

MEMORANDUM

TO: Mayor and City Council of Park Ridge, Illinois
FROM: Steven M. Taber, Taber Law Group, Irvine, California
DATE: August 9, 2010
RE: Options for Park Ridge Regarding Noise and Air Quality Issues Created by the Expansion of O'Hare International Airport

I. Facts Used in Drafting This Memorandum

A. O'Hare Modernization Program

Although the City of Chicago has been attempting to expand O'Hare International Airport for many years, it has only received approval from the FAA to move forward with the O'Hare Modernization Program (OMP) within the last five years. After years of study and many comments, the FAA issued its Final Environmental Impact Statement in July, 2005.

1. Noise

As a result of OMP, the City of Park Ridge would experience air traffic directly overhead. This is the result of the construction of two new runways: Runway 9L/27L located in the far northern section of O'Hare, and Runway 9C/27C, both of which will be located just north of current Runway 9R/27R. *OMP Final EIS*, Exhibit 1-42. Upon the construction of the two runways, the EIS predicted that the 65 DNL contour will make its way into Park Ridge for the first time. *Id.*, Appendix F, Attachment 1, F-306. Therefore, the EIS outlined noise mitigation programs that would be offered to the landowners within the 65 DNL contour.

2. Air Quality

The EIS noted in Appendix I that Park Ridge, in 2000, performed its own preliminary study of Hazardous Air Pollutants (HAPs) emitted in Park Ridge that were attributable to aircraft from O'Hare. *OMP Final EIS*, p. I-38. The FAA stated in the EIS that the Park Ridge study concluded that "lessons learned from this study can now be used to design and implement a more comprehensive investigation that will ultimately provide a more detailed picture of the affect [sic] that air pollution from O'Hare International Airport has on the surrounding communities." *Id.* Ultimately, however, the FAA concluded that because the Park Ridge Study's results were simply "preliminary" and since it did not follow EPA's new AERMOD protocol, "it is not known if the results would be higher or lower than reported in the Park Ridge analysis." *Id.*, at I-39. Thus, Park Ridge's concerns about air quality were summarily dismissed by the FAA.

3. FAA Issues Its Record of Decision (ROD)

The FAA issued its Record of Decision (ROD) approving OMP on September 29, 2005. Pursuant to 49 U.S.C. § 46110, all challenges the FAA's findings in the EIS had to be filed within 60 days of the issuance of the ROD. To date, however, all of the legal challenges have been focused on stopping or slowing OMP, not on addressing the effect OMP is having on the surrounding communities. The sole legal challenge to the OMP EIS focused on the Religious Freedom Restoration Act and whether the relocation of two cemeteries called for by OMP would "substantially burden a person's exercise of religion." *Village of Bensenville v. FAA*, 457 F.3d 52, 60 (D.C. Cir. 2006). The U.S. Court of Appeals for the District of Columbia Circuit decided that the EIS and OMP did not violate RFRA. *Id.* Separately, Petitioners also challenged the City of Chicago's funding of the OMP through an increase in Passenger Facility Charges, which was

dismissed for lack of standing on the part of the petitioners. *St. John's United Church of Christ v. FAA*, 550 F.3d 1168 (D.C Cir. 2008).

II. Project Related Causes of Action

A. The National Environmental Policy Act (NEPA)

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, requires that federal agencies examine the environmental impact of any action they take. 42 U.S.C. § 4332. This usually takes the form of an Environmental Impact Statement (EIS) or an Environmental Assessment (EA). Commenting on the draft EIS and litigating its conclusions is one of the primary methods of stopping or slowing a federal project. However, the time for challenging EIS for OMP has long since passed, since the deadline for filing challenges to the FAA's ROD on OMP was 60 days after its issuance. *See*, 49 U.S.C. § 46110. But that does not mean that NEPA should not be considered as a possible cause of action. Instead, litigation could ensue after a request for a Supplemental Environmental Impact Statement has been made and rejected by the FAA. *See, Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

Federal agencies are required by NEPA regulations to draft a Supplemental Environmental Impact Statement if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c)(1). The critical questions in litigation have been what constitutes “substantial change” and what constitutes “significant new circumstances or information.” *See, e.g., Marsh*, 490 U.S. at 384. Obviously, since the environmental process is costly, federal

agencies will go to great lengths not to trip either one of those thresholds. Thus, in order for Park Ridge to make the statement that a supplemental EIS should be drafted it would need to make the case that there have been “substantial changes” to the project or, more likely, that “significant new circumstances or information” has come to light.

