For seven years, the Federal Aviation Administration (FAA) has remedied the lack of slot rules at the busy New York City area airports with temporary orders that limit airlines’ ability to transfer slots. In January 2015, the FAA proposed new long-term slot rules that would, among other things, reinstate a secondary slot market, albeit with close oversight of the federal government to address alleged slot abuses by incumbent airlines. While the FAA and U.S. Department of Transportation (DOT) justify their review of slot transactions by pointing to the breadth of their statutory authorities and historical assertions of such authority, opponents see the proposed rules.

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Don’t Get Your Construction Project Grounded: Navigating the FAA’s Hazard Determination Process

Real estate developers often fail to recognize or understand the need to assess and mitigate aeronautical hazards relating to the construction or alteration of tall buildings or structures. This is a foreign concept to many builders, yet understanding the Federal Aviation Administration (FAA) process of analyzing such structures as potential hazards can be essential to achieving a positive outcome in the construction of tall buildings.

This article begins by discussing the historical tension between airspace regulation and the exercise of property rights. Next, we focus on the role of states in the regulation of construction projects and the ways in which the FAA utilizes its role in overseeing federal funding of airports to require municipalities and airport authorities to regulate projects that could affect.

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I am very pleased to share this, my first Chair’s Message, with you, in my new role as Chair of the Forum on Air and Space Law! I have been fortunate to work closely with the Forum’s leadership for the past seven years. Like many of you, I have also been a beneficiary of the excellent articles published in The Air & Space Lawyer, and of the conferences hosted by the Forum on Air and Space Law. I am honored to have this opportunity to work with other lawyers who have a zeal for understanding the many fascinating legal issues facing practitioners from federal government agencies, the private sector, space, airport, aircraft manufacturing, aviation security, aircraft financing and leasing, fixed-based operator, helicopter, general aviation, legal academia, the judiciary, and other sectors of the aviation and space industries.

This issue of The Air & Space Lawyer is being published in conjunction with the 2015 Annual Conference of the Forum on Air and Space Law in Marina del Rey, California. I would like to thank the Conference co-chairs, Michael Podberesky of Kirkland & Ellis and Rebecca MacPherson of Jones Day, for their excellent leadership in planning what will be another great conference! We are looking forward to hearing, for example, how to get to “yes” when the regulators say “no,” developments affecting aviation consumer and safety interests in the preemption area, and how airports can expand access to planes, trains, drones, and rockets without running afoul of federal guidelines on rates and charges and revenue diversion, among many other great panel topics.

The editorial staff of The Air & Space Lawyer, under the leadership of Editor-in-Chief David Heffernan and Managing Editor Brent Connor, has done an excellent job of compiling this issue of the publication. We would like to acknowledge their hard work and dedication in reviewing, editing, and working with the authors to finalize their articles. Our congratulations also go to the contributors to this issue, who have taken time out of their busy schedules to craft timely, well-researched, practical, and scholarly articles on topics that are beneficial to the members of the Forum, as well as other aviation and space legal enthusiasts. The contributors include: Ben Berlin and Graham Keithley of Pillsbury; Dawn Meyers and Paul Figg of the Ft. Lauderdale office of Berger Singerman; Carlos Martins of the Bersenas firm in Toronto, Canada; and Ben Jacobs and Sabrina Jawed of the FAA.

Finally, I wish to thank Robert Span, the Immediate Past Chair, for his outstanding leadership of the Forum over the past two years. Bob continued the trend of excellence that we have come to expect of the Forum, and will remain an important contributor to the Executive Committee, as have all of the past Chairs of this unique and important ABA Forum. I look forward to another great year in the Forum’s history, and encourage you to share any ideas that you might have for our consideration in planning conferences, publications, and other events for our members over the next two years.
Our first cover article in this issue, by Ben Berlin, who recently joined the FAA, and Graham Keithley of Pillsbury’s Washington, D.C., office, analyzes the pending FAA/DOT proposed regulations governing “slot management and transparency” at the primary New York area airports: LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport. The article focuses in particular on FAA/DOT’s assertion of statutory authority to review certain slot transactions for competition and public interest implications. Airlines for America (A4A) and its members that hold the largest share of slots at these airports (Delta, American, and United) have argued that, under the post-deregulation statutory framework, FAA/DOT do not have authority to conduct such reviews. Ben and Graham anticipate that if FAA/DOT finalize the slot transaction review regulations as proposed, the issue of FAA/DOT’s statutory authority likely will have to be resolved in court.

Our second cover article is by Dawn Meyers and Paul Figg of the Berger Singerman law firm in Ft. Lauderdale, Florida. It analyzes the issue of hazards to aviation posed by the construction or alteration of tall buildings. Real estate developers often fail to consider or understand how such structures may be deemed to obstruct airspace and the regulatory process for addressing such hazards. Dawn and Paul analyze those hazards and the process for notifying the FAA about a construction project and obtaining FAA clearance to proceed. Underlying their analysis is an appreciation of the tension between individual property rights, state jurisdiction over land use and zoning decisions, and federal authority with respect to airspace.

Our next article is by Carlos Martins, a partner at the law firm of Bersenas Jacobsen Chouest Thomson Blackburn in Toronto. Carlos’s article highlights the recent emergence of a consensus interpretation among the United States, the United Kingdom, and now Canada in applying a so-called “strong exclusivity” principle when determining air carrier liability under the Montreal Convention. The strong exclusivity principle holds that the Montreal and Warsaw Conventions are the exclusive source of liability for air carriers where those conventions apply. In Thibodeau v. Air Canada, the Supreme Court of Canada upheld the strong exclusivity principle in a case involving a claim brought by passengers arising from the airline’s failure to provide service in the French language in violation of the Canadian Official Languages Act. The court ultimately dismissed the plaintiffs’ claims on the basis that the Montreal Convention, which governed their air transportation, provided the exclusive source of remedy.

Finally, Ben Jacobs and Sabrina Jawed, who are attorney-advisors in the Regulations Division of the FAA Chief Counsel’s office, survey various mechanisms for obtaining streamlined FAA approval for various aviation activities. They discuss the scope and forms of FAA authority to exempt petitioners from a wide variety of regulatory requirements under part 11 of the FAA’s regulations, then examine several specific forms of relief: commercial space waivers and certificates of waiver or authorization for public aircraft operations of unmanned aircraft systems.

Please send your article ideas and comments on The Air & Space Lawyer to me at dheffernan@cozen.com.

David Heffernan
Editor-in-Chief

David Heffernan is a member of Cozen O’Connor, based in the firm’s Washington, D.C., office.
A recent statistical analysis by *Air Traffic Management* magazine reveals not only that Canada is the United States’ largest trading partner, but also that transborder commercial air passengers total 27 million per year. This is approximately 14 percent of all commercial international air passengers traveling to or from the United States, making Canada the country with the largest volume of international commercial air traffic with the United States.

Given the importance of Canada to the United States, and vice versa, in terms of air transportation, one would expect uniformity in the manner in which transborder passengers are treated when things go wrong. An increased assurance of such uniformity recently emerged in the form of a decision from the Supreme Court of Canada that establishes a broad consensus with the United States and the United Kingdom on the applicability of the “strong exclusivity” principle when determining air carrier liability under the Montreal Convention.

This article reviews the history of the strong exclusivity principle in Canada, which is now in line with the decisions of *El Al Israel Airlines, Ltd. v. Tseng* by the U.S. Supreme Court and *Sidbu v. British Airways PLC* by the United Kingdom’s House of Lords.

The issue of whether the Montreal Convention and its predecessor, the Warsaw Convention, are the exclusive source of liability for air carriers where the conventions apply has been before the Canadian courts for some time. While the aviation defense bar in Canada has taken comfort in the decisions of appellate courts from the provinces of British Columbia, Ontario, and Québec that are supportive of the conclusion that the exclusivity of the conventions is absolute, until October 2014 the Supreme Court of Canada had never squarely decided the matter. It has now done so in *Thibodeau v. Air Canada*—resolutely on the side of strong exclusivity.

First, this article provides a brief explanation of the distinction between “strong” and “weak” exclusivity when considering the application of the conventions to cases involving the potential liability of an air carrier. The doctrine of strong exclusivity holds that “within the timeline and space governed by the Convention,” the only remedies available are those provided by the conventions. If the applicable convention provides no remedy, none is available. A “weak exclusivity” interpretation of the conventions would preempt all local law claims if, but only if, the plaintiff is provided some form of remedy by the applicable convention.

### “Strong” vs. “Weak” Exclusivity

The first significant reported case in Canada that dealt with the issue explicitly (although not definitively) was a motions court of the Ontario Court (General Division) in *Naval-Torres v. Northwest Airlines, Inc.* In that case, Justice Robert J. Sharpe heard a motion to strike a plaintiff’s pleading in a case where the plaintiff (a representative of a proposed class) brought a claim against Northwest Airlines for injury sustained as a result of being exposed to secondhand cigarette smoke on a return flight between Canada and the Philippines. The claim was founded in contract, negligence, willful infliction of injury, breach of duty to warn, misrepresentation, and false advertising–type allegations made pursuant to the Competition Act. In *Sidbu*, Justice Sharpe reviewed the plaintiff’s allegations as well as the “strong exclusivity” principles, as laid out in *Sidbu*, which Justice Sharpe characterized as follows:

[T]he House of Lords [recently expressed the view] that the Convention provides the exclusive cause of action and sole remedy for a passenger who claims against the carrier for loss, injury and damage sustained in the course of, or arising out of, international carriage by air. *Sidbu* holds that the exclusivity of the Convention prevails even if an injured or aggrieved party has no recourse under the Convention and is deprived

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of a legal remedy for an injury or loss that would otherwise be available under domestic law.13

Justice Sharpe then analyzed the allegations in the claim and found that, as they were drafted, the presence of cigarette smoke in the cabin could support a claim for “bodily injury,” as contemplated under article 17 of the Warsaw Convention. As the convention did provide a remedy, the case could be determined under the “weak” exclusivity interpretation. All claims based on local law remedies were dismissed.

