AIRPORT LAW 101

By Robert L. Sims

Assistant City Attorney

City of Dallas

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I. INTRODUCTION

Okay. You have recently been assigned to be the legal counsel for your local municipal airport. Lucky guy/gal! What a great assignment! You know nothing about airport law, but, hey … how hard can it be? You studied oil & gas law to pass the Texas bar, didn't you? After struggling to learn the rule of recapture, airport law will be a breeze. In order to get some idea of what types of legal matters you will now be responsible for handling, you go to the law library for that seminal airport law tome and find out that … whoops … there are no handbooks on airport law!

Alright, settle down. Things are not as bleak as they might seem. Just as there are a number of ways to skin a cat, there are a number of ways to learn airport law. In fact, there are a plethora of resources at hand. They are just not conveniently all in one place.

First, a clarification is in order. Airport law is not aviation law. Aviation law covers pilot training, qualifications and certifications, as well as aircraft operation, construction, handling, use, licensing, certifications, crash liability and the legal issues related thereto. Airport law covers just that … the law regarding the creation, use, operation and maintenance of airports. There is a difference.

Second, this paper is designed to be just a general survey of the basic concepts and issues that relate to the practice of municipal airport law in Texas. Let's leave a more comprehensive study of the subject to another day. Maybe one of you will write it. I, myself, am looking forward to retirement.

Third, throughout this paper, I sometime refer to "airport sponsor" and sometime refer to "airport proprietor". Technically, an "airport sponsor" is normally associated with the recipient of federal or state funding, while an "airport proprietor" is simply the operator of an airport. Since a large number of airports in this state receive either federal or state funding, for purposes of this paper, I use both terms interchangeably.

Fourth, in order to assist your basic understanding of airport law, rather than to clutter this paper with statutory and case law references, I have attempted to limit such references in the paper itself and have included an appendix with a more complete listing of the relevant statutes, cases and other sources of law organized by subject.

Fifth, like most federally regulated areas of the law, airport law is rife with acronyms. A collection of the most common acronyms that you may encounter in servicing your airport clients is included in an acronym listing that accompanies this paper on the Texas City Attorney's Association website located at: http://www.texascityattorneys.org .

Finally, I would like to acknowledge that portions of this paper are based on the "Basics of Airport Law" presentations sponsored each year by the American Association of Airport Executives (AAAE) and presented by the Kaplan Kirsch Rockwall law firm of Denver, Colorado, an airport law boutique.

II. GENERAL NATURE OF AIRPORTS

Let's first get a good handle on what we are talking about. There are over 3,154 public-use airports in the United States. A "public-use" airport is an airport with a runway for airplanes which prior permission is not necessary for the landing or taking off of aircraft. At least 400 of the public-use airports in the United States are located in Texas. The vast majority of those 400 airports are owned or controlled by municipalities, counties or regional airport authorities. Tens of million operations (takeoffs and landings) are made annually at these public-use airports. Texas, by the way, has an estimated 1,522 private-use airports, by far, the most in this country. California, in second place, has approximately 710 private use airports. Interestingly, Alaska has the most public-use airports (414), the only state ahead of Texas.

Nine percent of air travelers in the United States board at a Texas airport. Thirty-eight different airline companies serve the state with 26 Texas cities receiving commercial airline service. And the air travel demand in Texas is growing. The Texas Transportation Commission has developed a Texas Airport System Plan forecast that predicts that, by the year 2012, boardings at Texas airports will have increased to 102 million passengers and total operations will have more than doubled during the same period.

So, understandably, an airport can serve as a source of significant economic development, as well as an indirect tax revenue generator for a city (sales and business personal and real property taxes). An airport further serves as a place to conduct aeronautical educational and recreational activities. Airports also tend to encourage societal feelings of municipal self-esteem and civic pride. (Wow! Your city is large enough to have an airport!!?)

However, an airport can also be a source of great controversy, especially with regards to the effect that airport operations can have on an adjacent neighborhood. Additionally, in our post 9/11 world, security issues play a predominant role in the design, operations and activities conducted at an airport … just ask any public traveler trying to make his or her flight on time.

A. Large Airports. Airports come in all sizes: small, medium and large. The largest airports are busy commercial service-primary airports like Dallas-Fort Worth International Airport (over 28 million enplanements in 2007) or George Bush International Airport in Houston (over 20 million enplanements in 2007). Commercial service-primary airports are publicly-owned airports which receive scheduled passenger service and have more than 10,000 enplanements (i.e., passenger boardings) per year. The largest of them are essentially mini-

cities. They have their own immediate governance in the form of a board of directors and their own maintenance crews, engineers, architects, financial staff, attorneys, and police and fire rescue personnel stationed at and dedicated entirely to the airport. As we shall see below, like most airports in the state, they also have their own revenue system – separate and apart from the general revenues of the municipality that owns the airport. There are multiple sit-down restaurants, miscellaneous food and beverage concessions (non sit-down or kiosk-type specialty food stands), retail item concessions, (books, magazines, baggage carts, souvenirs, etc.) parking garages, on-and-off airport car rental facilities and services, ground transportation services (taxis, shuttles, limousines). A growing trend is to have some sort of non-aviation economic or revenue-generating activity taking place on airport property. Dallas-Fort Worth International Airport, in addition to its long-existing hotels and golf course, now has operating gas wells and a soon-to-be office park complex on airport land that will annually add million of dollars directly to airport coffers.

B. **Medium Airports**. Medium-sized airports may have many aspects of the largest airports. Most have some sort of commercial passenger service, albeit using smaller or regional passenger aircraft. The medium-sized airport does cater to general aviation (non-commercial service aircraft activities) and typically has a terminal building and at least one restaurant. Most have on-airport food and beverage and retail item concession operations and both on and off-airport rental car concessions. Most cater to both corporate jets (a temporarily endangered species thanks to the recent brush-up between Congress and the Big 3 auto executives) and individually-owned private aircraft. Most medium–sized airports are serviced by multiple fixed based operators ("FBOs") at the airport that provide aircraft fueling, maintenance and repair, as well as providing customer amenities (catered food service, showers, flight and travel information, rental car or limousine service, etc.). Examples of medium-sized airports run all the way from airports like San Antonio International Airport (over 3.9 million enplanements in 2007), Austin-Bergstrom International Airport (over 3.9 million enplanements in 2007) and El Paso International Airport (over 1.6 million enplanements in 2007) to Abilene Regional Airport (over 90,000 enplanements in 2007). Dallas Love Field, an airport with over 3.4 million enplanements in 2007 is classified as a medium–sized hub airport. The smaller of the medium-sized airports are considered to be secondary or reliever airports. There are 22 reliever airports in Texas. Reliever airports are designated by the Federal Aviation Administration (FAA) to relieve congestion at a large commercial service airport and to provide more general aviation access to the overall community in which they are located. They feed passenger traffic to the larger airports or can be used as emergency airfields in case of in-flight aircraft mechanical problems or congestion-related delays.

C. **Small Airports**. Small public-use airports are strictly general aviation airports. Texas has over 164 airports that are classified as general aviation airports. General aviation is an industry that the Texas Department of Transportation has estimated has an annual impact in Texas of over $8.7 billion and generates over 61,000 jobs annually. General aviation airports are

often serviced by one or maybe two FBOs. There may or may not be an FAA tower at the airport. There may or may not be a central small terminal building which may or may not be staffed by municipal or contract staff during business hours. There may or may not be a restaurant at the small airport. Small private planes housed in small hangars are predominant. Recreational flying and flight school training consist of much of the flight activity, although helicopter, blimp, crop-dusting, banner-towing or other small business/entrepreneurial operations may also be conducted from a smaller airport. Examples of small public-use airports include reliever airports such as Dallas Executive Airport, Addison Airport or Georgetown Municipal Airport, as well as general aviation airports such as Avenger Field (Sweetwater), Alice International Airport and Brownwood Regional Airport**.**

III. AIRPORT GOVERNANCE – OVERALL SUMMARY

As we have seen, municipal airports come in all sizes. They also come with all types of governance. A somewhat confusing matrix of laws awaits an outsider when dealing with airport regulation. There certainly is a hybrid mix of overlapping and often confusing federal, state and local statutes, rules, regulations, ordinances, orders and guidance documents that an airport law attorney has to be familiar with and carefully review as he provides his airport client with advice on handling an airport legal issue.

A. Airport Operating Certificates. There are no federal statutes concerning how airports are owned or governed locally. However, there is federal authority over airports which have scheduled air carrier operations with more than 9 seats or unscheduled air carrier operations in aircraft with more than 30 seats. *49 U.S.C. §§ 44104, 44706 and 47107(q).* Such airports have to obtain an airport operating certificate from the FAA. Since an airport does not have to have an airport operating certificate, an airport proprietor's decision not to have an airport operating certificate is considered sufficient basis for that airport proprietor to deny access to the airport of an air carrier seeking to operate the type of passenger service that requires one.

