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MEMORANDUM

TO: South Dakota Aeronautics Commission
FROM: Dustin W. DeBoer, Office of Legal Counsel, SDDOT
DATE: July 7, 2022

RE: Informational Item: FAA Preemption Regarding Air Navigation Hazards

I. BACKGROUND: The United States Congress charged the Federal Aviation Administration (FAA) with the responsibility to encourage air commerce in the United States. As part of this responsibility, the FAA is tasked with ensuring air safety and preserving the National Airspace System (NAS). It is through these mandates that the FAA draws its authority to conduct Aeronautical Studies of planned structures.

II. FEDERAL REGULATION: 14 CFR § 77.31 - Determinations.

(a) The FAA will issue a determination stating whether the proposed construction or alteration would be a hazard to air navigation, and will advise all known interested persons.

(b) The FAA will make determinations based on the aeronautical study findings and will identify the following:

(1) The effects on VFR/IFR aeronautical departure/arrival operations, air traffic procedures, minimum flight altitudes, and existing, planned, or proposed airports listed in § 77.15(e) of which the FAA has received actual notice prior to issuance of a final determination.

(2) The extent of the physical and/or electromagnetic effect on the operation of existing or proposed air navigation facilities, communication aids, or surveillance systems.

(c) The FAA will issue a Determination of Hazard to Air Navigation when the aeronautical study concludes that the proposed construction or alteration will exceed an obstruction standard and would have a substantial aeronautical impact.

(d) A Determination of No Hazard to Air Navigation will be issued when the aeronautical study concludes that the proposed construction or alteration will exceed an obstruction standard but would not have a substantial aeronautical impact to air navigation. A Determination of No Hazard to Air Navigation may include the following:

(1) Conditional provisions of a determination.

(2) Limitations necessary to minimize potential problems, such as the use of temporary construction equipment.

(3) Supplemental notice requirements, when required.

(4) Marking and lighting recommendations, as appropriate.

(e) The FAA will issue a Determination of No Hazard to Air Navigation when a proposed structure does not exceed any of the obstruction standards and would not be a hazard to air navigation.

III. CASE LAW

A. Big Stone Broadcasting, Inc. v. Lindbloom, 161 F.Supp.2d 1009 (DSD 2001)

1. **Synopsis:** Plaintiff Big Stone Broadcasting, Inc. ("Big Stone") instituted an action for declaratory and injunctive relief against the seven members of the South Dakota Aeronautics Commission (SDAC) and the South Dakota Attorney General (collectively "defendants"), claiming that SDCL Chapter 50–9 and ARSD 70:02:03, which governed the construction of structures over 200 feet in height, had been preempted by the Federal Aviation Act of 1958 ("the Act"), 49 U.S.C. § 1301 et. seq., and by Part 77 of the Federal Aviation Administration (FAA) Regulations governing "Objects Affecting Navigable Airspace," 14 C.F.R. § 77. Parties cross-moved for summary judgment, with Broadcaster's summary judgment motion granted in part. The District Court held that the Federal Aviation Act and regulations promulgated thereunder, preempted field of air traffic and safety with respect to placement and construction of radio broadcast towers and the appropriate remedy in light of preemption decision was injunction barring SDAC from acting to prohibit construction of proposed broadcast towers permitted by FAA.
2. The doctrine of preemption is based on the Supremacy Clause of the Constitution, which provides that "[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." *U.S. CONST. Art. VI, Cl. 2.*
3. "Congress has expressly declared that the federal government has exclusive sovereignty over the airspace of the United States. 49 U.S.C. § 40103(a)(1). As an exercise of its exclusive sovereignty, Congress has given the FAA the duty to determine what constitutes an efficient use of the airspace and what broadcast towers present hazards to air traffic. 49 U.S.C. § 40103(b)(2)(A) & (C). In addition, Congress has statutorily mandated that the FAA and FCC coordinate their efforts governing the placement, construction, and location of radio broadcast towers. 49 U.S.C. § 44718." *Big Stone*, 2001 DSD 22, at ¶17.
4. "Pursuant to that directive, both the FAA and FCC have promulgated detailed regulations. The regulations specifically relate to radio broadcast towers, 47 C.F.R. § 17, and expressly take into account the impact any proposed construction could have on VFR flight routes, 14 C.F.R. § 77.31(a). Thus, federal control is pervasive, and, more importantly, directly covers the proposed construction in this case." *Id.* at ¶18.
5. The FAA's determination of "no hazard" "promotes air safety through 'moral suasion' by encouraging the voluntary cooperation of sponsors of potentially

