DISTRICT COURT, COUNTY OF BOULDER, COLORADO Boulder County District Court Boulder County Justice Center 1777 6th Street Boulder, CO 80302	
Plaintiff: CITIZENS FOR QUIET SKIES, INC., KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **Defendants:** MILE-HI SKYDIVING CENTER, INC.	▲ **COURT USE ONLY** ▲ Case Number: **2013CV031563** Div. **2** Crtrm.: **Q**
Counsel for Defendant Anthony L. Leffert, #12375 Laura J. Ellenberger, #43931 Robinson Waters & O'Dorisio, P.C. 1099 18th Street, Suite 2600 Denver, CO 80202-1926 Telephone: 303-297-2600 Facsimile: 303-297-2750 E-mail: aleffert@rwolaw.com lellenberger@rwolaw.com	

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court after trial held April 13, 2015 through April 17, 2015, a site visit on May 2, 2015, and closing arguments on May 6, 2015. The Court, having heard the testimony and reviewed the evidence, hereby FINDS and ORDERS as follows:

I. BURDEN OF PROOF

1. The Plaintiffs bear the burden of proving by a preponderance of the evidence that Defendant Mile-Hi Skydiving Center, Inc.'s ("Mile-Hi") operations are a private nuisance and/or that Mile-Hi has been negligent.

2. The Plaintiffs have the burden of proving that they have suffered actual damages by a preponderance of the evidence. *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1201 (Colo. App. 2009). The Plaintiffs must establish the amount of damages with reasonable certainty. *Id*. "To satisfy this obligation, a plaintiff must provide substantial evidence which will, when combined with reasonable inferences drawn from the evidence, provide a reasonable foundation for the computation of damages." *Id*.

II. FINDINGS OF FACT

A. PARTIES.

4. Mile-Hi is a Colorado corporation. Mile-Hi is in the business of providing skydiving services and operates out of the Vance-Brand Municipal Airport in Longmont, Colorado (the "Airport"). Mile-Hi has conducted its operations at the Airport since 1995. Frank Casares became the owner of Mile-Hi in 2005 and has operated and managed the business since that time.

5. Plaintiff Citizens for Quiet Skies, Inc. ("Citizens") was incorporated by Plaintiff Kimberly Gibbs on October 18, 2012 as a Colorado nonprofit corporation pursuant to C.R.S. § 7-122-101 and § 7-122-102. Ms. Gibbs organized Citizens as a nonprofit organization for religious, charitable, scientific or educational purposes. (*See* Exhibits V and W.) In fact, Citizens was formed in order for Ms. Gibbs to raise money to fund this lawsuit and encourage people to make noise complaints about Mile-Hi.

6. Plaintiffs Kimberly Gibbs, Timothy Lim, Robert Yates, Suzanne Webel, John Behrens, Carla Behrens, and Richard Dauer (collectively, the "Individual Plaintiffs") are all residents of Longmont in Boulder County, Colorado.

7. Plaintiffs Kimberly Gibbs and Timothy Lim are married and reside together at 7468 Mt. Sherman Road, Longmont, Colorado 80503. Their house, which they purchased in or around January of 2006, is located five to six miles from the Boulder County Airport and approximately five to six miles from the Airport.

8. Plaintiffs John Behrens and Carla Behrens are married and reside together at 904 Little Leaf Court, Longmont, Colorado 80503. The Behrens' house is located one-third to three-quarters of a mile from the Airport, and it is situated under the flight path for airplane landings at the Airport. When the Behrens purchased their home in 2000, they signed a Disclosure Statement acknowledging and agreeing that, due to the proximity of their property to the Airport, there would be aircraft passing over the property. The Behrens also acknowledge that the frequency of aircraft passing over the property may increase in the future. (*See* Exhibit HH.)

9. Plaintiff Robert Yates resides at 6796 Nelson Road, Longmont, Colorado 80503, which is approximately one and a half miles from the Airport and approximately one mile from a takeoff runway for the Airport. Mr. Yates purchased his home in 1971, after the Airport had already been established. Mr. Yates owns his home with his wife, who is not a plaintiff in this case.

10. Plaintiff Suzanne Webel resides at 5735 Prospect Road, Longmont, Colorado 80503. Ms. Webel purchased the property on which her home is located in 1996; began construction on the home in 1998; and completed the construction of her home in 1999. Ms. Webel owns her home with her husband, who is not a plaintiff in this case.