In order to prove that “significant new circumstances or information” have arisen, it may be necessary for Park Ridge to develop the information and evidence itself. In other words, Park Ridge may have to perform its own air quality and noise analysis to show that the conclusions in the studies and information contained in the OMP EIS have significantly changed. Once Park Ridge obtains information showing that the conclusions of the OMP EIS are no longer valid, then it would request that the FAA perform a supplemental EIS. Should the FAA then deny the request, Park Ridge could then have a basis to file a lawsuit under NEPA. It should be pointed out, however, that the FAA’s assessment of whether Park Ridge’s new studies constitute “significant new circumstances or information” would be subject to an “arbitrary and capricious” standard of judicial review. Thus, should Park Ridge file a lawsuit, it would have to show that the FAA’s action in denying the request for a supplemental EIS was “arbitrary and capricious” and without a reasonable basis, which is a particularly high standard to accomplish. *See, Marsh*, 490 U.S. at 360.

In addition, the NEPA regulations state that a federal agency “[m]ay also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so. 40 C.F.R. § 1502.9(c)(2). Barry Cooper, the FAA Regional Administrator for the Great Lakes Region, in a letter to Joel B. Pollak stated that the FAA “has no basis to initiate a supplemental EIS” for the OMP project because the EIS “anticipate[d] and analyze[d] the

impacts” about which Park Ridge is concerned. However, §1502.9(c)(2) gives the federal agency the ability to draft a supplemental EIS if it feels that it will serve the purposes of NEPA.

Section 4331 of title 42 of the U.S. Code outlines what the purposes of NEPA are:

It is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a). In other words, if the FAA were serious about allaying the fears that the noise and air quality levels in Park Ridge are not beyond what was anticipated in the EIS, then it could take upon itself to draft a supplemental EIS. The drawback to this approach, however, is that it is purely discretionary on the part of the federal agency. As such, there is little potential for a lawsuit, since the determination that the “purposes of the Act will be furthered” by drafting a supplemental EIS is solely within the discretion of the FAA.

With respect to challenging OMP on NEPA grounds, the best way forward would seem to be (1) request that the FAA supplement the OMP EIS because the “purposes of [NEPA] will be furthered;” (2) upon the FAA’s denial of that request, Park Ridge would then conduct noise and air quality analyses in Park Ridge, establishing how Park Ridge has been impacted in a manner that was not anticipated by the EIS; (3) after the completion of the analyses, request that the FAA supplement the OMP EIS based on “significant new circumstances or information; (4) also Park Ridge would renew its request that FAA for a supplemental EIS because the purposes of NEPA would be furthered; and (5) if the FAA denies all of these requests, then Park Ridge would file a lawsuit alleging violation of NEPA.

B. The Clean Air Act

The Clean Air Act requires that federal agencies, prior to commencing a project, assure that the project “conform[s] to an implementation plan after it has been approved or promulgated under section 7410” of the Clean Air Act. This is called a “conformity determination.” Because the Chicagoland area is “nonattainment” for ozone under the Clean Air Act, the Illinois Environmental Protection Agency developed a “State Implementation Plan” (which was approved by the USEPA) to bring the area into compliance. Before OMP was approved, the FAA must show that OMP will conform to that State Implementation Plan. Therefore, the ROD concludes that:

For these reasons, the FAA, in consultation with the IEPA and USEPA, has determined that the VOC and NO_x emissions [precursors to ozone] associated with all of the Build Alternatives and construction schedules for the proposed O’Hare Modernization Program improvements conform to the applicable SIP, and thus to the Clean Air Act. IEPA’s letter dated July 13, 2005 (Final EIS page J-345) provides that agency’s concurrence with FAA’s findings that the “airport’s emissions are accounted for in the 1-hour ozone attainment demonstration SIP for the Chicago region.”

OMP ROD, p. 59. While the Clean Air Act does not specify when the conformity determination must be performed, the usual practice is to make the determination prior to commencing the project. However, the Chicagoland area is now designated in the 8-hour ozone nonattainment area. <http://www.epa.gov/air/oaqps/greenbk/gncs.html#ILLINOIS>. Because of this fact, there may be an ongoing duty to update the Conformity Determination to show that OMP is in conformity with the 8-hour standard.

C. Conclusion

While there is potential for causes of action that would affect the OMP, and thereby prevent or reduce the noise over Park Ridge, the time for filing project related lawsuits has essentially passed. There are a couple of possible causes of action related to new information

that was not addressed in the EIS or the ROD, but FAA retains much discretion in deciding whether the new information is significant enough to warrant another study. In order to succeed on these causes of action, there would have to be “significant” evidence that the conclusions in the EIS were unfounded and that the noise and air quality levels in Park Ridge are higher than predicted by the EIS.

