OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

TO: Keith Miller
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VIA: Marc P. Hansen Marc Hansen
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FROM: Clifford L. Royalty, Chief Clifford L. Royalty
Division of Zoning, Land Use and Economic Development

DATE: August 31, 2021

RE: Regulation of the Airpark

PREFACE: You have requested our opinion as to the authority of the Montgomery County Revenue Authority (MCRA) to place restrictions on aircraft operations at the Montgomery County Airpark (Airpark). As posed, the question is broad. However, we understand the context to be narrower. MCRA is seeking guidance as to what restrictions it may adopt to reduce noise produced by aircraft using the Airpark.

Our concise answer to the narrowed question is that, as the proprietor of the Airpark, MCRA may regulate aircraft operations for the purpose of reducing noise, though the Federal Aviation Administration (FAA) may need to approve the restrictions.

ANALYSIS: Noise and aircraft operations being close companions, local governments and airport proprietors have sought, with varying degrees of success, to regulate aircraft operations so as to address complaints from noise-afflicted residents. The starting point for the legal discussion is the Supreme Court's decision in *Burbank v. Lockheed Air Terminal, Inc.*[1] In *Burbank*, the Court addressed the legality of a town ordinance that prohibited aircraft from taking off during certain hours of the day. The Court ruled that Congress has impliedly preempted local regulation of aircraft noise. However, in a footnote, the Court expressly confined its ruling to the regulatory, not proprietary, acts of local government. *Burbank* left open the possibility that an airpark owner, acting as a proprietor, could adopt aircraft noise restrictions. Congress codified the *Burbank* proprietary exception in the Airline Deregulation Act of 1978.[2]

In reliance on the proprietary exception, airpark owners have enacted restrictions

[1] 411 U.S. 624 (1973).
[2] 49 U.S.C. § 41713(b)(3).

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on aircraft operations. Court decisions arising from challenges to these restrictions have reaffirmed the validity of the proprietary exception and the authority of the airpark operators to adopt reasonable, non-discriminatory aircraft restrictions.[3]

The potential scope of the propriety exception has been constricted by post-*Burbank* legal developments, including an act of Congress. In 1990, Congress enacted the Airport Noise and Capacity Act (ANCA).[4] ANCA has been construed as requiring airpark operators to submit noise restrictions to the FAA for its review and approval.[5] ANCA expressly applies to Stage 2 and 3 aircraft.[6] The statute may also apply to Stage 4 aircraft.[7]

Further, as you know, the Airpark has received federal funds over the years under the Airport and Airway Improvement Act.[8] As a condition of receiving the funds, MCRA pledged to comply with certain mandates known as "Grant Assurances." The Grant Assurances include "Economic Nondiscrimination" provisions which require MCRA to ensure that the Airpark will remain open to the flying public "on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities . . . ." The Grant Assurances also require MCRA to comply with ANCA. There has been a suggestion in the case law that ANCA, on its face, may not preempt proprietors from establishing noise restrictions, but, regardless of whether that is so, MCRA is bound by the Grant Assurances to follow the procedures in ANCA if MCRA proposes to establish aircraft noise restrictions that govern Stage 2 and 3 aircraft.

We lack definitive information on the types of aircraft that use the Airpark. We understand that most of the aircraft that use the Airpark are nonstage, propeller-driven aircraft. As to those aircraft, ANCA does not, on its face, apply. Nevertheless, in enacting any noise regulations, MCRA would still be subject to the Grant Assurances (and case law) which prohibit unjust discrimination against users. Thus, with respect to nonstage aircraft, MCRA could implement noise restrictions so long as MCRA does not discriminate against a particular use of the Airpark and there is a sound factual basis for the restriction.[9]

We are not aware that MCRA is currently proposing aircraft restrictions; if MCRA does intend to adopt noise restrictions, MCRA should consult with our office concerning the

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[3] *See Santa Monica Airport Association v. Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *Faux-Burhans v. County Comm'rs of Frederick County*, 674 F. Supp. 1172 (D. Md. 1987); *Harrison v. Schwartz*, 319 Md. 360 (1990); *San Francisco v. Federal Aviation Administration*, 942 F.2d 1391 (9th Cir. 1991); *Alaska Airlines, Inc. v. Long Beach*, 951 F.2d 977 (9th Cir. 1992); *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81 (2nd Cir. 1998); *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (1998); *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001); *City of Naples Airport Authority v. FAA*, 409 F.3d 431 (D.C. Cir. 2005).

[4] 49 U.S.C. §§ 47521, *et seq.*

[5] *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 811 F.3d 133 (2nd Cir. 2016).

[6] "Aircraft are classified roughly according to the amount of noise they produce, from Stage 1 for the noisiest to Stage 3 for those that are relatively quieter." *City of Naples Airport Authority,* 409 F.3d at 433.

[7] *Friends of the East Hampton Airport, Inc.,* 811 F.3d at 149.

[8] 49 U.S.C. §§ 47107, *et seq.*

[9] The FAA Airport Compliance Manual - Order 5190.6B, Chapter 13, acknowledges the authority of airport proprietors "to reduce the effect of noise on residents" by, for example, regulating scheduling and operations.

application of ANCA and the Grant Assurances. Restrictions on Stage 2 and 3 aircraft would require FAA review. Restrictions on nonstage aircraft would need to be justified by a proper, data-driven analysis, like, for example, a "Part 150" study under the Airport Safety and Noise Abatement Act of 1979.[10]

Any noise restrictions imposed by MCRA will be scrutinized by the FAA. Historically, the FAA has taken a dim view of aircraft use restrictions. If the FAA objects to any restrictions that MCRA adopts, MCRA's grant monies will be jeopardized. It has been suggested that MCRA could prohibit, or reduce, flight training operations ("touch and go's") at the Airpark. The FAA will likely deem such a restriction a violation of the "Economic Nondiscrimination" provisions of the Grant Assurances. While FAA approval of noise restrictions governing nonstage aircraft may not be a legal necessity, it is preferable that MCRA receive FAA approval before adopting any restrictions.

We close this legal review with a few additional observations. The foregoing discussion addresses aircraft restrictions that are imposed by MCRA. Federal law does not prohibit Airpark users from voluntarily modifying their operations, or agreeing to restrictions, to reduce noise.

Also, as noted above, this opinion addresses restrictions that are intended to reduce aircraft noise. MCRA, acting in its proprietary capacity, also has authority to address aircraft safety. Should MCRA propose safety regulations, we would be glad to revisit this opinion.

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[10] *See* 49 U.S.C. §§ 47501, *et seq.*