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MEMORANDUM

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TO: Airport Community Advisory Team
TRUCKEE TAHOE AIRPORT DISTRICT

FROM: KAPLAN KIRSCH & ROCKWELL

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SUBJECT: Legal Context and Options for Limiting Nighttime Operations at Truckee-Tahoe Airport

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The purpose of this memorandum is to provide background information and outline possible options for the Board of the Truckee Tahoe Airport District and the Airport-Community Advisory Team (ACAT) as each body considers whether to pursue the imposition of restrictions on nighttime operations at Truckee-Tahoe Airport (TRK). While some ACAT and Board members are already fully versed in the legal foundation for this discussion, we begin with a basic review of the legal principles which would underlie any effort to impose restrictions at TRK. Citations are provided for those ACAT members who are interested in further detail on any of the points discussed here.

LEGAL PRINCIPLES

An airport operator's authority to limit nighttime flight operations at a federally-funded airport like TRK is severely limited by the Constitution, by federal laws, and by the federal grant assurances to which airport operators agree when they accept federal grants for airport projects. Before considering the specific types of limitations which TTAD might adopt, it is essential to understand the relatively narrow parameters within which an airport owner may legally restrict nighttime use of its airport. Unfortunately, not only are the parameters narrow, they are also complex, not entirely consistent, and subject to change.

I. Constitutional Law

Although, in general, the authority to own, operate, and regulate airports is a power reserved to state and local governments, this authority is subject to, and constrained by, the legitimate exercise of power by the federal government as authorized by the Constitution.[1] Two basic principles of constitutional law govern the essential balance of power between the federal government and the local governments that own and operate airports: (1) Congress's authority to regulate interstate commerce, and (2) the supremacy of federal law over state or local law attempting to regulate in the same subject area.[2]

In practice, these principles mean that when Congress decides to regulate an aspect of interstate commerce such as aircraft operations, state and local airport operators may only impose regulations that are consistent with federal regulations. Sometimes Congress preempts an entire field of regulation, leaving no room at all for state or local government regulation, whether or not it is consistent with federal law. While Congress heavily regulates aircraft, aircraft operators (pilots) and aircraft safety, its regulation of airports is more limited.

II. Federal Statutes, Regulations and Grant Assurances

A. Statutes and Preemption Principles

Beginning with the Air Commerce Act of 1926, federal legislation and court decisions have reserved many aviation-related subjects entirely to the federal government. These include aviation safety and the regulation of air carrier service, routes, and prices. The federal government also has exclusive jurisdiction over the regulation of airspace.

When Congress deregulated the airline industry in the Airline Deregulation Act of 1978, in order to avoid state and local governments stepping in to re-regulate the industry, Congress included a provision, now codified at 49 U.S.C. § 41317(b)(1), expressly banning states and local governments from regulating prices, routes, or service of air carriers (defined to include not just what are commonly referred to as commercial airlines but also air charters, air taxi, and other similar entities certified under 14 C.F.R. Part 135 that operate at TRK). At the same time, in what is known as the "proprietor's exception" to this otherwise expansive prohibition, Congress left state or local owners and operators of airports the authority to carry out "proprietary rights and powers."[3] Essentially, the proprietor's exception permits airport sponsors acting as the proprietor of an airport, rather than as a local government regulating with its police powers, to impose some limited restrictions on airports. These restrictions may not intrude on areas exclusively reserved to the federal government such as aviation safety or regulation of the airspace. What airport owners *may* do under the proprietor's exception continues to be the subject of litigation, and the specific parameters of the authority are complex and uncertain.