II. Common Law and Constitutional Causes of Action

Aside from possible project-related causes of action, property owners may seek damages for noise injury under two common law causes of action: trespass and nuisance. In addition, communities and landowners near airports have been successful in arguing that the Fifth Amendment of the U.S. Constitution (as well as various state constitutions) bars the taking of property without just compensation. This is called an “inverse condemnation” cause of action. In general, these causes of action are aimed reimbursing the landowners for the damage that airport noise has had their property, rather than preventing it. Although these causes of action are “traditional” tort actions, the interaction between the theories of trespass, nuisance and inverse condemnation and the field of aviation law is a tricky one that has developed its own jurisprudence. Other communities and individuals have had success in addressing airport noise with these causes of action.

A. Trespass

It has long been a precept of property law both in England and the United States that “*cujus est solum ejus est usque ad coelum et ad inferos*,” which roughly translates to mean that the owner of a piece of land owns everything above and below it to an indefinite extent. *Black’s Law Dictionary, Fifth Ed.*, (1979). Trespass constitutes an interference with that exclusive

possession of land and everything below and above it. *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993). It involves an unauthorized physical entry onto another's land. Such physical invasion need not involve entry by persons or tangible objects and may instead constitute such things as smoke, gasses, and odors. *Davis v. Georgia-Pacific Corp.*, 445 P.2d 481 (Or. 1968).

With respect to a potential trespass by an aircraft, the *Restatement (Second) of Torts* provides:

- (2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,
 - (a) it enters into the immediate reaches of the air space next to the land; and
 - (b) it interferes substantially with the other's use and enjoyment of his land.

Restatement (Second) of Torts § 159(2) (1965); see also, *Brenteson Wholesale, Inc. v. Arizona Public Service Co.*, 803 P.2d 930, 934 (Ariz. Ct. App. 1990). Thus, "traversing the airspace above another's land is not, in and of itself, a trespass; it is lawful unless done under circumstances that cause injury." *Pueblo of Sandia Chaves v. Smith*, 497 F.2d 1043, 1045 (10th Cir. 1974).

Trespass may be intentional or unintentional. If the defendant's action consists of an intentional trespass, harm and mistake are irrelevant, and typically nominal damages are recoverable (in addition to actual damages, where proven). See, e.g., *Crosby v. Chicago*, 298 N.E.2d 719 (Ill.App. 1973) and cases cited therein. Some courts have held that one with knowledge or reason to know of physical entry commits an intentional trespass. *McGregor v. Barton Sand & Gravel, Inc.*, 660 P.2d 175, 180 (Or. Ct. App. 1983); see also, *Furrer v. Talent*

Irrigation Dist., 258 Or. 494 (1970).

Recovery for an unintentional trespass may be had for actual harm suffered by recklessness, negligence, or an ultra-hazardous activity. For an unintentional trespass, nominal damages are not awarded, and the plaintiff must prove actual damages suffered. *Restatement (Second) of Torts*, § 165 (1965). The social value of the defendant's conduct is typically not considered in assessing compensatory damages, though it may be relevant on the issue of punitive damages. *Davis v. Georgia-Pacific Corp.*, 445 P.2d 481, 483 (Or. 1968).

Trespass with respect to airports has been used when ground damage is caused by aircraft, the *Restatement (Second) of Torts* provides:

If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft,

- (a) the operator of the aircraft is subject to liability for the harm, even though he had exercised the utmost care to prevent it, and
- (b) the owner of the aircraft is subject to similar liability if he has authorized or permitted the operation.

Restatement (Second) of Torts, § 520A (1977). Thus, the recent health studies showing the physical harm caused by aircraft noise would be beneficial in establishing a trespass cause of action. However, of the three common law and constitutional causes of action, trespass would seem to be the weakest.

B. Nuisance

The common law cause of action of nuisance has been used successfully in airport noise matters. Nuisance has been defined as an interference with the quiet use and enjoyment of land. *Beatty v. Washington Metropolitan Area Transit Authority*, 860 F.2d 1117, 1122 (D.C. Cir. 1988) (quoting *Restatement (Second) of Torts*, § 821D (1965); see also, *Am. Jur. 2d*,

“Nuisances,” §§ 1 *et seq.* (nuisance is “the substantial and unreasonable interference with the use and enjoyment of land”). For a plaintiff to recover, there need be no physical entry onto the land, but actual damages must be proven. In determining whether air travel over one’s property constitutes a nuisance, courts examine the purpose of the travel, whether it is conducted in a reasonable manner, and at such height as not to interfere unreasonably with a property owner’s use and enjoyment of his land. *Restatement (First) of Torts*, § 194 (1934), *Restatement (Second) of Torts*, § 159. “Reasonableness,” the heart of the nuisance analysis, is an objective standard that depends on the effect upon an ordinary habits and sensibilities. *Atkinson v. Bernard, Inc.*, 355 P.2d 229, 233 (Or. 1960).

