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A WASTE OF JUDICIAL AND AGENCY RESOURCES—THE FAA'S PAINSTAKING COMPLIANCE WITH REGULATIONS GOVERNING THE HANGAR 24 PROJECT

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SAFEGUARDING THE HISTORIC Hanscom Area's Irreplaceable Resources, Inc. v. FAA concerns conservationist organizations' and concerned citizens' unsuccessful challenge of the Federal Aviation Administration's (FAA's) approval of a demolition and rebuilding project at a Massachusetts airport.[1] The First Circuit held that the FAA's findings and decision to sanction the project clearly complied with the Department of Transportation Act (DOT Act), the National Historic Preservation Act (NHPA), and the National Environmental Policy Act (NEPA).[2] The FAA's fulfillment of its responsibilities under the applicable statutes demonstrates the necessity for a more streamlined challenge process that prevents wasteful use of judicial resources.

The dispute at issue arose when the Massachusetts Port Authority (Massport) began developing a plan to modernize Laurence G. Hanscom Field (Hanscom), a "general aviation airport" located in Bedford, Massachusetts, near a plethora of "historically significant sites."[3] Massport, an entity affiliated with the Massachusetts state government, requested FAA authorization of a project that included "demolition of an existing hangar and . . . development of a state-of-the-art fixed base operator (FBO) facility."[4] An FBO facility helps deliver a variety of services for aircraft, operators, and passengers, such as "maintenance, fueling, parking, and hangaring" for the aircraft, "flight

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1 651 F.3d 202 (1st Cir. 2011); *see Why It Matters*, SHHAIR, http://www.shhair.org/whyitmatters.html (last visited Feb. 1, 2013).

2 *Safeguarding*, 651 F.3d at 205.

3 *Id.*

4 *Id.*

planning services" for pilots, and "ground transportation or overnight accommodations" for passengers.[5] At the time the case was decided, Hanscom operated as a "relief valve" for the main airport in the Boston area, Logan International Airport (Logan); this allowed Logan to focus on providing "large-scale commercial flights" while Hanscom offered services such as pilot training and other aviation operations for corporations, institutions, and individuals.[6]

Here, the debate concerning the modernization of Hanscom revolved largely around Hangar 24, a structure that had been a part of the airport since 1948, had been deemed "unsuitable" for use as a research facility by the Massachusetts Institute of Technology in 2001, and had been vacant since that determination was made.[7] After requesting proposals for the redevelopment of the Hangar 24 site in 2005, Massport selected a project that would replace Hangar 24 with an FBO facility.[8] This decision caused concerned citizens and preservationist groups to mobilize against the project.[9] One organization, Save Our Heritage, contacted the Massachusetts Historical Commission (Commission) in 2006 and requested that it evaluate Hangar 24 for potential addition to the National Register of Historic Places (National Register).[10] The Commission determined that Hangar 24 met two of the necessary criteria because the structure was associated with "significant historical events" and "the lives of historically significant persons."[11] As a result, Massport initiated studies that analyzed the hangar's current condition and potential for alternative uses.[12] One study conducted by an aviation consultant, HNTB Corporation, "found [the hangar] 'functionally obsolete' and unsuitable for aviation use"; another study found the hangar unfit for use by the Massachusetts Air and Space Museum.[13]

In 2008, per the regulatory framework requiring the FAA to "ensure the safety, security, and efficiency" of airport facilities,

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[5] Respondent's Answering Brief at 2, *Safeguarding*, 651 F.3d 202 (No. 10-1972).

[6] *Safeguarding*, 651 F.3d at 206; Respondent's Answering Brief, *supra* note 5, at 7–8.

[7] *Safeguarding*, 651 F.3d at 206.

[8] *Id.*; Respondent's Answering Brief, *supra* note 5, at 9.

[9] *Safeguarding*, 651 F.3d at 205.

[10] *Id.* at 206.

