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THE NATIONAL AIR TRANSPORTATION SYSTEM: 
DESIGN BY CITY HALL?

E. Tazewell Ellett*

I. INTRODUCTION

TODAY WE ARE clearly approaching a crisis in the national air transportation system because of increasing restrictions on both the access to the nation’s airports and on the use of aircraft at those airports. This is occurring at a time when airport capacity is becoming increasingly inadequate to satisfy the growing demand for air transportation services. Because of its historic role as a pervasive regulator of aviation in the United States, and as a protector of the nation’s interstate commerce system, the federal government is generally viewed as having the primary responsibility for, and pervasive authority over, preserving the nation’s air transportation system, and ensuring that it grows to meet current and projected demands. For this reason, it might really surprise the millions of Americans who, on a daily basis, enjoy the benefits of our strong national air transportation system to know just how little control over that system resides with the national government and how much control actually resides at the local level.

This article will first explore the background of the cur-

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1 Domestic passenger enplanements are expected to almost double between 1985 and the year 2000, going from 372.6 million to 740.0 million. During these fifteen years, total civil aircraft operations are forecast to increase from 167.0 million to 262.2 million. FAA, LONG RANGE AVIATION PROJECTIONS, FISCAL YEARS 1998-2010, END YEAR ERROR ANALYSIS (1986).
rent problem involving increasing restrictions on access to the nation's airports and on the use of aircraft at those airports at a time of growing inadequacies in the airport capacity throughout the country. The article will then explain the respective roles of the federal and local governments, the airport proprietor, and the airport user with respect to airport access and aircraft use restrictions. Finally, this article will raise some fundamental questions about the adequacy of the current allocation of responsibility for, and authority over, this critical aspect of our nation's system of interstate and foreign commerce. To do this, the article will focus primarily on restrictions designed to address an aircraft noise problem, although there are many other reasons why airport proprietors might desire to impose such restrictions.

II. BACKGROUND OF THE CURRENT AIRPORT ACCESS AND AIRCRAFT USE RESTRICTION SITUATION

While airport access and aircraft use restrictions have a long history, the current chapter in this history begins with the Airline Deregulation Act of 1978 (Deregulation Act). The Deregulation Act lifted the burdens of economic regulation and allowed airlines to fly wherever they wanted to fly at whatever rates they could charge given free and open competition. The increased freedom for the airlines not only has increased service options for

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2 For the purpose of this paper, the term "airport" refers to airports which have received federal financial assistance under the Airport and Airway Improvement Act of 1982, 49 U.S.C. app. §§ 2201-2225 (1982) or its predecessors, the Airport and Airway Development Act of 1970, 49 U.S.C. app. §§ 1711-1731 (repealed 1982) and the Federal Airport Act of 1946, 49 U.S.C. app. §§ 1101-1120 (repealed 1982).

3 See infra notes 7-11 and accompanying text.

4 See infra notes 12-49 and accompanying text.

5 See infra notes 50-66 and accompanying text.

6 For example, airport proprietors might want to impose restrictions to reduce congestion or to increase economic efficiency. See, e.g., Hardaway, The FAA "Buy-Sell" Slot Rule: Airline Deregulation at the Crossroads, 52 J. AIR L. & COM. 1, 44-67 (1986).

many air travelers, but it has also increased the number of aircraft operations at many airports. These increased operations have created an additional noise impact on many communities near airports, and certain members of these communities who particularly dislike this additional impact have reacted strongly to it.

These communities have exerted significant pressure on the local governing bodies and on the airport proprietors to persuade them to take action to reduce the noise. This pressure has been both legal and political. There has been a rise in the number of lawsuits brought against airport proprietors for damages based on the concept of inverse condemnation, trespass, or nuisance. Regardless of the legal theory argued, the airport proprietor is exposed to substantial potential damage awards in these cases. In addition to the growth in litigation, there has been an increase in the political pressure applied to the airport proprietor by the neighboring communities and local governments to reduce airport noise. Airport proprietors have increasingly reacted by developing aircraft noise abatement procedures, restricting access to airport runways and taxiways, and restricting the use of aircraft at

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8 These theories can appear in the same case. For example, in Greater Westchester Homeowner's Ass'n v. City of Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), an inverse condemnation theory was alleged with regard to property damage, while a nuisance theory was alleged with respect to personal injury. Nuisance, inverse condemnation, and trespass were all alight in Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975).

9 For example, the Los Angeles City Attorney's Office has recently reported, in a paper before the American Bar Association Forum Committee on Air and Space Law, Fourth Annual Forum, that the City of Los Angeles has expended approximately $32 million since 1972 to satisfy judgments for noise suits, and approximately $96 million for the acquisition of fee interests in property subject to noise controversy. Pearson, *Major Airports' Problem with Noise—the Liability Issue—Is it Real?*, ABA FORUM COMM. ON AIR & SPACE L., FOURTH ANNUAL FORUM 1 (1986). In addition, in a decision for the plaintiffs involving the Burbank-Glendale-Pasadena Airport Authority, the California Supreme Court has held that airport operations are "the quintessential continuing nuisance." Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal. 3d 862, 873, 705 P.2d 866, 873, 218 Cal. Rptr. 293, 300 (1985). That case involved approximately 375 residents, each claiming $100,000 for personal injury and an equal amount for property damages. *Id.*
These increasing restrictions on the access to airports and the use of aircraft at airports have raised significant public policy questions which cry out to be answered now, before a real crisis develops in the nation’s air transportation system:

— Since the need to impose such access and use restrictions often arises where local governments fail to properly exercise their zoning and land use authority to prevent or minimize the presence of incompatible land uses around airports, should there be a strong nationwide initiative to encourage the responsible exercise of this authority in the future?

— Should the airport proprietor, the airport user, and the national air transportation system have to bear the cost of solutions to problems created by local governments’ failure to properly exercise this authority?

— Given the vulnerability of the national air transportation system to locally imposed airport access and aircraft use restrictions, is the current allocation of responsibility for, and authority over, that system among the federal and local governments, the airport proprietor, and the airport user adequate?