hazardous structures." *Aircraft Owners and Pilots Ass'n v. FAA*, 600 F.2d 965, 966 (D.C.Cir.1979).

6. Because of the broad legislative scheme, the detailed regulations adopted pursuant to that scheme, the required cooperation and coordination between the FAA and FCC, the legislative history, case law, and the FAA's own interpretation, the court concludes that the Act and the regulations promulgated in connection with the Act, preempt the field of air traffic and safety as to radio broadcast towers, and, therefore, SDAC's decision to prohibit construction of the tower in the case was of no legal effect.
7. "This court, however, will not disarm SDAC and prevent it from assisting in the enforcement of FAA determinations. Clearly, in many situations, both the FAA and SDAC will agree on whether a proposed construction plan will pose a hazard to air traffic and safety. In such situations, SDAC must be free to enforce such determinations." *Big Stone*, 2001 DSD 22, at ¶33.
8. "Various forms of relief could potentially be sought in federal court [by the FAA]. However, that issue is not before the court and no further discussion is therefore warranted." *Id.* at ¶35.

B. **Carroll Airport Commission v. Danner**, 927 N.W.2d 635 (Iowa 2019) [most recent court ruling on the issue]
   1. **Synopsis:** A "no hazard" letter issued by the FAA to a farmer who built a twelve-story grain leg (bucket elevator) near an airport. The structure intruded sixty feet into airspace restricted for aviation. Construction underway when a member of the local airport commission raised objection. The airport commission informed the farmer he needed a variance and refused to grant one, without waiting for input from federal officials. Shortly thereafter, the FAA investigated and granted a no-hazard determination, approving the structure on the condition the farmer paint it and place blinking red lights on top, which he did. The FAA also adjusted the flight path. This did not satisfy the local commissioners, who two years later filed this action in equity to force the farmer to remove or modify the structure. The farmer raised an affirmative defense that the federal no-hazard determination preempted the local regulations.
   2. The district court, sitting in equity, rejected the preemption defense and issued an injunction requiring the farmer to remove or alter the grain leg at his expense and imposed a daily penalty after a nine-month grace period to abate the nuisance. The farmer appealed, and the case went to the court of appeals, which affirmed the rejection of his preemption defense. The Iowa Supreme Court granted the farmer's application for further review.
   3. The Supreme Court determined the Federal Aviation Act allows for local zoning regulation, and the no-hazard letter did not preempt the local airport zoning regulations as a matter of law, affirming the district court's finding the structure constitutes a threat to aviation requiring abatement.

