *Id.*

[16] City of Naples Airport Auth. v. FAA, 409 F.3d 431 (D.C. Cir. 2005).

[17] *Id.* at 433-35.

[18] *Id.* at 435.

[19] *Id.*

[20] *Id.* at 436.

[21] *Id.* at 435.

[22] *Id.* at 436.

lar environment.[23] Thus, the court permitted the Stage 2 restriction.[24] While the court reached the correct outcome in permitting the Naples Stage 2 restriction, it erred in deferring to the FAA's interpretation of ANCA.

In deferring to the FAA's interpretation, the court relied on *Chevron v. Natural Resources Defense Council*.[25] In that case, the U.S. Supreme Court held that if a law is ambiguous and the governing federal agency suggests a permissible interpretation then that interpretation will be given effect.[26] Under the *Chevron* analysis, the first inquiry is whether Congress spoke to the issue.[27] If Congress' intent is clear on the issue, then that intent must be upheld.[28] Intent can be determined by natural meaning, legislative history, and purpose.[29] If the intent is unclear, the second inquiry is whether the federal agency's interpretation is permissible.[30] In this case, Congress' intent was clear: (1) to pass a Stage 2 restriction, an airport proprietor has to submit only to procedural requirements, not to a substantive review by the FAA, and (2) the FAA cannot deny federal funding to airports with Stage 2 restrictions under AAIA.

First, the plain language of ANCA makes clear that airport proprietors need only to perform certain procedural requirements to pass a Stage 2 restriction. The airport proprietors must (1) publish the proposed restriction 180 days before the effective date and (2) make available for public comment an analysis of the anticipated costs and benefits of the restriction, a description of alternative restrictions, and a comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction.[31] The FAA regulations provide the details of the analysis and notice requirements.[32] All of these requirements are procedural. Stage 3 restrictions, however, are expressly subject to substantive review. These restrictions can only become effective if either all aircraft operators at that airport or the Secretary of Transportation approve.[33] In approv-

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[23] *Id.*
[24] *Id.*
[25] *Id.* at 434-35.
[26] Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 49 U.S.C. § 47524(b) (1990).
[32] 14 C.F.R. § 161 (1991).
[33] 49 U.S.C. § 47524(c) (1990).

ing, the Secretary considers whether the restriction is reasonable, non-arbitrary, and non-discriminatory.[34] Because Congress explicitly required FAA approval of Stage 3 restrictions but did not require such approval of Stage 2 restrictions, Congress clearly intended to allow airport operators to promulgate Stage 2 restrictions free from FAA review.

Further, the plain language of ANCA makes clear that it supercedes AAIA. The AAIA is the means through which the federal government supports state and local airport operation. Airport proprietors can receive grant funds in return for "grant assurances," which obligate proprietors to comply with policies of the federal government.[35] The first assurance is that "the airport will be available for public use on reasonable conditions and without unjust discrimination."[36] If an airport violates this promise, the FAA may suspend federal grant funds.[37] Fortunately, ANCA specifically addresses its relationship to previous laws such as AAIA. It states "except as provided by section 47524 of this title, this subchapter does not affect" law currently in effect relating to airport noise or the authority of the Secretary of Transportation to seek and obtain legal remedies where appropriate.[38] Thus, section 47524, which sets forth the requirements for Stage 2 and Stage 3 restrictions, *does* affect law currently in place. The FAA can no longer suspend federal funds for unreasonable noise restrictions. As one author stated, section 47524 "provides" something; "it provides its own self-contained regulatory structure for reviewing Stage 2 and 3 restrictions."[39]

The court overlooked this section. Instead, the court focused on section 47524(e) of ANCA, which states that an airport with a Stage 3 restriction is eligible for grants under AAIA if the restriction has been approved by the Secretary of Transportation or agreed to by all the aircraft operators.[40] In other words, the FAA cannot withhold grants on the basis of approved Stage 3 noise restrictions. The court argued that, because there is no such similar provision for Stage 2 restrictions, Congress intended to continue to allow the FAA to withhold grants for Stage 2 restrictions, even if the airport operator complied with the procedural

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[34] *Id.* § 47524(c)(2).
[35] 49 U.S.C. § 47107(a) (1982).
[36] *Id.*
[37] *Id.* § 47107.
[38] 49 U.S.C. § 47533 (1990).
[39] Irvine, *supra* note 4, at 208.
[40] 49 U.S.C. § 47524(e) (1990).

requirements.[41] However, section 47533 made clear that Congress did not intend current law to continue to apply to section 47524 restrictions. Because previous law does not govern section 47254, to the extent that Congress wanted previous law to apply, it had to write it into that section. Section 47524(e) is such an example, making clear Congress' intent that airports with Stage 3 restrictions still receive the benefits of AAIA.

