



Semi-Annual Airport Law Digest - 2020 Mid-Year Review

07.07.20

In March, the COVID-19 pandemic began to envelope the United States and send shockwaves through American everyday life. Airports, airlines, and the travel industry as a whole was and continues to be particularly hard-hit. Passenger numbers have begun to inch up at airports across the country, but the pandemic continues to disrupt the system on a daily basis as new hotspots develop, and health restrictions ebb and flow in different states and local communities. As we highlighted in our May 2020 Airport Law Alert, FAA and airport sponsors continue to grapple with necessary health measures, grant assurance compliance issues, and making sound financial decisions in this time of unprecedented uncertainty.

While COVID-19 is unquestionably the most important development of the last six months, there have been other court decisions, guidance updates, and policy changes affecting airports. This Digest is a summary of the important developments in airport law in the first six months of 2020, including: a list of principal cases decided; new DOT and FAA rules, policies, and guidance; and reports, studies, and articles of particular interest to airport legal professionals. Some of these, including proposed new NEPA regulations, are highlighted in more depth below. We have attempted to provide links to publicly available documents, and most other documents are available via subscription services such as Westlaw or LexisNexis. To ensure that the important regular news items are not contaminated, we have visually quarantined all COVID-19 materials at the end of this Digest.

We hope you find this Digest useful in your efforts to remain current in the always-evolving legal and regulatory framework that governs airports. If you have questions about any of the materials in this Digest, please contact editor Nicholas M. Clabbers or any other Kaplan Kirsch & Rockwell attorney who normally represents you.

LITIGATION (In Reverse Chronological Order)

FEDERAL AND SELECT STATE COURT DECISIONS

NEPA and Judicial Review. *Howard Cty. v. FAA*, No. 19-1062 (4th Cir. July 1, 2020) (unpublished) (rejecting petition for review of FAA approval of EIS for cargo improvements at Baltimore-Washington International Thurgood Marshall Airport and finding that petitioners had filed too late, but noting that under specific circumstances, state agency could operate as FAA's agent with respect to notice of decision).

Car Rental and TNCs. *Turo, Inc. v. City of Los Angeles*, No. 18-cv-06055 (C.D. Cal. June 19, 2020) (granting preliminary injunction against unpermitted car-sharing service at Los Angeles International Airport and finding that the City was likely to succeed on its claims under California trespass and municipal airport business licensing laws).

Takings. *Riser, et al. v. City of Chicago*, 2020 IL App (1st) 190143-U (June 9, 2020) (in case concerning alleged aircraft overflight takings claim, affirming trial court grant of summary judgment to City of Chicago on statute of limitations grounds and holding that statute began to run upon the opening of a new runway).

Immigration and Customs Enforcement. *United States v. King Cty.*, 2020 U.S. Dist. LEXIS 92512 (W.D. Wash. May 27, 2020) (denying motion for judgment on the pleadings and proceeding to discovery phase).



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where United States brought challenge to local government executive order requiring airport contracts to contain a prohibition on providing services to aircraft involved in the deportation of immigrant detainees).

Takings. *Taylor v. United States*, 2020 U.S. App. LEXIS 15565 (Fed. Cir. May 15, 2020) (dismissing complaint alleging regulatory taking, where plaintiff claimed Air Force employee made statements to wind developer contract partner that FAA would likely not issue a No Hazard Determination and developer subsequently elected to terminate the contract).

National Parks and Overflights. *In Re: Public Employees for Env'tl Responsibility*, 957 F.3d 267 (D.C. Cir. May 1, 2020) (granting writ of mandamus directing FAA and NPS to comply with Air Tour Management Act of 2000, which required agencies to develop air tour management plans for flights over National Parks).

Ridesharing. *Arizona v. City of Phoenix*, No. CV-20-0019-SA (Ariz. Apr. 2, 2020), en banc (order without opinion holding that City's assessment of fees on ridesharing companies at Phoenix Sky Harbor Airport did not violate the Arizona Constitution).

Essential Air Service. *Bd. of Cty. Comm'rs of Washington Cty. v. United States DOT*, 955 F.3d 96 (D.C. Cir. Apr. 7, 2020) (rejecting petition for review of DOT decision to remove Hagerstown Regional Airport from Essential Air Service program, finding that it was not arbitrary and capricious because the airport did not meet the enplanement requirement).

Preemption. *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65 (2d Cir. July 9, 2019) (holding that state statute limiting length of runway was preempted by federal safety standards), cert. denied 2020 U.S. LEXIS 1705 (Mar. 23, 2020).

Metroplex/NextGen. *Maryland v. FAA*, 952 F.3d 288 (D.C. Cir. Mar. 10, 2020) (dismissing as untimely petition for review of FAA implementation of new approaches at Washington National Airport).