[11] *Id.*; *see* 36 C.F.R. § 60.4(a)–(b) (2012).

[12] *Safeguarding*, 651 F.3d at 206.

[13] *Id.*

the FAA began the approval process for the Hangar 24 project.[14] In 2010, the FAA approved the replacement of Hangar 24 after "engag[ing] in a consultation process and prepar[ing] an environmental assessment (EA)" that focused on the project's potential impacts on the environment and historic landmarks.[15] Specifically, the FAA determined that the Hangar 24 project complied with the requirements set forth by the DOT Act, the NHPA, and the NEPA.[16] Disagreeing with each of these determinations, the petitioners filed an action for judicial review under 49 U.S.C. § 46110, challenging the FAA's order allowing the Hangar 24 project to proceed.[17]

In short, the First Circuit upheld the FAA's findings and denied the petitioners' request for judicial review because the FAA adequately complied with the regulatory framework set out by the statutes and regulations governing this case.[18] With respect to the standard of review, the court was required to "uphold the FAA's findings of fact as long as they [were] supported by substantial evidence"; the agency's actions could be set aside only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[19] In other words, the FAA's order could be set aside if it depended on improper factors, neglected to consider relevant aspects of the issue, presented a rationale that contradicted the available evidence, or "reached a conclusion so implausible that it [could not] be attributed to a difference of opinion or the application of agency expertise."[20] The court upheld the FAA's order for the following reasons: (1) the Hangar 24 project was the "only feasible and prudent alternative" under the DOT Act; (2) replacing the hangar would have no adverse consequence under an interpretation of the NHPA; and (3) the project posed no significant impact within the meaning of the NEPA.[21]

The court first addressed the petitioners' argument that the FAA's findings failed to comply with Section 4(f) of the DOT

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[14] *Id.* at 206–07, 214; *see also* Exec. Order No. 13,180, 65 Fed. Reg. 77,493 (Dec. 7, 2000), *amended by* Exec. Order No. 13,264, 67 Fed. Reg. 39,243 (June 7, 2002).

[15] *Safeguarding*, 651 F.3d at 207.

[16] *Id.* at 205, 207.

[17] *Id.* at 207; *see generally* 49 U.S.C. § 46110 (2006).

[18] *Safeguarding*, 651 F.3d at 218.

[19] *Id.* at 207 (quoting 5 U.S.C. § 706(2)(A) (2006)).

[20] *Id.* (quoting Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997)).

[21] *See id.* at 207, 218.

Act, which limits the use of land listed in the National Register.[22] The FAA may approve a transportation project involving the use of historically significant lands only if "there is no prudent and feasible alternative to using that land . . . [and] the program or project includes all possible planning to minimize harm to the . . . historic site."[23] The EA that was prepared in conjunction with the Hangar 24 project took four alternative courses of action into consideration: (1) "[d]o nothing"; (2) "[l]ocate a new hangar facility elsewhere on the airport"; (3) adapt and reuse Hangar 24; or (4) "[r]eplace Hangar 24 as proposed by Massport."[24] The FAA determined that while each alternative was feasible, only Massport's proposal of replacing Hangar 24 was prudent.[25] The First Circuit rejected the petitioners' argument based on *Citizens to Preserve Overton Park, Inc. v. Volpe*,[26] which suggests that an alternative is only imprudent if it presents "'extraordinary costs,'" disruptions, or other "'unique problems.'"[27] Analyzing each alternative, the court first held that the FAA's rejection of the "do nothing" option was neither arbitrary nor capricious because this proposal would fail to support Massport's goal of meeting a proven increased demand for aviation services at Hanscom.[28] This conclusion rested partly on First Circuit precedent that "'an alternative is not prudent if it does not meet the transportation needs of a project.'"[29] Next, the court addressed the possibility of locating the FBO facility in the only other available site at Hanscom: the East Ramp.[30] The FAA ultimately determined that Hangar 24 was the more prudent option because the East Ramp location posed complications such as distance from other airport facilities, access problems, property rights issues, and potential environmental impacts.[31] The petitioners attacked this determination as vague and unsubstantiated, but the court upheld the FAA's "judgment call" as "within

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[22] *Id.* at 207; *see also* Petitioners' Opening Brief at 28, *Safeguarding*, 651 F.3d 202 (No. 10-1972).