Second, the legislative intent of ANCA makes it clear that the FAA cannot perform substantive review of Stage 2 restrictions or deny federal funding to Stage 2 restrictions under AAIA. During Senate debate on the bill, Senator Frank Lautenberg asked Senator Wendell Ford whether "under this proposal, an airport operator would be allowed to impose restrictions on Stage 2 operations, without the approval of the FAA, and without risking loss of . . . money."[42] Ford, the Chairman of the Aviation Subcommittee, replied that the Senator was correct on both points.[43] Thus, the members of Congress, before voting, were clear on the facts that, under ANCA, the FAA could not review Stage 2 restrictions and could not deny federal funding for such restrictions. Further, the early versions of ANCA required approval by the FAA for Stage 2 restrictions.[44] However, the Conference Committee removed that requirement before the legislation was passed. Thus, Congress specifically considered such a substantive review for Stage 2 restrictions and rejected it.

The court also considered this evidence, but did not give it weight because it does not deal with the FAA's pre-existing power to withhold grants under AAIA.[45] However, the previously discussed evidence is relevant to that issue. The questioning between the Senators implicitly refers to the FAA's pre-existing power to withhold grants. Senator Lautenberg asked the question *because of* the FAA's pre-existing ability to withhold grants based on unreasonable restrictions. He wanted to clarify whether ANCA would change that power. And Senator Ford confirmed that the FAA had indeed lost that ability; airport proprietors could now pass Stage 2 restrictions without such a loss of federal funding. Because this evidence of legislative intent implicitly deals with the FAA's pre-existing power to withhold

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[41] City of Naples Airport Auth. v. FAA, 409 F.3d 431, 434 (D.C. Cir. 2005).

[42] 136 CONG. REC. 36, 252 (1990) (statement of Sen. Lautenberg).

[43] 136 CONG. REC. 36, 252 (1990) (statement of Sen. Ford).

[44] Omnibus Budget Reconciliation Act of 1990, S. 3209, 101st Cong. § 3202(a) (1990).

[45] *City of Naples*, 409 F.3d at 434.

grants under the AAIA, the court should have given this evidence more weight.

Third, the purpose of ANCA has been thwarted by the FAA's interpretation. When ANCA was passed, each local airport passed its own restriction on noise levels.[46] Congress found that "community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system" and thus "a noise policy must be carried out at the national level."[47] In passing ANCA, Congress certainly intended airports to pass restrictions—just at the national rather than the local level. But the FAA's interpretation has led to just one Stage 2 restriction in fifteen years, the one in Naples. Certainly this is not what Congress envisioned.

Between the plain language, legislative intent, and purpose of ANCA, it is clear that Congress intended Stage 2 restrictions to be passed without substantive review by the FAA and without the loss of AAIA funding. Thus, under *Chevron*, the court should not have given deference to the FAA's interpretation of ANCA. However, even if the Congressional intent was unclear, the FAA's interpretation of ANCA is not permissible because of its effects. First, the FAA's interpretation creates a burdensome and costly two-step process for Stage 2 restrictions. Airport proprietors must first complete the procedural requirements, which involve a costly economic study. In fact, the requirements are so burdensome that Naples is the only airport that has been able to complete them.[48] After completing those requirements, the airport proprietors then must get the approval of the FAA. This interpretation makes ANCA just a procedural hurdle to restricting Stage 2 aircraft. Second, this interpretation undermines the compromise that ANCA was, making it only beneficial to the airline industry. By using AAIA to get substantive review of Stage 2 restrictions, "the FAA has attempted to assert authority through the back door that Congress never gave to the agency. This assertion of authority is unprecedented and upsets the balance between federal and local control that Congress and the courts have carefully struck."[49] And finally, the FAA's negative attitude toward Stage 2 restrictions, coupled with its ability to review for substance all Stage 2 restrictions, has intimidated airport propri-

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[46] 49 U.S.C. § 47521(2) (1990).

[47] 49 U.S.C. § 47521(2), (3) (1990).

[48] Irvine, *supra* note 4, at 200.

[49] Kratovil, *supra* note 10, at 522-23.

etors from attempting to enact such restrictions.[50] As one author stated, "through this substantive review, the FAA discourages the enactment of restrictions by threatening the suspension of a proprietor's eligibility to receive airport improvement funds."[51]

Overall, while the court reached the correct outcome by allowing the Stage 2 restriction, the court erred in deferring to the FAA's interpretation of ANCA. The plain language, legislative intent, and purpose of ANCA indicate Congress' intent: (1) airport proprietors have to satisfy only certain procedural requirements to pass a Stage 2 restriction, and (2) the FAA cannot deny federal funding for unreasonable Stage 2 restrictions under AAIA. Thus, the court should not have deferred to the FAA's opposing interpretation. Even if Congress' intent is ambiguous, the FAA's interpretation of ANCA is not permissible because of the undesirable effects. It makes ANCA a costly hurdle to Stage 2 restrictions. It undermines the compromise reached between airport proprietors and the airline industry. And it has further intimidated airport proprietors from attempting to restrict Stage 2 aircraft. So while the residents of Naples can again enjoy their quiet games of bridge and shuffleboard, other residents of airport cities will most likely not enjoy such peace and quiet.

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[50] *See* Irvine, *supra* note 4, at 213.

[51] *Id.*