Numerous airport use restrictions adopted by airport operators or local governments under the proprietor's exception have been challenged on the basis that they are preempted by the express preemption provision, the federal government's preemption of the field of aviation safety, and/or the federal government's exclusive jurisdiction over the regulation of airspace. Court cases decided over the last several decades have established the following guiding principles regarding the proprietor's exception:

- A local government entity that is not the airport proprietor lacks authority to restrict use of an airport for aeronautical activities and aircraft operations.[4]
- Non-proprietors can exercise traditional land use and police powers so long as such regulations do not amount to access restrictions.[5]
- Airport operators can adopt reasonable, nonarbitary and not unjustly discriminatory access restrictions. Using this and comparable tests, courts have declared that some access restrictions are preempted,[6] while some access restrictions are not preempted.[7] In

limited instances, different courts looking at remarkably similar access restriction have arrived at different conclusions regarding whether the restriction was preempted.[8]

B. The 1990 Airport Noise and Capacity Act (ANCA)

In the 1970s and 1980s, airports were increasingly subject to community complaints about aircraft noise, and a number of airports began considering – and in some case, adopting – use restriction such as nighttime curfews to minimize the growing noise impacts on the surrounding communities. These actions posed a threat to the expansion and unity of the national air system, and both the FAA and commercial and non-commercial aircraft operators sought Congress's help in limiting the spread of use and access restrictions at airports across the county.

Congress's response was a fundamental change in the law governing imposition of noise restrictions. In 1990, with the enactment of the Airport Noise and Capacity Act (ANCA), 49 U.S.C. § 47521 *et seq.*, and FAA's implementing regulations at 14 C.F.R. Part 161, onerous procedural and substantive requirements were imposed on any airport owner/operator seeking to implement mandatory noise rules or access restrictions. Indeed, ANCA's requirements are so onerous that in the twenty-three-plus years since its enactment, *only one airport* (Naples, Florida) has successfully adopted a use restriction under its provisions, and even in that case, the airport owner succeeded only after surviving extensive legal challenges brought against it by the FAA, an industry group, and aircraft operators.

As defined by the FAA in Part 161, ANCA applies very broadly beyond what may traditionally be thought of as noise restrictions:

> Noise or access restrictions means restrictions (including but not limited to provisions of ordinances and leases) affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such as limits on the noise generated on either a single-event or cumulative basis; a limit, direct or indirect, on the total number of Stage 2 or Stage 3 aircraft operations; a noise budget or noise allocation program that includes Stage 2 or Stage 3 aircraft; a restriction imposing limits on hours of operations; a program of airport-use charges that has the direct or indirect effect of controlling airport noise; and any other limit on Stage 2 or Stage 3 aircraft that has the effect of controlling airport noise. This definition does not include peak-period pricing programs where the objective is to align the number of aircraft operations with airport capacity.[9]

The definition does not clearly establish what constitutes a noise or access restriction, particularly because of the references to indirect effects on noise, but it is clear that a mandatory restriction or requirement limiting the operation of Stage 2 or Stage 3 aircraft is subject to ANCA and Part 161. Conversely, voluntary recommendations are not subject to ANCA and Part 161.

In practice, when evaluating proposed use restrictions, FAA considers both the effect and the intent of an airport sponsor's actions. Where an action taken by an airport sponsor *appears intended* to restrict operations or control noise, the FAA may conclude that the measure is subject to ANCA even if the strict language of the measure does not address noise at all. The FAA's determination would be given deference by a reviewing court. The FAA has an interest in providing only limited guidance on this topic in order to preserve its prosecutorial discretion and determine each case in light of its facts.

A few examples of FAA's treatment of measures proposed and implemented at other airports under ANCA is instructive. Several opinions or investigatory letters from the FAA on the scope of ANCA and Part 161 addressed thinly veiled attempts by airports to control noise and limit nighttime flights. Where the reasoning given for the rule does not comport with its effect, the FAA will generally find that the rule is a noise or access restriction.

