

Port of Port Townsend

**Protecting the Future of the Jefferson County
International Airport as an Essential Public Facility:
Statement of Legal and Factual Position**

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Port of Port Townsend

Protecting the Future of the Jefferson County International Airport as an Essential Public Facility: Statement of Legal and Factual Position

1. INTRODUCTION.

Over thirty years ago, the United States Supreme Court emphasized the importance of regional airports to commerce, transportation, the economy and the long-term health and vitality of the areas they serve.

The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance for aviation as a major force in passenger transportation and the increasingly significant role for commercial aviation in the nation's economy cannot be inhibited if the best interest of the public is to be served.

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973).

The Port of Port Townsend, owner and operator of the County's airport, is providing this memorandum to Jefferson County decision-makers for consideration in conjunction with the Port's proposed Comprehensive Plan and Unified Development Code ("CP/UDC") amendments.¹ The Port's proposed amendments are consistent with the substance and procedures agreed upon in the Second Settlement Agreement, dated December 10, 2003, between the Port and the County in WWGMHB Case No. 01-2-0016, and are intended to accomplish the following purposes:

1. Implement the mandates of the Growth Management Act, RCW Chapter 36.70A ("GMA"), as it relates to essential public facilities and specifically to airports;
2. Implement the 1998 Jefferson County Comprehensive Plan ("Comprehensive Plan") requirements related to the Jefferson County International Airport ("JCIA"), and to further clarify and refine the Comprehensive Plan language to better reflect current knowledge and additional information on airport issues and the challenges faced by airports;
3. Implement the mandates of RCW 36.70A.130 (4)(a), which require Jefferson County to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the GMA; and

¹ The authors gratefully acknowledge the Port of Skagit County, its Executive Director, staff and attorneys, for graciously providing the Port with legal and factual information for this Memorandum.

4. Address noise, safety and compatibility concerns by proposing limited disclosure to current and prospective property owners of their proximity to airport operations including take-off and landing patterns, and the potential for low level noise and vibrations associated with such activities; and identifying an airport overlay within which certain uses will be prohibited for public safety and compatibility reasons (e.g., mobile home parks, churches, nursing homes, hospitals, day care facilities and other similar uses).

The 2004 process for amending the Comprehensive Plan and UDC comes after many years of hard work, negotiation and compromise, starting with the adoption of the 1998 Comprehensive Plan provisions addressing the JCIA. A lot of dust has settled since the original noise ordinance was proposed as necessary to implement the Comprehensive Plan by then Prosecuting Attorney David Skeen. In this 2004 proposal, the Port has made every effort to strike a balance between legitimate private property rights and the need and obligation to protect the airport now and in the future, and has narrowed its proposal to the minimum of regulations necessary to provide meaningful protection for the airport's present needs and future viability. This proposal comes at a time when Jefferson County still has the opportunity to protect this community resource, while other regional airports face significant challenges, potential disruptions, and even closure due to new or incompatible development. The adoption of the proposed amendments will also help perpetuate the airport's role in the economic health of Jefferson County and its benefit to the community.

The JCIA plays a significant and positive role in the region, and state law requires sound and compatible land use planning around airports. The Port is providing this Memorandum to assist the Planning Commission and the Board of County Commissioners in their respective policy advisory and decision-making roles as they face these issues. Simply designating the airport as an essential public facility does not provide adequate substantive protection to the airport. This Memorandum identifies and describes the types of impacts and issues faced by other regional airports due to encroaching development, and explains how the proposed CP/UDC amendments support the JCIA while taking into account private property development rights. This Memorandum will also emphasize the basic fact that the Port is a special purpose district, not a regulatory body, and cannot protect the airport essential public facility, as envisioned by the GMA, on its own. Rather it is local government—cities and counties—that have the duty and authority under the local zoning and regulatory powers to achieve this goal.

The Second Settlement Agreement between the Port and the County also provides the framework for consideration of the proposal. It states, among other things:

1. The County shall docket the packet sent to the County on September 9, 2003, as it now exists or is later amended by the Port, during the 2004 Comprehensive Plan Amendment cycle. The County specifically agrees that the Port packet, including proposed revisions to the UDC Chapter 3, minor changes to UDC Chapters 7 and 8, and revisions to the Comprehensive Plan Chapters 7 and 9, shall be docketed and considered during the 2004 amendment cycle. **The parties agree that the UDC amendment process will include the adoption of a meaningful airport overlay. The County and Port agree that the proposed amendments to the UDC and Comprehensive Plan are consistent with and implement the Jefferson County Comprehensive Plan and the Growth Management Act, RCW Chapter 36.70A.** However, the Port acknowledges that the County cannot guarantee a specific result arising out of the public adoption process. (Tab 1., Emphasis added).

It would violate both the Settlement Agreement and the requirements of the GMA to enact the People For Rural Quimper’s amendments to the Comprehensive Plan, which propose to delete all references to an airport overlay and or noise conflicts, and *require* sub-area planning. Further, rather than seeking to regulate uses in adjacent to the airport, PRQ proposes to discourage the siting of new, incompatible uses “*at the Jefferson County International Airport,*” which is flatly contrary to the statutory language of RCW 36.70.547 and is a meaningless requirement. That being said, the Port is optimistic that, as expressed during the Planning Commission airport subcommittee meeting, PRQ may be willing to support the Port’s proposal based on the many compromises that have been made in large part due to PRQ member’s comments and concerns.

2. THE PORT OF PORT TOWNSEND

The Port is a municipal corporation and operates as an independent government entity under Title 53 RCW. The Port was established as a port district encompassing all of Jefferson County in 1924. The Port is authorized under the laws of Washington to promote economic development activities throughout the County. It is a special purpose district whose policy and direction are provided by three elected commissioners from the three voting districts of Jefferson County. Its stated mission as a county wide municipal corporation “is to responsibly develop property and facilities that encourage job creation, private investment, local economic stability and diversity, and to better the quality of life for the citizens throughout Jefferson County.”

3. JEFFERSON COUNTY INTERNATIONAL AIRPORT

The Port has owned and operated the Jefferson County International Airport since 1959, when it was transferred to the Port by the County. The County acquired the Airport from the United States Military in 1947, which had developed it for auxiliary military training prior to World War II, and later in the 1940s developed it into a public-use transport facility capable of accommodating

passenger and cargo aircraft. In accordance with FAA guidelines, the Port is authorized to operate the airport as a self-supporting enterprise.

Jefferson County has designated the JCIA as an Essential Public Facility in accordance with the GMA. This designation reflects the critical role that the Airport plays in providing transportation services necessary to the public health and safety, as well as in supporting job generating economic development activities. The Airport provides an invaluable alternative to surface routes for emergency medical transports and services, the shipment of goods and materials, as well as access by local property owners, business travelers and tourists. In addition, given the relatively isolated nature of the County, the JCIA is a valuable community resource during unplanned and planned road closures, such as the planned closure of the Hood Canal Bridge in 2007 for extensive repairs.

A WSDOT Aviation Report for Jefferson County, completed in 2001, finds that the direct economic impact of the airport on airport tenants and general aviation visitors was \$6,876,792. These first round expenditures were responsible for approximately 113 jobs and wages of \$1,759,953. The indirect economic impacts, which occur as a result of use of aviation services, at hotels, restaurants, etc, expenditures of county residents associated with use of the airport, and expenditures by firms having economic activity which is dependent on the airport: \$1,425,097, with 19 jobs providing \$468,655 in wages. The induced economic impacts, which is a multiplier effect taking into account the local value of payment for goods and services as it circulates though the local economy: \$1,538,011 and approximately 21 jobs. Total economic activity impact: \$9,839,899. (Tab 2.)

The JCIA consists of approximately 316 acres of land owned by the Port, 280 acres of which are part of the Essential Public Facility. It is important to note that property acquired and/or improved with FAA funds is limited to specific airport-related uses (262 acres), while property acquired or improved with Port funds may be used for a broader range of activities that directly or indirectly benefit airport operations.

A. *JCIA Master Plan Update.*

In 2001, the Port initiated a planning process, as contemplated by the Comprehensive Plan, to update the Master Plan for the airport. This updated Airport Master Plan, prepared in accordance with Federal Aviation Administration (“FAA”) requirements, the Comprehensive Plan, and the GMA provides direction and guidance regarding future airport development priorities. It provides an objective look at future airport needs based on a comprehensive review of design considerations, and provides a foundation for further site-specific county planning at the JCIA. Following extensive

public process, the Master Plan was adopted by the Port of Port Townsend Commissioners, and then approved by the FAA on May 7, 2004. The Plan is a 20-year visioning document, and is not expected to be updated (other than routine, minor updates as directed by the FAA) until 2024.