4. Case contains citation to *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 751 (N.D. Ohio 1995) ("While it is certainly true that runway placement will have some tangential effect on flight operations, the question of whether and where to construct a runway does not substantially affect the use of airspace. ... The Federal Aviation Act does not occupy the field of land use regulations in such a way so as to preempt Brook Park's ordinances.").
5. "The no-hazard determination is reviewable as a final agency disposition. *Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 966 n.2 (D.C. Cir. 1979). FAA no-hazard determinations have been successfully challenged under federal judicial review. *See, e.g., Town of Barnstable v. FAA*, 659 F.3d 28, 35–36 (D.C. Cir. 2011) (vacating FAA no-hazard determination for off-shore wind farm); *Clark County v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008) (vacating FAA no-hazard determination for wind farm near Las Vegas airport)." *Danner*, 927 N.W.2d at 645.
6. "*Big Stone* has not been followed by other courts. It is also distinguishable. Here, we are reviewing a judgment on a bench trial determining the grain leg is hazardous to aviation and violates local zoning requirements, rather than a district court ruling accommodating competing federal and state agency decisions. And, unlike *Big Stone*, the Commission was not really 'vetoing' the FAA's no-hazard determination because the no-hazard letter itself admonished the Danners that they remained subject to local zoning requirements." *Id.* at 652-653.
7. "Federal courts recognize that the FAA's 'hazard/no-hazard determination has no enforceable legal effect' and '[t]he FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation.'" *Id.* (*quoting Aircraft Owners & Pilots Ass'n*, 600 F.2d at 966–67.).

C. **Summary, majority view legal principles of FAA preemption**
   1. The Federal Aviation Act provides the FAA Administrator with exclusive authority in the field of air safety and airspace management.
   2. While the [Federal Aviation Act's] preemptive authority is well established, courts have distinguished between state regulation that directly affects air safety and airspace management, and facially neutral laws that have only a tangential impact. Generally applicable laws that do not regulate in the areas of aircraft operation, safety, or the use of navigable airspace are not preempted by the federal scheme.
   3. The FAA's regulation of air safety does not preclude local regulation that does not actually reach into the forbidden, exclusively federal areas, such as flight paths, hours, or altitudes.
   4. The FAA's hazard/no-hazard determination has no enforceable legal effect and the FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation.
   5. The Part 77 regulations do not authorize the FAA to order the removal of an obstruction.

6. Trees constituting obstructions to navigable airspace are very common, and the FAA will, in these cases, alert aircraft operators of the obstruction so that they take necessary precautions, but the FAA's authority to intervene is limited.
7. FAA no-hazard determinations have been successfully challenged under federal judicial review. *See, e.g., Town of Barnstable v. FAA*, 659 F.3d 28, 35–36 (D.C. Cir. 2011) (vacating FAA no-hazard determination for off-shore wind farm); *Clark County v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008) (vacating FAA no-hazard determination for wind farm near Las Vegas airport).

D. **Other Cases**

1. *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 751 (N.D. Ohio 1995): "While it is certainly true that runway placement will have some tangential effect on flight operations, the question of whether and where to construct a runway does not substantially affect the use of airspace. ... The Federal Aviation Act does not occupy the field of land use regulations in such a way so as to preempt Brook Park's ordinances."
2. *Commonwealth v. Rogers*, 430 Pa.Super. 253, 634 A.2d 245, 246–47 (1993): An appeal by a business owner found guilty of violating a state statute by erecting a ninety-five-foot-tall sign that encroached on an airport's approach area, without seeking prior approval from the Pennsylvania Department of Transportation. The Court concluded that because FAA hazard/no-hazard determinations had no enforceable legal effect, the ability to prohibit or limit proposed construction because of the hazard it poses to air navigation "has been left to the states." Id. at 250. The Court concluded, "Thus, although Congress has concerned itself with the hazards posed by tall structures, it has left untouched the legal enforcement of standards, which are peculiarly adapted to local regulation. Therefore, the states may legislate concerning such matters." Id. The court noted that "[b]y enacting [the state statute], the legislature empowered [the department of transportation] to enforce mandatory compliance with FAA regulations which are designed to identify potential hazards to air navigation." Id. at 253. "Unlike the determination made by the FAA, [the department of transportation's] determination is enforceable, rather than advisory." Id.
3. *Davidson County Broadcasting, Inc. v. Rowan County Board of Commissioners, 649 S.E.2d 904 (N.C.App. 2007)*: Landowners filed application for a conditional use permit to construct a 1,350-foot radio broadcast tower on their property. The county board of commissioners denied application, and landowners filed a petition for writ of certiorari. The Court of Appeals held that, as matter of first impression, federal regulations of navigable airspace administered by the Federal Aviation Administration (FAA) did not preempt county's authority under its zoning ordinances to regulate the location of proposed radio broadcast tower. There is no conflict between the FAA's regulations and Rowan County's ordinances and local governments are permitted to make aviation-related land use decisions.

