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# Beyond the Noise: The Airport Proprietor Exception and the Long Beach Airport Experience

by Daniel Friedenzohn\*

The airline industry continues to grow in the United States, where more than 10 million scheduled airline flights were operated in 2018.<sup>1</sup> Most of those flights operated into and out of airports located in large populated areas, such as Southern California, which is home to some of the busiest aviation activity in the world.

The Los Angeles metropolitan area has a population of over 13 million people<sup>2</sup> and has five airports with scheduled airline service: Hollywood Burbank Airport, John Wayne Airport, Long Beach Airport, Los Angeles International Airport, and Ontario International Airport.<sup>3</sup> Each of these airports is close to residential areas, and nearly 436,000 flights departed from them in 2018.<sup>4</sup>

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<sup>1</sup> Flights All Carriers – All Airports, BUREAU OF TRANSP. STAT., [https://www.transtats.bts.gov/Data\\_Elements.aspx?Data=2](https://www.transtats.bts.gov/Data_Elements.aspx?Data=2).

<sup>2</sup> *Los Angeles-Long Beach-Anaheim, CA Metro Area*, CENSUS REPORTER, <https://censusreporter.org/profiles/31000US31080-los-angeles-long-beach-anaheim-ca-metro-area/> (last visited July 22, 2019). The five-county Southern California region has a population of 18.7 million, which makes it the second most populated metropolitan region after New York. *Los Angeles' Economy – More Than Just Entertainment*, CENTRE FOR AVIATION (CAPA), Dec. 17, 2017.

<sup>3</sup> The area also has airports with considerable general aviation and corporate activity, such as Santa Monica Municipal Airport and Van Nuys Airport.

<sup>4</sup> Flights from Hollywood Burbank Airport, John Wayne Airport, Long Beach Airport, Los Angeles International Airport, and Ontario International Airport, BUREAU OF TRANSP. STAT., [https://www.transtats.bts.gov/Data\\_Elements.aspx?Data=2](https://www.transtats.bts.gov/Data_Elements.aspx?Data=2) (follow “Select an Airport” hyperlink; then search starting with the field for flights for each airport).

Airports with scheduled airline service strive to increase airline operations at their respective facilities. However, the increase in flights can also result in airports having to address the impact of noise in their communities.<sup>5</sup> Attempts to do so can also be challenging, as some local laws may be federally preempted because of their “negative impact on the air transportation system as a whole.”<sup>6</sup>

This article addresses how the legal landscape has evolved for airports to regulate noise activity. Part one discusses the federal role in regulating airport noise. Part two addresses the development of the airport proprietor exception as a legal pathway for airports to regulate airport noise. Part three provides a brief overview of the codification of the airport proprietor exception and the additional role that the federal government adopted with respect to regulating aviation noise. Part four addresses the legal action brought forth by airlines challenging the City of Long Beach airport’s restriction on flight operations. Part five will discuss the city’s Airport Noise Compatibility Ordinance. This section will also address how the city goes about enforcing its ordinance.

Important scholarly work in this area has analyzed the statutory framework and the varied judicial decisions regarding the airport proprietor exception.<sup>7</sup> The research has contributed to a better understanding of the challenges that governmental agencies face in enacting “reasonable, nonarbitrary and nondiscriminatory” airport noise regulations under the airport proprietor

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<sup>5</sup> Paul Stephen Dempsey, *Trade & Transport Policy in Inclement Skies – The Conflict Between Sustainable Air Transportation and Neo-Classical Economics*, 65 J. AIR L. & COM. 639, 646–47 (2000); Jan K. Brueckner & Raquel Girvin, *Airport Noise Regulation, Airline Service Quality, and Social Welfare*, (CESifo Economic Studies, Working Paper No. 1820, Oct. 2006), <https://ssrn.com/abstract=940345>; Luis G. Zambrano, *Balancing the Rights of Landowners With the Needs of Airports: The Continuing Battle Over Noise*, 66 J. AIR L. & COM. 445, 454 (2001).

<sup>6</sup> Zambrano, *supra* note 5; Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1, 3 (2002); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

<sup>7</sup> See, e.g., Christopher Scott Maravilla, *The Scope of the Proprietary Powers Exception to Federal Preemption under the Airline Deregulation Act*, 75 J. AIR L. & COM. 549 (2010); Wendy B. Davis & Rebecca Clarke, *Hot Air: Undue Judicial Deference to Federal Aviation Administration Expertise in Assessing the Environmental Impacts of Aviation*, 69 J. AIR L. & COM. 709, 731–32 (2004).

exception.<sup>8</sup> This article attempts to build on that research by addressing how one local government, the City of Long Beach, has adopted rules which attempt to address the impact of noise on the community while also taking into account the significant economic development role that the airport plays in the community.<sup>9</sup>

### ***I. The Pervasive Role of Federal Law in the Regulation of Noise at Airports***

The federal government plays a predominant role in the regulation of commercial aviation in the United States. In passing the Air Commerce Act of 1926, Congress charged the Secretary of Commerce with “issuing and enforcing air traffic rules, licensing pilots, certifying aircraft, establishing airways, and operating and maintaining aids to air navigation.”<sup>10</sup> The importance of the federal role in aviation was reiterated in the Civil Aeronautics Act of 1938 by giving the agency the authority to “provide necessary facilities and personnel for the regulation and protection of air traffic moving in air commerce.”<sup>11</sup>

In his concurrence in *Northwest Airlines v. State of Minnesota*, Justice Jackson noted the responsibility of the federal government in regulating aviation:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed

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<sup>8</sup> *British Airways Bd. v. Port Auth. of N.Y. & N.J. (Concorde II)*, 564 F.2d 1002, 1012 (2d Cir. 1977).