B. Noise Abatement Programs.

It has been asserted during public comment that the Port has an affirmative duty to reduce noise impacts on properties within Jefferson County. In fact, the Port occasionally receives phone calls asking it to “enforce” or “regulate” perceived violations of air space. The truth is quite different. The Port of Port Townsend has no regulatory authority over the flight patterns, paths or airplane height, which are solely governed by federal law. The JCIA is part of the FAA’s national transportation system and it is classified as NPIAS (National Plan of Integrated Airports) airport. NPIAS currently designates 3,331 of the 18,292 existing airport in the United States as components in the national system. The JCIA has no air traffic control and is basically uncontrolled space. Airplane flight above 500 feet is in federal airspace. The FAA has established procedures for take-offs and landings, which all licensed pilots need to obey. The pilot in command has wide latitude with respect to flying safety, and flight patterns vary widely depending on aircraft type, temperature, pressure altitudes, wind velocity, passenger loads, etc.

The Port, after meetings involving the public and pilots, established a voluntary noise abatement program--a good neighbor policy intended to educate pilots on the development patterns in the area, which it encourages and urges pilots to follow at every opportunity. The noise abatement program is also referenced on the FAA website. (*See* JCIA Noise Abatement Procedures, and FAA pilot procedural instructions, Tab 3.) The Port is *not*, however, an enforcement or regulatory agency for this class of airport, and has no ability to monitor, fine, or otherwise discipline pilots who may disobey the noise abatement program. Rather, the Port’s role, in conjunction with the pilots’ associations, is education, a role that it takes seriously as evidenced by its local noise abatement program.

Noise abatement programs, and funding, do exist under federal law. Such funding for noise reduction has mostly been used to acquire land and to soundproof buildings. The FAA sets funding priorities and has a national ranking system for Airport Improvement Plan (“AIP”) funding; however, nearly all AIP funds set aside for noise-related projects have been awarded to projects where incompatible land uses occur in areas exposed to noise levels of 65 decibels or higher under the FAA’s chosen method for measuring community exposure to airport-related noise. FAA Grants for Airport Noise Abatement—The Airport Improvement Program and Passenger Facility Charge

Program (Tab 4.) As is shown in the Master Plan, the noise level of 65 DNL is solely on Port-owned property. Thus, federal funds would not be available for implementing a noise abatement program locally.

With regard to the County's responsibilities, federal and state law preempts local government laws in the fields of aircraft and airport operations, safety and noise, when related to issues such as plane take-off, landing, flight patterns, sizes and purposes of aircrafts, altitudes or air traffic, placement of taxiways, runways, airport design, runway protection areas, air emissions, types of aircraft permitted at particular airports, curfews of flight operations, etc.

However, the County can use its police powers, particularly in land use controls, to anticipate, abate, mitigate, reduce and otherwise respond to the effects of having an airport in its jurisdiction. As will be further explained, GMA provisions confirm the authority and obligation under Washington State law to protect the airport in the present and the future, and to consider and mitigate the effects of the airport on neighboring communities, through land use policies and regulations.

4. ISSUES AND IMPACTS AFFECTING AIRPORTS

Airports in Washington State and across the country have faced severe impacts, disruptions and *even closure* because of new or incompatible development or due to poor or non-existent land use planning. A sampling of significant impacts and development pressures, and various responses to those pressures, experienced by airports locally and nationally, which are contained in the record submitted by the Port (containing Port of Skagit County consultant survey documents and ordinances from other jurisdictions), include the following:

- The lands around Pangborn Memorial Airport in Wenatchee, Washington (Douglas County) were zoned commercial-agricultural with development restricted to farm buildings, one home per 10 acres. With the GMA and development of urban growth boundaries, the airport was threatened with being included in the urban growth area. The airport began planning for an "overlay district" with prospective zoning as a way to preserve it. With help from the State and Douglas County a committee was formed to make recommendations to protect that airport and reduce hazards. Through an extended series of public meetings and compromises, general agreement was reached and an overlay district was adopted, the purpose of which was to protect the viability of the airport "as a significant resource to the community by encouraging compatible land uses, densities and reducing hazards that may endanger the lives and property of the public and aviation users." The current zoning preserves the current residential density and specifically protects against development that could create noise issues or safety concerns. Uses such as churches, hospitals, and multi-family housing, etc. are prohibited in the overlay zone. A disclosure statement must be recorded with Auditor for all

subdivisions, binding site plans and building permits on broadly defined areas within the overlay. Additionally, purchasers of property in the district have to be told about the airport zone. *See*, Arnie Clarke, Pangborne Memorial Airport, Wenatchee, WA; Douglas County Code, Chapter 18.65, “AP-O Airport Overlay District” and adoption ordinance. (Tab 5.)

- “Much of the area surrounding the Anacortes (Washington) Airport property has been built out with single-family residential development. The surrounding residential land use has had an impact upon the acceptability of the Airport by the community in its current location. This development could be viewed as an encroachment upon Airport operations. The surrounding residential land use has impacted staff time and Port resources by requiring the Port to address neighborhood and city concerns such as safety and noise.” Eric Johnson, Manager, Anacortes (Washington) Airport. (Tab 6.)
- In Skagit County, three key measures currently being proposed to protect airport operations are: All proposed land uses and associated development regulations are required to be consistent with continued utility of the Skagit Regional Airport, a designated essential public facility; the County will continue to require an "avigation easement" for all new development within the Airport Environs Overlay (AEO) district; and various measures and actions will be used to give the public, generally, and nearby property owners, specifically, notice of the Airport, its operations and impacts to and from the Airport. Other measures to deal with impacts to Airport operations due to encroachment of new or high-density development include incorporation of airport safety zone and noise contour maps, federally defined building height limitations added into the Development Regulations (UDC), strengthening the airport environs disclosure form (the “notice to purchasers”), requiring avigation easements for new development, and recognizing the Port’s assertion of existing prescriptive easements in the comprehensive plan and in the UDC. The DEIS also recognizes that other performance standards addressing noise, visual impacts and other areas of potential impact to the Airport and residential neighbors could be developed for new development within the industrial zoning districts. (Tab 7.)
- Kittitas County, recognizing that it has been charged with protecting and preserving the Kittitas County Airport, in cooperation with the City of Ellensburg, amended its zoning code in 2001 to establish an airport overlay zoning district on properties located on, adjacent to and in the vicinity of the airport, wherein they prohibit specified uses and provide for notice on the face of plats. Overlay zone appears to be based on WSDOT Matrix. (Tab 8.)
- Chelan County adopted an Airport Overlay District based on the WSDOT matrix that includes a notice to be recorded with the County Auditor within the Airport Overlay District of airport impacts, including noise and vibration. (Tab 9.)

- The Tacoma Narrows Airport in Tacoma (Washington) has experienced encroaching residential development, even though the land adjacent to the airport is zoned for relatively low densities. “The consequence of this has been community demands for restrictions on airport activities, which has been the focus of controversy.” *See*, Cynthia Stewart, Consultant to Tacoma Narrows Airport. (Tab 10.)
- Jack Northrop Field in Hawthorne (California) has been encroached upon by residential, commercial and industrial development. No land use restrictions were imposed when the newest residential tract of homes was developed. “These homes are now a constant source of noise complaints.” Recommends recording of easements prior to issuance of any permits. *See*, Airport Manager Don Knechtel, Jack Northrup Field. (Tab 11.)
- One example of some airports’ response to encroaching incompatible development is the City of Paso Robles (California) Municipal Airport. According to Roger Oxborrow, Airport Manager, the Paso Robles City Council has adamantly made the demand to the City Planning Director to “... protect the Airport at all costs...” In pursuit of this goal, “...the city annexed at least 3500 acres around the airport, so it could have control over any development that might occur there in the future. In the initial zoning for the annexation, it was specified THERE WOULD BE NO NEW RESIDENTIAL [development] in the subject area. 10-15 years later (now), that position has not changed. There will be no new residential development within 2 miles of this airport.” (Tab 12.)
- In Watsonville (California) “development around airports is an ongoing issue. Most recently there is a move to annex and develop property adjacent to the airport,” according to Watsonville Airport Manager Don French. (Tab 13.)
- Because of encroachment of incompatible development, Naples (Florida) Municipal Airport made a conscious decision to restrict any further expansion of the airport runways. The airport was also forced to restrict airport use to aircraft less than 75,000 lbs. (Tab 14.)
- The DeKalb-Peachtree (Georgia) Airport experienced encroachment because there was no special land use or overlay district around the airport that ensured compatible land use in compliance with federal grant assurances and certifications. This has caused problems. (Tab 15.)
- When the Berz-Macomb (Michigan) Airport originally purchased land surrounding the airport, the land was master-planned to be commercial and industrial. “Subsequently, the zoning was changed and we now have expensive houses all around us. Fortunately, we purchased enough land to protect our approaches. We are experiencing lots of noise and low overflight complaints. *Probably this airport will disappear*, since the property values have risen till it doesn’t make much [sense] to keep an airport here.

Particularly privately owned.” Milton H. Berz, Jr., Berz-Macomb Airport. (Emphasis added) (Tab 16.)

- In the case of McCarran International Airport in Las Vegas (Nevada), county officials “killed” a housing project planned for under an airport flight path. The proposal, which would have put 304 homes underneath one of the airport’s busiest flight paths, had to be denied because, the county commissioners said, “housing is incompatible with airplane noise, ...” See, article, Las Vegas Review-Journal, Feb. 6, 2003.

