

— by Jack Corbett —

Siting New Airport Runways *Who Should Decide?*



Who should have the final say as to whether a new runway will be constructed at a major airport: the local government airport sponsor? The nearby communities that would be adversely impacted by additional aircraft noise? Or the Federal Aviation Administration (FAA), whose mandate is to assure that adequate runways are available? Moreover, who should decide if a runway—or an entire airport—may be closed?

An Overlap of Powers

Each level of government has a role in the development of airports. The federal government, through the FAA, has broad preemptive powers over use of the navigable airspace, air traffic control, aircraft safety, and source noise regulation.¹ In addition, through the federal grant process, the FAA influences the placement of airport runways.² Some state governments have also kept control of airport development;³ state agencies have disapproved new runways by refusing to issue permits for planned expansion. Further, because most airport sponsors are created by state law, state legislatures may exercise power over their operation. Local governments (cities, counties, or freestanding airport authorities) act as airport sponsors under state laws that grant the power to site, establish, operate, and expand airports. Under federal case law, such airport sponsors have the right to regulate aircraft noise, at least as necessary to avoid financial exposure from inverse condemnation suits (the involuntary taking of property value by aircraft overflights).⁴

Non-proprietor local governments near an airport can assert traditional police powers to regulate land uses within their jurisdictions (including adopting land use plans that preclude aircraft operations) but are federally preempted from controlling aircraft noise.⁵ The lower federal courts are divided on whether an adjacent community can use land use powers to prohibit the physical expansion of another municipality's airport into its jurisdiction for a new runway.⁶ One view is that recent United States Supreme Court decisions indicate that the Court would allow federal preemption over airspace management and safety to trump state and local zoning powers, at least where the airport in question is a major element of the national aviation system.⁷

Too Few New Runways

In crafting a four-year reauthorization of federal airport development programs last year—the FAA Reauthorization Act⁸ (the Act)—Congress considered whether it should change the

legal powers of federal, state, and local governments as to how new runways are approved and constructed. Testimony indicated that airline delays were increasing, in part, because too few new runways were being approved.⁹ Nearby communities and some states were using environmental review under the National Environmental Policy Act (NEPA)¹⁰ to stop airport expansion. Where there was no local “stakeholder” consensus on the need for new airport capacity, new runways in major metropolitan areas were taking ten or more years to be planned, environmentally vetted, and constructed, even where congestion delays were painfully high. Lastly, federal agency environmental reviews of these projects were too slow, primarily because these issues weren't a high priority for most agencies.¹¹

Each level of government has a role in the development of airports. The federal government, through the FAA, has broad preemptive powers over use of the navigable airspace, air traffic control, aircraft safety and source noise regulation.

Congress faced two core questions. First, had the drop in demand (and runway congestion) after Sept. 11, 2001, eliminated the need for changes in new airport capacity decision-making? Congress concluded that, since airline aircraft operations and passenger levels were expected to recover to pre-2001 levels during the four years covered by the Act, planning for new runway capacity should continue to receive high-level attention.¹² The second question was whether the FAA should take a proactive role to ensure that runway capacity did not lag seriously behind demand. The Inspector General of the U.S. Department of Transportation (DOT) suggested, in 2001, that the FAA reconsider its historically passive role.¹³ Traditionally, land use decisions are local; the FAA offers federal planning grant funds and technical assis-

continued on page 22



Jack Corbett is a partner with the Washington, D.C., law firm of Spiegel & McDiarmid, a national firm providing legal and governmental affairs services to state and local public agencies, and heads its Transportation Practice group. For three decades, the focus of his practice has been public airport law, providing advice to aviation directors and their local airport attorneys at dozens of airline-served airports on federal aviation policy issues and on local airport-airline contractual relationships. He can be reached at jack.corbett@spiegelmc.com.

If getting a new runway approved is hard, closing an unneeded airport may be even harder. Even where an airport serves only a few general aviation aircraft and no airlines, and is not economically self-supporting, communities wanting to close airports face a “Catch-22” scenario.

AIRPORT RUNWAYS

continued from page 21

tance, and then waits, hoping that a local consensus on new airport capacity will “bubble up.” When an airport sponsor proposes a new runway project, the FAA completes a NEPA environmental impact statement and offers grants to construct the project and mitigate environmental consequences.

