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LIMITING THE SCOPE OF MUNICIPAL AUTHORITY OVER AIRPORT ZONING IN THE UNITED STATES: THE NEW JERSEY EXAMPLE

by

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ABSTRACT

The purpose of this thesis is: (1) to review the airport development and transportation policy of the United States (U.S.); (2) to provide an overview of the U.S. constitutional doctrines evolved under the Supremacy and Commerce Clauses, and their respective applications in the case law; (3) to review the regime of federal regulation of airport noise; (4) to examine the State Legislature's emphasis on "aeronautical progress" in the New Jersey State *Aviation Act of 1938*, as amended; (5) to examine the role of the State *Aviation Act* in zoning on and around airport land; and (6) to provide a detailed, thematic examination of relevant New Jersey and federal case law in this area.

RÉSUMÉ

Cette thèse propose en premier lieu une étude de la politique des Etats-Unis en ce qui concerne le secteur des transports et le développement des infrastructures aéroportuaires (1). Elle établit ensuite une vue d'ensemble des doctrines dégagées par les tribunaux, interprétant les *Supremacy and Commerce Clauses* de la constitution américaine, et analyse leur application jurisprudentielle (2). Puis, elle examine le régime fédéral de règlementation des nuisances sonores générées par les aéroports (3). Elle propose aussi un examen plus particulier des dispositions de l'*Aviation Act* de 1938 de l'Etat du New Jersey, lequel modifié, encourage spécifiquement le "progrès aéronautique" (4). Enfin, elle souligne le rôle de l'*Aviation Act* et des règlementations en découlant, quant à la classification juridique des terrains abritant les aéroports ou les environnant, et fournit une analyse thématique détaillée de la jurisprudence développée en la matière, dans l'Etat du New Jersey et au niveau fédéral.

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Stephen M. Ketyer
Montreal, Quebec
December 1997

In loving memory of my mother

ELIZABETH ANN KETYER
1932-1992

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INTRODUCTION: Purpose and Scope

A. THE GENERAL PROBLEM OF AIRPORT LAND USE

If all aircraft were as silent as gliders, much of the litigation and regulation discussed in this thesis would not have come into existence. But as residential populations grow in the vicinity of general aviation airports, so too do tensions between airport proprietors and local residents. The disputes are heated. One attorney, commenting on an airport case he had been involved with, noted "[a]irport litigation is more than polemic; it's dangerous."[1]

Still, as New Jersey citizens demand greater air transportation services and local airports' capacities grow, more general aviation airports serve a keystone function in the State and national transportation systems. To argue that an airport existed before the community grew around it or, that citizens of a community somehow reckoned that its general aviation airport would never increase in capacity, are arguments that lead nowhere and resolve nothing.

The proof is incontrovertible that these airports, in addition to the role they play in the transportation system, provide economic benefits to the communities that host them. A 1995-96 study conducted by the Airport Technology and Planning Group, Inc., stated that general aviation airports provide 16,000 jobs and bring in approximately $1.3 billion to New Jersey annually.[2] It is not difficult to imagine that the proper development of the existing general aviation airports in the State might increase those benefits many times over. The Report of the New Jersey General Aviation Study Commission noted that

[1] T.J. Hall, Esq., Hill Wallack, Princeton, N.J.

"[t]here is a general lack of awareness of the economic benefit provided by a local general aviation facility to the host and neighboring municipality."[3]

> What does exist on the municipal level, as the Legislature correctly determined, are conflicts between municipalities and airports located within the municipality or adjacent thereto. These conflicts have occurred as a result of residential and other development in the vicinity of the airport and the perceived incompatible uses of the airport facility, and, *a fortiori*, any improvement to it. The Commission has confirmed through its study that only a small portion of the host municipality is affected by the general aviation airport. In addition, the Commission has determined that these "perceptions," which are the seed of these conflicts, are more often based on emotion rather than reason.[4]

In the 1970s, corporate and business aviation was viewed by the New Jersey courts as an industrial status symbol.[5] In the late 1990s, however, few would argue that business aviation is seen by its users as a customary and necessary tool for doing business.[6] There is a direct relationship between the ability of a community to attract

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[2] See *Report of the New Jersey General Aviation Study Commission* (unpublished draft, 1997) at 10 [hereinafter *NJGASC*].

[3] *Ibid.* at 11.

[4] *Ibid.*

[5] See *Morristown I*, *infra* notes 364-378 and accompanying text.

> The case at bar does not concern itself with scheduled airlines where there has been a certification of need for public transport facilities to assist the general public in its travel through the air space on business or vacation. This distinction must be kept in focus. At Morristown Airport the offensive engine noises for the most part are not emitted by airplanes serving the general public, but by the jets of the few corporate executives who own or charter the aircraft which noisily ride the invisible highway as an industrial status symbol.

Ibid. at 479.

For clarity in this thesis, I am assigning the titles *Morristown I, II* and *III* to the following cases: *Township of Hanover* v. *Town of Morristown*, 108 N.J. Super. 461 (Ch.Div. 1969) [hereinafter *Morristown I*], *Township of Hanover* v. *Town of Morristown*, 135 N.J. Super. 529 (App.Div. 1975) [hereinafter *Morristown II*], and *The Town of Morristown* v. *The Township of Hanover*, 168 N.J. Super. 292 (App.Div. 1979) [hereinafter *Morristown III*]. The 1972 petition to intervene in *Morristown I*, *infra* notes 364 & 367, and the subsequent appeal of the same year, are neither numbered herein nor discussed in chief.

[6] For example, the NJGAC cites a study by Arthur Anderson & Co., which found that of 766 companies studied over a five-year period immediately following their purchase of a turbine powered aircraft experienced a 7% greater sales growth when compared to companies that did not purchase an aircraft. That study also concluded that on average, those companies also had significantly higher growth in earnings-per-

corporate businesses and the availability of airports adequate to meet the needs of corporate fleets.

Moreover, public use general aviation airports may preserve the last open space that would otherwise give way to residential or commercial development.[7] In testimony before the NJGASC, the Mayor of Hopewell Township testified that new houses in his community would require assessments of $400,000 to $500,000 in order for the township to break even on municipal services; and the Readington Township Administrator testified that new homes on average added up to an annual $20,000 loss to the municipality. The Deputy Mayor of Alexandria Township testified that every new house amounts to a loss for the municipality, while noting that its airport provides "the welcomed open space for the community and wildlife."[8]

B. THE NEW JERSEY EXPERIENCE

In this thesis, New Jersey acts as an excellent example to canvass the problems to be discussed herein. First, New Jersey is considered a major aviation state, being one of only seven states in the U.S. to receive Block Aviation Grants from the federal government. Yet New Jersey has only 48 public use general aviation airports (of which 70% are privately-owned public use airports), ranking it 36th in the U.S., while the number of persons served by each airport (154,604) ranks New Jersey 2nd in that

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share than the non-purchasing companies. Additionally, in a study of Fortune 500 companies, among "50 companies with the highest returns in capital gains or dividends to shareholders over the last ten years," 46 (92%) operated business aircraft. *NJGASC, supra* note 2 at 17.

[7] See *ibid.* at 30.

[8] *Ibid.*

category.[9] Fourteen of those general aviation airports have been designated as "reliever"[10] airports.

Second, New Jersey is a wealthy, industrial state, hosting the aircraft of many major corporations.[11] With an average population of 1,035 persons per square mile,[12] New Jersey is also among the most densely populated of states; the total population of approximately 8 million people is expected to double by the year 2017.[13]

Third, New Jersey is already a battleground over incompatible land uses around airports. Since 1952, the State has suffered the closing of fifty-four general aviation airports, which is on average one per year. In many cases, privately-owned public use facilities are simply sold the highest bidder for real-estate development. But airport land, once lost, can never be reclaimed. The State has a real economic—and perhaps an environmental—interest in preserving land for airports. The cases presented here illuminate some of the problems faced by airports when confronted by unfriendly, non-proprietor municipalities. The New Jersey experience should serve as a bellwether to other communities and airport proprietors in the U.S. facing similar competing goals.

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[9] See *ibid.* at 23.
[10] See *infra* note 19.
[11]

> New Jersey general aviation airports provide a home base for business aircraft of several [National Business Aviation Association] member companies including: AlliedSignal, BASF, Schering-Plough, Union Camp, American Home Products, and Warner-Lambert at Morristown Airport; Hoffman-LaRoche, Barnes & Noble, Becton-Dickson, Colgate-Palmolive, Metromedia, Loews Corporation, Philip Morris, and Sony Aviation at Teterboro Airport; Ronson Aviation, Unisys Corporation, Amerada Hess, Dow Jones, Johnson & Johnson, Pfizer Incorporated, and Merck at Trenton-Mercer Airport.

NJGASC supra note 2 at 18.
[12] See *ibid.* at 22.

C. THE STRUCTURE AND ORGANIZATION OF THIS THESIS

The first part of this thesis canvasses the federal limits on municipal authority over airport land use. Chapter 1 explores the problem of airport land use within the general context of federal aviation policy in order to emphasize that this is a matter of national, and not merely local, importance. Chapter 2 addresses the constitutional limits upon municipal zoning with specific reference to the constitutional doctrines that have, in fact, been invoked before the courts in this area. The most significant constitutional limitation on municipal authority, and on state authority as well, derives from the Supremacy Clause. Chapter 2 describes how federal preemption operates in light of the Supremacy Clause. A less successful, though frequently invoked constitutional doctrine derives from the Commerce Clause and in particular from what has come to be known as the "dormant" Commerce Clause. This chapter also outlines the limited and weak import of this doctrine. Chapter 3 provides a brief overview of the main federal statutory and regulatory interventions into airport land use; those relating to airport noise.

The second part of this thesis examines the State of New Jersey's regulatory framework for airport land use and the case law that culminates in *Morristown III*,[14] which identifies the "island of immunity from zoning regulations for property operated and used for the primary purpose of a municipal airport or for uses which are reasonably accessory or incidental to that primary purpose."[15]

Chapter 4 canvasses the New Jersey Legislature's constitutional and regulatory framework governing aviation and airports, particularly the State *Aviation Act of 1938*,[16]

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[13] See *ibid.* at 23.
[14] See *infra* notes 385-396 and accompanying text.
[15] See *infra* note 394 and accompanying text.
[16] See *infra* note 96.

which demonstrates the Legislature's commitment to aeronautical progress and development. Chapter 5 discusses the New Jersey Department of Transportation, Division of Aeronautics (NJDOT) regulations, promulgated pursuant to the State *Aviation Act*, with a view to highlighting the features of the state regime that limit a non-proprietor host municipality's ability to zone aeronautical activities. In particular, this chapter outlines the general principles governing municipal zoning authority and then itemizes the statutory and regulatory requirements governing airports.

The third part of this thesis examines all of the relevant state and federal case law affecting New Jersey and bearing upon, *inter alia*, federal and state preemption and the scope of municipal zoning authority over New Jersey airports. The cases are arranged thematically and the chapter concludes with an summary and analysis of their implications, together with some recommendations.

CHAPTER I

NATIONAL AVIATION DEVELOPMENT AND TRANSPORTATION POLICY

The airport development policy of the U.S. has been well articulated and is a worthwhile starting point to illustrate the national importance of the issue. Within the context of airport development and noise, as stated in the *Federal Aviation Act,*[17] the unequivocal "highest aviation priority" is safety.[18] Thus, with safety in mind, the U.S. has sought to develop aviation facilities that minimize noise impact on neighboring

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[17] See 49 U.S.C.A. § 47101 *et seq.* On July 5, 1994, Congress revised, codified, and enacted without substantive change the portions of Title 49 of the U.S. Code (and its Appendix) that concerned aviation law. As a result, the federal *Aviation Act*, the *Noise Control Act*, and the *Airport and Airway Improvement Act* technically no longer exist as discrete laws, but appear as Subtitle VII of 49 U.S.C.

[18] 49 U.S.C.A. § 47101(a) provides in relevant parts:

> (a) General—It is the policy of the United States—
>
> (1) that the safe operation of the airport and airways system is the highest aviation priority;
>
> (2) that aviation facilities be constructed and operated to minimize current and projected noise impact on nearby communities;
>
> (3) to give special emphasis to developing reliever airports; . . .
>
> (5) to encourage the development of transportation systems that use various modes of transportation in a way that will serve the United States and local communities efficiently and effectively;
>
> (6) that airport development projects under this subchapter provide for the protection and enhancement of natural resources and the quality of the environment of the United States;
>
> (7) that airport construction and improvement projects that increase capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease;
>
> (8) to ensure that nonaviation usage of the navigable airspace be accommodated but not allowed to decrease the safety and capacity of the airspace or airport system;
>
> (9) that artificial restrictions on airport capacity—
>
> (A) are not in the public interest;
>
> (B) should be imposed to alleviate air traffic delays only after other reasonably available and less burdensome alternatives have been tried; and
>
> (C) should not discriminate unjustly between categories and classes of aircraft; . . .

communities. There is a special emphasis on developing reliever airports,[19] which are vital to the effective and efficient intermodal transportation system enunciated in the national transportation policy, discussed below. New Jersey presently has fourteen designated reliever airports. Moreover, airport development projects must be undertaken in such a way as to protect and enhance the environment. This is a particularly important goal for New Jersey, where a general aviation airport is frequently the last open space enjoyed by a community. Nevertheless, airport construction and improvement projects that increase the capacity of facilities to accommodate public transportation needs must be undertaken "to the maximum feasible extent so that safety and efficiency increase and delays decrease."[20]

As might effect zoning, the U.S. policy foresees the importance of increased capacity at the nation's airports, and perhaps most importantly, emphasizes that artificial restrictions on airport capacity are not in the public interest. If such artificial restrictions are used, they must be used only as a last resort after other, less burdensome alternatives have been tried. While nonaviation use of the navigable airspace must be accommodated, such use must not be allowed to decrease aviation or airport safety or capacity. Additionally, there is an admonition against unjust discrimination between categories and classes of aircraft.

The national transportation policy[21] states that the future economic direction, health and leadership of the U.S. is directly dependent on an efficient intermodal

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[19] 49 U.S.C.A. § 47102(18) provides: "'reliever airport' means an airport the Secretary designates to relieve congestion at a commercial service airport and to provide more general aviation access to the overall community."

[20] 49 U.S.C.A. § 47101(a)(7), *supra* note 18.

[21] 49 U.S.C.A. § 47101(b) provides in relevant parts:

(b) National transportation policy—

(1) It is a goal of the United States to develop a national intermodal transportation system that transports passengers and property in an efficient manner. The future economic direction of the United States depends on its ability to confront directly the enormous challenges of the global economy, declining productivity growth, energy vulnerability, air pollution, and the need to rebuild the infrastructure of the United States;

(2) United States leadership in world economy, the expanding wealth of the United States, the competitiveness of the industry of the United States, the standard of living, and the quality of life are at stake; . . .

(4) All forms of transportation, including aviation and other transportation systems of the future, will be full partners in the effort to reduce energy consumption and air pollution while promoting economic development;

(5) An intermodal transportation system consists of transportation hubs that connect different forms of appropriate transportation and provides users with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States, as well as providing links to other forms of transportation and to intercity connections. . . .

(6) Intermodality and flexibility are paramount issues in the process of developing an integrated system that will obtain the optimum yield of United States resources; . . .

(c) Capacity expansion and noise abatement.—It is in the public interest to recognize the effects of airport capacity expansion projects on aircraft noise. Efforts to increase capacity through any means can have an impact on surrounding communities. Noncompatible land uses around airports must be reduced and efforts to mitigate noise must be given high priority. . . .

(g) Intermodal Planning.—To carry out the policy of subsection (a)(5) of this section, the Secretary of Transportation shall take each of the following actions:

(1) Coordination in development of airport plans and programs.—Cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs. The airport plans and programs shall be developed in coordination with other transportation planning and considering comprehensive long-range land-use plans and overall social, economic, environmental, system performance, and energy conservation objectives. The process of developing airport plans and programs shall be continuing, cooperative, and comprehensive to the degree appropriate to the complexity of the transportation problems.

(2) Goals for airport master and system plans.—Encourage airport sponsors and State and local officials to develop airport master plans and airport system plans that—

(A) foster effective coordination between aviation planning and metropolitan planning;

(B) include an evaluation of aviation needs within the context of multimodal planning; and

transportation system, allowing the nation to remain competitive in a global economy. "[T]he standard of living, and the quality of life are at stake."[22] Aviation is a key factor in intermodality.

In terms of land use zoning, the national transportation policy addresses capacity expansion and noise abatement directly, stating specifically: "It is in the public interest to recognize the effects of airport capacity expansion projects on aircraft noise. Efforts to increase capacity through any means can have an impact on surrounding communities. *Noncompatible land uses around airports must be reduced and efforts to mitigate noise must be given high priority. . . .*"[23]

The U.S. Secretary of Transportation, who is charged with intermodal planning, must coordinate development of airport plans by cooperating with State and local officials to assess overall transportation programs and needs. The airport plans and programs are to be developed in coordination with other transportation planning, and must take into consideration "comprehensive long-range land-use plans and overall social, economic, environmental, system performance, and energy conservation

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(C) are integrated with metropolitan plans to ensure that airport development proposals include adequate consideration of land use and ground transportation access.

(3) Representation of airport operators on MPO's.—Encourage metropolitan planning organizations, particularly in areas with populations greater than 200,000, to establish membership positions for airport operators.

(h) Consultation.—To carry out the policy of subsection (a)(6) of this section, the Secretary of Transportation shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency about any project included in a project grant application involving the location of an airport or runway, or a major runway extension, that may have a significant effect on—

(1) natural resources, including fish and wildlife;
(2) natural, scenic, and recreation assets;
(3) water and air quality; or
(4) another factor affecting the environment.

[22] *Ibid.*

objectives."[24] The policy sets forth goals for airport master plans and airport system plans, taking into account environmental issues through consultation with the Department of the Interior and the Environmental Protection Agency.

There is no doubt that the state participation impacts directly on the success or failure of national transportation goals. New Jersey has an aeronautical infrastructure that is decaying and shrinking, while paradoxically, airport facility capacity demands are increasing. This capacity increase must logically dictate a demanding new role for the general aviation airport, and the importance of that role will only increase over time. To view the legal issues of airports and the communities which surround them as independent, isolated problems is shortsighted. This thesis will argue that municipal land use issues involving general aviation airports can no longer be seen as merely peculiar local interests.

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[23] *Ibid.* [emphasis added].
[24] *Ibid.*

CHAPTER II

FEDERAL ISSUES: SUPREMACY AND COMMERCE CLAUSE

Justice Jackson's now famous pronouncement, in his concurring opinion in *Northwest Airlines, Inc.* v. *Minnesota,* provides an appropriate touchstone for the following discussion:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. *The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls.* It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.[25]

There is no dispute that the emphasized portion (or any portion) of Justice Jackson's statement is correct. However, is the placement and design of a runway critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace, or does it have merely a tangential impact on the use of airspace? Two federal courts faced this issue and reached two different conclusions, as discussed below. Where then is the boundary between the legitimate local regulation of land use on the ground and the necessary uniform federal regulation of the navigable airspace? This is but one example of the aviation-related legal issues that confront state legislators and courts today.

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[25] 322 U.S. 292 at 303 (1944) (Jackson, J., concurring) [emphasis added].

Congress has expressly preempted certain areas of aviation, such as prices, routes and service[26] of an air carrier. This includes any state or local law that would interfere with the operation of aircraft in flight or with the national sovereignty of airspace.[27] The Supreme Court has also declared that federal law preempts any local efforts by non-proprietor jurisdictions to control aircraft noise at its source.[28] (Proprietor jurisdictions, however, may not run afoul the Commerce Clause by imposing discriminatory restrictions.[29]) Nevertheless, communities surrounding an airport are generally free to enact zoning laws to control land development around an airport as a means of noise mitigation. The *Air Safety and Zoning Act of 1983*,[30] is an excellent example of this sort of compatible land use zoning issuing from the State Legislature.[31] Generally, communities are also currently free to determine whether or not to establish an airport in the first place. Moreover, New Jersey case law has established that there exists, albeit on a limited scale, "an island of immunity from zoning regulations for property operated and used for the primary purpose of a municipal airport or for uses which are reasonably accessory or incidental to that primary purpose."[32]

But what are the constitutional limitations? When does an airport ordinance violate the Supremacy Clause or the Commerce Clause? Can a neighboring or non-

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[26] See 49 U.S.C.A. § 41713.

[27] "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C.A. § 40103(a)(1).

[28] See *Burbank*, *infra* notes 275-284 and accompanying text. See also 49 U.S.C.A. § 41713(b)(3).

[29] See *Nat. Helicopter Corp.* v. *City of New York*, 952 F. Supp. 1011 (S.D.N.Y. 1997) [hereinafter *Nat. Helicopter Corp.*], for an examination of the limits of an airport proprietor's powers.

[30] See *infra* note 96. See also N.J.A.C. 16:62—1.1 *et seq.*

[31] These regulations, under Chapter 62, expire on January 1, 2000.

[32] *Morristown III*, *infra* note 385 at 297.

proprietor host community, which does not own or operate the airport, use its police power[33] to control or regulate airport growth? If so, to what extent?

In nearly any given litigation concerning non-proprietor control of airport noise, the complainant (usually the FAA, or an airport user such as an airline) mounts a two-pronged attack on the constitutionality of the state or local law, the first based on the Supremacy Clause, and the second—typically as a fallback position—based on Commerce Clause grounds.

A. THE SUPREMACY CLAUSE

First, the complainant claims that the state or local law in question violates the Supremacy Clause. This means that the existing federal law preempts and renders invalid the state or local law.[34] Article VI, clause 2 of the U.S. Constitution (Supremacy Clause), states in the relevant portion: "This Constitution, and the Laws of the United States

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[33] "Police power" is defined as:

> An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.
>
> The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process. Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits and is an essential attribute of government. *Marshall* v. *Kansas City, Mo.*, 355 S.W.2d 877, 883.

Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979).

[34] See generally K. Starr, P.E. Higginbotham, S.K. Seymour, W.C. Clark, J. Criswell, & J. Sneed, *The Law of Preemption: A Report of the Appellate Judges Conference* (American Bar Association, 1991).

which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Preemption is a matter of Congressional intent. Such intent may be express or implied.

1. EXPRESS PREEMPTION

Express preemption is precisely that: A federal act must contain language expressly preempting the area which the state act improperly seeks to regulate, thereby creating an actual conflict between state and federal law.[35]

2. IMPLIED PREEMPTION

However, when the federal act is silent as to the preemptive intent of Congress, there are two dominant "implied" preemption doctrines which apply, "field" preemption and "conflict" preemption.

(a) "Field" Preemption

To find field preemption, where the federal law is said to "occupy the field", the court looks for evidence of either (1) "pervasive federal regulation",[36] where the "scheme of federal regulation" is "so pervasive as to make reasonable the inference that Congress

[35] See *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (State law must yield to the federal enactment); L. Tribe, *American Constitutional Law*, 2d ed. (Mineola, NY: Foundation Press, 1988) at 479, § 6-25 ("Congress has complete authority to define the distribution of federal and state regulatory power over what is conceded to be interstate commerce. Courts assess the validity of state regulation in independent constitutional terms only when Congress has not chosen to act." *Ibid.*).

left no room for the States to supplement it";[37] or (2) "peculiarly federal interests",[38] involving areas such as immigration or foreign policy.

(b) "Conflict" or "Obstacle" Preemption

However, where the federal act does not entirely displace state or local regulation, but "compliance with both federal and state regulations is a physical impossibility,"[39] "conflict" preemption is found. Put another way, where a state or local act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress",[40] the state or local act will be invalid and preempted.

3. ADMINISTRATIVE PREEMPTION

There is a third doctrine of federal preemption, called "administrative" preemption, where Congress has created an administrative agency which has promulgated an express statement that it intends, by federal regulation, to displace state law. Thus, federal regulations, as well federal statutes, may preempt state or local law.

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[36] *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) ("[T]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Ibid.* at 234.).

[37] *Ibid.* at 230.

[38] *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) [hereinafter *Hines*] (invalidating a state alien registration law where federal statute governed the same subject). This case also stands for "conflict" preemption, discussed below at 16.

[39] *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 at 142-143 (1963) (upholding state law regulating the marketing the avocados on the basis of oil content to protect consumers from edible but unsavory fruit).

[40] *Hines, supra* note 38 (quoting Jones v. *Rath Packing Co.*, 430 U.S. 519 at 525 (1977) (invalidating state regulation requiring labeling of packaged flour in state, which frustrated federal Fair Packaging and Labeling Act.)).

Additionally, local ordinances are examined in the same manner as state statutes for purposes of preemption analysis.[41]

B. THE COMMERCE CLAUSE

The second prong of the complainant's attack is usually relegated to a fallback position: that the state act discriminates against interstate commerce, thus violating the "dormant" Commerce Clause.

The interstate Commerce Clause, found in Article I, Section 8 of the U.S. Constitution, provides in the relevant portion: "The Congress shall have the Power . . . To regulate Commerce . . . among the several States . . . ." Read in this positive fashion, Congress is granted sweeping powers to regulate activities affecting interstate commerce. The Supreme Court, in turn, appropriately gives a broad interpretation to the constitutional provision. However, the Commerce Clause has also been construed by the Supreme Court, where Congress is silent, as having negative implications or dormant qualities. That is, the Commerce Clause *impliedly* limits states from exercising power over interstate commerce, even in the absence of Congressional action.[42] Local ordinances, as well as state statutes, are subject to Commerce Clause scrutiny.

1. "HEIGHTENED SCRUTINY" TEST

Where a state regulation amounts to "simple protectionism" because it discriminates against interstate commerce either on its face or in effect, it is subject to a

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[41] See *Hillsborough County* v. *Automated Medical Lab., Inc.*, 471 U.S. 707 at 713 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

heightened level of scrutiny that amounts to a virtually *per se* rule of invalidity.[43] This "heightened scrutiny" test also applies to statutes that "adversely affect interstate commerce by subjecting activities to inconsistent regulations."[44]

2. PIKE *BALANCING TEST* ("AD HOC" *BALANCING)*

However, the more common and more difficult challenge is to an apparently "even-handed" or facially neutral state or local law purporting to advance some legitimate local public interest.

Pike v. *Bruce Church, Inc.* enunciated the following test of a facially neutral state law which persists as the modern approach to Commerce Clause issues and involves an *ad hoc* balancing of interests.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce, are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[45]

No U.S. Supreme Court opinions thus far have involved airport regulations challenged under the Commerce Clause. However, when an interstate commerce

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[42] See *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69 at 88 (1987) [hereinafter *CTS Corp.*] (state statute not unduly burdensome to interstate commerce where there was no danger of inconsistent state regulation).

[43] *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 at 622-624 (1978) (invalidating state law deemed a burden to interstate commerce by prohibiting importation of out-of-state waste for in state dumping that did not apply to in-state dumping); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 at 268-272 (1984); *Norfolk Southern Corp.* v. *Oberly*, 822 F.2d 388 at 400 (3rd Cir. 1987).

[44] *CTS Corp., supra* note 42 at 88.

[45] 397 U.S. 137 (1970).

challenge is made against an airport noise regulation, two cases frequently cited are *Concorde II*,[46] and *National Aviation* v. *City of Hayward*.[47] In *Concorde II*, the Second Circuit expressed the test as follows:

> The maintenance of a fair and efficient system of air commerce, of course, mandates that each airport operator be circumscribed to the issuance of reasonably, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport * * *."
>
> We must carefully scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.[48]

Hayward laid out a more complex three-step expression of the test. The court in *Santa Monica Airport Association.* v. *City of Santa Monica*,[49] synthesized both cases and formulated the following three-step approach:

> Step 1: Determine whether there is an effect on interstate commerce. If there is no effect, the inquiry is over. There is no need for further inquiry. If a d*e minimis* effect is found, I would construe that the same as a finding of no effect.
>
> Step 2: If there is an effect found, the next issue is whether the legislative body "* * * has acted within its province and whether the means of regulation chosen are reasonably adapted to the end sought." [quoting *South Carolina Highway Dept.* v. *Barnwell Bros.*, found at 303 U.S. 177, 190, 58 S.Ct. 510, 517, 82 L.Ed.2d 734 (1938).].

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[46] See *British Airways Board* v. *Port Authority of NY and NJ*, 564 F.2d 1002 (2nd Cir. 1977) [hereinafter *Concorde II*].
[47] See 418 F. Supp. 417 (N.D. Cal. 1976).
[48] *British Airways Board, supra* note 46 at 1011.
[49] See 481 F. Supp. 427 (C.D. Cal. 1979), *aff'd* 659 F.2d 100 (9th Cir. 1981).