5. GMA PLAN IMPLEMENTATION AND CONSISTENCY REQUIREMENTS AND THE PORT’S PROPOSAL

RCW 36.70A.040 requires that development regulations be consistent with, and implement, the comprehensive plan. Thus, a local government is bound to implement the policy provisions in its plan. Port of Seattle v. Des Moines, 97-3-0014, at 8 (FDO 1997). See also, WAC 365-195-840 (1) (development regulations for identifying and siting essential public facilities shall be consistent with and implement the process for this purpose set forth in the comprehensive plan.) WAC 365-195-800 broadly defines the meaning of “implement”:

Relationship to comprehensive plans.

Development regulations under the Growth Management Act are specific controls placed on development or land use activities by a county or city. Such regulations must be consistent with comprehensive plans developed pursuant to the act and they must implant those comprehensive plans.

“Implement” in this context has a more affirmative meaning than merely “consistent” (See WAC 365-195-210(5).) “Implement” connotes not only a lack of conflict but sufficient scope to carry out fully the goals, policies, standards and directions contained in the comprehensive plan.

Under the GMA, policy statements in comprehensive plans are now substantive and directive. Achen v. Clark County, 95-2-0067 (RO 11-20-0067), p. 2. Implementing regulations must be of sufficient scope to carry out fully the goals, policies, standards and directions contained in the comprehensive plan. CMV v. Mount Vernon, 98-2-0006 (FDO 7-23-98), pp. 11-13. Once a regional decision has been made to site or expand an essential public facility, the city or county must re-evaluate and/or amend its comprehensive plan to determine if it still complies with the GMA. See, Central Puget Sound Regional Transit Authority v. City of Tukwila, CPSGMHB Case No. 99-3-0003 (FDO 1999), pp.6-7 (“after the regional decision is made, the city then has a duty to accommodate the essential public facility”).

The 1998 Comprehensive Plan required adoption of an “Airport Overlay Zone” and “Noise Overlay Zone Ordinance” to address noise, safety and compatibility concerns:

GOAL:

EPG 3.1 Ensure continuation of the airport as a safe and efficient essential public facility.

POLICIES:

EPP 3.1 Develop an “Airport Overlay Zone” for Jefferson County International Airport (JCIA) which:

- Discourages the siting of new, incompatible land uses adjacent to the airport;
- Establishes a noise overlay zone;
- Identifies and regulates land uses within a “runway protection zone;”
- Identifies and regulates land uses within an “airport approach zone;” and
- Regulates obstacles in accordance with Federal Aviation Regulations (FAR) 77 until the “Airport Overlay Zone” is established for the JCIA.

EPP 3.2 Contingent upon the results of the “Glen Cover/Tri-Area Special Study,” review and, if necessary, amend the JCIA section of the Essential Public Facilities element.

EPP 3.3 The County, in cooperation with the Port of Port Townsend, will develop and adopt a Noise Overlay Zone Ordinance.

Resolution No. 71-98 prioritized work tasks to be immediately implemented after adoption of the Plan, and included a directive to adopt a noise overlay ordinance and noise overlay zone within 120 days of Plan adoption. This did not occur for a variety of reasons, and literally years of attempts to grapple with noise and compatibility issues followed.

The Port’s proposal is intended to implement the provisions of the 1998 Comprehensive Plan by addressing noise issue and compatibility issues. It represents a solution to the mandate to implement the Plan’s goals and policies that is based on much thought, negotiation and compromise. The Port took into account public, county staff and Planning Commission and Commissioner’s comments during staff level meetings and public meetings/workshops/hearings. The Port has also done a fairly exhaustive review of the various regulatory means available and appropriate to protect the JCIA from incompatible uses, and to insure its continued maintenance as an essential public facility. The 2004 proposal represents a “scaled back” version of the original proposal submitted in 2003, and proposes modifying Comprehensive Plan language to better reflect what the Port and

County have learned during the years since the 1998 Plan was adopted. It represents the minimum regulatory and policy guidance necessary to implement the intent of the 1998 Comprehensive Plan.

As will be discussed further below, the Port's proposal is also intended to help set the stage for a future process to consider allowing appropriately scaled industrial, manufacturing and related activities at the JCIA. The actual regulations related to non-aviation industrial or manufacturing uses at the airport will be considered during a later process, as agreed to in the Settlement Agreement at No. 4:

Resolution No. 71-98, No. 6, and Comprehensive Plan policies EPG 2.0 and EPG 3.0, and EPP 2.2 and EPP 3.2 (Comprehensive Plan, pages 9-7 and 9-8) and Strategy B (page 9-11) direct the County to cooperate with the Port to develop a plan to guide future development at the JCIA to include evaluation of non-aviation land uses and activities that are compatible with the airport facility and surrounding rural environment. Further, under the GMA no local development regulation may preclude the siting of essential public facilities, or the expansion or improvement of existing facilities. RCW 36.70A.200(2).

Accordingly, the County agrees to revisit and consider the issue of the uses allowed within the airport essential public facility, specifically to include the issue of whether such uses should continue to be restricted to aviation support facilities and aviation related development. This shall occur either during a Comprehensive Plan amendment process subsequent to the annual process which occurs in 2004, or a subsequent subarea planning process, whichever is proposed by the Port and coordinated by the parties' respective staffs. The County does not agree to any particular result, but does agree that during such education and adoption process, it will re-evaluate and reconsider, in good faith, the issue of whether the intensification of industrial and/or commercial uses within the airport essential public facility should be allowed so as to ensure the continued economic viability of the JCIA and fulfill the economic development function of the Port. County staff is directed to work cooperatively with Port staff and consultants on this issue, and attempt to present a joint staff position to the Planning Commission, Port Commissioners and BOCC during any such planning process.

The Port's current proposal, if adopted, will clarify and provide important guidance for that process, and confirm that the County recognizes and promotes the continued economic viability of the JCIA, and its role in facilitating appropriately scaled economic development in Jefferson County.

6. PLANNING REQUIREMENTS FOR AIRPORTS

A. *Importance of Aviation Planning Generally.*

The state of Washington has in the past and continues to strongly support regional airports and general aviation through required, thoughtful and compatible land use planning. The state Department of Transportation (“DOT” or “WSDOT”), for example, has stated:

Aviation is important to the economic health of Washington and the quality of life of its citizens, businesses and visitors. One of the major challenges of our day is to balance aviation needs of local communities . . . The state has an interest in a healthy aviation system. . . . Protection of these valuable facilities is of paramount importance to both the economic viability and the quality of life in Washington State. With population and development increases experienced in our state, airports are coming under increasing pressure from encroaching development. . . . The Washington State Transportation Commission finds three areas in which the loss, or potential loss of airports will be played out: lack of funding for investment in basic infrastructure preservation and safety improvements, incompatible land uses, and inappropriate environmental mitigation. In 1996, the Washington State legislature also recognized the importance of protecting aviation facilities from incompatible land uses.

Through Washington State Senate bill 6422, which amended the Washington state Growth Management Act and associated provisions of the act, the state recognized the inherent social and economic benefits of aviation. . . . The policy to protect airport facilities must be implemented in the comprehensive plan and development regulations as they are amended in the normal course of land use proceedings.

Washington State Department of Transportation, *Airports and Compatible Land Use: An Introduction and Overview for Decision-Makers*, Volume 1, p. 1-2 (1999) (“WSDOT Report.”)

Furthermore, the WSDOT Aviation Division has found the “Aviation plays a major role in the state economy and while airports facilitate commerce, they also serve as economic engines and their direct, indirect and induced benefits accrue throughout the rest of the community as well.” *See*, Washington State Dept. of Transportation, “Latest Findings – Airports Create Jobs and Money,” <http://www.wsdot.wa.gov/aviation/Planning/EconImpactsOfAirports/default.htm>.

The various roles and benefits of airports are well recognized for commercial service airports and urban general aviation airports. Less known is the benefit to state and rural communities provided by rural airports. Rural airports are often small, found in isolated locations and are facilities with which much of the population have no direct experience. To maintain economic viability, rural communities must maintain access to the urban centers of banking, commerce, law, engineering, medicine and other specialization found in metro centers. . . . The research found airports, in several cases, to be a symbol of hope for rural communities fighting for their economic life.

Numerous state statutes emphasize the importance of the State's airports and the strong legislative policy to protect them. *See, e.g.*: RCW 14.07.010 (broad authority to acquire, maintain and operate airports and airport facilities, which are a municipal purpose and a public use; RCW 14.08.030 (broad authority to acquire land and obtain easements, prohibit encroachments and operate and control airports and airport facilities); RCW 14.08.120 (broad authority to enlarge, improve, maintain, equip, operate and regulate airports and airport-related properties and facilities); RCW 36.70.547 (comprehensive planning required for airports and around airport property); RCW 36.70(A).200 (GMA planning for essential public facilities such as airports); RCW 36.70(A).510 (GMA planning for compatible land uses around airports); and WAC 365-195-340 (planning requirements for EPFs).

State and federal court decisions also emphasize the importance of the state's airports and the need to protect them. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, (1973); City of Des Moines v. Puget Sound Regional Council, 108 Wn. App. 836, 846 (1999), rev. denied, 140 Wn.2d 1027 (2000); Ackerman v. Port of Seattle, 55 Wn.2d 400 (1960); Highline School Dist. 401 v. Port of Seattle, 87 Wn.2d 6 (1976).