As an interesting diversion, eight months later, in the Tseng decision, the U.S. Supreme Court noted that the “strong” vs. “weak” dispute had been decided in Canada in Naval-Torres and that “strong” exclusivity is the law in this jurisdiction. In fact, although the Supreme Court of Canada ultimately upheld this interpretation in Thibodeau, the court in Naval-Torres did not have to decide the issue and refrained from doing so.

The issue arose on a number of occasions in subsequent years. For example, in Gal v. Northern Mountain Helicopters Inc.,14 the plaintiff was a miner who was seriously injured in a crash on a return segment of a journey from British Columbia to Alaska. After commencing a claim against the air carrier in the wrong jurisdiction, he commenced a suit in negligence in the province of British Columbia well after the expiry of the Warsaw Convention’s article 29 time bar. The British Columbia Supreme Court (later affirmed by the British Columbia Court of Appeal) held that the claim should be struck due to the article 29 bar. It specifically rejected the plaintiff’s attempt to revive the claim by casting it as a negligence action and followed the decision in Sidhu, where the court ruled that “the plaintiff has no claim except for that permitted under the Warsaw Convention.”15

In McDonald v. Korean Air,16 the plaintiff brought an action against Korean Air Lines after being diagnosed with deep vein thrombosis (DVT) following a 20-hour flight from Toronto to Hong Kong (via Anchorage and Seoul). The action was framed as a “failure to warn” case. In striking the claim on a motion for summary judgment, the motions judge took a strong exclusivity approach in his ruling, holding that “[n]ot advising passengers of the risk they assume, an airline may be negligent, but this negligence is not in itself an accident within the meaning of Article 17 in the sense that the DVT sustained by the plaintiff is not linked to an unusual and unexpected event external to him as a passenger.”17 The decision was later affirmed on this point by the Ontario Court of Appeal in a very brief endorsement.

In Connaught Laboratories Ltd. v. British Airways,18 the plaintiff brought an action against British Airways after it mishandled a shipment of vaccines in transit from Toronto to Melbourne (via London). Pursuant to the Warsaw Convention’s article 22 limitation of liability, British Airways’ maximum liability was C$2,500. In order to avoid the Warsaw Convention limit, the plaintiff argued that British Airways had misrepresented its ability to properly store the cargo while it was in transit. This misrepresentation preceded the carriage and, it was argued, provided an independent claim not subject to the convention’s limits of liability. The Ontario Superior Court of Justice dismissed this argument, concluding that “the Warsaw Convention is meant to be an exhaustive source of remedies for damage sustained as a result of international carriage by air.”19

In Walton v. MyTravel Canada Holdings Inc.,20 the Saskatchewan Court of Queen’s Bench refused to certify a class action founded in negligence, unlawful confinement, and breach of contract. In that case, evolving mechanical difficulties resulted in “creeping delay” and, as a result, 215 passengers were held in the aircraft for 90 minutes in Punta Cana, Dominican Republic. In refusing the certification, the court held that “the pleadings do not disclose a cause of action. The [torts pleaded] cannot be made outside the provisions of the Montreal Convention of 1999 as the claims being made were by passengers on an international flight.”21

**Thibodeau v. Air Canada**

Although these decisions were binding in their jurisdictions, in many cases the exclusivity question arose as a side issue and not the main focus of the argument. This was not the case, however, in Thibodeau. Michel and Lynda Thibodeau were passengers on three international flights operated by Air Canada (and its regional affiliate, Air Canada Jazz) between Canada and the United States over the course of four months. On one of those flights, the Thibodeaus did not receive service in the French language because no bilingual flight attendants were on duty. On another flight, the pilot made no French in-flight announcements, nor was a translation broadcast to the passengers over the public announcement system onboard the aircraft. In yet another instance, upon arrival at Toronto, an Air Canada announcement concerning baggage collection was made only in English.

There was no dispute that these circumstances amounted to a breach of section 22 of the Official Languages Act,22 which provides that:

Every federal institution has the duty to ensure that any member of the public can communicate...
with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities
(a) within the National Capital Region; or
(b) in Canada or elsewhere, where there is a significant demand for communications with services from that office or facility in that language.

The Official Languages Act is peculiar in that it applies only to Air Canada and not its Canadian competitors, such as WestJet and Porter Airlines. This is because the provision was enacted when Air Canada was a crown corporation owned by the Canadian government. Although the airline was privatized in 1989, a decision was taken in the course of the privatization to continue to apply this legislation to Air Canada even though the airline was no longer a federal institution.

As a result of the inconvenience, the Thibodeaus filed eight complaints with the commissioner of official languages, of which four (relating to the above-referenced incidents) were upheld at first instance. The commissioner's ruling was later also upheld by the Canada Federal Court of Appeal, which awarded damages to each of the Thibodeaus in the amount of C$6,000 (C$1,500 per incident) to compensate them for “moral prejudice, pain and suffering and loss of enjoyment of their vacation.”

In making this decision, Justice Bédard made an unequivocal finding that the Official Languages Act prevailed over the Montreal Convention, acknowledging that she was “depart[ing] from the Canadian and international case law.” Air Canada appealed this decision to the Federal Court of Appeal. The three-judge panel of the appellate court unanimously overruled the lower court. The appellate court found that, in fact, there is no conflict between the Official Languages Act and the Montreal Convention, on the basis that the Official Languages Act offers aggrieved persons only a remedy that is “appropriate and just.” In determining the proper relief to be granted for violations of that legislation, the Federal Court of Appeal noted that a court should consider the fact that the Montreal Convention prohibits damages of this sort from being awarded (because such damages are not contemplated thereunder), and that Canada has committed to honor that liability regime.

The Thibodeaus appealed to the Supreme Court of Canada, which defined the issue on appeal thus: “The issue of damages sits at the intersection of Canada’s domestic commitment to official languages and at its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. The question thus implicates two important values.”

The majority of the court, led by Justice Cromwell, addressed the issue of whether the Official Languages Act and the Montreal Convention are in conflict. The court began with a careful analysis of the conventions. It noted that the key provision of the Montreal Convention, for purposes of this case, is article 29, which states:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

The court noted that the exclusivity principle is expressed even more clearly in the broadly worded Montreal Convention than in article 24 of the Warsaw Convention, which spoke only to excluding non-convention claims covered by articles 17 (accident), 18 (destruction/loss/damage to cargo), and 19 (delay) of that treaty.

The court then interpreted the purpose of the Montreal Convention as to:

• Create a uniform set of rules governing claims arising from international air transportation;
• Limit the amount of liability and restrict the class of damages that may be sought against air carriers for the recovery of damages by injured/aggrieved shippers and passengers; and
• Strike a bargain between the shippers and passengers who seek a simple recovery of their damages (through reversed burdens of proof) and air carriers, which require protection “against potentially ruinous multi-state litigation and virtually unlimited liability.”

The court then addressed what it described as the “fatal flaw” in the Thibodeaus’ argument. It found that the appellants had attempted to challenge the exclusivity of the Montreal Convention, which, in the view of the majority, is unassailable. The court intimates that the appellants may have had a greater chance of success in their appeal had they argued that the sort of damages which they sought were indeed contemplated by articles 17–19 of the Montreal Convention.

The court then discussed Sidhu, Tseng, and Gilet v. Air Canada (of the French Cour de cassation),...
which applied similar reasoning to dismiss claims that were not explicitly contemplated under the Montreal Convention. It also cited decisions of appellate courts in Hong Kong, Ireland, New Zealand, Singapore, South Africa, and Germany, concluding its analysis in this part of the majority decision by adopting the U.K. Supreme Court’s finding in Stott v. Thomas Cook Tour Operators Ltd. that “[t]he Convention is intended to deal comprehensively with the carrier’s liability for whatever may physically happen to passengers between embarkation and disembarkation.”

The court then addressed the Thibodeaus’ three specific arguments on the issue of exclusivity. First, the Thibodeaus submitted that their complaint under the Official Languages Act did not fall within the substantive scope of the Montreal Convention because it was of a public law, not private law, nature. More specifically, they argued that the wrong committed in this case was of a “breach of statute” or “quasi-constitutional” variety for infringement of their language rights, as opposed to being the resolution of a dispute between two parties over monetary compensation for a loss. The majority of the court firmly rejected this argument.

The court first referenced the specific language of article 29 of the Montreal Convention, which broadly exempts any claims by passengers “for damages, however founded (emphasis in original), whether under this Convention or in contract or in tort or otherwise.” The court also noted that the Thibodeaus’ pleading in the federal court specifically sought “damages.”

The Thibodeaus’ first submission conflicted with jurisprudence from other jurisdictions where plaintiffs unsuccessfully sought damages for violations of their quasi-constitutional rights. For example, the court cited King v. American Airlines, Inc., where the plaintiffs alleged that American Airlines had “bumped” them from an overbooked flight as a result of their race; and Gibbs v. American Airlines, Inc., where a passenger alleged that the same carrier “refused to perform its contract to transport him . . . on the basis of his race.”

The court also placed significant reliance on Stott, where the U.K. Supreme Court refused monetary relief to a passenger who sought compensation under European Union (EU) regulations designed to protect disabled passengers. In that case, the court denied the passenger a remedy on the basis that the claim was barred by the Montreal Convention because “what matters is not the quality of the cause of action but the time and place of the accident or mishap.”