Car Sharing Programs. *Mass. Port Auth. v. Turo, Inc.*, Civ. Action No. 19-1773 (Mass. Sup. Ct. Jan. 22, 2020) (granting preliminary injunction against car sharing service, which sponsor alleges is illegally operating at airport without a car rental permit and trespassing at airport, among other claims).

Zoning and Hazards. *Northeast Pa. SMSA LP v. Smithfield Twp. Bd. of Supervisors*, 2020 U.S. Dist. LEXIS 7096 (M.D. Pa. Jan. 15, 2020) (where lessee sought to construct a cell tower in the vicinity of an airport, FAA Determination of No Hazard to Air Navigation was sufficient evidence to support lessee's contention that cell tower would not endanger operations at the airport or violate local ordinance).

Standing and Airport Closure. *Rosen v. United States Gov't*, 2020 U.S. App. LEXIS 558 (9th Cir. Jan. 3, 2020) (unpublished) (rejecting pro se pilot's third-party challenge to settlement agreement between the City of Santa Monica and the United States concerning eventual closure of Santa Monica Airport).

PENDING CASES

Environmental Review. *Ctr. for Community Action & Env'tl Justice v. FAA*, No. 20-70272 (9th Cir. petition filed Jan. 29, 2020) (petition for review of FAA approval of NEPA Finding of No Significant Impact associated with proposed air cargo facility at San Bernardino International Airport).

Slots. *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, Case. No. 19-1248 (D.C. Cir. petition for review filed Nov. 25, 2019) (petition for review challenging FAA decision not to immediately allow new flights at Newark Liberty International Airport (EWR) following Southwest Airlines' cessation of flights from EWR).

Drones. *Nat'l Press Photographers Assoc. v. McCraw*, No. 1:19-cv-00946 (W.D. Tex. complaint filed Sept 26, 2019) (challenging state law prohibition on certain unmanned aircraft flights).



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Metroplex/Next Gen.

City of Los Angeles v. FAA, No. 19-73164 (9th Cir. petition filed Dec. 12, 2019) (petition for review of FAA decision to allow flight tracks for departing aircraft at Hollywood Burbank Airport to shift following Metroplex implementation).

City of Los Angeles v. Elwell, No. 19-71581 (9th Cir. briefing on motion for summary disposition concluded June 26, 2020) (petition for review of FAA decisions setting flight procedures at Los Angeles International Airport).

Howard Cty. v. FAA, No. 18-2360 (4th Cir. supp. app'x filed Aug. 1, 2019) (challenging flight procedures at Baltimore-Washington International Thurgood Marshall Airport).

Maryland v. FAA, No. 18-1302 (D.C. Cir. case in abeyance pending FAA reconsideration) (petition for review of FAA decision denying administrative petition for supplemental environmental assessment concerning DC Metroplex and BWI).

ADMINISTRATIVE DECISIONS

Economic Nondiscrimination. Resort Aviation Services, Inc. v. Kootenai Cty., FAA Docket No. 16-20-01, Order of the Director (Apr. 30, 2020) (granting motion to dismiss FBO complaint alleging violations of Grant Assurances 22 and 23 where sponsor granted lease agreement to second FBO and withdrew RFP).

FEDERAL LEGISLATION

National Defense Authorization Act for Fiscal Year 2020, Pub. Law No. 116-92 (Dec. 20, 2019).

FEDERAL RULES, ORDERS, AND GUIDANCE (In Reverse Chronological Order)

THE WHITE HOUSE

Executive Order No. 13927, Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities (June 4, 2020).

DEPARTMENT OF TRANSPORTATION AND FAA ORDERS, POLICIES, AND ADVISORY CIRCULARS

Revised Grant Assurances, FAA Airport Sponsor Assurances (June 4, 2020).

Report to Congress, FAA Reauthorization Act of 2018 Sections 188 and 173 (Apr. 14, 2020) (study regarding day-night average sound levels).

Notice of Proposed Rulemaking, Noise Certification of Supersonic Airplanes, 85 Fed. Reg. 20,431 (Apr. 13, 2020).

Notice of Modification, Airport Improvement Program (AIP) Grant Assurances, 85 Fed. Reg. 12,048 (Feb. 28, 2020) (comment period expired Mar. 30, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-06, Environmental and Noise (Feb. 27, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-05, ZEV, VALE, and Energy Efficiency Programs (Feb. 27, 2020).



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Reauthorization Program Guidance Letter (R-PGL) 19-03, Airport Types and Eligibility (Feb. 27, 2020).

Part 139 Cert Alert No. 20-01, Required Training for Vehicle Operators Prior to Accessing the Movement Area (Feb. 25, 2020).

Advisory Circular No. 150/5200-33C, Hazardous Wildlife Attractants on or Near Airports (Feb. 21, 2020).

Notice of Proposed Rulemaking, Traveling by Air with Service Animals, 85 Fed. Reg. 6448 (Feb. 5, 2020) (comment period expired Apr. 6, 2020).

