July 25, 2014

John Speckin
Airport Obstruction Standards Committee
Region and Center Operations
Office of Finance and Management
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

FAA Docket No: 2014-0134

Re: National Real Estate Organizations' Comments on FAA's Proposed Changes to Part 77 Regulatory Criteria

Dear Mr. Speckin:

The undersigned national trade associations (Associations)[1] represent all aspects of the U.S. real estate industry covering development, ownership, management, brokerage, lending and investment in the commercial, residential, hospitality, health care, industrial, retail and other structures that comprise our built environment.

We oppose the Federal Aviation Administration's (FAA) *Proposal to Consider the Impact of One Engine Inoperative Procedures in Obstruction Evaluation Aeronautical Studies.*[2] The

[1] American Hotel & Lodging Association; American Resort Development Association; Building Owners and Managers Association International; CCIM Institute; International Council of Shopping Centers; Institute of Real Estate Management; National Apartment Association; National Association of Home Builders; NAIOP, the Commercial Real Estate Development Association; National Association of Real Estate Investment Trusts; National Association of REALTORS®; National Multifamily Housing Council; Society of Industrial and Office Realtors®; The Real Estate Roundtable; and the U.S. Chamber of Commerce.

[2] 79 Fed. Reg. 23,300 (April 28, 2014).

agency proposes to change the longstanding interpretation of its rules for determining hazards in navigable air space, by suggesting the inclusion of one engine inoperative (OEI) procedures into Part 77 regulations. As the FAA stated in its online presentation for the public hearing held on June 25, 2014, the intended OEI changes are "not about safety." We thus oppose the agency's proposed action because it is not grounded in any demonstrated justification to safeguard the safety of airline passengers, building occupants, or the neighborhoods and communities surrounding our nation's airports. Moreover, the Associations are concerned that the FAA will effectuate changes to its Part 77 interpretations in a rushed manner that fails to consider a full range of economic, environmental, and constitutional impacts in contravention of federal laws, orders, and court decisions.

Congressional attention to the FAA's proposed action is heightened.[3] Bipartisan letters to the Secretary of Transportation and the FAA Administrator have sought assurances that any Part 77 changes must satisfy all Administrative Procedure Act (APA) requirements,[4] with a cost-benefit analysis to enable review by the White House Office of Management and Budget and its Office of Information and Regulatory Affairs (OMB/OIRA).[5] Thus far, the FAA has ignored these entreaties. Legislation supported by our Associations has also been introduced[6] in an effort to ensure OMB/OIRA's oversight and completion of a cost-benefit

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[3] See, *e.g.,* H.R. Report 113-464 (May 27, 2014) ("The [Committee on Appropriations] directs FAA to carefully consider all comments that are submitted on this proposed policy and to work with relevant stakeholders to preserve safety and efficiency while balancing the important needs of communities, airports and airport users. The Committee urges FAA to consider whether a cost benefit analysis should be required in the final policy on obstruction evaluation aeronautical studies.").

[4] 5 U.S.C. § 551, *et seq.*

[5] See, *e.g.,* February 19, 2014 letter to Secretary Foxx from Representatives Moran (D-VA), Cohen (D-TN), Salmon (R-AZ), and Schweikert (R-AZ) ("Given the far-reaching effects of this change on local economies across the country, it is vital that any actions by FAA on this issue are conducted with input from [OMB and OIRA] to analyze the real-world effects of such change on economic development and private property owners, especially in areas surrounding airports"); March 18, 2014 letter from to Secretary Foxx from Senators Warner (D-VA) and Kaine (D-VA) (likewise calling for OMB/OIRA involvement because "[t]he proposed change could significantly – and adversely – affect jobs, economic development, and local tax bases in major metropolitan areas across the country"); March 26, 2013 letter to Administrator Huerta form Reps. Garcia (D-FL), Ros-Lehtinen (R-FL), Diaz-Balart (R-FL), Wasserman Schultz (D-FL), F. Wilson (D-FL), A. Hastings (D-FL), and Radel (R-FL) ("We would like you to clarify whether FAA intends to develop its new OEI policy as a proposed rule under the Administrative Procedure[ ] Act, or through some other mechanism").

[6] H.R. 4623, sponsored by Reps. Moran (D-VA), Cohen (R-TN), Franks (R-AZ), Gosar (R-AZ), Salmon (R-AZ), Schweikert (R-AZ), and F. Wilson (D-FL). Available on Thomas at: http://thomas.loc.gov/cgi-bin/bdquery/D?d113:13:./temp/~bdAOAd::|/bss/|.

analysis as required by Executive Order (EO) 12866.[7] With respect, it does not instill much confidence in the real estate community that the proposed OEI changes are considered in a fair and balanced manner, where repeated requests from Congress and stakeholders calling for OMB/OIRA review have not been heeded.

