

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and)
MARY E. PETERS, Secretary of)
Transportation,)
)
Plaintiffs-Appellees,)
)
v.) No. 08-55869
)
CITY OF SANTA MONICA,)
)
Defendant-Appellant.)

RESPONSE OF THE UNITED STATES AND MARY E. PETERS,
SECRETARY OF TRANSPORTATION, IN OPPOSITION TO
MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

In March 2008, the Santa Monica City Council voted to ban Category C and Category D aircraft, all of which are jet aircraft, from operating at Santa Monica Airport (SMO). See City Exhibits (CE) 134.¹ By the City's own estimates, the ban would affect 9,000 aircraft operations each year. Trimborn Decl. ¶16; CE114. Although Category C and D aircraft have been operating safely at Santa Monica Airport for more than twenty years, CE105, the City refused to stay enforcement of the ban. Accordingly, to preserve the status quo, the Federal Aviation Administration (FAA) issued interim cease and desist orders that bar the City

¹ Aircraft design categories are based on wingspan and approach speed. CE145. For example, a Category A-1 aircraft has an approach speed of less than 91 knots, and a Category C-1 aircraft has an approach speed of 121-140 knots. CE104 n.3. All Category C and D aircraft are jet aircraft; the vast majority of Category A and B aircraft operations at Santa Monica Airport are propeller driven (piston-powered) aircraft. Trimborn Decl. ¶16.

from enforcing the ban while administrative proceedings to determine its legality are underway. CE103, CE145.

When the City refused to comply, the United States filed enforcement proceedings in district court, which entered a preliminary injunction requiring compliance with the FAA orders during the administrative process. CE192. Now, the City asks this Court to "stay" the preliminary injunction so that its ban can take effect immediately. The City provides no basis for this extraordinary demand to alter the status quo in the midst of administrative proceedings.

The balance of harms and the public interest overwhelmingly favor maintenance of the status quo. Although the City Council purported to base the ban on a safety concern - the length of the airport runway - Category C and D aircraft are already subject to detailed federal safety requirements that take runway length, safety areas, and runway protection zones into account. CE109-CE111. The City Council's vote was not prompted by any new development, but by increases in aircraft operations that occurred "over the last twenty-five years." CE137. As the FAA explained, there is "no emergency requiring a ban, and the City has identified no safety or other basis for a change in the status quo that would bar these operations." CE105.

By contrast, implementation of the ban would cause immediate and irreparable disruption to the national air transportation

system. The ban would divert operations to other airports already operating at or near capacity, such as Los Angeles International Airport (LAX), Van Nuys, and Burbank. CE115. The ban is inconsistent with Santa Monica Airport's obligations as a "reliever" airport to relieve general aviation operations from LAX, and it would impose a significant burden on interstate commerce because Category C and D aircraft are used for a substantial number of non-stop interstate flights. CE115.

The City cannot demonstrate any likelihood of success on the merits of its appeal. The district court correctly rejected the only contention that was even arguably before it in the enforcement proceedings - the contention that, absent an emergency, the FAA has no authority to issue a cease and desist order to preserve the status quo while administrative proceedings take place. As the district court explained, "the City has not cited to any case law which supports its limitation on the Administrator's power to issue interim cease and desist orders." CE199.

STATEMENT

A. Statutory and Regulatory Background.

Under federal law, the Administrator of the FAA has plenary authority over matters concerning the use and management of navigable airspace, air traffic control, and air navigation facilities. 49 U.S.C. §§ 40103(b), 44502, 44721. Federal law

correspondingly restricts the ability of state or local governments to interfere with the operations of the national air transportation system.

An operator of an airport that is available for public use is subject to several statutory conditions, which are designed to ensure that the airport operator does not interfere with the safe and efficient operations of the national air transportation system. As particularly relevant here, an operator of an airport on which government money has been expended may not grant exclusive rights for the use of that facility, 49 U.S.C. § 40103(e), and a recipient of federal grants for use in connection with the facilities and operation of an airport must make that airport "available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1). Likewise, a recipient of a conveyance of any interest held by the federal government in surplus property, which the federal government has conveyed for use as a public airport, must maintain the airport "for public use and benefit without unreasonable discrimination," and ensure that rights in the use of the airport may not be vested in a person "excluding others in the same class." 49 U.S.C. § 47152(3).

Responsibility for the enforcement of these provisions is vested in the Administrator of the FAA. See, e.g., 49 U.S.C. §§ 40113(a), 47122(a), (b). The Administrator has delegated a

portion of that authority to the Director of the Office of Airport Safety and Standards of the FAA. The Director may issue orders and take such other actions as are necessary to fulfill the purposes of 14 C.F.R., part 16, which governs "all proceedings involving Federally-assisted airports." 14 C.F.R. §§ 16.1, 16.11(a).