— Assuming that the current allocation of responsibility and authority is adequate, given the airport proprietor’s extremely significant role in airport access and aircraft operations restrictions, should there be additional responsibilities placed on the proprietor to ensure that the proprietor adequately takes into account the impact of any proposed restrictions on local service, the local economy, and the national air transportation system?

10 There are many ways an airport proprietor can restrict access to an airport to achieve noise abatement, including: (1) total night curfews on all aircraft regardless of noise level; (2) day and/or night noise limits based on single event noise levels; (3) noise levels based on FAA listed noise levels; (4) noise limits based on FAA certification classes; (5) banning of all flight training; (6) noise landing fees; and, (7) noise "budget" limitations based on noise-per-seat or other means of translating a total "fleet noise" limit into operational limits. These are but a few examples of what has become a rapidly expanding phenomenon.

11 It should be noted that the problem of land use compatibility may result from airport expansion as well as from community growth.
While this article does not attempt to answer these questions, it does discuss the current roles of the "players" in the airport access and aircraft use restriction game and the many inadequacies of the current system in terms of its value in enabling the players to achieve their goals. It is hoped that this discussion will facilitate deliberations aimed at answering these important questions.

III. ROLES OF THE "PLAYERS" IN THE AIRPORT ACCESS AND AIRCRAFT USE RESTRICTION GAME

There are several players in the airport access and aircraft use restrictions game. These players do not have equal abilities to affect the outcome of local deliberations on these restrictions in today's environment. The players, and their roles in this game, are discussed here in the order of descending ability to affect the result of decision-making.

A. The Airport Proprietor's Role

The airport proprietor has a very significant role in the airport access and aircraft use restrictions game. The airport proprietor is responsible for locating the airport in the appropriate place and securing adequate land for airport operations to ensure that the airport does not become a nuisance to its neighbors. From this basic responsibility of the proprietor flow several other rights and responsibilities.

The airport proprietor is legally responsible for damages caused by the impact of airport noise on incompatible land uses near the airport, since properly locating the airport, acquiring the proper amount of land, and planning for airport growth presumably would have eliminated those noise impacts. This legal responsibility

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12 See, e.g., Griggs v. County of Allegheny, 369 U.S. 84, 89 (1962); Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981).
13 See Griggs, 369 U.S. at 89; Santa Monica Airport Ass'n, 659 F.2d at 103; see also Greater Westchester Homeowners Ass'n, 26 Cal. 3d at 97, 603 P.2d at 1334, 160 Cal. Rptr. at 738 (holding that an airport proprietor can be held responsible for the
imposes on the proprietor the obligation to make reasonable efforts to encourage local governments near the airport to wisely exercise their authority over zoning and land use so that land near the airport will be put to uses which are compatible with the neighboring airport. Frequently, the airport proprietor has no legal authority over zoning and land use in the area around the airport, although there is a healthy trend in some states to give airport proprietors a voice in this area. Local governments which are airport proprietors generally do have authority over zoning and land use, but in many cases other jurisdictions neighbor the airport so that the proprietor's zoning and land use authority is not extensive enough to ensure that land use is compatible in all areas surrounding the airport.

Because of the airport proprietor's exposure to liability for damages caused by aircraft noise, the courts have preserved for the proprietor the right to protect itself from such damages by restricting the use of the airport so long as the restrictions are reasonable and are consistent with the public interest. For example, a very positive approach to local land use responsibility is expressed, for example, in a Wisconsin statute which stresses both the land use responsibility of municipalities and the need for land use policies to balance national and local needs. 1986 Wis. Legis. Serv. 136 (West); see also Greenberg v. State of Maryland, 66 Md. App. 24, 502 A.2d 522 (Md. Ct. Spec. App.) (affirming an airport zoning board's refusal to permit residential development on noise-impacted land because the zoning regulations were a valid exercise of state police power in relation to land affected by a state-owned airport), cert. denied, 305 Md. 621, 505 A.2d 1342 (1986).

For example, the multi-jurisdictional situation facing Chicago with respect to its efforts to obtain an area-wide land use plan in coordination with the key period in the growth of O'Hare is discussed in a report of the Northeastern Illinois Planning Commission. NORTHEASTERN ILLINOIS PLANNING COMM'N, THE METROPOLITAN AIRCRAFT NOISE ABATEMENT POLICY STUDY—O'HARE INTERNATIONAL AIRPORT 83-84 (1971). This problem also was addressed in the Seventh Circuit's recent decision in Suburban O'Hare Comm'n v. Dole, 787 F.2d 186 (7th Cir.), cert. denied, 107 S. Ct. 169 (1986). The court stated that "many of these communities have resisted attempts by the city to harmonize their own land-use regulations with the aviation activity at O'Hare." Dole, 787 F.2d at 200.

The elements of a federal definition of a "proprietor" are ownership, promotion, and the ability to acquire approach easements. San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1317 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).
as such restrictions are justified by the need to respond to a demonstrable noise problem affecting the airport and its environment.\textsuperscript{17} Such restrictions may not be unreasonable, arbitrary, or discriminatory, and they may not create an exclusive right or constitute an undue burden on interstate or foreign commerce.\textsuperscript{18} These court decisions are based in part on airport grant agreements that require the airport to be open to all kinds and classes of aeronautical uses on fair and reasonable terms and without unjust discrimination.\textsuperscript{19}

When an airport proprietor is considering airport access or aircraft use restrictions, the proprietor may receive federal funding to conduct noise compatibility studies under the part 150 process\textsuperscript{20} established by the Federal Aviation Administration (FAA) pursuant to the Aviation Safety and Noise Abatement Act of 1979\textsuperscript{21}(Safety and Abatement Act). Such studies are used to develop, through a process involving all interested parties,\textsuperscript{22} noise compatibility programs which are subject to review and approval by the FAA.\textsuperscript{23} The pursuit of such studies and the development of such programs are entirely voluntary, however.\textsuperscript{24} If the airport proprietor elects to implement airport access studies or develop a noise compatibility program, the proprietor is free to do so if the above-mentioned judicial tests are satisfied.\textsuperscript{25} The proprietor is not required to submit the proposed restrictions to the FAA

\textsuperscript{17} British Airways Bd. v. Port Authority of New York, 556 F.2d 75, 84 (2d Cir. 1977); National Aviation v. City of Hayward, 418 F. Supp. 417, 418-29 (N.D. Cal. 1976). The airport proprietor can determine for itself the kind of injury (i.e., trespass, inverse condemnation, or nuisance) that may lead to liability, and thus justify the imposition of an airport use restriction. Santa Monica, 659 F.2d at 104 n.5.