4. *Faux–Burhans v. Cty. Comm'rs of Frederick County*, 674 F.Supp. 1172, 1174 (1987), aff'd, 859 F.2d 149 (4th Cir.1988), cert. denied, 488 U.S. 1042, 109 S.Ct. 869, 102 L.Ed.2d 992 (1989): Noting no federal preemption of local ordinances regulating the "size, scope, and manner of operations at a private airport" which are "all areas of valid local regulatory concern" and which do not inhibit "in a proscribed fashion the free transit of navigable airspace."
5. Burbank–Glendale–Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338 (9th Cir.1992): Holding that regulation conditioning construction on city approval of placement of runways was preempted
6. *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir.1989): Finding that the field of pilot regulation was preempted.
7. *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir.1983): Holding that city ordinances regulating night operations and setting air traffic patterns were preempted.
8. *City of Burbank v. Lockheed Air Terminal Inc.*, 93 S.Ct. 1854 (1973): Action was brought by owner and operator of airport and interstate air carrier against city and certain of its officers for judgment declaring city ordinance invalid. The Supreme Court held that city ordinance prohibiting jet aircraft from taking off between the hours of 11 p.m. and 7 a.m. from airport was invalid because Congress by its enactment of Federal Aviation Act and the Noise Control Act has preempted state and local control over aircraft noise.
9. *Goodspeed Airport, LLC v. East Haddam Inland Wetlands and Watercourses Commission*, 681 F.Supp.2d 182 (D. Conn. 2010): Privately owned and operated airport brought action against town's wetlands commission and its enforcement officer for declaration that Connecticut Inland Wetlands and Watercourses Act (IWWA) and Connecticut Environmental Protection Act (CEPA) were completely preempted by federal aviation law. Federal Aviation Act (FAA) did not impliedly preempt IWWA and CEPA insofar as state statutes required airport to obtain permit from town's wetlands commission before trimming or removing certain trees in protected wetlands at airport

IV. THE FAA DETERMINATION PROCESS

(Credit: Capital Airspace Group, LLC; capitalairspace.com)

A. Step 1: Filing with the FAA

Developers intending to construct structures in excess of 200 feet above ground level (AGL) or in excess of established notification standards (lower closer to airports) must submit a notice to the FAA at least 45 days prior to the start of construction.

Prior to the FAA's establishment of the OE/AAA automation system, notice was provided to the FAA by submitting FAA Form 7460-1, Notice of Proposed Construction or Alteration. Use of this form has largely been replaced by an online submittal process

through the FAA OE/AAA website. The FAA and industry continue to refer to these filings as "7460-1" filings.

7460-1 filings require very basic information about the project to be studied. Specifically, the FAA requires that the structure's location, ground elevation, and height be submitted.

Currently, 7460-1 filings must be submitted for each point on a project (with few exceptions). For wind and transmission line projects, individual points must be submitted for each wind turbine, MET tower, and transmission line tower. For building projects, usually the outside footprint of the building is filed. Once the FAA received and verifies these filings, an aeronautical study number (ASN) is issued for each filed point. This begins the aeronautical study process.

B. Step 2: Initial Review

The project will be assigned to a specialist within the FAA Obstruction Evaluation Group (OEG). There are usually ten different offices internal to the FAA and the Department of Defense (DoD) that respond to the OEG, including: Office of Airports, Obstacle Impact Team, Flight Standards, Technical Operations, Frequency Management, Air Force, Navy, Army, the Department of Defense (DoD) Siting Clearinghouse, and Department of Homeland Security. Technicians in each of these offices will review each point to ensure that the proposed project does not interfere with their areas of responsibility.