> Included in this step 2 is an inquiry as to whether the legislative action discriminates against interstate commerce or not.
>
> Step 3 is a balancing of the burden imposed on interstate commerce against the local interests supporting the legislation. In *Pike*, the Supreme Court says (at 397 U.S. 142, 90 S.Ct. 844) that if the regulation is non-discriminatory and for the effectuation of "a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[50]

Pike balancing has come under scholarly and judicial attack.[51] For one thing, how much of a burden on interstate commerce is required for it to be considered "excessive"? Among other criticisms:

> [I]n balancing courts are doing what seems emphatically to be the province of legislatures: weighing competing societal interests and values. That the judiciary is involving itself in a truly legislative process cuts strongly against the continued validity of balancing in any context. But where the context is airport noise restrictions challenged under the dormant commerce clause, the complexity of the circumstances and proliferation of federal regulations makes balancing an even less appealing process for the Supreme Court and lower federal courts to undertake, especially where Congress and the FAA are capable of performing—and performing well—this daunting task.[52]

Another criticism of *ad hoc* balancing turns to the "incommensurability" of the subject matter being balanced:

> Under the dormant commerce clause, courts are called upon to weigh state health, welfare, and safety interests against federal economic interests. After assigning weights to these competing interests, a court must determine on which side of the balance the interests fall. If the more

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[50] *Santa Monica Airport Ass'n* v. *City of Santa Monica*, 481 F. Supp. 927 at 936-937 (C.D. Cal. 1979).
[51] See generally C.S. Marchese, "The Dormant Commerce Clause and Airport Noise: A Case for Narrow Judicial Review" (1992) 44 Baylor L. R. 645.
[52] *Ibid.* at 696 [citations omitted].

> weighty side is that of the state, then the state legislation will be upheld. If, on the other hand, the balance falls on the federal side, then the legislation will be struck down.
>
> An underlying problem of this balancing process is that the interests being weighed are disparate; they simply defy logical comparison. * * *
>
> Justice Scalia has also highlighted this anomaly, stating that balancing the incommensurable state and federal interests is "like judging whether a particular line is longer than a particular rock is heavy."[53]

In *Alaska Airlines, Inc.* v. *City of Long Beach*,[54] the Ninth Circuit Court of Appeals addressed airport noise restrictions under the dormant Commerce Clause and abandoned the *Pike* balancing test. In upholding the City of Long Beach's noise ordinance[55] on Commerce Clause grounds (the ordinance was ultimately ruled invalid on procedural due process grounds), the *Long Beach* court issued a three-part test, paraphrased by one commentator as follows:

> First, a court must ask whether the ordinance or law discriminates against interstate commerce; second, it must question whether the benefits articulated in support of the law are either illusory or insignificant; and third, even if the first two parts are answered in the negative, the court must resolve whether the means are reasonably related to the end sought [and not "irrational, arbitrary or unrelated to those goals"[56]].[57]

While at least one commentator has questioned the precedential value of *Long Beach*,[58] the dormant Commerce Clause test applied in *Long Beach* was the authority in a widely-criticized 1995 decision, discussed below.

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[53] *Ibid.* at 700 [citations omitted].
[54] See 951 F.2d 977 (9th Cir. 1992) (*per curiam*).
[55] "The principal elements of the ordinance included a limit of 65 decibels on the Community Noise Level ("CNEL"). In addition, it limited the number of air carrier jet flights and set noise limits for individual aircraft." *Ibid.* at 981.
[56] *Ibid.* at 984.
[57] Marchese, *supra* note 51 at 685-686.
[58] See *ibid.* at 686-687.

To date, no New Jersey court has evaluated a Commerce Clause claim in the airport context under *Pike* and the cases which follow. In any event, such claims will likely be raised in federal court under federal question jurisdiction.

C. TWO ILLUSTRATIVE CASES

There is presently a conflict in the federal circuits over the question of whether airport ground activities are subject to the zoning regulations of non-proprietor municipalities, or insulated therefrom by federal preemption. In the 1992 case *Burbank-Glendale-Pasadena Airport Authority* v. *City of Los Angeles*,[59] an airport brought an action against a city to enjoin enforcement of an ordinance requiring prior submission of any plans for development on a parcel of airport land that was to be used exclusively for runways and taxiways. The Ninth Circuit Court of Appeals struck down the city ordinance:

> The problem with this Ordinance is that it conditions the construction of taxiways and runways on the prior approval of the City. This the City may not do. *The proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace.* The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law.
>
> Simply stated, a non-proprietor municipality may not exercise its police power to prohibit, delay or otherwise condition the construction of runways and taxiways at a non-city-owned airport.[60]

[59] See 979 F.2d 1338 (9th Cir. 1992) [hereinafter *Burbank-Glendale-Pasadena*].
[60] *Ibid.* at 1341 [emphasis added].

Though this argument clearly appeals to common sense,[61] the Ninth Circuit failed to provide any further analysis of the law.

Under similar circumstances, in 1995, the City of Cleveland, which owns and operates Cleveland Hopkins International Airport, challenged the zoning ordinances of the City of Brook Park, where most of the airport is located. As in the previous case, Cleveland intended to expand the runways and taxiways within the existing airport boundaries. In *City of Cleveland* v. *City of Brook Park*, the federal district court reached a different determination: "While it is certainly true that runway placement will have some tangential effect on flight operations, the question of whether and where to construct a runway does not substantially affect the use of airspace."[62] This highly controversial statement was left unsupported and unexplained. Rather, the court attempted to distinguish between the direct regulation of aircraft flight operations and the regulation of land use in the FAA's policy statements (that the district court freely admitted to taking out of context[63]) to the effect that "the FAA has disavowed any authority to supplant local land use ordinances."[64] This somehow led the district court to decline to follow the Ninth Circuit's reasoning in *Burbank-Glendale-Pasadena*.[65]

The absence of rigorous express reasoning in *City of Cleveland* has left that case as a doubtful precedential authority. It should be noted, too, that *City of Cleveland* settled before it reached the Sixth Circuit, where it may not have withstood close scrutiny on appeal. For the moment, however, the question remains open: If there is a boundary to

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[61] Design and placement of a runways and taxiways are done to maximize safety, which depends on factors such as prevailing wind direction, topography, obstructions to navigation and airspace availability. These factors usually serve to limit a particular runway's design and placement.
[62] 893 F. Supp. 742 at 751 (N.D. Ohio 1995).
[63] See *ibid.*
[64] *Ibid.*
[65] See *ibid.*

be drawn between the regulation of the navigable airspace and the regulation of airport ground space, where does that boundary lie? The confusion is self-evident.

The battle for this issue, in all likelihood, will be fought and decided on the grounds of the Supremacy Clause.

CHAPTER III

FEDERAL REGULATION OF AIRPORT NOISE

This chapter will provide a brief account of the detailed federal regime of airport noise regulation. Consistent with the principles of federal preemption outlined in the previous chapter, this regime constrains state and municipal noise regulation.

Under the *Federal Aviation Act of 1958*,[66] Congress gave the FAA the power to determine which aircraft and engines would be permitted to operate in the U.S.[67] However, the FAA's interest was in safety rather than noise, and the noise issue would not be addressed until the Congress issued a 1968 Amendment[68] to the *Federal Aviation Act of 1958*, where the FAA was required to develop standards for the measurement of noise, to provide for the control of aircraft noise at its source, and to make noise a factor in assessing whether to permit types of aircraft and aircraft engines to operate in the U.S.[69] The *1968 Amendment* led to Federal Aviation Rule 36 (FAR 36), which established procedures and standards of measurement of noise for aircraft and aircraft engines. However, the Rule did not apply to pre-existing aircraft and failed to promote the development of new noise reduction technology.[70]

The *Noise Control Act of 1972* (NCA)[71] authorized the Environmental Protection Agency (EPA) to determine the adequacy of the FAA's noise regulations and make recommendations to the FAA. The FAA, however, was free to reject the EPA

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[66] See former 49 U.S.C.A. §§ 1301-1542 (1976 & Supp. 1994); now codified as amended in 49 U.S.C.A. § 40101 *et seq.*

[67] See J.J. Jenkins, Jr., "The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved The Aircraft Noise Problem?" (1994) 59 J. Air L. & Com. 1023 at 1029.

[68] See former 49 U.S.C.A. § 1431 (1976 & Supp. 1994); now codified as amended in 49 U.S.C.A. § 44715.

[69] See Jenkins, *supra* note 67 at 1031.

recommendations if they were not technologically or economically feasible, and many of the EPA recommendations were not implemented by the FAA.[72] The NCA also required the FAA to consult with the EPA prior to issuing any exemptions under FAR 36. If the FAA determined, however, that safety was an overriding concern, it could issue an exemption without consulting the EPA.[73]

While the U.S. Supreme Court in *Burbank* v. *Lockheed Air Terminal, Inc.*,[74] discussed below, would hold that the combined federal acts so occupied the field as to leave no doubt that the control and regulation of airport noise at its source was federally preempted, it left to the airport proprietor the sole discretion as to what restrictions would be placed on its airport, so long as such restrictions were reasonable, nondiscriminatory and did not burden interstate commerce. The reason for this was that the airport proprietor was liable to neighboring property owners for damage caused to their property by airport noise. The airport proprietor's discretion, however, as well as its ultimate liability, would be limited by two acts which followed.

The *Aviation Safety and Noise Abatement Act of 1979* (ANSA)[75] was enacted to provide a comprehensive noise abatement program and to help relieve the financial burdens imposed on domestic airlines to meet the Part 36 requirements.[76] As a result, the FAA established the Airport Noise Compatibility Planning Program, under FAR Part 150,[77] commonly referred to as the "Part 150" program.[78] Part 150 encouraged airport

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[70] *Ibid.* at 1032.
[71] See former 49 U.S.C. § 1431 (1976 & Supp. 1994); now codified as amended in 49 U.S.C.A. § 44715.
[72] See Jenkins, *supra* note 67 at 1033.
[73] See *ibid.* at 1033-1034.
[74] See *infra* notes 275-284 and accompanying text.
[75] See former 49 U.S.C. app. §§ 2101-2125 (Supp. 1994).
[76] See Jenkins, *supra* note 67 at 1034.
[77] See 14 C.F.R. §150.1 *et seq.* (1997).

owners to prepare Noise Exposure Maps (NEM),[79] which are scaled geographic depictions of a particular airport, the measured noise contours emanating from it, and the land use compatibility of real property surrounding the airport. "The main objectives of the Part 150 program are to reduce existing noncompatible uses around an airport and to prevent the introduction of any additional noncompatible uses."[80] Part 150 was to become the primary vehicle for obtaining federal grants for noise abatement projects under the *Airport and Airway Improvement Act of 1982* (AAIA).[81] As an additional incentive, there was a section which remains in the law today, limiting the recovery of damages for noise for any person who acquires an interest in property after February 18, 1980, in an area surrounding an airport for which a noise exposure map has been submitted, where there is actual or constructive knowledge of the existence of the map, subject to certain exceptions.[82] There is, however, a prohibition on using the noise

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[78] See Comment, "Federal and State Coordination: Aviation Noise Policy and Regulation" (1994) 46 Admin. L. Rev. 413 at 415-416.

[79] See 14 C.F.R. § 150.21.

[80] Comment, *supra* note 78 at 416.

[81] See former 49 U.S.C.A. app. §§ 2201-2227 (1988 & Supp. IV 1992).

[82] 49 U.S.C.A. § 47506 provides:

> (a) General limitations.—A person acquiring an interest in property after February 18, 1980, in an area surrounding an airport for which a noise exposure map has been submitted under section 47503 of this title and having actual or constructive knowledge of the existence of the map may recover damages for noise attributable to the airport only if, in addition to any other elements for recovery of damages, the person shows that—
>
> (1) after acquiring the interest, there was a significant—
>
> (A) change in the type or frequency of aircraft operations at the airport;
>
> (B) change in the airport layout;
>
> (C) change in flight patters; or
>
> (D) increase in nighttime operations; and
>
> (2) the damages resulted from the change or increase.
>
> (b) Constructive knowledge.—Constructive knowledge of the existence of a map under subsection (a) of this section shall be imputed, at a minimum, to a person if—
>
> (1) before the person acquired the interest, notice of the existence of the map was published at least 3 times in a newspaper of general circulation in the county in which the property is located; or

exposure map as evidence in a civil action asking for relief for noise resulting from the operation of an airport.[83] Furthermore, the federal government expressly bears no liability for damages from aviation noise[84] because of actions taken under its noise compatibility programs.[85]

ANSA was voluntary however, and Congress felt a more comprehensive and aggressive approach was required.[86]

The *Airport Noise and Capacity Act of 1990* (ANCA),[87] which left ANSA intact,[88] consisted of two related programs. The first was to establish a national aviation noise policy by limiting the authority of state and local governments to restrict Stage 2 and 3 aircraft (as defined by FAR 36),[89] thus avoiding inconsistent local regulation. The second was to phase out Stage 2 aircraft after the year 2000.[90]

ANCA also resulted in the FAA promulgating FAA Part 161,[91] Notice and Approval of Airport Noise and Access Restrictions, which requires an airport operator to provide 180 days prior public notice to the effective date of a Stage 2 restriction, seeking

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(2) the person is given a copy of the map when acquiring the interest.

[83] 49 U.S.C.A. § 47507 provides:

> No part of a noise exposure map or related information described in section 47503 of this title that is submitted to, or prepared by, the Secretary of Transportation and on part of a list of land uses the Secretary identifies as normally compatible with various exposures of individuals to noise may be admitted into evidence or used for any other purpose in a civil action asking for relief for noise resulting from the operation of an airport.

[84] See 49 U.S.C.A. § 47504(d).

[85] See 49 U.S.C.A. § 47504.

[86] See Jenkins, *supra* note 67 at 1036.

[87] See former 49 U.S.C.A. §§ 2151-2158 (Supp. IV 1992); now codified as amended in 49 U.S.C.A. §§ 47521-47533.

[88] See former 49 U.S.C.A. § 2153 (h) (Supp. IV 1992); now codified as amended in 49 U.S.C.A. § 47533. See Comment, *supra* note 78 ("The ANSA Act today remains an important piece of legislation because it purposefully was not superseded by the ANCA." *Ibid.* at 416 [citation omitted]).

[89] See Jenkins, *supra* note 67 at 1037-1038.

[90] Presently, any waiver granted under the *Act* cannot extend operation of Stage 2 aircraft beyond December 31, 2003. See 49 U.S.C.A. § 47528(b)(3).

both FAA and public comment. Once the procedural notice and comment requirements are met, the proposed restrictions are still open to traditional legal challenges: they must be reasonable, nonarbitrary and nondiscriminatory; they must not create an unreasonable burden on interstate or foreign commerce; they must not be inconsistent with maintaining the safe and efficient use of the navigable airspace; they must not conflict with a law or regulation of the U.S.; and they must not create an unreasonable burden on the national aviation system.[92]

If the airport proprietor imposes restrictions which do not comply with the foregoing requirements, the airport may lose its ability to receive federal money under Chapter 471, Airport Development; it may also not impose passenger facility fees under 49 U.S.C.A. § 40117.[93]

In terms of the airport proprietor's liability, a section of the law provides for the federal government to assume liability for noise damages "only to the extent that a taking has occurred as a direct result of the disapproval" of a proposed noise restriction.[94]

However, "[i]n spite of ANCA's tighter federal regulation of airport noise restrictions, the FAA noted to Congress that '[t]here is clearly a vital role for increased State action, such as airport zoning laws."[95]

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[91] See 14 C.F.R. § 161.1 *et seq.*; see Comment, *supra* note 78 at 418.
[92] See 49 U.S.C.A. § 47524(c)(2). See also Comment, *ibid.* at 419.
[93] See 49 U.S.C.A. § 47526.
[94] 49 U.S.C.A. § 47528. The U.S. Court of claims is expressly given exclusive jurisdiction in this matter.
[95] Comment, *supra* note 78 at 426 [quoting Federal Aviation Administration, *Report to Congress: Issues Related to Aviation Noise* (Oct. 1992), app. 2 at I-11].

CHAPTER IV

"AERONAUTICAL PROGRESS" IN PROVISIONS OF NEW JERSEY LAW

Small public use airports, catering predominantly to business and general aviation, are an integral and necessary part of a vital national transportation system.

New Jersey is a major "aviation" state; one of only seven states to receive Block Grants from the federal government. Beginning with express provisions in its Constitution, New Jersey has fostered and encouraged aviation as an integral part of its move to intermodal transportation and commerce.

The New Jersey Legislature's placement throughout various provisions of the State *Aviation Act*[96] of the phrase "aeronautical progress" alongside the phrase "public safety" harmonizes with the federal *Act*. Thus, civil aviation is not merely an activity to be tolerated, but a public benefit to be encouraged and promoted. In the case of *Aviation Services, Inc.* v. *Board of Adjustment of Hanover Township,*[97] Justice Burling quoted Chief Judge Cardozo's famous *dicta* in *Hesse* v. *Rath,* presented here in full:

> Aviation is to-day an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race

[96] See N.J.S.A. 6:1—20 *et seq., An Act to regulate aeronautics over and within this State.* L.1938, c. 48, p. 126, as amended. [hereinafter "State *Aviation Act*"]. Other portions of Title 6 include N.J.S.A. 6:1—1 to -19 which establishes the State Aviation Commission; N.J.S.A. 6:1—80 —88 is the *Air Safety and Zoning Act of 1983* (originally entitled *Air Safety and Hazardous Zoning Act of 1983*, the title of the *Act* was changed in 1992 "to remove the stigma attached to land in what is currently referred to as an 'airport hazard area'." Assembly Transportation Committee Statement, Senate, No. 2174—L.1991, c. 445), which includes provisions for the establishment of "airport safety zones" and "airport clear zones", etc., in the vicinity of an airport; and for notice to prospective buyers of land located in one of the airport zones. See N.J.S.A. 6:1—85.1 and -85.2. Finally, N.J.S.A. 6:1—89 -97, *An Act providing for the financing of a program to ensure the safety of general aviation airports in New Jersey, enabling publicly owned airports to obtain federal funds for airport development, and revising parts of the statutory law,* L.1983, c. 264, and referred to by its short title, *Airport Safety Act of 1983*, which implements the subject matter mentioned its long title.

[97] See *infra* note 325 at 281.

> of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.[98]

From the State Constitution, to the State *Aviation Act* (and the regulations promulgated pursuant thereto), the State Legislature has enunciated a firm commitment to aeronautical progress and development. Article 4, Section 6, Paragraph 2 of the New Jersey Constitution, entitled "Zoning laws", provides:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

Article 4, Section 6, Paragraph 3, entitled "Acquisition of private property by agencies and political subdivisions of the state; title; easements; abutting property", provides (with emphasis added):

> Any agency or political subdivision of the State or any agency of a political subdivision thereof, which may be empowered to take or otherwise acquire private property for any public highway, parkway, *airport*, place, improvement, or use, may be authorized by law to take or otherwise acquire a fee simple absolute or any lesser interest, and may be authorized by law to take or otherwise acquire a fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the public highway, parkway, *airport*, place, improvement, or use; but such taking shall be with just compensation.

[98] 249 N.Y. 436, 164 N.E. 342 (Ct.App. 1928).

Title 6 of the New Jersey Statutes governs aviation in and over the state. The laws have been carefully revised through the years to ensure there is no conflict or overlap with federal laws and regulations. N.J.S.A. 6:1—1 provides (with emphasis added):

> The purpose of this chapter is to provide, in the interests of public safety *and of aeronautical progress*, for the regulation of aircraft in and over this state, to require that aircraft operating in and over this state shall conform with respect to design, construction, and airworthiness to the standards prescribed by the United States government with respect to the navigation of aircraft for civil purposes, subject to its jurisdiction, and to require the licensing of aircraft and airmen.

N.J.S.A. 6:1—9, which defines the commission's powers and duties, requires, in part:

> The commission shall keep a record of all of its proceedings and official acts, collect and disseminate information relative to the aviation industry in the state and make an annual report to the governor reviewing the operation of the development together with its *recommendations for the improvement and development of aeronautical safety and progress.*

Again, in N.J.S.A. 6:1—20, "Purpose" (with emphasis added):

> The purpose of this act is to provide in the interest of public safety *and of aeronautical progress* for the regulation of aeronautics in and over this State; to require that aircraft, airports, airport managements, landing fields, landing strips, and other avigational facilities, airmen, ground personnel and all engaged in aeronautics with or over this State, shall conform to standards of safety and sound practice as prescribed by the laws of this State and any rules or regulations thereunder, and for uniformity in certain regards with the laws, rules and regulations of the United States Government.

N.J.S.A. 6:1—29 provides (with emphasis added):

> [T]he Commissioner of Conservation and Economic Development *shall promote progress and education in and shall have supervision over aeronautics* within this State . . .. [It] may adopt and promulgate reasonable rules, regulations and orders . . . *to develop and promote aeronautics* within this State. The Commissioner shall have power to promulgate and adopt any reasonable rules and regulations that may be necessary to effectuate the purposes of this act in the interest of public safety *and the development of aeronautics* in this State.

This emphasis on fostering aeronautical progress runs through to more recent legislation, as well, with particular attention paid to privately-owned, public use general aviation airports.[99] Thus, in N.J.S.A. 6:1—80, the *Air Safety and Zoning Act of 1983*, the Legislature noted the public benefits derived from airports and declared the "creation or establishment of an airport hazard . . . a public nuisance."

And in N.J.S.A. 6:1—90a, which establishes the Airport Safety Fund, the Legislature declared:

> (1) New Jersey's public use, general aviation airports are an integral part of the State's transportation network and promote mobility and economic activities of common public benefit. These public use, general aviation transportation facilities are deteriorating and must be improved as to safety in order to realize their full public benefit.
>
> * * *
>
> (4) Many privately owned, public use, general aviation airports which are essential to the State's economic development are in danger of conversion to nonaviation uses, and it is in the public interest to provide State assistance to county and municipal efforts to preserve these airports, through acquisition or other means.

[99] That is, airports where the proprietor is a private individual or corporation. The distinction should be made between privately owned airports for public use, and privately owned airports for private, exclusive use. For example, Somerset Airport (N52) is a privately owned, public airport. Merck's private heliport, however, is reserved for ordinary use by Merck's own aircraft and is not open to the public.

The Legislature's recognition of the importance of aviation and airports, and its promotion of progress and education in aviation, as well as of public safety, are adequately codified in law. N.J.S.A. 6:1—98, *et seq.* establishes the Governor's Air and Space Medal, wherein each May, an individual or organization currently or formerly located in New Jersey, will receive an award "in recognition of the individual's or organization's outstanding achievement in aeronautics or space exploration."

Counties and municipalities are empowered, under N.J.S.A. 40:8—1, to acquire and use land for airports:

> The governing body of any county and the governing body of any municipality, or either of them, may acquire by gift, grant, purchase, condemnation or in any other lawful manner real estate or any right or interest therein for other public purposes and being *used for airport purposes and erect thereon and maintain buildings for the airport purposes.*
>
> Upon such acquisition or use, the governing body of any county and the governing body of any municipality, or either of them, may lease the real estate, so acquired, with or without consideration to the state of New Jersey, or any agency thereof, or may lease it to any person for such consideration and for such term of years as may be agreed upon.

CHAPTER V

THE ROLE OF THE STATE *AVIATION ACT* AND REGULATIONS IN ZONING AND LAND USE

The regulatory regime of the New Jersey Department of Transportation, Division of Aeronautics (NJDOT), is of crucial importance to circumscribing the limits of a non-proprietor host municipality's zoning authority. This chapter first examines the general contours of the municipal zoning authority and then identifies the specific implications of the NJDOT regulatory regime.

A. ZONING AND LAND USE IN NEW JERSEY

Frizell and Pozycki[100] provide the best discussion available, as set forth below:

> The Home Rule Act of 1917 [N.J.S.A. 40:42—1 *et seq.*] and the Constitution of 1947, have been liberally construed by the courts to favor the exercise of zoning power by municipal authority. However, it must be remembered that the zoning power is nonetheless an inherent power of the State, rather than the municipality, and can be delegated to the municipality only by specific legislation. This principle is not merely an expression of the relationship between the State government and the localities of New Jersey, it is a fundamental tenet of the Federalism that binds the United States together. There are two, and *only* two sovereigns under the United States Constitution—the state governments and the Federal government. The states may delegate authority but may never relinquish the sovereign powers which are guaranteed to them by the Tenth Amendment. This principle is a binding force in land use and municipal law.

While the State Legislature may enact legislation for the general welfare of the State's citizens, its authority is delimited by its citizens' rights under the State Constitution. Thus, the Legislature cannot violate the constitutional rights of a citizen in

acquiring, possessing and protecting property, nor take private property for public use without just compensation.

> The legitimacy of local land use law is therefore based on the observance of two principles: (1) such controls may only be adopted pursuant to properly delegated authority as expressed in the enabling legislation, i.e. they must be properly adopted; and (2) such controls must fall within the parameters of a valid exercise of the State's police and zoning powers on the one side, and an unjust "taking" on the other, i.e. they must be properly exercised.
>
> These principles were reviewed by the New Jersey Supreme Court in *Riggs* v. *Township of Long Beach.*[101] The *Riggs* Court held that a valid municipal development regulation must satisfy four objective criteria:
>
> (1) the ordinance must advance one of the purposes of the Municipal Land Use Law;
>
> (2) the ordinance must be "substantially consistent" with the master plan of the municipality, unless the special provisions of the law permitting deviations are satisfied;
>
> (3) the ordinance must comport with constitutional constraint pertaining to due process, equal protection, and the prohibition against confiscation; and
>
> (4) the ordinance must be adopted in accordance with statutory and municipal procedural requirements.[102]

B. INTERGOVERNMENTAL IMMUNITY FROM ZONING

This section briefly explores the limits of intrastate, intergovernmental immunity, as between the State or State agency and a municipality; and as between an municipality that is an airport proprietor and a host municipality.

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[100] See Fritzell, D.J., & H.S. Pozycki, Jr., *Land Use Law*, 36 New Jersey Practice § 1.1 (St. Paul, Minn., West Publishing Co., 1989).
[101] See 109 N.J. 601 (1988).
[102] See Fritzell & Pozycki, *supra* note 100 at § 1.1 [citations omitted] [emphasis in original].

The N.J. Supreme Court provided a balancing test to determine intergovernmental immunity in *Rutgers* v. *Piluso*.[103] The determination depends upon "reasoned adjudication of the critical question of which governmental interest should prevail in the particular relationship or factual situation,"[104] based on "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests,"[105] but for which "there is no precise formula or set of criteria which will determine every case mechanically or automatically."[106]

Two subsequent cases, *Ronson Corp.* and *Garden State Farms*, both discussed below, refined the test in *Piluso* by requiring that the immunity enjoyed by the Commissioner of Transportation in locating private helistops not be exercised either unreasonably or arbitrarily, and that "legitimate local interests" in zoning must be considered "a material concern" in the Commissioner's decision-making.

Yet it must also follow that for existing aeronautical facilities, the zoning activities of non-proprietor host municipalities which the NJDOT regulations proscribe are not presumed to be "legitimate" by definition. Moreover, the regulations discussed below, particularly those promulgated under the *Air Safety and Zoning Act of 1983*, require non-proprietor host municipalities to adopt compatible land use zoning near existing aeronautical facilities and to incorporate them into their master plans. At least

[103] See 60 N.J. 142 (1972).
[104] *Ibid.* at 150.
[105] *Ibid.* at 153.
[106] *Ibid.*

one court case requires that these municipalities must anticipate reasonable and necessary growth of existing aeronautical facilities.

In terms of express preemption, Fritzell & Pozycki point out that the Municipal Land Use Law exempts only two quasi-public uses from local zoning regulations,[107] neither of which involve airports. And while "[m]unicipal zoning restrictions are preempted by various other enactments of the State Legislature with respect to the Sports and Exposition Authority, solid waste facilities, and public utilities,"[108] no such express preemption has been made elsewhere.

In regard to intergovernmental immunity as between municipalities, which are equal government entities, *Shell Oil,* discussed below, demonstrates the Court's concern that a municipality might proceed, as Fritzell and Pozycki note, "with zoning immunity as a shield and state legislation as a sword, to put land to public use which is inconsistent with the applicable zoning ordinances."[109]

Prior to *Piluso*, in cases such as *Shell Oil* and *Aviation Services*, discussed below, State "courts had relied upon discerning the State's legislative intent, without further significant analysis, as a test for determining whether immunity from the host municipality's zoning ordinance should be invoked."[110]

However, when the *Piluso* balancing test was applied in *Morristown III*,[111] discussed below, the Appellate Division declared Morristown Airport an "island of immunity" from municipal zoning, subject to certain limitations based on reasonableness.