There are two types of nuisances, public and private. A public nuisance is an unreasonable interference with rights common to the general public, particularly those rights involving public health, safety, peace, comfort, or convenience. *Restatement (Second) of Torts*, § 821B (1965). A governmental body may seek judicial relief against such a nuisance, though individuals may bring an action against a public nuisance where they have suffered harm, different than the harm suffered by the public generally. *Id.*, at 821C.

A private nuisance constitutes a nontrepassory invasion of the private use and enjoyment of land. It may be intentional and unreasonable (in that the gravity of the harm outweighs the utility of the conduct). *Id.*, at 826-28. It may also be negligent, reckless, or abnormally dangerous. *Id.*, at 822. Under nuisance (as opposed to trespass), courts are generally more willing to engage in a balancing approach (*Fisher v. Capital Transit Co.*, 246 F.2d 666 (D.C. Cir. 1957)), and focus on the reasonableness of one interest. *Atkinson v. Bernard, Inc.* 355 P.2d 229 (Ore, 1960). As one court observed, “the law of nuisance affords no rigid rule to be applied in

all instances. It is elastic. It undertakes to require only that which is fair and reasonable. . .”

Stevens v. Rockport Granite Co., 104 N.E. 371, 373 (Mass 1914); *Spur Industries Inc., v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972). In a nuisance case where the utility of the defendant’s conduct outweighs the gravity of the plaintiff’s harm, most courts will authorize damages but not an injunction. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). Some courts, however, have issued an injunction requiring that the nuisance be abated where damages will not adequately remedy the substantial and irreparable injury the plaintiff suffers. *Crushed Stone Co. v. Moore*, 369 P.2d 811 (Okla. 1962). Courts consider air transportation to have a high level of public utility. Under the federal Noise Control Act of 1972, courts have consistently preempted injunctive relief against airport noise. 42 U.S.C. §§ 4901-18 (1972); *see also*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 634, 633-34 (1973); *see also*, *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975). On the other hand, actions for damages have not been preempted. *Alevizos v. Metropolitan Airport Commission*, 216 N.W.2d 651 (Minn. 1974).

Applying these concepts to the issue of aircraft noise generates decidedly mixed results. Whether a court finds that noise generated from airport operations constitutes a nuisance often depends on whether the noise is incident to the ordinary and necessary use of the airport or the result of the improper and negligent operation of an airport. *Delta Air Corp. v. Kersey*, 20 S.E.2d 245 (1942); *Thrasher v. Atlanta*, 173 S.E. 817 (1934). Depending on a court’s analysis of factors such as excessive noise, vibration, frequency of overflights, altitude of aircraft, and the time of day flights are made, interference with the use and enjoyment of property may or may not be sufficient to establish liability for nuisance. *Greater Westchester Homeowners Association v.*

Los Angeles, 603 P.2d 1329 (Cal. 1979); *Delta Air Corp.* 20 S.E.2d at 245. Many courts also balance what they call the “equities and conveniences.” See, e.g., *Swetland v Curtiss Airports Corp.* 55 F2d 83 (6th Cir. 1932) (nuisance established); *Virginians for Dulles v Volpe*, 344 F Supp 573, (E.D.Va. 1972) (nuisance not established). These include the social utility of aviation, the legitimacy of aviation as a business, the distance of the airport from the owner’s property, and the overall impact of the noise on the property owner. See, e.g., *id.*, *Oberhaus v Alexander*, 274 N.E.2d 771 Ohio 1971); *Swetland v Curtiss Airports Corp.*, 55 F2d 201 (6th Cir. 1932) (homeowners were there first); *Corbett v Eastern Air Lines, Inc.*, 166 So 2d 196 (Fla.App.Dist. 1, 1962) (airport came first); *Louisville & Jefferson County Air Board v Porter*, 397 SW2d 146 (Ky., 1965) (airport came first); *Smithdeal v. American Air Lines, Inc.* 80 F.Supp. 233 (N.D. Tex., 1948) (perimeter of airport 2 to 3 miles from plaintiff’s home); *Vanderslice v. Shawn* 27 A.2d 87 (Del., 1942) (airport “remote” from plaintiff’s buildings); *Coxsey v Hallaby* 231 F.Supp. 978 (W.D. Okla. 1964) (no “significant” harm to property or person); *Phoenix v. Harlan*, 255 P.2d 609 (Ariz. 1953) (trifling annoyances and inconveniences not recognized by the law as nuisances). If the court determines airport noise to be a nuisance, its determination of the appropriate remedy is based on these same equities and considerations. As mentioned above, courts typically refuse to grant injunctions restricting airport operations. Instead, courts opt for damages or limited injunctive remedies which allow airports to continue operations with changes to mitigate the nuisance.