- For example, the FAA addressed the Albany County Airport's proposed resolution to establish quiet hours between 11:00 p.m. and 6:00 a.m. "to ease an existing noise problem to area residents caused by '<u>maintenance and/or testing of aircraft engines</u>.'" Letter from L. DeRose, Manager FAA Airports Division, to H. Goldstock, Operations Coordinator, Albany County Airport (Sept. 11, 1992) (emphasis in original). The proposed resolution stated that "no aircraft engine shall be started or operated" during those hours. The FAA stated its concern that the resolution was overbroad if the County's concern was really with maintenance and testing.

- The FAA determined that a weight limit implemented by the Omaha Airport Authority was not a noise or access restriction subject to ANCA and Part 161 because there was no evidence that the weight limitation was adopted "as a pretext for imposing an airport noise or access restriction. Since the limitation was not imposed to control noise or limit access, it is not a noise or access restriction within the meaning of ANCA." Letter from C. Rich, FAA Associate Administrator for Airports, to R. Studenny (April 7, 1995).[10]

- The FAA has made clear that it will scrutinize operational and procedural mechanisms that operate as noise or access restrictions. In considering a proposal to close the passenger terminal at the Burbank - Bob Hope Airport at night, the FAA advised that actively barring use of the terminal would turn a voluntary curfew into a mandatory one and would require compliance with Part 161. Letter from J. Garvey, FAA Administrator, to Mayor S. Murphy (March 24, 2000).

- The FAA also raised concern, without taking a definitive position, regarding a local government's practice of closing the parking garage at the Westchester County Airport (New York) to arriving passengers during the hours of the airport's voluntary curfew. Letter from P. Galis, FAA Deputy Associate Administrator for Airports, to A. Spano, County Executive, Westchester County (July 5, 2001).

These examples provide some guidance in determining what actions the FAA may consider to be noise or access restrictions. While adoption of resolutions or ordinances and/or the inclusion of

lease provisions that *directly limit aircraft operations* will be viewed as noise or access rules, it is less clear what other procedural or operational measures fit within the statute's scope. It appears, however, that any measure that renders use of the Airport so difficult or inconvenient as to have essentially the same effect as the closure of a facility is likely to be considered a noise or access restriction. Measures that are meant to discourage nighttime operations, but do not actually forbid or impose serious obstacles to such operation, may be permissible.

C. Grant Assurances

In addition to the statutory limitations on proprietors' powers, the authority of airport proprietors like TTAD is further limited by virtue of having received federal grants. Since the original federal aid-to-airports grant program was enacted by Congress in 1946, Congress has required that federal grants to airport sponsors be provided only in exchange for assurances from the sponsor that it will satisfy specific obligations concerning the operation and development of the airport receiving the grant funding.

The statutory assurances are codified at 49 U.S.C. Section 47107. The grant assurances (which are slightly broader than required by statute) are included as part of each grant agreement executed by the FAA and an airport sponsor. The thirty-nine grant assurances, several of which have multiple sub-parts, have the following general features:

1. The assurances generally apply for 20 years. However, some of the assurances apply in perpetuity as a result of separate statutory requirements. These include the prohibition on granting an exclusive right and the requirement to use airport revenue only for airport purposes.[11] Additionally, the assurances associated with the use and disposal or real property apply in perpetuity when the airport operator has received AIP funds in connection with the acquisition of property.
2. The assurances impose substantive limitations on the airport sponsor's options in operating the airport; these limitations are enforced by the FAA.
3. The penalties for violating the assurances are severe. The FAA may withhold approval of a grant,[12] and may withhold payment under an existing grant agreement.[13] The FAA also may seek injunctive relief in federal court.[14] Although the assurances are included in a contract between the FAA and the airport sponsor, the commitments are more than mere contracts. As one U.S. Court of Appeals panel explained, the assurances are "part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will."[15]

The two Assurances most relevant to limitations on nighttime operations for purposes of this discussion are Assurance 22 (Economic Nondiscrimination) and Assurance 23 (Exclusive Rights). In the past, the FAA has used both of these assurances as a powerful tool to discourage (and in some instances, to prohibit) airports from imposing noise or access restrictions at an airport.