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[107] Fritzell & Pozycki, *supra* note 99 at 73, § 3.28(3) [citations omitted].
[108] *Ibid.* at 74 [citations omitted].
[109] *Ibid.* at 75.
[110] *Ibid.* at 76.
[111] See *infra* notes 385-396 and accompanying text.

"The failure of New Jersey, like other states, to provide more legislative guidance regarding intergovernmental land use conflicts is, according to at least one commentator, 'surprising', especially considering the tendency of the courts to 'legislate' in this area."[112]

From this discussion, one can conclude that the zoning authority of a non-proprietor host municipality can have only a limited role in controlling airport land use outside the perimeter of an airport. Whereas all municipalities have constitutional and statutory authority to acquire lands for airport purposes, they cannot extend their authority beyond what has been formally delegated to them by the State Legislature through the Municipal Land Use Law, or in a fashion contrary to the NJDOT regulations.

From the foregoing discussion, one may reasonably conclude that a municipal zoning ordinance concerning airport land use by a non-proprietor municipality of an existing aeronautical facility is, in fact, preempted by the regulations promulgated by the NJDOT, under the State *Aviation Act*.

C. THE NJDOT REGULATORY FRAMEWORK

The regulations under the State *Aviation Act* and the *Airport Safety and Zoning Act of 1983* are found in the New Jersey Administrative Code (N.J.A.C.). Chapter 54[113] regulates the licensing of aeronautical and aerospace facilities; Chapter 55[114] regulates the licensing of aeronautical activities; Chapter 56[115] regulates Airport Safety

[112] *Ibid.* (quoting D. Mandelker, *Land Use Law* (Charlottesville, Va.: Michie, 1982), § 4.43.
[113] See N.J.A.C. 16:54—1.1 *et seq.*
[114] See N.J.A.C. 16:55—1.1 *et seq.*
[115] See N.J.A.C. 16:56—1.1 *et seq.*

Improvement Aid; Chapter 57[116] regulates abatement of aircraft noise and hazards; Chapter 58[117] regulates sport parachuting; Chapter 59[118] regulates air races, meets, and exhibitions; Chapter 60[119] regulates the issuance of summons and designation of law enforcement officers, giving powers to Division of Aeronautics employees to function as law enforcement officers in compliance with Title 6; Chapter 61[120] regulates the reporting and investigation of aircraft accidents; and Chapter 62[121] regulates air safety and zoning.

Several of these regulations are helpful in detecting the limits of a non-proprietor host municipality's ability to zone aeronautical activities on an airport located within its corporate boundaries, as well as the broad discretionary scope of the powers of the New Jersey Commissioner of Transportation.

N.J.A.C. 16:54—3.2, "General requirements for all public use aeronautical facilities", provides in the relevant part: "(b) Aeronautical activities may be conducted at public use aeronautical facilities. For the purposes of land use and zoning, aeronautical activity(ies) are normally considered permitted uses at public use aeronautical facilities."

N.J.A.C. 16:54—1.3 defines the terms "aeronautical activity" and "aeronautical facility", and consequently establishes activities immune from municipal regulation.[122] It

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[116] See N.J.A.C. 16:57—1.1 *et seq.* Although the title to the section includes a reference to airport noise, nothing in Chapter 57 applies to that issue. Chapter 57 addresses only airport obstacles or obstructions.
[117] See N.J.A.C. 16:58—1.1 *et seq.*
[118] See N.J.A.C. 16:59—1.1 *et seq.*
[119] See N.J.A.C. 16:60—1.1 *et seq.*
[120] See N.J.A.C. 16:61—1.1 *et seq.*
[121] See N.J.A.C. 16:62—1.1 *et seq.*
[122]

> "Aeronautical activity" means any of the following aviation related commercial activities generally provided to the public or any segment thereof, at an aeronautical facility either by the licensee or his tenants or invitees, with or without compensation:
>
> 1. Aircraft: sales, charter, rental, lease storage, operation, hangaring, tiedown, and parking; and parachuting operations;

should be noted that the list of activities, which is specific and exhaustive, is nevertheless broad in scope and addresses all purposes likely to be pursued at an airport.

N.J.A.C. 16:54—5.2 both provides a specific limitation on aircraft at public use airports by reproducing FAA rules on air traffic pattern altitudes, and creates a remedy for communities that believe they are adversely impacted by aircraft noise.[123] This makes clear that municipalities are not to pursue what one might call "self-help" by establishing non-conforming zoning to discourage airport growth. Rather, the State has taken upon itself, through the Director of the Division of Aeronautics, the task of addressing noise

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2. Instruction: aircraft flight and ground instruction of all types, license examinations and proficiency checks, crew member training, parachute jumping training,

3. Maintenance: all types of maintenance, repair, inspection, testing, modification, overhaul, corrosion control or painting of aircraft, engines, systems, avionics, parachutes, or ancillary air or ground support equipment; and

4. Servicing: aircraft fueling using fixed, hydrant, mobile, or portable equipment; aircraft engine or systems servicing including hydraulics, pneumatics, oxygen, lavatory, aircraft catering, electronics, aircraft cleaning.

"Aeronautical facility" means any airport, seaplane base, heliport, helistop, drop zone, blimp mooring mast, balloonport, or vertiport.

1. The facility includes all property, paving, appliances, structures, seaplane docks, runways, taxiways, seaways, sealanes, aprons, hangers, or safety equipment associated with the aeronautical activities conducted on the premises and property.

[123]

(c) The Director may require noise abatement procedures to be prepared for a public use aeronautical facility, in accordance with N.J.A.C. 16:54—5.1(e), in the interest of good community relations. Communities which believe they are adversely impacted by aircraft noise from adjacent public use aeronautical facilities may request the Director to take such action. When such notice is received from the appropriate governing body of an impacted municipality, the Director will require the licensee to prepare noise abatement procedures. . . .

(e) Traffic pattern altitudes for fixed wing aircraft operations at public use airports shall not be less than 1,000 feet AGL (above ground level), except where required for operational considerations and/or as directed by the FAA for airspace, safety, or operational reasons.

abatement "in the interest of good community relations."[124]

N.J.A.C. 16:54—8.1 provides that the "[i]ssuance of a license does not relieve licensees of their responsibility to comply with any other applicable Federal, state, or local laws, rules or regulations." It should be noted that a municipal ordinance that conflicts with federal or State regulation is not an "applicable" local law.

The most significant positive requirements and limitations placed upon municipalities come from N.J.A.C. 16:62—1.1 *et seq.*, which establishes the minimum standards that must be implemented by municipalities pursuant to the *Airport Safety and Zoning Act of 1983*. In particular, these standards pertain to: (1) airport and aeronautical hazards; and (2) land use adjacent to airports. Aeronautical hazards are indeed to be addressed through municipal zoning, but municipalities are tightly constrained by the purposes of the regulation in establishing this zoning. Land use adjacent to airports is subject to the requirement that municipalities develop a master plan. The master plan must include provisions for "airport safety zones", "clear zones", and "runway end subzones".[125] Municipalities affected by these provisions must have implemented the

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[124] This crucial phrase is, quite unfortunately, of dubious legal value. Perhaps fixing a standard such as "in the interest of legitimate local concerns" would be a far more helpful a guide. See *Garden State Farms v. Bay, infra* notes 410-448 and accompanying text.

[125] N.J.A.C. 16:62—1.2 provides in relevant part:

> (a) Under the Air Safety and Zoning Act of 1983, as amended, this chapter establishes minimum standards for the control of airport and aeronautical hazards, and standards for land use adjacent to airports, which the municipalities of this State shall implement. These standards are minimum State standards, and municipalities may adopt more rigorous standards for control of the areas and condition under the provisions of the Municipal Land Use Law.[125] The Commissioner may adopt under N.J.A.C. 16:62—7 a special or amended standard for an airport when it is determined that local conditions require it.
>
> (b) No person shall build, rebuild, create or cause to be built, rebuilt or created any object or structure, or plant, or cause to be planted or permit to grow any tree or vegetation, which will interfere with, diminish, change or obstruct the airspace or landing and take-off of aircraft at airports or other aeronautical facilities.

(c) Nothing in this chapter shall be construed as limiting the power of the Commissioner regarding the design, placement, or operation of airports or other aeronautical facilities.

(d) Municipalities of this State are required to implement and maintain land use ordinances in accordance with the provisions of this chapter. These ordinances are subject to review by the Commissioner.

(e) No ordinance adopted under this chapter shall require the removal or lowering of, or other change or alteration of any structure or tree not conforming to the rules when this chapter was adopted, or otherwise interfere with the continuance of any nonconforming use.

* * *

(h) The mechanisms provided for control of aeronautical hazards within the "Air Safety and Zoning Act" rely substantially upon local zoning regulations. The powers to enact traditional zoning ordinances upon navigable waters are constrained; and the operational characteristics and jurisdiction of water facilities may differ substantially from many land facilities; the provisions of this chapter do not apply to seaplane or water facilities unless otherwise provided for by the Commissioner in N.J.A.C. 16:62—7.1. Any interested person may petition the Commissioner for review of Air Safety and Zoning issues under the operation of any Public Use Seaplane Facility.

* * *

(k) The review of applications under this chapter is limited to the purposes of this chapter as they relate to the public health, safety and welfare.

N.J.A.C. 16:62—2.1 provides "municipal requirements".

(a) Each municipality which contains within its boundaries any part of a delineated airport safety zone, as defined by N.J.A.C. 16:62—3.1, shall enact an ordinance or ordinances incorporating standards promulgated under this chapter. These standards shall also become a part of the masterplan of development for each affected municipality which has a masterplan.

(b) Each municipality affected under this chapter shall transmit to the Division at time of adoption, amendment, or when requested, a valid copy of the ordinance(s) and a local development masterplan . . .

(c) The Director will review ordinances and masterplans enacted by municipalities to implement the standards of this chapter.

(d) No variance, or other relief from the standards promulgated by or under this chapter may be granted by a municipality to itself or any person except upon the condition that the variance or relief is contingent upon the issuance of a permit allowing the variance or relief by the Commissioner.

(e) Municipalities which contain within their boundaries airports regulated by the provisions of this chapter, may not hereafter

classify those airports as non-conforming land uses within the context of their ordinances or master plans of development. Those municipalities which may currently classify an airport as non-conforming land use within the context of their ordinances or master plans of development, shall amend those ordinances or plans to eliminate that non-conforming status.

N.J.A.C. 16:62—5.1 lists the land use ordinance standards.

(a) Within the safety zones . . . each municipality shall implement under N.J.A.C. 16:62—2.1, ordinances which implement the following standards for land use around airports. Prohibited land uses are specifically prohibited without the written approval of the Commissioner. Prohibited land uses may be allowed by the Commissioner on airport property when they are determined necessary by the Commissioner for air commerce purposes or for the operation of the airport and its vendors directly serving air commerce needs. An example of this is a flight school.

1. Permitted land uses:

i. Residential-single family dwelling units which are situated on a lot at least three acres in size and not located in a CLEAR ZONE. Residential zoning is permitted in the CLEAR ZONE as long as all dwellings are physically located outside of the CLEAR ZONE;
ii. Airpark (minimum lot size of at least three acres which are not located in a CLEAR ZONE);
iii. Open space;
iv. Agricultural;
v. Transportation;
vi. Airport;
vii. Commercial (not located in a CLEAR ZONE);
viii. Industrial (not located in a CLEAR ZONE);

2. Specifically prohibited land uses:
i. Residential (dwelling units) not situated on a lot of at least three acres in size;
ii. Planned unit developments and multifamily dwellings;
iii. Hospitals;
iv. Schools;
v. Above ground bulk tank storage of compressed flammable or compressed toxic gases and liquids;
vi. Within the RUNWAY END SUBZONES only, the above ground bulk tank storage or flammable or toxic gases and liquids;
vii. Uses that may attract massing birds, including land fills;
viii. Above grade major utility transmission lines and/or mains.

(b) Subject to review by the Director, a municipality may implement land uses substantially similar to those listed as permitted land uses in (a) 1i-vi above as long as they are in accord with the intents of this chapter as determined by the Commissioner. A municipality may not,

standards by April 15, 1985, or in the case of clear zones, May 15, 1989.[126] Additionally, no municipal body may grant variances or subdivisions in an Airport Safety Zone where the purpose would be contrary to the standards found in the regulations of the *Air Safety and Zoning Act of 1983.*[127]

Finally, the State *Aviation Act* grants to the Commissioner of Transportation broad discretion to supervise aeronautics and, in particular, to supervise the "establishment, location, maintenance, operation, size, design, repair, management and use of airports, landing fields, landing strips, heliports and helistops, sport parachuting centers, air markings and other avigational facilities . . .."[128]

This discretion is exercised, most importantly, where the Commissioner, after public hearing, grants licenses for airport operation.[129] Such applications for license must be made not only for a new airport facility, but also for alterations to an existing airport facility. The Commission's licensing discretion has a prominent role in resolving disputes as between municipalities concerning conflicting uses arising out of expansion within the airport's perimeter.

The Commissioner's discretion is supplemented by his ability to enlist the courts

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> however, implement a land use ordinance or plan which may have the effect of allowing or promoting the establishment of specifically prohibited land uses as determined by the Commissioner. A municipality further may not implement ordinances which would have the effect of preventing routine improvement of an aeronautical facility or airport within the area zoned under this chapter.
>
> (c) Municipalities shall, when developing land use ordinances to conform with the provisions of this chapter, adopt general land use provisions within the ordinance to minimize unwarranted concentrations of persons within Airport Safety Zones, especially along the extended runway centerlines within RUNWAY END SUBZONES.

[126] See N.J.A.C. 16:62—10.1(a).
[127] See N.J.A.C. 16:62—10.1(b).
[128] N.J.S.A. 6:1—29.

to aid in enforcement of these regulations and compel licensees and third parties to conform with the regulations.[130] In particular, in my view, these enforcement powers could and should be used to allow the Commissioner to step in where recalcitrant host municipalities impede reasonable airport development.

Finally, two provisions in Title 6 give the Commissioner certain powers to acquire property or interests thereon. The *Air Safety and Zoning Act of 1983* grants the Commissioner the power to acquire interest in property or in a nonconforming structure;[131] and the *New Jersey Airport Safety Act of 1983* gives the Commissioner the power to:

> acquire airports or lands or rights therein, including aviation easements for clear zones or clear areas . . . when it is deemed necessary for the safe operation of the airport and the general public safety or necessary for the continued operations of an airport which is deemed to be necessary for a safe and efficient air transportation system in the State. . . He may also sell any airport or airport land so acquired to a county or municipality or other public bodies on the condition that they operate the facility as an airport

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[129] See N.J.A.C. 16:54—2.1 *et seq.*

[130] See N.J.S.A. 6:1—87. N.J.A.C. 16:62—11.1 provides:

> (a) Violation of any provision of this chapter may be grounds for fine, modification, suspension or revocation of any license issued under Title 6 of the New Jersey Statutes Annotated.
>
> (b) The Commissioner may institute, in any court of competent jurisdiction, an action in the name of the State to prevent, restrain, correct, or abate any violation of any provision of this chapter by way of injunction or otherwise, relief from the court.

[131] N.J.S.A. 6:1—88 provides:

> In any case in which it is desired to remove, lower, or otherwise terminate a nonconforming use; or in which the necessary protection from an airport hazard cannot, because of constitutional limitations, be provided by zoning regulations; or if it appears advisable that the necessary protection from an airport hazard be provided by acquisition of property rights rather than by zoning regulations, the commissioner may acquire by purchase, grant, condemnation, or otherwise in a manner provided by law, such air right, easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this act, including acquisition of a fee simple estate.

> and that they may not sell the land without the commissioner's approval.[132]

Both *Acts* have withstood one facial constitutional challenge,[133] and there are no other reported cases. Noteworthy too is the fact that both *Acts*, as well as the regulations, were enacted more than five years after the decision in *Garden State Farms* v. *Bay*,[134] discussed in the next chapter, and may help to resolve the State Supreme Court's ambivalence over the phrase "supervision over aeronautics" in terms of the Commissioner's powers.

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[132] N.J.S.A. 6:1—95.
[133] See *Patzau, infra* notes 235-264 and accompanying text.
[134] See *infra* notes 410-448 and accompanying text.

CHAPTER VI

NEW JERSEY CASE LAW

The following is a review of the relevant New Jersey and federal case law [135] addressing the scope of municipal zoning authority on and around airport lands. The broad categories these cases fall under are: A. problems establishing airports; B. "takings" and other liability problems arising from aircraft overflight; C. direct attempts by non-proprietor municipalities to regulate airport noise; D. "lawful accessory use"; E. development of the "island of immunity" doctrine; and F. powers of the Commissioner.

A. PROBLEMS ESTABLISHING AIRPORTS

The following cases each illustrate a successful challenge to local municipal authority in establishing an airport. In *Yoemans* v. *Hillsborough Township*, a landowner, who wanted to build an airport, unsuccessfully challenged the reasonableness of a municipal zoning ordinance prohibiting airports. In *Oeschle* v. *Ruhl*, the defendant had obtained, from the State Aviation Commission, a license to build an airport and neighboring landowners sought unsuccessfully to enjoin airport construction and operation on the basis of anticipated nuisance. Finally, in *Ridgwood Air Club* v. *Bd. of Adustment of Ridgewood*, a private association of pilots, desiring to build non-commercial flying facilities for its members, unsuccessfully challenged a municipal ordinance apparently amended to prohibit airports specifically in response to the Air Club's application.

The conclusion that can be drawn from these cases is that municipalities do indeed have significant discretion to exclude airports when new airports are being planned, although courts will not lightly interfere with a State license to operate an airport. This is in contrast to the emphasis placed in this thesis upon the need to constrain municipal interference with the development of existing airports. The burden of development of airport infrastructure will be on the expansion of existing airports, at least in the foreseeable furture.

Yoemans v. *Hillsborough Township*
135 N.J.L. 599 (S. Ct. 1947)
Zoning Ordinances Presumed Reasonable

In *Yoemans* v. *Hillsborough Township,*[136] the N.J. Supreme Court examined a Hillsborough Township zoning ordinance which expressly prohibited airports in designated residential and agricultural zones.[137] A landowner was selling her land to purchasers who wanted to build an airport. The executory contract of sale was contingent

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[135] Federal courts referenced herein which have binding authority in New Jersey are the United States District Court for the District of New Jersey, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court.

[136] See 135 N.J.L. 599 (S. Ct. 1947) [hereinafter *Yoemans*].

[137] The chronology of this case is interesting:

> In 1940 the Planning Board of the Township of Hillsborough was organized and meetings were held in an effort to prepare a zoning ordinance. The minutes of the meeting of the Planning Board of December 7, 1945 expressed the hope that the draft of the zoning ordinance would be ready in the spring of 1946. The contract between Yoemans and the present tenants was entered into on March 26th and the following day Messrs. Dates and Beatty made application to the township committee for the construction of an airport on the Yoemans property. On April 10th Dates made a further application for permission to construct another building on the said premises. On May 14, 1946 the Township Committee denied the two building applications above mentioned, and eight days thereafter, on May 22, 1946, the zoning ordinance was finally adopted. The ordinance divides the township into three zones—(1) residential and agricultural; (2) business and (3) industrial. In the residential and agricultural zone, it expressly prohibits airports.

upon the purchasers obtaining "federal, state or local consent or permission"[138] to use the lands as an airport. If not, the purchasers could cancel the contract upon 30 days' notice to the seller. The purchasers filed applications with the Township Committee to build an airport and two buildings on the property in question. The Township Committee denied the applications and eight days later the Township adopted a zoning ordinance which placed the property in question in a residential and agricultural zone, where airports were expressly prohibited.[139]

The plaintiffs, the parties to the Contract of Sale, alleged that: (1) the prohibition was unreasonable and therefore invalid; and (2) the ordinance was unconstitutional in that it deprived the plaintiffs of their property without just compensation or due process, and prevented them from making proper and legal use of it, in violation of state and federal constitutional protections.[140]

The issue before the Court was the reasonableness of the prohibition. The opinion merely recited the state constitutional and statutory underpinnings of municipal zoning authority, without any further comment or analysis. More particularly, the Court set forth Article 4, Section 6, Paragraph 5 of the State Constitution of 1844, as amended,[141] which

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Ibid. at 600.

[138] *Ibid.*

[139] See *ibid.*

[140] More specifically, a "violation of the first and sixteenth paragraphs of Article I of the Constitution of the State of New Jersey and the Fourteenth Amendment of the Federal Constitution." *Ibid.* at 601.

[141]

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

Const. 1844, art. 4, § 6, para. 5, added by amendment, effective Oct. 18, 1927. This provision was recodified without change in Article 4, § 6, ¶ 2 of the Constitution of 1947.

granted zoning authority to the municipalities; and *R.S.* 40:55—30[142] and *R.S.* 40:55—32,[143] the enabling acts. The opinion thus relied simply on municipal zoning law, without reference to the State *Aviation Act.*

Yoemans held that "[o]ne attacking a zoning ordinance as unreasonable is met by the presumption that the ordinance is reasonable and must bear the burden of establishing the contrary."[144] Here, the plaintiffs failed to meet that burden.

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[142]

> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the state. Such ordinance shall be adopted by the governing body of such municipality, as hereinafter provided, except in cities having a board of public works, and in such cities shall be adopted by said board.
>
> The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures for trade, industry, residence, or other purposes.

Ibid. at 601. *R.S.* 40:55—30 to 40:55—45 was repealed by L.1975, c. 291, § 80, eff. Aug. 1, 1976. It was replaced by the Municipal Land Use Law, N.J.S.A. 40:55D—1, *et seq.*, particularly in N.J.S.A. 40:55D—62; 40:55D—65; & 40:55D—67.

[143]

> Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

[144] *Ibid.* at 602 (quoting *Brandon* v. *Montclair*, 124 N.J.L. 135 at 149). The Court ultimately dismisses the plaintiff's action noting that the record below was "devoid of evidence that the prohibition of an airport in a residential and agricultural zone is unreasonable."

Oechsle v. *Ruhl*
140 N.J. Eq. 355 (1947)
Airports Not Nuisances *Per Se*; State Aviation Commission Has Sole Authority of Determining Propriety of Locating Airport or Airfield; Airport License No Bar to Injunction for Nuisance; Prior Injunction Not Favored Policy; Anticipated Diminution of Market Value Not a Basis for Injunctive Relief

In *Oechsle* v. *Ruhl*,[145] the defendant had obtained a license from the State Aviation Commission to construct and operate an airport. The complainants, residential landowners in the vicinity of the proposed airport, claimed anticipated nuisance[146] and sought an injunction against the defendant from continuing construction and subsequent operation.[147] "The question which defendant has posed is whether the license or permit granted by the State Aviation Commission is an absolute bar to the relief here sought and whether this court is attempting a usurpation of the power and authority of the legislatively created board or commission."[148]

The defendant urged that: (1) the complainants had an adequate remedy at law under the State *Aviation Act*, *R.S.* 6:1—1 *et seq.*, and therefore were precluded from applying to the Court of Chancery for relief; and (2) the license the defendant obtained

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[145] See 140 N.J. Eq. 355 (1947) [hereinafter *Oeschle*].

[146]

> Complainants . . . allege . . . that 'the normal operation of an airfield or airport on defendant's premises will deprive them of the full use and enjoyment of their premises, and that they will suffer grave and continuous annoyance and discomfort from airplanes taking off and landing, from loud noises made by said airplanes while warming up to take off, in taking off and in landing, from excessive dust particles being raised by said planes in taking off and in landing, said dust particles being carried into their respective homes and interfering with the health and comfort of themselves and their families, and from danger and reasonable apprehension of danger to themselves and their families and properties by reason of planes making imperfect landings or cracking up while in the course of taking off or landing' and that 'their properties will greatly depreciate in value.'

Ibid. at 356.

[147] See *ibid.*

[148] *Ibid.* at 360.

from the State Aviation Commission of New Jersey could not be attacked in this proceeding.[149]

In reviewing whether the complainants had an adequate remedy at law under the *Act*, the court examined specific provisions under the *Act*.[150]

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[149] See *ibid.* at 356-357.

[150]

> *R.S.* 6:1—24, 25, N.J.S.A., make provision for the appointment, qualification and term of the Aviation Commission and a director thereof. *R.S.* 6:1—29, N.J.S.A., provides, inter alia, that the Commission '* * * shall have supervision over aeronautics within this State, including, but not by way of limitation * * * the establishment, locations, maintenance, operation, size, design, repair, management and use of airports, landing fields, landing strips * * *. The commission shall have power to promulgate and adopt any reasonable rules and regulations that may be necessary to effectuate the purposes of this act in the interest of public safety and the development of aeronautics in this State.'
>
> *R.S.* 6:1—31, N.J.S.A., provides as follows:
>
> 'It shall be the duty of the commission to hold public hearings on matters affecting aeronautics; to conduct investigations, inquiries and hearings concerning matters covered by the provisions of this chapter.'
>
> *R.S.* 6:1—32, N.J.S.A., provides as follows:
>
> 'The commission may, in order to protect the public safety and the safety of those participating in aeronautical activities adopt reasonable rules, regulations and orders requiring the installation in and carriage by, aircraft, and the installation in airports, landing fields and landing strips, of safety devices and other avigation facilities consistent with the development of the art; and require obstructions which may be hazardous to avigation to be suitably marked by lights, signs or otherwise as the commission may provide. The commission shall have the right and is hereby empowered to proceed by appropriate legal or equitable action to cause any obstruction to flight in and about any airport or landing field to be abated and such obstructions are hereby declared to be hazards to human life and property, and the commission may cause the same to be removed by such orders and decrees as the court may issue in any legal or equitable proceedings instituted by the commission for that purpose.'
>
> *R.S.* 6:1—43, N.J.S.A., provides as follows:
>
> 'It shall be unlawful, except as hereinafter provided, to use, operate or cause to be used or operated any airport, landing field, landing strip, or other avigation facility, air school or flying club, unless it, and, in the case of airports, its management, shall be licensed as provided in this chapter; and except in case of emergency no aircraft shall land upon, or

It was the intent of the legislature in "investing [the State Aviation Commission with powers of] supervision and regulation over airports . . . to 'protect the public health and safety and the safety of those participating in aeronautical activities.'"[151] The complainants, therefore, would only have a legal remedy under the *Act* if the gravaman of their complaint was predicated on public health and safety, and not nuisance or violation of their property rights. In other words, if the "inquiry . . . is whether the conduct of defendant in the operation of his business is such as would materially interfere with the ordinary comfort, physically, of human existence and whether it is an invasion of their property rights,"[152] the State Aviation Commission would not have the legislative authority to consider such a complaint. Conversely, the State Aviation Commission

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> take off from, any airport, landing field or landing strip, not so licensed; provided, however, that neither the provisions of this chapter, nor the rules, regulations or orders issued pursuant thereto, shall apply to any airport, landing field, landing strip, or other avigation facility, or air school owned and operated by the government of the United States.' L.1938, c. 48, p. 136, § 24.
>
> *R.S.* 6:1—44, N.J.S.A., provides as follows:
>
> 'The commission shall provide for the licensing of airports, airport managements, landing fields, landing strips, other avigation facilities, air schools or flying clubs by rules, regulations and orders adequate to protect the public health and safety and the safety of those participating in aeronautical activities.'
>
> *R.S.* 6:1—45, N.J.S.A., provides as follows:
>
> 'Any license issued pursuant to the provisions of this chapter may be modified, suspended or revoked when in the interest of public safety or the safety of those participating in aeronautical activities, the commission shall deem such action advisable, after violation of any provision of this chapter or any rule, regulation or order promulgated thereunder.'
>
> *R.S.* 6:1—53, N.J.S.A., provides as follows:
>
> 'Any order made by the commission may be reviewed upon certiorari by the Supreme Court.'

Ibid. at 357-358.

[151] *Ibid.* at 358.

[152] *Ibid.* at 359.

would have no authority to revoke the license already issued to the defendant based on the reasons set forth in the same complaint.[153] Since the complaint did not contain any allegation concerning "health and safety," the complaint was beyond the ambit of the Commission and the complainants therefore had no adequate remedy at law under the statute.[154]

The second question was "whether the license or permit granted by the State Aviation Commission is an absolute bar to . . . relief . . . and whether this court is attempting a usurpation of the power and authority of the legislatively created board or commission."[155]

While the defendant had the legal authority to build and operate an airport, the license "does not authorize the maintenance of a private nuisance, even though the same be construed a legislative grant of authority to conduct business. An act of the legislature cannot confer any right upon an individual to deprive persons of ordinary enjoyment of their property without just compensation."[156] Moreover, the legal analysis of nuisances,[157] whether existing or prospective (anticipated), is the same.[158]

> There is a distinction, however, between an injunction against the construction of a structure or facility intended to be put to a legal use because a threatened or prospective private nuisance may arise from such use, and an injunction

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[153] See *ibid.*

[154] The court also notes that under this circumstance, the provision in *R.S.* 6:1—53, *supra* note 92, for review of the Commission's action by *certiorari* is a nullity. "Such a provision is of no avail to these complainants under the circumstances here alleged, since the State Aviation Commission had no authority to consider them in the first instance." *Ibid.* at 395.

