

MEMORANDUM

State of Alaska
Department of Law

TO: Joseph L. Perkins
Commissioner
Department of Transportation
& Public Facilities

DATE: October 24, 1996

FILE NO.: 661-97-0228

TELEPHONE NO.: 269-5161

SUBJECT: Aviation Zoning

FROM: Carolyn E. Jones
Transportation Section - Anchorage
Supervising Attorney

You have asked whether state-owned airports are subject to local platting, zoning and land use ordinances. The short answer is no.

The most recent activities of the Municipality of Anchorage (MOA) have prompted this request for advice. The Municipality of Anchorage is attempting to impose its land use regulations (zoning, platting, and subdividing) over activities at the Anchorage International Airport. Of most immediate concern is the MOA's threat that it will not issue a certificate of occupancy when construction of the United Parcel Service facility is completed in November. However, this is not the first time that a local government has attempted to assert its authority over land use to regulate activities at a state-owned airport. The same question has come up with regard to rural airports as well. Thus, your request for advice seeks a response that will assist you in managing the entire statewide airport system.

As a general matter, assertion of local jurisdiction over the state-owned airports would be costly and time-consuming, and duplicative where the state already has its own procedure for dividing and surveying tracts within airport boundaries and delineating permissible uses. Moreover, if 266 separate local governments were permitted to assert nonuniform and inconsistent land use regulations at the state's 266 airports, it would create an aviation and security nightmare.

The Alaska Legislature has enacted a comprehensive body of legislation in order to establish a safe, efficient, and self-sustaining air transportation system to meet the unusual transportation needs of Alaska. The Airport Zoning Act (AS 02.25 et seq.) ensures uniform state oversight over the 266 state-owned airports and ensures the state's continued eligibility for the available federal funding to finance construction and improvements at these airports. This special act is not preempted by the general requirements of AS 35.30.020 and AS 40.15.200 that departments comply with local zoning ordinances and subdivision requirements in the same manner and to the same extent as other landowners.

FACTS

Alaska is the largest state in the union. It covers 586,412 square miles. *Alaska Blue Book 1993-1994* at 246. Alaska measures 2,400 miles east to west -- about the same distance as between Florida and the State of Washington. North to south it measures 1,420 miles -- the distance between Denver and Mexico City. Alaska's 6,640-mile coastline is longer than that of all the rest of the Lower 48 states. More than three million lakes in Alaska are 20 square miles in size. There are over 3,000 rivers, including the third longest and fifth-ranked in terms of water discharge (the Yukon River). *Id.*

We normally only mention these geographic superlatives to impress the tourists. However, these same facts underline the transportation issues that Alaskans and Alaskan communities face on a daily basis.

Consequently, over the years, the state has established a comprehensive air transportation system that includes 266 airports: two international airports at Fairbanks and Anchorage and 264 airports and air navigation facilities throughout the state. Lake Hood, Anchorage, has the world's largest and busiest seaplane base. *Alaska Blue Book 1993-1994* at 241. The Anchorage International Airport is a major transshipping site for international cargo traveling between the U.S., Europe, and the Far East and is the nation's largest cargo airport as measured by weight of aircraft landings. "The Economic Contribution of the Anchorage International Airport," at 1 (1995).

The air transportation infrastructure, while necessary for a state of this size, is more elaborate than you would expect for a state with a population of over half a million. Federal grants covering 93.75 percent of the total costs have made airport construction and improvements possible. For the fiscal year ending October 1996, this amounted to \$61,000,000.

However, these grants do not come without strings attached. In exchange for the federal funds, the state must promise, among other things, to adopt zoning laws to restrict the use of land adjacent to or in the immediate vicinity of the airport; to limit land use to activities and purposes compatible with normal airport operations; and to maintain a fee and rental structure to be self sustaining. 14 C.F.R. pt. 152 at Appendix D, Assurance 21 (1996). Until now, the state has been able to construct and operate its airports with a uniform policy and to successfully qualify for the millions of dollars of federal aid so necessary to the development of aeronautics in this state.