For airports that support passenger air service, FAR Part 139 provides specific requirements for airport compliance with runway/taxiway construction & maintenance, airfield signage, building heights and sightlines, aircraft rescue and firefighting (ARFF) standards and other airport requirements. Airports that do not have a PART 139 airport operating certificate are off-limits to air carriers and pilots for the type of aircraft and operations that are required to be certified at the airport under Part 139.

B. Airport Master Planning & Airport Layout Plan. An airport in Texas is not required to have a master plan or an airport layout plan unless it receives federal funding and is required to have an airport layout plan in order to remain in compliance with its airport sponsor grant assurances. An airport master plan is a comprehensive study of an airport that describes an airport sponsor's short, medium and long-term development strategy for the airport. Key

components of a master plan include environmental considerations, aviation forecasts, facility requirements, alternatives development and evaluation and a facilities implementation plan. Master plans also include an airport layout plan (ALP). An airport layout plan is a key component that portrays a graphic representation of the long-term development plan for an airport. Airport sponsors receiving federal funds are not only required to maintain a current airport layout plan but can only develop the airport in strict conformance with the plan. The FAA has published an advisory circular that specifies the process for developing a master plan and an ALP. *Advisory Circular 150/5070-6B, Airport Master Plans.* However, it is important to make a distinction between master plans and airport layout plans. The FAA does not "approve" airport master plans or master plan updates, but only the aviation forecasts that are implicit in a master plan developed in accordance with FAA guidance. The FAA does approve ALPs, and, once approved, ALPs cannot be amended without FAA consent. The other important element of the airport layout plan is that it defines what the "airport" is comprised of in terms of boundary lines and also the location of other off-site areas owned and controlled by the airport sponsor. Once received by the FAA for review, the ALP can be unconditionally approved by the FAA, be conditionally approved subject to the completion of environmental review, or receive a mixed approval (portions approved and portions not approved).

C. Federal Statutes. The federal involvement in the aviation system is derived from the commerce clause of the U.S. Constitution. Federal responsibility for the aviation system dates back to the Air Commerce Act passed in 1926, an act urged on the government by the aviation industry which believed that the airplane could not reach its full potential without federal action to improve and maintain safety standards. However, it wasn't until the passage of the Civil Aeronautics Act in 1938 and the subsequent administrative actions of President Franklin Roosevelt, when the federal responsibilities regarding aviation safety and management were transferred from the Commerce Department to an independent agency, the Civil Aeronautics Administration (CAA), that the federal government expanded its air traffic control role to takeoff and landing operations at airports. Finally, the approaching era of jet travel and a series of unfortunate mid-air collisions (including the tragic 1956 Grand Canyon mid-air collision), resulted in the passage of the Federal Aviation Act of 1958. The National Aeronautic and Space Administration (NASA) was also created that year --- following the Soviet launch of the first artificial satellite. Currently, *49 U.S.C., Subtitle I.* (governing the organization of U. S. Department of Transportation and the Federal Aviation Administration) and *49 U.S.C., Subtitle VII.* (governing the air commerce & safety, airport development & noise, and airport financing) are the primary federal statutes affecting airports.

D. U. S. Department of Transportation (DOT). Created in 1966, the U.S. Department of Transportation is the federal department with jurisdiction over the use and operation of the country's navigable airspace. The FAA is an agency of DOT and most of the federal regulation of airports is performed by and through that agency. There are two important responsibilities

fulfilled directly by DOT: (1) the issuance of federal airport grants; and (2) the promulgation and oversight of the disadvantaged business enterprise (DBE) regulations.

E. Federal Aviation Administration (FAA). The FAA is the primary federal agency for the aviation system. It was created in 1958, and, in 1968, became an agency of the Department of Transportation and among its other responsibilities it regulates commercial space transportation, regulates civil aviation to promote safety and regulates the air traffic control and navigation system for both military aircraft. Among its other responsibilities, the FAA: (1) issues and enforces regulations and standards related to the manufacture, operation, certification and maintenance of aircraft; (2) is responsible for the rating and certification of airmen; (3) certifies airports that serve air carriers; (4) regulates a security program covering civil aviation; (5) enforcement of regulations under the Hazardous Materials Transportation Act for shipments by air; (6) operates a network of airport towers, air route traffic control centers and flight service stations, develops air traffic rules; and (7) allocates the use of airspace. The FAA is broken down into nine regional offices. The FAA Southwest Regional Office in Fort Worth handles FAA matters in all of Texas, as well as Arkansas, Louisiana, Oklahoma and New Mexico.

F. Transportation Security Administration (TSA). The TSA is a component of the Department of Homeland Security (DHS) and is responsible for the security of the nation's transportation system. The TSA employs a "layers of security" concept to ensure the security of the traveling public. With regards to aviation safety, the TSA: (1) establishes and staffs airport security checkpoints; (2) performs intelligence gathering and analysis; (3) performs checks of passenger manifests against watch lists; (4) employs random canine team searches at airports; (5) federal air marshals; (6) utilizes federal air marshals and federal flight deck officers; (7) performs cargo inspections and (8) employs other security measures "visible and invisible to the traveling public". More detail about the TSA and airport security in general is contained in Section VIII. of this paper.

G. Federal Regulations and FARs. The federal agencies described above, after a public comment period, promulgates and enforces regulations designed to implement the various airport-related statutes passed by Congress and to administer the programs developed by the FAA under those statutes. Additionally, a special set of federal regulations, the Federal Aviation Regulations ("FARs"), are federal aviation regulations promulgated by the FAA as part of Title 14 of the Code of Federal Regulations (CFR) and are designed to promote safe aviation, protecting pilots, passengers and the general public from unnecessary risk. A wide variety of activities are regulated such as airplane design, pilot training activities, man-made structure heights and obstruction lighting and marking and many others. FARs are found in tens of thousand separate sections and contain detailed and often very technical requirements and standards.

H. **FAA Orders and Notices.** The FAA periodically issues orders governing the use and operation of aircraft and the operation of airports directly involving the aviation travel system. Many of the FAA orders and notices are issued for specific conditions for various airports or specific aircraft types and warnings to pilots concerning specific airports or airports conditions are often contained in "Notices to Airmen" postings

I. **FAA Handbooks, Manuals and Program Guidance Letters (PGLs).** The FAA also periodically issues handbooks that are intended to serve as guidance to FAA staff and airport operators regarding the FAA regulations and programs. Between revisions of its handbooks, the FAA issues program guidance letters offering additional guidance.

J. **FAA Advisory Circulars**. Special, emergency issues and problems are addressed by the FAA's issuance of federal advisory circulars. Safety issues that come to the attention of the FAA and the traveling public are covered by the advisory circular as well as the issuance of standards for the construction and maintenance of airport facilities.

K. **Texas Transportation Commission; TxDOT's Aviation Division**. The actual authority to create and operate an airport is found in state and local law. In Texas, Chapter 22 of the Texas Transportation Code governs the creation, governance and operation of airports in this state. See Section IV of this paper. The Texas Transportation Commission, which oversees the Texas Department of Transportation (TxDOT), is charged with encouraging, fostering and assisting in the development of aeronautics and the establishment and aid of airports, airstrips and air navigational facilities in the state. TxDOT's Aviation Division plays a virtually non-existent role in administratively overseeing airports in Texas, but, plays a very significant role with regards to funding airport capital improvements, maintenance and pavement management, especially for Texas general aviation airports. The Aviation Division is also responsible for administering and making distributions to airports of FAA's State Block Grant aid funds and is responsible for operating. maintaining and repairing the fleet of state-owned aircraft kept for the transportation needs of state officials and employees.

The TxDOT Aviation Capital Improvement Program (CIP) compiles an annual listing of potential projects at state airports based on anticipated federal airport capital improvement funding levels. Current TxDOT forecasts of federal capital improvement monies available for Texas for the 2009-2011 are: (a) approximately $22 million in annual Airport Improvement Program (AIP) funding throughout the period. (See Section VI. of this paper for more on AIP funding); (b.) $26 million in non-Primary Entitlement Funds; and (c) approximately $15 million in annual Texas Aviation Facilities Development funding throughout the period.

L. **Local Laws, Ordinances, Rules & Regulations & Orders.** In addition, local ordinances or local regulations, rules and orders passed by the municipal, county or regional governmental authority with jurisdiction over the airport may be used to further govern the use of or operations at an airport. Further, it is not uncommon for many local governing bodies with

authority over primarily smaller airports to appoint advisory airport boards or commissions made up of airport tenants, pilots, community business persons and neighborhood representatives, which, in turn, recommend airport policies, ordinances, rules and regulations to the local governing body for that body to enact or otherwise put into effect. Section V. of this paper details in more detail the varieties of ordinances, rules, regulations and orders that are typically developed for an airport.