11. Plaintiff Richard Dauer resides at 4019 Milano Lane, Longmont, Colorado 80503. Mr. Dauer's house is located approximately two to two and a half miles from the VB Airport. Mr. Dauer purchased his property in 2001 with his wife, who is not a plaintiff in this case.

12. All of the individual Plaintiffs' houses are located within the "flight box." The Behrens' and Dauers' homes are located in the direct landing path for the Airport.

B. FACTS.

13. The Airport is a general aviation airport. The Airport has received over $4.7 million in Airport Improvement Program ("AIP") federal grant funds since 1988 in exchange for agreeing to be bound by certain Grant Assurances. (*See* Exhibit J.) These Grant Assurances require, among other things, that the Airport remain available to all general aviation operations, including skydiving.

14. All of the Plaintiffs purchased their homes after the Airport was in existence and with full knowledge of its existence and proximity to their homes.

15. Both Ms. Gibbs and Ms. Webel own condos in the flight box that they rent to tenants. Neither of them have ever had a tenant who complained about the noise from Mile-Hi's operations.

16. There are several other airports in the area of the Plaintiffs' homes, including Boulder Municipal Airport, Rocky Mountain Metropolitan Airport, and the Erie Municipal Airport.

17. Mile-Hi's operations make up approximately four to six percent of all flight operations at the Airport annually.

18. Mile-Hi's customers come from all over the world. Mile-Hi conducts skydiving flights in numerous states and has federal governmental contracts for skydiving training.

19. Mile-Hi conducts its skydiving operations as a Specialty Based Operator in compliance with leases executed with the City of Longmont (the "City") which allow Mile-Hi to conduct up to 50,000 jumpers per year. (*See* Exhibits A and B.)

20. Neither Mile-Hi nor any of its agents or representatives have ever harassed any of the Plaintiffs by purposefully flying directly over the Plaintiffs' homes. Neither Mile-Hi, nor any of its agents or representatives, are members of Citizens Against Citizens for Quiet Skies.

21. In the normal course of its skydiving business, Mile-Hi primarily operates four planes: a DeHavilland Twin Otter ("Twin Otter"), two Beechcraft King Air E90s, and one Cessna Turbo 206. Mile-Hi also occasionally leases a second Twin Otter airplane from Skydive Arizona for its skydiving operations. The Twin Otter is the most commonly used aircraft for recreational skydiving in the United States.

22. All of the airplanes that Mile-Hi uses are properly registered and certificated by the Federal Aviation Administration ("FAA") in their respective categories and classes. All planes operated by Mile-Hi comply with FAA noise limitations. Mile-Hi's skydiving operations comply with all applicable federal regulations.

23. On or about April 7, 2007, Mile-Hi entered into an agreement with the FAA (the "Letter Agreement") authorizing Mile-Hi to conduct parachute jumping at the Airport and establishing the procedures Mile-Hi must follow for its skydiving operations. The Letter Agreement mandates that Mile-Hi's parachute jumping operations must be confined to a two nautical mile radius called a "jump box." The Letter Agreement also provides that Mile-Hi's airplanes must remain within the confines of a designated "flight box" surrounding the Airport, unless otherwise diverted by Denver International Airport Air Traffic Control ("DIA TRACON"). The Letter Agreement specifically states that all provisions of the Federal Aviation Regulations Parts 91 and 105 apply to Mile-Hi's flights. The "flight box" extends from the surface of the earth to 18,000 above mean sea level. (*See* Exhibits K and L.)

24. The flight box is bordered on the north and south by the arrival and departure corridors for Denver International Airport ("DIA"). Directly to the east of the flight box is Class B Airspace, into which no aircraft departing from the Airport can enter without specific permission from DIA TRACON. Finally, to the west of the flight box is the mountains. (*See* Deposition Transcript of Yancy O'Barr at 8:17-9:14; 10:2-11:13; 54;5-56:4.) Both Mile-Hi and the Airport's former manager, Tim Barth, have spoken with the FAA and DIA TRACON about the possibility of moving the flight box. The FAA has responded that the flight box cannot be relocated due to the arrival and departure corridors for DIA.

25. Every time Mile-Hi conducts a skydiving flight the pilot establishes communication with DIA TRACON by the time the plane reaches 10,000 feet and maintains that communication until after he contacts TRACON two minutes before the parachutists jump and a "jumpers away" call when they jump.