[155] *Ibid.* at 360.

[156] *Ibid.*

[157] "Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that the law will presume resulting damages." Black's Law Dictionary, *supra* note 33. "The maxim, *sic utere tuo ut alienum non laedas* [use your own property in such a manner as not to injure that of another], expresses the well established doctrine of the law." *Ross* v. *Butler*, 19 N.J. Eq. 294 (1868).

[158] See *Oeschle*, *supra* note 145 at 362.

> against the use itself because it may become or constitute a private nuisance as a result of the manner of the conduct of the particular trade, occupation or business intended to be there operated. In order to sustain an action for an injunction against construction the pleadings must demonstrate that the business intended to be carried on in the structure cannot be carried on without becoming a nuisance.[159]

Thus, where a complainant seeks an injunction to prevent a lawful business from operating—as well as the construction of buildings and works for that lawful business—equity will require proofs beyond any reasonable doubt that such lawful business will interfere with a complainant's property rights.[160] The defendants would thus be permitted to continue to build and operate the airport at their peril. If necessary, an injunction could be issued at a later time should the complainants be able to demonstrate actual interference with their property rights. Prior injunction can be anathema to progress: "If the business was restrained in the first instance, we could never learn from the great teacher experience, whether the business would, in fact, be a nuisance or not."[161]

In essence, the complainants in this case were arguing that the construction of an airport would constitute a nuisance *per se*.[162] But the court disagreed:

> The thousands of airports and airfields in their varied and diverse locations are proof that they are not nuisances *per se*. The argument advanced by complainants is comparable to that advanced while steam railroads were in their infancy. The legislative grant of authority to the State Aviation Commission to issue licenses as above stated is a recognition of the construction, operation and conduct of an airport as a legal business. This Court should not enjoin a prospective construction where the injury apprehended from the operation of a proposed legal business is of a conflicting character to justify conflicting opinions as to

[159] *Ibid.* at 363.
[160] See *ibid.* at 363-364.
[161] *Ibid.* at 364 (quoting *Duncan* v. *Hayes and Greenwood*, 22 N.J. Eq. 25).
[162] See *ibid.*

> whether it will ever result. If the business can be conducted without becoming a nuisance the construction should not be enjoined.[163]

The court would not enjoin the construction of the airport because: (1) an airport is not a nuisance *per se*; and (2) the State Aviation Commission had been granted by the Legislature the sole authority of "determining the propriety of locating an airport or airfield" which the "court should not interfere with by way of restraint".[164] The court also noted that the allegation of mere disturbance of the market value of complainants' property, in and of itself, cannot form the basis for injunctive relief.[165]

Ridgewood Air Club v. *Board of Adjustment of Ridgewood*
136 N.J.L. 222 (S.Ct. 1947)
Private Airport; Zoning Ordinance Presumed Reasonable; *Yoemans* Amplified

In *Ridgewood Air Club* v. *Board of Adjustment of Ridgewood*,[166] the opinion begins with the statement, "This is a zoning case."[167] The Ridgewood Air Club, a non-profit association consisting of individuals "who are desirous of advancing their interest in aviation and to provide economical and convenient flying facilities for its members",[168] wanted to build a private-use airport and applied to the Board of Adjustment of the Village of Ridgewood for a permit to use certain lands in the municipality as a non-commercial airport.[169]

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[163] *Ibid.*
[164] *Ibid.* at 365.
[165] See *ibid.* at 366.
[166] See 136 N.J.L. 222 (S. Ct. 1947) [hereinafter *Ridgewood Air Club*].
[167] *Ibid.* at 222.
[168] *Ibid.* at 223.
[169] The Court notes that the record below "is highly confused and incomplete." *Ibid.*

The zoning ordinance at the time of the application placed the property in question in a single dwelling zone, where non-commercial aviation fields were permitted, but only subject to the approval and regulation of the Board of Adjustment.[170]

On April 22, 1946, the matter came before the Board of Adjustment for hearing. A member of the Ridgewood Air Club was the sole witness on behalf of the club. The Court characterized his testimony as uncertain and speculative.[171] He was unable to produce even an original map of the proposed Ridgewood Air Park for inspection by the Board of Adjustment. The plaintiff's application was fatally deficient in respect of any credible evidence upon which the Board could give approval for the project.

On April 23, 1946, the ordinance in question was repealed. The repealing ordinance made no provision for the establishment of an airfield of the type in question. The Court chose to decide this case on the merits, even though it made clear that it could dispose of the matter by dismissing the writ on the ground that the repealing ordinance, which was in effect at the time of the disposition of the cause by the appellate court, was the appropriate choice of law.[172]

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[170] The ordinance in force at the time of the plaintiff's application is set forth below and repealed by Board of Adjustment the day after the plaintiffs application was rejected:

> The Zoning Ordinance adopted April 14, 1931 and known as Ordinance No. 764 placed the property in question in a single dwelling zone, and for purposes material to this decision provides as follows:
> 'Section 5. Single Dwelling Zone Uses. Within any Single Dwelling Zone no building shall be used in whole or in part for any industrial, manufacturing, trade or commercial purposes, or for any other than the following specified purposes:
> * * *
> '(8) Aviation field not conducted primarily for gain and without shops, eating places or other commercial activities, and subject to the approval of the Board of Adjustment and such regulation as that Board may prescribe'.

Ibid. at 223-224.

[171] See *ibid.* at 224.

[172] See *ibid.* at 225.

Instead, the Court chose to amplify its decision in *Yoemans* v. *Hillsborough Township.*[173] First, that "one attacking a zoning ordinance as unreasonable is met by the presumption that the ordinance is reasonable and must bear the burden of establishing the contrary."[174] Ridgewood Air Club did not sustain this burden of proof.

Second, that the decision in *Yoemans* "impliedly" negated any contention in the *Ridgewood Air Club* case: "(1) that the regulation of aviation fields is not within the scope of the zoning Act, and (2) that it is beyond the scope of the zoning ordinance to regulate the use of lands."[175]

B. "TAKINGS" AND OTHER LIABILITY PROBLEMS ARISING FROM AIRCRAFT OVERFLIGHT

The following cases examine problems caused to landowners by the flight of aircraft over property adjoining an airport, as well as municipal attempts to restrict property use and abate hazards to aircraft in flight. In *Yara Engineering Corp.* v. *Newark,* the City of Newark was challenged for using its zoning power over land use at its airport's runway ends to avoid eminent domain. In *United States* v. *Causby,* low flying government aircraft substantially destroyed the value of property used as a chicken farm, which constituted a "taking" under the Fifth Amendment. In *Hyde* v. *Somerset Air Service,* a private property owner sought to enjoin flight operations from a privately-owned public use airport on the ground that frequent aircraft overflights constituted a nuisance. In *City of Newark* v. *Eastern Airlines,* several municipalities and individuals located near Newark Airport sought unsuccessfully to restrain flights by airlines over

[173] See *Yoemans, supra* notes 136-144 and accompanying text.
[174] *Ridgewood Air Club, supra* note 166 at 225.
[175] *Ibid.* at 226.

densely populated residential portions of their municipalities by claiming trespass. In *Griggs* v. *Allegheny County*, landowners, in a fact situation similar to *Causby*, successfully alleged that a county airport had taken an easement over their land without just compensation. The *Griggs* Court laid liability for airport noise solely on the airport proprietor. Finally, in *Patzau* v. *Dept. of Transportation*, the facial constitutionality of the *Air Safety and Zoning Act of 1983* was upheld as a legitimate exercise of the zoning power that did not *per se* amount to a taking.

The protection of property rights developed in this famous line of cases is now fully incorporated into federal and State aviation policy. On the one hand, these cases set out the exclusive rights of property owners and a liability regime for airports. On the other hand, these cases recognize that rights of ownership in the airspace above the land are limited and are no longer infinitely extensible to the heavens. The zone of municipal property rights leaves off where the zone of federal and state preemption takes over—*viz.* as concerns regulation affecting the operation of aircraft in flight through the navigable airspace. Municipalities thus cannot rely on property rights to control operations around airports. As airport proprietors, municipalities cannot substitute zoning for the constitutionally mandated exercise of eminent domain.

Yara Engineering Corp. v. *Newark*
132 N.J.L. 370 (S. Ct. 1945)
Exercise of eminent domain cannot be avoided by zoning.

In *Yara Engineering Corp.* v. *Newark*,[176] the State Supreme Court considered a Newark City ordinance[177] designed "to regulate and restrict the height of structures and

[176] See 132 N.J.L. 370 (S. Ct. 1945) [hereinafter *Yara Engineering Corp.*].
[177] The Court described the ordinance in question:

objects of natural growth and otherwise regulate the use of property in the vicinity of Newark Municipal Airport by creating airport approaches and turning zones and establishing the boundaries thereof."[178] The effect was to deprive the property within the airport approach and turning zones of all value.

The Court held that there was nothing in the enabling statute, *R.S.* 40:55—32,[179] allowing municipalities to zone land solely for use as an airport as does the Newark ordinance.[180]

Thus, while the City of Newark could acquire property for airport purposes under *R.S.* 40:8—1, and acquire it by condemnation if necessary under *R.S.* 40:8—5, its ordinance interfered with the rights of property ownership, a result not intended in the Zoning Law. "The city may not under the guise of an ordinance acquire rights in private

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> The airport approach zones and airport turning zones provided for in the ordinance extend for a considerable distance, two miles from the landing field, which is called Inner Boundary. No structure or tree may be erected or maintained within these zones in excess of certain heights ranging from 10 feet to 370 feet, the lower heights being in the zones nearest the Inner Boundary. Another provision of the Ordinance prohibits any use of land within a two mile radius of the landing area which would in any manner create electrical interference with radio communication between the airport and aircraft, or make it difficult for flyers to distinguish between airport lights and others, or make any glare in the eyes of flyers using the airport, or impair visibility in the vicinity of the airport, or otherwise endanger the landing, taking off, or maneuvering of aircraft. This area was classified as 'second industrial' under the general zoning ordinance of the City, prior to the adoption of this ordinance.

Ibid. at 371-372.

[178] *Ibid.*

[179] The purposes and essential considerations are set forth in *R.S.* 40:55—32, N.J.S.A., as follows:

> Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the over-crowding of land or buildings, avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

property which it may only acquire by purchase or by the exercise of its power of eminent domain."[181]

United States v. *Causby*
328 U.S. 256 (1946)
Low Flight of Military Aircraft Over Private Property Constitutes a Fifth Amendment "Taking"

In *United States* v. *Causby*,[182] decided in 1946, the U.S. Supreme Court considered the "chicken farm" case. The owners of a chicken farm, located near a municipal airport that had been leased by the U.S. government, claimed that the frequent, low overflight[183] of U.S. military aircraft, on approach and departure from the airport, destroyed the use of the property as a commercial chicken farm, and thus constituted an unlawful taking of property within the meaning of the Fifth Amendment, for which the owners were entitled to just compensation. Writing for the Court, Justice Douglas, in his *dicta*, noted that:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum est usque ad coelum* . . . But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.[184]

Nevertheless, the Court concluded in a supposed case that, "If by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose,

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[180] See *ibid.* at 372-373.
[181] *Ibid.* at 373.
[182] See 328 U.S. 256 (1946) [hereinafter *Causby*].
[183] In this case, 83 feet above the ground.
[184] *Causby*, *supra* note 182 at 260-261 [citation omitted].

their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."[185] Finding that an easement of flight was taken,[186] the Court distinguished the facts in *Causby* from a case where property owners of land adjoining a railroad line were denied incidental damages due to "[t]he noise, vibrations, smoke and the like, incidental to the operation of the trains" and arising from a legalized nuisance.[187]

The Court dismissed the fact that the Civil Aeronautics Authority had approved the glidepath of the aircraft since it was below "[t]he navigable airspace which Congress has placed in the public domain [which] is [the] 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.'"[188] Oddly, the definition of "minimum safe altitudes" did not provide for the takeoff and landing regimes.[189] Following the decision in *Causby*, Congress would redefine the term to encompass these phases of flight in the federal *Aviation Act of 1958*.

The Court noted that,

> While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself.[190]

The Court concluded:

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[185] *Ibid.* at 261.
[186] "That easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land." *Ibid.* at 262.
[187] *Ibid.*
[188] *Ibid.* at 263 [citation omitted].
[189] Justice Black's dissenting opinion, *ibid.* at 273: "It is unlikely that Congress intended that the Authority prescribe safe altitudes for planes making cross-country flights, while at the same time it left the more hazardous landing and take-off operations unregulated."
[190] *Ibid.* at 265.

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain . . .. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[191]

Hyde v. *Somerset Air Service, Inc.*
1 N.J. Super. 346 (Ch. 1946)
Airports Not Nuisances *Per Se*, But May Become a Nuisance; Factors Involved

In *Hyde* v. *Somerset Air Service, Inc.*,[192] a residential landowner sought to enjoin flight operations over his property to and from Somerset Airport. The Superior Court, Chancery Division, found that, "without malevolence on the part of the defendants", there were repeated plane flights either directly over or in relatively close proximity to the plaintiff's residence at altitudes as low as 300 feet, and that the noises were "startling and harassing" and the proximity of the planes "menacing and alarming", "thereby unreasonably impairing in a substantial degree the peaceful use and occupation of complainant's dwelling," justifying injunctive relief.[193] In this case, enforcement of specific flight patterns which "materially abate[d]" the "annoyances" settled the matter.[194]

The court held to the rule in *Oechsle*,[195] discussed above, that airports are not

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[191] *Ibid.* at 266. See generally W.B. Harvey, "Landowners' Rights in the Air Age: The Airport Dilemma" (1958) 56 Mich. L. Rev. 1313; J.D. Hill, "Liability for Aircraft Noise—The Aftermath of *Causby* and *Griggs*" (1964) 19 Univ. Miami L. Rev. 1 at 13-20.
[192] See 1 N.J. Super. 346 (Ch. 1946) [hereinafter *Hyde*].
[193] *Ibid.* at 352.
[194] *Ibid.* at 353.
[195] See *Oeschle*, *supra* note 145.

nuisances *per se*;[196] "noise which is created by the pursuit of a lawful enterprise has no inevitable immunity from judicial suppression. It may have the characteristics which constitute an actionable nuisance,"[197] such as "[t]he character, volume, frequency, duration, time, and locality of the noises" and whether, in fact, it "unreasonably interferes with the ordinary comfort of human existence in the neighborhood."[198]

The court reiterated the balance between the right to navigate within the public airspace, and the exclusive rights of the landowner, who "owns at least as much of the superadjacent space above the ground as he can occupy and utilize in connection with his land",[199] defined as "the immediate reaches of the enveloping atmosphere."[200] Noting the requirements of N.J.S.A. 6:2—6,[201] the court observed that "[p]rivate convenience must often in our modern environments yield to public convenience, but private comfort, health, and safety are still precious in the eyes of the law."[202] Under N.J.S.A. 6:1—29, the State Aviation Commission was created with the dual mandate to encourage the development of aeronautics in this State and to guard "the public safety".[203]

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[196] *Hyde* at 351.
[197] *Ibid.* at 349.
[198] *Ibid.*
[199] *Ibid.* at 350.
[200] *Ibid.* (quoting *Causby, supra* note 182 at 266).
[201]

> Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or the water beneath. * * *

[202] *Ibid.* [citations omitted].
[203] *Ibid.* at 351.

The court raised the enduring question of whether the aggrieved property owner should proceed on a theory of trespass, or nuisance, or both. Noting the split of authority in various jurisdictions,[204] the court found:

> It is sufficient to say that the flight of aircraft across the land of another cannot be said to be trespass without taking into consideration the question of altitude. It has been said that in cases of this nature the law of private nuisance is a law of degree, hence projecting in each case the factual question whether there is an appreciable and substantial injury causing material discomfort and annoyance.[205]

Hereafter, New Jersey courts generally preferred to decide questions of liability on the basis of nuisance, rather than trespass.[206]

City of Newark v. *Eastern Airlines*
159 F. Supp. 750 (D.N.J. 1958)
"Primary Jurisdiction" of CAB and Limits of Judicial Review; Proof of Altitude Required to Sustain Action in Trespass

In *City of Newark* v. *Eastern Airlines*,[207] the Cities of Newark, Elizabeth and Linden, and the Townships of Hillside and Union, and six individuals, sought to enjoin:

> first, 'the airborne operations of (the named) airlines[208] to and from Newark Airport to the extent that the same

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[204] As example, the court cited a Massachusetts case where low flight had been recognized as a technical trespass.

[205] *Ibid.* at 351-352.

[206] See *Morristown I*, *infra* note 364 at 483:

> The acceptance of nuisance as the sole theory of relief is more satisfactory for determining liability. Degree of actual interference, rather than a formalistic factor of the relationship of the flight path to a particular zone or column of air space, should be the criterion for relief. The court would then determine whether there was an 'unreasonable' degree of interference. Inherent in this determination would be consideration of all relevant interests, including broad national and commercial interests in the particular aviation activities involved.

(citing *Hyde*, *supra* note 192).

[207] See 159 F. Supp. 750 (D.N.J. 1958) [hereinafter *City of Newark*].

> constitutes a public and/or a private nuisance,' and second, to enjoin 'the continued airborne operations of said airlines to and from Newark Airport to the extent that the said constitutes a trespass on the property of the plaintiffs.'[209]

Specifically, the plaintiffs wanted the district court to restrain the defendant airlines "from operating any of their airplanes over the congested residential sections of Newark, Elizabeth, Hillside and Union at an altitude of less than Twelve Hundred Feet from the Ground."[210] The defendants urged that the matter be dismissed since the exclusive jurisdiction to grant the relief sought was in the Civil Aeronautics Board (CAB).[211]

The *Civil Aeronautics Act* recognized the right of any citizen of the U.S. of freedom of transit through the nation's navigable airspace.[212] The term navigable airspace meant "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority",[213] more precisely expressed in the regulations it prescribed. The CAB had promulgated regulations for minimum safe altitudes of flight where "except when necessary for take-off or landing, no person shall operate an aircraft . . . (b) [o]ver the congested areas of cities, towns or settlements, . . . [below] an altitude of

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[208] "There remain as defendants only seven of the twelve air carriers which operate from the Newark Airport, to wit, Eastern Airlines, Inc., American Airlines, Inc., Allegheny Airlines, Inc., National Airlines, Trans World Airlines, Inc., and United Airlines, Inc." *Ibid.* at 752.

[209] *Ibid.*

[210] *Ibid.* at 753.

[211] See *ibid.* Under 49 U.S.C.A. § 421 (rep.): "The Board was empowered to supervise and control by rule, regulation and order the entire field of interstate air commerce . . . . It was also made the final arbiter of the public interest." *City of Newark, supra* note 207 at 755.

[212] See 49 U.S.C.A. § 403 (rep.). Compare with 49 U.S.C.A. § 40103(a)(2): "A citizen of the United States has a public right of transit through the navigable airspace."

[213] 49 U.S.C.A. § 180 (rep.). Compare with 49 U.S.C.A. § 40102(a)(30), "'navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part [49 U.S.C.A. §§ 40101 *et seq.* 44101 *et seq.*] including airspace needed to ensure safety in takeoff and landing of aircraft."

1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft."[214]

The rule "seems to recognize impliedly"[215] that during landing and takeoff, the minimum altitude of 1,000 feet could not be maintained. Thus, the court held that the term "'navigable airspace' . . . includes not only the space above the minimum altitude of 1,000 feet prescribed by the regulation but also that space below the fixed altitude and apart from the immediate reaches above the land."[216]

Quoting from the case of *Allegheny Airlines* v. *Village of Cedarhurst*,[217] where a Village ordinance made it a violation to overfly the Village below 1,000 feet, the Second Circuit held that the minimum safe altitude altitudes prescribed in 14 C.F.R., above,

> contained no suggestion that 'navigable air space' is restricted to air space not less than 1,000 feet above the ground. On the contrary the Congressional purpose is clear to empower the Board to make rules as to safe altitudes of flight at any elevation, since its rules were to have, among

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[214] *City of Newark, supra* note 207 at 755 (quoting 14 C.F.R. § 60.17).

[215] *Ibid.*

[216] *Ibid.*

[217] See 132 F. Supp. 871 (E.D.N.Y. 1955); *aff'd* 238 F.2d 812 (2d Cir. 1956). In *Cedarhurst*, the municipal ordinance made flight below 1,000 feet above the ground a violation of the ordinance. It was intended to discourage flights on approach to Idlewild Airport (now Laguardia Airport). The *Cedarhurst* case was one of several cases where municipal ordinances were employed to limit low air traffic. The last case was *American Airlines* v. *Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967) [hereinafter *American Airlines*], which held that local zoning ordinances delimiting permissible noise levels for aircraft overflight to protect the public health and safety interfered with interstate air commerce and were invalid; *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

> The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decibel limit.

American Airlines, ibid. at 230.

A major practical concern at the time was the potential for the creation of patchwork airspace regulation below 1,000 feet making compliance nearly impossible. In the era after *Burbank* v. *Lockheed Air Terminal*, (see *infra* notes 275-284 and accompanying text) this general concern still exists in the context of proprietor imposed airport use restrictions. See E.T. Ellett, "The National Air Transportation System: Design by City Hall?" (1987) 53 J. Air L. & Com. 1 at 27; L.L. Blackman & R.P. Freeman, "The Environmental Consequences of Municipal Airports: A Subject of Federal Mandate?" (1987) 53 J. Air L. & Com. 375 at 376.

> other objects, prevention of collisions between aircraft, and between aircraft and land or water vehicles. Obviously the greatest danger of such collisions is when an aircraft takes off or lands. Appellants' argument that the Board has itself established the minimum safe altitude of flight over a congested area, such as Cedarhurst, at 1,000 feet, completely disregards the express exception of take-off and landing stated in the regulation. The federal regulatory system, if valid, has preempted the field below as well as above 1,000 feet from the ground.[218]

Therefore, if the district court in *City of Newark* undertook to modify the federal regulations setting minimum safe altitudes, it would violate the uniformity contemplated by the *Civil Aeronautics Act*. "The entire development of the air transportation system would be hampered by a myriad of judicially prescribed regulations of only local application."[219] Under the doctrine of "primary jurisdiction" the authority of the CAB to regulate such matters was exclusive, the courts being left only limited functions of review.[220]

As mentioned above, the plaintiffs also brought claims for damages and injunctive relief on the theory of trespass.[221] The district court held that while the principles in

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[218] *City of Newark, supra* note 207 at 756-757.
[219] *Ibid.* at 758.
[220] *Ibid.*

> It is now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Ibid. [citations omitted].
[221] See *ibid.* at 759.

Causby[222] and *Hyde*[223] do not foreclose the right of the aggrieved landowner to maintain an action in trespass, the formalistic nature of the evidentiary burden on the plaintiff is great:

> There must be evidence not only that the aircraft passed over his lands from time to time but also that there was an unlawful invasion of the immediate reaches of his land; in other words, there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above the surface.[224]

The district court dismissed all claims by all parties for damages and injunctive relief on the trespass theory. As if to underscore the evidentiary problems first enunciated in New Jersey in *Hyde*,[225] the court explained:

> We do not mean to suggest that the plaintiff must prove with mathematical exactitude the altitudes at which aircraft ordinarily passed over his property; this might very well be an impossible task. There must be some evidence, however, which will enable the Court to make a determination that the aircraft flights were at altitudes below the navigable airspace, which is in the public domain, and within the superadjacent airspace immediately above the land. The ultimate determination must be predicated upon a consideration of aircraft altitudes, and therefore some evidence as to altitudes, for example, well-grounded approximations, is necessary. A determination that there has been a continuing trespass may not rest on mere speculation and conjecture.[226]

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[222] See *Causby*, *supra* notes 182-191 and accompanying text.
[223] See *Hyde*, *supra* notes 192-206 and accompanying text.
[224] *Ibid.* at 760.
[225] See *Hyde*, *supra* notes 192-206 and accompanying text.
[226] *Ibid.* at 762.

Griggs v. *Allegheny County*
369 U.S. 84 (1962)
Airport Proprietor Liability for Airport Noise

A federal case usually associated with *Causby*[227] is *Griggs* v. *Allegheny County*,[228] where the question was whether Allegheny County had taken an air easement over petitioner's property for which it had to pay just compensation as required by the Fourteenth Amendment.

As mentioned in the discussion of *Causby*, above, Congress had redefined the term "navigable airspace" to "include airspace needed to insure safety in take-off and landing of the aircraft."[229] Reaffirming the decision in the *Causby* case that "the use of land presupposes the use of some of the airspace above it," the *Griggs* Court—Justice Douglas once again writing the Opinion—turned to the issue of who is the "taker" of the easement, in the constitutional sense: the respondent Allegheny County, which decided where and how the airport would be built, "what land and navigation easements would be needed, then subsequently promoted, owned and leased the airport; the airlines, whose aircraft actually caused the invasion of adjoining landowner's airspace; or the [Civil Aeronautics Authority] whose Administrator approved the plan."[230]

The *Griggs* Court placed liability squarely on the shoulders of the owner-proprietor, Allegheny County. "We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built."[231] "Respondent in designing [the airport] had to acquire

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[227] See *Causby*, *supra* notes 182-191 and accompanying text.
[228] See 369 U.S. 84 (1962) [hereinafter *Griggs*].
[229] *Ibid.* at 88.
[230] *Ibid.* at 89.
[231] *Ibid.*

some private property. Our conclusion is that by constitutional standards, it did not acquire enough."[232]

Consequently, the *Griggs* case[233] has generally come to be regarded as the genesis of the "proprietor exception" to the rule of federal preemption of aircraft noise control.[234]

Patzau v. *Dept. of Transportation*
271 N.J. Super. 294 (App.Div. 1994); *cert. den.* 138 N.J. 268 (1994)
Air Safety and Zoning Act of 1983 Not Facially Unconstitutional

Patzau v. *Dept. of Transportation*[235] presented a challenge to the constitutionality of the *Air Safety and Zoning Act of 1983*,[236] and the *New Jersey Airport Safety Act of 1983*.[237] Individual landowners filed suit against the NJDOT, the New Jersey municipalities of Branchburg, Bedminster, Readington and Alexandria, and the operators of several airports in or adjacent to these municipalities, seeking a declaratory judgment on the two acts and the regulations to implement them.[238] A complex series of motions

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[232] See F.V. Harper, F. James, Jr. & O.S. Gray, *The Law of Torts*, 2d ed. (Boston: Little, Brown, 1986, 1996), §§ 1:24–1:25. The authors note that *Causby* and *Griggs* left several questions unanswered. For example, once the 1958 Act was changed to include the landing and takeoff regimes in the term "navigable air space", could such flights still amount to a taking? While *Griggs* affirmed *Causby* and the landowner's interest in nearby airspace, does the theory of *Causby* proceed on the theory of trespass or nuisance?

> The opinion in *Causby* may well be construed as reasoning from the fact of trespass to that of taking, and it has been held that there can be no taking without a trespass [footnote omitted]. This would mean that owners of land not under the direct path of take-offs and landings could not establish a taking even though the proximity of the flights substantially impaired the value of the land because of noise, vibration, and lights of the planes.

Ibid.

[233] See generally Hill, *supra* note 191.

[234] Blackman & Freeman, *supra* note 217 at note 18; *United States* v. *State of New York*, 552 F. Supp. 255 ("[T]he rationale for the proprietor exemption to imposing curfews is to enable a proprietor to protect himself from liability for excess aircraft noise." *Ibid.* at 264).

[235] See 271 N.J. Super. 294 (App.Div. 1994), *cert. denied*, 138 N.J. 268 (1994) [hereinafter *Patzau*].

[236] See N.J.S.A. 6:1—80–88.

[237] See N.J.S.A. 6:1—89–97.

[238] See N.J.A.C. 16:62—1.1 *et seq.*

by the NJDOT resulted in the Supreme Court directing that "the Law Division shall consider the facial challenge to the constitutionality of *N.J.S.A.* 6:1—89, *et seq.*, prior to discovery regarding and consideration of any other issues raised in litigation."[239]

The plaintiffs moved for summary judgment on the question. Ultimately, the trial court found no constitutional infirmities with the *Acts per se* and dismissed the matter with prejudice, on ripeness grounds, insofar as the *Acts* had not yet been applied to plaintiffs. The plaintiffs appealed the dismissal.