LEGAL ANALYSIS

AIRPORT ZONING IN ALASKA REQUIRES UNIFORM AND CONSISTENT TREATMENT AT THE STATE LEVEL

I. The Commissioner and the Department of Transportation and Public Facilities Have Specific Authority to Provide for Zoning, Platting, and Land Use at State-Owned Airports

Prior to Statehood and continuing to the present, the Alaska Legislature has enacted a comprehensive scheme of legislation establishing a safe, efficient, and self-sustaining air transportation system. Alaska Statute 02.15.060 and AS 02.15.160 authorize the Department of Transportation and Public Facilities (DOT&PF) to “plan, establish, construct, enlarge, improve, maintain, equip, operate, regulate, protect, and police airports and air navigation facilities within the state.” In furtherance of this authority, the department may acquire and dispose of property, including the power of eminent domain, AS 02.15.070; enter into contracts, leases, and other arrangements, AS 02.15.090; fix charges, rentals, and fees with regard to expense of airport operations, AS 02.15.090; accept federal funds and money from other public or private sources for these purposes, AS 02.15.010 -- 02.15.020(c); and cooperate with the federal government and municipalities to accomplish these objectives, AS 02.15.010(2)-- 02.15.050 and AS 02.15.120-- 02.15.155.

DOT&PF has adopted regulations to implement this legislation. The regulations regulate such diverse activities and airport uses as:

- (1) aircraft rules, 17 AAC 40.010;
- (2) fueling operations, 17 AAC 40.020;
- (3) vehicle rules, 17 AAC 40.030;
- (4) rules of conduct, including access, business activities, and prohibited activities, 17 AAC 40.040;
- (5) construction of airports or air facilities within two miles of a federal aid highway, 17 AAC 40.220;
- (6) land uses and privileges for leasing airport lands, 17 AAC 40.320;
- (7) improvements, 17 AAC 40.330; and
- (8) provisions regarding permissible construction, including design, location, height, survey points, 17 AAC 40.360.

The Airport Zoning Act specifically addresses your request for advice. The Act controls planning and zoning at state-owned airports.¹

¹ Subdividing and platting authority are generally subsumed in the planning and zoning function. 1 Charles R. P. Keating, *The Law Of Municipal Corporations* para. 1.75 (rev. 3d ed. 1987). Consequently, this memorandum of advice is based on the conclusion that the department’s authority to enact zoning regulations includes the authority to enact related regulations regarding subdividing and platting as to those land

The department, under the police power, may adopt zoning regulations for any airport in the state; may divide the area surrounding the airport into zones; and may specify the land uses permitted within these zones, including uses related to safety issues.² AS 02.25.020. Furthermore, the department may bring an action in superior court to enforce any violation of the Airport Zoning Act or regulations adopted under the Act. AS 02.25.090.

The authority of DOT&PF to adopt zoning regulations serves several purposes. The most obvious purpose is for DOT&PF to have direct control over the land uses permitted on airport property. DOT&PF can thus ensure that appropriate safety measures and land development are made with regard to airport operations, and aircraft landings and takeoffs. In addition, the Airport Zoning Act ensures that DOT&PF will be able to comply with federal requirements, including grant assurances, regarding land use and zoning on or in the vicinity of its 266 state-owned airports, and the obligation to be as self-sufficient as possible.³

In summary, the provisions of AS 02.15 and AS 02.25 further two very important and specific statewide policies: (1) to provide for a safe, efficient, and self-sustaining air transportation system within the state, and (2) to qualify for available federal funding to support this ambitious policy.

II. Alaska Statutes Generally Require Compliance with Municipal Planning and Zoning, and Subdividing and Platting Ordinances Do Not Conflict with AS 02.15 and AS 02.25

A. No Repeal, Express or Implied

1. AS 35.30.020/Planning and Zoning

As you pointed out in your request for advice, AS 35.30.020 requires the department “to comply with local planning and zoning ordinances and other regulations in the

¹ (...continued)
uses that the department has designated at state-owned airports.

² Alaska Statute 02.25.020 clearly authorizes the department to prescribe land uses regarding both on-airport property and non-airport property surrounding any airport. This memorandum, however, is limited to the scope of state or local control as to land uses **on airport property**.

³ The federal aviation laws and regulations do not compel construction of airports. However, once constructed, an airport’s noncompliance with the federal requirements can result in loss of federal funding and, in some cases, denial of federal authority to engage in the desired aviation activity. *City of New Orleans v. City of Kenner*, 1992 WL 21744 (E.D. La. 1992).

same manner and to the same extent as other landowners.” That requirement would, on its face, appear to be in conflict with AS 02.25 et seq. that authorizes the department to adopt its own zoning ordinances and to identify permissible land uses for airports and property surrounding airports. However, we conclude otherwise.

The relevant provisions of Title 2, specifically providing for airport zoning, have been law since 1951. AS 35.30.020-- requiring state compliance with local planning and zoning ordinances in the same manner and to the same extent as any other landowner-- was enacted in 1977. Alaska Statute 35.30.020 does not specifically repeal AS 02.25 et seq. We have found no legislative history that would support an argument that the Legislature impliedly repealed AS 02.25 et seq. with the enactment of AS 35.30.020. Moreover there is a widely accepted presumption against the repeal of prior laws by implication. *Waiste v. State*, 808 P.2d 286, 289 (Alaska Ct. App. 1991).