Ultimately, Congress authorized the FAA Administrator to be more proactive where new runways were needed.¹⁴ In addition, the federal environmental review process for proposed new runways was to be expedited. DOT was given tools to speed up coordination between federal agencies and those states that choose to participate in the expedited environmental review process for new runways at major airports.¹⁵ DOT can now require participating states and all federal agencies to conduct their analyses concurrently, to the maximum extent practicable, and within a time frame established by the DOT Secretary.¹⁶ A state governor may enter into a “memorandum of understanding” with DOT subjecting state agencies to the federal environmental streamlining process.¹⁷ The FAA is now the lead agency for defining the scope of the environmental impact statement; further, all federal and participating state agencies must give “substantial deference”¹⁸ to FAA’s aviation expertise; be bound by the Secretary’s definition of purpose and need; and may consider only those project alternatives that the Secretary determines to be reasonable.¹⁹ Airport sponsors may speed up FAA environmental review by funding extra costs for FAA staff time and FAA’s outside consultants.²⁰ Finally, appeals of FAA decisions for new runway projects will be heard by the U.S. Circuit Courts of Appeals, not federal district courts.²¹ This clarified the case law (recently challenged in various federal circuit courts²²) by affirming pre-1994 law, and should cut a year off the judicial review process.

Significantly, Congress, in the Act, decided not to diminish the legal rights of runway opponents. While states that participate in the new streamlining pro-

cess are bound by the FAA’s shaping of that process, non-participating states retain all pre-existing rights to challenge the new runway projects, both through the NEPA process and collaterally. In addition, Congress made non-proprietor governments eligible for federal airport grant funds to make neighboring land uses compatible with the modified airport configuration.²³

Closing Airports

If getting a new runway approved is hard, closing an unneeded airport may be even harder. Even where an airport serves only a few general aviation (GA) aircraft and no airlines, and is not economically self-supporting, communities wanting to close airports face a “Catch-22” scenario. Under FAA rules, an airport that accepts any federal airport grants must be kept open for 20 years after the last grant,²⁴ and the FAA resists allowing an airport sponsor to eliminate that obligation by returning past grant amounts. Thousands of GA airports are thus “federally obligated” because they accepted grants for essential airfield safety purposes.

Even when there are no outstanding grants, opposition to airport closure runs high. Consider the case of Meigs Field. In April 2003, Chicago Mayor Richard Daley secretly ordered bulldozers to visit the city-owned Meigs Field in the middle of the night and rip up its single runway.²⁵ The airport was a money-losing proposition and the city had long wanted to transform it into a park. There were no outstanding federal grants; the mayor’s midnight action was simply aimed at avoiding political pressure. Nonetheless, an aviation lobbying group sued—unsuccessfully—to force the city to reconstruct the runway.²⁶ As a result of the Meigs Field incident, Congress moved to prevent more unexpected airport closings. A provision in the Act provides that any airport sponsor that closes an airport without giving the FAA 30 days’ notice (a period designed to provide time for political opposition to build against the closing) must pay a \$10,000 civil penalty for *each day* the airport remains closed without satisfying the notice requirement.²⁷

Remaining Issues

If Congress' actions in the FAA Reauthorization Act streamline the NEPA environmental review process for runway projects, and assure better coordination of reviewing and permitting by federal agencies, what problems remain?

A Proactive Role for the FAA Administrator? Congress preserved the rights of runway opponents, and did not address how local conflicts are to be resolved. As Congress just authorized, the FAA Administrator could take on an activist role in helping the local stakeholders reduce their differences.²⁸

Accommodation on Air Traffic Measures? Historically, the FAA refused to limit its right to change aircraft arrival or departure paths. This unwillingness to accept limitations on operations cuts into airport sponsors' ability to build capacity, as obtaining local consensus on a runway is hard when sponsors cannot offer airport neighbors any binding assurances on operational measures to make the proposal acceptable. The FAA's Air Traffic Service should be more accommodating of nearby communities' sensitivities to specific air traffic routes.

Quicker Action to Secure Possible Airport Sites? Construction of entirely new replacement airports near major population centers has been possible just once every twenty years (i.e., the Dallas-Ft. Worth and new Denver International Airports) because of two factors: the absence of large undeveloped sites nearby, and the high cost to airlines of a replacement facility. The FAA's national plan notes that no new replacement airports in major metropolitan areas are likely in the foreseeable future.²⁹

Allow Closure of Nonessential Small Airports. The FAA should cooperate in allowing the closing of non-essential small airports if aircraft operations can be handled at nearby airports without causing congestion or delay. Repayment of grant funds, if necessary, should be limited to the remaining share of the federal grant calculated on the esti-

mated 20-year useful life of the asset. Local communities might be more willing to get into the airport sponsor role if they could be assured that taking a federal grant wouldn't trap them there.