Second, the Thibodeaus argued that the Montreal Convention excludes only “individual damages” and not “standardized damages.” By this, the Thibodeaus meant that the convention was not intended to cover situations where the remedy is fixed for all persons in like situations—as is the case for relief to be granted to passengers for delays under EU Regulation 261/2004, which imposes a predetermined formula for flight-delay compensation based on the length of the journey. In this respect, the Thibodeaus relied on the decision of the European Court of Justice (ECJ) in International Air Transport Ass’n v. Department of Transport, which was followed in several other ECJ decisions, such as Wallentin-Hermann v. Alitalia, Sturgeon v. Condor Flugdienst GmbH, and Nelson v. Deutsche Lufthansa AG.

In those cases, the ECJ recognized an exception to the liability-limiting provisions of the Montreal Convention where damage “is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned.” The Supreme Court of Canada had no trouble distinguishing this line of authority, noting:

Even if we were to adopt the distinction between ‘individual damages’ and ‘standardized damages’ relied upon by the [ECJ], it would not assist the Thibodeaus. The damages which they seek in this case cannot be described as ‘damage . . . redress for which may take the form of standardised and immediate assistance or care for everyone concerned.’

Rather, the damages sought by the Thibodeaus were found by the federal court to be “at least in part, geared to and depended upon the impact on the Thibodeaus of the particular breaches.”

Third, the Thibodeaus argued that their claim did not fall within the class of claims contemplated by the Montreal Convention because the wrong did not occur within the temporal limits prescribed by the convention. Put differently, the Thibodeaus alleged that article 17 of the Montreal Convention applies only to accidents that occur between embarkation and disembarkation. The Thibodeaus argued that, in their case, the alleged wrong occurred well before the embarkation of the passengers, as the failure arose from Air Canada’s improper staffing decisions, i.e., the failure to assign a bilingual flight crew to the relevant flights. They supplemented this argument by noting that the federal court found that the staffing of Air Canada’s flights was a “systemic” problem, and not idiosyncratic to the flights on which the Thibodeaus traveled.

The Supreme Court of Canada ruled that this argument was not well founded. Citing Stott, it held that “courts must focus their application of the exclusivity principle on the location or the activity of the
passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault.” The court found that the breach of language rights suffered by the Thibodeaus in this case occurred aboard the aircraft and, as a result, fell “squarely within the exclusion established by the Montreal Convention”:

[The Thibodeaus] try to escape the application of the Montreal Convention by claiming that [their claim does] not constitute an ‘action for damages’ covered by the substantive scope of the Montreal Convention. . . . These submissions fail because they are inconsistent with the exclusivity principle that underlies the Montreal Convention and because they are not consistent with its clear text.42

Having dismissed these arguments, as did the Federal Court of Appeal, the Supreme Court of Canada then considered whether the Official Languages Act and the Montreal Convention truly are in conflict with each other—and if so, which legal instrument prevails. The Supreme Court of Canada held that the two pieces of legislation can operate together harmoniously.

In essence, the majority of the court concluded that the highly discretionary remedial provisions of the Official Languages Act do not conflict with the Montreal Convention, and further that there was no intention by the Canadian Parliament to permit the courts to make orders in breach of Canada’s international undertakings that have been incorporated into federal law. Accordingly, the Thibodeaus’ complaint was dismissed.

Conclusion

The decision in Thibodeau has been well received in Canada by the aviation defense bar. It aligns Canada with the highest courts of the United States and the United Kingdom (as well as many other jurisdictions), resulting in predictability and uniformity in the resolution of air carrier liability disputes.

Endnotes


5. Now the Supreme Court of the United Kingdom.


10. Now of the Ontario Court of Appeal.

11. R.S.C. 1985, c. C-34, s. 52(1)(a).

12. At that time, the U.S. Supreme Court had not yet decided the Tseng case. That decision, which also adopted a strong exclusivity approach to interpreting the Warsaw Convention, was issued eight months later.


15. Id. at para. 32.


17. Id. at para. 17.


19. Id. at para. 26.

20. 2006 SKQB 231 (Can.).

21. Id. at para. 84.

22. R.S.C. 1985, c. 31 (4th Supp.) (Can.).


24. Id.

25. Id. at para. 3.

26. Id. at para. 36. (Emphasis in original.)

27. Id. at para. 41.


30. Id. at para. 62.

31. 284 F.3d 352, 355 (2d Cir. 2002).


34. Case C-344/04, 2006 E.C.R. I-403 (Grand Chamber).


39. Id. at para. 81.

40. Id.

41. Id. at para. 85.

42. Id. at paras. 49, 87.
From individual pilots to the largest aircraft manufacturers, any individual or entity regulated by the Federal Aviation Administration (FAA) may at some time need to apply for an exemption, waiver, or other relief from the agency’s regulations. This article seeks to clarify some of the nuances of, and differences among, several such applications, focusing in particular on three forms of FAA approval: an exemption under part 11 of title 14 of the Code of Federal Regulations (14 C.F.R.), a waiver from the commercial space regulations, and a certificate of waiver or authorization (COA) for public aircraft operations of unmanned aircraft systems (UAS).

Part 11 Exemptions
The most common of the three types of applications discussed in this article is the part 11 exemption. FAA regulations define a petition for exemption as “a request to FAA by an individual or entity asking for relief from the requirements of a current regulation.” The FAA is authorized to issue exemptions under Congress’s delegation of regulatory authority, in particular sections 40109, 40113, and 44701 of title 49 of the United States Code (49 U.S.C.). A petition for exemption, however, is not the appropriate remedy to all potential conflicts with FAA regulations. For example, the FAA does not issue exemptions from applicability provisions, or if doing so would directly contradict a statutory mandate—such as a congressional requirement that the FAA issue certificates.

Assuming that a petition for exemption is appropriate, the petitioner should turn first to the standards for an exemption, codified in 14 C.F.R. part 11. FAA regulations specify the type of information a petition must contain, in addition to certain administrative and identifying information about the request. Although the details of each petition may vary widely depending on the nature of the relief sought, this substantive information must include:

- The specific section(s) of the regulations from which the petitioner seeks an exemption;
- The extent of relief the petitioner seeks;
- The reason the petitioner seeks relief;
- The reasons why granting the petitioner’s request would be in the public interest, e.g., how the exemption would benefit the public (not just the petitioner); and
- The reasons why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that provided by the rule.

The regulations also require that any petition be submitted 120 days before the petitioner needs it to take effect, and invite petitioners to provide “[a]ny additional information, views, or arguments” that may support the petition for exemption. The FAA uses two legal standards to analyze a petition: (1) whether the exemption is in the public interest, and (2) why the exemption will not adversely affect safety, or how the petitioner will maintain at least an equivalent level of safety. The FAA analyzes and decides each petition on the basis of its own unique facts. However, if a petitioner is aware that the FAA has previously granted a substantially similar exemption, the petitioner should cite the prior exemption as precedent.

Commercial Space Waivers
Not all FAA regulations are subject to exemption—some areas of the regulations specifically require other forms of relief. One such area is the commercial space licensing and permitting regulations in 14 C.F.R. chapter III. In particular, sections 404.3 and 404.5—implementing 51 U.S.C. section 50905(b)(3)—provide for the issuance of waivers from any requirement of a specific license or permit, or the requirement for a license. These regulations also set out the administrative and substantive requirements of any petition for such a waiver, similar to 14 C.F.R. section 11.81 for exemptions.
Despite some differences, commercial space waivers have many of the same requirements as part 11 exemptions. These similarities range from simple procedural requirements to the substantive showings a petitioner must make to be successful. For example, both forms of relief require the petitioner to include a summary of the request, which the FAA may publish in the Federal Register. With respect to the substantive showings required for a commercial space waiver, the FAA requires any petitioner to demonstrate why a grant of waiver (1) is in the public interest; (2) will not jeopardize public health and safety, or the safety of property; and (3) will not jeopardize national security or foreign policy interests of the United States. These requirements echo the public interest and safety showings required for an exemption under part 11.

For purposes of this article, the differences between part 11 exemptions and commercial space waivers are more interesting than the similarities. One difference is that a waiver applicant, unlike an exemption petitioner, must show that the waiver would not jeopardize national security or foreign policy interests of the United States. Ultimately, this difference may exist simply to codify the statutory language in 51 U.S.C. chapter 509 requiring the FAA to consider national security and foreign policy as two particular elements of the “public interest.” In other words, there is nothing to prevent the FAA from including national security or foreign policy concerns when the agency analyzes whether an exemption petition is in the public interest, even though that language does not appear in part 11.

Two more significant differences exist between the safety showings required for a waiver determination versus an exemption. For an exemption, the applicant must include the reasons why approval would not adversely affect safety, or would provide a level of safety at least equal to that provided by the FAA regulations. In contrast, an application for a waiver must include “any facts, views, and data available” to support a finding that the proposal will “not jeopardize public health and safety.” This waiver standard is a lower threshold in at least two ways.

First, a waiver petitioner’s obligation to “not jeopardize” public health and safety suggests a lower threshold than an exemption petitioner’s obligation to demonstrate “no adverse effect” on safety. The plain meaning of “no adverse effect” or a level of safety “at least equal to” is that a proposed action must be no less safe than compliance with the regulations. By contrast, the waiver requirement that a proposal “not jeopardize” public health and safety indicates that a petitioner may receive a waiver for operations that are less safe than compliance with the regulations, so long as the operations are not so unsafe as to rise to the level of jeopardizing public health and safety.