On the other hand, there are several well-established principles of statutory construction that preserve the validity of the Airport Zoning Act. First, the enactment of a general law broad enough in its scope and application to cover the field of a prior special or local statute will generally **not** repeal the prior special law. Second, if the later general statute does not present an irreconcilable conflict with the prior special statute then the special statute will be construed as a qualification or exception to the general law. *Waiste v. State*, 808 P.2d at 289. *See also* Norman J. Singer, *Sutherland Statutory Construction* § 23.15 (5th ed. 1992). Finally, to the extent of a conflict, the special statute will prevail over the general. *Id.*

Under these principles of statutory construction, AS 02.25 et seq., as a prior special statute, survived the subsequent enactment of the more general AS 35.30.020 regarding compliance with municipal planning and zoning ordinances. There is no irreconcilable conflict between the two statutes because they can be harmonized. Alaska Statute 35.30.020 may be read as requiring all state departments to comply with local planning and zoning ordinances in the same manner and to the same extent as other landowners *with the exception of* planning and zoning for state-owned airports. However, if the conflict is considered irreconcilable, then the special statute (AS 02.25 et seq.) prevails over the more general (AS 35.30.020).

2. AS 40.15.200/Subdivisions and Platting

We reach the same conclusion regarding compliance with municipal subdivision and platting requirements. AS 40.15.200, adopted by the legislature in 1972, provides, in relevant part, that

All subdivisions of land made by the state, its agencies . . . are subject to the provisions of this chapter [regarding subdivisions and platting] and AS 29.40.070--29.40.160, or home rule ordinances or regulations governing

subdivisions, and shall comply with ordinances and other local regulations adopted under this chapter and AS 29.40.070--29.40.160 . . . in the same manner and to the same extent as subdivisions made by other landowners.

The legislature adopted this general statute more than 20 years after the more specific Airport Zoning Act. For the same reasons stated regarding planning and zoning, *supra*, at pp. 5-6, we conclude that the specific authority of DOT&PF to adopt regulations regarding land uses on airport property survived the subsequent enactment of AS 40.15.200 that generally requires compliance with municipal subdivision and platting requirements. Like AS 35.30.020, AS 40.15.200 and AS 02.25.020 can similarly be harmonized by requiring state subdivisions to be subject to local regulations with the exception of subdivisions and platting for state-owned airports.

B. Local Governments Are Preempted from Regulating State-Owned Airport System

1. Whether Federal Aviation Laws Preempt Local Regulation Is Still an Open Question

A state statute or local ordinance may be construed as preempted under three circumstances. Congress may express a clear intent to preempt state law in the body of a federal statute. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203, 103 S. Ct. 1713, 1721-22 (1983). In the absence of express preemption language, federal law has an implied preemptive effect if Congress revealed its intent by “occupying the field” of regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621 (1984). Third, when state law actually conflicts with federal law, the federal law preempts the state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217 (1963).

During the last 30 years, Congress has enacted a comprehensive scheme of legislation regulating aircraft and airport operations, aircraft noise, and the expansion of the nation’s public airports in order to establish and maintain a safe and efficient national air transportation system. See e.g., Federal Aviation Act of 1958, 49 App. U.S.C.A. secs. 1301-1542; Airport and Airway Development Act of 1970, 49 U.S.C.A. secs. 1701-1742; Airport Noise and Capacity Act of 1990, 49 U.S.C.A. secs. 2151 et seq.; Airport and Airway Safety and Capacity Expansion Act of 1987, 49 App. U.S.C.A. secs. 2201-2227; National Aviation Noise Policy, 14 C.F.R. Part 91 (1991).

There are no express statements of congressional intent or other explicit indications by Congress to preempt state or local regulation of land use at airports. *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 784 (6th Cir. 1996). Whether, and to what extent, these laws were intended to occupy this field of airport regulation is still an unsettled question. Cf. 1977 Inf. Op. Att’y Gen. (Mar. 27; Gazaway)(whether federal aviation law would preempt proposed AS 35.30.020 unclear).

In one body of case law, the courts have distinguished permissible local regulations based on whether they pertain to aircraft flight operations versus land use regulation. The Ninth Circuit Court of Appeals enjoined the City of Los Angeles from enforcing a local ordinance requiring the city’s approval of any plans for development on airport land used exclusively for airplane landings and takeoffs. *Burbank-Glendale-Pasadena Airport v. Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992). Subsequently, an Ohio district court declined to follow the Ninth Circuit’s decision on the grounds that the Federal Aviation Act applied only to the direct regulation of aircraft flight operations. The court concluded that the City of Brook Park, Ohio,

was still free to adopt land use regulations restricting airport construction. *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 751 (N.D. Ohio 1995).