The Associations summarize our concerns as follows:

- ***The proposed OEI change should be abandoned.*** We urge the FAA to reject the proposed change to include OEI procedures in Part 77 regulations because – as the agency recognizes – it lacks any substantiated public safety basis.

- ***Any change to include OEI in Part 77 criteria must be supported by an APA rulemaking record – which must include a cost-benefit analysis that assesses economic impacts on all affected stakeholders.*** With no safety reasons backing the proposed regulatory changes, the FAA's overriding justifications are economic in nature. Should the FAA move forward and alter its longstanding Part 77 rules and determinations, it must conduct a full, 360-degree assessment of the economic impact on *all* stakeholders – including the impacts on land development interests and local communities. In this regard, the FAA must compile a rulemaking record that satisfies the APA. That record must include a cost-benefit analysis developed in accord with EO 12866, as well as a key study (discussed below) explaining the proposal's foreseeable impacts on development projects and airport communities in markets across the nation.

- ***Incorporation of OEI procedures into Part 77 rules would be a "major federal action" that triggers processes required by the National Environmental Policy Act.*** The FAA's proposed action is a "major Federal action significantly affecting the quality of the human environment" – and is thus within the scope of the National Environmental Policy Act (NEPA)[8] and implementing regulations of the White House Council on Environmental Quality (CEQ).[9] As the proposed OEI changes can encourage sprawl and discourage greater densities for viable transit-oriented development (TOD) projects, at this juncture the FAA should assess environmental impacts including possible increased greenhouse gas emissions (GHG) and climate change effects, impediments to "smart growth" policies such as programs allowing transfer of development and air rights, noise impacts, and effects on aquatic and habitat resources.

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[7] 58 Fed. Reg. No. 190 (Oct. 4, 1993) available at http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.

[8] 42 U.S.C. § 4332(C).

[9] 40 C.F.R. Parts 1500-1508.

- ***The FAA should consider whether its proposed regulatory action might infringe on constitutionally protected property rights in certain circumstances.*** The Fifth Amendment to the U.S. Constitution provides that, should government decide to "take" private property by regulation for a "public use," then it must pay "just compensation" to affected land owners. Furthermore, EO 12630 directs that government actions (including proposed rule and policy changes) must be "undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment …."[10] The FAA's proposed action may restrict valuable land development and transferrable air rights that attach to properties around airports, as recognized by state and local laws. However, it does not appear that (to date) the FAA has given any consideration to assess whether and under what circumstances the Part 77 rule changes might work a taking of private property. In the event a taking may arise, nor does it appear that the FAA has considered what level of government might be liable to pay just compensation to affected landowners – the FAA itself, or a local jurisdiction that becomes bound to enact local laws and ordinances for the sole purpose to effectuate the property restrictions occasioned by the incorporation of OEI procedures into Part 77 determinations.

I. The FAA's obligations under the Administrative Procedure Act require it to compile a rulemaking record that considers economic impacts on the real estate community, and should include a cost-benefit analysis that satisfies Executive Order 12866.

The APA is the statute that governs federal rulemaking. When an agency changes its existing regulatory interpretations it must follow APA processes.[11] Here, the proposed change completely reverses the FAA's regulatory interpretation to not take OEI into account for Part 77 rules – upending over seventy years of the agency's existing practice. Thus, a full legislative rulemaking is required.

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[10] Executive Order 12630, "Governmental actions and interference with constitutionally protected property rights" (March 15, 1988), available at http://www.archives.gov/federal-register/codification/executive-order/12630.html.

[11] See *Alaska Professional Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997) (APA processes required where FAA changed an interpretation that had been in effect for over 30 years; "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").

An agency must comply with "procedures laid down" in the APA when it promulgates a "legislative rule."[12] Key among these requirements is the agency's obligation to compile a fact-based, evidentiary rulemaking record to ensure that any final agency action is " 'based on a consideration of the relevant factors,' and rests on reasoned decisionmaking."[13] "Reasoned decisionmaking," in turn, requires the agency to "'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[14] The whole point of soliciting stakeholder input through notice and comment is to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'"[15] That is, "'[t]he requirement that an agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.'"[16] Moreover, an attempt by an agency to style its regulatory proposal as merely "voluntary" or a "change in policy" will not justify the evasion of APA mandates[17] – including the development of a fact-based evidentiary record that serves as the foundation for any well-reasoned decision.