IV. CHAPTER 22 – TEXAS TRANSPORTATION CODE

Chapter 22 of the Texas Transportation Code is basically a 1995 codification of the "Texas Municipal Airport Act" (with subsequent amendments). It governs the creation, administration, financing and operation of municipal and county-owned or controlled airports in Texas. The following is a summary of the most important provisions found in Chapter 22.

A. General Powers to Establish and Operate an Airport. Section 22.011(a) of the Texas Transportation Code provides that "… a local government may plan, establish, construct, improve, equip, maintain, operate, regulate, protect and police an airport, or air navigation facility in or outside: (1) the territory of the local government, or (2) the territory of this state." A "local government" is defined as a municipality or a county. An "air navigation facility" is generally described as a facility or device used or designed to aid air navigation, including a device, such as a beacon, light or marker that is useful as an aid in the safe landing, navigation or take off of an aircraft or the safe and efficient operation or maintenance of an airport. Further, Section 22.011 (c) gives the local government the power of eminent domain to acquire an interest in property outside the airport site in order to carry out the purposes of the airport or to permit the safe and efficient operation of the airport or to prevent eliminate or mark an airport hazard.. An "airport hazard" is generally described as a structure, object of natural growth or use of land that obstructs airspace required for the flight of aircraft in landing or taking off from an airport.

B. Authority to Promulgate Ordinances, Regulations and Rules. Section 22.014 further provides that a local government may adopt "…ordinances, resolutions, rules and orders necessary to manage, govern and use an airport or air navigation facility under its control or an airport hazard area relating to the airport." Again, the authority applies to an airport, air navigation facility or airport hazard area in or outside the territory of the local government. While an airport facility owned by a local government outside of the territory of that local government is subject to federal and state laws under the jurisdiction of the local government, no other local government may impose a license fee or occupational tax on the airport facility. The power to enforce the ordinances, regulations, rules or orders by the establishment of a police force is specifically given to the local government having control of the airport facility. A local government is not allowed to enact an ordinance, rule, regulation, or order in manner other than what is established in Chapter 241 of the Local Government Code, the statute that gives local

cities to enact zoning laws. Nor may the local government limit any other local government to enact zoning to limit an airport hazard.

C. Authority to Delegate Powers. Section 22.017 authorizes a local government, by resolution or ordinance, to delegate its power to plan, establish, construct, improve, equip, maintain, operate, regulate, protect and police an airport or an airport facility to an officer, board or other local governmental agency; provided, however, the local government remains responsible for the expenses incurred in carrying out the delegated powers.

D. Use or Operation of Airport By Others. Sections 22.020 and 22.021 allow a local government to enter into a contract to allow an airport that it controls to be turned over to another individual, local government or other entity to operate, or manage. Section 22.018 allows a local government to enter into an agreement with the Texas Department of Transportation (TxDOT) as that local government's agent to utilize its airport powers. Additionally, TxDOT may serve as the local government's agent relating to the acceptance and use of federal grant airport monies on behalf of the local government.

E. Limitation on Airport's Contracting Power. Except as to contracts, leases or other arrangements with the federal government, Section 22.021 limits a local government's authority to enter into a contract, lease or other arrangement for the purposes of operating an airport to a term of not more than 40 years. A renewal or extension of a lease may not exceed 40 years, but the airport can enter an agreement to enter into a new lease after the expiration of an existing lease, (the combined terms being more than 40 years) is expressly allowed by Section 22.022(c). Charges, rentals and fees must be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvement used and the expenses of operation to the local government.

F. Special Legislation (Dallas-Fort Worth International Airport). Dallas-Fort Worth International Airport was originally the creature of special legislation promulgated in 1965 that allowed the municipalities of Dallas and Fort Worth to establish an airport by acquiring land in the cities of Fort Worth, Irving, Euless and Grapevine. The special legislation used to create the airport was modified to apply more generally to other Texas cities and incorporated into the Texas Transportation Code as Subchapter D entitled "Joint Operations".

V. AIRPORT PROPRIETARY POWERS & CONTROLS

A. Rules & Regulations and Minimum Standards. An airport sponsor possesses both governmental powers and proprietary powers when operating its airport. In protecting the health, safety and welfare of all persons coming onto the airport, the governmental authority is exercising its governmental capacity. When it enacts and enforces minimum standards in furtherance of its proprietary obligation to ensure that commercial businesses provide

appropriate and necessary aeronautical services to airport users, the governmental authority is exercising its proprietary powers. Airport rules and regulations may be enacted by ordinance or be delegated by ordinance to the airport director or director of aviation, where appropriate and cover such topics such as ground movement and parking of aircraft, use of aircraft towing tugs, airport charges on fueling, fuel storage and fuel handling procedures, establishment of the airport rent structure, prohibited conduct on the airport, security procedures and automobile traffic. Oftentimes, rules and regulations adopted for the airport give the airport director the power to issue orders and sometimes to issue fines for violations (with an opportunity for appeal to a greater body).

Airport minimum standards may also be enacted as ordinances or, where authorized, may be adopted by the airport director, sometimes after consultation with the airport advisory committee. Minimum standards are usually divided by type of aeronautical service or between aeronautical and non-aeronautical services and typically involve items such as airport facility and improvement requirements, fueling services, aircraft maintenance and repair, aircraft sales and rentals, car rental, ground transportation (taxi, limousine, shuttle buses), flight training services. Minimum standards are important in assisting the growth and development of the airport and establishing the consistency and quality of the services offered to the airport users. While minimum standards are not required at an airport, the proper establishment and adherence to such standards can assist the airport proprietor in defending allegations and formal complaints that the proprietor has acted arbitrarily, has granted an exclusive right, has unfairly denied access to the airport to a service provider or has otherwise acted in violation of federal grant assurances or of law in general.

Two important tenets regarding rules and regulations and minimum standards are in order. First, FAA regulations prohibit the airport proprietor from adopting any rule, regulation or minimum standard that prevents an aircraft owner from self-fueling – fueling his or her own aircraft. The airport proprietor may, however, adopt reasonable safety rules with regards to fueling, such as the type of container used or the proximity of the aircraft fueling location to sources of heat, etc.

The second tenet is that the airport proprietor may not grant an exclusive right to provide aeronautical services at an airport where governmental monies have been expended. This tenet applies strictly to aeronautical services and there is an important exception to this rule that usually applies to smaller airports. Where providing a particular aeronautical service by more than one provider at the airport is unreasonably costly, burdensome or impractical, and, where providing the service by the additional provider would require the reduction of leased space under an existing agreement with the incumbent service provider, the airport proprietor is usually not considered to have granted an exclusive right at the airport. The prohibition as to the granting of exclusive rights does not apply to the situation where the airport proprietor is providing the aeronautical services, although there are anti-trust concerns if the airport proprietor exclusively provides the services through a third-party holding a contract directly with the airport proprietor.

Finally, an airport proprietor is under a very broad obligation to make the airport "available for public use on reasonable conditions and without unjust discrimination" *49 U.S.C. § 47107(a)(1).* Occasionally, disgruntled prospective airport business tenants who have failed to negotiate agreements with the airport proprietor resort to filing FAR Part 16 charges (see below) with the FAA alleging that the airport proprietor has engaged in demonstrating preferential treatment to existing tenants or has otherwise acted unreasonably or discriminatorily with respect to the negotiations. Most of these complaints are resolved in favor of the airport sponsor, but, caution is urged in how business is conducted by the airport proprietor and airport staff.

VI. AIRPORT FINANCING

A. Segregation of Airport Revenues For Airport Purposes. Section 22.054 of the Texas Transportation Code requires that all revenue from the ownership, control and operation of an airport or air navigation facility be deposited in a fund that is segregated from the general fund of the local government. The monies in the special airport fund can only be used for airport purposes and includes the proceeds from any sale of the airport or a portion of the airport or air navigation facility by the local government. FAA regulations echo the Texas statute by establishing that, except under very limited circumstances, airport revenues cannot be diverted by the local government into that government's general revenue coffers for use for other purposes other than to pay costs associated with the ownership, control or operation of an airport. One of the exceptions is that the local government, under certain guidelines, may reimburse itself for costs incurred by that local government in the creation or on-going support of the airport or air navigation facility. For instance, the costs incurred in supplying the airport with fire and rescue services on a part-time basis by the local government can be reimbursed to that local government from airport revenues. Many smaller airports do not always pay for themselves and from time to time receive support from the local government general revenues to meet certain operational or maintenance costs. These costs are also reimbursable to the local government from airport revenues, with a limit as to the time period in which such costs may be recovered.

B. Financing of Medium-Sized and Large Airports. Airports derive most of their revenue from several sources, but, primarily from the users of the airport facility. Airports charge rent to airport tenants. Rent is typically not a general commercial market rent associated with area businesses, but, more usually tied to similar facilities as similar type and sized airports in the vicinity or region.

