Evaluation of the City of Santa Monica's authority to address environmental impacts from Santa Monica Municipal Airport's operations

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Frank G. Wells Environmental Law Clinic, UCLA School of Law

Supervising Faculty:
Sean B. Hecht, Co-Director, Frank G. Wells Environmental Law Clinic
Marcela S. Butel, Assisting Attorney, Frank G. Wells Environmental Law Clinic

Student Researchers:
Kristin Hood, UCLA School of Law Class of 2007
Brooke Jimenez, UCLA School of Law Class of 2006

Additional assistance from Kevin Tredway, UCLA School of Law Class of 2007

I. Report background

Los Angeles City Councilmember Bill Rosendahl has requested that the UCLA School of Law's Frank G. Wells Environmental Law Clinic examine and report on the legal context for any attempt by the City of Santa Monica ("City") to regulate operations of the Santa Monica Airport to reduce air emissions from aircraft.[1] Councilmember Rosendahl, who represents a district that includes residents who are affected by the operations of Santa Monica Airport, has made clear his desire to use whatever tools are available to ensure that the airport's operations do not pose a public health risk to local residents. Understanding the limits of the City of Santa Monica's powers will be important to the Councilmember's work. In particular, he has requested us to analyze the extent to which the City of Santa Monica possesses the ability to regulate airport emissions. In doing so, we have addressed, at Councilmember Rosendahl's request, some of the arguments made in 2000 by then-plaintiffs in a lawsuit addressing the City's ability to institute such regulations.[2] Our analysis also incorporates information from officials of the City of Santa Monica, local residents, and scientific experts to provide factual context where necessary. The authors assume that understanding what tools are available to the City to improve local residents' health is a shared goal.

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[1] The Clinic and authors of this paper received no compensation for their work on it. Kristin Hood and Brooke Jimenez conducted the factual research and much of the legal research for this project, and drafted much of this paper. Marcela Butel supervised that process. Sean Hecht conducted additional legal research, drafted portions of the paper, and edited it. Kevin Tredway assisted with editing and revision of the paper.

[2] Hall & Henderson, LLP, Plaintiff's Position Concerning the City of Santa Monica's Ongoing Legal Right to Regulate Aircraft Operations at Santa Monica Airport (August 17, 2000) (*available at* http://www.jetairpollution.com). While our report does not explicitly refer to the contentions in this document, we address many of the same issues.

II. Summary of Report and Findings

Parts I-V are made up of background matter to provide context for the report's legal analysis. In Part III below, we briefly examine the history of the Santa Monica Airport and the current conflict. In Part IV, we summarize the interests of the various parties involved. In Part V, we summarize the key provisions of the Santa Monica Airport Agreement.

In Part VI, we undertake our legal analysis. First, we conclude that despite the general preemptive effect of the Federal Aviation Act on local regulation of aircraft operations, that statute does not extinguish the authority of municipal airport proprietors to take reasonable, non-discriminatory action to address local environmental impacts resulting from the operations of the airports it owns or operates. Second, we note that the Santa Monica Airport Agreement does not limit the City of Santa Monica's proprietary authority over the airport, except to the extent that express provisions of the Agreement place limits on that authority. Third, we analyze whether the Airport Noise and Capacity Act would prevent the City from unilaterally taking any new action to limit airport operations, and conclude that there is a significant argument that the City retains the power to take such action. Finally, we conclude that there is also a strong argument that the Clean Air Act does not preempt a municipal airport proprietor from taking action to address local air quality impacts in particular.

We conclude by noting that the City's authority to take action to address airport health impacts is not without limits. We do not try to delineate the permissible scope of municipal action in this context. The City would undoubtedly take on legal risk by taking such action, as all the issues are novel and the City cannot insulate itself from possible

claims that it is overstepping its legal authority. Nonetheless, we believe that the analysis below demonstrates that the City has significant arguments supporting its authority to address the airport's impacts on public health.

III. Factual background

The Santa Monica Airport ("Airport"), established in 1919, has a rich history and throughout its generations has left an enduring mark on the nature of aviation. In the early part of the 20th Century, Douglas Aircraft Company made the Airport headquarters for its vast operations of airline development and testing.[3] Douglas quickly transformed not only the face of aviation, but also the City of Santa Monica. At one time, the company employed 44,000 workers in shifts covering twenty-four hours a day, seven days a week.[4] To accommodate nearby housing for its work-force, Douglas negotiated with the City of Santa Monica to zone the area surrounding the Airport residentially.[5] This changed a once-sleepy beach resort town into a bustling and populated blue-collar city. It also set the stage for tension between the airport and local residents through the second half of the 20th century and extending to the present day.

During World War II, the Airport played a significant role in the building and testing of defense airplanes.[6] During this time, the Federal Government took over ownership of the Airport and made dramatic improvements to the land, including building the runway that exists today.[7] After WWII, the Federal Government deeded the Airport land back to the City of Santa Monica for indefinite ownership upon the

[3] http://www.santa-monica.org/airport/n_airport_h.aspx.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

condition that the property continued to be used as an airport.[8] In the 1950's, after the City denied a request by Douglas Aircraft to extend the runway to accommodate larger commercial airliners, the company moved its main operations to the Long Beach Airport.[9] By the mid-1970s, the Douglas Aircraft Company was gone, and the Airport has been used ever since as a general aviation (non-commercial) "reliever" airport.[10]

Since the middle of the 20th century, general aviation has grown from a novelty reserved for only the rich to a common form of transportation. Consequently, use of the Airport by private aircraft, and specifically jet aircraft, has grown dramatically since the 1960's. During the same time, residential development of the land surrounding the Airport has grown to capacity. Aerial photographs of the Airport today have been said to resemble an aircraft carrier in a sea of homes.[11] As a result, the City has endured over forty years of legal battles dealing with issues associated with the Airport. At the same time, the residents in the surrounding communities state that they have endured ever increasing levels of noise and air pollution and continue to fear for the safety of their homes and their families.[12]

The tension between the modern operation of the Airport and the residential communities began with the advent of jet-propelled aircraft in the 1960's. Although there were only five or six takeoffs and landings per day, residents aggrieved by noise from jet aircraft brought a nuisance lawsuit against the City in the early 1960's that reached the California Supreme Court.[13] After a ruling that the residents had standing to

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] http://www.jetairpollution.com.
[12] *Id.*; *see also*, Testimony from Councilmember Rosendahl's Santa Monica Airport Town Hall Meeting (November 2005).
[13] Nestle v. City of Santa Monica, 6 Cal.3d 920 (1972).

prosecute nuisance claims against the City, a settlement of the case resulted in, among other restrictions, a comprehensive ban on jet aircraft from using the Airport.[14] For most of the 1970s, jet aircraft was not allowed to land at the Airport. In 1979, however, a federal lawsuit was filed by various parties interested in landing jets at the Airport.[15] The 9th Circuit affirmed the district court's upholding of a series of noise regulations, but held that a comprehensive jet aircraft ban was an unconstitutional regulation.[16] After the repeal of the jet ban, jet aircraft once again began using the Airport, and noise-related impacts resumed.

In the early 1980's, the City of Santa Monica decided it would be better off closing the airport and initiated actions to do so.[17] The City was threatened with legal action, however, by the Federal Aviation Administration ("FAA") as well as by other interested parties (mainly pilots and businesses that service aircraft around the Airport). To settle the various disputes, the City of Santa Monica and the FAA entered into an agreement in 1984 ("the Agreement") which laid out various compromises responding to concerns of local and national aviation interests, as well as the residents of neighborhoods affected by the noise from the airport.[18] Important terms of the Agreement included a promise to keep the Airport open and operational as a general reliever airport until July 1, 2015;[19] a 95 dbl SENEL noise limit for take-offs and landings;[20] a nighttime curfew;[21] and a format within which future issues may be addressed within the scope of the

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[14] http://www.santa-monica.org/airport/n_airport_h.aspx.
[15] Santa Monica Airport Ass'n. v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981).
[16] *Id.*
[17] http://www.santa-monica.org/airport/n_airport_h.aspx.
[18] The Santa Monica Airport Agreement (1984), *at* http://www.santa-monica.org/airport/PDF%20Files/1984%20Agreement.PDF).
[19] *Id.* at § 3.
[20] *Id.* at § 16.
[21] *Id.* at § 22.