After an examination of the *Acts* and regulations,[240] the court referenced the landmark decision in *Village of Euclid* v. *Ambler Realty*[241] and reasserted the legitimate exercise of the zoning power. "Although most zoning power in New Jersey is exercised by local governments to which it has been delegated by statute pursuant to Article IV, § 6, ¶ 2 of the New Jersey Constitution, zoning is an exercise of the police power and the legislature may also delegate it to state agencies."[242] The *Acts* have a rational relationship to a justifiable legislative purpose, namely,

> to prevent 'the creation or establishment of airport hazards' that 'endanger[ ] the lives and property of the users of the airport and of occupants of land in the vicinity thereof, and

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[239] *Patzau, supra* note 235 at 299.
[240] *Ibid.* at 299-302.
[241] 272 U.S. 365 (1926):

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.

[242] *Patzau, supra* note 235 at 303.

> also, if the hazard is of the obstruction type, . . . tend to destroy or impair the utility of the airport and the public benefit therein.' Controlling the use of property in the immediate vicinity of airports in order to prevent the creation of new obstructions to aircraft certainly is not arbitrary or unreasonable on its face. [243]

The plaintiffs relied on *Yara Engineering Corp.*,[244] discussed above, to support a contrary contention, but the court distinguished that case on the basis that *Yara Engineering Corp.* was not an examination of the facial invalidity of the ordinance; rather, "the court found that its effect was to deprive the property within the [airport approach and turning] zones of all value."[245] Therefore, the case was of no guidance to the question of facial validity.

While the *Patzau* court conceded that property zoned into complete inutility without compensation would be unconstitutional, "the State may constitutionally impose very substantial zoning and other restrictions on the use of property in order to advance legitimate public interests without being obligated to provide compensation."[246]

"There is nothing in the provisions of the Air Safety and Hazardous Zoning Act which makes its enactment tantamount to a taking,"[247] as there is a distinction between the mere enactment of a statute versus its particular impact on a specific piece of property.[248] The test is whether a statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land.[249]

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[243] *Ibid.* at 304, quoting N.J.S.A. 6:1—80 (Legislative findings and declarations).
[244] See *Yara Engineering Corp.*, *supra* notes 176-191 and accompanying text.
[245] *Patzau*, *supra* note 235 at 304.
[246] *Ibid.* at 305 [citations omitted].
[247] *Ibid.*
[248] See *ibid.* (quoting from *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 at 494 (1987) (requiring mining companies to protect surface areas against subsidence)).
[249] See *ibid.* (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 US 264 at 295-296 (1981) which quotes *Agins* v. *Tiburon*, 447 U.S. 225 at 260 (1980)).

Examination of the statute reveals no such result: (1) the *Act*, at N.J.S.A. 6:1—84 requires the Commissioner to "specify permitted and prohibited land uses . . . within airport safety zones." However, under the statute, and specifically under N.J.S.A. 6:1—85, the Commissioner may not "require the removal, lowering or other change or alteration of any structure or tree not conforming to the standard when adopted or amended, or otherwise interfere with the continuance of a nonconforming use except" by condemnation;[250] (2) the eight acre clear zones at each end of an airport runway are the only areas where no new trees or structures will be permitted; and (3) N.J.S.A. 6:1—88 assures by its express terms that "to remove, lower, or otherwise terminate a nonconforming use," or to provide other "necessary protection from an airport hazard", which cannot constitutionally be provided by zoning regulations, the Commissioner of Transportation may acquire property by purchase or condemnation.[251] The *Air Safety and Hazardous Zoning Act of 1983* therefore withstands the challenge to its facial constitutionality.

Turning to constitutionality of the *Air Safety and Hazardous Zoning Act of 1983* as applied, the Appellate Division dismissed the allegation for the plaintiffs' complete failure "to allege the material facts with the specificity that would be required in order for us to consider an attack on the constitutionality of the [Act] as applied."[252] The court, in *dicta*, suggested that even if the plaintiffs had marshalled such evidence[253] in the first

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[250] *Ibid.* at 306.
[251] *Ibid.*
[252] *Ibid.* at 308.
[253] "[P]lot plans which show where each of plaintiffs' properties is located in relation to the airport hazard," runway, runway end and clear zones "plotted in accordance with the Commissioner's regulations"; photographs, testimony or affidavits as to what the present uses of their respective properties are; and "affidavits of competent experts," all going to demonstrate how the Act and the regulations promulgated thereunder would affect their properties. *Ibid.*

place, the failure to exhaust the available administrative remedies would not give them standing to claim a "taking."[254]

The Appellate Division then considered the constitutionality of the *New Jersey Airport Safety Act of 1983*, where the statute: creates a fund for the maintenance and upkeep of public-use airports in New Jersey by imposing a two cent per gallon tax on fuel distributed to general aviation airports; creates an airport safety fund; authorizes the Commissioner of Transportation to provide assistance to general aviation airports for specified purposes; and specifies the qualifications for eligibility to receive assistance from the airport safety fund. It also authorizes the Commissioner to

> acquire airports or lands or rights therein, including aviation easements necessary for clear zones or clear areas, by gift, devise or purchase, when it is deemed to be necessary for the safe operation of the airport and the general public safety or necessary for the continued operations of an airport which is deemed to be necessary for a safe and efficient air transportation system in the State.[255]

However, the plaintiffs argued that the statute permits condemnation and authorizes donations for the benefit of private interests, both of which are forbidden by the State Constitution.[256] The court quoted *Roe* v. *Kervick* [257] to explain the origin and purpose of the donation clause of the Constitution:

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[254] *Ibid.* at 308. Specifically, the Department of Transportation argued that none of the plaintiffs could suffer a taking until they first applied to the Commissioner of Transportation for a permit and then had their application denied.

[255] *Ibid.* at 309 (quoting N.J.S.A. 6:1—95).

[256] The relevant State Constitutional provisions are:

"No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

[N.J. Const., art. 8, § 3, ¶ 3.]

"Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners."

[N.J. Const., art. 1, ¶ 20.]

[257] See 42 N.J. 191 (1964).

> Historically, the forces which motivated the constitutional prohibitions recited above, in this and most states of the Union, are clear. During the nineteenth century states and their political subdivisions frequently undertook to encourage the development of railroads by furnishing financial aid. Such assistance was in the form of direct loans or gifts of public money or property, or by bond issues, or subscription to stock of the companies. Many abuses followed in the wake of such practices to the serious detriment of the taxpayer....
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> ....
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> The strictures of Article VIII, which were adopted in 1875, were simply the retreat to a fundamental doctrine of government, *i.e.*, that public money should be raised and used only for public purposes. The article brought the doctrine into the organic law and thus established as basic policy a prohibition against lending the credit of the State directly or indirectly, or loaning, giving or donating its money or property or that of its subdivisions to or for the use of an individual, association or corporation for private purposes.[258]

The test to determine whether the expenditure of public funds is a prohibited donation is: (1) whether the legislative provision of financial aid is for a public purpose; and (2) whether the means are consonant with that purpose. The Court, in that case, held that loans of public funds to private entities to finance private for-profit redevelopment projects in order to alleviate unemployment is constitutional.[259] The court also cited another case, *Davidson Bros.* v. *D. Katz & Sons,*[260] where the State Supreme Court applied the test in *Roe* v. *Kervick*, and "although the record was not sufficiently clear to decide the issue, what was in effect the donation of public funds to a private supermarket to attract it to an inner city area might be able to pass muster."[261]

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[258] *Ibid.* at 206-207.

[259] See *Patzau, supra* note 235 at 310. "On the other hand, the Court has held that the lease of public property to a veterans' association for one dollar a year was a constitutionally prohibited gift. *Borough of Rockaway* v. *Rockden American Legion Post No. 175,* 39 N.J. 504, 506 . . . (1963)." *Ibid.*

[260] See 121 N.J. 196 (1990).

[261] *Patzau, supra* note 235 at 310.

The Appellate Division criticized the language in N.J.S.A. 6:1—93, which "confers broad authority on the Commissioner of Transportation to provide assistance to publicly and privately owned, unrestricted, public use airports. The language conferring that authority is so general that, if it were understood literally, it might be read to permit unconstitutional donations, and we decline to interpret it to authorize such an action."[262]

Finally, the court held that "[t]he eminent domain clause of our Constitution contemplates that the Legislature may authorize both public and private entities to acquire property by condemnation, provided the acquisition is for a public purpose."[263] The court found that the plaintiffs did not allege any specific facts demonstrating the exercise of eminent domain under the *New Jersey Airport Safety Act of 1983* that was for non-public purposes.[264]

C. DIRECT ATTEMPTS BY NON-PROPRIETOR MUNICIPALITIES TO REGULATE AIRPORT NOISE

The following cases examine instances where non-proprietor host municipalities sought unsuccessfully to regulate airport noise directly by exercising their police power. In *Parachutes, Inc.* v. *Lakewood,* a municipal ordinance limiting noise levels in a way that would preclude a sport parachute operation survived a challenge that such an ordinance was federally preempted, only to be overturned by a second case, *Burbank* v. *Lockheed Air Terminal,* where the U.S. Supreme Court declared invalid a municipal ordinance setting a curfew on jet operations on the basis of federal occupation of the field

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[262] *Ibid.* (citing *Riggs* v. *Township of Long Beach, supra* note 101at 610-611; *In re Board of Educ. of Boonton,* 99 N.J. 523 at 539 (1985), *cert. denied,* 475 U.S. 1072 (1986)).

[263] See *ibid.* (citing *New Jersey Housing & Mortgage Fin. Agency* v. *Moses,* 215 N.J. Super. 318 at 326 (App.Div. 1987), *cert. denied,* 107 N.J. 638 (1987) ("condemnation of land for a privately owned shopping

preemption. Finally, in *Township of Hanover* v. *Morristown (Morristown II)*, a court sanctioned settlement between two municipalities was disturbed by the ruling in *Burbank*.

These cases demonstrate that municipal zoning can be controlled through a precise and vigorous application of federal preemption.

Parachutes, Inc. v. *Township of Lakewood*
121 N.J. Super. 48 (App.Div. 1972), *cert. den.* 62 N.J. 331 (1973)
Pre-*Burbank* Municipal Noise Control Ordinance

Parachutes, Inc. v. *Township of Lakewood*,[265] a New Jersey case that would later fall to the Supreme Court decision in *City of Burbank* v. *Lockheed Air Terminal, Inc.*,[266] is discussed immediately below. Lakewood passed a general noise control ordinance forbidding sound over 50 dB during night hours and 60 dB during the day. However, enforcement of the ordinance appears to have been aimed at the plaintiff's sport parachute operation.

The plaintiff, which owned and operated a sport parachuting center and flying school at Lakewood Airport, claimed that the ordinance would force it out of the sport parachuting business.[267]

The plaintiff's parachute operation was described as follows:

> [P]laintiff's plane bearing parachutists takes off from the field and then circles over a fixed zone. At the appropriate time the engine is stopped and a parachutist jumps. The engine is then started again, the plane continues to circle, the engine is stopped again and another parachutist jumps.

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center did not violate eminent domain clause where condemnation would serve public purpose of providing supplies and services for residents of publicaly financed housing projects in the area." *Ibid.* at 310-311.).

[264] See *ibid.* at 311.

[265] See 121 N.J. Super. 48 (App.Div. 1972), *cert. denied*, 62 N.J. 331 (1973) [hereinafter *Parachutes, Inc.*].

[266] See *Burbank*, *infra* notes 275-284 and accompanying text.

[267] See *Parachutes, Inc.*, *supra* note 265 at 48.

> This is continued until all parachutists aboard have jumped—usually eight or nine. Then the plane descends and another plane goes aloft and duplicates the operation. On weekends, when the weather is good, this often continues from morning until dark. It is the noise of the repeated starting of the engines in flight that runs afoul of the ordinance—take off, landing and ordinary sustained flight is not affected by the ordinance.
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> The ordinance forbids sound over 50 decibels during the night hours and 60 decibels during the day. Plaintiff claims that it cannot continue its stop-and-start operations in the air within those limits (at least, with its present equipment) and therefore the ordinance will force it out of business.[268]

The plaintiff alleged that the application of the ordinance was discriminatory and an abuse of the municipality's police power so far as the scope and degree of regulation exceeded the need for it.[269] Probably relying on the Ninth Circuit ruling in *Burbank*,[270] the plaintiff also argued that the federal government had preempted the entire field of regulation of flights of all kinds, and of all uses of aircraft in navigable airspace, whatever the purpose of the flight.[271]

In affirming the trial court's judgment against the plaintiff, the Appellate Division wrote, "We are not convinced that there is such preemption" under conflict, preemption, or interstate commerce theories. The Appellate Division cited *Morristown I* [272] as its sole

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[268] *Ibid.* at 49-50.
[269] See *ibid.* at 50.
[270] See *Lockheed Air Terminal* v. *City of Burbank*, 457 F.2d 667 (9th Cir. 1972) (affirmed on the basis of the Supremacy Clause with respect to both federal preemption and conflict); *aff'd* 411 U.S. 624 (1973) (affirming the Court of Appeals on preemption grounds only). See also *Burbank*, *infra* notes 275-284 and accompanying text.
[271] See *Parachutes, Inc.*, *supra* note 265 at 50.
[272] See *Morristown I*, *infra* note 364 at 477-480. In this pre-*Burbank* case, discussed above as to other issues, defendants relied on *Allegheny Airlines* v. *Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd* 238 F.2d 812 (2d Cir. 1956); *City of Newark* v. *Eastern Airlines, Inc.*, 159 F. Supp. 750 (D.C.N.J. 1958); *American Airlines* v. *Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied* 393 U.S. 1017 (1969), to assert complete preemption and supremacy to the exclusion of any power of the state. The trial court correctly distinguished these cases as involving areas over which the FAA had exclusive domain, namely, altitudes, flight patterns, takeoffs and landings.

authority. However, it included a "but see" reference to the *Burbank* case in the Ninth Circuit.[273]

Finally, the court dismissed the plaintiff's allegation of discriminatory enforcement, writing without reference to any authority: "The ordinance does proscribe other noises—it is not essential that it reach all sudden, transient noises, such as those of passing trucks, the sources of which are too difficult to identify, measure or punish."[274]

City of Burbank v. *Lockheed Air Terminal, Inc.*
411 U.S. 624 (1973)
Federal Preemption of Aircraft Noise

In 1973, the U.S. Supreme Court, in *City of Burbank* v. *Lockheed Air Terminal, Inc.*,[275] struck down a municipal ordinance that imposed a curfew on the arrival and

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However, wrote the court, "where there is no conflict, and certainly where there is state action consistent with the avowed second purpose of the F.A.A., suppression of noise, a state court may act."

In terms of interstate commerce, the trial court held "The burden on interstate commerce is patently excessive only if the pattern of local regulation presents so acute a conflict that aircraft cannot possibly comply with all standards and continue interstate flight. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959)." The court relied on *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960), where the Supreme Court sustained the application of a municipal smoke control ordinance to a vessel operating in interstate commerce powered by federally inspected and licensed boilers.

> The court stated that local power to regulate such matters is pre-empted only when an 'act of Congress, fairly interpreted is in actual conflict with the law of the state' (at 443). Noting that the purpose of the Federal licensing system was to insure safety, while that of the ordinance was to protect the health and welfare of the community against excessive smoke, the court found no actual conflict.

Ibid. at 476.

The *Morristown I* court thus applied this reasoning to the case and found no conflict. "If it is possible for aircraft to be made sufficiently quiet to meet the local noise standards without jeopardizing the network of Federal Air Safety Regulations, a municipal noise level ordinance would probably create no conflict within the meaning of *Huron*." *Ibid.* at 479. Moreover, "*Huron* also rejected an argument that pre-emption flowed from the fact that the ship was federally licensed, the fact that planes are licensed and operating with a zone defined by Congress as 'navigable airspace' should not immunize them from regulations evincing a valid local interest in maintaining community peace or protecting property rights." *Ibid.*

[273] See *Blue Sky Entertainment* v. *Town of Gardiner*, 711 F. Supp. 678 at 691, note 15 (N.D.N.Y. 1989) (Portions of local zoning ordinance aimed at curbing parachuting operations preempted by federal law).

[274] *Parachutes, Inc., supra* note 265 at 51.

[275] See 411 U.S. 624 (1973) [hereinafter *Burbank*].

departure of jet aircraft at the Hollywood-Burbank Airport between 11 p.m. and 7 a.m.[276] It declared "[The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control."

Justice Douglas, who had authored the Court's opinions in *Causby*[277] and *Griggs*,[278] wrote for the 5-4 majority in *Burbank*. The Court held: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." However, in the much debated "footnote 14"[279] of the opinion, the Court created an exception, permitting airport proprietors the limited, but exclusive authority to regulate noise at their airports, so long as such regulation would be nondiscriminatory in nature.[280] This exception was subsequently codified and can now

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[276] See *ibid.* at 625-626.

[277] See *Causby*, *supra* notes 182-191 and accompanying text.

[278] See *Griggs*, *supra* notes 227-234 and accompanying text.

[279] "Footnote 14":

> The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State of local public agency, *as the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such an exclusion is nondiscriminatory.' (Emphasis added.) This portion as well was quoted with approval in the Senate Report. *Ibid.*
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> Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are not concerned here with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.

Burbank, *supra* note 275 at 635-636.

[280] *National Helicopter Corp.* v. *City of New York*, 952 F. Supp. 1011 at 1023-1024 (S.D.N.Y. 1997):

be found in 49 U.S.C.A. § 41713(b)(3).[281] This exception served to harmonize *Burbank* with the airport proprietor's liability (and aggrieved landowner's remedy) under *Griggs*.

However, far from settling the question of field preemption once and for all, as the case purported to do, it complicated the issue, bifurcating cases between what happens in the air and what happens on the ground.[282] *Burbank* remains the subject of

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> After *Burbank*, Congress codified this view with a provision in the FAA providing that municipalities retain their 'proprietary powers and rights.' See 49 U.S.C. § 41713. Though neither Congress nor the Supreme Court has delineated the precise nature of the 'powers and rights' reserved to proprietors, '[t]he rationale for this exception is clear. Because airport proprietors bear monetary liability for excessive aircraft noise under *Griggs* v. *Allegheny County*, 369 U.S. 84, 82 S. Ct. 531, 7 L.Ed.2d 585 (1962), fairness dictates that they must also have power to insulate themselves from that liability.' San Diego Unified Port District, 651 F.2d at 1316-17.

[281] 49 U.S.C.A. § 41713(b)(3): "This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns and operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights."

[282] P.B. Stein, "The Price of Success: Mitigation and Litigation in Airport Growth" (1991) 57 J. Air. L. & Com. 513 at 521-524:

> The United States Supreme Court addressed the issue of federal preemption in the context of airport noise regulation in *City of Burbank* v. *Lockheed Air Terminal, Inc.* At issue was a Burbank city ordinance placing curfews on jet flights from the Hollywood-Burbank Airport between the hours of 11 p.m. and 7 a.m. The court noted that the FAA occasionally enforced curfews, but that such measures were generally opposed by the FAA unless the agency itself managed the curfews in its role as supervisor of navigable airspace. The court also acknowledged the lack of any express preemption in the 1972 Noise Control Act. This lack of express preemption was not considered decisive, however, for preemption can also occur if federal legislation is so pervasive that Congress leaves no room for state regulation, or if federal interests are so dominant that state regulation should be precluded.
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> Relying on these two justifications for implied federal preemption, the majority in *Burbank* held for the FAA. The Court declared that "fractionalized" control of the timing of flights by a variety of municipalities would severely limit the FAA's ability to control air traffic, and that the powers given by Congress to federal agencies should not be diffused by allowing states or municipalities to participate in the planning. But rather than definitively ending the preemption debate, parts of the Burbank decision added fuel to the controversy. * * *
>
> In footnote fourteen of the Burbank decision, the Court discussed a letter that the Secretary of Transportation submitted to Congress during the debate on the 1972 Noise Control Act. The letter expressed the

Secretary's view that the proposed Act would not affect the right of state or local public agencies to issue regulations governing aircraft noise provided this was carried out in the agency's role as proprietor of an airport. Airport owners acting as proprietors could even deny access to their facilities on the basis of aircraft noise as long as this was not implemented in a discriminatory manner. The Supreme Court, therefore, emphasized that its holding in Burbank was limited to the instance of a city acting within its police power authority, and that it was not considering what limits, if any, might apply to a municipal owner of an airport acting as the facility's proprietor.

The extent of this proprietor exemption has been the subject of several court cases, often with conflicting results. Some recent cases hold that proprietors still may not directly regulate frequency of take-offs, nor establish curfews, as such operational decisions are preempted by federal occupation of the field.

Yet other courts reject total federal preemption. The municipal operator of a California airport was allowed to establish a curfew on particularly loud aircraft in *National Aviation* v. *City of Hayward.* In another California case, the court made a distinction between two noise standards. Although the Single Event Noise Exposure Level (SENEL) was preempted because it measured in-flight aircraft noise, a more general Community Noise Equivalent Level (CNEL) was permissible because it did not interfere in an area regulated by the FAA. In other states, county zoning restrictions limiting the use of a public airfield have been upheld, as have proprietor-established restrictions forbidding the use of noisier stage I aircraft. [citations omitted].

Blackman & Freeman, *supra* note 217 at 380-381:

The exception to preemption which allows airport proprietors to adopt noise control regulations derives, at least in part, from earlier Supreme Court cases determining that the airport, rather than the operators of noisy aircraft, should be responsible for paying compensation in the event aircraft noise becomes substantial enough to constitute a taking of property under the fifth and fourteenth amendments. Refusing to address a subject not directly raised in this case, however, the Burbank Court did not consider 'what limits, if any, apply to a municipality as a proprietor.'

The Burbank decision thus left open a number of important questions concerning proprietor power, including: (1) whether the municipal airport owner may exercise the police powers denied to governments which are not proprietors or is limited to the use of the rights which derive solely from its status as the owner of the property on which the airport is located; and (2) whether the fact that the proprietor may regulate noise only because of its status as the owner of the airport affects the presumption of validity to which its ordinances are otherwise entitled and thus the level of judicial deference to be accorded its noise regulations. The answers to these questions will ultimately determine whether, absent further action in Congress, federal or local decisionmakers will hold the controlling authority to dictate the extent to which interstate commerce may be burdened in the interests of local environmental quality. (Footnotes omitted).

judicial and academic[283] debate. Virtually any case dealing with local regulation of airports since 1973 proves this point. Since its publication, dozens of reported federal cases have been turned on its application.[284] A complete discussion of *Burbank* and its

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J.S. Hamilton, "Allocation of Airspace as a Scarce National Resource" (1994) 22 Transp. L. J. 251 at 283, note 176:

> Footnote 14 to Burbank, has been problematic. At the time that decision was announced, the airport was the only privately-owned airport in the United States serving scheduled passenger-carrying airlines. This fact, along with the Court's insertion of footnote 14, appeared to yield a result which applied only to that one airport. Indeed, the decision did not apply to that airport for long as the owner (Lockheed) soon sold the airport to a public entity: the Burbank-Glendale-Pasadena Airport Authority. This left no airports serving regularly scheduled passenger carrying airlines fitting within the footnote 14 exception. Some, including this author, thought that it would have been more appropriate for the Supreme Court to have dismissed certiorari as improvidently granted, once the court found it necessary to insert footnote 14, under these facts. The decision has, however, proved to delimit the boundaries of federal, state and local authority.

[283] Though hardly exhaustive, the following list contains some of the more prominent articles on the subject: Note, "Aircraft Noise Abatement: Is There Room for Local Regulation?" (1975) 60 Cornell L. Rev. 269; Note, "Shifting Aircraft Noise Liability to the Federal Government" (1975) 61 Va. L. Rev. 1299; Note, "A Framework for Preemption Analysis" (1978) 88 Yale L.J. 363; Note, "Airport Noise: How State and Local Governments Can Protect Airports from Urban Encroachment" (1986) Ariz. St. L.J. 309 (1986); Marchese, *supra* note 51 at 645; Blackman & Freeman, *supra* note 217; Ellett, *supra* note 217; Stein, *supra* note 282; W. Pennington, "Airport Restrictions: A Dilemma of Federal Preemption and Proprietary Control" (1991) 56 J. Air L. & Com. 805; T.J. Cole, "Zoning Control of Airport Expansion by Host Cities and the Battle Over Dallas/Fort Worth International Airport" (1993) 59 J. Air L. & Com. 193; Note, "Federal and State Coordination: Aviation Noise Policy and Regulation" (1994) 46 Admin. L. Rev. 413; S.H. Magee, "Protecting Land Around Airports: Avoiding Regulatory Taking Claims by Comprehensive Planning and Zoning" (1996) 62 J. Air L. & Com. 243; A.T. Field & F.K. Davis, "Can the Legal Eagles Use the Ageless Preemption Doctrine to Keep American Aviators Soaring Above the Clouds and Into the Twenty-First Century?" (1996) 62 J. Air L. & Com. 315.

[284] Justice Rhenquist's dissent in *Burbank* should be studied in full, as it will later emerge in dicta to bolster a federal court of appeals' reasoning in reversing, on the issue of preemption, *Gustafson* v. *City of Lake Angelus*, 76 F.3d 778 at 786, note 6, & 787 (6th Cir. 1996) (reversing the district court in *Gustafson* on preemption.). Of specific interest are the two following passages: "[W]hile Congress clearly intended to pre-empt the States from regulating aircraft in flight, the author of the bill, Senator Monroney, specifically stated that FAA would not have control 'over the ground space' of airports." [citation omitted]. *Burbank*, *supra* note 275 at 644 (Rhenquist, J., dissenting).

* * *

> A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the

progeny is well beyond the scope of this case review. Rather, the following case illustrates the application of *Burbank* by the New Jersey courts.

Township of Hanover v. *Morristown* *(Morristown II)*
135 N.J. Super. 529 (App.Div. 1975)
Burbank Applied to Morristown Airport

In *Morristown I*[285] (discussed below in another context), the Superior Court, Chancery Division, fashioned an "experimental" remedy to permit all of the improvements contemplated under the General Airport and Layout Plans, in return for, among other things: (1) certain noise control restrictions, including a preferential runway requirement; and (2) a limitation on the hours jet aircraft could takeoff and land. The court retained jurisdiction to permit the parties to apply for modification or relief from any of the provisions of this experimental remedy, should circumstances change.[286]

Approximately two and a half years after entry of the final judgment, Morristown applied to have those two provisions[287] vacated in the final judgment on the basis of

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> Supremacy Clause merely because the Federal Government has undertaken responsibility for some aspects of aircraft noise control.

Ibid. at 653 (Rhenquist, J., dissenting).

[285] See *Morristown I, infra* note 364.

[286] See *ibid.* at 491.

[287] From the final form of judgment, the two provisions in question were:

> C. Having determined from the evidence that the wind rose patterns at the Morristown Airport indicate that the prevailing winds favor the utilization of Runway 5—23 approximately ninety percent of the time, it is directed that after the completion of the extension of said runway, that the preferential runway at Morristown shall be 5—23. This runway shall be utilized as the preferential one by all jet aircraft landing and taking off at Morristown, except as follows:
> (1) When the cross wind component on 5—23 is found to be in excess of twenty (20) knots;
> (2) When an emergency landing or take-off situation exists;
> (3) When the use of Runway 12—30 shall be requested and or directed by the Airport Tower personnel in the interests of flight safety.

Burbank. The Chancery Division agreed and Hanover appealed.

In *Morristown II*,[288] the Appellate Division affirmed the judgment of the Chancery Division. Quoting extensively from *Burbank*,[289] the court held that the control

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> Furthermore, such preferential runway program when initiated shall be under the direction and guidance of F.A.A. control tower personnel and enforced by the management of Morristown Airport.
> * * * *
> I. Oral argument having been heard from counsel and a proffer of proof having been made by counsel for defendants on the subject of restricting jet aircraft at Morristown Airport during certain hours and good cause being shown therefore, the Court directs that jet aircraft will be prohibited from take- offs or landings each day between the hours of 9:00 P.M. until 7:00 A.M. and on Sundays, except during the hours of 1:00 P.M. until 3:00 P.M., unless an emergency exists, or the interests of flight safety require the utilization of the airport under the guidance and direction of the F.A.A. tower personnel.

Morristown II, infra note 288 at 531.

[288] See 135 N.J. Super. 529 (App.Div. 1975) [hereinafter *Morristown II*].