REVIEW OF OPTIONS TO CONSIDER

This legal background should inform the TTAD and ACAT review of possible options to address nighttime noise at TRK. In the chart that follows, we identify a range of options and their potential legal complexity. In considering the universe of available options, we surveyed airports around the country and databases of airport restrictions to determine what other airport proprietors are doing (or have considered doing) to discourage nighttime operations.

In reviewing the attached list, it is important to recognize that the implementation of almost any of these measures would be subject to considerable variations – some of the measures could be combined with others and some measures could be implemented with varying levels of severity depending upon the interplay among various measures.

With the exception of implementing a formal curfew which subject to ANCA and Part 161 (items 12, 13 and 14 on the attached list), we do not believe that there is a single measure which could effectively prevent nighttime operations on its own. As a result, unless TTAD were to implement a formal curfew, we recommend that the ACAT consider a package of measures. Furthermore, if TTAD and ACAT were to want to discuss implementation strategies, we would likely recommend a staged implementation in which the simplest measures are considered first and progressively more stringent and complex measures are implemented after that, depending upon success of the earlier implemented measures.

One final word on strategy: as explained earlier in this memo, the TTAD intent (and the formal public record documenting that intent) will be carefully considered by FAA or a court reviewing any restrictions adopted. The legal viability of certain measures on the attached list may well depend upon documentation of the TTAD's stated objectives and intent. The same measure, proposed as a fiscal measure (e.g., item 6) could be implemented with minimal FAA oversight and limited legal risk but if proposed as a noise control measure would be legally risky and subject to considerable FAA attack. Therefore, we would urge that the TTAD Board and ACAT move forward cautiously with public discussions of implementation strategy to minimize legal exposure.

We will be prepared to discuss at the ACAT meeting on February 11 the details of the 14 options in the attached chart and how TTAD might implement each should it decide to proceed down that path.

ENDNOTES

[1] Airport operators derive their authority to maintain, operate and regulate airports by virtue of some combination of: (1) general delegations of authority in a state constitution or state statute; (2) specific delegations of authority in, for example, state and local enabling legislation for airport authorities and other special-purpose entities; and/or (3) inherent powers attendant to the ownership of real property that constitutes the airport. In the case of TTAD, the authority to operate TRK comes directly from state law.

[2] U.S. Const., Art. 1, § 8, Clause 3 and Art. VI, ¶ 2.

[3] 49 U.S.C. § 41713(b)(3).

[4] *See e.g.*, *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). *See also* Letter to K. Bohne from D. Fuller, FAA at 7 (Aug. 7, 2009) ("[T]he Town [of Grant-Valkaria, FL], as a nonproprietor, has no legal authority to use its police powers to regulate the type of aeronautical businesses that may be permitted to lease space at the Airport nor may the Town regulate the types of flight operations that can be conducted at the Airport, including determining whether airport users are based or transient.").

[5] *See e.g.*, *Price v. Charter Township of Fenton*, 909 F.Supp. 498 (E.D.Mich. 1995); *Command Helicopters, Inc. v. City of Chicago*, 691 F.Supp. 1148 (N.D.Ill. 1998); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990); *Command Helicopters, Inc. v. City of Chicago*, 691 F. Supp. 1148 (N.D. Ill. 1988); *Faux-Burhans v. County Comm'ers of Frederick County*, 674 F.Supp. 1172 (D.Md. 1987); *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); *U.S. v. City of Blue Ash*, 621 F.2d 227 (6th Cir. 1980); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

[6] *See e.g.*, *Arapahoe County Public Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001); *Skydiving Center of Greater Washington D.C., Inc. v. St. Mary's County Airport Comm'n*, 823 F.Supp. 1273 (D.Md. 1993); *U.S. v. County of Westchester*, 571 F.Supp. 786 (S.D.N.Y. 1983); *U.S. v. New York*, 708 F.2d 92 (2d Cir. 1983); *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956).

