U.S. Department
of Transportation
**Federal Aviation
Administration**

Oct 31, 2001

Mr. Theodore D. Soliday
Executive Director
City of Naples Airport Authority
160 Aviation Drive North
Naples, FL 34104

Dear Mr. Soliday:

The Federal Aviation Administration (FAA) has reviewed the report entitled "Naples Municipal Airport Part 161 Supplemental Analysis", submitted in draft June 23, 2001, and finalized August 2001.

While the analysis could be improved in ways indicated in the enclosed comments, the supplemental analysis responds to the Part 161 consultation, notice, and analysis requirements of Subpart C of that part. It contains valuable additional information concerning many of the elements in the scope of work you shared with us earlier this year. We appreciate the positive way in which you have responded to the Part 161 compliance issues we raised and the level of effort you have put into the supplemental analysis.

As we have noted in previous correspondence, airport access restrictions are subject to other applicable Federal law in addition to the Airport Noise and Capacity Act (ANCA) as implemented by Part 161. Compliance with provisions of ANCA and Part 161 does not assure the City of Naples Airport Authority (NAA) that this proposed restriction complies with other Federal law. This is particularly an issue for proposed Stage 2 restrictions, for which the requirements of ANCA and Part 161 are largely procedural. We have continued to raise serious questions with respect to airport development grant assurances, including factual questions regarding the NAA's use of the DNL 60 dB noise contour to justify the Stage 2 ban and the NAA's authority to adopt a ban on Stage 2 operations based on the circumstances presented.

While we have urged the NAA to resolve all aspects of Federal law concurrently, Chairman Eric West's July 27 letter conveys the Commissioners' decision to complete the process under Part 161 and to defer other issues. His letter clearly states the Commissioners' understanding that the Part 161 study does not resolve the issue of any action the Board may take relative to the grant assurances.

Consistent with our policy to inform you of the entirety of the FAA's concerns, we want to state clearly at this time that our review of the supplemental analysis has not resolved substantive issues of the NAA's compliance with other Federal law, including sponsor assurances in airport grant agreements. Accordingly, you will receive by separate mail an official Notice of Investigation (NOI) in accordance with FAA Rules of Practice for Federally Assisted Airport Proceedings, 14 C.F .R. Part 16, Subpart D. If the investigation establishes violations of Federal law and related sponsor obligations, the FAA may issue a determination that the NAA is in noncompliance with its sponsor obligations in its operation of the Naples Municipal Airport. The NAA could be found to be ineligible to receive FAA grants and to receive payments under existing grants until this matter is resolved. Further sanctions, including a judicial order of enforcement, are also possible. The NOI is being sent at this time in order to try to address Part 161 and grant assurance issues concurrently, as we committed at the public meeting on January 18.

It is the FAA's goal to achieve voluntary compliance with Federal grant obligations and to resolve alleged or potential violations. We are encouraged by your careful and detailed resolution of Part 161 compliance issues that you will choose to take the same approach with respect to grant compliance. We strongly recommend that the NAA continue to suspend enforcement of the Stage 2 ban until this matter can be resolved.

We are aware of the noise sensitivity of the Naples community and want to work cooperatively with you to minimize aircraft noise to the extent possible within the parameters established by Federal law.

Sincerely,

Paul L. Galis
Deputy Associate Administrator for Airports

Enclosure

cc: Eric West

Comments on Naples Supplemental Analysis
Naples Municipal Airport, Part 161 Supplemental Analysis dated June 23, 2001
and issued in final without change in August 2001

TOPICAL COMMENTS

Aircraft Profiles -The Federal Aviation Administration's Office of Environment and Energy (AEE) has approved the use of the submitted modified profiles for the analysis of alternative measures with the exception of the "Full Power" procedures for the GIIB and Falcon 20 aircraft. Based on statements made in the first paragraph of Section 3.4.3 on page 59 of the Supplemental Analysis (SA), it appears that these "Full Power" procedures were not used in the analysis of alternative measures. If that is the case, these procedures are not at issue. Detailed comments on all submitted modified profiles are available in the October 10,2001, letter from AEE to Senzig Engineering. Approval for use of these profiles is specific to the current FAR Part 161 study at Naples Municipal Airport. Use of modified profiles for Federally sponsored studies either at Naples or at another airport will require a separate submission and a separate approval. Noise documents citing approval of the procedures contained in the SA should cite the qualifying language contained in the referenced letter to Senzig Engineering.