\textsuperscript{19} 49 U.S.C. app. § 2210(a) (1982).

\textsuperscript{20} 14 C.F.R. §§ 150.1 - .35 (1986).


\textsuperscript{22} 14 C.F.R. § 150.23(d) (1986).

\textsuperscript{23} 14 C.F.R. § 150.33 (1986).


\textsuperscript{25} \textit{See supra} notes 16-18 and accompanying text.
for review or receive FAA approval of them.\textsuperscript{26}

A growing number of airport proprietors have availed themselves of the part 150 process, and many more have consulted closely with the FAA prior to implementing restrictions. Others however, have implemented restrictions with little or no prior coordination with either the FAA or other parties having an interest in the restrictions. Some have done so with little or no study of either the magnitude of the noise problem or the impacts of the restrictions on interstate or foreign commerce.

B. The Local Government's Role

Local governments are extremely important players in this arena. Most local governments are vested with the legal authority to zone land and make land use decisions. The manner in which this authority is exercised can have a significant impact on whether or not an environmental problem develops at an airport. Thus, if the local government or governments near the airport exercise their zoning and land use authority to create a protective zone of compatible land uses around the airport, airport noise might never become a community problem. If, on the other hand, these governments disregard the consequences of unplanned growth, as many have across the nation, incompatible land uses will develop near the airport which inevitably lead to an aircraft noise environmental problem accompanied by efforts to restrict access.

\textsuperscript{26} On September 14, 1984, the Air Transportation Association formally petitioned the FAA to adopt a rule that would require the submission of noise plans to the FAA for review and approval. FAA Rulemaking Docket 24,246 (Sept. 14, 1984), \textit{reprinted in} 49 Fed. Reg. 30,020 (1984). The FAA has stated that it does not believe that the Congress has authorized the FAA to require such review and approval, and that congressional action would thus be needed to effectuate the Air Transportation Association's request. (This is the FAA's official position. This author, in his capacity as Chief Counsel, has made this statement at several conferences. However, the position has not been reduced to writing in any agency document.) Partially in response to this petition, the FAA published a notice of proposed policy on this and related issues, in an attempt to both clarify the responsibilities of the parties and to request public comment. 51 Fed. Reg. 2985 (1986). As of this writing the FAA still is in the process of finalizing that policy statement.
to the airport or the use of aircraft at the airport. It should be noted that the need for proper planning for, and coordination of, growth exists regardless of whether it is the airport itself or the surrounding land use that is changing over time.

State and local governments are precluded from exercising their police power to regulate aircraft noise at airports because this area of regulation has been preempted by the federal government,27 with a narrow exception to the preemption carved out to enable airport proprietors to undertake certain restricted steps to protect themselves from liability.28 Despite this limitation on their legal authority, local governments or their citizens often bring very effective economic and political pressure to bear on airport proprietors to force them to impose airport access or aircraft use restrictions as a means of reducing airport noise. In this regard, local governments can be extremely influential.

C. The Federal Government's Role

The federal government has a significant role in the airport access and aircraft use restriction game. In addition to its pervasive safety regulatory role, the FAA, as part of the United States Department of Transportation, has a dual statutory mandate in this area. The FAA is charged with both fostering the development of a vital, dynamic, and efficient national air transportation system of airports and airways, and controlling, to the extent practicable, the

27 City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Air Transport Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975). Given these holdings regarding federal preemption in this area, it is inappropriate to discuss this matter as though it is an open question as to whether the federal government or the local government should have this responsibility. The courts have clearly decided that this is an area of exclusive federal responsibility. The crucial distinction between the police power and the proprietary power, *vis a vis* the plenary federal preemption of the control of aircraft noise, is discussed in S. REP. No. 1353, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2688. This led to the adoption of Pub. L. No. 90-411, 82 Stat. 395 (1968) (codified as amended at 49 U.S.C. app. § 1431 (1982)).

28 *Crotti*, 389 F. Supp. at 64.
negative effects of aircraft noise.\textsuperscript{29}

The mandate that the FAA create and maintain a vital, dynamic, and efficient national air transportation system has been present since the beginning of the federal government's involvement in civil aviation. The promotion and fostering of aviation and a system of national airports and airways were the major emphases of the Air Commerce Act of 1926,\textsuperscript{30} the Civil Aeronautics Act of 1938,\textsuperscript{31} and the Federal Airport Act of 1946.\textsuperscript{32} The Federal Aviation Act of 1958,\textsuperscript{33} while primarily addressing the need for a stronger safety emphasis, continued to focus on development of the system, and required the FAA to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad.\textsuperscript{34} The strongest statement of this mandate is more recent. The Federal Aviation Act was amended in 1978 by the Deregulation Act.\textsuperscript{35} Now, by virtue of these amendments, Congress has declared the following goals to be in the public interest:\textsuperscript{36}

— The availability of a variety of adequate, economic, efficient, and low-price services by air carriers;
— The placement of maximum reliance on competitive market forces;
— The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States;

\textsuperscript{29} 49 U.S.C. app. §§ 1346, 1348(c) (1982).
\textsuperscript{34} 49 U.S.C. app. § 1302(a) (1982).
\textsuperscript{35} Pub. L. No. 95-504, 92 Stat. 1705 (codified at scattered sections of 49 U.S.C. app.).
\textsuperscript{36} 49 U.S.C. app. § 1302(a)(3-6, 8, 10) (1982).
— The encouragement of air service at major urban areas in the United States through secondary or satellite airports;
— The maintenance of a comprehensive and convenient system of continuous scheduled interstate and overseas airline service for small communities;
— The encouragement of entry into markets by new air carriers; and,
— The regulation of air commerce in such a manner so as to best promote its development.