Orders of the FAA are subject to direct review in the Court of Appeals for the D.C. Circuit or the Court of Appeals in which the petitioner resides or has its principal place of business. 49 U.S.C. § 46110(c). The Court of Appeals has "exclusive jurisdiction" to affirm, amend, modify, or set aside any part of such orders, and may grant "interim relief by staying the order or taking other appropriate action" for good cause. Ibid.

B. Factual And Procedural Background.

1. The City's previous attempts to ban operations at Santa Monica Airport.

The City operates the Santa Monica Municipal Airport, which serves an important role in the regional and national system of air transportation and air commerce. As a reliever airport, its function is to divert aircraft away from other more heavily used airports in the greater Los Angeles area. CE115 & n.10. The City has received federal funds for airport development, and the airport thus must be made "available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1); see also id. § 40103(e) (prohibition on granting

exclusive rights).² Likewise, as a recipient of surplus federal property, the City is subject to analogous obligations under the Surplus Property Act and related instruments of transfer. CE108-109; 49 U.S.C. § 47152(3).³

The airport is apparently unpopular in some sectors of the community, however, and some Santa Monica residents "have long complained to the City over the impact of aircraft noise and demanded that the City take effective action with respect to aircraft noise." CE41. The City has repeatedly attempted to ban aircraft operations at SMO. In 1979, the Santa Monica City Council enacted several ordinances that were challenged in private litigation. Although various noise control measures, such as restrictions on night takeoffs and helicopter flight training, were sustained, the district court invalidated the City's "jet ban." The court rejected the City's asserted safety concerns, explaining that, "[a]s to safety, the evidence is

² The City received a total of \$9.7 million in Federal airport development assistance between 1985 and 1994, and its most recent grant amendment was in 2003. CE106. The relevant grant assurance obligations are effective for 20 years. Ibid. As a result, the Airport is obligated to adhere to the grant assurances until at least 2023.

³ The City received a much larger and extensively rebuilt airport when the Federal Government relinquished its lease, declared the property surplus, and transferred it cost free to the City for use as a civilian airport in 1948. See Director's Determination at 17-19 (Exhibit 1 to this response). Surplus Property Act obligations run with the land and continue in effect in perpetuity until released by the FAA.

utterly convincing that modern, small, business or executive-type jets of the type that would be able to fly out of this airport with the jet ban lifted, are at least as safe, if not much safer, than the types of piston-engine fixed-wing aircraft which are now allowed to use the airport." Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 943 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981).

In 1981, the Santa Monica City Council enacted a resolution calling for the closure of SMO. CE107. Litigation over the measure was resolved through a settlement agreement executed in 1984. CE107. In the 1984 settlement agreement, the City recognized that "exclusive authority is vested in the FAA for the regulation of all aspects of air safety, the management and control of the safe and efficient use of the navigable airspace, and movement of aircraft through that airspace." CE40; CE107-CE108. The City agreed to "operate and maintain the Airport as a viable functioning facility without derogation of its role as a general aviation reliever," CE46, CE107, and agreed that SMO "is to be open and available for public use as an airport on fair and reasonable terms, without unjust discrimination, and without granting any exclusive rights prohibited by law." CE39-CE40, CE107.

2. The current ban.

Nonetheless, in 2002, the Santa Monica Airport Commission recommended that the City Council ban the operations of Category C and D aircraft, CE104 & n.4, all of which are jet aircraft. See n.1, supra. The FAA began an investigation into the legality of the proposed ban, but the investigation was suspended for several years while discussions with the City took place. CE104 n.4.

These discussions broke down when, on March 25, 2008, the Santa Monica City Council voted to enact the ordinance at issue here, which bans all Category C and D aircraft from operating at SMO, except in an emergency. CE134. Violations are punishable by a fine of up to \$1,000, by a term of imprisonment of up to six months, or both. CE142. By its terms, the ordinance was to take effect on April 24.

On March 26, the Acting Director of the FAA's Office of Airport Safety and Standards issued an Order to Show Cause advising the City that the FAA had reason to believe that the ordinance was in violation of federal law. CE104. By letter dated April 21, the FAA asked the City not to enforce the ban during the administrative proceedings, and explained that an interim cease and desist order would be issued if the City refused to stay enforcement. CE159. The City refused, CE156, and, accordingly, the FAA issued an interim cease and desist

order on April 23, which barred the City from enforcing its ban during the pendency of administrative proceedings. CE145.