[289] The Court of Appeals quoted *Burbank* at length:

> Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question. Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581; *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L.Ed.2d 852 (78 ALR2d 1294). Control of noise is of course deep seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known. The procedures under the 1972 Act are under way. In addition, the Administrator has imposed a variety of regulations relating to takeoff and landing procedures and runway preferences.
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> The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. s 1348(a) (49 U.S.C.S. § 1348(a)), and the protection of persons on the ground. 49 U.S.C. § 1348(c) (49 U.S.C.S. § 1348(c)). Any regulations adopted by the Administrator to control noise pollution must be consistent with the 'highest degree of safety.' 49 U.S.C. § 1431(d)(3) (49 U.S.C.S. § 1431(d)(3)). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.
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> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at the Los Angeles airport between 10 p.m.

and regulation of aircraft noise had been preempted by the federal government and that the Chancery Division had infringed on the federal power when it imposed two provisions in question in its 1970 judgment.[290]

The court also found no merit to the plaintiffs' claim that vacating those restrictions left them without a remedy "for the alleged wrong resulting from the intolerable noise produced by the increased use of the airport without due process."[291]

> Although the Federal Government has preempted the field of aircraft noise, neither plaintiff municipalities nor the individual plaintiffs are without remedies. Both can take appropriate action before the Environmental Protection Agency and the Administrator of the Federal Aeronautical Act, and the individual plaintiffs, as landowners, may in a proper case have actions at law against the Morristown Airport Commission as the operator of the airport, on the

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and 7 a.m. because such restrictions could 'create critically serious problems to all air transportation patterns.' 25 Fed.Reg. 1764—1765.

The complete FAA statement said:

'The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p.m. and 7 a.m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce.'

This decision, announced in 1960, remains peculiarly within the competence of the FAA, supplemented now by the input of the EPA. We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it. (*Ibid.*, 411 U.S. at 638-640, 93 S.Ct. at 1862, 36 L.Ed.2d 556-557.)

Ibid. at 533-534.

[290] See *ibid.* at 535.

[291] *Ibid.*

theory of inverse condemnation [under *Griggs* v. *Allegheny County* and *Village of Bensenville* v. *City of Chicago*[292]].[293]

D. "LAWFUL ACCESSORY USE"

Is a private airstrip or helistop a lawful accessory use to property, not unlike a swimming pool? In *Schantz* v. *Rachlin*, an individual who obtained a license and built a private airstrip for his single-engine aircraft on his farmland survived a challenge to enjoin that "accessory" use. In *State* v. *P.T.&L. Construction Company*, a construction company which "constructed" a private helistop on the property of its corporate headquarters survived a similar challenge and provided a two-pronged test for whether a use is "customarily incident to a permitted use."

The concept of a lawful accessory use has become an important constraint on municipal zoning powers inasmuch as it helps to circumscribe the contours of the "island of immunity" from zoning granted to airports, discussed in the next section.

Schantz v. *Rachlin*
101 N.J. Super. 334 (Ch.Div. 1968); *aff'd* 104 N.J. Super. 154 (App.Div. 1969)
Private Landing Strip; Lawful Accessory Use; "Customary and Incidental"

In *Schantz* v. *Rachlin*,[294] the defendant brought a motion for summary judgment against the plaintiffs, who sought to restrain the defendant from using a landing strip on his lands and to compel him to demolish it.[295]

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[292] See 16 Ill. App. 3d 733, 306 N.E.2d 562 (1973) (Suit by municipalities to enjoin the city of Chicago from expanding its airport facilities at O'Hare Airport in such a manner as to intensify the existing noise and air pollution caused by and arising out of its operation of airport. Held that the federal government has preempted the regulation of aircraft noise and air pollution, and thus, municipalities could not maintain the suit.).

[293] See *Morristown II*, *supra* note 288 at 535-536.

The "main thrust" of the plaintiffs' complaint was that the landing strip violated the zoning ordinance of Holmdel Township.[296]

The defendant, an FAA-licensed private pilot, built a 2,200 foot turf runway on his 135 acre farm (Hop Brook Farm) in Holmdel Township. The runway ran roughly east-west and was located 700 and 750 feet from the north and south property lines. It did not change the appearance of the property as a farm and was not lighted since it was intended solely for daytime use pursuant to visual flight rules. No buildings were constructed in connection with the strip and there was no evidence of any intention on the part of the defendant to do anything more than land and takeoff from his property.[297] Additionally, the plaintiff's property was approximately 700 feet from the runway.[298]

The defendant's landing strip was licensed by the Division of Aeronautics, NJDOT, with these limitations: "This is for personal use with the following Aircraft only: Beechcraft C-33A N-5649S".[299]

Additionally, an affidavit had been filed in the trial court by Francis R. Gerard, Director, Division of Aeronautics, stating, *inter alia*:

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[294] See 101 N.J. Super. 334 (Ch.Div. 1968), *aff'd* 104 N.J. Super. 154 (App.Div. 1969) [hereinafter *Schantz*].

[295] See *ibid.*

[296] See *ibid.* at 338. The court found it unnecessary to decide the issue of plaintiff's standing, "[i]n view of the disposition to be made upon this motion." *Ibid.*

[297] See *ibid.* at 336-337.

[298] See *ibid.* at 336. It is not clearly stated in the opinion whether or not the plaintiffs' property was at one end of the extended center line of the runway; although it is doubtful that if such a condition had existed, it would not have been alleged in the most vigorous terms permitted by the Rules of Court.

[299] *Ibid.* at 337.

> The Beechcraft referred to in the license is a propeller-driven single engine, single-wing aircraft. According to the manufacturer's specifications, when the aircraft is fully loaded the take-off ground run is 880 feet, with a required total take-off run of 1,225 feet in order to clear a 50-foot obstacle. The landing ground run is 625 feet with a required total landing ground run of 1,150 feet needed to land over a 50-foot obstacle.

Ibid. at 338.

> In addition, I recently made my own inspection of the landing strip in question on Hop Brook Farm pursuant to the request of officials of Holmdel Township. Neither I nor my inspectors found any reason for concern nor any hazard or unsafe conditions as to people and property in the vicinity of the landing strip. I feel that the landing strip should not cause any annoyance to anyone, and of the 80 such private landing strips in this state, it is one of the safest of them.[300]

Section 4.1.1 of the zoning ordinance[301] listed the uses allowed by right in the R-40A district. The court noted that Holmdel did not intend to limit the district strictly to

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[300] *Ibid.* "In connection with the issuance of the license by the Division of Aeronautics, the defendant was required to demonstrate his flying proficiency and the capabilities of the aircraft to a State Inspector." *Ibid.*

[301]

> Article III of the zoning ordinance provides in part as follows:
> '3.1 Except as hereinafter provided:
> 3.1.1 No land shall hereafter be used or occupied and no building or part thereof shall hereafter be used, occupied, erected, moved or altered unless in conformity with the regulations hereinafter specified for the district in which it is located.'
> The zoning ordinance provides for the following uses by right in the R—40A zone:
> 'Following are the uses allowed * * * for residence districts.
> 4.1 Residence R—40A (1600), Residence and Agricultural District
> 4.1.1 Uses allowed by right
> a. One-family detached private dwelling with accessory buildings.
> b. A one-family detached private dwelling containing the professional office of its resident owner or lessee with accessory buildings.
> 3. Churches, public and private schools, libraries, nursing homes, hospitals and accessory buildings, firehouses, historical museums and private golf courses. No private golf course shall be permitted unless the property constituting said course shall consist of at least 150 acres of land.
> d. Farms in general, including truck farms, dairies, nurseries and fruit farms. Accessory buildings: incident to farms, such as tenant houses, greenhouses, buildings for housing seasonal workers for the farmer's own use, barns, packing, grading and storage buildings and buildings for the keeping of poultry and livestock, garage, or garages for the keeping of equipment and trucks used in farm operations. This section shall be construed to include the business of selling farm equipment, farm implements, farm machinery, fertilizers, and seeds of all kinds, at wholesale or retail, or both but only when said business is conducted by the owner or owners of the farm.
> e. Buildings, structures and premises for use and occupancy by the Township for any municipal purposes.'
> In Article IX 'accessory' is defined as follows:
> 'The term applied to a building or use which is clearly incidental or subordinate to the principal building or use and located on the same lot with such principal building or use. Any accessory building attached to

residential uses.[302] Additionally, "[a]lthough the ordinance in Section 4 refers only to accessory buildings, it must be implied that accessory uses are permitted."[303]

The issue thus became whether "the maintenance of the landing strip on the defendant's property was for his personal use accessory to its use as a residence and farm and therefore not prohibited under the Holmdel ordinance."[304]

An accessory use is defined as a use "customary and incidental to the principal use of a building."[305] The court referred to the Appellate Division's opinion in *City of Newark* v. *Daly*,[306] which discusses the phrase "customary and incidental":

> The use of the word 'customarily,' when applied to 'incidental,' may be helpful to establish affirmatively the existence of a use as 'accessory.' But the fact that a use is not 'customarily' indulged in is not conclusive. Thus, private garages are customarily used in connection with residences and are deemed to be an accessory use in a residential zone. But private swimming pools also are an accessory use in a residential zone, even though very few residents in many residential areas customarily have them.[307]

The court held that "[t]he installation of a landing strip on the defendant's property is no less an accessory to its primary use than the installation of a 60-foot tower support for a radio antenna that was held to be an accessory use in *Wright* v. *Vogt*, 7 N. J. 1 (1951)."[308]

> a principal building is deemed to be a part of such principal building in applying the Bulk Regulations to such accessory building.'

Ibid. at 338-339.

[302] See *ibid.*

[303] *Ibid.*

[304] *Ibid.* at 340.

[305] *Ibid.* (quoting *Zahn* v. *Newark Board of Adjustment*, 45 N.J. Super. 516 (App.Div. 1957)).

[306] See 85 N.J. Super. 555 (App.Div. 1964), *aff'd* 46 N.J. 48 (1965) (the operation of a single coin-operated milk vending machine in the basement of a high-rise apartment house did not violate a zoning ordinance which limited the use of the property in the district to multiple dwellings and hotels). See *Schantz*, *supra* note 294 at 340.

[307] *Schantz*, *ibid.* at 340-341.

[308] *Ibid.* at 341.

Furthermore, the court observed that there is no reference in the zoning ordinance to landing strips, noting that Holmdel could have adopted regulations concerning the use of landing strips, but had not done so.[309] "This court cannot legislate and supply what is not in the ordinance."[310]

> The proofs before the Court show that there are at least 80 landing strips presently licensed in New Jersey. The use of privately piloted aircraft for recreation and transportation is steadily expanding. It is perhaps true that more use is made of private aircraft as a customary and accepted means of private transportation in the southern and western parts of the country, but there is a sufficient use of such aircraft in our area so that it can be said that the installation of a landing strip for personal use is accessory to the use of property as a residence. It does not change the primary use of the premises from residential.[311]

The remaining issues in the plaintiffs' complaint [312] had been raised in *Oechsle* v. *Ruhl*,[313] and the court disposed of them by applying that case.

State v. *P. T. & L. Construction Company, Inc.*
77 N.J. 20 (1978)
Private Helistop is "Customarily Incident" to Main Property Use

In *State* v. *P. T. & L. Construction Company, Inc.*,[314] the defendant construction company was convicted in Paramus Municipal Court of violating a municipal ordinance

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[309] See *ibid.* at 342.
[310] *Ibid.*
[311] *Ibid.*
[312]

> [T]hat the use of the landing strip (1) will be dangerous to the public health and safety; (2) will create a hazard and nuisance 'in and about the general land area of . . . two [Holmdel Township] elementary schools . . . and of the entire residential zone in which the aforesaid airstrip and airport of the defendant is located;' and (3) will constitute an unlawful invasion of plaintiffs' property rights resulting in a decrease in the value of the property.

Ibid. at 343.
[313] See *Oeschle*, *supra* notes 145-165 and accompanying text.

by placing a private helistop[315] on its headquarter's property. The case was given direct certification by the State Supreme Court at the same time *Garden State Farms, Inc.* v. *Bay* [316] was certified, since it was thought issues of state or federal preemption would be involved.[317] However, those issues were not considered in this case.

Rather, the Court turned back to the question of whether, absent of an express prohibition in a zoning ordinance on a particular use, such use is customarily incident to a permitted use. The two-pronged test is: (1) whether the use is incidental to the main use ("does the use ' * * * bear a close resemblance and obvious relation to the main use to which the premises are put?'");[318] and (2) whether "a use which is found to be incident to the permitted use is also a customary use".[319]

The defendant, P. T. & L., argued that it required convenient, private air transport for its executives to inspect sites in nearby states, and that there were "several heliports within Paramus as well as at least eight other New Jersey construction companies operating heliports to facilitate transportation between their headquarters and ongoing projects."[320] Paramus countered that because of the heavily residential nature of the municipality, the intent of the drafters of the ordinance to prohibit heliports could be inferred. The Court found, however, that since helistops and heliports existed in Paramus as accessory uses prior to the adoption of the ordinance, no such inference could be made.

Of interest is Paramus's argument that the defendants and other individuals could

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[314] See 77 N.J. 20 (1978) [hereinafter *P.T.&L.*].
[315] The "helistop" in this case was simply a dirt area, 100 feet from the company's parking lot, covered with gravel to prevent dust from being kicked up by the helicopter's rotors. See *ibid.* at 31 & 32.
[316] See *infra* notes 324-447 and accompanying text.
[317] See *P.T.&L.*, *supra* note 314 at 22, note 1.
[318] *Ibid.* at 26-27.
[319] *Ibid.* at 27 (citing *Newark* v. *Daly*, 85 N.J. Super. 555 (App.Div. 1964), *aff'd* 46 N.J. 48 (1965)).

use the nearby Teterboro Airport, thereby precluding any assertion that such a proposed use was "necessary". However, "[a]lthough courts, in discussing accessory uses, have referred to 'necessity,' cases in this jurisdiction have classified uses as accessory uses even though they were not strictly necessary to the fulfillment of the permitted use."[321]

The Court distinguished "cases involving the use of aviation facilities other than helistops and heliports, such as airstrips for fixed-wing airplanes."[322] In support of this proposition, the court cited two out-of-state cases, holding that an airstrip is not customarily incident to a single family residence, followed by a "but see" reference to the New Jersey case of *Schantz* v. *Rachlin*.[323] This curious reference is not explained by the Court, but neither is it overruled.

> As explicated in *Newark* v. *Daly* * * * it is not essential to the concept of "customarily incident" that a majority or even a substantial percentage of a given type of principal use should in fact be accompanied by the mooted accessory use. Thus, * * * it is not controlling that most construction firms do not use helipads as incident to the main use of their headquarters' property. The record indicates that this business practice is increasingly coming into vogue and that there is a distinct functional relationship between such use and the business which P. T. & L. conducts as the main use of its property. We think these facts and circumstances suffice to bring the use within the accessory coverage of the ordinance and so hold. *Cf. Boulblis* v. *Garden State Farms, Inc.*, 122 N. J. Super. 208, 215-217 (Law Div. 1972) (heliport as accessory use to a large dairy plant). If the conditions and situation of a particular municipality lead its governing body to believe that tighter restrictions than those before us in this case are reasonably necessary or desirable, it is free so to provide in its ordinance."[324]

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[320] *Ibid.* at 27-28.
[321] *Ibid.* at 27.
[322] *Ibid.* at 28.
[323] See *Schantz, supra* notes 294-313 and accompanying text.
[324] *P.T.&L., supra* note 314 at 29-30.

E. DEVELOPMENT OF THE "ISLAND OF IMMUNITY" DOCTRINE

The following cases follow the development of the "island of immunity" doctrine previously mentioned. In *Aviation Services v. Bd. of Adj. of Hanover Twp.*, the N.J. Supreme Court examined the limits of a host municipality's ability to zone an airport owned by another municipality. In *Shell Oil Co.* v. *Bd. of Adj. of Hanover Twp.*, the Court determined that a gasoline service station located on a main road to an airport was not a use "accessorial and incidental to the primary purpose of airport operation." In the pre-*Burbank* case of *Township of Hanover* v. *Town of Morristown (Morristown I)*, the holding of the trial court that survives *Burbank* is the requirement that a non-proprietor host municipality must make reasonable accommodation of existing airport uses. The Appellate Division, in *Brody* v. *City of Millville*, clarified the holding in *Shell Oil*. Finally, in *Town of Morristown* v. *Township of Hanover (Morristown III)*, the Appellate Division defined the "island of immunity" an airport might enjoy from zoning regulations.

These cases create the framework that protects operative and orderly development of airports from countervailing municipal action. These cases also help to fill the gap left by the State Legislature in failing to provide express guidelines in airport zoning matters. In particular, *Morristown III* illustrates that the island of immunity concept extends not only to existing airport uses, but also to reasonable airport expansion for future public needs.

Aviation Services, Inc. v. *Board of Adjustment of Hanover Township*
20 N.J. 275 (1956)
State Legislative Intent to Immunize Airport from Local Zoning; Warning Against "Wholesale Aggrandizement of Territory"

In *Aviation Services* v. *Board of Adjustment of Hanover Township*,[325] the question decided by the N.J. Supreme Court was: If Municipality A is the owner-proprietor of a public use airport, and such airport is located in whole or in part in Municipality B, can Municipality B exercise its police power and make its zoning law applicable to that airport?

Morristown Municipal Airport was developed on a 235-acre tract of land in Hanover Township, which Morristown acquired from Hanover Township over a ten-year period, from 1931 to 1941. Commencing in 1941, in accordance with agreements between Morristown and the U.S., the land was developed for airport purposes, with the construction of runways, hangers and other buildings. After World War II, Morristown assumed control of the airport.[326]

In 1946, Hanover Township enacted a zoning ordinance which incorporated the airport lands into a Residence B zone, which impliedly excluded airports. The airport thus became a pre-existing, non-conforming use.[327]

Morristown leased airport facilities to private persons and corporations. In May 1953, one such lessee, Aviation Services, Inc., applied to the building inspector of Hanover Township for a permit to reconstruct and enlarge the building it had leased. The application was denied. An appeal was taken to the Board of Adjustment of Hanover Township, and when the appeal was denied, Aviation Services, Inc., filed an action in

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[325] See 20 N.J. 275 (1956) [hereinafter *Aviation Services*].
[326] See *ibid.* at 278.

lieu of prerogative writ against the building inspector and the Hanover Township Board of Adjustment.[328]

Morristown intervened as a party plaintiff and alleged that the ordinance as applied to the property in question was invalid and void either because: (1) the lands were owned by a municipal corporation[329] and were therefore immune from regulation by a governmental agency or authority not in a superior position in the governmental hierarchy;[330] or (2) by virtue of the unsuitability of the lands for residential purposes the ordinance imposed "restrictions and prohibitions which are arbitrary, unreasonable and capricious."[331]

The trial court, relying on the holding in *Bloomfield* v. *New Jersey Highway Authority*,[332] held that Morristown Municipal Airport was not subject to the zoning ordinance of Hanover Township. After the defendant appealed to the Appellate Division, the N.J. Supreme Court certified the issue prior to the Appellate Division's review on the basis "of the general public importance of the question."[333]

The Court provided the legislative background:

> In 1929 the Legislature authorized municipal governing bodies to "acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate" airports Within the municipal limits, R.S. 40:8—2 (L.1929, c. 325), N.J.S.A. This enactment was amended by L.1947, c. 85 to permit operation of airports "within or without" the

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[327] See *ibid.*
[328] See *ibid.* at 278-279.
[329] See *ibid.* at 279.
[330] See *ibid.* at 282.
[331] *Ibid.* at 279.
[332] See 18 N.J. 237 (1955) (Holding that the State Legislature has the power to immunize its public authorities from provisions of local zoning and building restrictions.) "[W]e held that in the absence of legislative provision to the contrary the Highway Authority, in carrying out the purpose for which it was created, was not subject to the municipal zoning ordinance of Bloomfield." *Aviation Services, supra* note 325 at 279.
[333] *Aviation Services, ibid.*

> municipal boundaries. The original legislation enabled municipalities to acquire property by condemnation if necessary, R.S. 40:8—4 and 5, N.J.S.A., characterizing property acquisition for airport facilities as "a public purpose" and "a matter of public necessity."[334]

Morristown argued that the airport operation constituted "an essential governmental function in serving the public need and by virtue of its nature" was immune from the zoning power of Hanover Township. Hanover Township contended that the use was "proprietary, 'a business pure and simple,' entitled to no greater sanctity than a private corporation."[335]

> It is unnecessary to dwell upon the public attributes of a municipal airport operation. The purposes thus served have long been recognized as responsive to the common weal . . . Over 27 years ago, Mr. Justice Cardozo stated with prophetic wisdom:
>
> 'We think the purpose to be served is both public and municipal. A city acts for city purposes when it builds a dock or a bridge or a street or a subway . . . Its purpose is not different when it builds an airport . . . Aviation is to-day an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition.'[336]

However, the *Aviation Services* Court reasoned that denomination of a municipal airport undertaking as a "governmental" or a "proprietary" function was not the germane issue. Rather, "[e]nlightenment must come from the legislative design in vesting municipalities with the authority to establish and maintain airport facilities."[337] Thus, from *Town of Bloomfield,* and a subsequent case, a general principle emerged: "[W]here

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[334] *Ibid.* at 279-280.

[335] *Ibid.* at 280. "The issue thus joined represents a conflict between the interests of a municipality in establishing and maintaining an airport outside its jurisdiction and the integrity of the zoning scheme embracing the territory sought to be utilized." *Ibid.*

[336] *Ibid.* (quoting *Hesse* v. *Rath,* 249 N.Y. 436, 163 N.E. 342 (Ct. App. 1928)) [other citations omitted].

[337] *Ibid.* at 281-282.

the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary."[338]

Morristown, not holding a "superior position" to Hanover Township, could not therefore invoke such immunity.

The Court then examined other statutory enactments "whereby municipalities are delegated powers of condemnation which may be exercised beyond the corporate limits in aid of their public functions."[339] Turning to the *Home Rule Act*,[340] there are instances where municipalities exercising their rights of condemnation must also seek the consent of the affected municipality.[341] In certain instances, as in the laying of conduits for an electrical power plant,[342] if consent is withheld, an aggrieved municipality has recourse to the Superior Court, which may "direct the terms" upon which the conduits may be laid.[343]

> There is no language in the airport legislation, *R.S.* 40:8—1 *et seq.*, directing preliminary inter-municipal negotiation and consent. *R.S.* 40:8—2, as am. *L.* 1947, *c.* 85, speaks in broad terms:
>
> The governing body of any municipality may acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such municipality and may use for such purpose or purposes any property, owned or controlled by such municipality, suitable therefor.

The Court continued:

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[338] *Ibid.* at 282.
[339] *Ibid.*
[340] See *R.S.* 40:42—1 *et seq.*
[341] "*R.S.* 40:62—7 authorizes a municipality to acquire by condemnation all necessary lands for the purpose of maintaining an abattoir, but it may not be established within any other municipality except by the consent of the latter's governing body and board of health." *Aviation Services, supra* note 325 at 282.
[342] See *R.S.* 40:62—12.
[343] *Aviation Services, supra* note 325 at 282-283.

> *R.S.* 40:8—4 and 5 authorize acquisition of property by condemnation to fulfill the broad purposes designated in the section above quoted. We cannot ascribe a vain and impotent meaning to the statute. If the purposes sought to be achieved are to be thwarted by zoning plans which arbitrarily exclude airport uses from an entire municipal domain the progress envisioned by the Legislature and stimulated by this statute may go unrecognized. Rules of statutory construction command a contrary result.[344]

Thus there are two factors which, when taken together, reflect the legislative intent to immunize acquisition and maintenance of lands and buildings from zoning power: (1) there is no statutory language limiting a municipal airport's undertaking either within or outside a municipality's boundaries; and (2) a municipality has the power of eminent domain to establish a municipal airport. Hanover Township's zoning ordinance was held inapplicable to the Morristown Municipal Airport.

The Court distinguished *Aviation Services* from the decisions reached in *Yoemans*[345] and *Ridgewood Air Club*,[346] discussed above, insofar as "the operation was proposed by private rather than public interests."[347]

However, the Court warned:

> Our holding in this case is not to be considered as giving judicial recognition or impetus to a program of wholesale aggrandizement of territory. The authority bestowed upon municipalities to establish and maintain public airport facilities must be reasonably exercised in response to the public need, both present and that fairly to be anticipated. While this court would not condone arbitrary action in the establishment or operation of airport facilities within the domain of another governing power, it is incumbent upon us to lend a liberal construction to the airport legislation, *R.S.* 40:8—1 *et seq.*, to insure the benefits which were intended to flow to municipalities having the foresight to

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[344] *Ibid.* at 283 [citations omitted].
[345] See *Yoemans*, *supra* notes 136-144 and accompanying text.
[346] See *Ridgewood Air Club*, *supra* notes 166-175 and accompanying text.
[347] *Aviation Services*, *supra* note 325 at 285.

> maintain these facilities. Art. IV, Sec. VII, par. 11, Constitution of 1947.[348]

The Court concluded:

> Air transportation is no longer in a stage of adolescence. It serves all segments of our economy and society in general. The State Constitution has recognized the importance of providing facilities to accommodate the public interest in air travel. 1947 Constitution, Art. IV, Sec. VI, par. 3. The legislative response may not be viewed in a different light.[349]

Shell Oil Co. v. *Board of Adjustment of Hanover Township*
38 N.J. 403 (1962)
Airport Zoning Immunity; Use for Airport Purposes; Accessory or Incidental Uses

In *Shell Oil Co.* v. *Board of Adjustment of Hanover Township*,[350] the N.J. Supreme Court revisited the issue of zoning immunity first raised in *Aviation Services*.[351] In 1956, Hanover Township adopted a revised zoning ordinance classifying the lands north and south along Columbia Road, including frontage of the Morristown Municipal Airport, as an Office Building and Research Laboratory district (Office Zone).[352]

In December 1958, Morristown leased part of this Office Zone frontage on the northerly line of Columbia Road to Shell Oil Company (Shell) for the purpose of erecting an automobile service station. Shell's application to the Hanover Building Inspector for a building permit was denied. Shell thereafter sought a variance from the Hanover Board of Adjustment. The Board denied the application on two grounds: (1) the zoning

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[348] *Ibid.* at 285-286.
[349] *Ibid.*
[350] See 38 N.J. 403 (1962) [hereinafter *Shell Oil*].
[351] See *Aviation Services*, *supra* notes 325-349 and accompanying text.
[352] *Shell Oil*, *supra* note 350 at 405.

ordinance specifically prohibited Shell's proposed use in the Office Zone; and (2) Shell had demonstrated neither hardship nor special reasons.[353]

Shell filed an action in lieu of prerogative writ to reverse the decisions of the Hanover officials. Morristown intervened and joined Hanover as a defendant, seeking to have the zoning ordinance declared invalid and unenforceable as to Morristown because of the immunity granted by *R.S.* 40:8—1[354] and because the creation of the Office Zone was an arbitrary, capricious and unreasonable exercise of the zoning power. Hanover filed an answer and the matter went to trial.[355]

The trial court found and entered judgment for the defendant, Hanover Board of Adjustment. The plaintiffs appealed to the Appellate Division, where arguments were directed solely at the alleged immunity of Morristown and the unlawful exercise of zoning power. The Appellate Division decided in favor of Morristown on the immunity issue with the following language: "We find the use here proposed by plaintiffs to be a proper accessory to an airport, appropriate for the present and reasonably prospective needs of the airport * * *."[356] The Appellate Division, though noting the issue, did not consider the reasonableness of the zoning ordinance. Instead, the arguments before the Supreme Court, as well as before the Appellate Division, were restricted to the relief

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[353] See *ibid.* at 405-406.

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> The governing body of any county and the governing body of any municipality, or either or them, may acquire by gift, grant, purchase, condemnation or in any other lawful manner real estate or any right or interest therein for airport purposes and so use lands therefore acquired for other public purposes and being used for airport purposes and erect thereon and maintain buildings for the airport purposes. * * *

Ibid. at 406-407.

[355] See *ibid.* at 406.

[356] *Ibid.* at 406-407 (quoting 71 N.J. Super. 532). Certification was granted by the Supreme Court at 37 N.J. 134.

sought by Morristown.[357]

In its pleadings before the Appellate Division and the Supreme Court, Morristown relied heavily on the construction of *R.S.* 40:8—1, *et seq.*, in *Aviation Services*,[358] where the statute in question was deemed to bestow immunity on Morristown from the zoning power of Hanover.