Similarly, the Airport and Airway Improvement Act of 1982 requires that the FAA continue airport and airway improvement programs, and develop more effective management and utilization of the nation's existing airports in order to meet the increasing demands resulting from the projected growth of aviation. In undertaking these responsibilities, the FAA is directed to act in a manner consistent with achieving the goals of the Deregulation Act.

The other aspect of the FAA's dual statutory charge is found in section 611 of the Federal Aviation Act, the Safety and Abatement Act, and the National Environmental Policy Act. Pursuant to each of these authorities, the FAA acts to protect the public health and welfare from the impacts of aircraft noise. Under the Safety and Abatement Act, the FAA is authorized to fund airport noise compatibility studies and to approve or disapprove any noise compatibility programs developed by airport proprietors as a result of those studies. To implement this responsibility, the FAA promulgated part 150 of the Federal Aviation Regulations. Pursuant to the Safety and Abatement Act and part 150, the FAA approves noise compatibility programs submitted by airport proprietors

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38 Id. § 2201(a)(2).
39 Id. § 2201(a)(5).
so long as the measures proposed are reasonable, nondiscriminatory, do not unduly burden interstate or foreign commerce, and are reasonably consistent with the goal of reducing existing noncompatible uses and preventing the introduction of additional noncompatible uses.\textsuperscript{45}

If an airport proprietor proposing to impose a restriction does not elect to conduct airport noise compatibility studies and to develop noise compatibility programs based on them pursuant to the part 150 process, the FAA cannot force the proprietor to do so.\textsuperscript{46} In this circumstance, the FAA seeks from the airport proprietor any information which might be available to substantiate the existence of a legitimate noise problem and to illustrate that the proposed restriction is a necessary and reasonable solution to the problem. If the proprietor declines to provide such information, again, the FAA cannot force the proprietor to do so. Once it has obtained all the information available to it, the FAA makes a determination as to whether the proposed restriction (1) will reduce the noise problem, (2) is reasonable and nondiscriminatory, and (3) does not create an exclusive right or unduly burden interstate or foreign commerce.\textsuperscript{47}

Apart from the part 150 process, the FAA does not have authority to formally approve or disapprove proposed restrictions. Thus, when a proposed restriction concerns the FAA, the agency can either try to persuade the proprietor to develop a more reasonable solution to the problem or challenge the restriction if it appears that it will be implemented despite the FAA’s objections. If the FAA decides to challenge the restriction, it generally has two

\textsuperscript{46} 49 U.S.C. app. § 2104(a) (1982). Section 2104(a) provides that “[a]ny airport operator . . . may . . . submit a noise compatibility program to the Secretary;” see also 14 C.F.R. § 150.23 (1986). See generally 51 Fed. Reg. 2985, 2986 (1986) (stating that the FAA recognizes the right of airport operators to achieve noise compatibility programs and that the FAA will cooperate with airport operators to implement such programs).
basic tools available. The agency can initiate a direct challenge in court with an accompanying request that the court enjoin the implementation of the restriction pending the court proceedings. The other option available to the FAA is declining to enter into new grant agreements with the airport, or using an administrative process leading to a withholding of funds payable under any existing grant agreements until the airport modifies its restrictions in such a way as to eliminate the FAA's concerns.

D. The Airport User's Role

The airport user is the airline, the air taxi, the business flyer, the recreational flyer, the airline passenger, the shipper, the freight forwarder, and virtually everyone else who uses the aviation services provided at an airport. The role of the airport user in the airport access and aircraft use restriction game is generally somewhat limited. For the most part, the user's interests are represented by the airlines and the business aircraft operators who use the particular airport where restrictions are being proposed. The users have virtually no legal authority in this area beyond the ability to initiate litigation, but they can attempt to provide information to the airport proprietor and the local governments and to influence decisions by persuasion.

If a decision on restrictions is reached which appears to be unreasonable, the airport user may challenge it in court, and may seek to enjoin its implementation pending a full court proceeding. Given the expense of such litigation, the user frequently looks to the FAA to take action against the airport proprietor, by either bringing suit or cutting off airport grant funds to the airport, as a means of

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49 See 14 C.F.R. § 151.7 (1986)(aid granted to airport only if FAA Administrator is satisfied that operator will meet the FAA requirements under existing or proposed agreements). For a description of the administrative process, see infra notes 54-57 and accompanying text.
obtaining a more reasonable solution to the airport’s noise problem.

IV. THE INADEQUACIES OF THE CURRENT ALLOCATION OF RESPONSIBILITY AND AUTHORITY

The current allocation of responsibility and authority in the airport access and aircraft use restriction area is inadequate because it has failed to provide the players either the legal authority, or the political strength (where the authority is present) to achieve their respective goals. The current situation also imposes on the players who have the will to achieve their goals significant administrative and logistical hurdles which make the achievement of their goals enormously difficult, if not impossible.

A. Inadequacies from the Airport Proprietor’s Perspective

The airport proprietor’s goals in this area are similar to those of the federal government. The proprietor generally wants a strong, active, vital airport with a large number of aircraft operations to provide an adequate flow of revenue to the airport and to support the transportation needs of the local economy. The proprietor also wants to maintain a positive relationship with the airport’s neighbors and with local political entities, so it has a strong interest in solving any environmental problems which result from aircraft operations at its airport. The airport proprietor generally recognizes that the airport and the surrounding community receive significant benefits from the national air transportation system, although the proprietor does not always clearly focus on the goal of preserving and protecting that system.

In the current situation, the airport proprietor continues to have a difficult time achieving any of these goals to the extent it would like. The proprietor is caught in a vise of conflicting pressures. On the one hand, there are those who want to maintain a high level of aircraft operations because of the added convenience and benefits to the local economy, and, on the other, there are those who want
to lower the level of operations to reduce the impacts of aircraft noise.