The April 23 order provided the City with an opportunity to file comments addressing the FAA's determination to enter the interim cease and desist order. The City filed a response on May 5. The FAA issued a supplemental interim cease and desist order on May 12 that addressed the City's objections and restated the bases for the interim cease and desist order. CE103.

By statute, an order of the FAA "remains in effect under its own terms" unless it is modified or set aside by the agency or by the Court of Appeals. 49 U.S.C. § 46105(a). Nonetheless, the City indicated that it would not comply with the April 23 interim cease and desist order. CE156-CE158. Accordingly, on April 24, the United States filed enforcement proceedings in district court pursuant to 49 U.S.C. §§ 46106 & 46107. On April 28, the court entered a temporary restraining order, CE188, and, on May 15, a preliminary injunction directing the City to comply with the FAA orders unless they are set aside by the FAA or by this Court. CE192.

3. The status of the administrative proceedings.

On May 27, after the City filed its stay motion in this Court, the Acting Director of the FAA's Office of Airport Safety and Standards issued his determination, finding that the City's ban on Category C and D operations violates the City's

obligations under federal law. See Director's Determination (Exhibit 1 to this response). This 69-page document sets out in detail the nature of the violations, and recommends that FAA issue a permanent cease and desist order.

The Director's Determination is subject to administrative review. See id. at 68. The City may request a hearing within 20 days. See ibid. The City also may waive a hearing and appeal the determination to the FAA Associate Administrator of Airports within 30 days. See ibid. If the City elects not to request a hearing or to file an appeal within the applicable time period, the Director's Determination becomes final, see ibid., and it would thereafter be subject to direct appellate review under 49 U.S.C. § 46110(c).

REASONS THAT THE STAY MOTION SHOULD BE DENIED

To preserve the status quo, the FAA has issued interim cease and desist orders that bar the City from enforcing its ban on Category C and D aircraft while that ban is being reviewed administratively. Although an FAA order "remains in effect under its own terms" unless it is modified or set aside by the agency or by the Court of Appeals, 49 U.S.C. § 46105(a), the City refused to comply, and the district court thus entered a preliminary injunction directing the City to comply with the orders during the administrative process. The City now asks this

Court to "stay" the preliminary injunction so that its ban may take immediate effect.

The City provides no basis for this extraordinary request. The balance of harms and the public interest overwhelmingly favor maintenance of the status quo, and the district court correctly rejected the contention that the FAA lacks the power to preserve the status quo through an interim cease and desist order.

**A. The Balance Of Harms And The Public Interest
Overwhelmingly Favor Maintenance Of The Status Quo.**

Implementation of the City Council's ban would cause immediate and irreparable disruption to the national air transportation system. By the City's own calculations, the ban would affect 9,000 operations each year, Trimborn Decl. ¶16, involving the travel of 20,000-30,000 passengers, CE114. The ban would divert operations to other airports already operating at or near capacity, such as LAX, Van Nuys, and Burbank. CE115. The ban is at odds with SMO's obligations as a "reliever" airport to relieve general aviation operations from LAX. Ibid. And it would impose a significant burden on interstate commerce, since Category C and D aircraft are used for a substantial number of non-stop interstate flights. Ibid.

The City suggests that the jet operators affected by the ban could "trade down" to the "lesser categories of aircraft" that its ordinance would allow. Stay Motion at 15; see also Trimborn Decl. ¶¶16, 26. But even assuming that such exchanges would be

feasible, Category C and D jet aircraft have a notably better safety record than Category A and B aircraft, which include propeller driven aircraft. CE110; National Transportation Safety Board, Annual Review of Accident Data, p.15 (2003), <http://www.nts.gov/publicctn/2007/ARG0701.pdf>. "[N]ot only do accident rates indicate that jets, including those in Category C and D, have lower accident rates than propeller driven aircraft, larger jet aircraft have even lower accident rates than smaller jet aircraft types." CE110. At Santa Monica Airport itself, there were six accidents in the 26-year period between 1981 and 2007. Ibid. "All six accidents involved aircraft that were small piston propeller driven A-I or B-I aircraft, and not those prohibited by the Ordinance." Ibid. Indeed, when the City's previous jet ban was invalidated, the district court stressed that "[a]s to safety, the evidence is utterly convincing that modern, small, business or executive-type jets of the type that would be able to fly out of this airport with the jet ban lifted, are at least as safe, if not much safer, than the types of piston-engine fixed-wing aircraft which are now allowed to use the airport." Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 943 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981). The City has offered no evidence that would justify disregarding the district court's prior conclusions.