Agreement.[22] The Agreement also reserved the City's proprietary powers to regulate airport operations.[23]

Since the 1984 compromise, the Airport has continued to serve as a "general reliever" airport for the Los Angeles Basin, and jet use at the Airport has grown dramatically. Annual jet operations have risen from 1,176 operations in 1983 to 18,091 in 2004.[24] The rise in jet aircraft use may be attributable to many factors. Technology in the last 20 years has created lighter, faster, and quieter jets.[25] Additionally, various federally-funded improvements have made it possible for ever larger and faster types of jets to land at the Airport despite noise and weight limitations which do serve to exclude certain types of jet aircraft.[26] For businesspeople and other private citizens with the means to do so, using the Santa Monica Airport is a convenient way to avoid the hassle of LAX. Furthermore, it is growing increasingly common for businesses and individuals to participate in "fractional share" jet use, whereby many different parties own a "fraction" of one or a pool of jet aircraft, making it much more economically feasible to fly private aircraft into smaller airports like Santa Monica.[27] General reliever airports are closed to commercial air traffic, so if the FAA considered fractional share jets a commercial form of travel, these jets would not be able to land at the Airport.[28] Although much of the fractional jet use is related to commercial operations, the FAA considers this fractional jet

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[22] *Id.* at § 29.
[23] *See, e.g., id*. at § 14.
[24] http://www.jetairpollution.com.
[25] Interview with Bob Trimborn, Airport Manager (February 22, 2006). *See also*, http://www.santa-monica.org/airport/n_airport_h.aspx; http://www.jetairpollution.com.
[26] Interview with Bob Trimborn *supra* note 25. *See also*, http://www.santa-monica.org/airport/n_airport_h.aspx.
[27] *See, e.g.,* http://www.fractionaljetownership.com/content/history.html.
[28] *Id.*

use a non-commercial form of air travel, making landings at the Santa Monica Airport permissible.[29]

The increase in jet use in the past 20 years has increased not only noise, but also air emissions, exacerbating the Airport's potential impact on the surrounding community. According to Dr. John Froines,[30] Professor of Toxicology at the UCLA School of Public Health, ultrafine particles emitted by jet aircraft can cause heart disease, lung cancer, asthma, allergic airway disease, developmental defects in unborn children, and chronic neurological disease.[31] Dr. Froines also found that ultrafine particles are more hazardous than other particulate matter because ultrafine particles invade and disrupt mitochondria, which are the energy-producing organelles within a cell.[32] Dr. Froines notes that terrestrial motor vehicle emissions also cause health hazards associated with ultrafine particles. Residents living near the airport runway are exposed to higher concentrations of these dangerous pollutants than those living farther away.[33]

In October 2005, the County of Los Angeles directed a study consisting of a sampling of "airport black dust" in 5 areas surrounding the Santa Monica Airport.[34] The purpose of the sampling was to identify the chemicals contained in the air around the

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[29] Santa Monica Deputy City Attorney Martin Tachiki stated in an interview with the student authors that much of the jet use at the Airport is fractional share jet use. Interview with Martin Tachiki (February 22, 2006). *See also*, http://www.jetairpollution.com.

[30] Dr. Froines is also the director of the Southern California Particle Center and Supersite, which is funded by the U.S. Environmental Protection Agency and the California Air Resources Board. He and his team of researchers are the national experts on the toxicity of particles which are released through combustible engines.

[31] Interview with Dr. John Froines, Professor of Toxicology, UCLA (April 5, 2006).

[32] John Froines et al., *Ultrafine Particulate Pollutants Induce Oxidative Stress and Mitochondrial Damage*, Environmental Health Perspectives, 455, vol. 111 (April 2003); *see also,* http://www.cellsalive.com/cells/mitochon.htm.

[33] Those living in close proximity to the 405 Freeway suffer similar heightened exposure to these toxic particles. *Id.*

[34] Full Particle Identification for Project: Santa Monica Airport Black Dust Sampling, County of Los Angeles, Material Science Division, 1 (Oct. 2005).

Airport.[35] In all 5 areas, carbon black was detected.[36] The report which details the results of this study indicates that "the carbon black concentration given in the tables is for carbon black that originates solely from incomplete burning of hydrocarbon compounds."[37] According to Dr. Froines' report, black dust is an indicator of ultrafine particles which are hazardous to people's health,[38] and the Santa Monica Airport sampling has found black dust in areas surrounding the Airport.[39]

Jet aircraft emissions are made up of 70% carbon dioxide (CO2), 30% water vapor (H2O), and less than 1% nitrogen oxides (NOx), less than 1% carbon monoxide (CO), less than 1% oxides of sulfur (SOx), less than 1% unburned or partially combusted hydrocarbons (VOCs), less than 1% particulates, and less than 1% other trace compounds.[40] In addition, about 10% of aircraft emissions are produced during airport ground level operations and during landing and takeoff, except for hydrocarbons and CO, of which 30% are produced during ground level operations, landings and takeoffs.[41] Each of these compounds and other aircraft emissions are regulated by the CAA.[42]

Local residents believe the increase in jet emissions is largely due to changes in flight takeoff procedures which were implemented in 1990.[43] Departure procedures instituted after a local jet crash motivated a change in the flight path from the Airport.[44]

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[35] *Id.*
[36] *Id.* at 2.
[37] *Id*. at 3.
[38] Froines, *supra* note 32.
[39] Full Particle Identification for Project: Santa Monica Airport Black Dust Sampling, County of Los Angeles, Material Science Division, 2 (Oct. 2005).
[40] Aviation & Emissions: A Primer, Federal Aviation Administration Office of Environment and Energy, 1 (Jan. 2005) *at* http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/media/AEPRIMER.pdf.
[41] *Id.* at 2.
[42] See 42 U.S.C. § 7571.
[43] Testimony from Councilmember Rosendahl's Santa Monica Airport Town Hall Meeting, *supra* note 12; see *also*, http://www.jetairpollution.com.
[44] http://www.santa-monica.org/airport/n_airport_h.aspx.

This change resulted in a convergence between the flight paths of planes taking off from the Santa Monica Airport and LAX. As a result, the FAA now requires all IFR (instrument-controlled) aircraft to await permission from LAX before takeoff. According to local residents, jets idle with their engines on for significant periods of time while awaiting approval from LAX to take off.[45]

The 1984 Agreement does not address jet aircraft emissions, and there has been no movement from the City in the recent years to pass ordinances which may help mitigate the impact of jet emissions on the community.[46]

The various interests at stake are conflicting, the laws are complex, and there are political dimensions to the issue, making movement towards a solution to the changing impacts from jet emissions slow.

IV. Stakeholder Interests

The Airport serves the interests of several constituents. Airport stakeholders include the Federal Aviation Administration, the City of Santa Monica, the neighboring community, and Airport users.

a. The Federal Aviation Administration ("FAA")

The FAA regulates our nation's airports, and has a paramount interest in ensuring that airport operations are safe and efficient. Under the Federal Aviation Act of 1958 (Aviation Act), exclusive authority was vested in the FAA for the regulation of all aspects of air safety, the management and control of the safe and efficient use of the

[45] http://www.jetairpollution.com.