Memorandum PFC 73-20, Streamlined Procedures for Passenger Facility Charge (PFC) Authorizations at Small-, Medium-, and Large-Hub Airports (Jan. 22, 2020).

Reauthorization Program Guidance Letter (R-PGL) 19-04, Pilot Program Eligibility (Jan. 22, 2020).

Final Rule, Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71,714 (Dec. 27, 2019) (eff. Jan. 27, 2020).

DEPARTMENT OF TREASURY

Final Rule, Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 3158 (Jan. 17, 2020) (includes specific provisions concerning airports).

DEPARTMENT OF JUSTICE

FBI Private Industry Notification No. 20200612-001, Unattributed Cyber Actors Register Domains Spoofing Legitimate Airport Websites as a Possible Precursor to Future Operational Activity (June 12, 2020).

Memorandum, Guidance Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems (Apr. 13, 2020).

COUNCIL ON ENVIRONMENTAL QUALITY

Notice of Proposed Rulemaking, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020) (comment period expired Mar. 10, 2020).

REPORTS, STUDIES, ARTICLES, & OTHER PUBLICATIONS (In Reverse Chronological Order)

U.S. DEPARTMENT OF TRANSPORTATION

Office of Inspector General, Report No. EC2020036, Changes in Airline Service Differ Significantly for Smaller Communities, but Limited Data on Ancillary Fees Hinders Further Analysis (May 27, 2020).

Office of Inspector General, Report No. AV2020028, Contract Towers Are More Cost Effective Than Comparable FAA Towers and Have Similar Safety Records (Apr. 28, 2020).

Office of Inspector General, Report No. IT2020027, FAA Lacks Sufficient Security Controls and Contingency Planning for Its DroneZone System (Apr. 15, 2020).

FAA, Response Letter to Quiet Skies Caucus (January 24, 2020).



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U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Report No. GAO-20-275, TSA Could Strengthen Its Insider Threat Program by Developing a Strategic Plan and Performance Goals (Feb. 2020).

CONGRESSIONAL RESEARCH SERVICE

Report No. IF11550, Protecting Against Rogue Drones (May 15, 2020).

Report No. IF11420, Aircraft Noise and Air Traffic Control Modernization (Jan. 27, 2020).

TRANSPORTATION RESEARCH BOARD, AIRPORT COOPERATIVE RESEARCH PROGRAM

Research Reports

Research Report 216: Guidebook for Assessing Collaborative Planning Efforts Among Airport and Public Planning Agencies (Apr. 15, 2020).

Research Report 215: Transportation Network Companies (TNCs): Impacts to Airport Revenues and Operations—Reference Guide (Mar. 31, 2020).

Research Report 218: Building and Maintaining Air Service Through Incentive Programs (Mar. 30, 2020).

Research Report 211: Guidance for Using the Interactive Tool for Understanding NEPA at General Aviation Airports (March 9, 2020).

Research Report 213: Estimating Market Value and Establishing Market Rent at Small Airports (Feb. 7, 2020).

Research Report 220: Guidebook for Developing a Zero- or Low-Emissions Roadmap at Airports (Jan. 7, 2020).

Synthesis Reports

Synthesis 106: Airport Risk Identification and Prioritization Practices (Mar. 3, 2020).

Legal Research Digest

Legal Research Digest 38: Legal Issues Related to Large-Scale Airport Construction Projects (Feb. 14, 2020).

Web-Only Documents

Web-Only Document 46: Recovering International Recyclables from In-Flight Service (May 18, 2020).

Web-Only Document 45: Airport Environmental Research Roadmap Narrative Report (Feb. 18, 2020).

OTHER INSTITUTIONAL AUTHORS

National Cooperative Highway Research Program

Research Report 938: Incorporating the Costs and Benefits of Adaptation Measures in Preparation for Extreme Weather Events and Climate Change Guidebook (March 23, 2020).

Airport Consultants Council (ACC)

ACC Report, Capital Development at US Airports (March 5, 2020)



COVID-19 MATERIALS

U.S. Department of Transportation, Runway to Recovery: The United States Framework for Airlines and Airports to Mitigate the Public Health Risks of Coronavirus (July 2020).

Airports Council International – North America, COVID-19 Recovery Recommendations (June 2020).

FAA, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations (updated May 29, 2020).

FAA, CARES Act Airport Grants – Frequently Asked Questions (updated May 29, 2020).

Part 139 Cert Alert No. 20-03, Notice to Airmen (NOTAM) Examples when Closing Runway(s) and/or Taxiway(s) to Temporarily Park Aircraft (May 5, 2020).

United States Department of Transportation, Docket DOT-OST-2020-0037, Final Order Regarding Continuation of Certain Air Service (Apr. 7, 2020).

FAA, Considerations for State, Local, and Territorial COVID-19 Restrictions That Impact Air Transportation (Mar. 28, 2020).

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