<sup>9</sup> The Long Beach Airport Aviation Complex generates over \$10 billion into the regional economy. It also directly supports 19,000 jobs. LONG BEACH AIRPORT: ECONOMIC IMPACT REPORT, <http://www.lgb.org/civicax/filebank/blobdload.aspx?BlobID=2671> (last visited Oct. 21, 2019).

<sup>10</sup> A Brief History of the FAA, FAA (Jan. 4, 2017, 4:42 PM), [https://www.faa.gov/about/history/brief\\_history/](https://www.faa.gov/about/history/brief_history/).

<sup>11</sup> Civil Aeronautics Act of 1938 § 302(a)(4), 52 Stat. 973, 985.

beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.<sup>12</sup>

The needs of the growing aviation industry required the federal government to continue to come up with ways to ensure a safe aviation system. The Federal Aviation Act of 1958 created a standalone federal agency, the Federal Aviation Agency (now Administration, hereinafter FAA), charged with overseeing aviation safety.<sup>13</sup> The agency has broad authority to enact regulations with respect to the following:

- A. Navigating, protecting, and identifying aircraft;
- B. Protecting individuals and property on the ground;
- C. Using the navigable airspace efficiently; and
- D. Preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.<sup>14</sup>

The Tenth Amendment to the U.S. Constitution states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>15</sup> The U.S. Supreme Court has stated that the authority granted to states to enact laws for the “public good” are called police powers.<sup>16</sup>

The so-called police powers allow a state (and its subdivisions) the “authority to protect the health, safety, and welfare of its citizens.”<sup>17</sup> Local governments generally play a significant role in regulating noise in their communities.<sup>18</sup> They do not, however,

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<sup>12</sup> 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

<sup>13</sup> Pub. L. No. 85-726, 72 Stat. 731 (now codified at 49 U.S.C. § 40103 (2006)).

<sup>14</sup> 49 U.S.C. § 40103 (2006); *City of Burbank*, 411 U.S. at 633.

<sup>15</sup> U.S. CONST. amend. X.

<sup>16</sup> *Bond v. United States*, 572 U.S. 844, 852 (2014) (citing *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

<sup>17</sup> Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J.L. & LIBERTY 662, 664 (2015) (citing ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS* 3 (1904)).

<sup>18</sup> Luis Inaraja Vera, *How Science Can Improve Regulation: Noise Control in Urban Areas*, 53 TULSA L. REV. 33, 41 (2017) (citing Steven N. Brautigam, *Rethinking the Regulation of Car Horn and Car Alarm Noise: An*

have the ability to regulate airport noise via their traditional police powers.<sup>19</sup>

Airport operators can be subject to liability, including noise-related nuisance and inverse condemnation claims.<sup>20</sup> As a result, the courts, and later Congress, have given governments – as airport proprietors – the authority enact noise regulations because of “municipalities’ legitimate interest in avoiding liability for excessive noise generated by the airports they operate.”<sup>21</sup> The airport proprietor exception has enabled local airport operators to find a way to balance “between competing needs of airport users with those of the surrounding community.”<sup>22</sup>

## II. *The Courts Attempt to Rule on the Authority of Local Governments to Regulate Airport Noise*

The question as to whether local governments have the legal authority to regulate aviation noise was first addressed by the U.S. Supreme Court in *City of Burbank v. Lockheed Air Terminal*. In that case, the City of Burbank, California had enacted an ordinance which made it unlawful for “pure jet aircraft to take off from the Hollywood-Burbank Airport between 11 p.m. of one day and 7 a.m. the next day.”<sup>23</sup> The ordinance also prohibited the City of Burbank, as airport proprietor, from allowing “any such aircraft to take off from that airport during such periods.”<sup>24</sup>

In its opinion, the Supreme Court stated that the enactment of the Noise Control Act of 1972 (which became law after the litigation commenced) resulted in the “FAA, now in conjunction with EPA” having “full control over aircraft noise, pre-empting state

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*Incentive-Based Proposal to Help Restore Civility to Cities*, 19 COLUM. J. ENVTL. L. 391, 425 (1994).

<sup>19</sup> *City of Burbank*, 411 U.S. at 638–40.

<sup>20</sup> Dempsey, *supra* note 6, at 2 (for a comprehensive overview regarding the various claims that can be brought against airport operators for noise-related issues).

<sup>21</sup> *Alaska Airlines, Inc. v. Long Beach*, 951 F.2d 977, 982 (1992). See Dempsey, *supra* note 6, at 2.

<sup>22</sup> Aimee Kratovil, Comment, *The Airport Noise and Capacity Act of 1990: Superfluous Hurdle for Airport Proprietors Who Have Assured Federal Grants*, 12 PENN ST. ENVTL. L. REV. 499, 509 (2004).

<sup>23</sup> *City of Burbank*, 411 U.S. at 625–26.

<sup>24</sup> *Id.*

and local control.”<sup>25</sup> In reviewing the legislative history of the Noise Control Act, the Court cited a letter from then-Secretary of Transportation Boyd to the U.S. Senate regarding his opinion on whether the proposed law would preempt state and local government regulation of aircraft noise.<sup>26</sup> Secretary Boyd stated:

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H.R. 3400 would merely expand the Federal Government’s role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.<sup>27</sup>

The Supreme Court held that the City of Burbank did not have the legal authority under its police powers to regulate aviation noise, noting that “[i]f that change is to be made, Congress alone must do it.”<sup>28</sup>

The *Burbank* case was focused on whether a local government has the right to enact a noise regulating ordinance through its police power.<sup>29</sup> The majority was clear that certain issues of “direct concern to local residents must be treated exclusively by the federal government in spite of the lack of an express statement of pre-emption on the part of Congress.”<sup>30</sup> In its opinion, the Court was mindful of the implications if it were to allow local governments to regulate airport noise activity. The Court stated that to do so would result in “fractionalized control of the timing of take-offs and landings” that “would severely limit the flexibility of FAA in controlling air traffic flow” around the country.<sup>31</sup>

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<sup>25</sup> *Id.* at 632–33. The High Court noted that the 1972 Noise Control Act had not yet been enacted when the legal challenge to the ordinance was commenced. Noise Control Act of 1972, 49 U.S.C. § 1431 (1970).