Concession revenues are obtained from businesses providing services to the airport patrons. As mentioned earlier, concession revenues may come from a wide variety of businesses, including food and beverage servicers, airport parking operators, ground transportation providers, advertising businesses, car rental operators, business centers, ATM machine servicers, shoe shine stands or baggage cart operations.

Aircraft operators (usually commercial air carriers) either pay a landing fee, based on the weight of the aircraft taking off from the airport or a fuel flowage fee (usually general aviation aircraft operators) based on the number of gallons of fuel dispensed to the aircraft at the airport. These methods of airport financing are established through the passage of ordinances or through lease agreements with signatory air carriers.

C. Rates and Charges. Airport sponsors may impose reasonable and not unjustly discriminatory rates and charges on airport aeronautical users. The fees must be directly related to the airport sponsor's costs to operate the airport facilities. Airport sponsors generally use one of two formulas for calculating rates and charges: a compensatory or a residual formula, although it becoming more common for larger airports to use a combination of the two.

1. Compensatory Formula. A compensatory formula involves charging aeronautical users their proportionate share of the airport sponsor's actual cost to construct, operate and maintain the airport facilities that they use. In using a compensatory system, an airport sponsor retains the net revenue from concession operation at the airport (rental cars, food and beverage, parking, advertising, etc.). While a compensatory airport bears the risk of a shortfall in such revenues, at most large airports, retaining the concession revenues is usually profitable for the airport.

2. Residual Formula. Generally, a residual formula places the burden on a specific airport user group (usually the signatory commercial air carriers) to be obligated to make up any shortfall in revenue so that total airport revenues match total airport expenses for the year. When total airport revenue from non-signatory airline sources is more than the airport's non-signatory airline expenses for the year, the signatory airlines are proportionately credited with the average. When a shortfall occurs, the airlines write a check to the airport. Under a residual formula, the signatory airlines have a significant say in what the airport's expenses and capital expenditures will be for a particular year.

D. Other Airport Rates and Charges Principles. *The FAA/DOT Policy Regarding Airport Rates and Charges* provides important guidance with regards to the imposition of fees and other charges at the airport. It should be cautioned, however, that significant portions of the Policy was vacated by the U.S. Court of Appeals in *Air Transport Association v. DOT, 119 F. 3d38, amended by 129 F. 3d625 (D.C. Cir. 1997)* and, therefore, the policy document should be followed carefully.

An airport sponsor has more flexibility in establishing rates and charges for nonaeronautical users of the airport facilities than the sponsor has regarding aeronautical users. Many of the standards and requirements concerning rates and charges apply only to aeronautical users.

Grant assurances contained in federal grant agreements are a primary method of enforcement of the rates and charges scheme developed and adopted by an airport sponsor. Two federal

administrative programs are also available for enforcing improper rates and charges: FAR Part 302 (Subpart F) and Part 16.

Recently, in order to ease airside congestion at crowded airports, DOT and the FAA have advocated allowing airports to charge landing fees based on a peak period pricing mechanism and other methods of congestion pricing. In a July 2008 amendment to the *Policy Regarding Airport Rates and Charges*, the FAA has clarified the standards applicable to congested airports. Such standards have traditionally been aggressively challenged by the airlines.

The FAA/DOT Policy Regarding Airport Rates and Charges articulates several important principles including: (1.) airport sponsors should attempt to negotiate rates and charges with airport users; (2.) rates and charges must be fair and reasonable; (3.) airside fees must not unjustly discriminate against aeronautical users or user groups; (4.) airport fees should be set at a rate that makes the airport as financial self-sustaining as possible; and, (5.) airport revenues can only be used for airport purposes.

E. Airport Improvement Program (AIP) Grants. Airport grants remain a primary funding source for capital improvement projects at many airports. The FAA makes capital improvement project grants in two ways: (1.) through entitlement funds based on an airport's size and passenger enplanements (and cargo-only landed weight); and, (2.) through discretionary grants.

Both types of grants are subject to the same eligibility requirements, assurances and application process. Discretionary grants, however, are based on the FAA balancing priorities among competing airports. AIP funds may be used to pay only 75% of project costs for large and medium hub airports and 90% of project costs for other types of airports. It is up to the airport sponsor to fund the "matching funds" to the AIP grant from other sources.

1. Entitlement Funds. Entitlement funds are distributed in accordance with set formulas based on the type of airport and the amount of specified activity at the airport. "Primary" airports receive funds based on minimum thresholds of passenger boarding at the airport. "Cargo service" airports receive funds based on cargo-only aircraft with a total landed weight of over 100,000 pounds in the subject fiscal year. "General aviation" or "reliever" airports receive 20% of the total amount of AIP program funds appropriated each year. From this share, all airports, excluding all non-reliever primary airports receive the lesser of: (1.) $150,000; or (2.) one-fifth of the estimated five-year costs for airport improvement at the airport as listed in the most recent National Plan of Integrated Airport Systems (NPIAS). The NPIAS, updated and published every two years, is a listing of airports that DOT has determined is important to the public transportation and that contribute to the needs of civil aviation, national defense and the postal service. The remaining amount goes to the states according to a formula based on population and area formulas. In Texas, the Texas Department of Transportation (TxDOT) is the state agency that administers and distributes the grant money.

Large and medium airports that collect a passenger facility charge of $3 or less have their AIP entitlement apportionments reduced by an amount equal to 50% of their projected PFC revenue for the fiscal year until they have forgone 50% of their AIP formula grants. In the case of a PFC above the $3 level, the percentage forgone is 75%. 87% of the forgone apportionments go to the small airport fund and 12.5% of the foregone apportionments go to the discretionary fund.

2. Discretionary Funds. Discretionary funds are the funds remaining after all of the apportioned entitlements have been made. There are two types of discretionary funds. Set aside funds are those that have been allocated for airport noise compatibility and mitigation airports and reliever airports impacted by significant flight delays. The second type of discretionary funds are the remaining discretionary funds which have been set aside for capacity safety, security and noise projects and other eligible projects at the airport. The criteria for discretionary grants include the effect that the project will have on the overall transportation system capacity, the benefit and cost of the project, the financial commitment from non-federal sources, and the projected growth in the number of passengers of aircraft that will be using the airport at which the project is located.

3. Project AIP Eligibility. In order for an airport development project to be eligible for AIP funding, it must meet the definition of an airport development under *49 U.S.C. §47102(3).* Subject to certain exceptions, "airport development" includes, but is not limited to, the following activities undertaken by the airport sponsor: (1) constructing, improving or repairing a public-use airport; (2) acquiring for, or installing at a public-use airport: (a) a navigation or other aid; (b) safety or security equipment; and (c) snow removal equipment; (3) acquiring an interest in land or airspace; (4) relocating an air traffic control tower; and (5) constructing, reconstructing, repairing or improving an airport, or purchasing capital equipment for an airport. *49 U.S.C. §47102 (3).*

Other eligible projects include airport system planning or master planning. Specific projects that cannot be funded by AIP grants include public parking facilities, hangars (except at non-primary airports, or any part of an airport building except components associated with eligible projects. Any professional services that are necessary for eligible projects – such as planning, surveying, and design services – are also eligible. Projects related to airport operations and revenue-generating improvements are typically not eligible for funding. Operational costs such as salaries, maintenance services, equipment and supplies are also not eligible for AIP grants.

State block grant programs exist from time to time as determined by the DOT secretary. Not more than 10 qualified states each fiscal year may be selected. State block grants may only be used for airport noise compatibility planning or projects.

4. Airport Sponsor Grant Assurances. When an airport sponsor, planning agency or other organization accepts funds from FAA-administered airport financial assistance programs, it must agree to certain obligations (or assurances). These obligations require that the

recipients maintain and operate their facilities safely and efficiently and in accordance with specified conditions. The assurances appear either in the application for federal assistance and become a part of the final grant offer or in restrictive covenants to property deeds. The duration of these obligations depends on the type of recipient, the useful life of the facility being developed and other conditions stipulated in the assurances. Separate grant assurances accompany grants for federal noise compatibility grants and airport planning grants. See a summary of the Airport Sponsor Grant Assurances accompanying this paper on the TCAA website – 2009 Summer Legal Conference – Speaker Papers http://www.texascityattorneys.org .

5. Letter of Intent (LOI) Guidance. The LOI program helps fund large-scale capacity projects at primary or reliever airports. LOIs state that the AA intends to obligate AIP discretionary and entitlement funds from future budgeting authorization, an amount not greater than the Federal government's share of allowable costs for that project. The FAA issues an LOI to state that reimbursement will be made according to a given schedule as funds become available from Congress each year over the term of the LOI.