In the past year, there has been some discussion of federal cause of action for nuisance. In *Connecticut v. American Electric Power*, 582 F.3d 309, (2nd Cir. 2009) the U.S. Court of Appeals for the Second Circuit held that power companies can be sued by states and land trusts

for “public nuisance” for their emissions of greenhouse gases under federal common law. While the application of this decision to a theory of “public nuisance” created by airport noise may have some pitfalls, it is a theory that may have some merit.

C. Inverse Condemnation

Inverse condemnation is a “cause of action against governmental defendant to recover the value of property which has been taken in fact by [the governmental defendant], even though no formal exercise of the power of eminent domain has been attempted by the taking agency.” *United States v. Clarke*, 455 U.S. 253, 257 (1980). Property owners may allege that their property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. *United States v. Causby*, 328 U.S. 256 (1946). The Fifth Amendment of the U.S. Constitution requires compensation for the “taking” of private property: “nor shall private property be taken for public use, without just compensation.” *U.S. Constitution*, amendment V. This constitutional guarantee also applies to state action through the Fourteenth Amendment. In addition, nearly all state constitutions, including Illinois have similar provisions regarding takings. *See, Illinois Constitution*, Section 15, Right of Eminent Domain, (“Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law”).

Takings claims are analyzed differently depending on whether they involve a physical taking or regulatory taking. *See, Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978). Actual physical takings of property constitute the most obvious types of governmental action that support claims of inverse condemnation. When the government authorizes either a

continuing process of physical events or an isolated event or activity that denies an owner of the use and enjoyment of his or her property, a taking occurs and the owner is entitled to compensation.

It has long been established in American jurisprudence that flying an aircraft directly over private property can constitute a “taking,” which requires just compensation under the Fifth or Fourteenth Amendments if the overflight noise and vibration significantly limits or decreases the land owners’ property utility and property value. *Causby*, 328 U.S. 256. The first major case to address the issue of physical invasion of property as it relates to aircraft noise pollution was *United States v. Causby*, 328 U.S. 256 (1946). At that time, Congress had put navigable air space (“airspace above the minimum safe altitudes of flight prescribed” by the Civil Aeronautics Board) in the public domain. *Id.*, at 260. In *Causby*, the U.S. Supreme Court concluded that continued, low-altitude military flights destroying the plaintiff’s poultry business constituted a “taking,” thus requiring compensation under the Fifth Amendment. However, the Court also concluded that comprehensive federal regulation made the airspace a public highway above a certain altitude for which no complaint could succeed on trespass grounds. *Id.*, at 264-65; 49 U.S.C. 40102(30) (2010). Noting the conflicting rights of landowners to the air space in the immediate reaches of their land and the need of overflying aircraft for access, Professors Prosser and Keeton urged, “A privilege to use air space for overflight of any height could be recognized so long as the exercise of that privilege did not unreasonably interfere with the use and enjoyment of the land surface. *Prosser & Keeton on the Law of Torts*, 81 (5th Ed. 1984). Since the Supreme Court’s ruling in *Causby*, plaintiffs have utilized inverse condemnation frequently to obtain redress for diminution in property values caused by aircraft noise.

After *Causby*, Congress redefined navigable airspace to mean, “airspace above the minimum altitudes of flight prescribed by regulations issued . . . [including] airspace needed to insure safety in take-off and landing of aircraft.” 49 U.S.C. 40102. By 1962, when the Supreme Court again addressed the issue, minimum safe altitudes were defined by regulation as heights of 500 or 1000 feet, “except where necessary for take-off or landing.” 14 C.F.R. § 91.119 (2010). Nonetheless, the court held that these provisions did not preempt inverse condemnation. *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962).

In *Griggs*, the U.S. Supreme Court held Allegheny County, the proprietor of Greater Pittsburgh Airport, liable for the unconstitutional taking of the plaintiff’s property as a result of the noise and vibration caused by low-flying aircraft from the airport. According to the Court, the local authority was liable because it decided where the airport was built, what runways were needed (and thereby, aircraft flight paths), the direction and length of the runways, and what land and navigation easements were necessary. *Id.*, at 89. The airport had taken an avigation easement over the plaintiff’s property via condemnation, and therefore owed him just compensation. *Id.* In addition, the local authority held status as promoter, lessor, and operator of the airport. The Supreme Court did find, however, that although the federal government approved the plans for the airport and established federal regulations concerning airport construction, the “Federal Government [has] taken nothing,” and therefore was not liable. Likewise, the airlines were absolved of liability. The Court decided that the airlines utilizing the airport were not responsible for damages due the plaintiffs as the airlines were simply complying with the rules and regulations of the Civil Aeronautics Administration (the predecessor of the FAA). *See also, Young v. DHL Airlines*, 191 F.3d 454 (6th Cir. 1999).