<sup>26</sup> *City of Burbank*, 411 U.S. at 635 (noting that the Noise Control Act did not include an express provision for the federal preemption of noise regulation); Maravilla, *supra* note 7, at 555.

<sup>27</sup> *City of Burbank*, 411 U.S. at 635.

<sup>28</sup> *Id.* at 640.

<sup>29</sup> *Id.* at 633–36.

<sup>30</sup> Mark J. Alonso, *Environmental Law: A Reevaluation of Federal Pre-emption and the Commerce Clause*, 7 *FORDHAM URB. L.J.* 649 (1978).

<sup>31</sup> *City of Burbank*, 411 U.S. at 639.

In his dissent, Justice Rehnquist stated that the regulation of noise was an issue that traditionally fell under “the historic police powers of the States” and was “not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>32</sup> The dissent also referenced the same letter written by Secretary Boyd to the U.S. Senate. Of particular interest to the dissent was the Secretary’s position that a local government operating an airport as a proprietor has the legal authority to regulate aircraft noise as the property owner so long as it goes about doing so in a nondiscriminatory manner.<sup>33</sup> This issue would be addressed in subsequent cases.<sup>34</sup>

The *City of Burbank* decision, however, “did not consider whether the same preemption that applied to local police power also applied to local proprietary authority.”<sup>35</sup> That issue would be addressed later by Congress when it enacted the Airline Deregulation Act of 1978, as well as subsequent judicial decisions.

In *British Airways Board v. Port Authority of New York and New Jersey (Concorde II)*, the U.S. Court of Appeals for the Second Circuit addressed the legality of the Port’s continued ban on supersonic Concorde flights operating from John F. Kennedy In-

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<sup>32</sup> *Id.* at 643 (Rehnquist, Stewart, White & Marshall, J.J., dissenting) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>33</sup> *Id.* at 649. Secretary Boyd stated: “Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The *Federal* Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the *Federal* Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the *Federal* Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation’s airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.” See Mary L. Warren, *Airport Noise Regulation: Burbank, Aaron, and Air Transport*, 5 B.C. ENVTL. AFF. L. REV. 97 (1976) (critiquing the *Burbank* decision).

<sup>34</sup> Philip Weinberg, *Environment Law*, 43 SYRACUSE L. REV. 357, 364–65 (1992).

<sup>35</sup> *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 139 (2016) (referring to the Supreme Court’s footnote 14 in the *City of Burbank* decision, which stated that “authority that a municipality may have as a landlord is not necessarily congruent with its police power.”).



ternational Airport in New York as it was directed to “develop a noise standard” without unreasonable delay.<sup>36</sup> Three months earlier, the Court had ruled that the Port had the legal authority “to promulgate reasonable, nonarbitrary and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environs” so long as the regulations did not create an undue burden on commerce.<sup>37</sup>

The Second Circuit revisited this matter after the Port Authority failed to “promulgate a noise rule equally applicable to all planes landing at Kennedy, without the court’s intervention on the details of the Rule.”<sup>38</sup> The court noted that the Port Authority had enacted a regulation in 1951 that required aircraft operators to obtain approval from the authority before it used one of its facilities.<sup>39</sup> This rule was in place in order to support the development of quieter aircraft and to provide the authority with the right to prohibit the operation of “certain jet airplanes whose din was deemed intolerable to surrounding communities.”<sup>40</sup>

The Port Authority developed a more sophisticated manner of determining permissible noise levels at Kennedy Airport. In 1958, the agency adopted 112 perceived noise in decibels (PNdB) “as registered at selected monitoring points, to be the maximum permissible noise limit for all aircraft wishing to use” the airport.<sup>41</sup> This standard ensured “that the next generation of civil aircraft be no louder than its noisiest predecessor” and thereby preventing “further deterioration” of the area near the airport.<sup>42</sup>

In its opinion, the court delineated the responsibilities between the federal government and local operators in regulating airport noise. The court stated:

The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. *Air Transport Assn. v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975) (three-judge court); *National Aviation v. City of Hayward*, 418 F. Supp.

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<sup>36</sup> *Concorde II*, 564 F.2d at 1004.

<sup>37</sup> *British Airways v. Port Authority*, 558 F.2d 75, 84–85 (2d Cir. 1977) (*Concorde I*).

<sup>38</sup> *Concorde II*, 564 F.2d at 1005.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

417 (N.D. Cal. 1976). It seemed fair to assume that the proprietor's intimate knowledge of local conditions, as well as his ability to acquire property and air easements and assure compatible land use, *cf. Griggs v. Allegheny County*, 369 U.S. 84, 7 L. Ed. 2d 585, 82 S. Ct. 531 (1962), would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme, and both the Supreme Court and executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions.<sup>43</sup>

In holding that the Port Authority had unlawfully imposed a ban on the operation of the Concorde at Kennedy Airport, the Court of Appeals noted that its ruling "does not deny the Port Authority the power to adopt a new, uniform and reasonable noise standard in the future."<sup>44</sup>

The legacy of the *Concorde* cases made it clear that any regulations adopted by a local governmental authority must be reasonable and non-arbitrary.<sup>45</sup> The use of technology to adopt noise standards backed by science would be critical for local governments moving forward. Coupled with the *Burbank* decision, it also became clear that the federal government, vis-à-vis both the courts and the executive branch, was concerned about the impact of airport noise regulations on the national air transportation system.

