

AIRPORT LAW ALERT

DECEMBER 2008

UPCOMING AIRPORT

LAW ALERT: The next issue of the Airport Law Alert will be devoted to the pending transition in senior DOT and FAA officials, as well as the continued focus on developments in airport law. For up-to-date information on developments in airport law, visit the Airport Law News page on our website, www.airportattorneys.com.

THE YEAR IN REVIEW

Kaplan Kirsch and Rockwell devotes this Airport Law Alert to a review of the major developments in airport law that occurred in 2008. The following is a brief summary of federal court decisions; DOT and FAA decisions; regulations and guidance; and reports, studies and articles issued in 2008. Following these summaries is an index of the decisions, rules and publications.

Federal Courts Remain Active in Airport Law But Break No New Ground in 2008 – This year was a typically busy year at the federal district and appeals courts on airport legal issues. In a relatively thin year for environmental cases, courts upheld FAA's decision authorizing airfield improvements at Boston Logan International Airport; the FAA's decision not to conduct environmental review for airspace changes at Boston-Logan; and the U.S. Army Corps of Engineers' issuance of permits for a new airport in Panama City, Florida. In two cases involving preemption claims, courts found that a state Passenger of Bill of Rights was preempted, and that local regulation of a runway safety area construction project also was preempted. Courts upheld two FAA decisions related to grant assurance compliance, but found that a third FAA decision lacked sufficient justification. In another rejection of FAA decision-making, a court held that the FAA erred in declaring that a proposed wind farm near a planned airport would not pose a hazard to air navigation. Courts also confirmed long-standing legal principles on such subjects as airport sponsor immunity from anti-trust claims and the lack of a private right of action under the Air Carrier Access Act.

Several Important Cases to be Resolved in 2009 – 2009 promises to be an equally active year, as there are several cases pending before the U.S. Court of Appeals, some of which have been fully briefed and argued. These cases include challenges to: FAA's changes in departure procedures at Las Vegas McCarran International Airport; FAA's approval of the replacement Panama City Airport; FAA's airspace redesign in New York, New Jersey and Philadelphia; FAA's issuance of a cease and desist order to the City of Santa Monica; DOT's decision regarding rates and charges at Los Angeles International Airport; DOT's amended policy on rates and charges; DOT's proposed slot auction at Newark Liberty International, JFK International and LaGuardia Airports; and DOT's rejection of a fee on aircraft operations imposed by a nonsponsoring local government.



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FAA Continues Course on Grant Assurance Compliance – The FAA published nine decisions in 2008 under FAR Part 16 (two final orders and seven Director’s Determinations) regarding grant assurance compliance. As is typical, the FAA concluded in most of these cases that the disputed conduct did not violate the grant assurances. However, the FAA did find that an airport sponsor violated the grant assurances in adopting a ban on aircraft in the interest of safety and found that another airport sponsor violated the grant assurances by not protecting an aeronautical user’s access to airport property. DOT did not issue any decisions on airport rates and charges under FAR Part 302; however, DOT did issue a declaratory order finding that a “privilege fee” on aircraft operations imposed by a nonsponsoring local government violated the Anti-Head Tax Act.

Few New Rules Issued in 2008 – DOT and FAA issued a relatively modest number of proposed and final rules in 2008. Most notable was DOT’s amendment to the policy on airport rates and charges which, as noted above, is the subject of a pending appeal. TSA took significant actions by finalizing the rules for Secure Flight and proposing security requirements for general aviation.

Several Notable Reports, Studies and Articles Published This Year – There were several excellent reports, studies and articles published in 2008. Most notable is the publication of four Legal Research Digests by the Transportation Research Board’s Airport Cooperative Research Program. Several additional Legal Research Digests will be forthcoming in 2009. Also of note, the Government Accountability Office published a report on the legal sufficiency of the FAA’s approval of the airspace redesign for New York, New Jersey and Philadelphia.



2008 INDEX

For copies of the documents listed below or to discuss these developments, contact *Peter Kirsch, Tom Devine, Art Berg, John Putnam* or *Dan Reimer*.

FEDERAL COURT DECISIONS

Air Transport Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218 (2d Cir. 2008) (court held that **Passenger Bill of Rights** adopted by state legislature is preempted by the Airline Deregulation Act of 1978).

BMI Salvage Corp. v. FAA, No. 07-12058, 2008 WL 927900 (11th Cir. April 8, 2008) (court remanded Part 16 proceeding to FAA to permit airport sponsor to provide sufficient justification for **disparate treatment of aeronautical service provider** or to require corrective action for unjustly discriminatory action).

Clark County v. FAA, 522 F.3d 437 (D.C. Cir. 2008) (court held that FAA erred in declaring that proposed **wind turbines near planned airport** pose no hazard to air navigation). KKR represents the petitioner.

Flamingo Express, Inc. v. FAA, 536 F.3d 561 (6th Cir. 2008) (court upheld FAA order finding no violation of grant assurances when airport sponsor refused to allow airline to provide commuter service on the basis that the sponsor lacked **airport operating certificate** necessary to accommodate such service).