Airport Noise Study Area Discussion in the SA -In its discussion of the airport noise study area, the SA is misleading by implying that the FAA will accept local land use compatibility designations as sufficient grounds for an airport operator to impose an airport use restriction.

Land Use Compatibility Discussion in the SA

Page 7 -The SA does not accurately describe the effect of the City and County ordinances. In the first full paragraph, the SA states "both the City and the County have formally modified their land use compatibility criteria to protect residential use within the 60 to 65 dB DNL contour interval." In the next paragraph, the SA in effect treats the City and County ordinances as establishing that residential use is *per se* incompatible inside the DNL 60 dB contour. The ordinances, adopted by the City and County in response to a recommendation from the NAA, do not establish such an absolute compatibility criterion, and residential land use is still permitted by the ordinances.

Page 8 -The NAA's rejection of sound insulation is inconsistent with Collier County's allowance of the construction of insulated residential properties inside the DNL 60 dB contour. The SA states that the ANSI standard is "more stringent than the ANSA definition at APF." This conclusion is apparently based on the SA's characterization that the ANSI standard "only considers single family land uses compatible below 55 dB DNL, five decibels *lower* than the City and County's 60 dB threshold." (Emphasis in original.) This text does not appear to be consistent with Table 2.1, which indicates that under the ANSI threshold, noise levels of DNL 55 dB to DNL 65 dB are "marginally compatible."

Page 10 -The SA states that the 1997 revised Noise Compatibility Program (NCP) "recommended that local governments select 60 dB DNL as the *land use -- compatibility threshold."* In fact, the recommendation in that NCP was for a *preventive zoning and land use planning measure* that would "create a *buffer* of compatible land use around the Airport" in order to "ensure that residential and noise sensitive uses are not developed too close to the Airport." (emphasis added) 1997 NCP Revision, p. 5-11. See also FAA Record of Approval for the 1997 NCP Revision, measure 7.3.3.

Item (3) in the first full paragraph states that "federal law compels the NAA to respect the decisions of the local government and take action consistent with such decisions." However, nothing in federal law compels the NAA to impose restrictions on airport use to remove existing residences from a contour that was not adopted for this purpose.

Comparison of Benefits and Costs of Alternatives in the SA

Page 3 -The range of alternatives is responsive to FAA's request for analysis of non-restrictive alternatives. However, the summary as presented in Table 1.1 may not provide an appropriate basis for comparing the costs of alternatives. It appears that what the table labels "incremental costs" are a mix of estimates of annual costs and one time capital investments. If this is the case, costs should be discounted and aggregated for a time period that reflects the life span of those alternatives that require capital investments. FAA's review of the available data associated with Table 1.1 suggests that, when the costs are spread over a ten-year period (without discounting), sound insulation and the limited acquisition of Rock Creek Campground appear to have approximately the same cost effectiveness as the proposed restriction of Stage 2 aircraft. FAA recognizes that other factors beyond economic cost-including financial and administrative burdens, benefits not quantified inside and outside the noise contour including community disruption from sound insulation construction, the absence of outdoor noise mitigation, the loss of low income housing stock and equity concerns-may also be factors in the evaluation of a preferred action.

Liability Discussion in the SA

Page 13, third paragraph -The SA states that "NAA is not aware of a single inverse condemnation case-successful or unsuccessful-in which the cumulative noise level experienced by plaintiff(s), as measured by the DNL metric, was the basis, or even a factor, in the court's decision." Examples of such cases are the Stephens case, cited in footnote 39 of the SA, as well as Persyn v. United States, 34 Fed. Cl. 187 (1995), and Baker v. Burbank-Glendale-Pasadena Airport Authority, 220 Cal. App. 3d 1602 (1990).

> In Persyn, the U.S. Court of Federal Claims referred to the HUD residential standard of DNL 65 dB in determining the onset of "high noise levels" that i could support a taking claim. 34 Fed. Cl. at 201. (The main issue in Persyn was the statute of limitations, which could also be an issue at Naples, although the SA does not address it.)