This principle is evident in a waiver granted in 2014 to Lockheed Martin and the United Launch Alliance (ULA) for the launch and reentry of the Orion Multi-Purpose Crew Vehicle (Orion). The mission was designed to test the Orion capsule—“a stepping stone towards a crew-capable vehicle that would enable human exploration missions beyond Earth orbit.” The FAA granted Lockheed and ULA a waiver from, among other things, 14 C.F.R. section 417.107(b)(1), which limits the expected casualty rate from impacting debris to $30 \times 10^6$ (30 in a million). These waivers allowed the mission to proceed with impacting debris risk as high as $218 \times 10^4$, based primarily on the U.S. government’s experience with similar launches in the past. By raising the allowable risk threshold, the FAA by definition accepted an increased risk, but determined that this greater risk nevertheless would not jeopardize public health and safety.

A second way in which the waiver standard is more permissive than the exemption standard is that the FAA analyzes a waiver petition only in terms of its effect on public safety, whereas the analysis of an exemption petition must consider the effect on “safety,” without qualification. This difference exists because the statutory requirements governing commercial space transportation have a narrower scope than those governing aviation activities, as described in more detail below. As a result, a waiver petitioner presumably could propose to jeopardize his or her own health and safety, without jeopardizing public health and safety, and still qualify for a waiver (assuming all other waiver criteria are satisfied).

The differences between the frameworks for granting waivers as opposed to exemptions may be significant for commercial space industry stakeholders. Congress has implicitly recognized the need to support the commercial space industry by establishing (and subsequently extending) a moratorium on FAA regulation of certain aspects of human spaceflight. In addition, in the findings to 51 U.S.C. chapter 509, Congress stated that spaceflight is a high-risk activity. Waivers allow the industry to assume the risk of testing and implementing highly experimental technology, while still protecting public health and safety.

Public Aircraft Certificates of Waiver or Authorization

The FAA may also issue a COA for public aircraft operation of UAS. A COA is a document by which the FAA approves an operator to engage in a specific aviation...
activity. COAs are issued by the FAA’s Air Traffic Organization and reviewed by the FAA’s Flight Standards Service, and have historically been used for air shows and other circumstances affecting air traffic. UAS operations require a COA because, at this time, UAS do not comply with various FAA operational regulations—most notably 14 C.F.R. section 91.113, which requires the operator of an aircraft to “see and avoid” other aircraft.

In a 2007 FAA notice, the agency announced that its UAS policy is based on whether an aircraft is operated as a model aircraft, civil aircraft, or public aircraft. In that notice, the FAA describes how potential model or civil UAS operators may proceed in accordance with FAA regulations, including clarifying that modelers should follow the guidance published in FAA advisory circular (AC) 91-57, Model Aircraft Operating Standards. In the context of UAS operating as civil aircraft, the FAA states in the 2007 notice that any individual or entity seeking to operate UAS must obtain an airworthiness certificate, and furthermore that the FAA would only issue special airworthiness certificates in the experimental category. Although the FAA has still not issued a standard airworthiness certificate for any UAS, the agency has issued two special airworthiness certificates in the restricted category, for UAS used to survey Alaska’s North Slope, and, under authority granted in section 333 of the 2012 FAA Modernization and Reform Act, recently began granting exemptions for certain commercial UAS operations. In 2014, the National Transportation Safety Board (NTSB) formally recognized that civil UAS may be regulated as civil aircraft, and therefore are required to have valid airworthiness certification and registration, and to be piloted by a certificated airman.

The FAA’s 2007 notice also includes guidance to entities seeking to operate UAS as public aircraft. Public aircraft operations (PAO) differ from civil aircraft operations in that “the FAA has no regulatory authority over PAO other than those requirements that apply to all aircraft operating in the” national airspace system (NAS). The framework for determining whether a particular operation qualifies as PAO resides in 49 U.S.C. sections 40102(a)(41) and 40125. As a baseline, only a government entity’s operations may qualify for PAO status; however, once it is determined that an operation has that status, the government entity may contract with another entity to perform the operation and may bestow PAO status on the operation. For example, the public aircraft statute specifically provides for a state or local (or U.S. territory) government to contract for search and rescue PAO operations, so long as the aircraft is leased by the government for “at least 90 continuous days” and is not used “for commercial purposes or to carry an individual other than a crew member or a qualified non-crew member.”

In addition to satisfying the requirement that the operation be conducted by or for a government entity, the aircraft operator must perform a “governmental function.” Section 40125(a)(2) defines a governmental function as “an activity undertaken by a government, such as national defense, intelligence missions, firefighting, search and rescue, law enforcement (including transport of prisoners, detainees, and illegal aliens), aeronautical research, or biological or geological resource management.” Although the statutory list of governmental functions is not exhaustive, the FAA construes the term narrowly. The FAA acknowledges that the list of governmental functions in section 40125(a)(2) is not exhaustive, but draws a line between “core functions that a state must accomplish in order to operate as a state” and other, more discretionary functions that do not qualify as governmental under the statute.

In June 2014, for example, the FAA’s Office of the Chief Counsel published a legal interpretation (in the form of a memorandum) on the scope of “aeronautical research.” The FAA states:

We do not interpret this term to encompass any research conducted using an aircraft. . . . We interpret the term . . . in a more limited sense to include research about aircraft, . . . such as [research performed by] the National Aeronautics and Space Administration, and the parts of the U.S. military that develop aircraft as their function.

The FAA released another legal interpretation in July 2014 (also in the form of a memorandum) addressing the proposed use of public aircraft for educational purposes. The interpretation states, “[w]e have determined that education is not a valid governmental function” under the public aircraft statute. The interpretation continues, “[i]f Congress had intended the list to [include] any [governmental] activity, it would have used the term ‘any activity.’” To illustrate, many public universities have sought COAs to train students to operate UAS. Just because a public university operates a flight school, however, does not mean that the school’s operations qualify as PAO. The FAA stated, “[a]ll manned flight schools [including state-owned flight schools] are civil operations, and are subject to significant regulation—none use public aircraft to teach students to fly, nor would we allow uncertificated pilots operating unregulated aircraft to teach others.”

Assuming that aircraft operations qualify for PAO.
status, another FAA guidance document, Interim Operational Approval Guidance 08-01, describes the elements of a UAS COA application. Because the FAA’s aviation regulatory authority extends only to the regulation of civil aircraft and control of the NAS, the FAA does not review a public aircraft operator’s policies and processes regarding pilot and crew certification, pilot currency, medical certificates, or airworthiness. Therefore, when a government entity applies for a PAO COA, the FAA expects the applicant to provide only an airworthiness statement specifying compliance with the [applicant’s own] applicable airworthiness policy or criteria.

This guidance further indicates that, when analyzing a PAO COA application, the FAA’s review focuses on the operational aspects of the application, and “[c]ompliance with the ‘see and avoid’ aspect . . . becomes one of the primary issues in UAS operational approvals.” As described in both the FAA’s 2008 operational approval guidance and the FAA’s 2007 policy notice, “[s]ee and avoid risk mitigation strategies are normally based on the use of visual observers or other methods of segregation.” The 2007 notice states:

Key to the concept are the roles of pilot-in-command (PIC) and observer. . . . The PIC is simply the person in control of, and responsible for, the UAS. The role of the observer is to observe the activity of the unmanned aircraft and surrounding airspace, either through line-of-sight on the ground or in the air by means of a chase aircraft.

If an applicant’s proposal does not rely on a visual observer, the applicant should “support [its] proposed mitigations with system safety studies which indicate the operations can be conducted safely,” including “a hazard analysis, risk assessment, and other appropriate documentation” showing that a collision is “extremely improbable.”

Guidance also indicates that the FAA expects a greater level of mitigation for proposed UAS operations, PAO or otherwise, conducted outside restricted, prohibited, or warning area airspace. In addition to a visual observer or satisfactory alternative measures of compliance, FAA guidance lists numerous operational requirements for any operations outside restricted, prohibited, or warning area airspace. These include radio communications between the UAS pilot and appropriate air traffic control (ATC) facilities; immediate communications between the UAS pilot and the visual or other observer; mitigation of any hazards related to dropping objects; prohibitions or limitations on operations over or near populated areas, heavily trafficked roads, open-air assemblies, and airports; flights below class A airspace (18,000 feet) must be conducted in accordance with certain visual flight rules (VFR) operating requirements, including section 91.155 (basic VFR weather minimums); flights above 18,000 feet must be conducted in accordance with instrument flight rules (IFR), including the filing of an IFR flight plan and coordination with ATC; limitations on vehicle autonomy; and certain operational restrictions on the use of chase aircraft, such as the requirement that chase operations only be conducted during daylight hours.

Finally, under certain limited circumstances, some government entities may bypass the FAA’s mitigation requirements for reasons of national security. According to FAA guidance, “When the Department of Defense or the Department of Homeland Security declares [that] a UAS operation is a matter of national security,’ the FAA may approve an application for a COA which, under normal circumstances, might otherwise not conform to the [agency’s mitigation guidelines].”

Conclusion

This article described three methods by which the public may request relief from various FAA regulatory requirements. Although not exhaustive, these examples illustrate the variety of issues and criteria the FAA will examine. Although each method ultimately may result in some form of regulatory relief or mitigation, the variations in legal standards or required showings among the types of relief reflect the various aspects of the FAA’s statutory and regulatory framework. A successful applicant must understand which form of relief is appropriate for his or her request, and what standards apply.