The proprietor in many cases has no authority over the critical land use and zoning decisions which create incompatible uses around the airport. Once these incompatible uses are in place, pressure is often brought to bear on the airport proprietor, via either law suits claiming noise damage or local political maneuvering, to restrict aircraft operations. The airport proprietor is limited in the types of restrictions it can impose, and yet it has the liability for any nuisance caused by aircraft noise. So long as the federal government does not preempt local airport proprietor restrictions on aircraft operations, the proprietor will continue to face the threat of litigation from those affected by aircraft noise and from the FAA because of unreasonable or unlawful restrictions.

The airport proprietor generally views airport access and aircraft use restrictions from a narrow, local perspective. Even if the proprietor desires to do so, it simply is not in a position to adequately evaluate the impact of proposed restrictions at the proprietor's airport in terms of their effect throughout the national air transportation system. In addition, since the FAA has recognized that each of the nation's airports is unique from the standpoint of noise impact and contribution to the national system, and since Congress has never given the FAA the authority to establish binding national standards for acceptable noise impact or acceptable impact of restrictions on the national system, the FAA has not established national standards in this area to guide airport proprietors. For these reasons, the proprietor is forced to guess at how far it can move toward restrictions without harming the national system and precipitating a challenge by the FAA.

The current system also places a sometimes intolerable burden on the airport proprietor to respond to local community and political pressures, even if the airport proprietor would prefer to take a different approach. Indeed, where the airport operator is an arm of the municipal gov-
ernment that is the actual proprietor, the airport operator can simply be directed to impose restrictions which the proprietor might believe are wholly unwarranted. This local community and political pressure on the proprietor grows with every new restriction imposed at other airports across the country, since those impacted by noise from the airport quickly point to restrictions imposed at other airports as examples of what the local proprietor could do if it simply put its mind to it. Ironically, each new restriction at an airport magnifies the cumulative effect of the previously imposed restrictions at other airports which were pointed to as examples.

The result of these many conflicting pressures imposed on the airport proprietor is sometimes a hurried decision on restrictions, reached without adequate opportunity for review and comment by interested parties, which does not necessarily achieve any of the proprietor’s goals, and yet antagonizes the other players in the game. Even when there is plenty of opportunity for review and comment by interested parties and a compromise is reached, the compromise may well be one reflecting simply which of the interested parties had the most political strength rather than which solution to the problem is the most reasonable.

It appears that some airport proprietors believe that because of this highly pressurized environment in which they operate, they must choose to impose significant restrictions on airport access and aircraft use, even if they believe that the restrictions are not warranted by the airport’s noise problem, and even if the restrictions might harm the national system and even the airport itself. By choosing this approach, these proprietors seem to believe that they are placing themselves in a “win or win” situation. Their reasoning appears to be as follows. If the federal government elects not to oppose the restrictions, the proprietor can point to the restrictions as significant concessions to the noise-impacted community, and can thereby ease local political pressure directed against the
airport without having to engage in an expensive and annoying lawsuit with the federal government. If the federal government elects to litigate the matter and loses, the airport proprietor can claim victory and point to its strong efforts, including taking on the federal government's challenge in litigation, to address the concerns of the noise impacted community. Finally, if the federal government elects to litigate the matter and wins, then the proprietor can again point to its strong efforts to help the noise impacted community and claim that it is the federal government, and not the proprietor, which is "insensitive" to the concerns of the noise impacted community. The proprietor can also point to the federal court's action as a defense in any lawsuit in which the proprietor's failure to take adequate measures to reduce airport noise is alleged.

The proponents of this approach would argue that any one of these outcomes is more attractive for the proprietor than pursuing the alternative course of action (resisting pressures to impose restrictions) and thereby possibly facing both an increase in the political pressure brought to bear against the proprietor and an increase in the number of lawsuits brought against the proprietor because of airport noise. The problem with this "convenient" approach, of course, is that it favors short-term political expediency over the long-term health of the airport, the local economy, and the national system. It strikes at the very heart of the working relationship among the interested parties in these situations, and it points the way to a fragmented and inefficient air transportation system which serves well neither the nation nor the local community.

As a result of this dilemma, the airport proprietor, once faced with a situation where planning, land use, and zoning decisions have failed to provide a "protective zone" of compatible land uses in the environs of the airport, in many cases feels compelled to pursue a course of action or inaction which leads to either an adverse impact on the national air transportation system, airport business and
revenues, local transportation services, and the local economy, or a continued adverse environmental impact on the airport’s neighbors who are using the land near the airport for incompatible uses.

B. Inadequacies from the Local Government’s Perspective

Local governments in proximity to an airport have goals in this area which parallel those of the airport proprietor. The local government wants a strong, thriving airport to provide convenient transportation services to the community, to provide jobs in the community, and to strengthen the community’s economy. The local government also wants to protect the environment of the community from any adverse impacts of aircraft noise. In addition, the local government desires to preserve the vitality of the national air transportation system, but this goal clearly is less understood by the local government than the goals of promoting local transportation services, local jobs, the local economy, and the quality of the local environment.

From a political standpoint, an emotional segment of local constituents sometimes forces local governments into the unenviable position of having to sacrifice the improvement of local transportation services and of the local economy in favor of addressing environmental problems, which, while they may be very real, may also affect a very small part of the community. Those members of the community who favor broader air transportation service for the sake of convenience or to boost the local economy often do not provide a political counterbalance, since they

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50 Political pressure also grows as local officials embrace, as a part of their personal political agenda, the goal of reducing aircraft noise. In recent years this has increasingly become an effective way for local officials to make their political mark, since there is a ready-made, vocal constituency in most areas pushing for environmental improvements and a notable absence of any organized group lobbying in favor of the airport and the benefits it brings to the community. In the heat of this highly charged political atmosphere, the very worthy goal of reducing airport noise often quickly becomes a crusade in which the costs to both the airport and the community may easily be forgotten.
generally do not express their views at the local political level unless major problems develop in the transportation system they use. This political imbalance at the local level is aggravated by the fact that no national standards have been set for acceptable noise impact or acceptable impact on the national or local air transportation system. The lack of a national norm encourages claims by some that a very harsh or strict standard for noise impact should be the standard in a particular community. Without an accepted national norm to point to, the local government has a difficult time arguing that a particular proposal for a local noise restriction is unreasonable.