Notes

1. 49 U.S.C. §§ 40101-40104 (air traffic); §§ 44701-44728 (aviation safety); and §§ 47501-47533 (aircraft noise) (2002 supp.).
2. 49 U.S.C. §§ 47101-47142 (2002 supp.).
3. See, e.g., 620 ILL. COMP. STAT. ANN. 5/47, 25/13 (1993) (state permit required before any airport expansion); 620 ILL. COMP. STAT. ANN. 5/48 (1993) (requiring state certificates of approval for airport expansion); TEX. TRANS. CODE ANN. § 22.025 (Vernon 1999) (state limiting airport design and operation).
4. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 640 (1975).
5. San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1982).
6. Compare Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992) (Los Angeles preempted from conditioning runway construction in its jurisdiction by a neighboring airport authority) and City of Cleveland v. City of Brook Park, 893 F. Supp. 742 (N.D. Ohio 1995) (Brook Park not preempted from enforcing land use ordinances preventing construction of new runways within its jurisdiction on Cleveland Hopkins Airport, even though ordinances "may have some tangential impact on the use of airspace"). See also City of Bridgeton v. City of St. Louis, 18 S.W.3d 107 (Mo. Ct. App. 2000) (state court applied balancing of interests test to find St. Louis immune from Bridgeton zoning ordinances).
7. "Obstacle preemption analysis" would determine whether local efforts to stop airport expansion truly impact national interests in a way meriting preemption. Jeffrey A. Berger, *Comment: Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 Nw. U.L. REV. 941, 989 (2003).
8. Flight 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2490 (2003).
9. *Airport Runway Construction Challenge: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 108th Cong. (March 6, 2003).
10. 42 U.S.C. § 4321 et. seq. (2002 supp.).
11. GENERAL ACCOUNTING OFFICE: REPORT TO THE SUBCOMM. ON AVIATION OF THE HOUSE COMM. ON TRANSP. AND INFRASTRUCTURE, GAO-03-164, AVIATION INFRASTRUCTURE: CHALLENGES RELATED TO BUILDING RUNWAYS AND ACTIONS TO ADDRESS THEM (Jan. 2003).
12. FAA's latest forecast anticipates reaching these passenger traffic levels in 2005, assum-

ing no additional terrorist attacks on U.S. civil aviation. FED. AVIATION ADMIN., AEROSPACE FORECAST-FISCAL YEARS 2004-2015 (March 25, 2004).

13. "Both the Administration and Congress face a decision whether FAA should move from a passive role (essentially distributing small grant funds) to a more active one of proposing a strategic view of the national airspace system and airport system, leveraging grant funds to capacity-constrained locations, and helping to resolve local opposition." DEPT. OF TRANSP., OFFICE OF THE INSPECTOR GEN., REP. NO. PT-2001-017, TEN TOP MANAGEMENT CHALLENGES § 3 (Jan. 18, 2001).
14. "Provides that the Administrator shall take action to encourage the construction of airport capacity enhancement projects at congested airports. This is designed to encourage the FAA to take a more proactive approach in encouraging the construction of new runways when it determines that it would be in the national interest." CONFERENCE REPORT ACCOMPANYING H.R. 2115, VISION 100—CENTURY OF AVIATION REAUTHORIZATION ACT, H.R. REPT. NO. 108-334, Statement of Managers at 125 (2003).
15. Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 301-309, 117 Stat. 2490, 2533 et seq. (2003).
16. *Id.* at 2534.
17. *Id.* at 2535.
18. *Id.* at 2536.
19. *Id.*
20. *Id.* at 2537.
21. *Id.* § 228, at 2532.
22. See, e.g., City of Alameda v. FAA, 285 F.3d 1143 (9th Cir. 2002), cert. den. 155 L. Ed. 2d 842 (U.S. 2003); Comm. to Stop Airport Expansion v. FAA, 320 F.3d 285 (2d Cir. 2003).
23. Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 152, 117 Stat. 2490, 2506 (2003).
24. Fed. Aviation Admin. Order 5190.6A, Para. 2.2(a) in AIRPORT COMPLIANCE HANDBOOK (Oct. 2, 1989).
25. Gary Washburn and Jon Hilkevitch, *Daley rips up Meigs runways in surprise raid*, CHICAGO TRIBUNE, April 1, 2003.
26. Complaint, *Aircraft Owners and Pilots Ass'n v. City of Chicago* (N.D. Ill. Apr. 7, 2003) (No. 03c-2367) (*complaint withdrawn June 2003*).
27. Century of Aviation Reauthorization Act, § 185, 117 Stat. at 2517.
28. The FAA Administrator commissioned a comprehensive analysis of the nation's airport capacity needs as of 2013 and 2020, which could serve as the basis of a pro-active FAA role in local airport capacity decision-making. FED. AVIATION ADMIN. & MITRE CORP., ANALYSIS OF AIRPORT DEMAND AND CAPACITY (forthcoming Summer 2004).
29. FED. AVIATION ADMIN., REPORT TO CONGRESS—NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (2001-2005) at 14 (Aug. 28, 2002). **M**