26. The Airport has adopted Voluntary Noise Abatement Procedures ("VNAP"). (*See* Exhibit C.) The VNAP were not promulgated by the FAA or promulgated in connection with the FAA. The VNAP only apply to airplanes within three miles of the Airport. The VNAP do not supersede the responsibility of each pilot for compliance with Federal Aviation Regulations, Air Traffic Control clearances and operating parameters of the Aircraft Operations Manual. (*See* Exhibit E.)

27. Mile-Hi complies with the Airport's VNAP and does what it can, with safety as the primary concern, to reduce the noise impact of its operations on the residential neighborhoods in Longmont. Mile-Hi trains its pilots to reduce the plane's power and propeller speed at a safe altitude during each skydiving flight. Mile-Hi's Flight Operations & Safety

Manual and its Flight Checklists provide that the propeller RPMs should be reduced at safe altitude. (*See* Exhibits O and P.)

28. Mile-Hi does not routinely fly in continuous circles around the flight box. While Mile-Hi does have optimal flight paths utilizing each direction of the runway, the flight paths that Mile-Hi follows are determined based upon wind, weather, and air traffic conditions on a flight-by-flight basis.

29. During the site visit on May 2, 2015, Mile-Hi's pilot, Nikolai Starrett, flew Mile-Hi's Twin Otter airplane in the flight paths that were necessary and appropriate for the weather and wind conditions at that time.

30. Mile-Hi complies with all of the Vance Brand Airport Rules and Regulations. (*See* Exhibit D.)

31. Kimberly Gibbs actively encouraged members of the community and of Citizens to file noise complaints against Mile-Hi. (*See* Exhibits W, X, Y, Z, AA, BB, DD, and EE.) Several complaints about Mile-Hi's operations were made on days when Mile-Hi did not fly. Don Dolce, the president of the Airport Advisory Board for the Vance-Brand Airport, conducted a statistical analysis of the noise complaints against Mile-Hi for 2014, which demonstrates that there is no community wide problem regarding noise from Mile-Hi's skydiving operations. (*See* Exhibit T.) Members of Citizens made up 76% of complaints about Mile-Hi to the Airport in 2013. One affiliate of Ms. Gibbs and Citizens filed over 1,100 complaints out of the 1,582 total complaints. (*See* Exhibit S.)

32. While the number of Mile-Hi's Twin Otter flights decreased from 2010 to 2012 (*see* Exhibit N), the number of complaints regarding Mile-Hi's operations increased due to Ms. Gibbs' efforts publicly targeting Mile-Hi. (*See* Exhibits W, X, Y, Z, AA, BB, DD, and EE.)

33. Mile-Hi's total number of skydiving flights per year did not significantly increase from 2005 through 2014. (*See* Exhibit N.)

34. The Federal Government has extensively researched and studied the effects of airplane noise on communities through several intergovernmental agencies. The Federal Government designed a comprehensive system to assess and control airplane and airport noise. This system includes remedial measures in instances where noise from airplanes or airports is excessive. (*See* Exhibits G, H, I, and JJ.)

35. Federal Regulation 11 C.F.R. Part 150 adopts the day night sound level average ("DNL") as the applicable sound metric for analyzing the impact of airplane noise on communities and establishes the average 65 decibel ("dB") as the federal limit. This 65 dB DNL standard is the only standard used by the FAA and the EPA for airplane noise. The DNL metric takes into account low frequency noises.

36. The Airport's Airport Master Plan specifically provides that the 65 dB DNL is the noise limit that applies to airport activities.

37. Based on the Plaintiffs' complaints, the former Airport Manager, Tim Barth, took noise readings and performed a noise study at five locations near the Plaintiffs' homes. Mr. Barth found that the noise from Mile-Hi's skydiving planes was not louder than other background noise or other planes flying in the area; was not a nuisance; and did not interfere with daily activities in those areas. (*See* Exhibit F.)

38. The City hired Terracon Consultants, Inc. ("Terracon") to perform a noise survey of Mile-Hi's skydiving operations. Terracon concluded that noise levels attributable specifically to Mile-Hi's Twin Otter and Beechcraft King Air aircraft were not, in general, significantly

higher than the background noise sources except in very specific, short duration instances. (*See* Exhibit U.)

39. The City has considered the Plaintiffs' complaints and thoroughly reviewed the federal regulations but has taken no action to request an FAA noise assessment or to limit Mile-Hi's activities. (*See* Exhibits G, H, I, and JJ.)