In the 60 years since *Causby*, federal courts have consistently held that private property may be converted to public use by the operation of aircraft. *Argent v. United States*, 124 F.3d 1277, 1281 (Fed. Cir. 1997). Recovery, however, has generally been limited to instances where aircraft usually flying at low altitudes have passed directly over the plaintiff's property. Recovery, on the other hand, has generally been denied where the complaint is only of noise from routine aircraft operations not directly passing overhead. *Id.*, at 1284. Additionally, the courts may not exact state common law remedies against an airport operator on certain issues governed by federal law. *Bieneman v. City of Chicago*, 864 F.2d 463, 473 (7th Cir. 1988).

Thus, although inverse condemnation holds promise as a cause of action for Park Ridge, *who* exactly is liable is another matter. Liability for damages stemming from noise pollution is placed on airport proprietors, yet responsibility for noise abatement resides among federal, state, and local governments, air carriers, and airport proprietors. This "single liability/shared responsibility" situation has been criticized because it "promotes, rather than discourages, confusion." Therefore, the airport proprietor is often left alone to mitigate noise, negotiate with local landowners, or pay for the increased costs associated with the spillover effects of aviation activity.

Applying inverse condemnation to Park Ridge's situation is a little different than many inverse condemnation cases that have been litigated. First, the runways in question are new runways, not expansions of existing runways. Second, because they are new runways, the flight paths are over areas that previously did not experience overflights. Because of those two factors it may be easier to show that there was a governmental taking of property when airspace above Park Ridge was taken without just compensation.

IV. Ordinance Regarding Airport Noise

- A. Despite the fact that courts have consistently ruled that state and local governments are pre-empted from passing ordinances restricting the movement of aircraft through the airspace, Park Ridge may be able to pass an ordinance that would affect airport noise.**

In addition to judicial measures, state and local governments have tried implementing statutes and ordinances designed to alleviate airport noise pollution, usually by restricting aircraft movement into or around airports. However, the courts have consistently ruled that attempts by local or state governments to restrict the movement of aircraft through the airspace is pre-empted by federal law. Despite this fact, there may be a way to draft an ordinance affecting airport noise that would pass constitutional muster.

The Supremacy Clause in the U.S. Constitution states that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the united States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Courts have construed this provision to apply in three circumstances:

1. Where Congress has expressly pre-empted state law in the statute;
2. Where Congress may have implied pre-emption if Congress intended to “occupy the field,” that is, where federal law is so pervasive that states have no room to supplement the law; and
3. Where state law hinders the execution of the purposes and objectives of Congress.

The pre-emption doctrine has restricted the ability of local and state agencies to pass laws

and ordinances governing airport operations and controlling airport noise pollution. The issue typically arises when a state or local agency attempts to restrict the types of planes using an airport, or impose curfews on times that planes may fly into airports in an effort to control the noise.

The seminal case in this regard is *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973). In that case, the U.S. Supreme Court, in an opinion by Justice William O. Douglas, affirmed a decision by the Ninth Circuit invalidating a noise control ordinance imposing a curfew on the grounds that federal law pre-empted the local ordinance. A majority of the Court held that local governments are pre-empted by federal statute from enacting regulations through the exercise of their municipal police powers that directly affect interstate commerce. Justice Douglas noted:

If we were to uphold the Burbank ordinance and 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 in scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.

Burbank, 411 U.S. at 639. The Court concluded that the legislative objectives in the Noise Control Act of 1972 left no room for local control of the movement of aircraft. The FAA's effort to balance safety and efficiency in the air transportation system required a "uniform and exclusive" system of federal regulation. Justice Rehnquist, in a dissent, argued that because noise regulation was traditionally an area of local concern, federal statutes should not supersede local police powers unless Congress expressed a "clear and manifest purpose" for federal law to pre-empt local ordinances. *Id.*, at 643. Justice Rehnquist noted that "control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of

regulation well within the traditional scope of police power possessed by states and local governing bodies.” *Id.* Justice Rehnquist concluded that if Congress intended for federal statutes to pre-empt a valid exercise of police power in the form of noise control ordinances, Congress would have expressly provided for this pre-emption. *Id.*

The Sixth Circuit reinterpreted the *Burbank* decision in *Gustafson v. Lake Angelus*, 76 F.3d 778 (6th Cir. 1996). The plaintiff brought suit challenging city ordinances that prohibited the operation of seaplanes on the surface of Lake Angelus. The city asserted that the ordinances were intended to protect the public health, safety and welfare of its citizens, and were designed to minimize the destruction of property values and the deleterious effects of noise and pollution on the use and enjoyment of land. The plaintiff argued that Congress promulgated a scheme of federal regulation so pervasive that the court could reasonably infer that Congress did not intend for the states to supplement or change the law.

