THE BRIEFING PROJECT EPISODE 15 – SUITS

December 11, 2018

Thank you. I'm Steve Edmiston, here for The Briefing Project, where I seek to provide the briefing you asked for, but did not receive last year, from the FAA and your staff. In my very first comment on January 30th – titled "The Briefing You Should Have Had" – I stated that the briefings you received were incomplete. Today, I'm commenting on one of the omissions from those briefings – lawsuits over the type of flight procedure changes and increased frequencies we face at Sea-Tac.

Here are three considerations.

First. It is likely that with 97,000 additional annual flights in the last four years, and another proposed 80,000, a lawsuit – just like the Winter in the Game of Thrones – is coming. This is not because we are a litigious society. This is different. Lawsuits are an integral part of a witches-brew ecosystem of FAA self-supervised airport expansions, where the FAA serves as both the judge and jury of its own conduct. The U.S. Court of Appeals is simply the first time any city, state, or community can compel independent review.

Second. While the lawsuits are unique, they also bear certain hallmarks. Two examples. Hallmark one is the use of marketing-driven community engagement playbooks with no actual weight granted to citizens in the decision-making outcomes. And hallmark two is an airport operator that elevates the goal of economic growth and pleasing industry stakeholders over community health and environmental protection.

Third consideration. The right type of lawsuit works. The best example is the FAA's setback in last year's *City of Phoenix case.* First, note the teams. Phoenix didn't partner with the FAA, didn't yield to a vision of economic growth. Instead, it sued the FAA to protect its citizens. And then America's second highest court sent a powerful message—that the standard FAA environmental review playbook failed to identify potential harm to humans, the environment, and historic neighborhoods, homes, parks, and failed to provide for sufficient involvement of city officials and community groups. Read the case. It was a very angry Court of Appeals.

And just last month, the entire State of Maryland filed suit over BWI-Thurgood Marshall airport. Again, note the teams. Maryland didn't frame the FAA as a partner, didn't default to an economic growth vision or the needs of industry stakeholders. Maryland chose citizens and the environment first and sued the FAA including for the failure to assess the impact to the human environment dating back to 2012, citing the 2017 National Defense Authorization Act.

The good news is you five can still choose your team. Thank you for providing a citizen two-minutes to comment.

CITY OF PHOENIX PLAYS "ROGUE ONE" TO FAA'S DEATH STAR

Steve Edmiston

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The Federal Aviation Administration's relentless nationwide rollout of satellite-navigation-based airport expansions was dealt a significant setback in *City of Phoenix v. Huerta and Federal Aviation Administration*, No. 15–1158 (D.C. Cir., August 29, 2017).

The Court of Appeals sent the FAA a powerful message—that the FAA's playbook for implementing satellite-based route changes and

frequency increases (sometimes known as "NextGen") in Phoenix failed to adequately identify the potential harm to humans, the environment, and historic neighborhoods, homes, parks, and sites, and it failed to give sufficient notice of the impacts to, and provide for sufficient involvement of, city officials and community groups. The FAA's actions —changing flight routes and increasing flight frequencies at the Phoenix Sky Harbor International Airport—were deemed "arbitrary and capricious" under three different federal statutes—the National Historic Preservation Act; the National Environmental Policy Act (NEPA); and the Department of Transportation Act. The Court even admonished the FAA for tactics that appeared designed to seduce the City to delay filing suit, in order to claim the City waited too long to file suit.

The case provides a useful roadmap for other airport neighbor cities, with a virtual step-by-step guide for reviewing the FAA's actions to determine whether the FAA failed to provide adequate notice and information to the proper individuals and groups, failed to collect needed information, and otherwise failed to comply with three federal statutes, before rolling out its satellite-based navigation procedures.

Along the way, the Court provides some truly remarkable holdings.

First, the National Historic Preservation Act (NHPA) suddenly becomes a critical component for community pushback against the FAA. The Court found the FAA failed to determine that no historic structures were adversely affected and failed to notify required parties and provide relevant documentation. The FAA's notice was deemed inadequate because the FAA was required to confirm, and did not confirm, that the individuals notified were the correct individuals for assuring compliance with the NHPA. Critically, for airport communities suffering from NextGen in other cities, the FAA failed because it did not

provide the public with information about *how action effects historic properties and seek public comment and input.*

> Additionally, unless confidential information is involved, agencies must "provide the public with information about an undertaking and its effects on historic properties *and* seek public comment and input." *Id.* § 800.2(d)(2) (emphasis added). The FAA admits, however, that it did not make "local citizens and community leaders" aware of the proposed new routes and procedures, J.A. 364, and it does not claim that any confidentiality concerns applied.
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> Further, by keeping the public in the dark, the agency made it impossible for the public to submit views on the project's potential effects—views that the FAA is required to consider. *See* 36 C.F.R. § 800.5(a); *see also Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) ("Interested persons cannot request an [environmental assessment] for actions they do not know about, much less for actions already completed.").

The more you (don't) know.