Endnotes

1. 14 C.F.R. § 11.15.
2. As the FAA explained in a recent denial on petition for reconsideration, “[a] grant of exemption relieves an individual or entity from the requirements of a current regulation,” and not from a definition or applicability provision. Bell Helicopter Textron Can. Ltd., Docket No. FAA-2012-0123, Decision on Petition for Reconsideration (Oct. 17, 2014) (emphasis added) (paraphrasing 14 C.F.R. § 11.15).
3. For a complete list of the requirements for a waiver petition, see 14 C.F.R. pt. 11.
4. 14 C.F.R. § 11.81(b)–(e). In addition to these substantive requirements, section 11.81(f) requires petitioners to include a summary of the request, which may be published in the Federal Register.
5. 14 C.F.R. § 11.63(d).
6. Id. § 11.81(g).
7. The FAA maintains a public, searchable database of

8. 14 C.F.R. §§ 11.81(f), 404.3(c).
9. Id. § 11.81(c).
10. Id. § 404.3(b)(4).
11. Id. § 404.5(b).
14. Compare 14 C.F.R. § 11.81(e) (“reasons why granting the exemption would not adversely affect safety”), with id. § 404.5(b) (“will not jeopardize public health and safety”) (emphasis added).
15. 51 U.S.C. § 50905(c)(3).
16. Id. § 50901(a)(12).
18. Since 2012, certain limitations on model UAS operations derived from AC 91-57 have given way to statutory limitations in section 336 of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11. For example, section 336 requires that, for model UAS operations within five miles of any airport, the UAS operator must notify the airport operator and air traffic control tower (if possible). AC 91-57 previously applied a three-mile standard.
21. See, e.g., Astraeus Aerial, Docket No. FAA-2014-0352, Grant of Exemption (Sept. 25, 2014). Section 333 of the FAA Modernization and Reform Act instructs the secretary of transportation to “determine if certain unmanned aircraft systems may operate safely in the national airspace system before” completing certain planning and rulemaking actions, which are also required by the act.
22. See Huerta v. Pirker, NTSB Order No. EA-5730, at 7 (Nov. 18, 2014); see also FAA Modernization and Reform Act of 2012 § 331(8), 126 Stat. at 63 (defining “unmanned aircraft” as “an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft” (emphasis added)).
23. FAA, ADVISORY CIRCULAR AC 00-1.1A, PUBLIC AIRCRAFT OPERATIONS ¶ 7.f. (Feb. 12, 2014).
24. 49 U.S.C. §§ 40102(a)(4)(D), 40125(b). Moreover, an aircraft leased exclusively for PAO does not need to be exclusively leased for 90 days if the administrator determines that the aircraft will be used for the performance of search and rescue missions, there are extraordinary circumstances, the community would not otherwise have access to search and rescue services, and the appropriate government entity demonstrates that granting the waiver is necessary to prevent an undue burden on the government. Id. § 40125(d).
28. Id. at 1.
29. Id. at 2.
30. Id. at 3. For more guidance on PAO, including how to determine whether particular operations qualify as PAO, see FAA, ADVISORY CIRCULAR AC 00-1.1A, PUBLIC AIRCRAFT OPERATIONS (Feb. 12, 2014).
31. AVIATION SAFETY UNMANNED AIRCRAFT PROGRAM OFFICE, INTERIM OPERATIONAL APPROVAL GUIDANCE 08-01, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM (Mar. 13, 2008) [hereinafter APPROVAL GUIDANCE 08-01].
32. Id. § 4.0.
33. Id. § 6.1.
34. Id. § 8.1.
35. Id.
37. APPROVAL GUIDANCE 08-01, supra note 31, § 8.1. The FAA’s application guidance document specifically describes four safety systems that may be considered by the FAA during the agency’s safety systems analysis, including onboard cameras/sensors, radar and other sensors, lost link procedures, and flight termination systems. Id. § 8.1.1.
38. Id. §§ 8.2.1–.13.
39. Id. § 4.1.2.
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As an excessive power grab that echoes the governance of the former regulated industry and openly defies Congress. With the comment period now closed, the parties have marked their battle lines and will likely need judicial adjudication to determine agency authority over slot transactions.

The FAA’s proposed rules govern slot management and transparency at LaGuardia Airport (LGA), John F. Kennedy International Airport (JFK), and Newark Liberty International Airport (EWR) collectively, the New York area airports), allowing the DOT to review certain slot transactions for antitrust and public interest issues. The FAA and DOT (collectively, the agencies) have asserted jurisdiction to review slot transactions under their existing statutory authorities to prevent unfair methods of competition, consider the public interest, and regulate the efficient use of airspace. The major U.S. air carriers that hold large numbers of slots at the New York area airports, however, argue that Congress long ago stripped the DOT of its authority to review such transactions when deregulating the industry.

If the Proposed Slot Rules are adopted as written, the rules likely will be challenged in court, where the agencies often enjoy the benefit of Chevron deference in interpreting the scope of their potentially ambiguous statutory authorities. Yet, challengers may have a well-grounded argument that the Proposed Slot Rules would violate Congress’s allocation of authority and responsibilities among the DOT, FAA, and U.S. Department of Justice (DOJ).

This article examines the agencies’ asserted authority to adopt the Proposed Slot Rules and the case that such rules would violate Congress’s allocation of authority and responsibilities. We also briefly discuss the level of deference a court would afford the agencies’ interpretation of the various legislation—the Civil Aeronautics Act of 1938, the Federal Aviation Act of 1958, and the Airline Deregulation Act of 1978—that forms the agencies’ statutory authority today.

Proposed Slot Rules
Under the Proposed Slot Rules, the FAA would refer all “stand-alone slot transactions” to the DOT except transactions that involve a small number of slots (fewer than eight). The DOT also proposes to exempt “more routine types of transactions” involving (1) limited terms, (2) one-for-one trades among incumbents, or (3) transfers to new entrants or incumbent airlines that hold or operate a relatively small proportion of the slots at an airport. The DOT would review the transaction for its competitive effects, including changing market structures, unreasonable industry concentration, excessive airline domination at an airport, or an environment that would facilitate monopoly powers or practices (e.g., the ability to raise fares).

While the DOT would coordinate, cooperate, and consult with the DOJ, it would conduct its own competitive review. For the public interest effects, the DOT would consider adverse effects on the traveling public, service to small communities, service through secondary or satellite airports, or “other areas.” The slot would not be available for the transferee’s use until the agencies complete the review process and the FAA approves the transaction. Moreover, the DOT asserts separate authority to investigate and prohibit unfair or deceptive practices or unfair methods of competition, as provided by 49 U.S.C. § 41712.

The FAA proposed the slot transaction review to address allegations that incumbent slot holders limit competitors’ access to New York area airports and avoid the loss of slots under usage requirements through slot transactions. Most major U.S. airlines—through Airlines for America (A4A) and joined by the International Air Transport Association (IATA)—and others dispute these allegations and challenge the agencies’ exertion of authority. Meanwhile, the agencies have the support of two major U.S. airlines, other U.S. airlines, and a number of airports and airport authorities, including the Port Authority of New York and New Jersey, which operates, but does not own, the New York area airports.

The Proposed Slot Rules are also the FAA’s attempt at a “long-term and comprehensive” approach to New York area airport slots, which have been subject to repeatedly extended temporary orders. In 1968, the FAA first began regulating slots at New York area airports to alleviate delays and congestion with the High Density Rules (HDR), relying on its authority to consider the public interest, regulate the use of airspace and air navigation facilities, prescribe air traffic rules, and prescribe rules
and standards for civil aircraft flight safety.\textsuperscript{15} With the HDR, the DOT occasionally resolved slot allocation deadlocks in the airline scheduling committee and reallocated slots from incumbent airlines to new entrants, but the agencies exercised their authority to regulate for the efficient utilization of navigable airspace.\textsuperscript{16}

After deregulation, the government opened the door to slot transactions and a secondary market in 1985.\textsuperscript{17} In 2000, Congress enacted the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR-21), which phased out the slot limitations, resulting in congestion and delays.\textsuperscript{18} In response to the delays and congestion, the FAA has taken a “piecemeal” approach, issuing short-term operating orders that: (1) limit the number of operating authorizations at each airport, (2) terminate upon adoption of a final rule, (3) prohibit the transfer of the operating authorizations beyond the duration of the orders, and (4) require FAA confirmation and approval before transfer of the operating authorizations.\textsuperscript{19} The FAA has issued the orders under its statutory authority to regulate the safe and efficient use of airspace and/or the required consideration of public interest factors.\textsuperscript{20} Now the agencies propose to expand their slot transactions oversight under their existing statutory authority.

The Agencies’ Asserted Review Authorities

No statute explicitly instructs the DOT or FAA to review airlines’ slot transactions. Accordingly, the agencies primarily rely on three existing statutory authorities: (1) the investigation, determination, and prohibition of unfair methods of competition; (2) the obligation to carry out duties in accordance with specific public interest considerations; and (3) the regulation of the use of navigable airspace.