The district court agreed, and applying *Burbank*'s rationale, held that the Federal Aviation Act expressly declared that the United States exercised exclusive national sovereignty over airspace, and that regulations promulgated pursuant to the Act comprehensively governed the aircraft operations at issue in *Gustafson*. *Gustafson*, 76 F.3d at 783. On appeal, the Sixth Circuit stated that although federal regulations clearly established that noise regulation is a field completely occupied by the federal government, no such scheme of federal regulation existed with respect to ordinances governing aircraft operations on the ground. *Id.* The court noted that the Act expressly exempted local land use planning and zoning from federal regulations governing ground-based operations. The court upheld the autonomy of local municipalities to regulate airport facilities through the exercise of traditional local police powers in the absence of

express congressional intent to pre-empt local zoning.

In reaching its conclusion, the court distinguished between federal regulation of airspace and local regulation of the surface, in part relying on Justice Rehnquist's explanation that local governments could extend their police powers to any ground-based activity. The regulation of land and water use, the issuance of construction permits, or other "ground space" control thus conformed to *Burbank*'s recognition that Congress only intended to regulate aircraft "in flight." *Gustafson* suggests that local governing bodies have exclusive control over air transportation up until the moment that the plane lifts off of the ground and enters airspace. This interpretation hampers the ability of local regulating bodies to plan adequately on the basis of overall noise impacts. *Gustafson* seems to indicate that although local planning bodies can regulate every aspect of land development, the same governing bodies must stop regulating the moment a plane enters airspace, although the noise continues to impact the land.

Burbank and *Gustafson* also contradict other case authority dealing with inverse condemnation. As seen above, under these causes of action, some courts have held that plaintiffs may sue when noise adversely impacts their property, using Fifth and Fourteenth Amendment claims of "inverse condemnation." These decisions are difficult to reconcile with *Gustafson*'s rationale that federal regulations, with respect to noise, conclusively pre-empt local regulations governing land use around airports that affect interstate commerce. *Gustafson*'s rationale suggests that local municipalities cannot minimize the risk of loss to property owners by reducing the external effects of jet engine noise. But it does not address the growing body of evidence that aircraft noise is harmful to communities' physical health as well. Instead, courts must look to the federal regulatory scheme to address the varying impacts of noise. Such

uniformity is difficult when the noise impacts vary by the type of engine, frequency of airfield operations, characterization of flights as military or civilian, and the extent to which local landowners acquiesce to operations upon adequate notice. A completely pre-emptive federal regulatory scheme also prevents local airport operators and government agencies from minimizing the risk of litigation by voluntarily adopting noise control ordinances.

Although the *Gustafson* decision restores some local control, Justice Rehnquist's dissent goes further by not limiting the exercise of police power solely to ground-based activity. Justice Rehnquist instead stated that the legislative history of the 1968 noise control amendment to the Federal Aviation Act, and the subsequent 1972 Noise Control Act, provided for local land use planning as a means of controlling the noise impacts on communities surrounding airports. *Burbank*, 411 U.S. at 643. Justice Rehnquist further noted that the House Committee on Interstate and Foreign Commerce specifically advocated the cooperation of state and local governments in achieving noise control. *Id.* Justice Rehnquist concluded from the legislative history that Congress intended only that the FAA regulate the “source” of noise, specifically the “mechanical and structural aspects of jet and turbine aircraft design.” *Id.*, at 650. The statute did not, however, limit the states from “enacting every type of measure, which might have the effect of reducing aircraft noise . . .” *Id.*, at 650-651. Justice Rehnquist's dissent suggests that so long as local or state governments do not regulate aircraft noise emissions directly, for example by requiring aircraft to meet certain noise standards or requiring certain technical modifications to jet engine design, they are free to regulate noise for the common benefit.

Justice Rehnquist's analysis more reasonably interprets local police power over land use, because it reconciles the importance of federal regulation of noise at its source with local

regulation of noise impacts on the ground. Justice Rehnquist recognized that “control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of police power possessed by States and local governing bodies.” *Id.*, at 643. Justice Rehnquist also summarized the “demanding and vexing” problem of balancing the needs of air transportation with the needs of communities “frequently burdened [by noise] to the point where they can neither enjoy nor reasonably use their land because of . . . aircraft operations which create the unwanted noise.” *Id.*, at 647. Furthermore, Justice Rehnquist pointed out that under the proprietor exception in *Burbank*, a local governing body would have the authority to permanently close down air facilities, or prevent the expansion of an airport within its territory. *Id.*, at 653. Justice Rehnquist concluded that if local police powers can extend to these actions, far less intrusive noise control ordinances would be appropriate under the same standard. Justice Rehnquist's opinion suggests that local communities have a valid interest in preserving the rights of local property owners against excess noise.