B. *Growth Management Act (GMA) Requirements.*

Under the Growth Management Act, cities and counties are required to include a process for identifying and siting essential public facilities in their comprehensive plans. Essential Public Facilities (EPFs) include those facilities typically difficult to site, such as airports. RCW 36.70A.200(1). "No local comprehensive plan or development regulation may preclude the siting of essential public facilities." RCW 36.70A.200(5). "The legislative purpose of RCW 36.70A.200(5) would be defeated if local governments could prevent the construction or operation of an EPF." City of Des Moines v. Puget Sound Regional Council, *supra*. 108 Wn. App. at 846. "Siting" of EPFs includes the *use, expansion, and/or improvement of airports*, including support activities necessary to accomplish these expansion or improvements. *Id.* at 843-847 (Emphasis added).

Recognizing the tension between airport impacts and the potential for local opposition to the siting and maintenance of airports, the state legislature addressed airport planning and compatibility issues, the GMA states that airports are essential public facilities and that "local jurisdictions are required to plan accordingly to protect these facilities." RCW 36.70A.200(5). Washington State Department of Transportation, Airports and Compatible Land Use: An Introduction and Overview for Decision-Makers, P. 2 (1999).

RCW 36.70.547 expresses a strong legislative concern for both the safety and viability of public airports in Washington State:

Every county, city, and town in which there is located a general aviation airport that is operated for the benefit of the general public, whether publicly owned or privately owned public use, shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. Such plans and regulations may only be adopted or amended after formal consultation with: Airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. All proposed and adopted plans and regulations shall be filed with the aviation division of the department of transportation within a reasonable time after release for public consideration and comment. Each county, city, and town may obtain technical assistance from the aviation division of the department of transportation to develop plans and regulations consistent with this section.

This section applies to every county, city, and town, whether operating under chapter 35.63, 35A.63, 36.70, [or] 36.70A RCW, or under a charter. (Emphasis added).

The GMA was amended in 1996 to recognize the inherent social and economic benefits of aviation and require that land use planning include consideration of general aviation airports. RCW 36.70A.510 provides: “Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting a general aviation airport are subject to RCW 36.70.547.”

GMA Hearings Board decisions increasingly address the need for sound land use planning around airports to protect them as essential public facilities. The Board’s reasoning and holdings make it clear that simply designating airports as EPFs, standing alone, is not enough. Some recent decisions illustrate the importance of these legislative planning requirements and the policy to preserve and protect the State’s airports. For example, the Western GMHB has held that designation of a large residential component within an airport UGA does not comply with RCW 36.70A.510. In Abenroth v. Skagit County, WWGMHB Case No. 97-2-0060c, (FDO1998), the Board held:

RCW 36.70A.510 requires the County to adopt land use policies and development regulations that preclude incompatible land uses adjacent to airports. The land use map for the Bayview UGA places a residential designation under the overlay for the main runway. Further, the map includes no overlay for the second runway which is currently in use. As we stated in our September 20, 1995, Final Order in Achen v. Clark County, #95-2-0067, the County has the responsibility to preclude development that conflicts with airport operations. Designation of a large residential component within an airport UGA does not comply with RCW 36.70A.510. *Id.* at p. 12.

In another decision, citing San Juan County’s own airport report, the Western GMHB emphasized that “Because there are increased safety risks in the vicinity of an airport, land use regulations will normally restrict uses such as schools, hospitals and nursing homes; multi-family

housing; and places of public assembly such as churches and public meeting halls. . . . Because airports are noisy, placing residential housing in flight paths and in the vicinity of airports creates a potential for conflicts between residents and the airport.” Klein v. San Juan County, No. 99-200010c (FDO 2002), pp. 48-49. In that case, San Juan County established an airport overlay for Orcas Island Airport, which the Board found did not do enough to discourage incompatible uses as mandated by RCW 36.70.547, because of densities that were too high for compatibility.

The Western GMHB in Achen v. Clark County, WWGMHB Case No. 95-2-0067 (FDO 1995), held that Clark County was not in compliance with the GMA because, as to airports, it violated RCW 36.60A.200(2). In this case, the Board found that the Clark County Aerodrome closed largely because of the County’s failure to properly regulate the surrounding area. The Board faulted the County for failure to regulate the area under the Evergreen Airport flight path “showing surrounding urbanization which will likely lead to the same death knell as befell the Aerodrome.” *Id.* at pages 40-42. It went on to state:

The concept of ‘siting’ involves future applications but also, particularly in the case of airports, requires efforts towards maintenance of current facilities. **Development regulations are an appropriate vehicle to prevent the encroachments that make siting and maintenance of existing public facilities so difficult. On remand, Clark County must re-examine its approach to the areas surrounding the existing airports.** (Emphasis added.)

The Western GMHB also acknowledged the importance of comprehensive planning and zoning for and around airports in Concerned Citizens Against Runway Expansion (CCARE) v. City of Anacortes, WWGMHB Case No. 01-2-0019c, (FDO 2001). The issue was whether an ordinance adopted by the City of Anacortes complied with the GMA requirements for EPFs, as applied to a 10-acre parcel located on airport property owned and operated by the Port of Anacortes. The Port had applied for a comprehensive plan amendment and rezone of its 10-acre parcel from a residential zoning (R2) to a light manufacturing (LM) designation and zoning. The city determined that a 6-acre portion of the property was appropriate for a CP amendment and rezone to the LM category, but the remaining 4-acre parcel would remain in the R2 category. In the 1960s, the Port approved a resolution establishing the airport and the City approved a major residential subdivision near the airport within hours of each other. Over the years, various neighbors and owners of residences in the area became embroiled in a conflict over expanded use of the airport. The City continued to approve major residential subdivisions on the surrounding property. By the time the present issue came on for decision by the city, the airport was surrounded by a “dense residential area.” Citing to RCW 36.70A.200(5), the Western Board held that the R2 zoning on the 4-acre parcel effectively prohibited

any use of the Port property except as a buffer for surrounding residential homes. “It is hard to imagine a more restrictive preclusion to airport uses than residential zoning.” *Id.* at p. 4.

The GMA is specific that a local government may not preclude siting or expansion of airport-related uses or facilities. Under the record, the City’s action in failing to rezone the 4-acre property from R2 designation effectively precludes airport operations and uses and therefore does not comply with the GMA . . . In our view, the City cannot comply with the Act by designating the area as a residential and/or buffer zone . . . The City has failed to comply with the Act by failing to adopt a different zone than residential for the 4-acre piece of property and also by imposing requirements that preclude airport or airport-related uses on the 10 acres in question here. *Id.* at pp. 4-5.

Washington State’s airport planning and compatibility requirements are also supported by other states’ laws.

State and local governments are directly and uniquely responsible for insuring that land use planning, zoning, and land development activities in areas surrounding airports are compatible with present and projected aircraft noise exposure in the area. Control of compatible land use around airports is a key tool in limiting the number of citizens exposed to unacceptable noise impacts, and should remain exclusively in control of State and local governments.’ ***In *Harrison v. Schwartz*, 572 A.2d 528, 535 n.6 (Md. 1990), we described this language as dealing with ‘zoning to keep residential and other incompatible activities away from airports.’

Maryland Aviation Administration v. Newsome, 652 A.2d 116, 174-175 (Md. App. 1995) (quoting S.Rep. No. 52, 96th Cong., 2d Sess. 3-4 (1980), reprinted in 1980 U.S.C.C.A.N. 89, 91-92 (emphasis in the original)). In Newsome, a developer’s application for a variance to permit construction of a residential housing development within an airport noise zone was denied. The Maryland Court of Appeals upheld this ruling based on planning requirements to protect the airport and to discourage incompatible development.

7. ANALYSIS OF THE VARIOUS METHODS FOR PROTECTING AIRPORTS FROM INCOMPATIBLE DEVELOPMENT AND AS ESSENTIAL PUBLIC FACILITIES.

In light of all the concerns and issues discussed above, entities in Washington State and around the country have taken proactive steps to protect their airports. The following is an example of the possible approaches.

A. *Presumption of Prescriptive Easement.*

Various airport planning reports and studies and general aviation airports recognize the existence of a “prescriptive easement” held by the airport for aircraft and airport-related “impacts” to surrounding properties and affected individuals. An easement acquired by “prescription” occurs as a

matter of law by continued, regular use of airspace over the statutory period. In Washington, that statutory period is 10 years. Peterson v. Port of Seattle, 94 Wn.2d 479 (1980). The law recognizes an “avigation” easement by prescription.

An avigation easement is acquired by prescription if the noise, fumes, and other intrusions caused by aircraft occupy a property-owner’s airspace without objection for such time that, under state statutes, ownership of airspace is transferred to the airport. The owner of the property underneath the prescribed airspace is then unable to assert any claims based on the taking of this airspace.