Thus, when environmental problems emerge, often because of past failures regarding land use planning and zoning around the airport, the political balance at the local level is such that local governments increasingly tend to insist that airport proprietors implement airport access or aircraft use restrictions even when the airport proprietor, and sometimes the local government itself, may not really believe those restrictions are in the overall best interests of the community. When the local airport is independent of the local government, various forms of political and economic pressures are placed on the airport proprietor to achieve this result.\footnote{When the airport is an arm of the local government, the government can act directly by ordering the airport operator to impose such restrictions, even though the local government could not impose the restrictions itself through the exercise of its police powers.}

When the pressures from the local government reach the point of requiring the airport proprietor to impose aircraft operations restrictions, several problems result. The airport proprietor often loses its flexibility to deal with the FAA and the airport users in a reasoned, logical fashion to achieve noise accommodation which does not adversely impact on the national system. Once political accommodation becomes the guiding principle of local actions, local efforts at achieving reasonable solutions based on real, documented noise problems all but disap-
Even if the airport proprietor at this point is conscientiously trying to reach a fair and reasonable solution to the noise problem, it is often extremely difficult for the FAA to obtain information concerning what is being proposed and what data is available to substantiate either the validity of the noise problem or the reasonableness of the proposed solution.

As noted above, airport proprietors, even though they are deeply involved in aviation, are not in a position to adequately evaluate the impact of proposed restrictions on the national air transportation system. Local governments, which generally are only rarely involved in aviation matters, are even less able to do this. Thus, since the FAA has not established national standards for an acceptable noise impact or acceptable impact on the national air transportation system, the airport proprietor who feels pressured not to have a discourse with the FAA will be very likely to propose restrictions, urged upon it by the local government, which are unreasonable from the standpoint of the impact on the national system, and possibly even from the standpoint of the impact on the local community.

The imposition of such unreasonable restrictions, at the insistence of the local government, if it occurs, is extremely unfortunate for two reasons. First, in many cases such restrictions would have been unnecessary had the local government (and the local governments in the neighborhood of the airport) exercised its zoning and land use planning authority in the past to ensure that only compatible land uses were allowed to exist around the airport. In such cases this past failure of the local government inevitably created a situation where either an environmental problem or a restriction on airport access or aircraft use would occur. Second, when the local government pressures the airport proprietor into imposing unreasonable

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52 This occurs not only where sensitive land uses are allowed to encroach on existing operations, but also where airport expansion is not accompanied by area-wide planning and land use control.
airport access or aircraft use restrictions, the local community represented by that government is the real loser. Aviation services are provided only when there is a demand, and any restriction on those services imposed by an airport proprietor presumptively indicates that a local demand for air transportation services is going to go unmet. In addition, restrictions on air transportation services, like any other restraints on commerce, cost the local community jobs and revenue.

Moreover, while no one can accurately guess when it might happen, eventually the cumulative effect of additional, independently derived and wholly uncoordinated airport access and aircraft use restrictions at the nation's airports inevitably would cause the national air transportation system to become so inefficient and costly to operate that it would have to cease to exist as we know it today. Local communities now derive significant economic and other benefits from having an airport nearby which is part of a vital national system. For this reason, any significant impairment of the national air transportation system caused by local airport access and aircraft use restrictions would severely burden the very local communities whose governments have pressured airport proprietors into imposing such restrictions.

Unfortunately, the importance of maintaining the fragile balance of responsibilities which keeps our nation's air transportation system a vital network benefiting both the nation and local communities appears to be either not understood or ignored with increasing regularity by local governments facing airport environmental problems. If this trend continues, the outlook for the continued vitality and efficiency of the national air transportation system is not bright.

C. Inadequacies from the Federal Government's Perspective

The federal government's goals of preserving a vital and efficient national air transportation system with open access and protecting the public from the adverse envi-
ronmental consequences of aircraft noise, clearly are not being adequately achieved under the current system. On the one hand, some airports have not adequately considered and addressed the impact of aircraft noise on their neighbors. Given the authority residing in the airport proprietor to decide on the appropriate noise level at the airport, the federal government has limited tools with which to address this problem. On the other hand, some airport proprietors have imposed restrictions which burden the nation's air transportation system, although in most cases not to the extent of imposing an undue burden on interstate commerce.

Under the current system, the pressure on airport proprietors for a rapid solution to a noise problem can result in the FAA being kept in the dark about proposed restrictions and their factual support. When this happens, it makes it difficult for the FAA to do a thorough analysis of the noise problem and of the proposed solution, and it forces the agency to address the restriction without the benefit of a full evaluation of all relevant facts and with many questions still unanswered. The FAA is far more likely to start down the path toward opposing the restriction in this situation than would be the case if all the facts were available to the agency.

When the FAA finally makes the determination that a proposed restriction should be opposed as being unreasonable or unlawful, the FAA must choose between litigating in the courts to have the restrictions overturned, or withholding federal airport grant monies based on a violation of federal grant law or of assurances made by an airport proprietor in an airport grant agreement. While these remedies have been, and will continue to be, used very effectively by the FAA to challenge airport proprietors who insist on imposing unreasonable and unlawful restrictions, these remedies are inefficient, and they are hardly the best method for determining national transportation policies.

In the case of litigation, the FAA must first have the ap-
proval of the Department of Transportation and the Department of Justice to initiate suit. If such approval is obtained and litigation is commenced, and if the FAA does not obtain an immediate grant of injunctive relief, the FAA and the airport proprietor (and often the affected users) must settle for a protracted court battle, often lasting two to three years. During this time the restrictions might be allowed to remain in place, and, if so, the users’ access to the airport or use of its aircraft would be limited during that period.