First, the DOT relies on its authority to investigate, decide whether an airline is engaged in, and prohibit “unfair method[s] of competition” under section 41712.\textsuperscript{21} The DOT characterizes its authority as “prohibit[ing] airline conduct comparable to antitrust violations,”\textsuperscript{22} and the statutory language echoes the antitrust authority of the Federal Trade Commission Act.\textsuperscript{23}

The agencies’ reliance on section 41712 may be familiar because the FAA asserted the DOT’s jurisdiction over slot subleases under section 41712 in 2008.\textsuperscript{24} Unlike the currently proposed rule (14 C.F.R. § 93.47), which explicitly authorizes the DOT review to “determine adverse public interest and/or anticompetitive effects, as described in 49 U.S.C. § 40101(a)” and reserves the DOT’s authority to take action under section 41712 (proposed 14 C.F.R. § 93.47(d)), the 2008 slot subleasing rules merely recognized that the DOT “already has the authority under [section] 41712 to investigate, prohibit, and impose penalties” for unfair methods of competition and required the airlines to file sublease details with the FAA.\textsuperscript{25} The rules were challenged principally for other reasons and ultimately withdrawn for reasons apart from the FAA’s assertion of DOT authority.\textsuperscript{26} The DOT acknowledges that it has never used section 41712 to bring an enforcement action regarding airline slot transactions,\textsuperscript{27} but one airline tried unsuccessfully to get the DOT to do so. In 2003, AirTran asked the DOT to exert its authority over unfair methods of competition to prevent a slot reallocation at DCA among four airlines.\textsuperscript{28} After the planned reallocation was abandoned, the DOT found AirTran’s complaints to be moot and did not answer the question of whether it had the power to order the divestiture of slots. Contrary to the objections of the subject airlines, the DOT stated that it had “broad authority under [section 41712]” to address AirTran’s complaints.\textsuperscript{29}

Second, the agencies rely on Congress’s purported instructions that the DOT “carry out the pro-competitive aspects of the Airline Deregulation Act” (ADA).\textsuperscript{30} The DOT looks to the congressional mandate that the DOT consider, when carrying out its duties: (1) preventing unfair or anticompetitive practices in air transportation; (2) avoiding market domination, monopoly powers, and other conditions that would tend to allow an airline to increase prices, reduce services, or exclude competition; (3) encouraging, developing, and maintaining a system relying on actual and potential competition; (4) encouraging competitive entry; and (5) ensuring consumer access to affordable, regularly scheduled air service.\textsuperscript{31} The agencies note that Congress instructed the DOT to consider these factors to be in the “public interest” and afforded the agencies discretion to identify other potential factors that may be in the public interest.

The agencies seek to validate their reliance on the congressional requirements with the FAA/DOT’s application of the public interest factors in the 2010 review of Delta Air Lines’ and US Airways’ slot transaction, where the DOT ultimately required the divestiture of slots at LGA and DCA to remedy effects that the DOT (and DOJ)\textsuperscript{32} perceived as anticompetitive. Responding to the parties’ request for a waiver of the prohibition on sale of LGA slots,
the agencies cited the “pro-competitive policies” of the ADA, many of the same statutory public interest factors that the agencies now invoke for the new slot rules, and the availability of “adequate, economic, efficient, and low-priced services.”

The review, described as “independent” and “complementary” to the DOJ’s review, also invoked a declared authority to consider “fostering of competition” to be in the public interest. The FAA also notes that, in the 2010 review, the DOT clarified that the DOJ’s authority to reject anti-competitive transactions “does not remove the DOT’s responsibility to carry out its programs consistently with the [pro-competitive] public interest criteria” required by Congress.

Third, for the FAA’s more limited role in the proposed review process—referring the transaction to the DOT—the FAA calls upon its “broad authority” to regulate the use of navigable airspace and specific authorities to (1) develop plans and policy for the use of navigable airspace and to assign the use the FAA deems necessary for safe and efficient utilization, and (2) prescribe rules and regulations governing the efficient utilization of navigable airspace. The FAA reads this authority to require that the FAA ensure efficient use of navigable airspace that “does not effectively shut out potential operators at the airport” and “takes account of competitive market forces.” In turn, the FAA states that it should ensure the slot rules “do not inefficiently constrain competitive market forces,” but must “strike a balance” between promoting competition and new entrant access with historical airport investments and continuity.

In sum, the FAA appears to have two primary bases on which it asserts the agencies’ authority to implement the Proposed Slot Rules. First, the FAA relies on the broad, and potentially ambiguous, statutory language for the agencies’ authority to consider antitrust effects and public interest factors. For example, when the FAA looks to its authority over the “efficient” use of airspace, it includes competitive effects. However, reliance on certain arguably ambiguous words may be inadequate because statutory provisions are not examined in isolation and their meaning may only become evident when placed in context of the statute and larger legislative framework.

For the DOT, the agencies appear to avoid this potential issue and look to the multiple broad public interest considerations that the DOT must consider and explicitly include competitive effects, as well as the DOT’s facially broad competition protection authority under section 41712.

Second, the FAA seemingly looks to the history of the agencies’ assertion of the currently relied-upon authorities for past slot transactions and slot rules. Although unlikely to be dispositive as to whether the statutes include the asserted authority, the agencies may not face the circumstance of having their own long-standing and contrary interpretation be used as evidence of a congressional intent that is contrary to their current interpretation.

While having a history of interpreting the statutes in their own favor and despite having the benefit of Chevron deference for the interpretation of broad and potentially ambiguous statutory language, the agencies may face significant statutory interpretation challenges.

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**A4A, alleging agency overreach, argues that the DOT has never applied its section 41712 authority to airline asset transactions.**

A4A’s principal arguments to sever the slot transaction review from the final rule focus on what A4A sees as a lack of statutory authority for such review. First, A4A argues that section 41712 does not support the DOT’s competitive review of slot transactions. Under the Civil Aeronautics Board Sunset Act of 1985, Congress stripped the DOT of its authority to conduct competitive reviews of mergers and acquisitions. A4A argues that it strains credulity that, at the same time Congress removed the DOT’s authority to conduct competitive reviews of airline transactions, it vested the DOT with that same authority under section 41712 under the guise of preventing “unfair methods of competition.” Instead, A4A contends that section 41712 is a consumer protection statute that fills the gap created by the Federal Trade Commission’s (FTC’s) lack of jurisdiction over airlines. A4A, alleging agency overreach, argues that the DOT has never applied its section 41712 authority to airline asset transactions. Moreover, even if section 41712 does authorize competitive review of slot transactions, A4A argues that the presumption that nearly all transactions are problematic violates the plain language of section 41712 and due process and turns the DOT’s section 41712 enforcement policy “on its head.”

Second, A4A argues that the DOT and FAA cannot rely on the prior practice of invoking competition authority over slots, including their review of the Delta–US Airways slot swap, to create statutory authority that does not exist. A4A also contends that the DOT’s argument that the “efficient use of airspace” under section 40103(b) made in support of its review of the Delta–US Airways slot swap offers no more support now than it did then; nothing in the statute’s plain language or legislative
history suggests that, in using the term “efficient,” Congress intended to vest the FAA with authority to conduct competition reviews. A4A also argues that the agencies’ reliance on the pro-competitive policies of the ADA is equally unavailing because Congress withdrew authority for the DOT to perform competitive reviews of mergers and asset transactions, placing sole responsibility for those functions with the DOJ. In fact, A4A suggests that the two-part process is an implicit acknowledgment that the FAA lacks authority to conduct competitive reviews.

Third, A4A argues that the agencies do not have the general authority to conduct competition reviews of slot transactions under antitrust law standards; rather, that authority rests solely with the DOJ. A4A argues that section 40103 of title 49, which confers authority on the FAA to regulate the nation’s airspace, limits the FAA’s consideration of the public interest to the safety of aircraft and the efficient use of airspace. For support, A4A points to the legislative history of the DOT’s statutory authority, which shows that the secretary’s powers and duties concerning aviation safety are transferred to the FAA, and notes that many of the FAA’s statutory duties are found in a subpart of title 49 labeled “Safety.” A4A argues that (1) the proposed review mechanism violates the statutory prohibition on submitting FAA decisions regarding the use of airspace to the DOT for coordination or approval; and (2) the DOT has no authority to insert public interest considerations reserved for economic regulation into the FAA’s airspace regulations.

Finally, A4A argues that section 11 of the Clayton Act does not give the DOT antitrust authority over slot transactions because the DOT’s authority is limited to transactions that are within the secretary’s authority to regulate under the Federal Aviation Act and ADA—an area that does not include slot transactions. Any other interpretation would mean there is no limit to the DOT’s authority.

Standard of Review
If the rules are adopted as proposed and are challenged on the ground that the agencies misinterpreted their statutory authority to impose the Proposed Slot Rules, the agencies’ interpretation would be analyzed under the *Chevron* framework. Although some courts have hesitated to defer to an agency’s interpretation of its own jurisdiction, the U.S. Supreme Court confirmed in 2013 that the *Chevron* framework applies even to agency interpretations of a statutory ambiguity that concerns the scope of the agency’s statutory authority (i.e., its jurisdiction).

If *Chevron* is applied, two familiar questions must be answered to determine whether the agencies have correctly interpreted the statutes to enact the Proposed Slot Rules: (1) whether Congress has directly spoken to the precise question; and (2) if not, whether Congress has left the language silent or ambiguous. If Congress has spoken, as the major airlines allege, the court and the agencies must give effect to the unambiguous congressional intent. Some of the key factors to determine whether Congress has spoken include not only the statutory language itself, but also the broader statutory scheme, statutory history, and past interpretations. If Congress has not spoken and the authorities are found to be ambiguous, however, the challengers have a considerably more difficult standard to overcome. If the agencies’ interpretation is merely found to be “reasonable,” the review rule likely would stand under a court’s *Chevron* deference to the agencies.

Even if a court determines that the agencies have the authority to review slot transactions for antitrust issues, opponents of the Proposed Slot Rules may attempt to derail the final rule by raising a number of potential deficiencies under the Administrative Procedure Act, including the argument that the Proposed Slot Rules are arbitrary and capricious because, for example, the FAA has not demonstrated a need for review of slot transactions, has failed to provide clear standards for slot transaction review, and did not impose a time limit on the DOT’s proposed review.