Pamela B. Stein, THE PRICE OF SUCCESS: MITIGATION AND LITIGATION IN AIRPORT GROWTH, 57 J. Air L. and Com., 513, 542 (1991). The scope of a prescriptive avigation easement typically includes noise, vibration, fumes, fuel particles, and inconvenience caused by low-flying aircraft interfering with the use and enjoyment of underlying property. See, Institoris v. City of Los Angeles, 210 Cal. App. 3d 10, 22, 258 Cal. Rptr. 3d. 10 (Cal. 1989).

The Washington Supreme Court has recognized a prescriptive avigation easement where there is a showing of uninterrupted, hostile use that has been open and notorious for a period of 10 years or more. Peterson, supra, 94 Wn.2d at 485. The Supreme Court noted: “The avigation easement, if prescriptively acquired, would *not* be compensable.” 94 Wn.2d at 483. See also, Highline School District 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Proof of a prescriptive easement right includes a showing of uninterrupted, hostile use (of airspace) for 10 years that has been open and notorious. Peterson v. Port of Seattle, supra 94 Wn.2d at 485; Krona v. Brett, 72 Wn.2d 535, 433 P.2d 858 (1967).

Although the Court in Petersen did not find a prescriptive easement under the specific facts of that case, the case was decided over 20 years ago, had unique facts, precedes the GMA and the designation of the airport as an essential public facility, and involved a radically changing use of Sea-Tac Airport. A recent article has asserted that there is a general trend *toward* greater recognition of prescriptive avigation easements by the state airports. See, David Casanova, EASEMENTS, 28 B. C. Env. Aff. L. Rev. 399, 427 (2001). The Courts Of Appeals of California and Oregon have recognized prescriptive avigation easements. See, Institoris v. City of Los Angeles, supra.; Baker v. Burbank-Glendale-Pasadena Airport Authority, 220 Cal. App. 3d 1602, 1610, 270 Cal. Rptr. 337 (Cal. 1990). In Baker, for example, the California Court of Appeals found that “having acquired an easement entitling the airport to cause the described interferences, the [airport] Authority cannot thereafter be required to compensate the plaintiffs for its use of the easement.” In Christie v. Miller, 719 P.2d 68 (Or. App. 1986), the Court held that because plaintiffs were aware of aviation activity in the area

since the construction of the airstrip at issue, and because they failed to assert a claim within the requisite statutory period, an avigation easement by prescription existed. *Id.* at 719 P.2d 70. In the Christie case, the plaintiffs argued that prescriptive easement could not arise because aircraft did not continuously land or take off. The Court rejected that claim, finding that the law *presumed* a prescriptive easement.

The record submitted by the Port contains examples of airports and planning agencies establishing or recognizing “prescriptive easements” to protect and perpetuate the airport’s mission and to satisfy FAA requirements and planning law. For example, the Chico (California) Municipal Airport recommends giving deed notices and avigation easements on the land impacted by noise exceeding 55 DNL. Robert A. Grierson, Chico Airport Manager. (Tab 17.) The WSDOT Report recommends as one of its proposed land use planning strategies obtaining aviation, noise and obstruction easements through various means. Skagit County is currently proposing recognition of prescriptive easements by the County in its development regulation. The Port of Skagit County has historically taken the position that it has obtained prescriptive air easements over lands under and around the Skagit Regional Airport, the scope of which includes noise, vibration, fumes, fuel particles, inconvenience and other unavoidable impacts cause by single and multi-engine aircraft using the airport. Skagit County, too, has acknowledged the existence of these prescriptive easements by requiring avigation easements to be recorded as a condition of development. The proposal is to *continue* to recognize the existence of these prescriptive air easements and to identify them in the Subarea Plan, the DEIS, and the Development Regulations. The Development Regulations contain an acknowledgement of the existence of the Port’s prescriptive air easements through the following language:

The Property has been continuously subject to aircraft overflights, either directly above the Property or over adjacent properties for an uninterrupted period in excess of ten years. These overflights, known to Grantor and/or Grantor’s predecessors, by aircraft either landing at or taking off from the Skagit Regional Airport have subjected the Property to Overflight Effects. Grantee has not sought, nor has either Grantor nor Grantor’s predecessors granted, permission to operate the Airport or to cause Overflight Effects upon the Property. See, SCC 14.16.210(6). (Tab 7.)

B. Use of an “Avigation Easement” to protect the Port from Legal Claims.

One of the most common tools to address impacts to airports by encroaching or incompatible development is the use of an “avigation easement” to protect the airport from legal claims by potentially effected property owners. It is felt that the use of such an easement, in conjunction with the continued recognition of a prescriptive easement, provides important protection to the continued

operation of the Airport, and also helps provide notice of airport operations and impacts to property owners.

Avigation easements attempt to protect airports from, primarily, three types of legal claims: (1) constitutional Fifth Amendment “takings” claims (in this case, the sub-species of takings claims are “physical invasion” claims); (2) common law nuisance claims; and (3) common law trespass claims. Washington courts recognize the *potential* for claims for compensation based on a governmental “taking or “damaging” of property resulting from provable impacts from aircraft overflights or airport operations. *See, e.g., Peterson v. Port of Seattle, supra; Highline School District 401 v. Port of Seattle, supra; Martin v. Port of Seattle*, 64 Wn.2d 309 (1964), cert. denied, 379 U.S. 989 (1965); *Ackerman v. Port of Seattle*, 55 Wn.3d 400, 77 A.L.R.2d 1344 (1980).

In light of the potential and substantial liability for takings and nuisance claims by owners of property surrounding airports, some airports have been requiring property owners to execute “avigation easements,” which are ultimately recorded with the local jurisdiction and thereafter “run with the land.” Avigation easements are one recognized measure to protect the airport from problems associated with new, encroaching development, legal claims and potential financial costs which could result in closure of the airport.

Katsos v. Salt Lake City Corp., 634 F. Supp. 100, 102 (D. Utah 1986), is an example of a reported court decision that recognized the use of avigation easements as a condition of receiving permit or development approval by the local jurisdiction. In *Katsos*, the avigation easement required by Salt Lake City was a prerequisite to development. Washington courts also recognize, at least implicitly, avigation easements that, if obtained, would preclude liability for “takings,” nuisance or other claims of damage to private property due to aircraft overflights or associated airport operations. *See, Peterson v. Port of Seattle, supra*, 94 Wn.2d at 483-485; *Highline School District 401 v. Port of Seattle, supra*. Statutory law also supports the use of avigation easements. *See generally*, RCW 14.07.010; RCW 14.08.030; and RCW 14.08.120.

Skagit County regulations have required the recording of avigation easements since the mid-1980’s, and the current, recommended proposal is to continue this policy and requirement, albeit with a revised form of avigation easement with stronger language as part of the larger subarea planning now in process. *See*, SCC 14.16.210(6) containing form of avigation easement (which would be required within the airport overlay which is based on the WSDOT guidelines discussed below). The Subarea Plan and DEIS Plan recognize the use of an avigation easement to achieve the

goals, Objectives and Policies aimed at assuring the continued use of the Skagit Regional Airport, and in meeting GMA requirements. (Tab 7.)

Other examples are provided in the record before the Planning Commission:

- “Bottom line: easements MUST be recorded prior to the issuance of any [building] permits. . . Period!” according to Don Knechtel, Airport Manager of Jack Northrop Field in Hawthorne (California). (Tab 11.)
- “Create an LOA with your Building Permit department which requires: A 7460-1, an Airport Management sign-off and avigation easements for any construction within your airport influence area.” Unidentified representative of Montgomery Field Airport in San Diego (California). (Tab 18.)
- The airport owner and surrounding jurisdictions should adopt an Airport Comprehensive Land Use Plan (CLUP) [similar to an airport master plan, which details what type of uses are compatible within certain areas around the airport, and what, if any, mitigation measures should be required for development, **“an avigation easement should be granted, a disclosure/covenant document must be recorded with the property, and structural coverage is limited to 25% for each parcel. Although these mitigation measures won’t keep future residents from complaining about the airport, they will protect the airport from frivolous lawsuits.”** Scott Smith of Oxnard Airport (California). (Emphasis added) (Tab 19.)
- A developer agreed to dedicate an avigation easement over the developer’s property for the benefit of the Santa Rosa, California airport, in order to conform with the airport’s land use compatibility plan; in turn, the developer was allowed to develop its property in accordance with the guidelines in the *Airport Land Use Planning Handbook* published by the Aeronautics Division of the California Department of Transportation. The Handbook sets the compatibility guidelines for all public airports in California. “Airport Land Use: Article, *“California Airport Saved form Encroachment”* July 3, 2001.

C. *Adoption of Noise Contour Maps.*

Noise is the single most significant and frequently asserted “impact” from airport and aircraft operations. In the airport survey results from Skagit County, their consultant identified noise as the predominant “impact” at virtually all of the airports studied. The State DOT in its WSDOT Report at page 22 bluntly concluded: “Noise is the most common negative impact associated with airports.” Based on the Skagit County research attached to the Memorandum, most airports surveyed either utilize or strongly recommend the use of noise contour or “exposure” maps to apprise the public in general and owners of surrounding property specifically of noise levels, and recommend use of noise contour maps to address and mitigate a noise impacts. The State DOT encourages the use of noise exposure mapping to manage and mitigate noise levels. WSDOT Report at pp. 24, 40-43.