Litigation is not an attractive means for the achievement of federal policies in this area. The time, energy, and resources employed in prolonged litigation could be better expended by developing a reasonable, factually supportable, and comprehensive noise abatement program for the airport involved before the airport proprietor imposes restrictions. Moreover, the decisions in such court proceedings, in addition to being long in coming, usually leave at least one party dissatisfied and bitter, and the results sometimes even impair future working relationships.

Litigation also has significant drawbacks from the policymaking standpoint. Court decisions over time, viewed as an aggregate, will hardly reflect a wise, comprehensive national policy. Such ad hoc judicial determinations are made on the facts of a particular case, which may not provide either the time or the opportunity to educate the court with respect to the cumulative effect of prior restrictions nationwide or the possible impact of similar restrictions imposed elsewhere in the future. In fact, such questions of national impact may not even be viewed by the court as relevant to the specific issue being litigated. For these reasons, the initiation of litigation by the federal government each time airport proprietors impose unreasonable restrictions clearly is not the most effective or effi-

53 49 U.S.C. app. § 1487(b) (1982). Section 1487(b) provides that litigation can proceed at the request of the Secretary of Transportation and under the direction of the Attorney General. Id.
cient manner in which to formulate a coordinated, balanced, and reasoned policy on national air transportation matters.

One alternative to lengthy litigation is a compromise settlement to avoid the expense and delay of a court proceeding. However, this is not necessarily a desirable solution, since the efforts to settle individual cases sometimes result in ad hoc compromises which are not necessarily reflective of a wise, consistent, and broad-based national policy.

In the case of withholding federal airport grant monies, the FAA is faced with the unattractive choice of either allowing a breach of federal law and/or an airport grant agreement to go unaddressed, or withholding airport grant funds which are aimed at worthwhile projects, such as raising airport safety levels or increasing airport capacity. FAA officials have repeatedly stated that the agency remains committed to using the tool of withholding airport grant funds when this is necessary to achieve a reasonable and lawful solution to an airport noise problem, but it must be recognized that any effort at withholding airport grant funds is immediately met with a barrage of criticism by local officials concerned with the development of the airport and by Congressional representatives for whom the airport or the affected community is a constituent. From a procedural standpoint, any final decision not to enter into new grant agreements is subject to review by a federal court. If the decision is to cut off the flow of payments under existing agreements, the FAA generally provides to the airport proprietor the option of having an administrative proceeding on the issue presided over by a hearing officer. Such proceedings generally take many

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54 Address by E. Tazewell Ellett, Chief Counsel of the FAA, American Association of Airport Executives 35th Annual National Airports Conference (October 1, 1985); see, e.g., O'Lone, San Francisco Commission Challenging FAA's Role in Airport Noise Abatement, Av. Week & Space Tech., July 21, 1986, at 36. The FAA proposed a cease-and-desist order threatening to cut off federal funds to the commission over an airport noise abatement dispute. Id.

months, and the outcome is an order of the hearing officer which then can be accepted or rejected by the Administrator.\textsuperscript{56} The Administrator’s decision is subject to review by a federal court, and in some cases proprietors have sought to have the FAA enjoined from cutting off grant payments pending such a review.\textsuperscript{57} Settlement of airport grant disputes, before the administrative or judicial proceedings run their course, is an alternative to this lengthy process, but just as in the case of a direct court challenge to a restriction, an ad hoc compromise designed to achieve a settlement might be inconsistent with national policy goals.

Litigation and compromise settlement agreements are time-consuming and inefficient. They are therefore not effective ways to obtain quick relief for the airport user harmed by the unreasonable or unlawful restriction. They are also not conducive to establishing a sound, balanced federal policy in this area on the national scale.

D. Inadequacies from the Airport User’s Perspective

The airport user desires convenient facilities and services provided in an inexpensive, efficient, and timely manner. For the airline, air taxi, business aircraft operator, and general aviation aircraft operator, this means access to any airport at any time, with an aircraft the user chooses to use, and without unreasonable cost or other obstacles. For the airline passenger and the shipper, this means a wide variety of flight options provided at convenient hours, at inexpensive prices, and with no delay. For the most part, airport users are seeing their goals becoming increasingly harder to achieve under the current system.

The airport users, the people and businesses for whom the nation’s airport and airway system exists, are the least influential of the players in the airport access and aircraft

\textsuperscript{56} Id. Any appeal from the order is heard by the Administrator, who may dismiss, reverse, modify or affirm the order. Id. at § 13.20(j).

\textsuperscript{57} 49 U.S.C. app. § 1486 (1982).
use restriction game as it is played today. The American flying public is virtually silent on airport access and aircraft use restriction issues. Airline passengers, to the extent that they even are aware of the situation, essentially rely on the airlines and the FAA to protect their interests in this area. While they are represented by very effective national associations in Washington, air taxis, business fliers and general aviation generally have had very little influence in local disputes over airport access. In disputes involving airports which primarily serve general aviation, the National Business Aircraft Association has, on occasion, challenged proposed use restrictions, but at the larger airports the general aviation community generally relies on the airlines and the FAA to preserve airport access.

The airlines themselves, while having an enormous stake in the outcome of local deliberations on airport use restrictions, often have not been an effective force in these deliberations. Each airline that serves a particular airport is often willing to look the other way when restrictions are proposed, if it appears that those restrictions will hurt the airline's competitors more than the airline itself. The Air Transport Association, for the most part, has been only slightly active in this area, apparently because its member airlines either are occupied with other problems or are unable to put aside their competitive instincts in order to join together to fight the more global battles presented by nationwide airport access problems.

The ability of airport users generally in challenging unreasonable aircraft operations restrictions in the courts has also been called into serious question by the recent decision in the case of Montauk-Caribbean Airways v. Hope, in which the Second Circuit held that there exists no private right of action based on the provisions of the Federal

\[58\] See, e.g., United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983). The National Business Aircraft Association joined as a party-plaintiff in that case, challenging the county's curfew on all night flight operations.