[23] 49 U.S.C. § 303(c) (2006).

[24] FAA, DRAFT ENVIRONMENTAL ASSESSMENT 5 (2008), *available at* http://www.massport.com/in-the-community/pages/communityaffairsnotices.aspx.

[25] *Safeguarding*, 651 F.3d at 208.

[26] 401 U.S. 402 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

[27] *Safeguarding*, 651 F.3d at 208 (quoting *Overton Park*, 401 U.S. at 413).

[28] *Id.* at 209–10.

[29] *Id.* at 209 (quoting Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin., 463 F.3d 50, 65 (1st Cir. 2006)).

[30] *Id.* at 210–11.

[31] *Id.*

the purview of the FAA's expertise" and compliant with the requirements set forth by 49 U.S.C. § 47101(a).[32] Furthermore, the court held that the petitioners' broad attack did not amount to the "'sustained and organized rebuttal'" required to defeat the FAA's factor analysis.[33] Finally, the court upheld the FAA's rejection of adapting Hangar 24 for use within the FBO facility because the totality of factors inhibiting ease of adaptation justified the FAA's finding.[34]

After determining that replacing Hangar 24 was the only prudent option, the First Circuit held that the proposed project included all possible planning to minimize harm within the meaning of Section 4(f) of the DOT Act.[35] The court noted that the FAA's decision that a proposed project "sufficiently minimizes the likely harms to historic properties" merits "'even greater deference'" than a determination concerning feasible and prudent alternatives.[36] Furthermore, the FAA was only required to consider harm-minimizing actions that were "feasible and prudent under existing circumstances."[37] The court ruled that the FAA's analysis met this standard.[38]

The First Circuit next rejected the petitioners' argument that the FAA failed to comply with procedures required by the NHPA.[39] Because Hangar 24 fell within Section 106 of the NHPA due to its inclusion in the National Register, the FAA was obligated to (1) determine whether the project was an "undertaking" that could affect historic property; (2) consult with the Commission to ascertain and resolve potential effects; (3) notify the Advisory Council on Historic Preservation (Council) of the issue; and (4) implement a memorandum of agreement (MOA) once all parties settled on a method of resolving the potential effects.[40] Here, the FAA determined the project to be an "under-

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[32] *Id.* at 211; *see* 49 U.S.C. § 47101(a)(1), (7) (2006) (mandating that "the safe operation of the airport . . . system is the highest aviation priority" and that "airport . . . projects that increase the capacity of facilities . . . be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease").

[33] *Safeguarding*, 651 F.3d at 211 (quoting Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 60 (1st Cir. 2001)).

[34] *Id.* at 211–13.

[35] *Id.* at 213–14.

[36] *Id.* at 213 (quoting Conservation Law Found. v. Fed. Highway Admin., 24 F.3d 1465, 1476–77 (1st Cir. 1994)).

[37] *Id.*

[38] *Id.* at 213–14.

[39] *Id.* at 216–17.

[40] *Id.* at 214; *see* 16 U.S.C. § 470f (2006); 36 C.F.R. §§ 800.3–800.6 (2012).

taking" and began consulting with the Commission.[41] The FAA then released a draft EA for public comment, and following the Council's determination that its involvement was unnecessary due to the FAA's "exhaustive" consideration of alternatives, the FAA issued a draft MOA detailing its pledge to mitigate effects.[42] The court refused the petitioners' arguments that the project was too ambiguous to assess, that historic sites other than Hangar 24 would be affected, that scenic views would be altered, that the project posed a fire hazard, and that it would significantly increase noise levels.[43]