The City cannot possibly demonstrate the type of irreparable harm that could justify immediate disruption of the national air transportation system. Category C and D aircraft have been taking off and landing safely at Santa Monica Airport for more than twenty years. CE117. The City Council's vote was not prompted by any emergency or even by any recent development. To the contrary, the ban was first proposed six years ago, in 2002, CE104 & n.4, and it was prompted by an increase in Category C and D traffic that occurred "over the last twenty-five years." CE137.

The City's arguments and evidence in defense of its ban were addressed in detail in the May 27 Director's Determination, which is subject to further administrative review. For present purposes, what matters is that there is "no basis here for the City to alter the status quo, deprive operators of their existing right to use SMO, and subject other airports and the air navigation system to the disruption that will ensue while the City tests its various arguments in defense of its Ordinance in the ongoing administrative proceeding." CE117.

Although the merits of the City's ban are not before the Court at this juncture, we note that the City's safety claims reflect a fundamental misunderstanding of federal aviation safety standards. The City argues that the airport runway is too short for Category C and D operations, but these operations are already

subject to strict federal requirements that take approach speed and runway length (and many other factors) into account. Federal aircraft certification rules (14 C.F.R. Part 25) and operating rules (14 C.F.R. Parts 91, 121, 125, 135) "take into account the aircraft design features and characteristics (for example, aircraft weight, configuration, engine thrust, stopping capability, speeds, and procedures) and the operating environment (for example, airport elevation, runway surface condition (dry or wet), runway length and slope, and atmospheric conditions such as wind and temperature) to determine the conditions under which takeoff and landing operations can be conducted." CE109-CE110. Under these rules, "operations by Category C & D aircraft at SMO are completely permissible." CE110.

The FAA provisions that the City invokes are not operating requirements and do not provide a basis for denying access to aircraft that comply with federal operating requirements. For instance, the "Runway Safety Area" (RSA) cited by the City, see Stay Motion at 13, "is not an operating requirement," and airplanes "must be able to safely operate regardless of the presence or absence of an RSA." CE111. Likewise, airport design standards such as the 1983 FAA Advisory Circular that the City cites, see Stay Motion at 10-11, "do not determine whether a given aircraft can safely land or take off at a given airport;

this is the function of the aircraft certification and aircraft operating rules." CE109; see also CE105.

**B. The City Cannot Show A Likelihood of Success
On The Merits Of Its Appeal.**

As we have just shown, the balance of harms and the public interest strongly favor maintenance of the status quo, and the City's stay motion may be denied on that basis alone. Nor can the City show any likelihood of success on its appeal.

1. The interim cease and desist orders were well with the FAA's authority.

As the district court recognized, the scope of its review was narrow, because this Court has "exclusive jurisdiction" to review the merits of FAA orders. 49 U.S.C. § 46110(c). The district court correctly rejected the only contention that was even arguably before it in the enforcement proceedings - the City's assertion that the interim cease and desist orders were "ultra vires." Motion at 7.⁴

As the district court explained, the FAA's broad "General authority" under 49 U.S.C. § 40113(a) permits it to issue orders to preserve the status quo during administrative proceedings.

⁴ Even this contention falls within this Court's exclusive jurisdiction. See Public Utility Commissioner of Oregon v. Bonneville Power Administration, 767 F.2d 622, 626 (9th Cir. 1985) ("where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review"); see also 49 U.S.C. § 46110(c) (authorizing this Court to grant "interim relief by staying the order or taking other appropriate action" for good cause).

Under that provision, the Administrator of the FAA "may take action the ... Administrator ... considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders." In addition, under 49 U.S.C. § 47122(a), the FAA Administrator (as the Secretary of Transportation's delegate) "may take action the [Administrator] considers necessary to carry out this subchapter, including conducting investigations and public hearings, prescribing regulations and procedures, and issuing orders." Likewise, the Director of the Office of Airport Safety and Standards (as the Administrator's delegate) may "issue orders" and take such other actions as are necessary to fulfill the purposes of 14 C.F.R., part 16, which governs "all proceedings involving Federally-assisted airports." 14 C.F.R. §§ 16.1, 16.11(a).