40. Mile-Hi's noise expert, John Freytag, conducted a detailed sound study near two of the Plaintiffs' homes. Mr. Freytag found that the DNL values for the two sites from all noise sources were 55.3 and 56.7 dB, which are within the normally accepted range for residential communities. (*See* Exhibit JJ.) Mr. Freytag found that the noise level from fly over events was 30.2 DNL to 32.2. DNL, well below the 65 DNL limit. Mr. Freytag further found that Mile-Hi's skydiving operations contributed less than 0.1 dB to the overall noise environment in the area surrounding the Plaintiffs' homes. Mr. Freytag concluded that the noise exposure contribution from Mile-Hi is negligible when compared to all aircraft noise in the area, and it is not unreasonable to the average person in the community. Mr. Freytag further concluded that Mile-Hi's operations do not create a nuisance. Finally, Mr. Freytag stated that if the Court were to shut down Mile-Hi for this level of noise, every airport in the country would have to be closed.

41. The Plaintiffs' noise expert, Robert Rand, also conducted a noise study, and found the DNL average that resulted from his study was so low that it was not consistent with the Plaintiffs' subjective descriptions of the noise. Mr. Rand calculated a DNL average in the low 30 decibels, which is consistent with Mr. Freytag's findings.

42. Properties around the Airport have appreciated at a faster rate than other neighborhoods in Longmont outside of the flight box.

43. The Plaintiffs' real estate expert, Robert Myers, does not know whether Mile-Hi's operations have caused the Plaintiffs' homes to appreciate at a slower rate than homes in the neighborhood to the east of the flight box. He found that there is a difference in the appreciation rate between the Plaintiffs' homes compared to other surrounding areas, including areas within the flight box, but he could find no indication that this difference was caused by Mile-Hi's skydiving operations. Mr. Myers' report shows that homes inside the flight box appreciated at a greater rate than outside the flight box.

44. Mile-Hi's real estate appraisal expert, William Kamin, analyzed whether there is any measurable diminution in value to any properties located within the flight box around the Airport as a direct result of Mile-Hi's operations. (*See* Exhibit NN.) He found the fact that Mile-Hi constitutes a very small portion of all aircraft traffic at the Airport means that its actual contribution to any diminution in values in the area is statistically insignificant, if it exists at all. Therefore, the typical purchaser of any of the Plaintiffs' properties would not alter their opinion of value as a result of the proximity to the Airport, the Airport's general operations, or as a result of Mile-Hi's skydiving operations. In summary, Mr. Kamin found that there has been no measurable diminution in value of any of the Plaintiffs' homes that is attributable to Mile-Hi's skydiving operations. Mr. Kamin also found that homes inside the flight box appreciated at a faster rate than homes outside the flight box.

III. CONCLUSIONS OF LAW

45. Mile-Hi's skydiving operations are part of air commerce and interstate commerce.

46. Private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of his land. To demonstrate its existence a plaintiff must show that the defendant unreasonably and substantially interfered with the use and enjoyment of his property.

Allison v. Smith, 695 P.2d 791, 793-94 (Colo. App. 1984).) "In making any determination of unreasonableness, the trier of fact must weigh the gravity of the harm and the utility of the conduct causing that harm. Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001).

47. Because the Airport's Voluntary Noise Abatement Procedures were not promulgated under the Code of Federal Regulations, the federal regulations regarding aircraft noise are the standard by which the Plaintiffs' negligence and private nuisance claims must be analyzed. The FAA has determined the standard of reasonableness for airplane noise, and that substantive standard applies in this case.

48. As there is no evidence that Mile-Hi has violated any federal regulations, the Plaintiffs' negligence and negligence *per se* claims are dismissed.

49. Longmont Code § 10.20.100 and 10.20.110 are preempted by federal regulations relating to aviation noise, and, therefore, do not apply to Mile-Hi's skydiving operations. Accordingly, the Plaintiffs' negligence *per se* claim is dismissed.

50. Because the federal regulations regarding airplane noise are the standard with which Mile-Hi must comply, and because there is no evidence before the Court that Mile-Hi has violated the federal noise limits, Mile-Hi has not unreasonably and substantially interfered with the Plaintiffs' use and enjoyment of their homes. There is also no credible evidence that the Plaintiffs have been damaged in any way by Mile-Hi's skydiving operations. Accordingly, the Plaintiffs' claims for private nuisance are also dismissed.

51. All of the Plaintiffs' claims for relief against Mile-Hi are dismissed. Accordingly, the Plaintiffs' request for injunctive relief is denied.