[46] The City of Santa Monica contends, however, that the air pollution has gotten better since 2004. Idling times have decreased in the aggregate since clearance for IFR aircraft now needs only to go through LAX, and not through Southern California's centralized air traffic control center in San Diego. Interviews with Bob Trimborn and Martin Tachiki, *supra* notes 24, 29. The residents claim, however that the pollution has steadily gotten worse over the last 10 years. Testimony from Councilmember Rosendahl's Santa Monica Airport Town Hall Meeting, *supra* note 12.

navigable airspace, and movement of aircraft through that airspace.[47] The FAA clears the takeoffs and landings of all aircraft entering the Airport, and any changes in takeoff, flight, or landing paths need FAA approval.[48] Moreover, it broadly regulates airport operations. The FAA can be expected to continue to assert broad authority to regulate airport access and to minimize the role of local governments in such regulation.

Since the FAA's primary obligation is to ensure flight safety, it has an interest in decreasing air traffic congestion. Increasing the number of operational airports can help decrease air traffic congestion. "The Airport serves an important role in the regional and national system of air transportation and air commerce. It has a vital and critical role in its function as a general aviation reliever for the primary airports in the area."[49] The FAA has an interest in the continual operation of the Airport since it helps to relieve air traffic from LAX, thus decreasing overall air traffic congestion in Los Angeles.

The FAA also has an interest in regulating aircraft noise. Under Section 611 of the Aviation Act, the FAA was given substantial responsibility for the reduction of aircraft noise.[50] By entering into the Agreement, the FAA has acknowledged and agreed that the City retains certain powers over Santa Monica Airport operations.[51] The FAA has a specific interest in complying with the Agreement, and ensuring compliance by the City, to reduce the impacts of aircraft noise pollution.

In addition to regulating noise, the FAA is among the agencies responsible for ensuring that aircraft emissions at airports do not lead to significant public health impacts. The agency has stated that "FAA, together with EPA and NASA, is committed

[47] 49 U.S.C. § 106.
[48] *Id.*
[49] The Santa Monica Airport Agreement, *at* § 2(b)(i).
[50] *Id*. at § 2 (a)(ii). *See also* 49 U.S.C. § 44715.
[51] The Santa Monica Airport Agreement.

to ensuring aviation emissions do not pose health concerns for our citizens or restrain aviation's mobility and economic benefits enjoyed by society."[52] The agency has taken steps to reduce emissions from airport ground operations by developing a program to address air quality improvements through alternative fuel ground support equipment.[53] The FAA has also expressed an interest in studying the effects of jet air pollution.[54]

b. The Residents

Since the Airport is closely surrounded by residential neighborhoods, residents near the Airport are impacted by its operations. The primary interest of the neighboring community is to live in an area free from the negative impacts of the Airport, such as noise and air pollution.

The residents surrounding the Airport expressed their interests at a public meeting held on November 10, 2005. Many residents of Santa Monica and Los Angeles expressed concern about the increase in jet operations at the Airport, and its impact on both noise and air pollution in their neighborhoods. Among the most common problems the residents cited was the presence of "sticky black soot" on their lawn furniture, cars, and fruit trees.[55] Another common problem cited by the residents was the smell of jet fumes which motivated them to close their windows to avoid breathing the fumes.[56] A concern stated by numerous residents was a fear that inhaling jet fumes may lead to respiratory problems and disease.[57] According to John Froines, the presence of black

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[52] *Id.* at 21.
[53] Aviation & Emissions: A Primer, Federal Aviation Administration Office of Environment and Energy, 13-14 (Jan. 2005), *at* http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/media/AEPRIMER.pdf.
[54] *Id.* at 18.
[55] Testimony from Councilmember Rosendahl's Santa Monica Airport Town Hall Meeting, *supra* note 12.
[56] *Id.*
[57] *Id.*

soot is an indication of ultrafine particulate pollutants, produced by incomplete fuel combustion, which, as stated previously, lead to numerous negative health effects.[58]

Another concern expressed by residents who live near the Airport was the noise caused by jets flying in and out of the Airport.[59] Many residents reported an increase in noise events related to the increase in jet operations, stating that over the last 10-12 years, the number of jets flying above their homes has increased significantly.[60] At certain times of the day, some residents reported jets fly over their homes every two minutes.[61] They report that the noise inhibits their ability to talk on the phone, watch television, and invite guests to their homes.[62] Further, residents have testified that they can no longer relax in their backyards because of the noise from jets flying overhead.[63]

c. Businesses and other Jet Users

The Santa Monica business community also has an interest in the way the Airport is operated. Many businesses in the City use the Airport for travel. Several businesses surrounding the Airport participate in the fractional share jet use programs allowing them to affordably and conveniently fly in and out of the Airport rather than use LAX.[64] Since Santa Monica and nearby communities are home to numerous entertainment companies and other businesses, and LAX is surrounded by dense traffic, local businesses find the

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[58] Froines, *supra* note 32. Primary ultrafine particles are formed during gas-to-particle conversion or during incomplete fuel combustion. Due to their small size, high number concentration, and relatively large surface area per unit mass, ultrafine particles have unique characteristics, including increased adsorption of organic molecules and enhanced ability to penetrate cellular targets in the lung and systemic circulation. One of the major advances in particulate matter research has been the recognition that the organic and metal particulate matter components can induce proinflammatory effects in the lung due to their ability to cause oxidative stress. *See id.*
[59] Testimony from Councilmember Rosendahl's Santa Monica Airport Town Hall Meeting, *supra* note 12.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Interviews with Bob Trimborn and Martin Tachiki, *supra* notes 25, 29. *See also*, http://www.netjets.com/The%20NetJets%20Program/netjetsprogram_overview.asp.

Santa Monica Airport more efficient for travel.[65] These businesses benefit from jet operations at the Airport.

d. City of Santa Monica

The City of Santa Monica has its own interests and obligations as the airport's proprietor and as the municipality in which the airport operates, including protecting the health and safety of local residents, responding to the needs of both residents and businesses in the area, and minimizing its own liability from operating the airport.

The Agreement has been interpreted by the City as a restriction on its ability to decrease its operations, or to exclude certain types of aircraft, without first getting permission from the FAA.[66] City officials have explained that the City has limited authority to regulate the Airport, and has no authority to regulate air emissions.[67]

Under the Agreement, the City retains the power to regulate noise in the manner specified in the Agreement.[68] In complying with the Agreement, the City has created a Noise Abatement Program, and the City has the power to enforce the 95 dB maximum SENEL limit.[69] In furtherance of this power, the City has taken steps to ensure that aircraft meet this limit by issuing warnings and citations to pilots who fail to remain under the 95 dB SENEL limit.[70]

The City also has an interest in serving the needs of local businesses. Cities are responsible for providing benefits to its businesses in order to raise revenue and create jobs for the city. Because the Airport attracts businesses to the City, Airport management

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[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] The Santa Monica Airport Agreement, § 20.
[69] *Id.*
[70] Interviews with Bob Trimborn and Martin Tachiki, *supra* notes 25, 29.

should consider accommodating their interests at the Airport. If the City were to regulate the Airport in a way that damages local businesses, the City could face lawsuits.[71]

The City has a responsibility to serve the needs of its residents. In addition, the City is open to potential liability to its residents as well as to Los Angeles residents for nuisances caused by the Airport,[72] so it has a legal interest in mitigating the local impacts from the Airport.

Since the City of Santa Monica is made up of a diverse constituency, the needs of its residents will not always be uniform, and will often conflict. Commonly, cities respond to concerns that affect a large number of people, and have important consequences for the city. Nonetheless, many local residents believe that the City of Santa Monica has been slow in taking steps to work with the FAA to minimize the impacts of air pollution on the Airport's neighbors.