Once each of these offices has assessed the project, they submit a response of either "objection" or "no-objection" via FAA's internal OE/AAA system. During this portion of the review, the case is considered to be in "work status" by the FAA. Review by all respondents often takes between 45 and 90 days.

After all of the responses have been logged in the system, the case is moved from "work-in-progress status" to "evaluation status." At this point, the OEG specialist will assess all responses and determine whether structure exceeds obstruction standards established under 14 CFR Part 77. Proposed structures that exceed these surfaces are deemed to be "obstructions" and warrant further scrutiny by the FAA to determine if they would constitute a hazard to air navigation.

Also, structures that are deemed to be an obstruction are generally issued a Notice of Preliminary Findings (NPF) (previously referred to as a Notice of Presumed Hazard (NPH)).

C. Step 3: Preliminary Results

Unless the project receives a favorable "Does Not Exceed" determination, the FAA will likely issue a Notice of Preliminary Findings (NPF) (previously referred to as

a Notice of Presumed Hazard (NPH)). These notices are guaranteed for all structures in excess of 499 feet above ground level (AGL).

The NPF letter is meant to be a means for the FAA to notify the developer that it has identified an issue which will require further study in order to determine whether or not the structure will pose a hazard to air navigation. This letter is intended to initiate negotiations between the developer and the FAA.

At this point, the developer can either reduce the height of the proposed structure, remove the proposal, or request that the FAA conduct further aeronautical study at the originally filed height.

D. Step 4: Responding to a Notice of Preliminary Findings (NPF)

While there are many methods to resolve objections received on a project, nearly all NPF cases must be circularized to the public for comment. Through this 37-day public comment period, the FAA can collect information regarding the actual impact on the local flying community.

E. Step 5: Final Determinations

Favorable Determinations of No Hazard are valid for 18 months. A one-time extension can be requested. This request is further reviewed by the FAA OEG and may result in an additional 18 months.

The favorable determinations may include requirements for marking and lighting in accordance with the current FAA Advisory Circular 70/7460-1, notifying certain aviation facilities of the start of the construction, or notifying the FAA once the construction is completed.

Furthermore, the developer will also be required to file the temporary construction equipment if it will be taller than the permanent structure.

F. Step 6: After Construction

Depending on the requirements in the determination, supplemental notice may require the developer to notify the FAA prior to, or shortly after, construction.

This allows the FAA to chart the project so that pilots are aware of the new structure.

V. SOUTH DAKOTA STATE STATUTES

A. 50-9-1. FAA determination of no hazard to be provided to commission before construction or alteration of structure--Violation as misdemeanor.

A person or organization that has obtained a Federal Aviation Administration determination of no hazard, shall provide the determination to the commission prior to the start of construction or alteration of any structure that is subject to the jurisdiction of the Federal Aviation Administration.

A violation of this section is a Class 1 misdemeanor.

B. 50-9-10. Conflicting jurisdiction between commission and political subdivision--Superiority of commission--Public hearing.

If conflicting jurisdiction arises over the control of the erection of a building, structure, tower, or hazard in relation to an airport, airway, or airport facility between the commission and any political subdivision of the state, the commission may overrule, change, modify, or amend zoning rules and regulations adopted by any political subdivision or by any airport zoning board created by a political subdivision under the laws of this state, after a public hearing in which all parties have been given an opportunity to be heard.

C. 50-9-14. Airport hazard--Public nuisance--Prevention.

The creation or establishment of an airport hazard is a public nuisance and an injury to the community or the United States served by the airport and shall be prevented in accordance with this title.

D. 50-9-15. Removal of airport hazards--Public purpose--Public funds.

The prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which the political subdivisions may raise and expend public funds and acquire land or a property interest.