It should also be pointed out the composition of the Supreme Court has significantly changed since *Burbank*, toward a court that may be loath to give the federal government even more authority over state and local affairs. The current court may reinterpret the holding in *Burbank* more in line with Justice Rehnquist’s dissent such that a carefully drawn local regulation to preserve the rights and health of local citizens would not be pre-empted.

Although the matter was decided in the context of applying the *Burbank* proprietor exception to the federal preemption doctrine, which does not directly apply to Park Ridge, the Second Circuit concluded that the City of New York could impose curfews on airport operations for the purpose of restricting noise. *National Helicopter Corp. v. City of New York*, 137 F.3d 81,

92 (2nd Cir. 1998). In *National Helicopter*, the court noted that the Airline Deregulation Act of 1978 specifically preserved the ability of local and state government agencies to carry out their proprietary powers and rights under a cooperative scheme with the federal government. *National Helicopter*, 137 F.3d at 88. Local authorities could exercise these powers without restriction, so long as they did not promulgate unreasonable, arbitrary or discriminatory regulations, or interfere with pricing, routes, or air carrier service. *National Helicopter*, 137 F.3d at 88-89; *see also* 49 U.S.C. § 41713(b)(1).

B. Applying the Case Law To Park Ridge's Situation

The lesson to be learned from the discussion of the case law regarding local ordinances is that it may behoove Park Ridge to draft a carefully worded ordinance that does not restrict the movement of aircraft through the airspace, but does address Park Ridge's legitimate interest in protecting not only the property rights of itself and its citizens, but also the health and welfare of its citizens. For example, Park Ridge could pass an ordinance that restricts all single-noise events to 110 decibels or below within the city limits without a permit based on health of the citizens of Park Ridge. *See, OMP EIS*, Appendix F, Attachment 6, p. A-3. Prior to passing the ordinance, however, a study should be done concerning the noise levels within Park Ridge and research should be done to back up claims of health effects of aircraft noise. The principle would be that Park Ridge has the police power to regulate noise on the ground that affects the health and well-being of its citizens. The ordinance would be drafted with an eye toward the case law on local ordinances and air transportation attempting to fit it in under the rubric of Justice Rehnquist's dissent in *Burbank*.

After the passage and implementation of the ordinance, the FAA, City of Chicago and the

airlines would have to make a choice whether or not to challenge Park Ridge's ordinance. If the FAA, City of Chicago and/or the airlines do not sue Park Ridge, then Park Ridge has its remedy in place for controlling noise within its city limits. If the FAA, City of Chicago and/or the airlines do challenge the ordinance on the basis that it is pre-empted by federal law, then Park Ridge could counterclaim against them for nuisance, trespass and inverse condemnation.

V. Summary

Park Ridge has several legal options regarding the aircraft noise created by the O'Hare Modernization Program. With respect to limiting OMP itself, after performing studies regarding the noise and air quality that Park Ridge is experiencing, Park Ridge may have grounds for a supplemental EIS. It may also have grounds for a supplemental conformity determination based on the 8-hour ozone standard. These causes of action are based on discretionary actions by the FAA. Therefore, Park Ridge would have to show that the FAA acted "arbitrarily and capriciously" in denying a request for a supplemental EIS and/or supplemental conformity determination based on 8-hour ozone standard. Standing alone, the probability of success is not very high, even with significant evidence supporting noise in excess of the levels predicted by the EIS. However, if Park Ridge were successful with these causes of action, it would be in a better position to obtain the relief it desires: a curfew on the North Runway and/or a change in the flight path that would not fly directly above Park Ridge residences and schools.

Park Ridge would have much better chance of recovery using one or any combination of the common law and constitutional remedies, including inverse condemnation. These are the traditional methods of obtaining relief from aircraft noise. The problem with these causes of action is that, in general, injunctive relief is not available – although it might be obtained in a

settlement. If Park Ridge were successful in its lawsuit, it probably would not be able to receive a judgment stopping aircraft from flying over Park Ridge, or establishing a curfew on the North Runway. Instead, Park Ridge would be able to obtain money damages for the losses created by the nuisance and the loss of property value created by the governmental taking.

Finally, Park Ridge may want to consider passing an ordinance that prohibits single noise event in excess of a certain decibel level. While local ordinances that attempt to restrict the movement of aircraft through the airspace have been pre-empted by federal law, if the ordinance were carefully worded to avoid restricting aircraft movement and concentrated on ameliorating the effects of loud and continuous noises on the ground, it may pass muster. Park Ridge could even request input from the FAA, the City of Chicago and the airlines in an effort to avoid litigation and resolve the serious issues of aircraft noise in Park Ridge. In any case, if the ordinance were challenged by the FAA, City of Chicago, and/or the airlines, Park Ridge would then be in a position to counterclaim for trespass, nuisance and/or inverse condemnation.