52. Mile-Hi's skydiving operations have not caused any diminution in value of the Plaintiffs' homes. A range of damages does not meet the "reasonably certain" threshold. In addition, there is no evidence that Mile-Hi operations have caused any diminution in value of the Plaintiffs' homes. Plaintiffs' real estate expert, Mr. Myers, claims that the Plaintiffs' home have not appreciated at the same rate as other homes but he admits he does not know why and cannot say it is attributable to Mile-Hi operations. As such, Mr. Myers' range of damages is based on speculation. Mr. Kamin, Mile-Hi's real estate expert, found that there has been no measurable loss in value to any of the Plaintiffs' homes as a result of Mile-Hi's skydiving operations.

53. A local government or airport operator cannot prohibit an aircraft that is otherwise in compliance with FAA regulations from flying in order to decrease noise levels, as local government and airport operators, pursuant to federal regulations, have no authority to impose such restrictions on aircraft operations. (*See* Order re: Defendant's Motion for Summary Judgment Regarding Preemption of State and Local Laws at p. 3.)

54. The FAA's aircraft noise regulations are codified in 14 C.F.R. Part 36. Part 36 prescribes noise standards for the type certification of subsonic transport category airplanes. These federal regulations state that "the noise levels in this part have been determined to be as low as economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply." 14 C.F.R. § 36.5. Additionally, 14 C.F.R. § 36.501 establishes noise limits for propeller driver small airplanes. This section applies to propeller driven small airplanes applying for new, amended or supplement type certificates after October 10, 1973. *See* 14 C.F.R. § 36.501(a)(1). The Twin Otter at issue in this case received a Noise Certification in July, 1979, certifying that Mile-Hi's Twin Otter airplane complies with the federally regulated noise requirements for noise requirements for propeller-driven small airplanes. The evidence

establishes that the other planes that Mile-Hi uses in its skydiving operations are also all in compliance with 14 C.F.R. § 36.501.

55. Addressing the issue of a state's ability to regulate aircraft noise, the Supreme Court of the United States has held that "the pervasive nature of the scheme of federal regulation of aircraft noise … leads us to conclude that there is preemption" of state law in this area. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Federal control in this area is "intensive and exclusive." *Id.*

56. The Plaintiffs' claims are preempted by the Federal Aviation Act, as amended, and by the extensive regulatory scheme that the FAA has promulgated in the area of aircraft noise. The City is, therefore, prohibited by federal law from imposing limitations on aircraft operations for the purposes of controlling noise without FAA approval.

57. The City has entered into agreements with the FAA for the acceptance of federal funds for airport development projects and land acquisition pursuant to 49 U.S.C. 47101, *et seq.* The City has accepted over $4.7 million in AIP funds and has agreed to specific federal obligations, including a commitment to keep the Airport open and available for public use as an airport.

58. In exchange for the AIP funds, the City agreed to be bound by specific federal obligations, including Grant Assurance No. 22, Economic Nondiscrimination. This Assurance mandates that the City "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activity, including commercial aeronautical activities offering services to the public at the airport." Also pursuant to Grant Assurance No. 22, the City may establish "such reasonable, and not unjustly

discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." *See* Grant Assurance No. 22(h).

59. The federal statutory scheme provides the exclusive and comprehensive process to measure airport noise and develop any remediation measures which must be approved by the FAA. 14 C.F.R. Part 150 establishes the method by which the public at large, or individuals in the public, may address airport noise. It is not by seeking an injunction issued by a state court, but by requesting a detailed noise study to be conducted by the airport operator, in conjunction with the FAA, which includes public participation as well as local governments. The study makes recommendations for remediation measures, if warranted, which must then be approved by the FAA. The entire purpose of Part 150 is to prevent individuals in the community from seeking *ad hoc* and inconsistent injunctions regarding aircraft noise or noise emanating from airports.

60. Part 150 establishes the single, comprehensive process for airport operators to develop "noise exposure maps" and "noise compatibility programs" to govern noise emissions from public use airports. Part 150 adopts the day-night average sound level (DNL) as the applicable metric by which to measure community exposure to and annoyance from aircraft noise. *See* 14 C.F.R. §§ 150.7 and 150.9(b). Part 150 also prescribes "a uniform methodology for the development and preparation of noise exposure maps," which "includes a single system of measuring noise at airports for which there is a highly reliable relationship between projected noise exposure and survey reactions of people to noise along with a separate single system for determining the exposure of individuals to noise." 14 C.F.R. § A150.1 (emphasis added).