V. **The Santa Monica Airport Agreement**

Twenty-two years ago, the FAA and the City of Santa Monica, with input from other stakeholders, were able to collaborate to develop a historic agreement to deal with noise issues relating to the Airport's operations. The goal of the Agreement was to "expand and improve the communication, cooperation, and mutual understanding of the various perspectives of the parties, while recognizing and preserving their respective legal rights."[73] Much has changed since 1984. Jet operations, which are primarily responsible for both noise and air pollution impacts on the surrounding community, have increased from 1,176 in 1983 to 18,091 in 2004.[74] The residents complain that the

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[71] *See, e.g.,* Santa Monica Airport Ass'n. v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981).
[72] *See, e.g.,* Nestle v. City of Santa Monica, 6 Cal.3d 920 (1972).
[73] The Santa Monica Airport Agreement, § 1(b).
[74] http://www.jetairpollution.com.

disruption on their lives has continually gotten worse in the last 20 years. Furthermore, City officials have told us that 18,000 + take-offs and landings does not even come close to the capacity of operations which the Airport could maintain.[75] It is therefore reasonable to assume that if anything, the adverse environmental impacts will increase.

In addition, under the Agreement, the City must ensure that "[t]he mix of aircraft to be accommodated at the Airport shall be consistent with the present mix of aircraft now based at the Airport and the mix forecast for the future as shown in Chapter III of the Airport Master Plan Study dated October, 1983."[76] While jet operations have continued to increase, total airport operations have decreased over time. The Airport currently has total operations of 130,000 per year, while in the 1990s it had over 360,000.[77]

The Agreement sets forth many specific provisions aimed at reducing aircraft noise impacts. It also recognizes that the City retains the power to regulate airport operations in ways not inconsistent with the Agreement's specific provisions. For example, the Agreement states both that "the City has the responsibility to manage the Airport, including the ability to take reasonable action designed to abate the impact of noise from aircraft operations on surrounding communities, in accordance with the principles of *Santa Monica Airport Association v. City of Santa Monica* and *British Airways Board v. Port Authority of New York*,"[78] and that "[t]he parties recognize and agree that it is appropriate for the City to exercise its proprietary authority to adopt

[75] Interviews with Bob Trimborn and Martin Tachiki, *supra* notes 25, 29.
[76] The Santa Monica Airport Agreement, § 13.
[77] *Id.*
[78] *Id.* at § 2(a)(iii).

ordinances and regulations applicable to lessees and users of the Airport consistent with the terms of the Agreement."[79]

The 1984 Agreement contemplated the possibility that circumstances may change during the life of the Agreement (1984-2015)[80] and specifically laid out a platform upon which future issues could be addressed and resolved. In section 3, the parties agreed that "all actions of the parties during the duration of this Agreement shall be interpreted consistently with this Agreement." Section 7 of the Agreement states that the "terms [of the Agreement] shall not be altered without the mutual consent of the parties, which shall not be unreasonably withheld" and goes on to read in pertinent part:

> "It is recognized and agreed to that the parties will cooperate with each other and rationally analyze issues as they arise, and that any term of this Agreement may be modified by the terms of any future agreements between the parties, provided such future agreements expressly indicate an intention to modify this Agreement."[81]

If, as it appears, the regulations which were laid out in 1984 are no longer sufficient to combat the increasing noise pollution from the increase in jet operations, the terms of the Agreement could be modified as long as all parties agree on revised regulations. It appears this could take the form of either an entirely new agreement or an amendment to the existing regulations.

The 1984 Agreement does not explicitly address jet emissions impacts. Section 29 of the Agreement, however, states in relevant part: "the parties agree to work

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[79] *Id.* at § 14.
[80] *See id.* at § 27, Analysis of Future Alternatives, *stating in part*: "the parties recognize and acknowledge that there may be other feasible noise abatement actions possible but not described in this Agreement…"
[81] *Id.* at § 7(h).

cooperatively and consult with each other and other interested persons to resolve any differences between them which may arise in the future…”[82]

Because jet operations at the airport have increased so dramatically in the two decades since the Agreement became operations, impacts from increasing jet aircraft emissions on the community surrounding the Santa Monica Airport may well be such a new issue. Alternatively, if this is untenable, the City, as set forth below, may consider regulating unilaterally to address the problem of jet emissions' impacts on local residents.

VI. Legal Analysis

a. The scope of the City's municipal proprietor powers to regulate airport operations under the Federal Aviation Act.

The Federal Aviation Act (“Aviation Act”) broadly preempts most local regulation of airport operations. Nonetheless, the City possesses municipal proprietor powers that enable it to take reasonable, non-discriminatory actions to regulate airport operations to reduce the City's exposure to liability for nuisance and enhance the surrounding community's “human environment.” Here, Aviation Act preemption should not prevent the City from taking some steps to regulate aircraft emissions, consistent with the Agreement and other legal principles discussed below.

(1) Municipal airport proprietors possess authority to act to address specific local environmental concerns relating to airport operations.

Generally speaking, under the Supremacy Clause of the United States Constitution,[83] federal law will preempt state law when Congress “expressly or impliedly indicates an intention to displace state law, or when state law … conflicts with federal

[82] *See id.* at § 29, Commitment to Future Cooperation.
[83] U.S. Const. art. VI, cl. 2.

law."[84] In 1973, recognizing that uniformity in airport regulation was "essential to the maintenance of a sound air transportation system,"[85] the Supreme Court held in *City of Burbank v. Lockheed Air Terminal, Inc.* that federal regulation of airways was intended to preempt aircraft restrictions enacted by states and local governments pursuant to their police powers.[86] The Court left the door open, however, to regulations imposed by municipal airport *proprietors* – that is, local governments that themselves own or operate airports – based on a legitimate interest in mitigating liability created by excessively noisy aircraft using their airports.[87] Federal law thus broadly preempts state or local regulations that deal with aircrafts and airspace, subject to a complementary though limited role for local airport proprietors in addressing environmental concerns surrounding their airports.[88] This is consistent with the recognition in other contexts that preemption applies only where a state or local government is acting as a regulator. Where a state or local government acts in a "proprietary" capacity, such as landowner or purchaser of goods, constitutional doctrines such as preemption and the "dormant commerce clause" that would otherwise bar state regulation do not prevent state or local action.[89]

Because the City of Santa Monica owns and manages the Airport, it is considered a municipal airport proprietor. After the *City of Burbank* case, Congress amended the Aviation Act to provide expressly that the proprietary powers and rights of municipal

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[84] Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991).
[85] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973).
[86] *Id.*
[87] *Id.* (Rehnquist dissenting) at 653.
[88] National Helicopter Corp. of America v. City of New York, 137 F.3d 81, 88 (2nd Cir. 1998).
[89] *See, e.g.*, Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 227 (1993); Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist., 952 F.2d 1173, 1177-78 (9th Cir. 1992).

airport owners are not preempted by federal law.[90] Subsequent case law has delineated some of the circumstances under which this municipal proprietor power may be exercised.