### III. *The Airline Deregulation Act of 1978 and the Increased Federal Role in Regulating Airport Noise*

As aircraft operations increased during much of the second half of the 20th century, the concerns about aircraft noise increased as well. The Noise Control Act of 1972 (as discussed *supra*) con-

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<sup>43</sup> *Id.* at 1010–11 (citation omitted).

<sup>44</sup> *Id.* at 1012–13. The Court also stated in a footnote that "[o]f course, the Port Authority must afford all aircraft, including the Concorde, a fair and equal opportunity to meet the requirements of any future noise rule." *Id.* at 1013 n.12.

<sup>45</sup> *Concorde I*, 558 F.2d at 84–85; Maravilla, *supra* note 7, at 558.

ferred on the Environmental Protection Agency (EPA) the primary federal role in the regulation of aircraft noise.<sup>46</sup>

In 1978, Congress passed the Airline Deregulation Act of 1978 (ADA), a landmark piece of legislation that deregulated the domestic airline market.<sup>47</sup> The ADA included a provision which specifically prohibited states or local governments from enacting or enforcing “a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.”<sup>48</sup> Congress, however, also included this language in the ADA: “This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.”<sup>49</sup>

Congress also enacted laws that were focused on aircraft noise. The Aviation Safety and Noise Abatement Act of 1979<sup>50</sup> provided “financial and legal incentives for airports to implement noise mitigation programs to proactively address noise issues.”<sup>51</sup> Due to concerns about the growing “patchwork of local airport noise and access restrictions” that could adversely impact the national air transportation system, Congress enacted the Airport Noise and Capacity Act of 1990 (ANCA).<sup>52</sup> The law required a “mandatory phase-out of certain Stage 2 aircraft.”<sup>53</sup>

ANCA also narrowed the airport proprietor exception as it required federal approval to “adopt noise restrictions.”<sup>54</sup> For example, if an airport operator wants to restrict Stage 3 aircraft, it must get approval from “all aircraft operators” or the Secretary of

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<sup>46</sup> Pub. L. No. 92-574, 92 Stat. 1239 (codified as amended at 49 U.S.C. § 1431 (1976 & Supp. 1994)). See John J. Jenkins Jr., *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?*, 59 J. AIR L. & COM. 1023, 1033 (1994).

<sup>47</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. § 41713 (2000)).

<sup>48</sup> 49 U.S.C. § 41713(b)(1) (2019).

<sup>49</sup> 49 U.S.C. § 41713(b)(3) (2019).

<sup>50</sup> Pub. L. No. 96-193, 94 Stat. 50 (1980), *repealed & restated by* Pub. L. No. 103-272, § 7(b), 108 Stat. 379 (1994) & Pub. L. No. 103-429, § 11(b), 108 Stat. 4391 (1994) (codified as amended in scattered sections of 49 U.S.C.).

<sup>51</sup> See W. Eric Pilsk, *Airport Noise Litigation in the 21st Century: A Survey of Current Issues*, 11 ISSUES AVIATION L. & POL'Y 372, 388 (2012).

<sup>52</sup> 49 U.S.C. §§ 47521–47534.

<sup>53</sup> *Id.*; 49 U.S.C. § 47524(a); 14 C.F.R. § 161.6.

<sup>54</sup> *Id.*; 14 C.F.R. pt. 161 (2019).

Transportation (e.g., FAA).<sup>55</sup> Restrictions for which FAA approval is required include:

- A. a restriction on noise levels generated on either a single event or cumulative basis;
- B. a restriction on the total number of Stage 3 aircraft operations;
- C. a noise budget or noise allocation program that would include Stage 3 aircraft;
- D. a restriction on hours of operations; and
- E. any other restriction on Stage 3 aircraft.<sup>56</sup>

#### ***IV. Airport Litigation and the Impact it Had on the Long Beach Airport***

Because the ADA does not define what constitutes *proprietary powers and rights*, the courts have done so on “on a case-by-case basis.”<sup>57</sup> A number of cases have specifically addressed noise regulations enacted by government-operated airports under the proprietary rights exception. In *Alaska Airlines, Inc. v. City of Long Beach*, the Ninth Circuit Court of Appeals was asked to review the District Court’s order regarding the issuance of a permanent injunction of the City of Long Beach’s noise control ordinance

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<sup>55</sup> 49 U.S.C. § 47524(c)(1); 14 C.F.R. pt. 161 (2019).

<sup>56</sup> 49 U.S.C. § 47524(c)(1); 14 C.F.R. § 161.7 (2019).

<sup>57</sup> Maravilla, *supra* note 7, at 553. See *Friends of the E. Hampton Airport, Inc.*, 841 F.3d 133; Nat’l Bus. Aviation Ass’n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001); *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183 (2d. Cir. 2001); Nat’l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81 (2d Cir. 1998); *Santa Monica Airport Ass’n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981). See also *City of Houston v. Fed. Aviation Admin.*, 679 F.2d 1184, 1187 (5th Cir. 1982). In *City of Houston*, the City and American Airlines challenged the FAA’s authority to enact a perimeter rule restricting service to airports greater than 1,000 statute miles from National Airport. The FAA was considered the proprietor of both National and Dulles Airports. The purpose of the amended regulation was:

- (1) To assure the full utilization of Dulles;
- (2) To preserve the short- and medium-haul nature of National; and
- (3) To eliminate the inequity of the prior rule, with its exceptions for the grandfathered cities.