> In Baker, the California Court of Appeals noted that "evidence substantially supports the court's determination that CNEL values exceeding 65 decibels are sufficiently intrusive to amount to a taking or to give rise to a prescriptive easement, and that lesser CNEL values are not." 220 Cal. App. 3d at 1608 n.2.
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> We also note that in the Argent case, cited in footnote 40 of the SA, the U.S. Court of Appeals for the Federal Circuit, vacating a grant of summary judgment to the Federal government on a takings claim based on military aircraft training exercises, found that the plaintiffs' allegations, if true, could constitute a "peculiar burden" that would justify departure from the "general rule that flights over 500 feet did not constitute a taking." As stated by the court: "[T]he plaintiffs allege a peculiar burden imposed on landowners surrounding the site selected for Naval aircraft training. Field carrier landing practice involves groups of planes making passes over a landing strip at averages approaching fifty times a day. The record at this stage of the litigation suggests that this activity sometimes occurs as late as 1 :00 in the morning. ...[F]lights reach low altitudes over adjacent properties. All of these operations allegedly cause 'constant' noise and vibrations. *These are not the ordinary incidents of life near an airport.* See Causby, 328 U.S. at 266 ('The airplane is part of the modern environment of life, and the inconveniences which its [sic] causes are normally not compensable under the Fifth Amendment.')" 124 F.3d at 1283 (emphasis added).

Page 14, second paragraph -The SA states that the NAA "also recognizes itself to be exposed to liability under the constitution and laws of the State of Florida." This statement is not clearly supported in the SA. A required element for inverse condemnation in Florida is a substantial adverse impact on the market value of the property; reduced appreciation in value is not sufficient. Fields v. Sarasota-Manatee Airport Authority, 512 So.2d 961,964 (Fla. App. 1987). Thus, as we read the law in Florida, the airport has no liability for inverse condemnation to property owners whose property in the vicinity of the airport has appreciated in value. The SA states that "[t]he value of residential property in the City of Naples and Collier County has been appreciating in recent years," and that "an average of 15 percent appreciation per year is a reasonable conservative estimate." SA, p. 35.

Third paragraph -The SA suggests that the NAA might be liable for aircraft noise " under a nuisance theory. However, the "law in Florida about airport operations has long been that the lawful operation of such a facility in the 'usual, normal and customary manner prescribed' cannot constitute a nuisance." St. Lucie County v. Town of St. Lucie Village, 603 So.2d 1289, 1293 (Fla. App. 1992), quoting Brooks v. Patterson, 159 Fla. 263, 31 So.2d 472 (1947).

Last paragraph -In light of our comments above, the FAA questions the statement that the "description of the legal standards governing inverse condemnation and nuisance claims alone reveals that there exists a credible risk of liability."

Page 15 -The information provided in the SA is not sufficient to demonstrate the relevance of the cited cases from other states to the Naples situation. We would need more information on their applicability to Florida law, for example:

> (1) With respect to the Wake County case, how does the applicable North Carolina law compare to Florida law?
> (2) In the description of DuPage County, Illinois, are there schools within the DNL 60 dB contour in Naples that would make this case applicable? How does the applicable Illinois law compare to Florida law?
> (3) What is the relevance of the Palm Beach County cases, in light of the fact that they were "settled and dismissed on grounds unrelated to cumulative noise exposure levels"?
> (4) Regarding the Plainfield, Indiana cases, we fail to see the relevance to Naples of the fact that a group of homeowners sued before the noise level they were exposed to was determined. How does applicable Indiana law compare to Florida law?

Page 16 -The SA states that the cases cited are "only examples" and that "it is apparent that other disputes, from among the many cases involving liability for aircraft noise, involved parties that were located in these areas." We note that none of the cases cited involved a judicial determination of liability outside the DNL 65 dB contour, nor is the FM aware of any such case. However, we are aware of cases in which the courts have associated liability with DNL contours. For example, see the Persyn and Baker cases, discussed above.

OTHER:

Page 3 - In addition to an editorial error in the Table 1.1 footnote, the number under land acquisition, first column, should be zero.