Most recently, a Texas appellate court analyzed the same case law and concluded that the issue of preemption turns on whether the local land use regulation was an attempt to control expansion or activity *within the boundaries of an existing airport*. *Dallas/Fort Worth Int'l Airport Bd.*, 854 S.W.2d 161, 167 (Tex. Ct. App. 1993), *remanded on different grounds*, 868 S.W.2d 750 (1993). If the activity was within the boundaries of an existing airport, local land use regulation on the airport would be preempted. On the other hand if the proposed activity required acquiring property not yet within the boundaries of the airport, then local land use regulation would be permissible. *Id.*

Given the disagreement among courts elsewhere in the country, we cannot conclude that a court would find that the federal aviation laws reflect a Congressional intent to occupy the field of aviation regulation, thereby preempting local regulation of land use at airports.

2. State Aviation Laws Manifest an Intent to Occupy the Field of Land Use Regulation as to the State Airport System

The approach to the state preemption issue parallels the federal analysis to the same question in two respects. State preemption may be either by express terms or by implication. In the latter case, the statute and ordinance must be substantially irreconcilable so “that one cannot be given its substantive effect if the other is to be accorded the weight of law,” *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974); or the local ordinance impedes or frustrates a specific statewide policy expressed by state law, *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1204 (Alaska 1981).⁴

The state aviation laws do not expressly prohibit municipalities from engaging in airport activities. In fact, state law expressly permits municipalities as proprietors to construct, enlarge, or improve airports and air navigation facilities. AS 02.15.120.

However, the comprehensive body of state aviation law evinces a legislative intent that the state, through DOT&PF and its commissioner, have the ultimate power and responsibility for the development of aeronautics in Alaska. The department has the authority to plan, construct, improve, maintain, operate, and police airports and air navigation facilities within the state. AS 02.15.060. The department has the power to acquire property for these purposes, including the

⁴ However, the Alaska Supreme Court has rejected the doctrine of state pre-emption by “occupying the field.” *Jefferson v. State*, 527 P.2d at 43 n.33.

power of condemnation, and to dispose of its interests in airport and air navigation facilities. AS 02.15.070. The department has broad powers to enter into long-term contracts, leases, and other agreements regarding the operation of the airport and use of airport property. AS 02.15.090. In its discretion, the department may offer its services to the federal government, a municipality, or a person in connection with planning, acquisition, construction, improvement, maintenance, or operation of airports or air navigation facilities. AS 02.15.130.

The department may grant or lend money to a municipality or person for these same activities. AS 02.15.140. The department must approve a municipality's application for federal aid under the Federal Airport Act or the municipality may not participate in the program. AS 02.15.150. The commissioner's approval is required before a person may construct an airport near a federal highway or air facility. AS 02.15.205. The department is vested with general police powers to enforce state aviation laws, related regulations, and all other laws of the state relating to aeronautics. AS 02.15.230. The department has the authority to enact regulations pertaining to land uses for *any* airport within the state; to divide the area surrounding the airport into zones; to specify the land uses permitted within the zones; to regulate and restrict the height of structures and trees within the zones; and to require the abatement of lights, electronic devices, or other hazards. AS 02.25.020.

Municipalities may still possess some powers with respect to airport construction and operations. For example, municipalities have traditionally played a role in determining the location of new airport construction, or banning new airport construction altogether. *Gustafson v. City of Lake Angelus*, 76 F.3d at 790 n.9; *City of Cleveland v. City of Brook Park*, 893 F. Supp. at 750-751; *Garden State Farms, Inc. v. Bay*, 390 A.2d 1177, 1184-1185 (N.J. 1978). However, we conclude that a municipality may not regulate land use activities, including zoning, subdividing, and platting, on airport property. We also conclude that a municipality must not exercise its authority over airport property so as to frustrate the statewide policy expressed in AS 02.15 (Alaska Aeronautics Act of 1949) and AS 02.25 (Airport Zoning Act). *Garden State Farms*, 390 A.2d at 1184-85. The imposition of 266 different local zoning ordinances and platting and subdividing requirements at 266 separate state airports would frustrate the legislative intent for a uniform and system-wide state aviation system, and is therefore preempted.

CONCLUSION

Alaska Statute 02.25 et seq. authorizes the Department of Transportation and Public Facilities to enact zoning regulations with regard to state-owned airports and air navigation facilities. DOT&PF need not comply with local planning and zoning ordinances, or with local subdivision and platting requirements, in the same manner and to the same extent as other landowners.