



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

Western-Pacific Region
Office of the Regional Administrator

777 S. Aviation Blvd., Suite 150
El Segundo, CA 90245

August 13, 2021

Ms. Suzanne D. Case
Chair, Hawaii Board of Land
and Natural Resources
P.O. Box 621
Honolulu, HA 96809

RE: Regulation of Helicopter Air Tour Operations

Dear Ms. Case:

Thank you for your May 28, 2021 letter raising the issue of regulation of helicopter air tour flight paths throughout Hawaii and alerting us to community concerns in Hawaii regarding helicopter noise in residential neighborhoods, and over natural and cultural areas. You indicate that the Bureau of Land and Natural Resources (BLNR) has jurisdiction over the uses of State land, including the “staging and operation of aircraft in Hawai’i airports...,” and acknowledge that the Federal Aviation Administration (FAA) is the sole regulator of aircraft flight paths. Your letter requests the FAA to address community noise concerns through regulation and to confirm the agency’s position on the permissible scope of State regulation of helicopter flight operations.

Your letters seeks to:

1. Relay community concerns regarding “noise disruption and safety issues” from air tour helicopters, request the FAA to address these concerns through “meaningful regulation to avoid and mitigate these impacts,” and include community input in the process, and
2. Confirm the FAA’s position on the permissible scope of State regulation over helicopter flight regulations. You ask whether BLNR has the authority to condition its approval of leases and revocable permits in state airports for helicopter operations,” and regulate flight paths and “limits such as on altitude, frequency and time of operation, to minimize widespread disruption...”

Community Noise and Safety Concerns

Thank you for sharing community concerns regarding helicopter noise in residential neighborhoods and over natural and cultural areas in Hawaii. The FAA works with State and local government partners, within our respective Constitutional and statutory authorities, as well as operators and local communities to address citizens’ noise concerns through a variety of statutory, regulatory, and voluntary mechanisms. For

example, currently we are serving as a technical advisor to the Hawaii Air Noise and Safety Task Force; which was developed to address safety and noise issues related to rotor and fixed-wing aerial tours in the State of Hawaii. We champion efforts to advance the development and industry adoption of source reduction technologies and noise abatement operations. We have also promulgated informed, well-reasoned and scientifically grounded regulatory standards and noise policies intended to protect the traveling public and those on the ground.

The FAA is required by statute to protect the public health and welfare from aircraft noise by prescribing standards that measure aircraft noise and by promulgating regulations to control and abate aircraft noise (49 U.S.C. § 44715). FAA has fulfilled these requirements by promulgating noise certification standards for helicopters in 14 CFR part 36. Those regulations ensure that new helicopter type designs incorporate noise reduction technologies as needed to comply with lower noise limits. The most recent change in the certification regulations was the reduction to Stage 3 noise limits for newly certificated helicopter models. 79 FR 12040 (Mar. 4, 2014). As operators retire and replace older aircraft with those that meet the newer standards, community noise impacts are expected to improve.

The FAA also works to address helicopter noise with partners in academia through our ASCENT Center of Excellence¹ as well as with industry through collaboration with regional operators and with the Helicopter Association International (HAI) Fly Neighborly training program.² These efforts are designed to advance research and adoption of voluntary measures related to scheduling and flying aircraft to minimize the impact of noise on people on the ground. Noise abatement measures developed with input from engaged stakeholders remain one of the most effective approaches to reducing helicopter noise.

The FAA is committed to developing meaningful and equitable solutions to the complex and nuanced issue of aviation noise. We recently announced our plans to conduct a noise policy review that is informed by research and leverages the development of new analytical tools and technologies. This effort will build on our partnerships with academia, industry, and government to better understand, manage, and reduce the environmental impacts of aviation, including but not limited to noise. As a core part of this effort, we are encouraging input from a broad range of stakeholders, including local communities. This will not be a short, simple, or superficial undertaking and the FAA

¹ Rotorcraft Noise Abatement Procedures <https://ascent.aero/project/rotorcraft-noise-abatement-procedures-development/>

² <https://www.rotor.org/initiatives/fly-neighborly>

encourages agency partners and communities to keep abreast of future opportunities to engage in dialogue with our agency.

Permissible Scope of State Regulation of Helicopter Flight Operations

Federal Statutory and Regulatory Framework

In your letter, you acknowledge that the State’s jurisdiction is “limited to the land disposition itself,” and that the “regulation of flight paths is the sole jurisdiction of the FAA.” Your understanding is correct: the States lack the authority to regulate aircraft operations, including helicopter flight paths.

Congress enacted an express preemption provision stating that, “a State [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.” 49 U.S.C. § 41713(b)(1). The Supreme Court has interpreted the statute’s “related to” language broadly, holding that it applies to State laws “having a connection with or reference to” prices, routes, and services. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

By statute, the FAA is obligated to regulate for safety; the efficient use of the airspace; protection of people and property on the ground; air traffic control; navigational facilities; and the regulation of aircraft noise at its source. 49 U.S.C. §§ 40103, 44502, and 44701-44735. Congress has directed the FAA to “develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” 49 U.S.C. § 40103(b)(1). Other responsibilities of the FAA include prescribing air traffic regulations on the flight of aircraft for navigating, protecting, and identifying aircraft; protecting individuals and property on the ground; using the navigable airspace efficiently; and preventing collision between aircraft and between aircraft and land. 49 U.S.C. § 40103(b)(2). Since 1926, Federal law has provided that a citizen of the United States has a public right of transit through the navigable airspace. 49 U.S.C. § 40103(a)(2).