The "municipal proprietor" exception to Aviation Act preemption was originally recognized in the context of allowing municipalities to regulate aspects of airport operations to limit their own financial liability for constitutional takings. In 1962 the Supreme Court held municipal airport owners liable for "takings" of private property resulting from low flying planes landing near neighboring communities.[91] The implications of that holding created a need for municipal airport owners to be able to mitigate their liability in some way. Nonetheless, the Ninth Circuit has made clear that the proprietor power is not limited to those circumstances, and allows municipalities to enact regulations based on any "rational belief that the ordinance will limit the possibility of liability or enhance the quality of the city's human environment."[92]

While the Ninth Circuit has so far applied this exception to Aviation Act preemption only in the context of allowing a city to limit noise by ordinance,[93] there is a strong argument that the same principles should apply in other contexts in which a municipality attempts to impose operational conditions to improve local environmental conditions, despite the generally narrow scope of municipal regulatory power over airport operations. The Second Circuit, for example, has explicitly noted that the proprietor

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[90] 49 U.S.C. § 41713(b)(3).
[91] In this case, landings occurred at low levels of altitude causing people to become nervous, distraught, unable to sleep, and in certain cases the noise was so intense it caused property damage to the homes. Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84 (1962).
[92] Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d at 982; see Santa Monica Airport Ass'n. v. City of Santa Monica 659 F.2d 100, 104, n.5 (9th Cir. 1981).
[93] In Santa Monica Airport Ass'n. v. City of Santa Monica, the 9th Circuit stated "a municipal operator … can govern the noise levels of planes which have taken off from it both before and for a reasonable distance after the wheels have left the ground." *Id.*

exception to preemption allows cities to regulate within the "narrowly defined subject matter" of "noise and other environmental concerns at the local level."[94] In *National Helicopter Corp. of America v. City of New York*, the Second Circuit upheld a phase-out plan which would eliminate weekend operations and impose weekday and weekend curfews, for a reduction of 47% in total operations. The court reasoned that all of these regulations were intended to enhance the local human environment and reduce liability to the municipal proprietor.[95] The regulations at issue in *National Helicopter Corp. of America* go far beyond the area of simply regulating narrowly to reduce noise, and instead reach well into the basic operations of the airport.

Reducing municipal takings liability and enhancing the quality of the local human environment are goals that, by their terms, have application far beyond noise regulation. Indeed, there is no principle that has been articulated that would explain why proprietor powers should be limited to noise-related regulation. Thus, while the Ninth Circuit has never directly addressed the issue of whether proprietary regulation of airport operations may include environmental regulation beyond or apart from the control of noise, the principles offered by the Ninth Circuit and other courts appear to be consistent with interpreting the law in this way, and no court appears to have held otherwise.

A contrary argument could be made that federal authority over airport operations is extremely broad and subject only to the narrowest of exceptions, and that that authority leaves no room for regulation here. Under this reasoning, the FAA needs this broad authority to fulfill its mandate to ensure safety, security, and predictability in airport

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[94] National Helicopter, 137 F.3d 81, 88 (2nd Cir. 1998); British Airways Bd. v. Port Authority of New York, 558 F.2d 75, 83-83 (2nd Cir. 1977); See *also*, Western Airlines, Inc. v. Port Authority of New York and New Jersey, 658 F.Supp. 952, 956 (S.D.N.Y. 1986).

[95] National Helicopter, 137 F.3d at 89-91.

operations. A "slippery slope" argument can be made that we risk allowing the exception of proprietary regulation to swallow the general rule that the FAA has authority over airport operations. If airports were subject to wide-ranging local regulation to mitigate or avoid environmental impacts, there would be a risk of undermining the FAA's appropriate role and mission. It would follow that although the Supreme Court in *City of Burbank* and the Ninth Circuit have explicitly allowed local proprietary regulation of airport operations relating to noise, this authority should be interpreted narrowly, and local regulatory authority in other areas should be sharply limited or held not to exist.

Acknowledging the FAA's strong interest in ensuring safety and predictability, we nonetheless believe there is room for local regulation of non-noise environmental impacts. There is no principle articulated in the cases cited above that would distinguish noise impacts from other localized environmental impacts. Moreover, in areas such as local environmental regulation, in which local and state governments have traditionally made and enforced laws, as well as in the context of proprietary regulation to ensure that locally-operated entities are operated safely and in a way that minimizes the legal liability of the local operator, the scope of preemption is particularly narrow.

(2) Cities must exercise proprietary authority over airports in a reasonable, non-discriminatory fashion.

Even if municipal action would otherwise fall within the proprietary exemption to preemption, it must not run afoul of the Commerce Clause or the Equal Protection Clause of the U.S. Constitution. Thus, in enacting regulations, the municipal proprietor must be careful to "avoid even the appearance of irrational or arbitrary action" to satisfy equal protection concerns.[96] Municipal airport proprietors have been allowed to exercise local

[96] *Id.* at 89.

regulatory power provided such control is exercised reasonably, non-discriminatorily, and without pointing a "dagger … at the heart of commerce."[97] Municipal ordinances will withstand constitutional challenge based on alleged violations of the commerce clause if the statute regulates "even-handedly to effectuate a legitimate local public interest."[98] The local proprietor is given deference in passing regulations and unless it imposes a burden on commerce that is "clearly excessive in relation to the putative local benefits," such an ordinance will be upheld.[99] Similarly, local regulations will withstand equal protection challenges if the court finds *any* rationally related state interest in the law.[100]

In *National Helicopter*, the 47% reduction in operations was debated in a dissenting opinion which contested the seemingly "arbitrary and unreasonable" nature of the regulation.[101] This specific ordinance was not supported by evidence of an appropriate percentage of reduced aircraft operations which would mitigate noise impacts on the surrounding communities, making the 47% seem arbitrary to the dissenting judge.[102] The majority reasoned, however, that "it is unrealistic to insist that a proprietor justify by some scientific method a specific percentage reduction in operations in order to achieve the general result of a reduction of excessive noise."[103] It stated further that "if there is a reasonable prospect of beneficial effect" the regulation should be upheld.[104]

More recently, in *Clay Lacy Aviation v. City of Los Angeles*, the "Non-Addition Rule," a regulation that restricts the amount of time certain aircrafts can be present at the

[97] British Airways Bd., 558 F.2d at 83.
[98] Pike v. Bruce Church, Inc., 397 U.S. 137, 142.
[99] *Id.*
[100] National Helicopter, 137 F.3d at 89 (emphasis added).
[101] *Id.* at 92.
[102] *Id.*
[103] *Id* at 91.
[104] *Id.*

Van Nuys Airport each year,[105] was upheld by a federal district court against an equal protection challenge.[106] The court stated that "the challenged law must be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for the classification."[107] It went on to hold that the challenged law, a de facto ban on all aircraft exceeding a noise threshold for 335 days per year, passed this equal protection test.[108]

Comprehensive bans on certain types of aircraft that would otherwise be able to use the airport, however, are not allowed. These types of restrictions are viewed as discriminatory and violate the equal protection clause of the Constitution.[109] For example, in *Santa Monica Airport Association v. City of Santa Monica*, the comprehensive jet ban in Santa Monica was struck down. [110] The court held that other permitted types of aircrafts which utilized the Airport made just as much noise as the banned jets.[111] Therefore, the court reasoned, there was no rational connection between the purpose of the ordinance (to mitigate noise) and the ends used to achieve the purpose (banning jets).[112] The rationale behind the disallowance of these types of regulations is that if the specific type of aircraft can otherwise meet size, weight, safety, noise etc. characteristics enabling it to take off and land at the Airport, then it is arbitrary and discriminatory to

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[105] The regulation applies only to Stage 2 aircrafts with noise levels of 77 dBA or greater, and can only be parked, tied down or hangared at the Airport for no more that 30 days each year, creating the net effect that 335 days each year these types of aircrafts are banned from using the Van Nuys Airport. Clay Lacy v. City of Los Angeles, 2001 WL 1941698 at *1 (C.D. Cal.).

[106] The court distinguished this case from *Santa Monica Airport Ass'n. v. City of Santa Monica* by noting that under the non-addition rule, loud aircraft "cannot, under any circumstances, use the Airport" more than is allowed by the rule, and there was therefore no disparate treatment by the regulation as there was with the Santa Monica jet ban. *Clay Lacy*, 2001 WL 1941698 at *1 (C.D. Cal.).

[107] *Id.*

[108] *Id.* at *1-*3.

[109] U.S. Const. Amend. XIV, § 1.

[110] Santa Monica Airport Ass'n. v. City of Santa Monica, 481 F.Supp. 927, 943 (C.D. CA 1979).