6. AIP Procurement Policies. The procurement of certain professional services and of construction work under AIP must adhere to the provisions contained in 49 CFR Part 18.36. This regulation provides for policies and procedures to be applied to typical procurement actions under the AIP, such as construction development, equipment purchases and selection for professional services (engineering consultants, etc.)

The FAA is not a party to the contracts a grantee/sponsor executes in support of the AIP. The grantee is the contractual authority for establishing and administering the contract agreements and is responsible for all contractual matters, including evaluation and award of contract, resolution of claims and disputes, and settlement of litigation issues.

7. AIP Handbook and Program Guidance Letters (PGLs). The AIP Handbook (provides FAA staff with guidance about the administration of the AIP. Between revisions of the Handbook staff will receive additional guidance in the form of PGLs.

F. Passenger Facility Charges (PFCs). Airport sponsors are authorized by statute *(49 U.S.C. § 40117)* to impose, collect and use a charge on enplaning passengers. Such a charge is called a Passenger Facility Charge. PFCs of $1, $2, $3 per passenger may be used to fund airport projects to enhance safety, security or capacity, reduce noise, or increase air carrier competition. For large and medium hub airports, a PFC of $4.00 or $4.50 may be charged, under certain circumstances, in order to cover the airport's cost for projects that the FAA finds will make a significant contribution to improving air safety and security, increasing competition among air carriers, reducing current or anticipated congestion or reducing the impact of aviation noise on people living near the airport.

Airport sponsors who charge PFCs are subject to contain grant assurances like prohibition of long-term exclusive use leases. However, such PFC grant assurances do not involve many of the general social goals sought by Congress or the FAA as in the AIP grants.

PFCs are also considered to be local revenues even though they must be approved by the FAA before they can be imposed. This characterization of PFCs allows the airport sponsor to use the revenues in a broader way as long as they are used on PFC eligible projects. As an example, unlike AIP grant funds, PFCs may be used to pay debt service for eligible projects.

G. Ground Transportation and Airport Access Fees. Airport sponsors may impose fees and charges on off-airport businesses to access the airport based on either a per trip criteria or as a percentage of gross receipts. Such fees and charges are calculated not only to compensate the airport sponsors for the user's proportionate share of the cost of the access roads, but also for costs of the larger airport facility. Such latter justification is based on the premise that the existence of the airport is responsible for much or all of the revenues generated by the off-airport business.

Unlike AIP grant funds, airport access fees and charges are not subject to many of the grant assurances, including the requirement that the fees and charges must be reasonable and nondiscriminatory, which applies only to rates and charges on aeronautical users.

As a result, there have been numerous legal challenges by off-airport businesses to access fees. The vast majority of those challenges have been unsuccessful. Reviewing courts have consistently held that where access fees have been carefully and lawfully enacted, they: (1.) are not impermissible; (2) do not violate the Equal Protection and Commerce Clauses of the U. S. Constitution; (3) do not constitute taxes; (4) are not subject to the Anti-Head Tax Act; (5) do not violate federal anti-trust statutes; and (6) do not violate a concessionaire's substantive due process. Additionally, a Texas court has ruled that the regulation of a private shuttle service from a city's airport is a governmental function for which the city is protected from suit by its sovereign immunity. *Ethio Express Shuttle v. City of Houston, 164 S. W. 3rd 751 (Tex. Ct. App. 2005)*

H. Airport Revenue and Special Facility Bonds. Where specific capital improvements are sought to be constructed and operated at the airport, airport revenue bonds and special facility bonds is often used by the airport, or, in some cases, the air carrier, to finance the project. These bonds generally look to airport revenue streams for security for the financing and the airport agrees to bond covenants that may restrict the airport from certain uses of airport revenue streams until the bonds have been paid off. A capital reserve requirement dedicated to the bond debt service is typically also established by the bondholders. Outside legal counsel is often used to negotiate, draft and review bond documents by the airport.

VII. AIRPORT NOISE LIABILITY & MANAGEMENT

A. Airport Noise Liability. Airports attract aircraft and aircraft generate noise – be it the buzz of a Cessna prop plane, the thundering rush of a 737 jet or the whirl of a Bell helicopter. And neighbors around airports tend have activist spirits. Needless to say, airport proprietors have been held liable for excessive aircraft and airport noise. Theories most commonly used to find liability on the airport proprietor's part include inverse condemnation, nuisance and trespass. The rationale that courts have used to find airports liable as opposed to aircraft owners, users or the FAA itself is that airport proprietors control the configuration of runways and can acquire buffer land adjacent to the airport and obtain avigation easements from nearby property owners. In order to establish a taking under inverse condemnation, a property owner generally must establish that aircraft over flights are so low and so frequent as to directly and substantially interfere with the use and enjoyment of property. Over flights conducted in what has been defined as the "public domain" *(See 14 C.F.R. § 91.11*9) do not constitute the taking of private property rights without just compensation. "Public domain" is defined in the regulation differently for "congested areas" and "other than congested areas".

Recognizing the need to protect airports from unlimited exposure on noise liability, the FAA has attempted to put a limit on noise liability for airports that have duly adopted noise exposure maps – giving airports, existing property owners and new property owners who purchase property within the noise exposure contours after the noise exposure maps have been published some scientific standard by which to measure the demonstrable effect that aircraft noise has on the property owner's enjoyment of his property. *14 C.F.R. Part 150*. The statute passed by Congress goes on to prohibit the noise exposure map developed by an airport proprietor under the regulations and information related to the map cannot be admitted in a lawsuit for noise-related damages. *49 U.S.C. §47507.* However, the viability of the statute and regulations themselves and the extent that they protect airports from liability from the effects of aircraft noise, as of yet, has not been fully legally tested in the courts.

B. Acquisition of Land for Noise Compatibility. Airport sponsors may acquire property for airport development or to eliminate land uses that are incompatible with airport-related noise. The acquisition of property for these purposes are eligible projects for both the use of AIP grant funds and PFCs. Airport sponsors using federal funds to acquire land should comply with the *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("The Uniform Act").* The Uniform Act has detailed regulations regarding procedures involving property appraisal, negotiation and relocation assistance. It is wise to stick with the strictures of the Uniform Act even if federal monies are not used in the actual acquisition because there still may be federal involvement in the noise compatibility/mitigation project. It is important to be knowledgeable of local and state acquisition procedures as well as the detailed federal requirements, especially if the use of eminent domain is contemplated or involved in the acquisition.

Except for the property acquired to promote land compatibility, property purchased by an airport sponsor becomes part of the airport and must be depicted on the Airport Layout Plan. Additionally, the land becomes subject to all of the restrictions applicable to the airport, even if the property is not immediately used for aeronautical purposes. Further, once acquired by the airport sponsor, property acquired with AIP funds cannot then be sold without getting the prior approval of the FAA and a release of the grant assurances as to that tract. The FAA may require the airport sponsor to reimburse the federal government for the grant monies used to acquire the property. Federal law requires that property purchased for noise purposes must be sold if no longer needed for land use compatibility. The FAA, while once a bit lenient regarding this requirement, has recent becoming more vigilant in this area. Finally, airport sponsors are allowed to "land bank" property for future airport development (more than 5 years) under limited conditions.

C. Part 150 Noise Studies and Mitigation. In general, property acquisition for noise is AIP-eligible only if the FAA has approved the acquisition in a FAR Part 150 noise study. 14 C.F.R. Part 150. But, more than property acquisition, reducing noise emanating from airport operations is a day-to-day activity involving a number of tools and the efforts of a number of interested parties, including airport tenants, pilots, air carriers, neighbors, off-airport concessionaires and airport staff. Since airport operators have little authority to abate aircraft noise at its source by controlling the type of aircraft flown or number of operations at the airport, an airport sponsor concentrates on mitigating the effects of noise.

Part 150 noise studies are detailed and comprehensive affairs. What is as important as the result of a Part 150 study is the process employed by the study in order to reach the result. Substantial public outreach, participation and comment are required to complete a study. The wise airport operator uses this opportunity to not only educate the public about airport noise but also to enlist the public's support in identifying the source of and in ameliorating the effects of airport noise. The airport lawyer plays an important role in the public discussions in detailing the legal obligations of the airport sponsor and the limitations placed on the airport operator in dealing with noise.

Nonetheless, Part 150 noise studies are not without some controversy. The FAA's approved methods of measuring noise exposure are based on measuring the cumulative noise exposure. This is a modeled prediction of the steady rate (average) noise exposure over a given period of time. This is referred to as "DNL". Critics of the DNL model believe that the effects of "one-time" noise events are diluted by the cumulative measurements. The FAA has established DNL 65 dB as the threshold of significant noise exposure. Most land uses have been determined by the FAA to be compatible with airport operations registering at noise levels below DNL 65dB.