In so holding, the Fifth Circuit noted that “the FAA is not the typical airport proprietor.”

that regulated the number of air carrier flights.<sup>58</sup> The permanent injunction was issued after 10 years of litigation.<sup>59</sup>

The Long Beach Airport, like many similar facilities, has been surrounded by residential housing since it opened in 1923.<sup>60</sup> The city's first airport noise control ordinance was adopted in 1981 and it only allowed air carriers to operate 15 flights per day.<sup>61</sup> In December 1983, two years after Alaska Airlines (later joined by other carriers) initiated this litigation, the district court ruled "that there was an insufficient basis to support the fifteen-flight restriction" and "entered a preliminary injunction prohibiting the city from reducing the number of daily carrier flights below eighteen."<sup>62</sup>

On appeal, the appellee airlines argued that the ordinance's indemnity clause precluded the city from applying the proprietor exemption because, in effect, this provision shifted "liability to airport users."<sup>63</sup> The provision stated:

Commencement of flight operations at Long Beach airport shall be deemed to constitute an undertaking to indemnify the City of Long Beach for any judgment for nuisance, noise, inverse condemnation or other damages awarded against the City as a result of flight operations of that user at the Long Beach airport.<sup>64</sup>

The airlines argued that because this provision was in the ordinance, "the reasons for allowing the municipality to regulate air-

<sup>58</sup> 951 F.2d 977 (9th Cir. 1991).

<sup>59</sup> *Id.* at 980. An overview of the city's lengthy litigation history is set forth in Memorandum, City Attorney's Opinion Regarding Federal Inspection Station (FIS), City of Long Beach Office of the City Attorney (Oct. 4, 2016), <http://www.lgb.org/civicax/filebank/blobdload.aspx?BlobID=3133> [hereinafter FIS Memorandum].

<sup>60</sup> *Alaska Airlines*, 951 F.2d at 981.

<sup>61</sup> FIS Memorandum, *supra* note 59.

<sup>62</sup> *Alaska Airlines*, 951 F.2d at 981. After the preliminary injunction was entered, the City of Long Beach initiated a noise study in order to comply with the then FAA regulatory scheme calling "for development of a 'noise compatibility program'." *Id.* at 982. The city submitted its noise compatibility program plan along with an "implementing ordinance to the FAA" for review in 1986. The FAA failed to issue its approval of the plan during the subsequent 5½ years. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (citing LONG BEACH, CA. MUN. CODE § 16.45.130 (1981)).

port noise as a proprietor disappeared.”<sup>65</sup> The Circuit Court of Appeals found this argument to be without merit. The Court acknowledged that a government “may contract away its proprietorship rights, and thus lose the right to regulate noise.”<sup>66</sup> The Court, however, determined that this ordinance only allowed the city “a right of recovery” against the airlines for “damages actually awarded against” it.<sup>67</sup> The Court also stated that an airport proprietor “should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the City’s human environment.”<sup>68</sup> The city was, therefore, still liable for the noise and therefore a proprietor of the airport.<sup>69</sup>

The Court also addressed whether the City of Long Beach ordinance “impermissibly burdened interstate commerce,”<sup>70</sup> and concluded that the ordinance treated “interstate and intrastate flights” the same way as it did airlines from California and those from outside the state.<sup>71</sup> The Court also noted that “[t]he goal of reducing airport noise to control liability and improve the aesthetics of the environment is a legitimate and permissible one.”<sup>72</sup> The Court was neither persuaded that the ordinance provisions were “completely arbitrary or unreasonable” nor that the ordinance constituted a violation of the airlines’ equal protection rights.<sup>73</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 983 (citing *Pirola v. City of Clearwater*, 711 F.2d 1006, 1009–10, *reh’g denied*, 720 F.2d 688 (11th Cir. 1983)).

<sup>67</sup> *Id.* at 983.

<sup>68</sup> *Id.* (citing *Santa Monica Airport Ass’n v. City of Santa Monica*, 659 F.2d 100, 104 n.5 (9th Cir. 1981)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The District Court had ruled that the ordinance was facially neutral. Even after weighing the “‘valid concerns of the Long Beach community’ against ‘the demand for vibrant, safe, fair and efficient national transportation system,’” the District Court concluded that the ordinance “impermissibly burdened interstate commerce.” *Id.*

<sup>71</sup> *Id.* at 985.

<sup>72</sup> *Id.* at 984 (citing *Santa Monica Airport Ass’n v. City of Santa Monica*, 659 F.2d 100, 104 n.5 (9th Cir. 1981)).

<sup>73</sup> *Id.* at 985–86.

The issue that resulted in the Court ruling in favor of the carriers had to do with procedural due process.<sup>74</sup> The City of Long Beach ordinance authorized the airport manager to force airlines to reduce flights at the airport without a hearing after determining that “a carrier exceeds a certain cumulative noise level and had the highest average single event noise exposure level (SENEL).”<sup>75</sup> The ordinance also provided that the decision “shall be conclusive unless it is demonstrated to lack a rational basis.”<sup>76</sup> Moreover, the ordinance did not set forth any procedures for airlines to challenge this decision.<sup>77</sup> Given that the ordinance required the airport manager to force an airline with the “highest average single event noise level” to reduce flights, the Court reasoned that at least one carrier would certainly be adversely affected by this provision because the “threat of action” was real.<sup>78</sup> Accordingly, the Court held that the “absence of adequate procedural protections” resulted in a constitutional violation. The Court’s decision in this case was narrow.

The appeal and eventual settlement of this case in 1995 came amidst the changing landscape regarding the regulation of aviation noise in the United States. Congress enacted ANCA while this case was being appealed. It is clear that the potential changes to the ordinance (whether the result of legislative action by the City of Long Beach or because of the long-standing litigation) could have created additional problems for the city.