[111] *Id.*

[112] *Id.*

exclude a certain type of aircraft just because it is a jet or otherwise.[113] The same comprehensive jet ban enjoined in the 1979 case was also held to be a violation of the commerce clause. The court held that the ban placed a substantial burden on interstate commerce which outweighed the local interest in supporting the legislation.[114]

In sum, courts have recognized both the delegation of regulatory power to airport proprietors and the limitation of this power to the issuance of nondiscriminatory regulations that are not arbitrary, but rather are based on reasonable and legitimate interests in mitigation of liability or enhancing the community's "human environment." The City of Santa Monica can set forth regulations to further these interests, consistent with other applicable laws, as long as those regulations are non-arbitrary, non-discriminatory, and have a rational relationship to legitimate purposes such as reducing the City's exposure to liability for nuisance or protecting the surrounding community's "human environment." Overall, there should be room for the City to take actions that would address local environmental impacts from airport operations without running afoul of the Aviation Act.

b. The effect of the Agreement on the City's proprietor powers.

A municipality will retain the right to regulate pursuant to its proprietor powers unless they are contracted away.[115] Contracts which have been held to compromise proprietorship of an airport include those that involve a change in ownership, operation, promotion of or ability to acquire easements necessary to airport operations.[116] However,

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[113] *Id.*
[114] *Id.*
[115] Alaska Airlines v. City of Long Beach, 951 F.2d at 982.
[116] San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1316-1317 (9th Cir. 1981).

if the contract does not affect the management, operation, or liability for nuisance of the municipality, the proprietor powers will not be jeopardized.[117] Here, the City has not broadly contracted away its proprietor powers by entering into the Agreement. Proprietor powers were given up upon the signing of the Agreement only to the extent the Agreement expressly resolved particular operational issues in a way that would limit the City's use of those powers.

The Agreement limits the City's proprietary power to issue regulations that contravene specific operational provisions set forth in the Agreement.[118] The Agreement's limitations on the City's powers nonetheless extend only to the specified issues addressed.[119] Where the Agreement limits the City's proprietary powers, it does so in a manner that expressly constrains those limitations to specific operational issues designed to abate or mitigate noise impacts. Section 15 of the Agreement states that "the parties agree to cooperate and work toward the abatement of aircraft noise by the following methods." By agreeing to these measures, the City by implication has not agreed to contract away its proprietary powers with respect to other unspecified issues.

Moreover, with respect to all other proprietary authority over the airport, the Agreement preserves the management and regulatory authority that is characteristic of proprietor powers. The Agreement states: "The City has the responsibility to manage the Airport, including the ability to take reasonable action designed to abate the impact of noise from aircraft operations on surrounding communities, in accordance with the principles of *Santa Monica Airport Association v. City of Santa Monica* and *British*

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[117] Alaska Airlines v. City of Long Beach, 951 F.2d at 982.
[118] The Santa Monica Airport Agreement § 7 (1984); *see* §§ 13, 14, 16, 17, 18, 19, 22, 24, 25.
[119] *See id.* at §§ 2(a)(iii), 14.

Airways Board v. Port Authority of New York."[120] Both of these cases recognized the existence of municipal proprietor powers and discussed their proper application, including the authority to regulate to enhance the surrounding "human environment" or to reduce municipal liability.[121]

The Agreement also expressly refers to the City as having proprietary authority over the airport, stating that "[t]he parties recognize and agree that it is appropriate for the City to exercise its proprietary authority to adopt ordinances and regulations applicable to lessees and users of the Airport consistent with the terms of the Agreement."[122] While this provision of the Agreement appears within a specific paragraph in the Agreement dealing with Fixed Base Operators, there is nothing in the Agreement to indicate that this principle is limited. On the contrary, the language of this provision broadly and clearly states that the City retains proprietary authority, with the only limitation being consistency with the Agreement's express terms.

c. The effect of the Airport Noise and Capacity Act on the City's municipal proprietor powers.

There is a question whether and to what extent the Airport Noise and Capacity Act of 1990 (ANCA) preempts or limits local regulation of the Santa Monica Airport under the City's reserved proprietary powers. Apart from the Aviation Act, ANCA separately provides limitations on local governments' ability to regulate airport noise and access. While this is a difficult question, the City has a significant argument that local regulation consistent with the Agreement is not preempted by ANCA.

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[120] *Id.* at § 2(a)(iii).
[121] Santa Monica Airport Ass'n. v. City of Santa Monica, 659 F.2d at 104, n.5. Accord, Alaska Airlines v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1992).
[122] *Id.* at § 14.

ANCA was passed to implement airport noise policy at the national level. The FAA established aircraft noise standards for each aircraft's flyover, lateral, and approach positions, in which noise levels are measured by using "effective perceived noise level" (EPNdB) measurements.[123] Aircraft are categorized in stages ranging from one to four, depending on each aircraft's EPNdB levels.[124] Under the regulations, stage 4 aircraft are the quietest. ANCA regulates stage 3 aircraft and sought to eliminate all stage 2 aircraft.[125]

The Act set forth uniform regulations for all commercial and private stage 2 and stage 3 aircraft over 75,000 pounds.[126] The Act states that "the Secretary of Transportation shall issue regulations establishing a national aviation noise policy which takes into account the findings, determinations, and provisions of this subtitle, including a phase out and non-addition of Stage 2 aircraft."[127] The Act also states that "[t]he national aviation noise policy…shall require the establishment, by regulation…a national program for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft."[128]

ANCA and 14 C.F.R. Part 161, the FAA's rules implementing the relevant provisions of ANCA, require airport operators to collect and analyze data to justify any noise or access restrictions at airports, and in most cases ultimately to seek FAA approval of airport restrictions.[129] City officials have asserted that ANCA prevents the City from imposing any new restrictions on aircraft operations without first going through this

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[123] 14 C.F.R. Part 36, Apps. A and B.
[124] 14 C.F.R. § 36.1(f).
[125] See 49 U.S.C. § 47528(b)(3), 49 U.S.C. § 47523(a)..
[126] 49 U.S.C. § 47528(a).
[127] 49 U.S.C. § 47523(a).
[128] 49 U.S.C. § 47524(a).
[129] 14 C.F.R. Part 161; 49 U.S.C. § 47524(b)(1), (c)(1).

process of notice, data collection, review, and approval, informally referred to as the "161 process."[130] The statute provides several exceptions to the notice, review, and approval process, most of which "grandfather" in existing restrictions and regulatory instruments. Relevant here is the exception where "a [pre-existing] intergovernmental agreement including airport aircraft noise or access restriction" existed on November 5, 1990.[131] The Part 161 regulations implementing this section of the statute state that "[t]he notice, review, and approval requirements set forth in this part do not apply to airports with restrictions as specified in [49 U.S.C. § 47524(d)]: [including] . . . . (3) An intergovernmental agreement including airport aircraft noise or access restriction in effect on November 5, 1990."[132]

ANCA created noise standards to be applied to airports at a national level. Congress found that prior to ANCA's passage, inconsistent and uncoordinated noise-related restrictions on aviation had the potential to "impede the national transportation system."[133] Exempting airports with prior intergovernmental agreements might in some cases be seen as in tension with a coordinated system. Nonetheless, the exemptions can be explained as a reflection of Congress' sense that prior agreements already furthered the purposes of ANCA by balancing federal and local interests, and Congress' intent to honor the bargains struck by prior agreements and to minimize ANCA's interference with existing arrangements.

There is no question that the Agreement itself is exempted from ANCA's Part 161 requirements and is in force today, as it includes noise and access restrictions, and was

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[130] Interviews with Bob Trimborn and Martin Tachiki, *supra* notes 25, 29.
[131] 49 U.S.C. § 47524(d)(1).
[132] 14 C.F.R. § 161.7(b).
[133] 49 U.S.C.A. § 47521.

enacted prior to ANCA's effective date. Moreover, it is clear from the statute that any amendments to the Agreement that would not reduce or limit operations or affect safety would be exempt from the 161 process.[134] By implication, if the City were to attempt to restrict aircraft operations further in the areas addressed by specific provisions of the Agreement, such an action would arguably trigger the 161 process, as restrictions that would constitute post-1990 amendments to the Agreement that do "reduce or limit aircraft operations or affect aircraft safety."[135]

The remaining question is whether the 161 process would apply to new restrictions that do not require amendment of the Agreement – the most likely use of the City's proprietor powers to improve air quality.