D. Part 150 Noise Maps and Noise Compatibility Programs. AIP grant funds can be used to conduct Part 150 noise studies and to fund noise mitigation measures. The noise study results in a noise exposure map having contours showing where airport noise varies at different

locations on and off the airport. The FAA is responsible for ensuring that the noise exposure map has been prepared in accordance with the Part 150 technical requirements. However, regarding each proposed noise mitigation measure in the noise compatibility program submitted by the airport sponsor, the FAA must approve or disapprove each measure. The airport sponsor may submit the noise exposure map and noise compatibility program together or in sequence. The regulations prescribe a 180-day review period for FAA to approve or disapprove the entire noise compatibility program. Some of the suggested noise mitigation usually identified by the Part 150 study include both the fee acquisition of property and the acquisition of certain interests in property (usually avigation easements), the construction of noise barriers, the insulation of sound-proofing in schools and residential structures, the use of a preferred runway system, noise abatement flight departure and approach procedures/profiles, and certain aircraft operating restrictions. Certain restrictions adopted by airport proprietors prior to October 1, 1990 have been grandfathered.

A Part 150 noise study is voluntary. Since airport sponsors do not apply for federal funds to implement aircraft operating restrictions, airport sponsors sometimes choose omit to such restrictions from the airport noise compatibility program that they submit to the FAA. However, airport sponsors must ensure that they have complied with the *Airport Noise and Capacity Act, 49 C.F.R. §§ 47521 – 47533* and its implementing regulations, 14 C.F.R. Part 161, prior to enforcing any restriction on Stage 2 or Stage 3 aircraft (aircraft that meet certain FAA noise standards with regards to engine noise emissions).

Since FAA guidance has not been consolidated in one place and Part 150 noise studies vary from region to region, it is important that the airport attorney work very closely with the FAA Regional Counsel's Office and with the outside noise engineering professionals hired by the airport sponsor in order to ensure that all of the federal procedures are followed and that a good product is the outcome of the study. One final important point: local governments are free to establish their own land use compatibility standards and regulations in response to locally determined needs and values. This usually occurs through the zoning and platting process.

VIII. AIRPORT SECURITY

As we know, the world changed as a result of 9/11. The most significant aspect of tightened security at airports in this country was provided by *The Aviation and Transportation Security Act (ATSA) of 2001* which created the Transportation Security Administration (TSA). In an effort to secure all modes of transportation in the United States, including civil aviation, ATSA, among other things, required that after November 19, 2002, screening of all passengers and property boarding domestic commercial be conducted by employees of the federal government, although two years later, in 2004, ATSA allowed private screeners meeting certain stringent requirements to be employed by airports who make application to the TSA. The major impediment that has to be overcome by the airport proprietor applicant is that the proprietor has the burden of

demonstrating that the private screener can perform screening services and protection at an equal or better level than provided by the federal employees, while meeting all of the compensation and employee benefit standards that the TSA is held to.

The head of the TSA was authorized by ATSA to implement "trusted passenger" programs designed to expedite the screening of certain passengers. *49 U.S.C. § 114.* The TSA has subsequently developed the Registered Traveler (RT) Pilot Program to test and evaluate such a trusted passenger program. The pilot program has been rolled out at a number of airports around the country, with the private sector working on an initial interoperability phase. In July, 2008, TSA announced revisions to the RT Program that include no longer having TSA conduct security threat assessments and no longer collecting a fee from RT participants.

With the passage of ATSA, Congress was just warming up. Since ATSA, various statutes such as the *Homeland Security Act of 2002, the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002, Vision 100 – Century of Aviation Reauthorization Act, the Intelligence Reform and Terrorism Prevention Act of 2004 and the Implementing* Recommendations of the *9/11 Commission Act of 2007* and other various appropriations acts have been passed that affect airport security.

While TSA has the primary screening responsibilities, airport proprietors have certain obligations to fulfill. *49 C.F.R. § 1542* is that portion of the Transportation Security Regulations (TSRs) that covers airport security. When ATSA was first passed, airports were required to assist the TSA with its passenger screening tasks by making significant improvements to terminal buildings and other airport facilities. The airport proprietor was later aided by specific grants for the capital improvements imposed by the TSA. Additionally, under TSA regulations, airport proprietors were obligated to adopt a security program that includes among other things, establishment of a badge security & identification program, establishment of secured areas, air operations areas and the development of contingency plans. Each airport's security program is a highly confidential document and is designated as Sensitive Security Information (SSI). SSIs are protected from public disclosure by federal regulations *49 C.F.R. § 114(s), 49 C.F.R. Part 1520 and by the Texas Public Information Act (Sections 418.176 through 418.182 of the Texas Government Code).* The Texas Attorney General, in several informal letter rulings, has allowed that the decision to withhold or release information that is classified as SSI rests with the head of the TSA and that requests for such information should be referred to the TSA (or the Coast Guard, where applicable) for their decision regarding the disclosure of the information. *Open Records Letter Nos. 2005-7525 (2005), 2003-4166 (2003), 2002-2710 (2002), 2002-2623 (2002).*

The list of TSA programs and activities involving air travel and airports, include, but are not limited to, the following:

1. putting in place local Visible Intermodal Prevention and Response (VIPR) teams that employ intermodal technologies such as communication devices and surveillance cameras in

order to determine the timing, location and duration of a VIPR deployment involving law enforcement officers;

2. requiring flight instructors, pilot schools and aviation training centers to notify the Secretary of Homeland Security that an alien has requested training in the operation of aircraft prior to providing such training;

3. developing Secure Flight, a next generation aviation passenger screening system, wherein the air carrier will provide a limited amount of passenger information whenever a reservation is made by that passenger for a domestic flight;

4. entering into law enforcement reimbursement agreements with local jurisdictions, focusing on the local government costs associated with the ATSA-required deployment of local law enforcement officers at each airport security screening;

5. interacting, on an on-going basis, with Airport Security Coordinators (ASCs) at certain large and medium-sized airports who serve as the airport proprietor's primary contact with TSA for security activities;

6. working with airport proprietors to establish various levels of security programs, including (in airports with complete security programs) designating certain areas of the airport to be "secured areas", "air operations areas" and "security identification display areas";

7. developing and implementing a "Known Shipper Program", an initiative to determine the validity and integrity of cargo shippers, as well as, ensuring that cargo is screened or inspected – a responsibility of the aircraft operator;

8. administering numerous air cargo security requirements pointing to a *9/11 Commission Act of 2007* mandate of 100% screening of passenger air cargo by 2010;

9. issuing legal guidance on conducting criminal history records checks and requiring such checks on all airport employees, TSA checkpoint screeners, flight crew members and anyone else who has unescorted access to secure areas of the airport;

10. implementing a pilot program at 19 airports testing the use of whole body image scanners – scanners which TSA has determined will eventually replace the metal detectors now used in air carrier airports;

11. re-establishing a gate random screening program – conducting identification checks and hand-wanding passengers at airline gates; and

12. performing pre-flight comparisons of airline passenger information to federal government watch lists.

An additional TSA initiative that has proven to be somewhat controversial for airport proprietors is the TSA push to have local enforcement officers conduct vehicle searches outside of airport terminals. Warrantless, suspicionless searches at airport security points have been consistently upheld by courts as being administrative in nature and part of a general regulatory scheme justified by the risks to public safety associated with having weapons and explosives on airplanes, buses and trains. *See United States v. Aukai, 440 F.3rd 1168 (9th Cir. 2006) aff'd on reh'g, 497 F.3d 955 (9th Cir. 2007).* However, to the extent that such searches pass constitutional muster when the challenged curbside search occurs outside the traditional airport security area, such as on airport access roads and at terminal buildings, remains to be determined by the courts. Moreover, since such searches are usually conducted by local enforcement officials at the behest of TSA, liability questions for the local airport proprietor remain unsettled.