The City of Long Beach Airport was required to allow 41 airline flight operations (one departure/one arrival) by the District Court in 1988.<sup>79</sup> The city, as a result of its settlement with the airlines, adopted its Airport Noise Compatibility Ordinance in 1995. That ordinance also allows a minimum of 41 air carrier flight operations per day. The FAA has stated that the ordinance, as currently enacted, is exempt from ANCA.<sup>80</sup>

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<sup>74</sup> *Id.* at 988. This is particularly important in this case because the ordinance contained a nonseverability clause that would require the entire ordinance to be invalid if one or more provisions were found to be unlawful.

<sup>75</sup> *Id.* at 986.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 987.

<sup>79</sup> FIS Memorandum, *supra* note 59.

<sup>80</sup> *Id.*, Exhibit A (Letter from James W. Whitlow, Deputy Chief Counsel, FAA, to Chris Kunze, Manager, Long Beach Airport).

## V. *The Long Beach Airport Noise Ordinance*

As discussed *supra*, the City of Long Beach's attempts to regulate airport noise has evolved through a history of litigation between the city, the FAA, and other stakeholders.<sup>81</sup> The city's Airport Noise Compatibility Ordinance<sup>82</sup> regulates aircraft noise by establishing permissible levels of single event noise limits for all categories of airport users as established under the ordinance.<sup>83</sup>

The ordinance creates a noise budget for each user group. The categories of airport users include air carriers, commuter carriers, industrial operators, charter operators, and general aviation.<sup>84</sup> The initial noise budgets for air carriers and commuter carriers were developed based on recorded noise level data for the twelve months ending October 31, 1990.<sup>85</sup> The ordinance encourages airlines to operate aircraft with the "lowest average noise" levels.<sup>86</sup>

The ordinance imposes "single event noise limits for categories of [a]irport users in order to reduce such group's cumulative noise levels."<sup>87</sup> Between the hours of 7 a.m. and 10 p.m., for example, the single event noise exposure level is set at 102.5 decibels for departures and 101.5 decibels for arrivals.<sup>88</sup> Between the hours of 6-7 a.m. and 10-11 p.m., the single event noise exposure level is

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<sup>81</sup> Long Beach Airport Fact Sheet—Noise Compatibility Ordinance, <http://www.lgb.org/civicax/filebank/blobdload.aspx?BlobID=3332>. See FIS Memorandum, *supra* note 59.

<sup>82</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43 (1999), <http://www.lgb.org/civicax/filebank/blobdload.aspx?BlobID=2764>.

<sup>83</sup> *Id.* ch. 16.43.010.A.

<sup>84</sup> *Id.* chs. 16.43.010, 16.43.050.B. The ordinance defines "air carriers" as scheduled carriers, certificated under FAR Parts 121, 125, or 135, operating aircraft having a certificated maximum takeoff weight of seventy-five thousand (75,000) pounds or more, transporting passengers or cargo. The ordinance defines "commuter carriers" as entities (certificated as FAA Part 121 or 135) operating aircraft with a "certificated takeoff weight less than seventy-five thousand." *Id.* ch. 16.43.010.D.

<sup>85</sup> *Id.* ch. 16.43.050.C.

<sup>86</sup> *Id.* ch. 16.43.060.E.2.

<sup>87</sup> *Id.* ch. 16.43.040. Military and public aircraft are not included in the formulation of the noise budgets because the city is not liable for noise for those two categories of aircraft operations. *Id.* ch. 16.43.040.A.

<sup>88</sup> *Id.* ch. 16.43.040.



90 decibels.<sup>89</sup> Between 11 p.m. and 6 a.m., when many residents are sleeping, the single event noise limit is 79 decibels.<sup>90</sup>

Neither air nor commuter carriers (e.g., airline operators) are allowed to schedule flights (arrivals or departures) between 10:00 p.m. and 7:00 a.m.<sup>91</sup> The ordinance, however, does allow for a violation occurring between 10-11 p.m. (e.g., late flight arrival at 10:30 p.m.) to be waived if it is the result of an “unanticipated delay” which is beyond the “reasonable control of the aircraft Owner/Operator.”<sup>92</sup> The following qualify as situations beyond the control of the operator:

- A. Mechanical failure (unplanned maintenance)
- B. Weather conditions
- C. Air traffic control<sup>93</sup>

### A. *Slot Allocation Issues*

The ordinance provides that air carriers may operate no fewer than 41 slots (one departure and one arrival comprise a slot) per day from the airport while commuter carriers have a minimum of 25 slot pairs per day.<sup>94</sup> Under the ordinance, an increase in flights (air carrier and commuter carrier) can be approved so long as the airport manager “determines that initiation of service utilizing those Flights will not” result in each group exceeding the Community Noise Equivalent (CNEL) budget limits.<sup>95</sup> In 2016, the Long Beach Airport allocated nine “supplemental” slots (departure and landing), resulting in air carriers being able to operate up to 50 operations per day.<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ch. 16.43.060.D.5, E.6.

<sup>92</sup> *Id.* ch. 16.43.040.B.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* ch. 16.43.060.E. See FIS Memorandum, *supra* note 59 (explaining the rather lengthy litigation history involving attempts to regulate noise activity at the airport and its impact on slots).

<sup>95</sup> Long Beach Airport Fact Sheet—Noise Compatibility Ordinance, *supra* note 81; LONG BEACH, CAL., MUN. CODE ch. 16.43.040.

<sup>96</sup> Supplemental flights are those additional operations (beyond the minimum 41 flights) that can be awarded to carriers because the “cumulative noise generated by Air Carrier Operations during the prior twelve month period” is under the CNEL budget. Those flights can be awarded for a one-year period, subject to renewal. LONG BEACH, CAL., MUN. CODE ch. 16.43.060.E.3-5.