The Supreme Court held that "the test to be applied to a land use in order to ascertain whether it qualifies for an immunity from local zoning regulations is whether it is reasonably accessorial or incidental to the primary purpose sought to be advanced by the creation of the separate authority."[359] More particularly, "[a]n examination of the statute forces the conclusion that it intended an exemption only as to such uses as are in fact accessorial and incidental to the primary purposes of airport operation."[360]

In considering the facts from the trial record in light of this test, the Court examined the testimony from the trial court. For example, the manager of the airport testified that the Shell service station was a project viewed favorably for its revenue producing characteristics. Revenues derived from the lease would be used "not so much to continue to develop, as to continue to safely operate the airport."[361] Other testimony was developed to show that airport customers were not without other convenient facilities. There were four service stations on Columbia Road 2.1 miles east of the airport and two more service stations two miles west of the airport. Additionally, the proposed service station buildings were to face Columbia Road, demonstrating that "the business's major attention is addressed to the highway traffic or general public rather

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[357] See *ibid.*
[358] See *Aviation Services*, *supra* notes 325-349 and accompanying text.
[359] *Ibid.* at 409.
[360] *Ibid.* at 410.

than those who use the airport facilities."[362]

> The conclusion is unavoidable that the establishment of a gasoline service station at this location was not stimulated because it was necessary for the primary purpose of the airport nor even incidentally necessary for that purpose, but rather was prompted as a revenue-producing measure.
>
> The most favorable view of plaintiffs' proposed use is that it may be convenient for some airport customers but is not incidental to or necessary for the maintenance and operation of the airport. We find that the operation of a gasoline station at this location does not bear such a relation to airport purposes as would bring it within the aegis of statutory immunity. The land is subject to the zoning power of Hanover except insofar as it is used for airport purposes or a purpose accessorial or incidental thereto. The use here proposed not being within that exemption, the zoning ordinance controls.[363]

Township of Hanover v. *Town of Morristown (Morristown I)*
108 N.J. Super. 461 (Ch.Div. 1969)
"Reasonable Accommodation" of Existing Airport Uses

Morristown I, [364] discussed above in another context, is a case about airport noise and "[t]he search . . . for the zone of unacceptable annoyance and a determination of what, if anything can be done in attenuation."[365] While many of the court's holdings, especially the key noise issue, would be overruled by *Burbank*,[366] discussed above, much

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[361] *Ibid.* at 411 (quoting testimony from the trial court record).
[362] *Ibid.* at 412.
[363] *Ibid.*
[364] See 108 N.J. Super. 461 (Ch.Div. 1969); *sub nom Township of Hanover* v. *Town of Morristown*, 118 N.J. Super. 136 (Ch.Div. 1972) (same case, petition to intervene denied); *aff'd Township of Hanover* v. *Town of Morristown*, 121 N.J. Super. 536 (App.Div. 1972).
[365] *Ibid.* at 469.
[366] See *Burbank*, *infra* notes 275-284 and accompanying text. Briefly, the *Burbank* Court would hold that while the FAA occupies the field of aviation and therefore preempts state and local control, the proprietor of the airport has exclusive authority over the regulation of airport noise, provided such regulation is not exercised in a discriminatory fashion. Thus, a municipality which neither owns nor operates a public use

of the holding pertaining to the requirement that Hanover's zoning ordinances must reasonably accommodate existing airport uses is important and is still "good" law.

The statement of facts in the published opinion was abstracted by the publisher of New Jersey Superior Court Reports because of its length; the abstracted facts cover nearly ten pages in the official reporter.

The original complaint in the case was filed on July 24, 1969. The trial began on October 14, 1969 and lasted for 12 full trial days plus one additional day for site inspection. Thirty-eight witnesses, lay and expert, testified. Experts in acoustical engineering, architectural engineers, airport planning experts and attorneys either presently or formerly with the FAA were called upon. More than 60 exhibits (documents, sketches, surveys, plans, etc.), most of which were of a technical nature prepared by experts, were received into evidence. The Director of Aeronautics and an FAA representative also testified.[367]

In the late 1960s, Morristown Airport was engaged in an expansion project which was necessary if it was to meet its projected capacity demands by 1980. The $2,700,000 project was approved by the federal government, which funded half the expansion and improvements. Hanover adopted a Master Plan in 1963, which acknowledged that additional improvements and plans for expansion at Morristown Airport were anticipated. It was the only party municipality to include the airport in its zoning and planning.

All of the plaintiffs proceeded on a theory of nuisance.[368] The full force of the

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airport, located within its corporate boundaries, is federally preempted from exercising its police power and adopting any ordinance which purports to control airport noise. The court would not, however, decide on the limits of a proprietor municipality using its own police power to enforce its own airport noise regulations.

[367] See *Township of Hanover* v. *Town of Morristown*, 118 N.J. Super. 136 at 137 & 147 (Ch.Div. 1972) (post-*Morristown I* motion to intervene).

[368] See *Morristown I*, *supra* note 364 at 474.

plaintiffs' attack was directed against the proposed lengthening by 2,000 feet of runway 5-23 at its northerly end, and the increasing of the weight-bearing capacity of both of the runways from 56,000 to 80,000 pounds.[369] The plaintiffs asserted that the increase in airport capacity and weight of the aircraft (with a concomitant increase in noise) that the lengthening would allow the airport to accommodate would result in irreparable, harmful, and adverse effects upon life in the surrounding communities.[370]

The issue of interest to the précis, however, was that Hanover asserted that the proposed runway lengthening would violate its zoning ordinance by extending the north end of the runway into a non-airport zone, and that "the attempted encroachment upon such zoning was unreasonable and represents a total aggrandizement of the territory" of Hanover Township.[371]

In response to the zoning issue, Morristown maintained that the zoning of Hanover was arbitrary and unreasonable in terminating the airport zone 100 feet from the north end of runway 5-23. It also alleged that the zoning and planning of other municipalities completely ignored the existence and future growth of the airport.[372]

In *Aviation Services Inc.* v. *Board of Adjustment of Hanover Township*,[373] (holding that Morristown Municipal Airport was not subject to the zoning ordinance of Hanover Township) the Supreme Court admonished that the case was "not to be considered as giving judicial recognition or impetus to a program of wholesale aggrandizement of territory. *The authority bestowed upon municipalities to establish and maintain public airport facilities must be reasonably exercised in response to the public*

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[369] See *ibid.*
[370] See *ibid.*
[371] *Ibid.* at 473.
[372] See *ibid.* at 474.

need, both present and that fairly to be anticipated."[374]

Recalling this admonition, the court noted by the emphasized portion that there were still some areas in aviation cases where the courts had the power to act without "crossing into the forbidden area of the federal preserve."[375] The court thus analyzed the instant case:

> Examining . . . Hanover's complaint that the proposed expansion of runway 5—23 will violate that municipality's zoning ordinance, the ruling in *Aviation Services, supra*, is binding upon this court and precludes Hanover from barring completely the normal growth of the Airport. The zoning ordinance which cuts airport property from any airport use more than 100 feet from the northerly end of the runway was an attempt to foreclose in a swamp area of limited use any further development. The land upon which the extension of the runway is planned has been owned by the Airport and the proofs do not show this to be a "wholesale aggrandizement of territory". Additionally, it comes with bad grace for the municipality on the one hand to lure industry by promoting the existence and proximity of the Airport and on the other to prevent the natural growth and safety plans which must be undertaken to serve the attracted industry.[376]

The court held that the restriction in the zoning ordinance failed to exhibit the "reasonable accommodation for existing legal uses in line with *N. J. S.* 40:8—1 *et seq.*, and the statement in our State Constitution [N.J.Const., Art. IV, sec. 6, par. 3] recognizing the importance of protecting and preserving the public interest in air travel."[377] Moreover, such accommodation would not irreparably impair the integrity of Hanover's comprehensive zoning plan where it was within the bounds of legitimate

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[373] See *Aviation Services, supra* notes 325-349 and accompanying text.
[374] *Morristown I, supra* note 364 at 480 (quoting *Aviation Services, supra* note 325 at 285) [emphasis added by the court].
[375] *Ibid.*
[376] *Ibid.*
[377] *Ibid.* at 481.

purpose.[378]

Brody v. *City of Millville*
114 N.J. Super. 94 (Law Div. 1971), *aff'd.* 120 N.J. Super. 1 (App.Div. 1972) Explains "Shell Oil"

In *Brody* v. *City of Millville*,[379] the holding in *Shell Oil* [380] was revisited and clarified when the plaintiff challenged the authority of the City of Millville to borrow money for the purpose of erecting buildings on the airport property for lease to Airwork, a private lessee engaged in the business of repairing aircraft. Pointing to the language of N.J.S.A. 40:8—1,[381] the plaintiff asserted that the renting of existing buildings and building new structures for rental to Airwork constituted an *ultra vires* engagement by the city in private business.

The court disagreed: "Although the language of N.J.S.A. 40:8—1 authorizes the erection of buildings for airport purposes, it does not delimit the construction of buildings for other purposes."[382]

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[378] See *ibid.*

[379] See 114 N.J. Super. 94 (Law Div. 1971), *aff'd* 120 N.J. Super. 1 (App.Div. 1972) [hereinafter *Brody*].

[380] See *Shell Oil*, *supra* notes 350-363 and accompanying text.

[381] The statute reads:

> The governing body of any county and the governing body of any municipality, or either of them, may acquire by gift, grant, purchase, condemnation or in any other lawful manner real estate or any right or interest therein for airport purposes and so use lands theretofore acquired for other public purposes and being used for airport purposes and *erect thereon and maintain buildings for the airport purposes*
>
> Upon such acquisition or use, the governing body of any county and the governing body of any municipality, or either of them, may lease the real estate, so acquired, with or without consideration to the state of New Jersey, or any agency thereof, or may lease it to any person for such consideration and for such term of years as may be agreed upon.

Brody, *supra* note 379 at 98 [emphasis added by the court].

[382] *Ibid.*

For an example the court turned to N.J.S.A. 40:60—42, which "authorizes municipalities to lease to any person any land or building not presently needed for public use. Its language is broad enough to authorize leases of less than the entire airport property for either airport or other purposes."[383]

The plaintiff's reliance, *inter alia*, on the *Shell Oil* case was misplaced and the court made an important clarification:

> Thus, the holding [in *Shell Oil*] is not that the airport land could not be rented for a purpose foreign to airport purposes; but only that if part of the airport lands were leased for purposes unrelated thereto, the use must comply with the zoning requirements of the municipality having jurisdiction. Actually, this case supports the views of defendants because it recognizes that a portion of municipal airport property may be rented for a use unrelated to airport purposes and also because of its recognition of the right of a municipality to foster the development of a part of the airport lands for commercial purposes.[384]

The Town of Morristown v. *The Township of Hanover (Morristown III)*

168 N.J. Super. 292 (App.Div. 1979)

***Aviation Services* and *Shell Oil* Established Island of Zoning Immunity for Uses Reasonably Accessory or Incidental to Airport Purpose**

In *The Town of Morristown* v. *The Township of Hanover*,[385] the Appellate Division considered a case that presented "another round in the never-ending struggle between the Town of Morristown and the Township of Hanover relating to the use of the Morristown Municipal Airport,"[386] this time an action brought by Morristown to set aside

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[383] *Ibid.* at 99.
[384] *Ibid.* at 100.
[385] See 168 N.J. Super. 292 (App.Div. 1979) [*Morristown III*].
[386] *Ibid.* at 294.

as invalid and enjoin the enforcement of Ordinance 8-78[387] adopted by Hanover on May 11, 1978.[388]

Morristown moved for summary judgment on the basis of *Aviation Services*,[389] contending that it was immune from the restrictive provisions of Hanover's amendatory zoning ordinance so long as the uses it sought were "accessorial or incidental" to the

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> ORDINANCE NO. 8-78
> AN ORDINANCE TO AMEND THE "LAND USE ORDINANCE OF THE TOWNSHIP OF HANOVER, COUNTY OF MORRIS AND STATE OF NEW JERSEY
> BE IT ORDAINED, by the Township Committee of the Township of Hanover, County of Morris and State of New Jersey, as follows:
> Section 1. Article 9, entitled "ZONING REGULATIONS," Section 919 "A AIRPORT DISTRICT" of the above entitle ordinance is hereby deleted and the following substituted in its place and stead:
> 919. A AIRPORT DISTRICT
> PRIMARY INTENDED USE. This zone district is designed for the operation of an airport for general aviation, other than commercial air carriers, as regulated by the Federal Aviation Agency and the applicable agencies of the State of New Jersey and accessory uses customarily incident thereto. Permitted uses, including primary and accessory uses, shall be limited to a landing strip, control tower, hangars, offices for airport personnel, equipment for the supply of fuel to aircraft, and facilities for the repair, maintenance and testing of aircraft permanently based at the airport. For the purpose of this ordinance, the term permanently based aircraft shall mean aircraft registered with the Commissioner of Transportation of the State of New Jersey pursuant to N.J.A.C. 16:56—1.1 for which the application for registration filed with the Division of Aeronautics, Department of Transportation, shall disclose that the aircraft is based at the airport located within this zone district and said aircraft shall have been based at the airport for 90 consecutive calendar days.
> PROHIBITED USE. All uses are prohibited other than those which have been specifically permitted in Section 919 A of this ordinance. Nothing contained herein shall be construed to permit banks, service stations, hotels, motels, office buildings, restaurants, terminal facilities for commercial air carriers, and the repair, maintenance and testing of aircraft, other than on an emergency basis, of airplanes which are not permanently based, as defined in (A) above, within this zone district.
> REQUIRED CONDITIONS. All height, yard and area requirements of this zone shall be regulated by the requirements of the Federal Aviation Agency.
> SECTION 2. This ordinance shall take effect as provided by law.

Ibid. at 295-296.

388 See *ibid.* at 295.

389 See *Aviation Services*, *supra* notes 325-349 and accompanying text.

primary purpose of airport operation.[390] Hanover, also relying on *Aviation Services*, argued that the ordinance was entitled to a presumptive validity and that Morristown had the burden of proving its allegations factually.[391] The trial judge denied the motion, Morristown appealed and the Appellate Division reversed the decision.[392]

The Appellate Division found that *Aviation Services* and *Shell Oil* [393] established "an island of immunity from zoning regulations for property operated and used for the primary purpose of a municipal airport or for uses which are reasonably accessory or incidental to that primary purpose."[394] The caveat contained in *Aviation Services* against programs of wholesale aggrandizement of territory "does not authorize a municipality burdened with the airport of another government entity to exclude uses in advance of legislation which are manifestly within the ambit of appropriate primary or accessory uses consonant with an airport operation."[395] To do so is an abuse of its legislative function.

The proper recourse for the aggrieved municipality would be in the courts, where it would have the burden of proving unreasonableness on a factual basis. The test would be whether the use or proposed use: (1) is not incidental or necessary for the maintenance and operation of the airport; or (2) is beyond the ambit of reasonable present or future public need; or (3) is a "wholesale aggrandizement of territory."[396]

The court noted that the prohibition in paragraph B of the ordinance prohibiting banks, service stations, hotels, etc., though not invalid *per se*, in line with the holding in

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[390] *Morristown III, supra* note 385 at 296.
[391] See *ibid.* at 297.
[392] See *ibid.* at 296.
[393] See *supra* notes 350-363 and accompanying text.
[394] *Morristown III, supra* note 385 at 297.
[395] *Ibid.* at 298.
[396] *Ibid.*

Shell Oil, is nevertheless invalid because of the reference in the same sentence to paragraph A.

F. POWERS OF THE COMMISSIONER

In *Pennsylvania R.R. Co. v. N.J. State Aviation Commission,* the N.J. Supreme Court distinguishes the Commission's *quasi*-judicial administrative function from a "merely ministerial" function and the due process requirement for formal public hearings. In *Garden State Farms* v. *Bay,* while the Commissioner has the ultimate authority on placement of aeronautical facilities, including private use helistops, that authority must make lawful local interests a material factor in his decision-making. Finally, *In re Application of Ronson Corp.* presents a case where the rule in *Garden State Farms* is applied to another private use helistop.

At first, these cases appear to oppose the "island of immunity" doctrine discussed in the foregoing section. The obligation on the Commissioner to take into account the lawful or legitimate local interests affects to some measure the primacy of airport development. However, a close examination of the few cases reveals that the courts are preoccupied with the formal requirements of public hearings which the Commissioner can easily fulfill simply by allowing municipalities the opportunity to state their objections and by responding to them.

The *Garden State Farms* Court was particularly concerned with what it perceived to be the less than "absolutist" nature of the term "supervision of aeronautics", which characterizes the powers of the Commissioner in the State *Aviation Act.* Although the *Airport Safety and Zoning Act of 1983* and the *New Jersey Airport Safety Act of 1983,*

enacted some years after *Garden State Farms,* have clearly given broader powers to the Commissioner as discussed above,[397] it is argued here that absent clear guidance from the State Legislature, the N.J. Supreme Court will be reluctant to admit that the Commissioner has unfettered "superintending" power.

Pennsylvania R. R. Co. v. *N. J. State Aviation Commission*
2 N.J. 64 (1949)
"*Quasi* Judicial" and "Ministerial" Administrative Functions Distinguished; Due Process Requirement of Public Hearings for State Aviation Commission.

In *Pennsylvania R. R. Co.* v. *N. J. State Aviation Commission,*[398] the N.J. Supreme Court re-examined this case, particularly the manner in which the State Aviation Commission conducted its hearings.[399] The Commission had granted a license to Aeromotive Corporation of New Jersey to operate an airport in North Brunswick Township, Middlesex County, subject to the restriction that "no take-off will be permitted to the east from the East-West Runway."[400]

The appellant railroad company had objected to the issuance of the license. The site of the airport was 638 feet from the railroad company's main line connecting New York and Philadelphia, "one of the heaviest travelled railroads in the world."[401] The catenary system providing the electricity to power the railroad consisted of poles paralleling the tracks varying in height from 70 to 80 feet. There were 343 trains passing the airport site daily, of which 248 were passenger trains carrying more than 150,000

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[397] See *supra* discussion at page 47.
[398] See 2 N.J. 64 (1949) [hereinafter *Penna. R.R. Co.*].
[399] See *ibid.* at 67.
[400] *Ibid.* The opinion is unclear as to where the railroad was situated with respect to the runway in question. However, one might presume that the railroad was situated to the east of the East-West runway.
[401] *Ibid.* at 71.

passengers per day, or 56,000,000 annually.[402] Based on these proofs, the railroad company contended that use of the airport would "menace the safety of the travelling and shipping public."[403]

The Commission, "after careful consideration of objections presented and evidence admitted before it" at hearings, "voted unanimously to dismiss said objections on the grounds that they were without merit consistent with Federal Civil Aeronautics Administration standards for safe operation of aircraft."[404] The finding of the former Supreme Court was that it could not be said that "there was not reasonable support in the evidence for the result reached by the commission."[405]

Since the statutory functions that the Commission exercises have the attributes of a judicial inquiry, it is therefore *quasi*-judicial and thus subject to the requirements of due process.[406] In distinguishing *quasi*-judicial from merely "ministerial" functionings of an administrative agency,

> [T]he determinative is the quality of the act rather than the character of the agency exercising its authority. Where the administrative tribunal is under a duty to consider the evidence and apply the law to the facts as found, thus requiring the exercise of a discretion or judgment judicial in nature on evidentiary facts, the function is *quasi* judicial and not merely ministerial.[407]

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[402] See *ibid.*
[403] *Ibid.*
[404] *Ibid.* at 67.
[405] *Ibid.*
[406] See *ibid.* at 70.
[407] *Ibid.* [citation omitted]. *R.S.* 6:1—31 and 6:1—51 both charge the Commission with the "duty" of holding public hearings on matters affecting aeronautics," and empower it "to conduct investigations, inquiries and hearings concerning matters covered by the provisions" of the act. Evidentiary and record requirements of such hearings are set forth in *R.S.* 6:1—52, and include requirements that "all testimony be taken stenographically; and that "Every order of the commission shall contain findings in sufficient detail to enable a court to determine the controverted questions presented by the proceeding, and whether the proper weight was given to the evidence." The chairman and vice-chairman of the Commission can administer oaths and affirmations, issue subpoenas to compel attendance at the hearings and the testimony of witnesses, as well as the production of papers, books and documents. The Commission could also hold a recalcitrant witness in contempt. The current version of the statute at N.J.S.A. 6:1—51 permits the

The Court in this case questioned the manner in which the Commission's hearing was conducted. The hearing was "quite informal", such that the witnesses were not sworn. The Commission's findings and decision to dismiss the appellant's objections, as above-mentioned, did not state the standard by which the evidence had been considered. That is, if the Commission's primary standard, under the statute, was "the public health and safety" and the "safety" of participants in aeronautical activities,[408] that standard was not enunciated in the Commission's findings. The Court therefore had no way of knowing "whether the evidence was appraised in the light of this norm."[409] The matter was remanded to the Commission for rehearing.

Garden State Farms, Inc. v. *Mayor Louis Bay, II*
77 N.J. 439 (1978)
Private Helistop Not Federally Preempted; Commissioner of Transportation Has Ultimate Authority in Placement of Aeronautical Facilities; Commissioner Must "Pay Due Attention" to Lawful Local Interests

In *Garden State Farms, Inc.* v. *Bay*,[410] "the question for decision is whether a local zoning ordinance which prohibits the use of land within a municipality as a helistop is invalid because the federal or state governments have preempted the power of local governments to regulate the establishment and location of helistops."[411]

Garden State Farms operated over eighty-five retail stores selling milk and related food products throughout New Jersey, New York and Pennsylvania. It wanted to

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commissioner or his authorized representative to invoke, *ex parte*, the aid of the Superior Court to order compliance with the Commission's subpoena.

[408] *R.S.* 6:1—44.

[409] *Penna. R.R. Co., supra* note 398 at 71.

[410] See 77 N.J. 439 (1978) [hereinafter *Garden State Farms*].

[411] *Ibid.* at 442-443.

construct a private use heliport at its main facility in Wyckoff, New Jersey. The portion of its Wyckoff property where the helistop was to be built was actually located in the Borough of Hawthorne. On October 6, 1971, the Board of Commissioners of the Borough of Hawthorne adopted a resolution granting the company permission to construct a helistop.

The history of this case is long, beginning with *Boublis* v. *Garden State Farms, Inc.*,[412] where neighborhood residents sought a restraining order enjoining Garden State Farms from constructing the helistop on the grounds that such a use would violate the Borough zoning ordinance and therefore would require a variance. The Law Division denied the requested relief and held that no variance was required because the intended helistop was an accessory use and permitted under Hawthorne's local statute.[413] Thereafter, the Borough of Hawthorne adopted Ordinance No. 1123,[414] which amended

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[412] See 122 N.J. Super. 208 (Law Div. 1972). In footnote 1, the Court stated:

> Hawthorne's zoning ordinance permits a subordinate use or building whose purpose is " * * * incidental to that of the main or principal use or building and located on the same lot." 122 N.J. Super. at 215, 299 A. at 767. We have recently held that a zoning ordinance providing for accessory uses to the principal uses of property would authorize a heliport. *P. T. & L. Constr. Co.* v. *Borough of Paramus*, 77 N.J. 20, 389 A.2d 448 (1978).

In that case, which was argued together with *Garden State Farms*, the Court never reached the issue of preemption and decided the matter on other state law grounds, subject to its final determination in *Garden State Farms*.

[413] See *ibid.* at 215; *Garden State Farms, supra* note 410 at 443-444.

[414] See *Garden State Farms, ibid.* at 444; the Supreme Court refers to the ordinance as "Ordinance No. 1123"; the Superior Court, Law Division, at 136 N.J. Super. 1 at 7 (Law Div. 1975) referred to the ordinance as "No. 1223". For purposes of this discussion, the Supreme Court's reference of "Ordinance No. 1123" will be used herein.

The Ordinance in question reads:

> AN ORDINANCE TO FURTHER AMEND THE ZONING ORDINANCE OF THE BOROUGH OF HAWTHORNE, REVISION OF 1970, HERETOFORE ADOPTED AS ORDINANCE 1175 OF THE BOROUGH OF HAWTHORNE.
>
> The Board of Commissioners of the Borough of Hawthorne, in the County of Passaic and the State of New Jersey, do hereby ORDAIN as follows:
>
> SECTION 1. That the Zoning Ordinance of the Borough of Hawthorne, Revision of 1970, heretofore adopted as Ordinance No.

the existing zoning ordinance to prohibit the principal or accessory use of any land, buildings or rooftops for heliports or helistops.[415] Garden State Farms instituted an action in lieu of prerogative writ to have Ordinance No. 1123 declared invalid, contending that: (1) local governments were preempted, on both the state and federal levels, from regulating aviation; (2) the ordinance violated N.J.S.A. 40:55D-62, in that it was not reasonably related to the public health, safety and welfare of the residents of Hawthorne; and (3) it was not enacted pursuant to a "comprehensive plan".[416] Hawthorne presented testimonial evidence at the trial that: (1) the landing and taking off of helicopters would have an adverse impact upon the "serenity" of the community; (2) the general quality of life would be adversely affected by low-level air traffic with its concomitant increase in noise, air pollution and automobile traffic; and (3) it anticipated distraction and anxiety to its residents resulting from the foregoing.[417]

The trial court held that Ordinance 1123 was valid and dismissed Garden State Farms' complaint. As to the issue of federal preemption, the trial court decided that while the *Federal Aviation Act of 1958* (former 49 U.S.C.A. § 1301 *et seq.*) preempted state and local authority in the area of the operation and avigation of aircraft, the *Act* required cooperation by the federal regulatory authorities with state and local aeronautical agencies (under former 49 U.S.C.A. §§ 1324(b) and 1343(i)), and thus

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> 1175 of the Borough of Hawthorne shall be and hereby is amended by the addition to Section 5 thereof, Paragraph 11, as follows:
> In all districts the use of any land or property or any buildings or roof tops or structures, or the construction, development or alteration of any structure, roof or building, for the purpose of accommodating the taking off or the landing of airplanes, helicopters or any and all other types of airborne vehicles is specifically prohibited whether a principal use or accessory use.
>
> SECTION 2. Any and all parts or provisions of Ordinance 1175, and any amendments or supplements thereto

[415] See *ibid.* at 444.
[416] *Ibid.*

contemplated the retention by state and local governments of the power to regulate ground activities not directly involving aircraft operation.[418] As to the issue of state preemption, the trial court held that although the State *Aviation Act of 1938* (N.J.S.A. 6:1-20 *et seq.*) embraced a comprehensive state regulation to promote safety and aeronautical progress, it did not necessarily preclude municipalities from determining whether or not aeronautical facilities should be constructed within their boundaries, noting the express grant of authority to municipalities to acquire and use land for airports.[419] The trial court also determined that the justification of the zoning ordinance on the grounds of public health, safety and welfare was supported on the record.[420] Finally, the trial court found that the zoning ordinance in question satisfied the "comprehensive plan" requirement of the enabling statute.[421]

Garden State Farms filed a notice of appeal to the Appellate Division, which reversed the judgment of the trial court.[422] The appellate panel found no substance to Garden State Farms' federal preemption argument.[423] Furthermore, the State *Aviation Act of 1938* did not preclude municipal zoning power to limit or prohibit the use of land for aeronautical facilities, so long as such an exercise of local zoning authority did not conflict with the powers granted by other legislation to the State or one of its agencies. The appellate panel also held that the State *Aviation Act* gave the Commissioner of Transportation the power to supervise the location and regulation of helistops and heliports, and that a municipal zoning ordinance could not operate as a bar to the

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[417] See *ibid.*
[418] See *ibid.* at 445.
[419] See *ibid.*
[420] See *ibid.*
[421] *Ibid.*
[422] See *Garden State Farms, Inc.* v. *Mayor Louis Bay II,* 146 N.J. Super. 438 (App.Div. 1977); *Garden State Farms, supra* note 410 at 445.

Commissioner's grant of a license for that use.[424] The Appellate Division did not consider the question of Garden State Farms' "comprehensive plan" attack, the issue for which the Supreme Court granted certification.[425]

The Supreme Court agreed that state and local governmental efforts to regulate the location of helistops are not preempted by the federal government.[426]

> Federal preemption will be found where the subject activity intrinsically requires uniformity of regulation, *Cooley* v. *Bd. of Wardens of the Port of Phila.*, 53 U.S. (12 How.) 299, 319 * * * (1851), or where Congress has either expressly or impliedly assumed regulatory control of the entire field of activity. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 * * * (1947).
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> The case at hand does not present a situation where preemption may be predicated upon a felt need for a monolithic system of regulation. While in some important aspects uniform regulation may be required, such as in the control and supervision of air space, *Cf. Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626-628, * * * (1973), that obvious need does not reach down to the level of the location of small, relatively isolated, privately owned helistops or heliports. Cf. *Cooley* v. *Bd. of Wardens of the Port of Phila., supra*, 53 U.S. (12 How.) at 320 * * *.[427]

The Court noted that while state and local authority over the operation and avigation of aircraft is supplanted by the *Federal Aviation Act of 1958* (former 49 U.S.C.A. § 1301 *et seq.*), "significant local power over ground operations remains viable."[428] This, of course, so long as the ground activities referred to do not directly involve actual aircraft operations. "[I]f federal preemption were found in the present case, state and local governments, which are the only bodies that currently license

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[423] See *ibid.*
[424] See *ibid.* at 446.
[425] See 74 N.J. 280 (1977); *Garden State Farms, ibid.*
[426] See *Garden State Farms, ibid.*
[427] *Ibid.* at 446-447.
[428] *Ibid.* at 447.

privately operated helistops and heliports, would be shorn of this regulatory responsibility. Congress could not have intended to create a governmental vacuum with respect to privately operated helistops."[429] In a footnote,[430] the Court explained that the FAA recognized that "local bodies have 'prerogatives with respect to approving the physical sites of airports or related matters' and '* * * authority in matters involving land use, zoning, and airport site selection.'"[431]

The Court's analysis of state preemption paralleled its federal preemption analysis, except that "because our State Constitution enjoins a liberal construction of legislation in favor of local authority, Art. IV, § 7, ¶ 11, legislative intent to supersede local powers must be clearly present."[432]

However, while the Appellate Division ruled that there was no preemption of a municipality's power to adopt zoning ordinances limiting or prohibiting the use of property as an aeronautical facility, it also affirmed that the Commissioner of

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[429] *Ibid.* at 449.