In furtherance of these statutory commands, the FAA has established a comprehensive regulatory scheme, governing, among other things, the certification of aircraft, airports, pilots and mechanics; aircraft equipage; air traffic control systems; aviation navigation and communication; airspace classifications, and more. The FAA has also promulgated safety regulations addressing commercial air tours nationally (14 CFR part 136, subpart A, *National Air Tour Safety Standards*) and specific regulations imposing special operating rules on air tour aircraft (including helicopters and special minimum flight altitudes for Hawaii) in Hawaii. See 14 CFR part 136, subpart A, *National Air Tour Safety Standards*, and Appendix A, *Special Operating Rules for Air Tour Operators in the State of Hawaii*. Since the 1950s, Federal courts in various circuits have upheld FAA’s preemption of aviation safety and the efficiency of the airspace, and, more specifically, the Government’s preemption of aircraft flight management, including flight altitude and traffic patterns.

Permissible Scope of State Regulation of Helicopter Air Tour Operations through Police Powers and Proprietary Powers

The States may generally protect their citizens through land use planning and development, zoning, and other police power measures not affecting aviation safety, operations, or airspace management. The States have the authority to mitigate the effects of noise independently of source noise control. “Local governments may adopt local noise abatement plans that do not impinge upon aircraft operations.” *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1314 (9th Cir. 1981), *cert denied*, 455 U.S. 1000 (1982).

However, because the State of Hawaii is the *proprietor* of the State’s airports, it has additional authority when acting in a proprietary capacity as an airport owner and operator.³ In the context of air carrier operations, Congress has codified the ‘proprietor exception’ by providing that the express preemption provision does not limit “a State, political subdivision of a State, or political authority of at least two States that owns or operates an airport served by [federally-certificated air carriers] from carrying out its proprietary powers and rights.” 49 U.S.C. § 41713(b)(3).

Your letter includes two specific questions:

1. Whether the State has authority to condition its approval of leases and revocable permits in state airports in order to regulate helicopter air tour operators’ flight paths, and place “limits such as on altitude, frequency and time of operation, to minimize widespread disruption....”

Through the exercise of its police power authority, the State may not utilize its lease or permit approval system to directly or indirectly⁴ regulate aviation safety, the efficient use of the airspace, protection of people and property on the ground, air traffic control, or the regulation of aircraft noise at its source. 49 U.S.C. §§ 40103, 44502, and 44701-44735; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (Court struck down

³ See *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991). Proprietary powers generally include the authority to regulate airport noise levels, choose airport sites, acquire land, ensure compatible land use, and control airport design and scheduling.

⁴ In *Gianturco*, the State made extension of an airport noise curfew a condition of the variance needed by the Port District to continue to operate Lindbergh Field. The court held that the State action unlawfully impinged on Federal control of airspace management and aircraft noise at its source by restricting the permissible flight times.

an 11 p.m. to 7 a.m. curfew on jet flights imposed by the City in the exercise of its police powers at an airport not owned by it). If the State were to regulate flight paths indirectly through its lease or permit approval process rather than expressly by statute or regulation, the result would be the same – unlawful police power regulation of aircraft flight paths.⁵

Regulation by BLNR of helicopter air tour operators’ flight paths and its establishing limits on altitudes, frequency, and time of operation would interfere with the FAA’s “delicate balance[ing] between safety and efficiency, and the protection of persons on the ground,” where the “interdependence of these factors requires a uniform and exclusive system of federal regulation” if Congress’ objectives are to be fulfilled. *Burbank*, 411 U.S. at 638-639. Air traffic, including over the Hawaiian Islands, must be regulated at the national level to ensure safety, efficiency, and uniformity.

2. What specific requirements can the BLNR or other state agency impose on commercial air tour helicopter operations as a condition of use of state lands?

Acting in its role as airport proprietor of the State’s airports, Hawaii may promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for its airports and their immediate environs. *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991); *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 153 (2d Cir. 2016). The Second Circuit held that proprietary restrictions must also comply with the Airport Noise and Capacity Act of 1990 (ANCA), 14 CFR part 161, and the Airport Improvement Program grant assurances (if applicable); it also stated that the exercise of proprietary authority may not produce a patchwork of “uncoordinated and inconsistent” airport restrictions that impede the national transportation system....” 841 F.3d at 154, *citing* 136 Cong. Rec. S13619 (Sept. 24, 1990) (statement of Sen. Ford).

Specifically, for example, the State would have proprietary authority at its airports to enact restrictions on time of day, weekday versus weekend, or a reduction in overall operations subject to the above limitations. In 1998, the Second Circuit upheld the following restrictions on New York City-based helicopter air tour operations including (1) a restriction of weekday operations to between 8 a.m. and 8 p.m.; (2) a restriction of weekend operations to between 10 a.m. and 6 p.m.; (3) the phasing out of weekend operations entirely; and (4) the reduction of operations by a minimum of 47 percent overall.⁶ In addition, New York City’s decision to reduce the number of seaplane air tour

⁵ The Supreme Court stated in *Burbank*:

[i]f we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. 411 U.S. at 639. See also *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 91-92 (2d Cir. 1998) (the proprietor exception “... gives no authority to local officials to assign or restrict routes.”).

⁶ *National Helicopter*, 137 F.3d at 90.

flights and prioritize transportation over tourism was upheld as a reasonable means to achieve noise reduction.⁷ Again, such restrictions would have to comply with part 161 and the grant assurances, if applicable.

I am hopeful that the above information will be helpful to the BLNR in its management of its public lands.

Sincerely,

A handwritten signature in black ink, appearing to read "Raquel Girvin". The signature is written in a cursive style with a large initial "R" and a long, sweeping tail.

Raquel Girvin
Regional Administrator

⁷ *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183, 187 (2d Cir. 2001).