In 2001, the City of Long Beach allocated 27 slots to JetBlue Airways.<sup>97</sup> The carrier had as many as 35 slots at the airport in August 2018.<sup>98</sup> Over the past few years, concerns have been raised about the underutilization of slots by carriers at the airport.<sup>99</sup> Until spring 2019, airlines with allocated slots, at a minimum, had to utilize “at least four flights per slot per week over any 180-day period” or use the “slot at least 57% of the time over a six-month period, or risk forfeiting the slot.”<sup>100</sup> JetBlue, as the largest carrier at the airport, appeared to have underutilized slots because it was losing money on certain routes.<sup>101</sup>

Given that capacity (as measured by slots) is constrained at the airport, the underutilization of allocated slots can be anticompetitive and adversely affect the traveling public.<sup>102</sup> As such, the City of Long Beach amended its allocation resolution and now requires carriers to utilize a slot at least 60 percent of a month, 70 percent of each quarter, and 85 percent for each calendar year.<sup>103</sup> Given that there is a waiting list for carriers seeking slots at the airport, this new policy will be effective in ensuring that carriers utilize their slots while also ensuring a better competitive environment at the airport.

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<sup>97</sup> FIS Memorandum, *supra* note 59, Exhibit A (Letter from James W. Whitlow, Deputy Chief Counsel, FAA, to Chris Kunze, Manager, Long Beach Airport).

<sup>98</sup> Pierce Nahigyan, *New Rules Passed For Flight Slots at Long Beach Airport, Airlines Split on the Issue*, LONG BEACH BUS. J. (Dec. 3, 2018), <https://www.lbbusinessjournal.com/new-rules-passed-for-flight-slots-at-lgb/>.

<sup>99</sup> Brett Snyder, *Long Beach Chooses Southwest over JetBlue with Slot Rule Changes*, CRANKY FLIER (Nov. 27, 2018), <https://crankyflier.com/2018/11/27/long-beach-chooses-southwest-over-jetblue-with-slot-rule-changes/>.

<sup>100</sup> Nahigyan, *supra* note 98.

<sup>101</sup> Snyder, *supra* note 99.

<sup>102</sup> Nahigyan, *supra* note 98; Memorandum, Long Beach Airport—Implementation of Amended Allocation Resolution, Claudia Lewis, City of Long Beach Airport Interim Director (Apr. 3, 2019), <http://www.longbeach.gov/globalassets/city-manager/media-library/documents/memos-to-the-mayor-tabbed-file-list-folders/2019/april-3—2019—long-beach-airport—implementation-of-amended-allocation-resolution> [hereinafter Memorandum—Implementation of Amended Allocation Resolution].

<sup>103</sup> Memorandum—Implementation of Amended Allocation Resolution, *supra* note 102.

## B. Ordinance Enforcement

The city's Airport Noise and Operations Monitoring System (ANOMS) relies on 18 noise monitors placed in various parts of the city to monitor compliance.<sup>104</sup> Those who violate the Noise Compatibility Ordinance face a progressive system of sanctions.<sup>105</sup> First-time violators receive a written notice of the violation, which includes language requiring that the operator (e.g., air carrier) take steps to become compliant with the ordinance.<sup>106</sup> A second violation involves a written notice and a request that the operator provide the airport manager with a copy of a noise abatement plan with an explanation as to how the operator will ensure future compliance with the city's ordinance.<sup>107</sup> A third violation will result in a \$100 fine.<sup>108</sup> Any subsequent violation occurring within a 12-month period will result in a fine of \$300.<sup>109</sup>

The ordinance policy appears to be effective in providing an enforcement mechanism through both criminal enforcement and administrative fees.<sup>110</sup> In 2018, there were 378 aircraft noise violations at the airport; 240 were from air carriers operating at the airport.<sup>111</sup> This represents less than 0.7 percent of air carrier (and commuter carriers as defined by the ordinance) operations at the Long Beach Airport in 2018. During this time period, the airport collected \$1,049,600 in fees for airport noise violations.<sup>112</sup>

Violations of the noise restrictions can also result in misdemeanor criminal charges against an air carrier. Section 16.43.100 states in part that “[i]t is a misdemeanor, subject to the penalties applicable to misdemeanors, for the Owner/Operator of an aircraft to exceed any established SENEL limit without a reason-

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<sup>104</sup> Long Beach Airport Fact Sheet—Noise Compatibility Ordinance, *supra* note 81.

<sup>105</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43.090.C.

<sup>106</sup> *Id.* See Long Beach Airport, Noise Abatement FAQs, [http://www.lgb.org/information/noise\\_abatement/frequently\\_asked\\_questions.asp](http://www.lgb.org/information/noise_abatement/frequently_asked_questions.asp) [hereinafter Noise Abatement FAQs].

<sup>107</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43.090.D; See Noise Abatement FAQs, *supra* note 106.

<sup>108</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43.090.E; See Noise Abatement FAQs, *supra* note 106.

<sup>109</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43.090.F; See Noise Abatement FAQs, *supra* note 106.

<sup>110</sup> FIS Memorandum, *supra* note 59.

<sup>111</sup> Long Beach Airport Monthly Noise Report, Dec. 2018, <http://www.lgb.org/civicax/filebank/blobdload.aspx?BlobID=3352>.