Aviation Act of 1958, which prohibit the creation of an exclusive right and prohibit local control of air carrier rates, routes, and services.60

Airport users charge that the current allocation of responsibility in this area has resulted in a "patchwork quilt" of local airport use restrictions which threaten to "Balkanize" the national system and strangle its vitality. Business flyers and general aviation users see increasing efforts to keep them out of some airports altogether, to restrict the periods during which they are allowed to operate, or to charge high fees for services provided to them at airports.61 Airlines see increasing efforts to restrict the types of aircraft which they can operate at airports, to restrict the numbers of total flight operations allowed at airports, and to restrict the times during which takeoffs or landings of certain types of aircraft can be made at airports. From the airlines' perspective, this means that they will be less able to schedule flights to meet passenger demand, will be less able to use the aircraft they would like to use on certain flights, and will have increasing difficulty scheduling their aircraft fleets efficiently to meet the demands of their overall schedules.

60 Id. at 97-98. The court based its decision on 49 U.S.C. app. §§ 1305(a), 1349(a) (1982). Section 1305(a), according to the court, contains nothing, either on the face of the statute or in its legislative history, "to suggest that Congress intended to create an implied private right of action under that statute." Hope, 784 F.2d at 97. Section 1349(a) provides, in pertinent part, that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." 49 U.S.C. app. § 1349(a) (1982). According to the court, "the law [§ 1349(a)] was enacted to benefit the general public" and airport users were not the intended beneficiaries. Hope, 784 F.2d at 97.

61 While the general aviation aircraft manufacturing industry has been having great difficulties in recent years for a number of reasons, the impact on the industry of restrictions on access to airports by business and other general aviation aircraft cannot be overlooked. Companies which are considering the purchase of a business aircraft fleet are looking for a quick and efficient means of transportation meeting marketing needs at times and places that require freedom from the limitations of airline schedules. Growing restrictions on access to airports by these aircraft undoubtedly raise questions regarding the utility of these aircraft, and it is likely that these questions have been translated into many lost sales for the aircraft manufacturers and hardships for the many community interests that are dependent upon those manufacturers.
Even as the airlines deal with a myriad of airport proprietor-imposed restrictions on the use of aircraft which meet current FAA noise standards, the airlines are becoming increasingly concerned about proposals from the airport community to outlaw, by national regulation, the use of Stage 2 aircraft, which now comprise 69.4% of the entire United States airline fleet. The airlines are particularly concerned that these proposals do not include any suggestion that the Stage 3 aircraft, which will replace the phased-out Stage 2 aircraft, should be protected by national regulation from local restrictions on their use. Thus, the airlines see increasing demands that they purchase extremely costly new, quieter aircraft, but no assurances that those aircraft will be able to operate at the airports the airlines service. They argue, with ample justification, that this makes the task of planning for the future, particularly in regard to purchasing new aircraft, an extremely difficult and risky task.


63 FAA, ALTERNATIVES AVAILABLE TO ACCELERATE COMMERCIAL AIRCRAFT FLEET MODERNIZATION 5 (1986). That report forecasts the domestic fleet composition through the year 2005 and notes that, as of January 1, 1985, 10.2 percent of the fleet were Stage 1 (exempted under the small community exemption of the Safety and Abatement Act, 49 U.S.C. app. § 2124 (1982)), and 20.4 percent were Stage 3. Id. at 5-6.

64 See supra note 62.

65 The representatives of airports and airport associations who testified at the FAA's three 1986 hearings on its Notice of Proposed Policy on Airport Access and Capacity were virtually unanimous in their opinion that airport proprietors will not commit to opening their doors to Stage 3 aircraft operations at their airports once an all-Stage 3 fleet has been created.

66 While it might be argued that large civil aircraft manufacturers would benefit from ever-tightening restrictions on the use of aircraft, this is not necessarily the case. Even though new aircraft, that have to be purchased to replace outlawed noisy aircraft, would be purchased from these manufacturers, they recognize that airline purchasers will rapidly lose interest in purchasing expensive new aircraft, unless there is some assurance that the aircraft will be able to be operated in the desired market for the greater part of their useful life. For this reason, the uncertainty created by growing airport access and aircraft use restrictions is of some concern to this industry as well.
Given their limited influence in the local deliberations regarding aircraft use restrictions, it is not surprising that airport users generally are very dissatisfied with the current allocation of responsibilities in this area and with the impact on the national air transportation system which local airport access and aircraft use restrictions are having and are likely to have to an even greater extent in the future.

V. Conclusion

Rising demands from the American air traveling public are going to result in increased airline operations at more and more domestic airports for the foreseeable future. If the current lack of adequate planning for the growth of airports and of their surrounding communities continues, the noise problems currently facing some of the nation's airports will grow and will spread to other airports which currently are unaffected. This will undoubtedly precipitate further challenges from the growing noise-affected community. As additional airports react to the pressure from this community by imposing restrictions on airport access and aircraft use, the effect on the national air transportation system will be compounded, since the aggregate impact of current and future restrictions will be far greater than the sum of their individual impacts.

At some as yet unknown point, the bending of the system will cease, and the breaking will begin. Once this happens, the effect on both our local and national economies will be devastating. More importantly, the "cure" at that point will be frighteningly costly and time-consuming.

Now is an opportune time for our nation to reverse the current trend and cure this problem before it causes major damage. The solution might include legislative, regulatory, economic, or educational elements, or any combination thereof. All of these tools are currently available and could be employed very swiftly. Yet before we set about debating the appropriate elements of a solution,
a far more critical and difficult step must be taken. We must force ourselves as a nation to face up to the fact that a crisis is approaching. Once that very difficult and very courageous step is taken, it will be relatively easy to obtain the resolve, at all levels of government and on all sides in the aviation industry, to jointly develop, at the earliest possible date, a comprehensive solution which enables each player to more efficiently and effectively achieve its very worthwhile goals in this area.