MEMORANDUM OF LAW

DATE: August 7, 1987

TO: Jerry Groomes, Deputy Director, Airports Division

FROM: City Attorney

SUBJECT: Letter from Aircraft Owners and Pilots Association Regarding Manager's Regulation Prohibiting Touch and Go Landings after Sunset at Montgomery Field

This memorandum will respond to your request concerning an appropriate response to the inquiry from the Aircraft Owners and Pilots Association (AOPA). The AOPA has protested the City Manager's promulgation of a regulation dated February 20, 1987 prohibiting "touch and go" landings after sunset. This office's memorandum of March 23, 1987 is pertinent to background on that issue. You have advised the AOPA on an interim basis that you are studying their request that the regulation be rescinded.

We have researched this issue and conclude that the regulation is valid and that the request may be denied. However, we are also mindful of the potential for litigation and would suggest a possible compromise be sought as to the time. We shall therefore proceed to discuss AOPA's contentions and the applicable case law as it pertains to the regulation issued by the Airport Director.

The AOPA claims that the "touch and go" prohibition is preempted by federal law regulating flight activity and aircraft noise abatement pursuant to 49 U.S. Code section 1301, et seq. and 42 U.S. Code section 4901, et seq. AOPA cites the case of United States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), aff'd, 708 F.2d 92 (2d Cir. 1983), as authority for this proposition. That case, however, is based upon an express provision in a federal grant agreement which required federal approval before certain actions could be taken. We shall discuss the impact of that case later as we address the applicable law.

You have also provided us with copies of the federal grant documents (hereafter referred to as the "Grant") concerning the improvements to Montgomery Field Airport and runways filed as City Document No. RR-250275 of September 26, 1979. We have reviewed the Grant together with the applicable provisions of the Airport and Airway Development Act of 1970, 49 U.S. Code section 170l, et seq. (hereafter cited as the "Development Act"). We find that there are no specific provisions therein requiring the

prior approval of, or review by, the Federal Aviation Administration (FAA) of local regulations, nor do we find that there are any provisions applicable to the promulgation of such regulations. The only requirement of general applicability is that contained in 49 U.S. Code section 1718(a)(1) which provides that the airport will be "available for public use on fair and reasonable terms and without unjust discrimination."

As you know, the Federal Aviation Act (the "Act") (49 U.S. Code section 1301, et seq.) provides generally that the regulation of flight activity is exclusively under the jurisdiction of the FAA. That Act further provides, however, that the authority of the FAA "shall not be construed to limit the authority of any state or political subdivision thereof . . . as the owner or operator of an airport . . . to exercise its proprietary powers and rights." 49 U.S. Code section 1305(b). This issue of federal preemption versus municipal proprietary rights has been considered in a variety of contexts involving local regulations imposing curfews and establishing noise controls and limits.

The leading case on federal preemption relative to municipal regulation is Lockheed Air Terminal, Inc. v. City of Burbank, 411 U.S. 624, 36 L.Ed.2d 547, 93 S. Ct. 1854 (1973). In Burbank, the Supreme Court held that the City of Burbank could not enact a noise curfew ordinance which would prohibit all evening flight operations at the Lockheed Air Terminal, a private airport. A similar result was earlier reached in American Airlines v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017, 89 S. Ct. 620, 21 L.Ed. 2d 561 (1969). In a footnote to the Burbank opinion, however, the court left open the question of whether a municipal proprietor was similarly so restricted. 411 U.S. at 635, n. 14.

The case cited by the AOPA, United States v. State of New York, 552 F.Supp. at 255, initially appears to follow Burbank, but analysis reveals its inapplicability to the issue of a proprietary right of reasonable regulation. In State of New

York, the District Court noted that Burbank recognizes the rights and duties of airport proprietors to directly control excessive noise. See, 552 F. Supp. at 263. The court then went on to hold that a flight curfew which extends to all aircraft, regardless of the degree of accompanying noise, is overbroad and violative of that portion of the Development Act which provides, in pertinent part, that

> All of the facilities of the airport developed with federal financial assistance and all those usable for landing and take off will be

> available to the United States . . . in common with other aircraft at all times. . . . 49 U.S. Code section 1718 (a)5. Emphasis added.