Conclusion
Unless the FAA removes the slot transaction review and other requirements from the Proposed Slot Rules, a court challenge is likely. The FAA will likely rely on the considerable deference given to agencies under the *Chevron* framework, particularly with the broad, and potentially ambiguous, statutes conferring authority on the DOT and FAA. However, challengers have presented strong points that when looking at the more general scheme established more recently by Congress, and the fact that Congress took away certain DOT review powers, the DOT has been divested of its authority to review slot transactions. Ultimately, the final rules, if issued to include slot transaction review, will prescribe the nature of any challenge and defense of the agencies’ authority.

Endnotes
1. The FAA’s temporary orders impose operating limitations at the New York City area airports and assign “operating authorizations” to the air
carrier that previously held the equivalent slot or slot exemption.


3. Id. at 1291.

4. See Comments of Airlines for America Concerning FAA/DOT Slots Authority, Docket No. FAA-2014-1073 (May 8, 2015) [hereinafter A4A Comments]. Alaska Airlines and Southwest Airlines did not join the A4A Comments. A4A opposes the FAA’s proposed rules in general, arguing that the FAA should maintain the status quo by continuing to regulate by means of “operating authorizations” under final rules, but permitting carriers to engage in permanent slot transfer transactions. Id. at 4.


7. While “small” transactions of fewer than eight slots in total would not be subject to review under the Proposed Slot Rules, the DOT may consider multiple transactions within a three-year period as constituting a single aggregate transaction that would be subject to review. See Proposed Slot Rules, 80 Fed. Reg. at 1304 (to be codified at 14 C.F.R. § 93.47(a)).

8. Id. at 1293. The Proposed Slot Rules define a “new entrant” as “a U.S. or foreign air carrier that holds or operates fewer than 20 slots on any day of the week, in any combination during the slot-controlled hours, at the respective airport.” Id. at 1300 (to be codified at 14 C.F.R. § 93.36). Thus, for purposes of the Proposed Slot Rules, an incumbent is implicitly defined as any carrier that is not a “new entrant.”

9. Id. at 1291.


15. See Part 93—Special Air Traffic Rules and Airport Traffic Patterns, High Density Traffic Airports, 33 Fed. Reg. 17,896 (Dec. 3, 1968) (citing sections 103, 307(a), (b), and (c), 313(a), and 601 of the Federal Aviation Act of 1958). Washington National Airport (DCA) and Chicago O’Hare International Airport (ORD) were also subject to the rules. The EWR slots were suspended in 1970 because airport capacity could meet demand. See Part 93—Special Air Traffic Rules and Airport Traffic Patterns, High Density Traffic Airports, 35 Fed. Reg. 16,591 (Oct. 24, 1970).

16. See Nw. Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1314 (8th Cir. 1981) (upholding the FAA’s Special Federal Aviation Regulation (SFAR) reallocating slots at DCA and the secretary’s interpretation that the statutory authority to ensure efficient utilization of navigable airspace encompasses authority to allocate slots at DCA).


22. Id. at 1291.


proposed rescission).
35. Id. at 63,704.
37. Id. at 1274.
38. Id. at 1275.
40. See id. at 157.
41. AAA Comments, supra note 4, at 18–22.
42. AAA also argues that the FTC has never interpreted its section 5 authority (on which section 41712 was modeled) to allow it to prohibit, indefinitely, an entire class of transactions.
43. Under 49 U.S.C. section 41712(a), the secretary “may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.”
44. AAA Comments, supra note 4, at 22–25.
45. AAA’s argument is bolstered by the precept that the words of a statute must be interpreted “with a view to their place in the overall statutory scheme.” Brown & Williamson, 529 U.S. at 133.
46. AAA Comments, supra note 4, at 12–18.
47. Id. at 25–26.
48. See City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013) (holding that a court must defer under Chevron to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s authority). This deference is based on the “implicit delegation from Congress to the agency to fill in the statutory gaps.” King v. Burwell, 135 S. Ct. 2480, 2488 (2015).
50. Id.
51. See Antipova v. U.S. Att’y Gen., 392 F.3d 1259, 1261 (11th Cir. 2004) (“We review the agency’s statutory interpretation of its laws and regulations de novo. However, we defer to the agency’s interpretation if it is reasonable and does not contradict the clear intent of Congress.” (citation omitted)).

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Don’t Get Your Construction Project Grounded

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interference with the enjoyment and use of the land.1

The Causby decision highlights the tension between historical concepts of property rights and the realities of the modern world. This tension is inherent in the framework for the FAA’s regulation of airspace.

Congress has declared that the U.S. government “has exclusive sovereignty of airspace of the United States.”2 “Navigable airspace,” which is the airspace over which the FAA has authority, includes “airspace above the minimum altitudes of flight prescribed by regulations . . . including airspace needed to ensure safety in the takeoff and landing of aircraft.”3 The breadth of this mandate arguably suggests that the FAA should have authority to block construction that impedes air navigation. The U.S. Constitution, however, generally reserves for individual states authority over land use and zoning decisions.4 In fact, “the FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation.”5

States’ Role in Regulating Construction Affecting Navigable Airspace

The FAA relies on the states to prohibit construction activities that pose a hazard to air navigation, but no legal mechanism exists to require states to do so. The FAA effectively delegates the task of ensuring appropriate state regulation of construction activities that pose a hazard to air navigation by requiring the public and private entities that operate airports to educate states and work with them to implement appropriate planning and zoning laws. The mechanism the FAA uses to bind these public and private airport operators is contractual. The FAA conditions receipt of grant funds for airport projects on acceptance by these airport operators of grant assurances, which include the requirement to “take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft.”6

Difficulties may arise when the airport operator does not have direct jurisdictional control over uses of property near the airport, but the FAA expects an airport sponsor to take appropriate action to the extent reasonably possible to minimize incompatible land uses.7

In Florida, for example, jurisdiction over land use and zoning regulation is primarily vested in local governments.8 Florida requires local governments to adopt comprehensive plans that “provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements.”9 Zoning ordinances and other development regulations are required to be consistent with adopted comprehensive plans.10 The Florida legislature has mandated that an adopted comprehensive plan address the “compatibility of uses on lands adjacent to an airport as defined in [section] 330.35 and consistent with [section] 333.02” or the adoption of an airport master plan.11 Thus, Florida, unlike other states, requires that construction activities in areas adjacent to airports are compatible with air navigation by forcing local governments to incorporate requirements in their comprehensive plans, which in turn dictate zoning and other development requirements.

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The FAA’s Role in Regulating Construction Affecting Navigable Airspace

While states and local governments may have ultimate jurisdiction over construction activities, the process for determining the impact of such activities on navigable airspace primarily occurs at the federal level.\textsuperscript{12} Congress has authorized the secretary of transportation to implement a process for making such determinations and outlined the basic requirements of that process.\textsuperscript{13} This process begins with the requirement for a developer to provide public notice “of the construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill” that affects “(1) safety in air commerce; and (2) the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports.”\textsuperscript{14} In furtherance of this authority, the FAA promulgated part 77 of the Federal Aviation Regulations (14 C.F.R. part 77).

The FAA’s Hazard Determination Process

A sponsor of a proposed construction or alteration must file a notice of construction or alteration of structures\textsuperscript{15} with the FAA if the structure falls within the parameters set forth in 14 C.F.R. § 77.9 or if requested by the FAA.\textsuperscript{16} These requirements apply to both a completed construction project and equipment used in the project’s construction. For example, most construction projects that meet the standards set forth in section 77.9 require construction cranes that tower far above the actual completed structures. For the vast majority of nonairport buildings and structures, notice is required for construction or alteration that:

1. Is more than 200 feet above ground level (AGL)\textsuperscript{17} at the site; or
2. Exceeds an imaginary surface extending outward and upward at any of the following slopes:
   - 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each airport with its longest runway more than 3,200 feet in actual length, excluding heliports;
   - 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each airport with its longest runway no more than 3,200 feet in actual length, excluding heliports; or
   - 25 to 1 for a horizontal distance of 5,000 feet from the nearest point of the nearest landing and takeoff area of each heliport.\textsuperscript{18}

The FAA has developed an obstruction evaluation/airport airspace analysis website (https://oeaaa.faa.gov/oeaaa/external/portal.jsp) to assist the public with the notice requirement. The notice criteria tool\textsuperscript{19} requires exact coordinates\textsuperscript{20} for the structure,\textsuperscript{21} which can be identified using the map function at http://earthexplorer.usgs.gov/.

If notice is required, the sponsor of the proposed construction or alteration must provide it using Form 7460-1 (Notice of Proposed Construction or Alteration), which must be submitted to the FAA “at least 45 days before the start date of the proposed construction or alteration or the date an application for a construction permit is filed, whichever is earliest.”\textsuperscript{22} Form 7460-1 provides the FAA’s Obstruction Evaluation Group (OEG) with the information necessary to determine whether the proposed construction or alteration is an obstruction to air navigation, including information about the sponsor, the location, the height and site elevation of the proposed construction or alteration, the type of structure, whether the structure is permanent or temporary, and a complete description of the proposed construction or alteration.\textsuperscript{23}

For a developer of a project of substantial height or potential electromagnetic output, one potential option is to request that the OEG perform a feasibility study before the project is fully developed. A feasibility study is limited aeronautical review based on very broad, estimated, or general information about the structure.\textsuperscript{24} The OEG will perform feasibility studies to the extent FAA resources and staff workloads allow.\textsuperscript{25} A feasibility study is not an official determination but rather a report, the findings of which may assist the project developer to design and plan its project to ensure safety and regulatory compliance.

Structures that exceed one or more of the obstruction standards set forth in 14 C.F.R. section 77.17 are presumed to be hazards to air navigation unless further aeronautical study concludes otherwise.\textsuperscript{26} After notice is submitted on Form 7460-1, the OEG conducts a preliminary aeronautical study (as opposed to the more general feasibility study discussed above) to determine whether the proposed construction or alteration is an obstruction. After this preliminary study, the FAA will issue one of three notices.