[7] *See e.g.*, *National Business Aviation Ass'n v. City of Naples Airport Auth.*, 162 F.Supp.2d 1343 (M.D. Fla. 2001); *SeaAIR NY, Inc. v. City of New York*, 250 F.3d 183 (2d 2001); *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (2d Cir. 1998); *Alaska Airlines v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991); *Arrow Air, Inc. v. Port Auth. of New York and New Jersey*, 602 F.Supp. 314 (S.D.N.Y. 1985); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *National Aviation v. City of Hayward*, 418 F.Supp. 417 (N.D. Cal. 1976); *Air Transport Ass'n of America v. Crotti*, 389 F.Supp. 58 (N.D.Cal. 1975).

[8] *Compare Arapahoe County Public Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001) *with Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998).

[9] 14 C.F.R. § 161.5.

[10] An airport user, Millard Refrigerated Services ("MRS"), also filed a formal complaint against the OAA. *See Millard Refrigerated Servs., Inc. v. FAA*, 98 F.3d 1361 (D.C. Cir. 1996). MRS "made a number of charges against the OAA in connection with the OAA's decision to bar heavy aircraft, including MRS's corporate jet, from using Millard Airport, located outside Omaha." *Millard*, 98 F.3d at 1361. The FAA dismissed MRS's complaint, and the D.C. Circuit considered MRS's claim that the FAA should have interpreted ANCA and Part 161 to apply to the OAA's decision "because it constitutes a restriction on airport use that affects quiet aircraft, whether or not the restriction was intended to limit airport noise." *Id*. MRS argued that ANCA and its implementing regulations must apply to restrictions on stage 3 aircraft whether direct, indirect, intentional or incidental. *Id*. at 1363. Rather than opining on this issue, the D.C. Circuit determined that the FAA failed to resolve this issue in ruling on MRS's complaint, and it remanded the case to the FAA to resolve the issue. *Id*. at 1364. FAA did not make any further findings in this case on remand.

[11] *See* 49 U.S.C. §§ 40103(e) and 47133.

[12] 49 U.S.C. § 47106(d).

[13] 49 U.S.C. § 47111(d).

[14] 49 U.S.C. § 47111(f).

[15] *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991).

Possible Options for Limiting Nighttime Operations
Draft as of February 3, 2014

Note: Measures are *not* listed in order of priority

Option	Possible measure	A Mandatory	B ANCA Noise Restriction?	C Legally Complex	D FAA Coordination Required	E FAA Approval Required
1.	Improved communication with pilots	N	N	N	N	N
2.	Strictly enforce existing rules and regulations	Y	(?)	N	Y	N
3.	Publicize identity of nighttime operators	Y	N	N	N	N
4.	Implement/ strengthen voluntary curfew; strengthen existing Fly Quiet program	N	N	N	Y	N
5.	Agreement (with or without compensation) with based operators	N	N	N	N	N
6.	Restructure rates and charges to reflect higher costs of nighttime operations	Y	(?)	Y	Y	N
7.	Implement financial incentives for compliant operators (based aircraft only)	N	N	Y	Y	N
8.	Require advance notice of nighttime operations	Y	Y	Y	Y	(?)

		A	B	C	D	E
Option	Possible measure	Mandatory	ANCA Noise Restriction?	Legally Complex	FAA Coordination Required	FAA Approval Required
9.	Alter airfield lighting	Y	N	N	Y	N
10.	Establish voluntary or mandatory flight tracks	Y/N	N	N	Y	Y
11.	Limit availability of aeronautical services at night	Y	N	N	N	N
12.	Implement formal mandatory curfew on *all* nighttime operations (Part 161)	Y	Y	Y	Y	Y
13.	Implement formal mandatory curfew on *selected* nighttime operations (Part 161)	Y	Y	Y	Y	Y
14.	Implement *preventive* mandatory restrictions (i.e., no current effect)	Y	Y	Y	Y	Y