In State of New York, the airport operator had covenanted with the United States to allow flight activity at all times as part of a federal grant. The blanket curfew undeniably conflicted with both this statute and the contractual obligation. 552 F. Supp. at 265. In addition, the federal government was required to approve a transfer of the airport to the State of New York, an act which had not occurred.

We may thus conclude that the State of New York case in which the AOPA participated, is limited to a blanket ban on all aircraft activity, and would not apply to a ban on merely a particular type of flight maneuver that does not otherwise prevent the use of the field for normal takeoffs and landings. Thus, the AOPA's reliance on the case is inappropriate.

The case we consider on point is Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981). That case held that the City of Santa Monica as the operator of a municipal airport could adopt ordinances prohibiting certain low aircraft approaches, "touch and go" and "stop and go" operations at specified times, consistent with noise control. Those ordinances are similar to San Diego Municipal Code section 68.0160 which prohibits such maneuvers between 11:30 p.m. and 6:30 a.m. The court did, however, strike down a ban on all jet aircraft traffic, regardless of time.

In Santa Monica, the Ninth Circuit looked to the Burbank decision (411 U.S. at 635, footnote 14), as requiring municipal airport operators to limit their liability under Griggs v. Allegheny County, 369 U.S. 84, 82 S. Ct. 531, 7 L.Ed.2d 585, reh'g denied, 369 U.S. 857, 82 S. Ct., 931, 8 L.Ed.2d 16 (1962)

for Fifth Amendment "takings" of property resulting from the unreasonable use of airport property with respect to neighboring

lands. It concluded that environmental quality control ordinances are one means of doing so. 659 F.2d at 103.

The Ninth Circuit further noted that in light of Griggs, Congress was not preempting a municipal operator's (proprietor's) right to enact noise regulation. It stated that municipal operators can govern the noise levels of planes which have taken off from the airport both before and for a reasonable distance after the wheels have left the ground. Id. at 104. It concluded that Congress intended to allow a municipality flexibility in

fashioning its noise regulations. Id. at 105.

This decision is particularly relevant to the issue at hand. The District Court found the Santa Monica ordinances to be of peculiar local concern (481 F. Supp. at 937) and reasonably adopted to achieve the protection of the surrounding community from excessive noise. In doing so, the court found that the ordinances were merely an indirect, incidental and insubstantial burden on interstate commerce and thus not invalid. Of particular interest is that the court did not consider the "touch and go" restriction to be "sham noise control in any respect," Id. at 939, because of the need to reduce repetitive noise when people are most likely to be home. The court further commented that a need for training pilots in landing practice is not persuasive when there are other times and facilities where such training could occur, thereby balancing the needs of the flying public and the residential areas. Ibid.

We therefore conclude that the flight regulation prohibiting a "touch and go" operation is lawful and would be defensible in the event of litigation. You should, however, avoid referring to flight safety as a basis for the regulation, since not only is that within the FAA's jurisdiction, but it is also likely to invalidate the regulation based on the reasoning in Santa Monica which also said that safety is not a basis for local regulation. 481 F. Supp. at 938.

You may inform Mr. Baker that, after review of his letter, the regulation is considered a valid regulation within the proprietary jurisdiction of The City of San Diego in administering its airports. We recommend, however, that you invite him to suggest an alternate time after which such operations would cease that he might consider consistent with the needs of his constituents. (You will recall his comment about wishing to cooperate with the City.)

Should he respond appropriately, you may possibly stave off potential litigation by the AOPA. Otherwise, you may maintain the status quo.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:mrh:280(x043.2)
cc Coleman Conrad
Terry Flynn
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