[430] *Ibid.* at 448, note 2:

> Indeed, the F.A.A. itself has consistently recognized the role of state and local governments in regulating airports in general and heliports in particular. For example, although a variety of federal regulations indirectly affect heliport design and construction and aspects of commercial helicopter operators, E. g., 14 C.F.R. s 139.101 *Et seq.* (standards for heliports which serve helicopters holding certificates of public convenience); *Ibid.* at §§ 121, 133, 135 (standards for commercial helicopter operations), no federal agency licenses privately used heliports. The F.A.A. in its directives concerning safe construction of heliports acknowledges that many state aeronautics commissions license heliports and specifically advises that local zoning ordinances be considered in heliport construction. F.A.A., Heliport Design Guide (8/22/77), Advisory Circular 150/5390-1B, p. 16 P 22. With respect to the construction of heliports, the F.A.A. has also recognized that local bodies have "prerogatives with respect to approving the physical sites of airports or related matters" and " * * * authority in matters involving land use, zoning, and airport site selection." 31 Fed.Reg. 1269 (1966); see also 14 C.F.R. 157 (1977).

[431] *Ibid.*

[432] *Ibid.* at 450, citing *Kennedy* v. *City of Newark*, 29 N.J. 178 at 187 (1959); *Summer* v. *Teaneck*, 53 N.J. 548 at 554-555 (1969).

Transportation had the "ultimate power and responsibility of determining where aeronautical facilities may be located * * * ." [433] Once an appropriate showing had been made and a license was granted, "a local zoning ordinance could not '* * * operate as a bar to the grant of a license or to that use.'"[434]

> The real issue is the extent to which a local zoning ordinance is a relevant factor which must be considered by the Commissioner in the exercise of his paramount authority under the Aviation Act. Although it is accepted here that the Aviation Act of 1938 is preemptive, we do not share completely the Appellate Division's conception of the Commissioner's statutory discretion, which suggests that in its exercise the Commissioner is free to disregard a conflicting local zoning ordinance.[435]

Highlighting portions of N.J.S.A. 6:1—29,[436] the Court found that "[t]he express statutory purpose of the Act is to provide for the regulation of aeronautics '* * * in the interest of public safety and the development of aeronautics in this State.'"[437]

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[433] *Ibid.* at 450-451 (quoting *Garden State Farms v. Mayor Louis Bay II,* 146 N.J. Super. 438 at 442-443).
[434] *Ibid.*
[435] *Ibid.* at 451.
[436] N.J.S.A. 6:1-29 [emphasis supplied by the Court]:

> Except as otherwise specifically provided by law, the Commissioner * * * shall promote progress and education in and *shall have supervision over aeronautics within this State, including, but not by way of limitation,* the avigation, flight and operation of aircraft, *the establishment, location,* maintenance, operation, *size, design,* repair, management and use Of airports, landing fields, landing strips, *heliports and helistops,* sport parachuting centers, air markings and other avigational facilities, and the establishment, operation, management and equipment of fixed base operators. The Commissioner may adopt and promulgate reasonable rules, regulations and orders regulating air traffic and establishing minimum standards for aircraft, pilots, fixed base operators, airports, landing fields, landing strips, heliports and helistops, sport parachuting centers, air markings and all avigational facilities within the State and establishing minimum altitudes of flight commensurate with the needs of public safety, the safety of persons operating or using aircraft and the safety of persons and property on the ground, and to develop and promote aeronautics within this State.

[437] *Garden State Farms, supra* note 410 at 451.

Noting that the phraseology is not "absolutist", by using such phrases as "supervision over aeronautics", the Court concluded:

> It would thus seem that there were contemplated the participation and contribution of other entities in locating heliports and helistops subject to state supervision or superintendence, a notion reinforced by reference to the qualifying statutory phrase "[unless] otherwise specifically provided by law * * *" which prefaces the grant of the Commissioner's statutory powers.[438]

Looking to legislation prior to the State *Aviation Act of 1938*, the Court found that the Legislature had empowered local planning boards to plan for aviation fields under N.J.S.A. 40:55—5, L.1930, c. 235, § 5, and carried through intact to former N.J.S.A. 40:55—28(b)(4)[439],[440] with regard to a "circulation plan element showing the *location* and types of facilities for *all* modes of transportation * * *."[441]

"Thus, the consistent legislative concern for the infusion of local thinking into the decision as to where to locate aeronautical facilities, not only predated the Aviation Act of 1938, but has been a continuing theme throughout its statutory tenure."[442]

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[438] *Ibid.*, quoting N.J.S.A. 6:1—29.

[439] N.J.S.A. 40:55D—28(b)(4) today reads:

> A circulation plan element showing the location and types of facilities for all modes of transportation required for the efficient movement of people and goods into, about, and through the municipality, taking into account the functional highway classification system of the Federal Highway Administration and the types, locations, conditions and availability of existing and proposed transportation facilities, including air, water, road and rail;".

N.J.S.A. 40:55D—28(b)(2) was amended after 1983 to require the planning board to make "a land use plan element * * * (c) showing the existing and proposed location of any airports and the boundaries of any airport safety zones delineated pursuant to the 'Air Safety Zoning Act of 1983' P.L.1983, c. 260 (C. 6:1—80 *et seq.*); * * *."

[440] See *Garden State Farms, supra* note 410 at 452.

[441] *Ibid.*

[442] *Ibid.* at 452-453.

The Court held therefore that the "dominant legislative intent" in the State *Aviation Act* is for the Commissioner to "supervise" and "regulate" aeronautics in general and the establishment, location, size and design of heliports and helistops in particular.[443]

> We can thus agree with the Appellate Division's observation that while municipalities, consistent with the broad statutory purposes of zoning, N.J.S.A. 40:55D—2, may pass ordinances fixing particular land areas for airports or heliports, or even ban them altogether, they must not exercise their zoning authority so as to collide with expressed policy goals of the State legislation, N.J.S.A. 6:1—20, or the final decision of the Commissioner.[444]

However, the Court disagreed with the Appellate Division's determination that the Commissioner, in exercising his authority, is "* * * free from municipal control except to the extent that the Commissioner, by regulation, deems it appropriate to give controlling weight to local zoning provisions."[445]

> To the contrary, we perceive that it is entirely appropriate for the Commissioner to pay due attention to the lawful zoning expressions of local governments and not act " * * * in an unreasonable fashion so as to arbitrarily override all important legitimate local interests." *Rutgers* v. *Piluso*, 60 N.J. 142, 153, 286 A.2d 697, 703 (1972). In a similar context, where the actions of state-level officials were held to be otherwise impervious to local zoning ordinances, we have stated that they " * * * ought to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions in order to minimize the conflict as much as possible." *Ibid.* at 154, 286 A.2d at 703.
>
> Especially probative of the vital interests of local government is the municipal zoning ordinance itself. Indeed, the Commissioner by regulation already recognizes the importance of such interests by giving controlling weight to local ordinances in the case of applications for public use airports and private landing strips. N.J.A.C.

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[443] *Ibid.*
[444] *Ibid.* at 454 [citations omitted].
[445] *Ibid.* at 454-455.

> 16:54-1 *et seq.*; N.J.A.C. 16:54-2 *et seq.* See also *Aviation Services* v. *Bd. of Adj. of Hanover Twp.*, 20 N.J. 275, 285, 119 A.2d 761 (1955); *Town of Bloomfield* v. *New Jersey Highway Auth.*, 18 N.J. 237, 248, 113 A.2d 658 (1955). Clearly he should, at the very least, acknowledge the relevance of the local zoning ordinance with respect to applications for private heliports and helistops. To this we would add as a material consideration that the Commissioner ought to take into account whether an applicant for a private heliport has availed itself of any right to a variance under the local zoning law and whether an application for a variance should be pursued as a helpful procedure for fleshing out the impact of the proposed facility upon neighboring land uses.[446]

Thus, the policy can be described as giving deference to municipal zoning ordinances that express local land use decisions, but are "tempered by the supervision of the Commissioner."[447] The Court held that the failure by the Commissioner to weigh conscientiously local interests, to examine the compatibility of surrounding land uses, and to consult with local authorities when making a licensing decision would constitute an abuse of discretion.[448]

The Court remanded the matter for rehearing on the license application in accordance with its opinion.

In re Application of Ronson Corporation
164 N. J. Super. 68 (App.Div. 1978), *cert. denied*, 79 N. J. 492 (1979)
Private Helistop; Application of *Garden State Farms*

In *In re Application of Ronson Corporation*,[449] the Township of Bridgewater appealed an order of the Acting Commissioner of Transportation issuing a license for a

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[446] *Ibid.* at 455.
[447] *Ibid.* at 456.
[448] See *ibid.*
[449] See 164 N.J. Super. 68 (App.Div. 1978), *cert. denied*, 79 N.J. 492 (1979) [hereinafter *Ronson Corp.*].

private use helistop to Ronson Corporation on its property in Bridgewater Township.[450] Though a public hearing had been held on Ronson's application, the findings of the hearing officer did not meet the requirements under *Garden State Farms*,[451] where specific findings concerning local interests and zoning must be made. Ronson argued that the facts of the case were more analogous to *P. T. & L.*[452] than to *Garden State Farms*. The court disagreed, since there had been no administrative or judicial holding, applying the *P. T. & L.* two-pronged test, that the proposed helistop use was "customarily incidental to the principal permitted use" of Ronson's land. Moreover, the facts on record were insufficient for the Appellate Division to make any such finding.[453]

Under *Garden State Farms*, if an examination of the local zoning ordinance revealed that the property was not a permitted accessory use in the zone, a "material consideration" for the Commissioner would be whether the applicant had availed itself of any right to a variance under the local zoning law, as well as "whether an application for a variance should be pursued as a helpful procedure for fleshing out the impact of the proposed facility upon neighboring land uses."[454] *Garden State Farms* held that the failure to make such a finding would constitute an abuse of the Commissioner's discretion.

Thus, the Appellate Division reversed the adjudication and order of the Commissioner, and remanded it for further proceedings consistent with *Garden State Farms*.[455]

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[450] See *ibid.* at 69.
[451] See *Garden State Farms*, *supra* notes 410-448 and accompanying text.
[452] See *P.T.&L.*, *supra* notes 314-324 and accompanying text.
[453] See *Ronson Corp.*, *supra* note 449 at 72.
[454] *Ronson Corp.*, *ibid.* at 72-73 (quoting *Garden State Farms*, *supra* note 410 at 455-456).
[455] See *ibid.* at 73.

CHAPTER VII

SUMMARY AND ANALYSIS

This final section shall attempt to draw all of the foregoing information together into more precise statements of the existing law. Brief reference will be made to additional federal case law, some of which has not heretofore been discussed, to illustrate the general confusion that exists in the various courts. Finally, there will be a brief discussion of recommendations for the New Jersey Legislature, whose goal should be to designate clearer lines of authority and avoid confusion within the State system.

1. There is a legal distinction to be made between an "airport proprietor", regardless of whether it is an individual, a municipality, or other governmental entity, and a "host" municipality, in which the airport is located in whole or in part. The ability of a host municipality to exercise its police power to regulate what goes on at an airport is limited, as shall be discussed below. When reference is made herein to a "municipal proprietor", it should be taken to mean an airport owned and operated by the State, a county, a municipality, or a governmental or intergovernmental agency (such as the Port Authority).

2. In the State *Aviation Act* the New Jersey Legislature has given the goal of "aeronautical progress" the same weight as it has given the goal of "public safety".[456]

3. The U.S. Constitution reserves to the States the right to regulate for themselves matters concerning public health, safety and welfare[457] that do not conflict with the laws

[456] See generally N.J.S.A. 6:1—1 *et seq.*
[457] See *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

of the United States[458] or have the purpose, means or effect of regulating interstate commerce.[459]

4. The New Jersey Constitution of 1947 gives the Legislature the authority to grant to municipalities the right to regulate municipal land use. Such regulation is deemed to be within the police power of the State. The Article also contains a clause that permits repeal or alteration by the Legislature.[460] A municipality may also establish an airport, and take land for that purpose subject to Constitutional provisions requiring just compensation to the affected landowner.[461] However, a municipality may not under the guise of a zoning ordinance acquire rights in private property that it may only acquire by purchase or eminent domain.[462]

5. *The Home Rule Act of 1917*,[463] when read in light of the foregoing Constitutional provisions, has been broadly construed by the N.J. courts to favor a municipality's power to zone.[464] Thus, a zoning ordinance enjoys the presumption that it is reasonable. However, this presumption is rebuttable on a showing that the ordinance in question is arbitrary, unreasonable or capricious.[465] More importantly, this local zoning power is only a delegation of police power by the State to the municipality, not an abdication by the State of its sovereign powers under the U.S. Constitution.[466]

6. In New Jersey, the Commissioner of Transportation has the ultimate authority

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[458] See U.S. Const. art. VI, cl. 2 (Supremacy Clause).
[459] "Negative" reading of U.S. Const. art. I, s. 8 ("dormant" Commerce Clause)
[460] NJ Const., art. 4, § 6, ¶2.
[461] NJ Const., art. 4, § 6, ¶ 3; N.J.S.A. 40:8—1 *et seq.*
[462] See *Yara Engineering Corp., supra* notes 176-181 and accompanying text. 132 N.J.L. 370 (S. Ct. 1945) (Invalidating city ordinance setting height restrictions on properties adjoining Newark Airport).
[463] N.J.S.A. 40:42—1 *et seq.*
[464] Frizell & Pozycki, *supra* note 100 at § 1.1.
[465] See *Ridgewood Air Club, supra* notes 166-175 and accompanying text (sustaining Board of Adjustment's refusal to grant a permit for the use of certain lands as a non-commercial airport); see *Yoemans, supra* notes 136-144 and accompanying text (evidence failed to establish that provision in township zoning ordinance prohibiting an airport in a residential and agricultural zone was unreasonable).

in the placement of aeronautical facilities.[467] However, he must weigh conscientiously local interests, examine carefully whether proposed a aeronautical facility is compatible with surrounding land uses, and consult local ordinances and authorities when making licensing decision.[468] While State court cases from the late 1970s[469] appear to have fretted over the meaning of the phrase "supervision over aeronautics" in the State *Aviation Act* to delimit the powers of the Commissioner, two subsequent acts,[470] the *Airport Safety and Zoning Act of 1983* and the *New Jersey Airport Safety Act of 1983*, having withstood initial challenges to their constitutionality,[471] have broadened the discretion and powers of the Commissioner. The regulations promulgated under these *Acts* widen the scope of his "superintendency" over land use issues affecting airports and aeronautics, and may be closer to "absolute" authority than previously contemplated under *Garden State Farms.* This is not to say, however, that the requirement to weigh local interests conscientiously during the Commissioner's decision-making is of any less procedural importance or that his failure to do so would not be an abuse of his discretion.

7. Under New Jersey law, a non-proprietor municipality which is host to an existing airport must make reasonable accommodation for such existing legal uses, while recognizing the importance of protecting and preserving the public interest in air travel.[472] Moreover, each case in which a municipality bars air facilities must be judged on its particular facts to determine if the local action is arbitrary and should be

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[466] Frizell & Pozycki, *supra* note 100 at § 1.1.
[467] See *Garden State Farms, supra* notes 410-448 and accompanying text.
[468] *Ibid.*
[469] See *Garden State Farms, supra* notes 410-448 and accompanying text. See *Ronson Corp., supra* notes 449-455.
[470] See *supra* note 96.
[471] See *Patzau, supra* notes 235-264 and accompanying text.

invalidated.[473]

8. A non-proprietor municipality MAY NOT exercise its police power to engage in any regulation which:

(a) has the purpose, means or effect of regulating airport noise at its source;[474]

(b) excludes uses which are manifestly within the ambit of appropriate primary or accessory uses consonant with an airport's operation;[475]

(c) interferes with the operation of aircraft in flight, including takeoff and landing procedures;[476]

(d) classifies airports as non-conforming land uses within the context of the municipality's ordinances or master plans of development;[477]

(e) has the purpose, means or effect of discriminating against interstate commerce;

(f) is preempted by State statute or regulation; or

(g) is preempted by federal law or regulation, such as the operation of aircraft in flight.

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[472] See *Aviation Services, supra* notes 325-349 and accompanying text (holding that even though Morristown's airport was located within the boundaries of Hanover, Hanover's zoning ordinance was inapplicable to such airport). See *Morristown I, supra* notes 364-378 and accompanying text.

[473] *Ibid.* ("If the purposes sought to be achieved are to be thwarted by zoning plans which arbitrarily exclude airport uses from an entire municipal domain the progress envisioned by the Legislature and stimulated by [the State *Aviation Act*] may go unrecognized.").

[474] See *Burbank, supra* notes 275-284 and accompanying text (city ordinance prohibiting jet aircraft from departing airport between the hours of 11 p.m. and 7 a.m. was invalid because Congress by its enactment of Federal *Aviation Act* and *Noise Control Act* has preempted state and local controls over aircraft noise). See also subsequent federal acts *ANSA* and *ANCA, supra* notes 66-95 and accompanying text

[475] See *Morristown III, supra* notes 385-396 and accompanying text (such as runways, taxiways, hangers, etc.; though it may exclude banks, service stations, hotels, etc.).

[476] See *City of Newark, supra* notes 207-226 and accompanying text; *Allegheny Airlines* v. *Cedarhurst supra* notes 217-218 and accompanying text (ordinance prohibiting overflight at less than 1,000 feet above ground level preempted by federal regulation). See also *American Airlines* v. *Hempstead, supra* note 217 (local zoning ordinances delimiting permissible noise levels for aircraft overflight to protect public health and safety interfered with interstate air commerce and were invalid).

[477] See *Air Safety and Zoning Act of 1983*, as amended; N.J.S.A. 6:1—80 to -88; N.J.A.C. 16:61—2.1(e).

9. A proprietor municipality, or a private owner of a public use airport, MAY NOT regulate:

(a) airport noise in any manner that is arbitrary, unreasonable, discriminatory, or contrary to federal regulation;[478]

(b) in an area preempted by State statute or regulation; or

(c) in an area preempted by federal law or regulation.

10. A proprietor municipality which transfers its proprietary control of an airport to another entity, without reservation, may lose its power to impose any restrictions on the airport.[479]

11. While *municipalities* are equal government entities and thus generally enjoy no intergovernmental immunity from one another, the New Jersey Supreme Court has found a legislative intent to immunize acquisition and maintenance of lands and buildings from zoning power.[480] However, there are limits to this immunity.[481] A proprietor municipality of an airport located in whole or in part in another municipality MAY NOT engage in a land use that:

(a) is not incidental or necessary for the maintenance and operation of the airport;

(b) is beyond the ambit of reasonable present or future public need; or

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[478] See *British Airways Bd.* v. *Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977) ("*Concorde I*") (regulations to ban Concord jet found to be unreasonable and unduly burdensome on interstate commerce); and *Concorde II, supra* note 46 and accompanying text. (same case).

[479] See generally *Nat. Helicopter Corp., supra* note 29 at 1024-1026; *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (State held not proprietor of airport where local port district and residents of its constituent cities would pay cost of taking any air easements under State Act); *Pirolo* v. *City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983) (State failed to reserve for itself, in contract with leaseholder, the right to exercise certain of its proprietary functions).

[480] See *Aviation Services, supra* notes 325-349 and accompanying text.

[481] See *Shell Oil, supra* notes 350-363 and accompanying text; *Morristown III, supra* notes 385-396 and accompanying text.

(c) is a wholesale aggrandizement of territory.

12. The proprietor of an airport is liable for damages from airport noise to affected landowners.[482] This is commonly referred to as *Griggs* liability.[483] However, if the airport proprietor meets the requirements of the FAA Part 150 program, its liability may be limited.

13. New Jersey courts have favored the law of nuisance[484] over trespass in assessing liability for damages, which is the majority rule.[485]

14. Airports are not nuisances *per se*.[486] Although operations at an airport may become a nuisance.[487]

15. Notwithstanding approval by the Division of Aeronautics, a private individual or corporation MAY NOT establish a private use landing area for fixed-wing aircraft, or a heliport or helistop on its property if an existing local zoning ordinance expressly prohibits that use. In the absence of an express prohibition, however, the courts will likely consider such use to be an appropriate and lawful accessory use.[488]

16. State and local governmental efforts to regulate the location of helistops are not preempted by the federal government so long as the local regulation referred to does

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[482] See *Griggs, supra* notes 227-234 and accompanying text (flight of aircraft 30-300 feet above petitioner's property on take off; 53-153 feet on landing); *Causby, supra* notes 182-191 and accompanying text (flight of military aircraft 83 feet above petitioner's property).

[483] Compare *City of Newark, supra* notes 207-226 and accompanying text at 160-162.

[484] "Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that the law will presume resulting damages." Black's Law Dictionary, (Sixth ed. 1990). "The maxim, *sic utere tuo ut alienum non laedas* [use your own property in such a manner as not to injure that of another], expresses the well established doctrine of the law." *Ross* v. *Butler*, 140 N.J. Eq. 294 (1868)).

[485] See *Hyde, supra* notes 192-206 and accompanying text; *Oeschle supra* notes 145-165 and accompanying text; *City of Newark, supra* notes 207-226 and accompanying text.

[486] See *Oeschle, supra* notes 145-165 and accompanying text; *Hyde, supra* notes 192-206 and accompanying text.

[487] See *Hyde, ibid.*

[488] See *P.T.&L., supra* notes 314-324 and accompanying text.

not directly effect actual aircraft operations.[489] However, the Commissioner of Transportation has the ultimate authority as to placement of aeronautical facilities,[490] subject to consultation with local officials and consideration of local objections.[491]

17. In many jurisdictions, the inability of the courts to detect clear lines of authority has lead to conceptual confusion and inconsistency regarding land use and zoning in regard to airport land. For example, if the placement and design of runways and taxiways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace, as the Ninth Circuit has held, municipal attempts to regulate their placement and design are clearly invalid.[492] In 1995, a federal district court in Ohio arrived at an opposite conclusion. However, if flight in the navigable airspace begins when an aircraft takes the runway, then the Ohio court's conclusion is fatally confused and cannot be satisfactorily explained.

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[489] See *Garden State Farms, supra* notes 410-448 and accompanying text.
[490] *Ibid.* at 454.
[491] *Ibid.* at 455.
[492] See *Burbank-Glendale-Pasadena, supra* note 59 and accompanying text.

CHAPTER VIII

CONCLUSION

New Jersey State courts have subjected and should continue to subject the municipal zoning regulation of airports to strict scrutiny. However, this leaves the courts to function on an *ad hoc* basis, which will inevitably lead to inconsistent results, through years of costly litigation. This thesis covers no fewer than six reported cases concerning Morristown Airport alone.

Although there have been no published cases since 1979 (not including the 1994 *Patzau* decision), the legal battles have continued, especially between privately-owned public use airports and host municipalities. Bedminster and Wall Townships that have resisted implementing the *Air Safety and Zoning Act of 1983*, causing costly legal battles with Somerset and Allaire Airports, respectively.[493] Trinca Airport, desiring to expand its runway to 4300 feet to accommodate business traffic to the International Trade Zone in Mt. Olive Township, has faced "a small number of very vocal residents," and has been unable to move forward with the Airport Master Plan.[494] Between 1989 and 1993, Princeton Airport fought Montgomery Township over zoning, and in the interim, the Township permitted 350 houses to be built under Princeton's air traffic pattern. The case settled in Princeton Airport's favor, but the residents of that new housing were left to suffer with the concomitant noise.[495] Branchburg and Readington Townships have acrimoniously opposed Solberg Airport's expansion plan to extend its runway from 3700

[493] *NJGASC*, supra note 2 at 33. Somerset Airport spent $178,000 and Allaire Airport spent $600,000 in legal fees.
[494] *Ibid.* at 34.

to 5600 feet to accommodate small corporate aircraft.[496] In addition, Redington Township built a children's recreation area off the departure end of the primary runway and continues to attempt to build a school at the end of the secondary runway in an airport clear zone.[497]

As Superior Court Judge Rosenberg observed, in the trial court opinion of *Garden State Farms*,[498] "[w]hile it may well be that a unified system of laws preempting all land use power for aeronautics would best serve the interests of the people of New Jersey, such a policy decision should be made by the Legislature and not by the court."[499]

It falls to the State Legislature to rethink and more clearly define the authority of the Commissioner over land use regulation on and around airport land. The argument made here is for a clear legislative statement that enhances the Commissioner's authority and expressly preempts this area from any municipal regulation. A strong, central authority would benefit both airports and the surrounding communities that they serve. This is especially true where two recent acts, the *Airport Safety and Zoning Act of 1983* and the *New Jersey Airport Safety Act of 1983*, have served to enhance the Commissioner's discretion and power. The legislative goal should be to eliminate, once and for all, the problems caused by the ambiguous phrase "supervision over aeronautics", used to describe the powers of the Commissioner of Transportation.

Another problem arises where the courts are left to guess at intergovernmental immunities between a State agency and a political subdivision inferior to the State, such as a municipality. As discussed in Chapter 5, where legislative silence leaves the State

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[495] *Ibid.* Princeton Airport spent $600,000 in legal fees.
[496] *Ibid.*
[497] *Ibid.*
[498] See 136 N.J. Super. 1 (Law Div. 1975).

courts no choice but to divine legislative intent, the courts are left, in effect, with the power to legislate. This is not a power the that courts necessarily desire, but they must interpret the law to apply it properly. While it is a conclusion of this thesis that the NJDOT regulations preempt local zoning ordinances *de facto*, that conclusion should rely on express preemption language in the positive law, not guesswork.

The New Jersey Legislature has made great strides since *Garden State Farms*, particularly in laws aimed at protecting local residents. For example, the *Airport Safety and Zoning Act of 1983*, including the law requiring notification to prospective buyers whether the property they wish to purchase is located in an airport zone, is particularly praiseworthy. As a practical consideration, the establishment of clearly defined airport zones aid in the determination of just how many of New Jersey's residents are adversely affected by airports, especially when a necessary airport expansion is planned.

Recalling the observation made at the beginning of this thesis that airport litigation tends to be a highly charged emotional confrontation, the State Legislature ought to diffuse confrontation by providing "bright line" statements of authority over well defined zones of land on and around airports, anticipating reasonable, future airport development needs.

This discussion should not obscure the fact that many host communities in New Jersey are friendly to general aviation airports, enjoying good community-airport relations and welcoming the benefits derived from the airports.[500]

While the legal aspects of airport zoning discussed in this thesis are important, they are but one facet of a multifaceted problem. If one was to view the open spaces of

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[499] *Ibid.* at 20.
[500] See *NJGASC*, *supra* note 2 at 34-36.

airport lands as limited natural resources, the importance of their preservation would become apparent, and not only for the environmental reasons previously mentioned. In New Jersey, airport land, once lost, will be lost forever. As long as the State continues to attract new residents at an unprecedented rate, the strong demand for residential development will continue. The lands that airports occupy are usually seen as ideal in the eyes of real-estate developers. The temptation to convert airport land for other uses for quick, short-term economic gain is powerful. However, the economic and social gains derived over the long-term that come part and parcel with the development of a fully integrated intermodal transportation system, as has been discussed above, benefit everyone. The safeguarding of any valuable, limited resource will always be a question of political will. The safeguarding of airport land is no exception.

The State Legislature, acting decisively, can arrest the protracted and costly legal battles that exist or will otherwise and inevitably occur, protect a valuable land resource, and ensure that the final elements of a robust intermodal State transportation system—the general aviation airports—will develop and thrive in coherent uniformity.

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