According to the FAA, noise exposure mapping is required when noise values of 65 DNL or greater exists at an airport. “DNL” refers to the yearly day-night average sound level, in decibels. It is, in general, a cumulative exposure of such noise to individuals around airports. As will be explained further below, noise contour maps generally involve a scaled, geographic depiction of an airport with its noise contours, surrounding development, and forecast land uses. The federal government has emphasized, however, that although it has set the federal standard at 65 DNL, airport noise remains a local issue to be addressed by local entities, who are primarily responsible for planning, zoning and implementing actions to address compatibility with airport operations at the local level. (Tab 20.)

D. *Use and Recording of “Over-flight Disclosure and Acknowledgment Form”*

The use and recording of “over-flight disclosure forms” by land use applicants is also a commonly used measure to address, up front, land use incompatibility impacts due to encroaching development. *See generally*, Tabs above, which contain Dick Wilson’s “Airport Encroachment Information” survey, including Tab 21. Over-flight or airport “disclosure forms” are used by airports nationally to help comply with FAA regulations and to help perpetuate airport’s missions as essential public facilities and preserve benefits for area residents. Their use helps provide actual notice of airport impacts, thereby reducing the likelihood of complaints and expensive litigation later.

E. *Adoption of an Airport-Compatible Land Use Element.*

The ultimate goal of comprehensive planning for areas surrounding airports is to provide compatibility between airports and aircraft operation and surrounding land uses. Virtually all of the airports surveyed by Skagit County emphasized the importance of “compatible” – and consistent – land use planning for areas around or affected by airports. As the record establishes, many planning agencies which include an airport within their jurisdiction either excludes residential development, or strictly limit surrounding development to very low density residential uses in order to protect the airport and the public. In fact, many planning jurisdictions avoid conflicts entirely simply by prohibiting *all* types of residential development in areas within one, two or more miles surrounding the airport “safety” or “flight” zones. Some comments or examples from other airports or jurisdiction using their planning and zoning authority to satisfy compatibility, growth planning and FAA requirements are listed below:

- “Work with the economic development community on pushing for rezoning (or pre-zoning) of open land to industrial and commercial uses,” according to Robert Grierson of the Chico (California) Municipal Airport. (Tab 17.)

- “Ensure the enactment of a compatible land use/overlay district.” Lee Remmel Airport Director, DeKalb-Peachtree (Georgia) Airport. (Tab 15.)
- “Overlay zones and zoning restrictions for incompatible use are recommended.” Tim Ward, President, Alliance Air Services, Fort Worth (Texas) Alliance Airport. (Tab 22.)
- “If the planners for an Airport were to advocate the purchase of any property surrounding the airport where you believe development would have negative impacts on airport operations, the airport would be better able to control surrounding land use. A less certain, but possibly effective method would be to advocate adoption of an Airport Overlay Zone on surrounding land uses. This zone could place restrictions on surrounding land uses to protect and preserve airport operations.” Eric Johnson, Manager, Anacortes (Washington) Airport. (Tab 6.)
- “It would be important for the Port district to work with any existing planning agencies to create a plan for the future of the airport and its contiguous properties. Creation of an overlay district would also be important. Zoning and land use issues need to be addressed before contiguous landowners suffer from lost economic possibilities because they are dealt with after the fact. A current airport master plan would be of great value.” Bea Von Tobel, Airport Manager, Orcas Island (Washington) Airport. (Tab 23.)
- “Try to get an airport overlay area to restrict incompatible development for as large an area as possible surrounding the airport.” Cynthia Stewart, Consultant to Tacoma Narrows (Washington) Airport. (Tab 10.)
- **“Houses and airports don’t mix well,”** according to the Indianapolis (Indiana) Airport Authority. The authority is advising county officials to implement policies focused on commercial and industrial land uses around [Graham Field] instead of houses. **“It has been our experience that after an airport is built, residential or other noise-sensitive uses are permitted to develop around the airport which eventually leads to demands to close the airport due to airport operations and related noise impacts,”** said Robert A. Duncan, the Airport Authority’s general counsel. Article, “As Airport Develops, Land Concerns grow; Agency Urges County to Restrict Use of Land Near Graham Field to Business, Industry,” The Indianapolis Star, August 7, 2002. (Emphasis added).
- Prince Georges County (Maryland) created a restrictive zoning “overlay” for developments surrounding airports in the county to keep the airports from closing. The measures taken by the county should ensure the airports’ long-term survival by limiting homeowners’ noise exposure and making sure buyers in a wide area acknowledge their location with respect to the airports. Article, “Pilots Push for Broader Zoning,” Aviation Week & Space Technology, April 15, 2002.

An example of a more drastic measure taken by some jurisdictions includes condemnation, where the public entity owning the airport takes physical ownership of as much land as it can. For example, the Chico airport owns the land for one mile surrounding the airport. (Tab 17.) The City of Battle Creek, Michigan’s economic development agency bought a 62 acre-parcel near the airport as a defensive move, to protect the area from incompatible uses such as residential housing or mobile home parks. BCU Buys Land Near Airport, Battle Creek Enquirer, October 8, 2002.

Another approach is to adopt highly restrictive regulations or even exclude all residential development:

- “Integrate the airport in a land use system that supports **business, rather than residential** uses near the airport; try to get **only industrial uses, rather than any form of residential uses**, in areas adjacent to the airport on the basis of supporting the economy of the region and not just because it’s safer and **creates less controversy long-term.**” Cynthia Stewart, Consultant to Tacoma (Washington) Narrows Airport. (Emphasis added.) (Tab 10.)

Finally, the worse case scenario is the closure of an essential public facility. This concern was recognized by the Western GMHB in Achen v. Clark County, *supra*, where the Board found that the Clark County Aerodrome was closed largely because of Clark County’s failure to properly regulate the surrounding area. Final Decision and Order, p. 39. In Oxnard, California, according to the airport manager, city officials “love” new development and have not planned for compatible development around the airport. As a result, airport officials believe that because of this city’s emphasis on new development, the city would “. . . just as soon see the airport close.” Scott Smith, Manager, Oxnard Airport. (Tab 19.)

8. APPLICATION OF THE VARIOUS OPTIONS TO THE JCIA.

The purpose of this rather lengthy analysis is to educate and illustrate other measures – much more drastic in scope and effect – that *could have been* included in the proposed Comprehensive Plan/UDC amendment, but were not. Some of these measures, taken by other planning jurisdictions or airports across the country, include the following:

- Acquiring all land in the general vicinity of the airport through “eminent domain” (condemnation);
- Banning all residential development in the area;
- Limiting surrounding land uses to agricultural or open space only;
- Imposing highly restrictive, draconian building and development requirements;

- Requiring avigation easements;
- Requiring county recognition of a prescriptive easement in favor of the airport; and
- Requiring title notice within an adopted noise overlay zone.

A. *Airport Overlay Zone.*

As can be seen from the attached documents, an “Airport Overlay” is a commonly used method in other jurisdictions to address noise and compatibility concerns. (*See particularly*, Douglas and Skagit County Ordinances.) The Airport Overlay proposed by the Port is based on the noise contours developed during the 2002-2003 JCIA Master Plan Update process, which requires a noise analysis under federal law, FAR Part 150.² Airport noise exposure is measured in a day-night average sound level (DNL) and is used to analyze and characterize multiple aircraft noise events, and for determining the cumulate exposure of such noise to individuals around the airport. DNL means the 24-hour average sound level, in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for periods between midnight and 7:00 a.m., and between 10:00 p.m. and midnight. The yearly day-night average sound level means the 365-day average, in decibels.

Using best available technologies, a revised noise analysis for current and projected operations at JCIA projected noise levels through 2022. In general terms, the 75 DNL is considered to be significant and may have severe impacts that would require further study and mitigation. The 65 DNL level delineates moderate noise exposure and is the federal threshold for residential compatibility. The 55 DNL level represents minimal noise impacts and is below the regulatory threshold of the FAA standards. The 50 DNL is a highly conservative measure of noise impacts. By way of comparison, 50 DNL is comparable to the noise from a residential lawn mower.

Documented noise levels in excess of the federally established residential compatibility threshold of 65 DNL are limited to a very small area located wholly upon Port-owned property immediately surrounding the runways. However, as previously discussed, DNL levels and noise and compatibility concerns below the federal threshold are considered a matter to be addressed at the local level. As the Port and County know, individual and community responses to aircraft noise may differ, and for some individuals, even a moderate or low amount of noise may result in annoyance or irritation. Even if followed completely, noise abatement measures reduce, but do not eliminate all aircraft noise. The experience of numerous airports also shows that compatibility remains a concern

² A noise contour map with the contour lines overlaid on County maps through GIS will be provided at the Public Hearing.

even at rural densities, and that different property owners have different tolerance to noise levels. Moreover, in Jefferson County, properties can be purchased at a time when airport overflight is minimal or flight paths are not obvious, so that potential residential property purchasers are not always aware of possible exposure to airport operations, including low-level exposure to noise and vibrations.