- A “does not exceed” (DNE) letter means the structure does not exceed obstruction standards, does not have a substantial adverse physical or electromagnetic interference effect on navigable airspace or air navigation facilities, and would not be a hazard to air navigation.\textsuperscript{27}
- An “exceeds but OK” (EBO) letter means the structure exceeds obstruction standards but without causing a substantial adverse effect. An EBO letter may only be issued for temporary or existing structures, or for alterations that do not increase height or

\textsuperscript{21}http://earthexplorer.usgs.gov/
change location. The developer may proceed with the project, subject to the conditions set forth in the EBO letter, if applicable.

- A “notice of presumed hazard” (NPH) letter means that the structure exceeds obstruction standards and/or has an adverse effect on navigable airspace or air navigation facilities and resolution or further study is necessary to fully determine the extent of the adverse effect. The intent of the NPH is to inform the sponsor of the initial findings and seek a resolution.

Upon receipt of an NPH letter, the project’s sponsor must contact the OEG and decide how the sponsor wishes to proceed. Otherwise, the OEG will terminate the case. An NPH letter typically provides steps that may be taken to keep the proposed construction or alteration from exceeding obstruction standards. The sponsor can accept the FAA’s recommendations, assuming that is feasible given the requirements of the project, in which case the OEG will issue a subsequent determination of no hazard (DNH) based on the changes to the project.

If the sponsor does not wish to change the project or disagrees with the OEG’s conclusions in the NPH, then the OEG will conduct further study. The OEG not only must perform the aeronautical study, but also must consider comments and information provided by interested parties. The sponsor has a right to communicate with the OEG about a specific aeronautical study through its representative identified in the e-filing. Such communications enable the sponsor to submit analyses performed by its own consultants and engineers to influence the OEG’s decision.

The OEG will perform further aeronautical study “to determine whether the aeronautical effects of the specific proposal and, where appropriate, the cumulative impact resulting from the proposed construction or alteration when combined with the effects of other existing or proposed structures, would constitute a hazard to air navigation.” The proposed construction or alteration of a structure, if not amended, altered, or removed, is deemed to have an adverse effect if it:

- Requires a change to an existing or planned instrument flight rules (IFR) minimum flight altitude, a published or special instrument procedure, or an IFR departure procedure for a public-use airport.
- Requires a visual flight rules (VFR) operation, to change its regular flight course or altitude.
- Restricts the clear view of runways, helipads, taxiways, or traffic patterns from the airport traffic control tower cab.
- Derogates airport capacity or efficiency.
- Affects future VFR and/or IFR operations.
- Affects the usable length of an existing or planned runway.

Even if the OEG determines that the proposed construction or alteration has an adverse effect, it may issue a DNH because the predicate for a DNH is that the structure will not have a substantial adverse effect. An adverse effect becomes substantial if a significant volume of aeronautical operations would be affected by the structure. The OEG equates significant volume with regular and continuing activity and gives the example of a structure that affects one or more operations per day. The analysis for significant activity is type-specific. Thus, an affected instrument procedure or minimum altitude may need to be used only an average of once a week to be considered significant if it is deemed to be the primary procedure under certain conditions.

If the structure exceeds obstruction standards but does not result in a substantial adverse effect, the OEG will issue a DNH. A DNH, however, does not mean that the sponsor is free to move forward with the proposed construction or alteration as originally proposed. A DNH will likely be subject to additional requirements. The OEG may condition provisions of the DNH and impose limitations necessary to minimize potential problems, such as the use of temporary construction equipment. The OEG may require the filing of a supplemental notice, which is provided on Form 7460-2. It is most common for the OEG to impose marking and lighting recommendations. The OEG has developed standard marking and lighting protocols set forth in advisory circular AC 70/7460-1K. Marking is used to make certain structures conspicuous to pilots during daylight hours, typically by painting the structure specific colors (aviation orange and white) and patterns. Patterns vary depending on the dimensions of the structure.

If the OEG issues a determination of hazard (DH), the local government agencies responsible for development approvals will likely prevent a project from going forward as proposed. The issuance of a DH, however, is a rare occurrence. For all cases in which the OEG conducts further study that are not terminated by the sponsor, the OEG issues a DNH for over 99 percent of structures. The key to obtaining a DNH in these cases is to proactively engage with the OEG, including providing all information necessary for the OEG to reach the desired result (e.g., offering a comprehensive technical analysis of the effect of the structure, identifying other structures impacting the determination, and providing well-developed and cost-effective mitigation options).

After the OEG issues a DH or DNH, if the sponsor is still not satisfied, it has two options: (1) petition the FAA for discretionary review;
(2) seek judicial review. Discretionary review is available not only for the sponsor, but also for any party with a substantive aeronautical comment on a proposal, subject to certain limitations. A petition for discretionary review must be filed within 30 days of the issuance of the DH or DNH. The petition must contain a full statement of the aeronautical basis for the petition, and include new information or facts not previously considered or presented during the aeronautical study, including valid aeronautical reasons why the FAA’s determination, revisions, or extension should be reviewed.

DH and DNH determinations issued by the OEG constitute a “final disposition,” which is reviewable by the federal court of appeals for the circuit in which the proposed construction or alteration is located. DH and DNH will be sustained by the reviewing court if the findings of the DH or DNH are supported by substantial evidence.

The FAA will be afforded substantial deference by the courts.

Conclusion
For a real estate developer, the process for reviewing whether its construction project may interfere with navigable airspace may seem foreign and daunting. If, however, a developer is armed with the necessary knowledge and data, the FAA’s hazard determination process does not have to be an impediment to development or a limitation on the size and scope of a development project.

Endnotes
3. Id. § 40102(a)(32).
4. See Compatible Land Use Planning Initiative, 63 Fed. Reg. 27,876 (May 21, 1998). The states’ general authority over property is subject to exceptions. For example, 49 U.S.C. section 44718(d) limits the construction or establishment of certain municipal solid waste landfills within six miles of certain airports unless specifically exempted by the FAA.
5. Aircraft Owners & Pilots Ass’n v. FAA, 600 F.2d 965, 967 (D.C. Cir. 1979).
10. Id. § 163.3194.
11. Id. § 163.3177(6)(a)(2)(g).
14. Id. § 44718(a).
15. These requirements apply to: “(a) Any object of natural growth, terrain, or permanent or temporary construction or alteration, including equipment or materials used and any permanent or temporary apparatus.
(b) The alteration of any permanent or temporary existing structure by a change in its height, including appurtenances, or lateral dimensions, including equipment or material used therein.
16. See id. § 77.9.
17. The height above ground level should be the highest point, including any appurtenance or object on top of a building.
18. 14 C.F.R. § 77.9(a)–(b).
20. Latitude and longitude must be geographic coordinates, accurate to within the nearest second or hundredth of a second if known. FAA Form 7460-1: Notice of Proposed Construction or Alteration (Feb. 2012) [hereinafter Form 7460-1], available at https://www.faa.gov/forms/index.cfm/go/document.infoynamics/documentID/186273.
21. In the case of buildings, the coordinates of each of the building’s corners must be given.
22. 14 C.F.R. § 77.7.
23. See Form 7460-1; see also 14 C.F.R. § 77.15. If the proposed construction or alteration involves a structure over 200 feet AGL, the sponsor must include its marking and/or lighting preferences on Form 7460-1.
26. 14 C.F.R. § 77.15(b).
28. Any proposed structure that would exceed a height of 2,000 feet above ground is presumed to have a substantial adverse effect on the safe and efficient use of navigable airspace and must be determined to be a hazard to air navigation unless the sponsor, at the time of filing, makes a clear and compelling showing to the contrary. Id. § 6-1-5.
29. The sponsor may also request that the FAA perform the aeronautical study. See 14 C.F.R. § 77.27.
30. Procedures for Handling Airspace Matters, supra note 24, § 6-3-17. The OEG likely will issue a notice of a particular proposed construction or alteration to solicit information that may assist in determining the proposed structure’s effect, if any, on the navigable airspace. The OEG will issue such a notice with respect to a structure that exceeds the obstruction standards if an airport is affected or may have an effect on VFR or aeronautical operations or procedures.
31. 14 C.F.R. § 77.25(b).
32. This does not apply to VFR military training route (VR) operations conducted under 14 C.F.R. part 137 or operations conducted under an FAA-issued waiver or exemption.

33. Procedures for Handling Airspace Matters, supra note 24, § 6-3-3.
34. Id. § 7-1-3(c).
35. Id. § 6-3-5.
36. Id. § 6-3-4.
37. A DNH expires 18 months after its effective date. 14 C.F.R. § 77.33(a).
38. Id. § 77.31(d).
41. A petition for discretionary review is not available for a DNH that is issued for a temporary structure, marking and lighting recommendation, or when a proposed structure or alteration does not exceed obstruction standards. 14 C.F.R. § 77.37(b).
42. Id. § 77.37(a).
43. Id. § 77.39(a).
44. Id. § 77.39(b).
45. 49 U.S.C. § 46110(a); see also Paskar v. U.S. Dep’t of Transp., 714 F.3d 90, 96 (2d Cir. 2013), corrected (Apr. 22, 2013).
46. Aircraft Owners & Pilots Ass’n v. FAA, 600 F.2d 965, 973 (D.C. Cir. 1979).
47. Id. at 973–74 (quoting Pillai v. CAB, 485 F.2d 1018, 1027 (D.C. Cir. 1973) (“[a]dministrative prediction and strategy in the face of essentially unprovable levels of risk . . . constitute . . . the sort of determination for which this court should have the utmost deference[,]”)).