Florida Clean Water Network, Inc. v. Grosskruger, No. 3:08-cv-120, 2008 WL 4791879 (M.D. Fla. Oct. 30, 2008) (court held the U.S. Army Corps of Engineers properly defined project purpose and identified alternatives in connection with dredge-and-fill permit for **proposed new airport**).

Huntleigh USA Corp. v. U.S., 525 F.3d 1370 (Fed. Cir. 2008) (court held that there was no taking under the Fifth Amendment when United States **federalized airport security**, resulting in financial loss to private screening contractor).

In re Air Crash at Lexington, Ky., No. 5:06-CV-316-KSF, 2008 WL 2397708 (E.D. Ky. Aug. 27, 2008) (court dismissed for lack of jurisdiction certain claims presented against United States by airline involved in **fatal accident**).

Int'l Soc'y for Krishna Consciousness, Inc. v. City of Los Angeles, 530 F.3d 768 (9th Cir. 2008) (court held that certification to California Supreme Court was warranted to answer question of whether airport constituted **public forum** under state's constitution).



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Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n, 534 F.Supp.2d 201 (D. Mass. 2008) (court held that airport sponsor was entitled to **state action immunity** for claims of anticompetitive behavior).

Rowe v. New Hampshire Motor Transp. Ass'n, 128 S.Ct. 989 (2008) (court held that state regulation of tobacco transportation is preempted under the **Federal Aviation Authorization Act of 1994**).

R/T 182, L.L.C. v. FAA, 519 F.3d 307 (6th Cir. 2008) (court upheld FAA order finding no violation of grant assurances when sponsor of a general aviation airport imposed **landing fee** only on based aircraft).

St. John's United Church of Christ v. FAA, 520 F.3d 460 (D.C. Cir. 2008) (court dismissed for lack of standing claim challenging FAA issuance of grant to the City of Chicago under the **Airport Improvement Program**).

Thomas v. Nw. Airlines Corp., No. 08-115802008, 2008 WL 4104505 (E.D. Mich. Sept. 2, 2008) (court dismissed claim under **Air Carrier Access Act** on the basis that the statute did not confer a private right of action).

Town of Marshfield v. FAA, No. 07-2820, 2008 WL 5251104 (1st Cir. Dec. 18, 2008) (court upheld FAA determination that airspace changes were **categorically excluded** from environmental review).

Town of Winthrop v. FAA, 535 F.3d 1 (1st Cir. 2008) (court upheld FAA's decision not to prepare **supplemental EIS** before giving final approval to project).

Tweed-New Haven Airport Auth. v. Town of East Haven, No. 3:08-cv-597, 2008 WL 4696980 (D. Conn. Oct. 24, 2008) (court held that **local regulation of runway safety area** construction project is preempted by the Federal Aviation Act of 1958 but not the Airline Deregulation Act of 1978).

DOT AND FAA DECISIONS

Director's Determination, *Sun's, Inc. v. Port of Seattle*, FAA Docket No. 16-06-13 (Nov. 14, 2008) *appeal pending* (concerning allegations of civil rights discrimination in connection with airport concession program). KKR represents the respondent.

Director's Determination, *Atlantic Helicopters, Inc. v. Monroe County*, FAA Docket No. 16-07-12 (Sept. 11, 2008) (concerning allegations of economic discrimination and grant of an exclusive right in connection with the lease and use of airport property for aeronautical use).

Director's Determination, *Nw. Airlines, Inc. v. Indianapolis Airport Auth.*, FAA Docket No. 16-07-04 (Aug. 18, 2008) (concerning numerous allegations in connection with airport sponsor's lease of land for aeronautical use and construction of aircraft parking apron).

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Final Decision and Order, *Boston Air Charter v. Norwood Airport Comm'n*, FAA Docket No. 16-07-03 (Aug. 14, 2008) (concerning allegations of economic discrimination and grant of an exclusive right regarding lessee's access to portions of airport to conduct aeronautical activities).

Director's Determination, *41 North 73 West Inc. v. Westchester County*, FAA Docket No. 16-07-13 (June 12, 2008) *appeal pending* (concerning allegations of economic discrimination and grant of an exclusive right in connection with airport sponsor's treatment of larger-class and smaller-class fixed base operators). KKR represents the respondent.

Director's Determination, *In re Compliance with Fed. Obligations by the City of Santa Monica*, FAA Docket No. 16-02-08 (May 27, 2008) *appeal pending* (concerning numerous allegations presented by FAA in connection with airport sponsor's decision to ban certain aircraft in the interest of safety). KKR represents the respondent.

Final Decision and Order, *Airborne Flying Serv., Inc. v. City of Hot Springs*, FAA Docket No. 16-07-06 (May 2, 2008) (concerning allegations of economic discrimination in connection with airport sponsor's requirement to place fuel tanks in common fuel farm).

Declaratory Order, *Tinicum Twp. Privilege Fee Proceeding*, FAA Docket OST-2007-29341 (March 19, 2008) (concerning non-airport sponsor Tinicum Township's attempt to impose "privilege fee" for aircraft operations at airport located within township).