As required by the 1998 Comprehensive Plan, County records will show that the County drafted a noise ordinance and that this approach was found to be consistent with GMA by the Washington State Department of Transportation, Aviation Division (Tab 24.). However, it met with great resistance by some property owners. The Port's proposal establishes an Airport Overlay based on the 55 DNL, a change from its original proposal that proposed a noise overlay based on the 50 DNL. The Overlay boundary is a fixed boundary, reflecting the projected 55 DNL contour through the year 2022. The Overlay has a rational basis because it is based upon best available technology and reflects those areas adjacent to the airport that are most affected by normal, routine airport operations (i.e., aircraft take-off and landing patterns). An Airport Overlay is not magic, however. The Port also wants to be sure that the County regulations advise the public that areas lying outside this fixed Overlay may also be subject to low level noise and vibration.

The other possible "Overlay District" is to use the Washington State Department of Transportation, Aviation Division, Land Use and Compatibility Guidelines. (Tab 25.) Other jurisdictions have used these guidelines as shown in the attached exhibits. The WSDOT guidelines set up 6 safety zone dimensions. The JCIA is in runway length category less than 4000 feet. From the runway to the north and south (Dimensions "E" and "F"), the zone would be 4500 feet (3/4 of a mile). This would put the north/south zone beyond Four Corners Road to the south and almost to Courtesy Ford to the north. From the runway to the east and west (Dimensions "S, which starts 200 feet off the runway, "T" and "U"), the zone would be 5200 feet (200 + 1000 + 1500 + 2500) on either end of the runway. This equates to just short of a mile to the east and the west, which is almost all the way across from Discovery Bay to Port Townsend Bay.³ The bottom line is that a "safety" zone based on the WSDOT guidelines would include properties well south of Four Corners Road and north to near Courtesy Ford, and would extend from just short of Discovery Bay to Port Townsend Bay to the east and west. The latter distance from east to west corresponds roughly to the 50 DNL contour. The 55 DNL is entirely within (and much smaller) than the WSDOT zones.

³ County Planning Staff will be providing a GIS map of these zones at the Planning Commission Public Hearing.

B. *Dissemination of Information Regarding the Impacts of Airport Operations.*

As discussed, various approaches to disseminating information exist. The WSDOT guidelines recommend aviation and obstruction easements up to Zone 5. A WSDOT letter dated December 5, 2000 recommended consideration of a Notice to Title and Noise Overlay Zone in conjunction with the airport. (Tab 26.) As recognized by many jurisdictions, disclosure recorded on title is an effective way of informing residents and potential purchaser of airport impacts. However, as the County is well aware, any form of disclosure perceived as a “Notice to Title” caused grave concern among single-family residential property owners in the vicinity of the airport. Further, at the rural densities surrounding the JCIA, the incompatibility of airport operations with residential development is not the overwhelming concern that it is at higher, non-rural densities. For these reasons, the Port is no longer proposing any recorded disclosure on existing or new single-family residential development within the Airport Overlay.

This does not mean, however, that no action should be taken. Indeed, the County recognized in its 1998 Comprehensive Plan that additional regulations were necessary, and mandated a noise overlay and noise ordinance. The proposed alternative is disclosure of airport impacts on adopted County maps which will be posted on the County website. This represents a public service in that it provides information to those property owners or potential property owners who seek information from the County. It implements RCW 36.70.547 by helping ensure the continued viability of the airport into the future, as land use and zoning codes change and Jefferson County continues to develop. To be effective and meaningful, the following are the minimum actions that must occur through County regulations:

- The maps are broadly disseminated on the website and any other applicable County and Port database;
- The maps include a notation accurately revealing the types of inconveniences and discomforts associated with being in proximity to normal airport operations;
- The maps advise that even if a property owner is not within the Overlay Zone it does not mean that they may, on occasion, be subject to low level noise and vibration;
- The County acknowledges that airport operations consistent with FAA guidelines are not a nuisance as a County regulatory matter, via a UDC provision clearly stating that Jefferson County does not consider airport operations that are consistent with FAA standards to be a nuisance (similar to the mineral resource provisions of the UDC);

- A disclosure of airport operations and impacts is given to development other than Type I permits (e.g., single-family residential) during the project application and approval processes;
- A disclosure statement is recorded on any subdivision or planned residential development (this is consistent with the current practice at the County, mirrors what other jurisdictions are doing, and has not been controversial.)

C. *Land Uses Within the Airport Overlay.*

Finally, development where large congregations of people gather is also an issue of grave concern that must be addressed through county regulations, as has been done by other jurisdictions based on the WSDOT zones discussed above. At the time of the adoption of the UDC, a WSDOT Aviation Division letter dated December 5, 2000 recommended that Jefferson County prohibit land uses such as schools, play fields, hospitals, nursing homes, manufactured mobile home parks, day care facilities and churches in proximity to the airport, and encouraged consultation with Prosecutor's Office and risk management regarding uses that draw a large concentration of people adjacent to airport. (Tab 26.) This same advice was given to the County at the time the 1998 Comprehensive Plan was adopted, by letter dated May 1, 1998. (Tab 27.) The WSDOT Land Use and Compatibility Guidelines recommend limiting such uses in accident safety zones 1-5. (Tab 24.) The intent is to limit the intensity of use in locations most susceptible to an off-airport accident. The Port has proposed the same limitation on uses within the Airport Overlay, a significantly smaller area than the WSDOT guidelines. (*Compare*, Douglas County, Skagit County and Kittitas County documents which appear to rely on the WSDOT recommendations to prohibit the above-named uses within an overlay zone, Tabs 5, 7 and 8.)

D. *Conclusion.*

In sum, here in Jefferson County we have the opportunity to protect the airport before serious conflicts with residential development occur, as has been the case in other jurisdictions, to the detriment of their airports and communities. It is not perfect, but, for example, disclosure on the County website will reduce the potential for conflict between the surrounding single-family residential property owners and airport operations by helping ensure that property is purchased with knowledge of airport operations and impacts. The measures proposed are less stringent than the approach taken by some jurisdictions, and may not represent the best possible protection for the future of the JCIA. Nonetheless, the Port has listened to the concerns of neighboring property owners, County staff and the County Commissioners and understands that the implementation of the

Comprehensive Plan language and the County's obligations under GMA is a balancing act. The Port believes that the current proposal, which is the result of much compromise, strikes an appropriate balance that provides some measure of protection for the airport, will have little if any impact on single-family homeowners, and fulfills the County's GMA duties to address compatibility and noise and safety issues at the local level.

9. FUTURE EXPANSION OF USES AT THE JCIA.

As the airport operator, the Port must protect and perpetuate the airport's mission and satisfy federal (FAA) requirements and planning laws. Under GMA, the County has an obligation to support the expansion of essential public facilities, which includes adopting land use regulations and policies that support the continued economic viability of the airport.

The Port's statutory purpose includes economic development in Jefferson County. This has been expressly recognized in the Jefferson County Comprehensive Plan: CP 7.5: "The Port of Port Townsend's legislative authority should be utilized as a tool to implement industry and trade strategies; including the promotion of employment opportunities, the consolidation and parceling of property, and the development of infrastructure to meet the needs of industry consistent with comprehensive plans and development regulations." The RCWs give Ports broad authority to engage in economic development:

- Authorization/Purposes/Powers: Port districts are authorized to be established for the purposes of "acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements." RCW 53.04.010.
- Acquisition of Property - Levy of Assessments: A port district may "acquire. . . all lands, property, property rights, leases or easements necessary for its purposes and may exercise the right of eminent domain in the acquisition or damaging of all such lands, property, and property rights, and may levy and collect assessment upon property for the payment of all damages and compensation in carrying out its purposes. . ." RCW 53.08.010.
- Acquisition and Operation of Facilities: A port district is authorized to construct, condemn, purchase, acquire, add to, maintain, and operate "sea walls, jetties, piers, wharves, docks, boat landings, and other harbor improvements, warehouses, storehouses, elevators, grain-bins, cold storage plants, terminal icing plants, bunkers, oil tanks, ferries, canals, locks, tidal basins, bridges, subways, tramways, cableways, conveyors, administration buildings, fishing terminals, together with modern appliances and buildings for the economical handling, packaging, storing, and transporting of freight and handling of passenger traffic, rail and motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, and

any combination of such transfer and terminal facilities, commercial transportation, transfer, handling and storage and terminal facilities, and improvements relating to industrial and manufacturing activities within the district, and in connection with the operation of the facilities and improvements of the district, it may perform all customary services, including the handling, weighing, measuring and reconditioning of all commodities received. . . .” RCW 53.08.020.