Second, under the National Environmental Policy Act (NEPA), the FAA wrongfully avoided a more detailed environmental impact statement by erroneously applying a "categorical exclusion" to the route changes. The Court again provided the roadmap, holding no categorical exclusion can apply if there are "extraordinary circumstances," which exist when the action is "likely to be highly controversial on environmental grounds." Perhaps the most excoriating quote in the case is this: "*Common sense reveals otherwise. As noted, the FAA's proposal would increase by 300% the number of aircraft flying over twenty-five historic neighborhoods and buildings and nineteen public parks, with 85% of the new flight traffic coming from new jets. The idea*

that a change with these effects would not be highly controversial is 'so implausible' that it could not reflect reasoned decision-making."

> concerns." FAA Br. 80. Common sense reveals otherwise. As noted, the FAA's proposal would increase by 300% the number of aircraft flying over twenty-five historic neighborhoods and buildings and nineteen public parks, with 85% of the new flight traffic coming from jets. The idea that a change with these effects would not be highly controversial is "so implausible" that it could not reflect reasoned decisionmaking. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Common sense? What a concept.

The FAA was also called to task *for failing to take into account its prior experiences in similar circumstances at other airports*. In other words, the FAA's divide-and-conquer strategy, claiming each airport is different, was rejected. The FAA should have provided a "reasoned explanation for… treating similar situations differently."

> The FAA also erred by deviating from its usual practice in assessing when new flight routes are likely to be highly controversial, without giving a "reasoned explanation for . . . treating similar situations differently." *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014). In assessing proposed route changes at airports in Boston, Northern California, Charlotte, and Atlanta, the FAA has relied on its general observation that a proposal is likely to be highly controversial if it would increase sound levels by five or more decibels in an area already experiencing average levels of 45-60 decibels. But here the agency said exactly the opposite and

If it looks like a duck...

The practical implication? The FAA is being held to account for the Nixon question—what did it know and when did it know it—in relation to how bad the FAA NextGen satellite-based navigation rollouts have been in all prior cities. And because they have all been bad, and because the FAA did not explain why the prior problems were not likely to be problems at Phoenix, the FAA's failure to conduct a full EIS was arbitrary and capricious.

Third, the Transportation Act holdings may provide the most unique and powerful roadmaps of all. The Court found the FAA failed to consult with the City "in assessing whether new routes would substantially impair the City's parks and historic sites," and "FAA was wrong to find the routes would not substantially impair these protected areas." The key rationale that will cause the FAA severe heartburn is this: "*the FAA cites no evidence that it consulted with these city officials on historic sites and public parks in particular.*"

> consultation duties required. Besides, the FAA cites no evidence that it consulted with these City officials on historic sites and public parks in particular. Thus, the FAA's consultation process was arbitrarily confined.

It's not just who you consulted with—it's whether you consulted with the right people.

In other words, the FAA can't go through the motions in a consultation, because the devil is in the details *and* in the content of the consultation.

Also under the Transportation Act, if the use of a park is so negatively impacted by overflights that it amounts to a taking, the FAA action can only proceed if there is no prudent and feasible alternative to using the park. Here, the problems for the FAA suddenly magnify exponentially. Reliance on the FAA's go-to hole card—compliance with the NEPA Part

150 Noise Study—may not be sufficient to determine noise impact if "*a quiet setting is a generally recognized purpose and attribute*" of historic residences, neighborhoods, and sites. The Court agreed that a Part 150 alone does not provide adequate information on this required topic. Critically, this was true even where the sites were urban: "*even in the heart of a city some neighborhoods might be recognized as quiet oases.*"

Finally, the Court used the Transportation Act to hit the nail on the head for other impacted airport communities across the country. In addressing the FAA's argument that overflights had already historically occurred in these communities, the Court shut the door with common sense: "*But those earlier flights involved propeller aircraft that flew far less often so the homes beneath them might still have been generally recognized as "quiet settings.*" In other words—historical uses are not the same as present uses and the FAA can't try to avoid its obligations by claiming it has already made some noise.

> Thus, it was unreasonable for the agency to rely only on the Part 150 guidelines in concluding that noise from the new flight routes would not substantially impair the affected historic sites. As a result, that conclusion lacks substantial supporting evidence. For both these reasons, we find that the agency's substantial-impairment analysis was arbitrary and capricious.

One Part 150 does not fit all.

It must be noted that this case comes with a dire warning to all—that timing matters. The rule is that a petition must be filed within 60 days after FAA "final action" issues. The problem in Phoenix? The routes had been in effect for six months. They were too late. But the Court provided a yet another "save" because it found the FAA repeatedly communicated it was continuing to look into the noise problem, was

open to fixing the issue, wanted to work with the City and others to find a solution. This led to the conclusion that "reasonable observers to think the FAA might fix the noise problem without being forced to do so by a court." In other words, the FAA led the community groups and city down a path of cooperation. The Court clearly did not like this tactic. "*While we rarely find a reasonable-grounds exception, this is such a rare case*." The Court finished with a truly remarkable identification of nefarious intent: "*To conclude otherwise would encourage the FAA to promise to fix the problem just long enough for sixty days to lapse and then to argue that the resulting petitions were untimely*."

This case will require some ongoing thought and consideration—and certainly, the FAA may well appeal. At first blush, on the outside looking in, it's a winner for long-suffering airport neighbor communities. Perhaps for now, like the impossible-odds-facing Rogue One crew and Rebel Alliance that follows, the Force is now with us—for at least a brief period of time.