Despite these broad provisions, the City contends that interim cease and desist order may not be issued unless "'an emergency exists related to safety in air commerce' which 'requires immediate action.'" Stay Motion at 3 (quoting 49 U.S.C. § 46105(c)). But the City misunderstands the provision on which it relies. Section 46105(c) allows the FAA to issue emergency orders "without notice" to the affected party. Here, the City has long been on notice of the FAA's concerns, which were first presented in the 2002 Notice of Investigation, CE104 &

n.4, and which were again set out in the Order to Show Cause issued shortly after the ordinance was passed. CE104. The City was specifically advised that an interim cease and desist order would be issued if it refused to stay enforcement of the ban. CE159. The City has had repeated opportunities to present its arguments and evidence to the FAA, and it will have additional opportunities to do so if it elects to challenge the May 27 Director's Determination administratively.

The provisions that the City cites governing the issuance of permanent cease and desist orders, see Stay Motion at 3-6, are equally inapposite, because the FAA has not issued a permanent cease and desist order. The May 27 Director's Determination recommends that a permanent cease and desist order be issued, and the City may request a hearing to challenge that decision. By contrast, the interim cease and desist orders - which are designed to preserve the status quo during the administrative process - are not subject to the procedural requirements that apply to permanent cease and desist orders. Indeed, it defies common sense to suggest that Congress gave operators of federally funded airports carte blanche to shut down operations, leaving the FAA powerless to prevent disruptions to the federal aviation system except in an emergency. As the district court explained, "the City has not cited to any case law which supports its

limitation on the Administrator's power to issue interim cease and desist orders[.]” CE199.

2. The City's other arguments are not before the Court and are, in any event, baseless.

The City's remaining contentions would not advance its position even if they were properly before the Court.

The City contends that its ordinance was a valid exercise of its "proprietary and police powers." Motion at 1. With respect to police powers, the Supreme Court has held that even noise control measures (such as a jet curfew) constitute "an unauthorized extension of state police power into the federal domain." Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 102-103 (9th Cir. 1981) (citing City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973)).

The Supreme Court left open the question whether an airport "proprietor" (i.e., owner) could enact a noise control measure of the type invalidated in City of Burbank. See 411 U.S. at 635-36 n.14. As this Court explained, the caveat may have been thought necessary in view of the Supreme Court's earlier decision in Griggs v. Allegheny County, 369 U.S. 84 (1962), which held municipal airport owners liable for Fifth Amendment "takings" of private property resulting from noisy flight paths over neighboring lands. See Santa Monica Airport Ass'n, 659 F.2d at 103; see also Griggs, 369 U.S. at 87 (noting the finding that "on take-off the noise of the planes [was] comparable to a riveting

machine or steam-hammer"). This Court, in Santa Monica Airport Ass'n, concluded that Congress had not preempted "a municipal airport proprietor's right to enact noise ordinances," 659 F.2d at 103, and sustained various noise control measures imposed by the City other than its jet ban, see id. at 104-105.

Although the precise scope of the proprietary power has not been defined, it is well established that "local proprietors play an 'extremely limited' role in the regulation of aviation." Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213, 1222 (10th Cir. 2001) (quoting American Airlines, Inc. v. DOT, 202 F.3d 788, 806 (5th Cir. 2000); see also British Airways Board v. Port Authority of New York and New Jersey, 564 F.2d 1002, 1010 (2d Cir. 1977) (same). Only measures aimed at establishing acceptable noise levels and managing ground congestion (in the case of multi-airport proprietors) have been sustained. See American Airlines, 202 F.3d at 806 (citing cases). Whatever the scope of the proprietary power, it plainly would not allow the City to override the FAA's determinations as to matters of safety - determinations that receive substantial deference on judicial review. See Arapahoe, 242 F.3d at 1223. Indeed, as noted above, the City's 1984 settlement agreement recognized that "exclusive authority is vested in the FAA for the regulation of all aspects of air safety, the management and control of the safe and

efficient use of the navigable airspace, and movement of aircraft through that airspace." CE40; CE107-CE108.

Finally, the City's Tenth Amendment objection (Stay Motion at 16) is baseless. Conditions on receipt of federal funds do not implicate the Tenth Amendment, see Mayweathers v. Newland, 314 F.3d 1062, 1069 (9th Cir. 2002); New York v. United States, 505 U.S. 144, 168 (1992); South Dakota v. Dole, 483 U.S. 203, 210 (1987), whether or not the recipient characterizes the conditions as "vague" (Stay Motion at 16). See Mayweathers, 314 F.3d at 1067 (rejecting an analogous vagueness argument).

CONCLUSION

The stay motion should be denied.

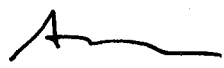
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JUNE 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2008, I caused a copy of the foregoing response and the accompanying exhibit to be served on the following counsel by federal express overnight mail and by e-mail:

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