IX. FIRST AMENDMENT ISSUES

From time to time, the larger airports have to deal with First Amendment issues relating to free speech. Individuals and groups who would like to express their views often choose airports as a location to express their views to the traveling public. Under the First Amendment, "Congress shall make no law … abridging the freedom of speech, or of the press." The First and Fourteenth Amendments protect the freedom of speech and the press. State constitutional provisions also afford such protections. The extent of the protection afforded such individuals and groups depends on the nature of the forum. There are three types of forum: public, designated and non-public. Public fora are "…places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).* Public fora usually include streets, sidewalks and parks. Non-public fora are areas where there is traditionally some type of restriction as to public access or speech activities. See *Perry* above. Designated public fora are areas that the government has determined to be made available for speech activities within either a public or non-public forum. If the designated public forum is unlimited in nature, the designated public forum is subject to the same standards as a traditional public forum. If the designated public forum is limited, then the governmental regulations must only be reasonable and view-point neutral, as with a non-public forum. *Good News Club v. Milford Central School, 533 U.S. 98, 106-107 (2001).* The U.S. Supreme Court has ruled that, since airport terminals have not historically been made available for speech activity, they are considered to be non-public fora under the federal constitution. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).* In a non-public forum, airport rules and regulations as to speech need only be reasonable and viewpoint-neutral. View-point neutral regulations are regulations that do not discriminate on the basis of a position taken on a particular issue. Airport rules and regulations concerning speech can additionally be content-based if they are rationally related to a legitimate government interest. Content-neutral regulations are regulations that discriminate based on the content of speech. In a non-public forum, one court

has held that a ban on leafleting is constitutional, but a ban on solicitation was unconstitutional. *Gannet Satellite Information Network. v. Berger, 894 F.2d 61 (3rd Cir. 1990).*

Other interesting First Amendment cases include the following: (A) While the terminal building was found to be a non-public forum, a total ban on newspaper racks at the airport violated the First Amendment because such a ban created a substantial burden on speech and the press. *Multimedia Publishing Co. of South Carolina v. Greenville-Spartanburg Airport, 991 F.2d 154 (4th Cir. 1993*); (B.) An airport rule limiting distribution of religious literature to one or more booths was found to be a valid time, place and manner regulation of speech *Int'l Soc'y for Krishna Consciousness of Missouri, Inc. v. City of St. Louis, 890 S.W. 2d 660 (Mo. Ct. App. E.D. 1994);* (C.) Unlike airport terminals, display cases in airport terminals may be considered a public forum based on the government's intent. *Air Line Pilots Association International v. Department of Aviation of the City of Chicago, 45 F.3rd 1144 (7th Cir. 1995);* (D.) A court also found that an advertising display case was neither a traditional public forum nor a designated public forum because the government's intent was to develop the display cases to generate revenue rather than to promote the exchange of free ideas. *Park Shuttle N' Fly, Inc. v. Norfolk Airport Authority 352 F. Supp. 2d 688 (E.D. Va. 2004);* (E.) An airport free speech policy requiring any person wishing to perform speech activities to obtain a permit before doing so (the policy provided a limited number of locations, renewal requirements limitations on signs and other requirements) was held to be constitutional in that it was a content-and viewpoint neutral time, place and manner permit scheme. *Jews for Jesus, Inc. v. Port of Portland, Oregon, 2005 WL 1109698 (D. Or. 2005).*

Individuals and groups have also tried to use the Establishment Clause of the First Amendment to obtain clearance to conduct religious activities at airports. The U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion." This clause applies to the fifty states under the Fourteenth Amendment. The U. S. Supreme Court has constructed a three-part test for determining whether a statute or government practice violates the Establishment Clause. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third, the statute must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman, 403 U.S. 602 (1971).* The lease of space in the terminal for the purpose of a chapel was upheld because the lease serves a secular purpose of accommodating the religious needs of travelers and providing them with a place for rest and comfort, the chapel would not lead a reasonable observer to conclude that the city endorses religion by allowing the diocese to maintain the chapel, the lease of the space for the chapel does not constitute an endorsement of religion and does not foster an excessive government entanglement with religion. *Hawley v. City of Cleveland, 24 F.3d 814 (6th Cir. 1989).*

Obviously, these cases will continue to be decided on a case-by-case basis. The good airport lawyer needs to be generally aware of the First Amendment implications of the rules, regulations

and actions adopted or taken at the airport relating to free speech and press and needs to be ready to quickly respond to these types of situations as they arise from time to time.

X. DISADVANTAGED BUSINESS ENTERPRISES ("DBEs")

The work and services performed in conjunction with airport planning, development, construction, operations and concession services have spawned some of the largest minority-owned companies in this country. The U.S. Department of Transportation is charged with the implementation of laws specifically designed to provide airport business opportunities for small business owned and controlled by socially and economically disadvantaged individuals. The goals of the DOT DBE program is to ensure nondiscrimination in DOT-assisted contracts, create a level playing field and remove barriers to participation by DBE. As a result of the U.S. Supreme Court's holding in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), wherein the court stated that "…all racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny", DOT revised portions of 49 C.F.R. 23 (specifically addressing airport concessions) and created a new set of regulations in 49 C.F.R. 26. Important to Part 26 is the requirement that, with limited exceptions, a grant recipient must set an overall goal for DBE participation based on the relative availability of disadvantaged business enterprises in the recipient's market. The old minimum standard established by the airport sponsor's acceptance of grant assurances that the airport sponsor will take necessary action to ensure that 10% of all businesses at the airport selling consumer goods or providing consumer services to the public be a DBE or qualify as a historically underutilized business (HUB) as defined in Section 3(p) of the Small Business Act is no longer an adequate standard.

Part 26 guidelines include: (A.) race-neutral means must be used by a recipient when attempting to meet its goal; (B.) contract goals must be established for any portion of the overall goal a recipient does not expect to meet through race-neutral means; (C.) a recipient's program must be narrowly tailored to overcome the effects of discrimination; and, (D.) quotas and set-asides cannot be used in achieving a recipient's goal, although some set-asides can be used in very limited instances. *See 49 C.F.R. 26.43.* A recipient cannot be penalized because its DBE participation falls short of its overall goals, unless the recipient has not administered its program in good faith.

XI. FAA COMPLIANCE & ENFORCEMENT PROCESS

The FAA has several avenues for enforcing the requirements contained in grant assurances and federal airport regulations. A withholding of a grant payment or the finding that a grant recipient has violated its grant assurances are two simple FAA enforcement activities. The FAA has broad

authority to conduct investigations and issue orders in order to carry out its responsibilities. Additionally, the FAA may seek injunctive relief to stop the violation of a grant assurance.

However, most allegations of airport sponsor regulation or sponsor grant assurance violations are initiated through a formal complaint filed by a third-party or originated by the FAA itself and handled in accordance with the formal FAA Part 16 or the informal FAA Part 13 investigation and hearing mechanism. *14 C.F.R. Part 13 and Part 16.* Certain other regulations have separate enforcement programs. Part 158 Subpart E handles disputes involving Passenger Facility Charges. Part 161 Subpart F handles disputes involving compliance with the *Airport Noise and Capacity Act of 1990.* Part 13 investigations have no formal process and usually result in a determination either to further investigate the alleged violation through the formal Part 16 procedure or to drop the investigation entirely as being without merit.

Only a party that is "directly and substantially affected by any alleged noncompliance" is authorized to file a complaint. *14 C.F.R. 16.23.* The FAA may initiate an investigation without a complaint. *14 C.F.R. § 16.101.* The FAA investigation concludes with the issuance of a Director's Determination, by the Director of the FAA Office of Airport Safety and Standards. *14 C.F.R. § 16.31.* After the Director's Determination is issued, the process can go in several directions. FAA Part 16 complaints are first subject to "good faith efforts to resolve the disputed matter informally *14 C.F.R. § 16.21.* If the Director's Determination results in finding the respondent airport sponsor in noncompliance, the initial determination will contain a notice of opportunity to have a hearing, if the FAA, in its sole discretion, so decides a hearing is warranted. The respondent airport sponsor may waive an offered hearing and appeal the Director's Determination to the FAA Associate Administrator. The complainant may appeal an adverse decision to the FAA Associate Administrator. The Associate Administrator's decision constitutes the final decision of the FAA, which can then be appealed to the U.S. Court of Appeals. *14 C.F.R. § 16.247.*

While there have been more than 80 reported decisions under Part 16, there have only been two cases that have proceeded through the three levels of review under Part 16 (investigation, hearing and appeal) and have been considered by the U.S. Court of Appeals. The majority of federal courts that have considered the question of whether there is a private right of action under the *Federal Aviation Act or the Airway Improvement Act* to judicially challenge alleged violations of these laws. Part 16 has been determined to be the exclusive means to pursue airport compliance matters.

A high percentage of Part 16 matters involve charges of unjust discrimination or economic discrimination or the grant of an exclusive right. To date, the vast majority of Part 16 matters are resolved in favor of the airport proprietor. However, these matters tend to both draw a lot of local publicity and can be both time-consuming and an irritation to airport staff. If possible, it is best to try to resolve the underlying dispute prior to an informal or formal complaint being filed by an aggrieved party or prior to an investigation being launched by the FAA.

XII. LOCAL ZONING AND LAND USE REGULATION OF AIRPORTS

Federal law preempts local jurisdictions from restricting aircraft operations, but generally does not preempt local zoning and land use regulation. The local governments have the power to exercise their zoning and land us authority to control the location and growth of airports. Where it gets complicated is where local zoning or land use regulation indirectly affect aircraft operations. The more a local regulation of aircraft, the more chance there is that the local regulation will be determined to be preempted by federal law. Additional complications involve the effect that a neighboring local jurisdiction's zoning or land use laws may have on another local jurisdiction's airport. FAR Part 77 governs structure height restrictions and natural objects near an airport. The regulations do not prohibit any particular construction or type of construction and are merely advisory. However, should the FAA determine that a violation of the height restriction has occurred and that there exists a "substantial adverse effect on air navigation", one of the options it has is to order air traffic at the airport to cease – thereby shutting down the airport. Cases are currently mixed as to whether a determination of a height restriction violation is a per se regulatory taking.