A broad interpretation of the exemption from notice, review, and approval requirements for prior intergovernmental agreements would recognize that those agreements, like most binding agreements, were the product of a negotiating process, and abrogating some portions of such an agreement while leaving others intact could leave anomalous and unfair results. Such an interpretation is consistent with the wording of the statute, which exempts "intergovernmental agreements" from the 161 process. The fact that the FAA's Part 161 regulations are even broader, stating that the 161 process does not apply to "airports" that are subject to prior intergovernmental agreements, lends weight to interpreting the exemption to apply to any new regulation of access at the airport that does not conflict with or require amendment of the Agreement's own express terms.

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[134] "Subsequent amendment[s] to an airport aircraft noise or access agreement or restriction in effect on November 5, 1990, where the amendment does not reduce or limit aircraft operations or affect aircraft safety," are exempt from ANCA's notice, review, and approval requirements. 49 U.S.C. § 47524(d)(4).
[135] *See id.*

Even if the statutory exemption from ANCA's notice, review, and approval process were read more narrowly than FAA's own regulations interpret it, there is a significant argument that if the City were to regulate aircraft operations pursuant to its reserved proprietary powers in a way that does not conflict with specific provisions of the Agreement, the City's action would be authorized under the Agreement, and thus Part 161's process requirements would not apply in any event. Under this reasoning, the Agreement's effect of reserving proprietary powers for the City – allowing further regulations not inconsistent with the Agreement – was presumably part of the overall bargain struck between the FAA and the City in order to keep the airport operational. Thus, the exemption from the notice, review, and approval process of the whole negotiated agreement between the City and the FAA would include any noise or access regulation allowed under the Agreement, including those developed or implemented in the future.

This interpretation of ANCA would acknowledge the City's pre-existing and retained proprietary authority, while a contrary interpretation would result in the City retaining none of its reserved proprietary authority after ANCA's passage. Given that Congressional action typically is held not to abrogate pre-existing contractual rights,[136] and that Congress made a specific "grandfather" exception to the Part 161 requirements for airports with intergovernmental agreements, it would make little sense for ANCA to have destroyed any proprietary rights retained by the City. 14 C.F.R. section 161.7(d)(1) supports this idea, as it confirms that except to the extent required by ANCA, the regulations do not "eliminate[], invalidate[], or supersede[] . . . [e]xisting law with respect to airport noise or access restrictions by local authorities."

[136] *See*, *e.g.*, Carteret Savings Bank v. Office of Thrift Supervision, 963 F.2d 567, 581 (3d Cir. 1992).

Although we believe that the argument in favor of viewing the exemption in this broad way carries significant force, both because FAA's own regulations support this position and because the policies behind the statute appear to favor it, it is also possible that a court would reject this view. A court, looking at the regulatory scheme as a whole or at the statutory language stating that an "intergovernmental agreement" is exempt from the Part 161 requirements, might conclude that only those restrictions specifically set forth in an intergovernmental agreement, and not any new restrictions enacted pursuant to pre-existing powers reserved in such an agreement, are exempt from ANCA's requirements of notice, comment, and approval. Under this view, new unilateral regulations or other actions by the City that affect airport operations, even if consistent with the Agreement, could be viewed as independent, new restrictions on airport operations rather than as part of the Agreement. Moreover, if a court were to conclude that reservation of proprietary powers not otherwise affected by the Agreement was merely incidental to the Agreement, it might hold that any future attempts to regulate airport operations to limit air emissions are unrelated to the Agreement, and therefore subject to Part 161's requirements. Under this less expansive view of the reservation of municipal authority, and of ANCA's application to the Agreement, new attempts to regulate noise or access, even if they are consistent with the Agreement and do not require amendment of the Agreement, would be subject to the 161 process.[137]

We believe that the more expansive view both of the Agreement's reservation of municipal authority, and of ANCA's application to the Agreement, is consistent with the bargain struck by the Agreement and with the FAA's own regulations interpreting

[137] It is also possible that upon the expiration of the Agreement in July of 2015, if the Agreement is not extended, ANCA may begin to apply to the Airport, thus requiring the "161 process" to be implemented at least for later-enacted restrictions.

ANCA. The language used by Congress in describing the scope of the exemption for intergovernmental agreements is broad, and the wording of the FAA rule implementing the exemption, are expansive. And the Agreement allows the City to retain proprietary powers except where the Agreement explicitly limits the use of those powers by setting specific standards that the City cannot unilaterally change. A contrary result would mean that ANCA operated to revoke all proprietary powers of the City to regulate noise and access, abrogating the Agreement's terms that reserve those powers. Thus, we believe there is force to the position that ANCA's application does not prevent the City from taking action within the scope of its proprietary powers in ways that do not conflict with the Agreement's express terms.

d. The effect of Clean Air Act preemption on the City's use of municipal proprietor powers.

Not only do the Aviation Act and ANCA preempt much state and local regulation of airport operations, but the Clean Air Act ("CAA") also preempts much state and local regulation of aircrafts' emissions of pollutants into the air. The scope of a municipality's proprietary authority to restrict aircraft emissions has never been adjudicated, and that there is some risk that a court would interpret that authority extremely narrowly. However, we believe that there is a significant argument that the City possesses sufficient authority, as the Airport's proprietor, to take actions to address airport operations' localized air pollution impacts.

The CAA regulates air quality throughout the nation. It applies to aircraft emissions: section 231 of the Act requires the EPA administrator to "issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution

which may reasonably be anticipated to endanger public health or welfare."[138] The CAA also mandates that "the Secretary of Transportation … prescribe regulations to insure compliance with [all standards prescribed under section 231] … includ[ing] provisions making such standards applicable in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by the Federal Aviation Act."[139] Further, under section 233 of the Act, "No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part."[140] Thus, under the CAA, the EPA has the exclusive regulatory authority to set aircraft emissions standards.[141]

The CAA's language, cited above, indicates a strong intent to create a uniform, national set of emissions standards for air pollutants emitted by aircraft. City officials have expressed the belief that the preemptive effect of the CAA prevents the City from regulating even localized air pollution impacts.[142] Indeed, on its face, the statute appears to leave little room for local regulation of air quality.

Nonetheless, we believe that the City may well retain the ability to use its proprietor powers to regulate in this context. The same arguments that underpin the use of municipal proprietary authority to mitigate local environmental impacts of airport operations apply generally to federal preemption in other contexts, as long as the municipal action stems from proprietary power. The proprietary exception to preemption

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[138] 42 U.S.C. § 7571(a)(2)(A).
[139] 42 U.S.C. § 7572(a).
[140] 42 U.S.C. § 7573.
[141] Aviation & Emissions: A Primer, Federal Aviation Administration Office of Environment and Energy, 12-13 (Jan. 2005) *at* http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/media/AEPRIMER.pdf.
[142] Interviews with Bob Trimborn and Martin Tachiki, *supra* notes 25, 29.

applies in all statutory contexts where a state acts in a proprietary capacity in a way that affects interests otherwise regulated only by the federal government. So, for instance, in the context of labor law, the Supreme Court has held that "[w]hen a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation."[143]

Thus, there is a significant argument that municipal proprietary action to address air impacts is appropriate despite the generally broad scope of Clean Air Act preemption. Such action to address "aircraft noise and other environmental concerns at the local level" is permissible.[144] Particulate air pollution is a peculiar local concern which affects the surrounding human environment. And the City, as airport owner, would be justified in taking action to reduce its liability for nuisance, takings, or other legal theories under which the City might have to compensate local residents for the environmental impacts of aircraft operations.