- Industrial Development: Article 8, section 8 (amendment 45) of the Washington State Constitution provides in pertinent part: “The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development . . . shall be deemed a public use for a public purpose. . . .” Consistent with this provision, RCW 53.08.040 allows a port district to improve its lands “by dredging, filling, bulkheading, providing waterways or otherwise developing such lands for sale or lease for industrial and commercial purposes.”
- Improvements of Lands for Industrial and Commercial Purposes: “A district may improve its lands by dredging, filling, bulkheading, providing waterways or otherwise developing such lands for industrial and commercial purposes. . . .” RCW 53.08.040.
- Leasing Powers: The port district is authorized to lease all “lands, wharves, docks and real and personal property owned and controlled by it, for such purposes and upon such terms as the port commission deems proper. . . .” RCW 53.08.080.
- Park and Recreating Facilities: “A port district may construct, improve, maintain, and operate public park and recreation facilities when such facilities are necessary to more fully utilize boat landings, harbors, wharves and piers, air, land, and water passenger and transfer terminals, waterways, and other port facilities authorized by law pursuant to the port’s comprehensive plan of harbor improvements and industrial development.” RCW 53.08.260.
- Economic Development Programs Authorized: “It shall be in the public purpose for all port districts to engage in economic development programs. In addition, port districts may contract with nonprofit corporations in furtherance of this and other acts relating to economic development.” RCW 53.08.245.
- Studies, investigations, surveys - Promotion of Facilities: All port districts . . . shall be, and they are hereby authorized and empowered to initiate and carry on the necessary studies, investigations and surveys required for the proper development, improvement and utilization of all port property, utilities and facilities, and for industrial development within the district when such industrial development is carried out by a public agency, institution or body for a public purpose, and to assemble and analyze the data thus obtained and to cooperate with the state of Washington, other port districts and other operators of terminal and transportation facilities for these purposes, and to make such expenditures as are necessary for said purposes, and for the proper promotion, advertising, improvement and development of such port properties, utilities and facilities. . . .” RCW 53.08.160.
- Tourism Promotion Authorized: Any port district, “acting through its commission, has power to expend moneys and conduct promotion of resources and facilities in the district or general area by advertising, publicizing, or otherwise distributing information to attract visitors and encourage tourist expansion.” RCW 53.08.255.

- Miscellaneous. In addition, by other statutes, port districts are authorized to perform such functions as the operation of foreign trade zones (RCW 53.08.030), the acquisition and operation of trade centers (RCW 53.29.020), the operation of various enumerated toll facilities such as bridges, tunnels and the like (RCW 53.34.010), and the maintenance and operation of municipal airports (RCW 14.08).

Growth Management case law has also evolved to recognize that expansion of public facilities is an essential part of their future success. GMA planning requirements, in “the identification of essential public facilities, the broadest view should be taken of what constitutes a public facility.” WAC 365-195-340(2)(a)(i). The comprehensive plans should contain local criteria for the identification of essential public facilities, focusing on the public need for the services involved, with the critical concern being that the facility be needed locally. WAC 365-195-340(2)(a)(i)-(iii).

Moreover, the courts have interpreted “siting” to include airport expansions. Des Moines v. CPSCGMHB, 98 Wn.App. 23, 33 (1999); accord Port of Seattle v. City of Des Moines, CPSCGMHB 97-3-0014 at 7, 12 (holding “airports are specifically identified essential public facilities. . . there is no credible argument that expansion of an existing essential public facility is not within the scope of RCW 36.70A.200”). The Courts have defined the term “preclude” as meaning “to render impossible or impracticable.” Des Moines, 98 Wn.App. at 34 (upholding the Central Board’s interpretation of “preclude.” “Impracticable” means “incapable of being performed or accomplished by the means employed or at [one’s] command.”

This requirement means that a local government may not, through policies or strategy directives, effectively preclude the siting of an essential public facility, including its necessary support activities. Port of Seattle, CPSCGMHB No. 97-3-0014 at 8; *See also*, Children’s Alliance v. City of Bellevue, CPSCGMHB No. 95-3-0011, (FDO July 25, 1995). Any comprehensive plan provision or development regulation which forces siting that is “impracticable” or “unsuitable” or that “adversely affect the economic viability” of an essential public facility effectively precludes an essential public facility and is prohibited under the GMA. *See*, Port of Seattle, at 8; Children’s Alliance, at 103; Hapsmish v. City of Auburn, CPSCGMHB No. 95-3-0075c (May 10, 1996), at 42; DOC v. City of Tacoma, CPSCGMHB NO. 003-3-0007 (FDO Nov 20, 2000), at 49. *See also*, Achen v. Clark County, *supra* at page 45 (“the concept of ‘siting’ involves future applications but also, particularly in the case of airports, requires efforts towards maintenance of current facilities.”); Abenroth v. Skagit County, *supra* at page 54, (master planned portion of UGA complied with the GMA since the Port’s analysis showed that its land is well planned for, will be efficiently served, and will provide for industrial uses compatible with the airport).

In the past ten years, the airport has operated at a loss of over two hundred and eight-eight thousand dollars (\$288,033):

1994:	\$21,931
1995:	\$28,604
1996	\$23,269
1997	\$43,105
1998	\$16,053
1999	\$47,603
2000	\$39,026
2001	\$46,872
2002	\$11,802
2003	\$9,768

See POPT JCIA Summary of Revenues and Expenses. (Tab 28.) This means Jefferson County taxpayers have been subsidizing the airport for many years. The Port is very interested in halting this reality, and desires to start a new trend, that of making the airport self-supporting. The majority of airports in Washington State are currently characterized by industrial development, even within rural settings. With this in mind, the Port and County have been discussing various options to make the airport more economically viable.

The question has been asked whether the Port could just make up this deficit by charging increased and/or additional landing fees. The Port currently charges \$.30 per 1000 pounds for commercial aircraft, on a voluntary payment basis, which amounts to about \$250/year. This fee schedule is on the low end, but on researching the issue, Port staff found that even if fees were increased to \$.50 per 1,000 pounds, the amount used in the State of Alaska for commercial aircraft, the increase in fees would be minimal, and could even drive away potential commercial carrier(s) who also generate revenue for the Port through fuel purchases, rental of office space, etc.

The Port does not charge landing fees for recreational aircraft, and is not aware of any public, general aviation airport that does so. However, even if it did, such charges would not generate income and in fact would cause an even greater deficit. Jefferson County International Airport has approximately 24,000 recreational planes land per year. Fees at the higher end of \$.50 would generate \$12,000 per year. Because most of the planes at arriving at JCIA are about 1000 lbs. they would only generate \$.50 per landing. However to collect those fees around the clock would require about \$75,000 to \$100,000 in staff costs. This is the reason that General Aviation airports do not collect fees from recreational users.

In essence, the Port researched various options and concluded that appropriately scaled non-aviation industrial development at the JCIA and surrounding Port-owned property warrants serious consideration by the County, which is the same conclusion reached during the 1998 Comprehensive Plan process but needs to be further refined.

To understand the Port's current proposal, some background is important. The Port's original proposal in 2003 was to amend the Comprehensive Plan to support future expansion of the uses at the JCIA to include rural-scale, non-aviation related development, so as to allow the Port to attract tenants to give it a greater opportunity to operate and maintain the JCIA, while creating job opportunities in the county. The proposal was contemplated in the 1998 Plan, which contained the following goals and policies:

GOALS:

EPG 2.0 Ensure the continued viability of the Jefferson County International Airport as a transportation hub.

POLICIES:

EPP 2.2 Cooperate with the Port of Port Townsend to develop a sub-area plan to guide future development at the Jefferson County International Airport. This sub-area plan may evaluate non-aviation uses and activities that are compatible with the airport facility and surrounding area. The sub-area plan should address the following siting issues for all new uses and activities proposed for siting at the Jefferson County International Airport and all plans for facilities expansion:

- a. Compatibility with airport operations as an essential public facility;
- b. Provision of infrastructure consistent with the requirements of the GMA;
- c. Land use capability with surrounding area;
- d. Potential environmental impacts;
- e. Availability of alternative sites;
- f. Public health and safety;
- g. Sub-area plan amendment process for possible future acquisition of adjacent properties

On further review, however, County staff questioned the necessity to accomplish these goals through sub-area planning. The two governments also realized that the airport master plan update alone would not accomplish the planning analysis necessary for any proposed expansion of uses. That document is FAA-driven and is intended to look at future airport operation needs and facility requirements, rather than local planning and compatibility under the GMA.

Instead, the dual goals of operating the airport as a self-sufficient and self-supporting public enterprise, and regulating the airport in a manner that facilitates economic development in the county

so long as permitted under the GMA, could be accomplished in a variety of ways: zoning changes to allow rural-scale light industrial and manufacturing uses with protective measures in place; designation of the JCIA and surrounding properties as part of a UGA; designation of the JCIA and surrounding properties as an industrial land bank site; or designation as a major industrial development site.

All of these possibilities have their positive attributes and drawbacks and need to be explored further. The Port's intent at this juncture is to simply keep open the possibilities by proposing modest UDC and CP text changes to reflect the changes in the GMA (such as the ability to plan for an industrial land bank in Jefferson County) and current policy considerations, while always bearing in mind the need to ensure the continued economic viability of the airport. The exact mechanism will be considered and analyzed in the future, with public input and GMA requirements in mind. The current intent is to simply add policy language to the Comprehensive Plan to better frame the issues and policies behind that discussion. It is also intended to reaffirm the County's obligations under the GMA; the County's support of the airport as an essential public facility and economic asset in the county; and the County's willingness to consider regulations allowing appropriately scaled industrial development non-aviation related development within a defined area as long as consistent with the GMA.