XIII. AIRPORT ENVIRONMENTAL ISSUES

Aside from the impact that aircraft noise has on surrounding communities, airports face significant air, water, ground and toxic substance storage, handling and disposal environmental issues related to airport development, operations and maintenance. Moreover, in certain circumstances, airports can be held liable not only for what environmental consequences the airport proprietor has directly caused, but, also for what airport tenants might cause. Such consequences include civil penalties, criminal sanctions, injunctive relief and clean-up responsibilities imposed by state and federal environmental agencies such as the Texas Commission of Environmental Quality (TCEQ) and the U. S. Department of Environmental Protection (EPA). Therefore, it is incumbent upon airport proprietors to include strong environmental compliance standards and responsibility clauses, as well as risk-shifting and indemnification provisions in airport leases, regulations, minimum standards and service contracts.

Substances such as petroleum products, emissions from aircraft gas turbine engines, emissions from airside and landside ground vehicles, paint fumes, asbestos, de-icing chemicals and refrigerants are common on the airport and must be properly managed. Additionally, stormwater management plans, Spill Prevention Control and Countermeasure (SPCC) plans and other contingency operations are required under EPA regulations. SPCC plans are especially important at airports in that airport proprietors are required to put in place containment and countermeasures that would prevent oil spills that could reach navigable waters. Leaking

underground storage tanks and underground fuel lines are of a particular concern at larger airports and an effective management and inspection plan needs to be in place.

Not all airport environmental legal issues involve inert substances, such as air, water and petroleum products. As seen in the recent Hudson River Continental Airlines ditching incident, it is important that airports be conscious of the environmental conditions at the outskirts of airport property that might impact airport operations. The effect of Migratory Bird Treaty Act and the Endangered Species Act may be factors in the management of your airport. Recently, the FAA has indicated that it will soon issue a CertAlert to its Airport Safety and Certification Inspectors that will identify approximately 150 airports that have been identified by the FAA as having "triggering events", but that have not completed FAA-approved wildlife hazard assessments as required under 14 C.F.R. Part 139. The CertAlert will require inspectors to contact these airports to discuss their strategies for achieving regulatory compliance by submitting their respective wildlife hazard assessments. The FAA has also announced plans to initiate a rulemaking action concerning the wildlife hazard management provisions contained in Section 139.337 of 14 C.F.R. Part 139.

The Voluntary Airport Law Emissions Program (VALE) is a national program to reduce ground emissions of commercial service airports located in designated air quality nonattainment and maintenance areas. The program was established under the *Vision 100 Century of Aviation Reauthorization Act of 2003 (PL108-176).* The VALE Program allows airport sponsors to use the Airport Improvement Program funds and passenger facility charges to finance low emission vehicles, refueling and recharging stations, gate electrification, and other airport air quality improvements.

Airport development projects will need to comply with the National Environmental Policy Act (NEPA), including possibly performing an environmental assessment that results in a Finding of No Significant Impact (FONSI) or an Environmental Impact Statement (EIS).

XIV. MISCELLANEOUS AIRPORT LEGAL ISSUES

Recent "hot button" airport legal issues of interest to would-be airport attorneys include:

1. The City of Santa Monica is trying to ban Category C and D business jets with faster approach speeds from operating at the City's airport due to the airport's runway safety areas being drastically shorter than FAA guidelines. The FAA has ruled that such ban is unreasonable, unjustly discriminatory, violates the terms of a previous 1984 agreement between the City and the FAA and is violative of the Surplus Property Act. The City has appealed the FAA determination.

2. A Georgia appeals court has ruled that Hartfield-Jackson Atlanta International Airport may prohibit concealed weapons inside the airport. The plaintiff had argued that a

Georgia Statute allowing concealed firearms to be carried in certain public areas as long as the actor has a valid permit to carry such weapons. The court rejected that argument stating that the law should not be extended to the non-sterile areas of the airport because the stature does not apply to the airports.

3. Efforts are currently underway in the U.S. House of Representatives to ban full body scans at airports and to allow TSA security officers to wear "personal protective equipment", including protective masks during any public health emergency. Additionally, the World Health Organization has proposed banning the sale of tobacco products in airport duty-free shops. The airport trade organizations have opposed the proposed ban.

4. The TSA has proposed rulemaking to impose security requirements on larger general aviation aircraft and many of the general aviation airports that such aircraft operate at. The proposed Large Aircraft Security Program (LASP) would allow TSA to place federal air marshals on private flights. The proposed rulemaking has been criticized as laying the groundwork to impose massive security regulations on all general aviation and airports without having established any foundation for doing so, such as making findings with regards to threat, vulnerability, operational sense or cost.

5. A pilot program designed to facilitate the privatization of Midway Airport collapsed recently, due mostly to the existing financial market crunch.

6. TSA has discontinued the "puffer" machines designed to test individuals for traces of explosives as they passed through passenger screening posts. The "puffer" machines proved to be mechanically unreliable.

XV. AIRPORT FUTURE TRENDS

NEXGEN. Through its massive NexGen Program, DOT is preparing future air transportation to transition from a radar-based air traffic management system to a satellite–based system, with goal of reducing delays, improving safety and achieving certain environmental goals. By 2018, NexGen is expected to offer operational economic and environmental benefits while increasing safety throughout all phases of flight. The first NexGen phase is concentrating on mid-term (mid-term = 2012-2018) still using today's technologies but introducing new systems and procedures that will change air traffic surveillance, communication and the exchange of information between air traffic managers, pilots and airports.

Aircraft operators will access all related info through a single source. This information will include, among other items: (1). airspace blocked for military, security or space operations; (2). other airspace limitations such as weather delays and congestion; and (3.) the status of properties and facilities, such as closed, blocked runways, and out-of-service navigation aids. This will

allow users to begin the planning process with a full picture of potential limitations on their flights from ground operations to the intended flight path trajectory.

During flight planning, an electronic representation of the aircraft operator's intent will be developed. This intent information can be updated as flight progresses with tactical and strategic information. It will better accommodate operator preferences and optimize resource usage. Access to real-time flight planning info will be available to authorized users via a secured network and will include publish/subscribe capability so that users can receive automatic updates when conditions change along the proposed flight path. The expected results will be fewer radio transmissions, shorter wait times, fewer departure delays, increased fuel savings and reduced emissions. The system will recommend the best runway and taxi path and the status and positions of all other aircraft on the airport and in the terminal area.

XVI. AIRPORT LAWYER - RESOURCES

So what do you do when "airport law" is not conveniently located in one spot. You stay loose, stay flexible, be creative and improvise. With the advent of the internet, it is amazing the type of information now located at one's fingertips. I was slightly surprised to find the list of Texas public-use airports provided with this paper is located on Wikipedia http://en.wikipedia.org/. Naturally, the government websites for the U.S. Department of Transportation http://dot.gov/new/index.htm/, the FAA http://faa.gov/ and the Department of Homeland Security http://dts.gov/index.shtm and the TSA http://www.tsa.gov/ are key resources and should used when needed and revisited on a frequent basis.

Additionally, joining one (or both) of the two main trade associations, American Association of Airport Executives (AAAE) http://www.aaae.org/ or the Airport Council International – North America (ACI-NA) http://www.aci-na.org/ are essential resources for garnering the type of updated information that an airport law attorney needs to have available to him or her. These trade groups also hold two and three-day legal seminars twice a year where airport attorneys have a chance to meet one another and share valuable information as well as war stories. They are well worth the membership fees in that they provide weekly and monthly updates (AAAE) and legal alerts (ACI-NA).

Major Texas cities, such as Houston, Austin and Dallas have aviation department or airport web-sites that contain helpful information on various things like minimum standards, master plans, competition plans and ground transportation regulations.

Don't overlook the major daily newspapers for articles on airports. The Atlanta Journal Constitution http://ajc.com/ is constantly reporting on the ever-changing events at one of the world's busiest airports, Atlanta Hartsfield-Jackson International Airport.

Through our own Texas Municipal League (TML), you can subscribe to a daily news service http:///www.connectnews.org that provides TML members with news concerning newsworthy events involving Texas municipalities. Occasionally, these news events concern airports or legal issues important to the practice of airport law.

Finally, for many airport proprietors of medium and large airports, the use of outside counsel who are well-versed in airport law, who have the capability to interact with the FAA and who have the political connections with state and national legislative representatives, may be necessary to handle selected legal issues involving your airport. The cost of engaging outside legal counsel may be well worth the money if your airport is able to secure that pilot program interoperability grant or your airport is able to avoid FAA sanctions for a perceived FAA financial diversion violation.