Director's Determination, *Self-Serve Pumps, Inc. v. Chicago Executive Airport*, FAA Docket No. 16-07-02 (March 17, 2008) (concerning allegations of economic discrimination and grant of an exclusive right in connection with the airport sponsor's regulation of commercial self-service fueling).

Director's Determination, *Flightline Aviation, Inc. v. City of Shreveport*, FAA Docket No. 16-07-05 (March 7, 2008) (concerning allegations of economic discrimination and airport sponsor's enforcement of Minimum Standards in connection with airport sponsor's decision regarding termination of an operating agreement).

RULEMAKING AND GUIDANCE

DOT, Proposed Rule, *Enhancing Airline Passenger Protections*, 73 Fed. Reg. 74,585 (Dec. 8, 2008).

TSA, Proposed Rule, *Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program*, 73 Fed. Reg. 64,790 (Oct. 30, 2008).

TSA, Final Rule, *Secure Flight Program*, 73 Fed. Reg. 64,018 (Oct. 28, 2008).



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FAA, Notice of Proposed Rulemaking, *Aircraft Noise Certification Documents for International Operations*, 73 Fed. Reg. 63,098 (Oct. 23, 2008).

FAA, Proposed Modifications and Opportunity to Comment, *Airport Improvement Program Grant Assurances*, 73 Fed. Reg. 52,074 (Sept. 8, 2008).

DOT, Notice of Amendments to Policy Statement, *Policy Regarding Airport Rates and Charges*, 73 Fed. Reg. 40,430 (July 14, 2008).

FAA, Order JO 7400.2G, *Procedures for Handling Airspace Matters* (April 10, 2008).

FHWA and FTA, Final Rule, *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites*, 73 Fed. Reg. 13,368 (March 12, 2008).

FAA, Program Guidance Letter 08-02, *Management of Acquired Noise Land: Inventory – Reuse – Disposal* (Jan. 30, 2008).

REPORTS, STUDIES AND ARTICLES

Transportation Research Board, Airport Cooperative Research Program Publications

Legal Research Digest 1 – *Compilation of Airport Law Resources* (Jan. 2008).

Legal Research Digest 2 – *Theory and Law of Airport Revenue Diversion* (May 2008).

Legal Research Digest 3 – *Survey of Laws and Regulations of Airport Commercial Ground Transportation* (July 2008).

Legal Research Digest 4 – *Compilation of DOT and FAA Airport Legal Determinations and Opinion Letters Through December 31, 2007* (Nov. 2008).

Synthesis 9 – *Effects of Aircraft Noise: Research Update on Select Topics*.

Synthesis 10 – *Airport Sustainability Practices*.

Project Report 7 – *Aircraft and Airport-Related Hazardous Air Pollutants: Research Needs and Analysis*.

Project Report 9 – *Summarizing and Interpreting Aircraft Gaseous and Particulate Emissions Data*.



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Government Accountability Office Reports

U.S. Gen. Accounting Office, *Aviation and the Environment: Initial Voluntary Airport Low Emissions Program Projects Reduce Emissions, and FAA Plans to Assess the Program's Overall Performance as Participation Increases*, GAO-09-37 (Nov. 2008).

U.S. Gen. Accounting Office, *FAA Airspace Redesign: An Analysis of the New York/New Jersey/Philadelphia Project*, GAO-08-786 (July 2008).

U.S. Gen. Accounting Office, *Aviation and the Environment: NextGen and Research and Development are Keys to Reducing Emissions and Their Impact on Health and Climate*, GAO-08-706T (May 2008).

Studies

FAA and Airport Consultants Council, *Improving the Quality of Airport Projects: ACC/FAA Best Practices*.

Partnership for Air Transportation Noise and Emissions Reduction, *Land Use Management and Airport Controls: A Further Study of Trends and Indicators of Incompatible Land Use*, PARTNER-COE-2008-006.

Articles

Daniel S. Reimer, *Airport Privatisation in the USA: Recent Legal Developments and Future Outlook*, 3 JOURNAL OF AIRPORT MANAGEMENT 62 (2008).

Neil J. King and Bruce H. Rabinovitz, *Congestion Pricing and Capacity-Related Delay at U.S. Airports*, 22 AIR & SPACE LAWYER 1 (2008).

Robert S. Span, *Airline Passenger "Rights" Legislation*, 22 AIR AND SPACE LAWYER 1 (2008).

Ruwantissa Abeyrathne, *The Authority of the European Union to Unilaterally Impose and Emissions Trading Scheme*, 21 AIR & SPACE LAWYER 5 (2008).

Mary F. Withum, *An Analysis of Port Authority of New York and New Jersey v. Department of Transportation*, 21 AIR & SPACE LAWYER 10 (2008).



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Kaplan Kirsch & Rockwell's airports practice is one of the largest and most experienced in the country. The firm's lawyers have counseled clients on issues associated with complex airport development and master planning projects, environmental review, rates and charges, security, safety, financing, and compliance with federal requirements. The firm has represented clients throughout the nation in regulatory and legislative advocacy on a wide range of policy matters and in litigation related to airport operations and development. The firm's clients have included airport proprietors; local and state governments; airport tenants and users; and businesses who are directly affected by airport operations.

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