Finally, the First Circuit dismissed the petitioners' critique of the FAA's compliance with the NEPA, which "requires federal agencies to prepare an environmental impact statement (EIS) for 'major [f]ederal actions significantly affecting the quality of the human environment.'"[44] However, if an agency issues an EA and determines that a more detailed EIS is unnecessary, "it may issue an explained finding of no significant impact."[45] Here, the petitioners' challenge under the NEPA concentrated on the FAA's finding that the project's potential increase in cumulative noise levels would be minimal.[46] The court rejected this argument, concluding that the FAA's analysis was conducted in a reasonable manner and its results could not be challenged.[47]

This case presented an ideal opportunity for the First Circuit to initiate a discussion about how to remedy the inefficient state of the review process for FAA findings. The court, however, failed to act on this opportunity. Where, as here, the FAA appears to have gone above and beyond what is required by the review process, judicial resources are squandered by such an extensive review of the administrative record and FAA actions. Though any possible solution is bound to present additional hurdles, Congress, the FAA, and other appropriate agencies should work together to reform the process through which concerned citizens challenge FAA decisions. Reform efforts could focus on restructuring the public comment process and encouraging greater third-party involvement in the assessment of proposed projects.

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[41] *Safeguarding*, 651 F.3d at 214.
[42] *Id.* at 215.
[43] *Id.* at 215–16.
[44] *Id.* at 217–18 (quoting 42 U.S.C. § 4332(2)(C) (2006)).
[45] *Id.* at 217; *see* 40 C.F.R. § 1501.4(c), (e) (2012).
[46] *Safeguarding*, 651 F.3d at 217–18.
[47] *Id.*

The role of the public comment period should be expanded to more effectively resolve citizens' concerns. The NHPA, the NEPA, and the DOT Act all contain similar provisions requiring an agency to "provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking."[48] Additionally, in an action for judicial review of an FAA order, a court may only consider objections previously raised in a proceeding conducted by the Under Secretary of Transportation or the FAA Administrator—unless reasonable grounds for the lack of previous objections exist.[49] These provisions demonstrate a commitment to public involvement, but this commitment should be taken a step further to prevent needless litigation and judicial review. While these regulations do not require public hearings in addition to a public comment period,[50] a mandatory public hearing held subsequent to the distribution of the draft EA, MOA, and potential EIS could require concerned parties to raise all objections at that time. A final ruling on each concern could be issued by a representative from the Council, the DOT, or other agency. The appeals process would therefore become more streamlined by relying on these discussions and rulings.

Another potential resolution involves mandatory assessment of the project by a neutral third party and deference to its conclusion. For instance, in *Safeguarding*, the FAA could have relied on an aviation consultant like HNTB Corporation to establish certain indisputable findings. A neutral third party's involvement would simply function as an extension of the provision encouraging individuals with a "demonstrated interest in the undertaking" to consult with the agency in its decision making process.[51]

The FAA is required to abide by an assortment of statutes and regulations in the process of approving an airport project. These regulations include, but are not limited to, the DOT Act, the NHPA, and the NEPA. The FAA should not be punished with extended litigation after it has carefully complied with the requirements set forth in such statutes. Therefore, reform of the

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[48] 36 C.F.R. § 800.6(a)(4) (2012); *see* 42 U.S.C. § 4332(2)(C) (revealing the NEPA's commitment to public involvement in agency statements); 49 U.S.C. § 303(c)–(d) (2006) (demonstrating that the DOT Act incorporates the public comment requirements stated under the NHPA).

[49] 49 U.S.C. § 46110(d).

[50] *See* 42 U.S.C. § 4332(2)(C); 49 U.S.C. § 303(c)–(d); 36 C.F.R. § 800.6(a)(4).

[51] *See* 36 C.F.R. § 800.2(c)(5).

review process for FAA findings is critical to improving the efficient operation of the FAA, other agencies, and the judicial system.