<sup>112</sup> *Id.*

ble basis for believing that the aircraft employed would comply with the applicable SENEL limit.”<sup>113</sup> Furthermore, under this provision, there is a presumption that owners of so-called Stage 3 aircraft<sup>114</sup> “possess a reasonable basis for believing that such aircraft can be operated in compliance with applicable SENEL limits.”<sup>115</sup>

The City of Long Beach has prosecuted five carriers for violating its noise ordinance since 2002.<sup>116</sup> In 2003, the city reached a settlement agreement with JetBlue to avoid prosecution under the ordinance.<sup>117</sup> This resulted in the carrier paying “\$3,000 for the first six, and \$6,000 for every violation thereafter.”<sup>118</sup>

Between April 1 and June 30, 2017, 58 JetBlue flights violated the curfew under the Noise Compatibility Ordinance by arriving at the Long Beach Airport after 11 p.m.<sup>119</sup> The carrier claimed that some of those late arrivals were the result of air traffic control issues, which could be subject to a waiver because they were beyond the control of the carrier.<sup>120</sup> A consent decree was entered into between the city prosecutor’s office and JetBlue with the carrier agreeing to pay \$6,000 for each noise violation.<sup>121</sup>

In 2019, the City of Long Beach brought a criminal complaint against Mesa Airlines, operating as American Eagle, alleging that the airline violated the city’s single event noise exposure level 16 times between August 2018 and August 2019.<sup>122</sup> The city’s effort to obtain compliance through its traditional process had failed to

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<sup>113</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43.100.

<sup>114</sup> 14 C.F.R. § 36.1(f)(6).

<sup>115</sup> LONG BEACH, CAL., MUN. CODE ch. 16.43.100.

<sup>116</sup> Emily Rasmussen, *Airline Faces Criminal Charges for Violating Long Beach Airport’s Noise Ordinance*, LONG BEACH PRESS-TELEGRAM (Aug. 16, 2019, 6:16 PM), <https://www.presstelegram.com/2019/08/16/airline-faces-criminal-charges-for-violating-long-beach-airports-noise-ordinance/>.

<sup>117</sup> Courtney Tompkins, *JetBlue is Fighting Back Against Fines for Late-Night Flights at Long Beach Airport*, LONG BEACH PRESS-TELEGRAM (Feb. 5, 2018, 12:22 PM), <https://www.presstelegram.com/2018/02/05/jet-blue-is-fighting-back-against-fines-for-late-night-flights-at-long-beach-airport/>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Harry Saltzgaver, *JetBlue Signs Pledge to Pay, Reduce Violations*, LONG BEACH PRESS-TELEGRAM (June 26, 2018, 12:31 PM), <https://www.presstelegram.com/2018/06/26/jetblue-signs-pledge-to-pay-reduce-violations/>; LONG BEACH, CAL., MUN. CODE ch. 16.43.040.B.

<sup>121</sup> *Id.*

<sup>122</sup> Rasmussen, *supra* note 116.

compel Mesa Airlines to make the necessary changes in order to ensure compliance with the ordinance. The city's prosecutor stated that "[n]o criminal case is prosecuted unless all reasonable efforts have been exhausted."<sup>123</sup>

### C. *Additional Sound Mitigation Efforts*

There are many ways to mitigate the impact of noise from aircraft, including developing a sensible zoning plan, "sound-proofing homes in flight paths, altering flight paths to minimize noise impacts, and imposing flight curfews at night."<sup>124</sup> The City of Long Beach and neighboring communities continue to seek ways to mitigate the impact of aircraft noise on their community. The nearby City of Huntington Beach, for example, created an Air Traffic Noise Working Group in 2018 in order to examine ways to lessen the effects of noise on residents emanating from arriving aircraft.<sup>125</sup> The city is often under the approach path to the Long Beach Airport. The city is recommending, subject to FAA approval, that aircraft "maintain a minimum altitude of 2,200 feet while flying over Huntington Beach" and follow a 3 degree glide slope.<sup>126</sup> This procedure can help reduce aircraft noise.<sup>127</sup>

## VI. *Conclusion*

Airport noise is an issue that policymakers and the aviation industry as a whole have been addressing for decades. The FAA reports that "[t]he number of people exposed to significant noise levels was reduced by approximately 90 percent between 1975 and 2000."<sup>128</sup> The agency has attributed this decline largely to the enactment of laws that have resulted in airlines (and other large operators) acquiring newer and quieter aircraft.<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> Dempsey, *supra* note 6, at 3.

<sup>125</sup> Miranda Andrade, *Huntington Beach to Study Lower Aircraft Noise Over the City*, VOICE OF OC (July 9, 2019), <https://voiceofoc.org/2019/07/huntington-beach-to-study-lower-aircraft-noise-over-the-city/>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Aircraft Noise Issues*, FAA.GOV (Jan. 9, 2018, 5:20 PM), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/apl/noise\\_emissions/airport\\_aircraft\\_noise\\_issues/](https://www.faa.gov/about/office_org/headquarters_offices/apl/noise_emissions/airport_aircraft_noise_issues/).

<sup>129</sup> *Id.*

The City of Long Beach continues to find ways to support growing demand for its airport (and aviation in general) while understanding the needs of the community. The number of airline flights departing from the Long Beach Airport decreased in 2018 as compared to 2017.<sup>130</sup> However, the demand for slots at the airport is still strong, and four airlines are on the waitlist for permanent slots.<sup>131</sup>

As the city continues to balance the needs of its stakeholders, it will do so without attempting to change what is one of the most “stringent” noise ordinances in the nation. Any significant change could result in the city having to comply with ANCA and obtaining federal approval to regulate aircraft noise.

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<sup>130</sup> LONG BEACH AIRPORT, DECEMBER 2018 COMMERCIAL FLIGHT ACTIVITY REPORT (2019), <http://www.lgb.org/civicax/filebank/blobdload.aspx?BlobID=3347>.

<sup>131</sup> Memorandum—Implementation of Amended Allocation Resolution, *supra* note 102. Four carriers are also on the waitlist for supplemental slots.