Although there is scant case law on the subject, it is noteworthy that in another context, a federal district court in Southern California has upheld a proprietary exception to broad preemption under a provision of the Clean Air Act functionally identical to the one at issue here. In *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 2005 WL 1163437 (C.D. Cal. 2005), the court considered whether, and to what extent, another "proprietary" power – a government agency's power to regulate purchasing decisions for public fleets, acting as a market participant – allowed the air quality regulator to require the purchase of low-emissions vehicles for public agencies'

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[143] Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 227 (1993).
[144] National Helicopter Corp. of America v. City of New York, 137 F.3d 81 at 88.

automobile fleets, despite the Clean Air Act's generally broad preemptive effect.[145] The U.S. Supreme Court had held that the preemptive effect of Clean Air Act section 209, the language of which mirrors the language of the section at issue in the aircraft context,[146] applied to make the so-called "fleet rules" invalid if they constituted regulation of emissions under the Clean Air Act.[147] At the same time, the Court noted that the fleet rules might not be preempted for various reasons not presented to the court in that case, including that the rules might be characterized as internal purchasing decisions.[148]

On remand, the district court held that the fleet rules were facially valid and not preempted, because the air quality management district was exercising proprietary power as a market participant by limiting state and local governments' fleet purchasing.[149] The court noted that although state regulation of mobile sources (including both automobile and aircraft emissions) to "enforce any standard" relating to emissions control is broadly prohibited under the Clean Air Act, "'[r]egulation' excludes state proprietary actions."[150] The court explained that "Congress did not 'clearly and manifestly' intend that 'attempt[ing] to enforce any standard' should include proprietary actions because it characterized the statute as pertaining only to state *regulation*."[151] The court reasoned that 42 U.S.C. section 7416, which retains state authority over air quality except to the extent provided in preemptive statutory provisions cited above, "limits the reach of the

[145] It is possible that appeals to the Ninth Circuit will ultimately result in solidification of the principles articulated in this opinion, or, on the other hand, in modification or even reversal of the decision.
[146] "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. . . . ." 42 U.S.C. § 7543(a).
[147] Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 541 U.S. 246, 248-258 (2004).
[148] *Id.* at 258-59.
[149] Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 2005 WL 1163437 (C.D. Cal., 2005).
[150] *Id.* at *5 (citing Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. at 227).
[151] *Id.* at *5 (emphasis added).

Supreme Court's definition of 'attempt[ing] to enforce any standard.' Applying the market participant doctrine to preemption under the CAA would therefore be consistent with the language of the statute."[152] The court went on to note that allowing proprietary actions to improve air quality by the State "is also consistent with the purposes of § 209," because Congress proclaimed in the Clean Air Act that states retain primary responsibility for maintaining air quality.[153]

Thus, although it is clear that the Clean Air Act's preemptive effect on local governments' efforts to regulate air quality is very broad, there is a weighty argument, articulated by the district court in *Engine Mfrs. Ass'n,* that where a state or local government acts in a proprietary capacity it may nonetheless take actions that have the effect of limiting emissions.

It can be argued, on the other hand, that even if a state agency may control state action as a market participant, a municipality or state may not directly regulate private parties' actions in order to improve air quality, as any action taken by the City to limit airport operations would do. The district court in *Engine Mfrs. Ass'n* found that the fleet rules were valid at least as applied to local and state government vehicles, but did not reach the issue of whether application of the rule to private parties would be valid. So there is a question whether or how the court's reasoning would apply to state or local action affecting private parties directly, or to direct regulation to protect the environment. Moreover, that case is still in the courts, and the regulated parties continue to argue that it was wrongly decided.

[152] *Id.*
[153] *Id.* at *6.

We believe that the reasoning of the court in *Engine Mfrs. Ass'n* is sound and can plausibly apply in a broad range of circumstances, likely including municipal airport operators' proprietary regulation of aircraft emissions. Regulations adopted with the purpose or effect of protecting the environment may be nonetheless proprietary. Although the fleet rules affect purchasing decisions, in the most literal sense the fleet rules are "regulations" respecting "emissions" – they are administratively-adopted rules than operate to ensure that only low-emitting cars will be allowed to operate in certain contexts. The court, citing ample precedent, held that the form of the state action was not dispositive; even adopted regulations can be proprietary actions by the government. The court also noted that the rules both had the purpose and would have the effect of limiting emissions, and, again citing ample precedent, held that the action was nonetheless proprietary.[154]

Moreover, under the cases cited above dealing with "proprietary" action in the context of airport regulation, action by a local government that owns or operates an airport to protect residents from aircrafts' local environmental impacts can be viewed as inherently proprietary rather than regulatory, even if it impacts private parties directly, as long as the use of that power is reasonable and limited to protecting residents from local impacts. Authority over governmental purchasing decisions is one type of proprietary power, and authority to mitigate local public health impacts and to minimize governmental liability is another type of proprietary power; each type of power can be exercised without running afoul of federal preemption, under the same basic principles.

Of course, the holding and reasoning of the district court in *Engine Manufacturers* are not binding on other courts. And it is possible that a future published appellate

[154] *Id.* at *9-*11 (citing numerous cases).

decision in that case or another case will shed new light on the nature of proprietary powers, either consistent with or contrary to the district court's opinion. Nonetheless, currently, the court's decision, taken together with the body of cases that allow airport proprietors to take actions to protect local public health despite the preemptive effects of the Federal Aviation Act, shows that there is a strong argument that the City of Santa Monica retains some authority to take action to protect local air quality if airport use is affecting nearby residents. If evidence were to show that airport operations have a localized impact on air quality, a court following the principles of these cases should conclude that the City of Santa Monica may take steps to require the airport to mitigate those localized air pollution impacts.

VII. Conclusion

Even without the agreement of the FAA, the City as proprietor would be justified in taking steps to ensure that the local environmental impacts of jet operations, including air emissions, do not reach levels that constitute a nuisance to local residents. Because the law is not well-developed in this specific area, the City would have to consider carefully how to regulate in this area without exceeding its proprietary powers. Moreover, the City cannot unilaterally change express terms of the Agreement or enact regulations that conflict with the Agreement. Nonetheless, within these parameters, the City has the authority to exercise its proprietary powers to protect local environmental quality and to ensure that airport operations do not constitute a nuisance or result in inverse condemnation claims. It is beyond the scope of this paper to propose a framework for evaluating the limit of these powers or the appropriate scope of municipal

action. Nonetheless, there is evidence that tends to show that environmental impacts of the Airport are burdening local residents.

The City would undoubtedly take on legal risk by asserting proprietary authority to regulate airport operations with the objective of controlling emissions. The issues involved are novel, and it is likely that the FAA would take the position that the scope of the City's proprietor powers is narrow. Thus, the City cannot be assured that a court will hold that any particular action it might take is within its legal authority. Nonetheless, courts should view favorably the efforts of a municipal airport proprietor to reduce or limit aircraft operations in a way that is tailored to address local environmental impacts and calculated to improve the quality of life for local residents. We believe that a court should uphold the City's use of nondiscriminatory, reasonable means to accomplish the proprietary goal of ensuring that airport operations do not unduly interfere with nearby residents' property and health, as long as doing so does not conflict with express provisions of the Agreement. We also believe that the City has a significant argument that any such actions are exempt from the Part 161 notice, review, and approval procedure.

It would be optimal for the City of Santa Monica and the FAA to work together to develop and implement some reasonable regulations or restrictions on use at the Airport to help reduce the negative impacts of jet operations on local residents. If the FAA will not work to accomplish these goals, the City may consider acting unilaterally, taking into account the legal issues discussed above and other practical considerations.