61. Only after an airport operator has submitted a noise exposure map that the FAA has approved and "in consultation with FAA regional officials, the officials of the state and of

any public agencies and planning agencies whose area, or any portion or whose area, of jurisdiction within the [DNL] 65 dB noise contours is depicted on the noise exposure map, and other Federal officials having local responsibility of land uses depicted on the map" can an airport operator promulgate restrictions on aircraft noise pursuant to a "noise compatibility program," which also must be approved by the FAA. 14 C.F.R. §150.23.

62. State and local attempts to implement noise regulations, flight-pattern controls, restrictions on night operations, and air safety regulations are all impliedly preempted by the Federal Aviation Act. *See Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005) (collecting cases).

63. State courts are preempted from awarding injunctive relief in aviation noise actions. *Krueger v. Mitchell*, 332 N.W.2d 733, 740 (Wis. 1980). "Allowing state court ordered injunctions to abate an aircraft noise nuisance would have such a severe impact on the free flow of air commerce that such remedy cannot co-exist with the [Federal Aviation] Act. If state courts were allowed to enjoin the operation of all or part of an airport based on nuisances to neighboring property, air commerce would be completely disrupted." *Id*. (finding federal preemption of a private cause of action seeking to enjoin flights over plaintiff's business); *see also Northeast Phoenix Homeowners' Ass'n v. Scottsdale Mun. Airport*, 636 P.2d 1269 (Ariz. App. 1981) (federal preemption of plaintiffs' claims for injunctive relief seeking to limit flight operations, including certain flight paths, and impose a curfew on flights). A state court has "no power to regulate through its injunctive powers the operation of flights, the methods of landing or takeoff of aircraft, or any other aspect of actual aircraft operation technique or scheduling." *Scottsdale*, 636 P.2d at 1273.

64. The following cases involve state or local attempts to regulate the operation of aircraft in navigable airspace, which the respective courts have held to be preempted by federal law:

- Federal preemption of state agency's maximum noise levels. *State of Minnesota Public Lobby v. Metropolitan Airports Comm'n*, 520 N.W.2d 388 (Minn. 1994);
- Federal preemption of an ordinance limiting flight operations and imposing curfew on flights. *Gary Leasing, Inc. v. Town Board*, 127 Misc.2d 194, 485 N.Y.S.2d 693 (1985);
- Federal preemption of a local ordinance imposing curfews and limitations on landing patterns. *Harrison v. Schwartz*, 319 Md. 360, 572 A.2d 528 (1990);
- Federal preemption of court order limiting times of flights. *Township of Hanover v. Town of Morristown*, 135 N.J.Super. 529, 343 A.2d 792 (1975);
- Federal preemption of a nuisance action seeking to impose maximum noise levels. *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 735, 306 N.E.2d 562 (1973).

See People ex rel. Birkett v. City of Chicago, 769 N.E.2d 84, 94-95 (Ill. App. 2002) (collecting cases).

65. Any nonfederal attempt to control aircraft noise is preempted if it might affect air traffic flow. *Harrison v. Schwartz*, 572 A.2d at 369 (interpreting *Burbank*, 411 U.S. at 639). Neither the size of the airport nor the recreational nature of flights sought to be regulated precludes a finding of preemption. *See id*. at 373. Accordingly, the fact that the Airport is a relatively small municipal airport without its own air traffic control tower has no bearing on the determination of the preemption issue.

66. Moreover, the scope of "air commerce" includes not just "interstate, overseas, or foreign air commerce" but also "any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." 49 U.S.C. § 40102(a)(3); 14 C.F.R. § 1.1. Aircraft operations carrying skydivers fall under the definition of "air commerce"

because those operations use aircraft that directly "affect or may endanger safety in interstate air commerce." *Id.*; *see also Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1279 (10th Cir. 1989). Thus, the definition of air commerce is "clearly not restricted to interstate flights occurring in controlled or navigable airspace." *Hill*, 886 F.2d at 1280. The FAA's jurisdiction over airplane noise is not restricted by the fact that such regulation includes within its scope activities which are intrastate in nature. *Id.* at 1279.

Respectfully submitted this 15th day of May, 2015.

ROBINSON WATERS & O'DORISIO, P.C.

s/Anthony L. Leffert
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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2015, a true and correct copy of the foregoing **DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was delivered via *ICCES*, addressed to the following:

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