At the June 25, 2014 online public hearing,[18] the FAA stated that safety reasons do not motivate the proposed changes to the Part 77 regulations. Rather, the agency explained that its proposal is prompted by anticipated economic consequences arising from the need for aircraft to reduce passengers, cargo, and fuel load on takeoff to achieve a higher climb

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[12] *Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1020 (D.C. Cir. 2000). The APA defines "rule" as an "agency statement of general or particular applicability and future effect" that, going forward, is intended to guide or alter the conduct of the regulated community. 5 U.S.C. § 551(4).

[13] *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

[14] *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

[15] *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1044 (D.C. Cir. 1987).

[16] *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (quoting *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)).

[17] See, *e.g., Columbia Broad. Sys. v. United States*, 316 U.S. 407, 418 (1942) (rejecting FCC's argument that radio station were free to do "as they choose" as a basis for agency to avoid APA requirements). "They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts." *Id.* at 422. See also *Appalachian Power Co. v. EPA,* 208 F.3d 1015 (D.C. Cir. 2001) (agency' styled "guidance document" had the practical effect of a "legislative rule" for APA purposes); Moreover, just because an agency decides to style one of its pronouncements as "technical guidance" or "interpretive" is "self-serving[]" and not determinative where it indeed intends to bind parties into compliance. *Gen. Elec. Co. v. EPA,* 290 F.3d 377, 383-85 (D.C. Cir. 2002).

[18] This public meeting was fundamentally flawed and failed to provide a meaningful opportunity for interested persons to participate in the FAA's administrative procedure. *See* Letter from Kenneth P. Quinn, Partner, Pillsbury Winthrop Shaw Pittman, to Hon. Michael P. Huerta (July 21, 2014).

gradient.[19] The agency, however, must consider economic impacts on *all* affected stakeholders. It acknowledges that "zoning authorities and private insurers may be reluctant to permit construction of the structure, given the FAA's determination that it poses a hazard to navigation."[20] The Associations submit that the FAA must prepare a cost-benefit analysis – that fully considers the economic impacts on local economic development and real estate interests – as a prerequisite to inform any ultimate decision as to whether or not OEI procedures are incorporated into Part 77 hazard determinations.

Executive Order 12866 defines the general contours of the requisite cost-benefit analysis.[21] Among other things, the Order explains that agency decisions must be based "on the best reasonably obtainable scientific, technical, economic and other information concerning the need for, and consequences of, the intended regulation,"[22] and that regulations should be "tailor[ed] … to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities) …."[23] For "significant regulatory actions" – such as the FAA's proposal here – the Order specifies that White House OMB/OIRA must be provided with an assessment of costs and benefits arising from the agency's action.[24]

For purposes of preparing a cost-benefit analysis that satisfies EO 12866, the Associations refer the FAA to a study prepared by the Weitzman Group (Weitzman Study),

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[19] See slide 7 of FAA PPT presentation, "Public Meeting: Consider the Impact of One Engine Inoperative (OEI) Procedures in Part 77 Hazard Determinations" (June 25, 2014).

[20] 79 Fed. Reg. at 23,302, col. 2.

[21] Executive Order 12866 § 1(a) states: "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated), and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."

[22] *Id.* § 1(b)(7).

[23] *Id.* § 1(b)(11).

[24] *Id.* § 6(a)(3)(C). "Significantly regulatory action" means "any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal communities …." *Id.* § 3(f)(1). "Rule" tracks the APA definition at 5 U.S.C. § 551(4), and includes "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." *Id.* The proposed OEI rule changes considered here plainly qualify as "significant regulatory action" within the meaning of EO 12866.

attached to these comments.[25] The Weitzman Study states that that the FAA's proposal could likely result in greater limitations on building height and increased restrictions on the availability of valuable private land development and air rights:

> The effect of the OEI change would be that the economic responsibility to provide for sufficient flight clearances would be shifted from the airlines, where it has been since the FAA began evaluating hazards to air navigation over seventy years, to individual property owners. Proposed construction exceeding these new criteria would receive FAA determinations of hazard, which may impact the ability to obtain financing, insurance, necessary permits, and comply with local zoning requirements. While not likely to be applied retroactively, the policy would likely apply to any redevelopment of projects on sites with existing FAA determinations of no hazard. When local entitlement agencies adopt the FAA's advisory opinions of "hazard" or "no hazard," the result may be a "downzoning" of a development site or a building, limiting a property's development potential and value.[26]

As national trade Associations we recognize the importance of thoughtful, well-planned strategies that promote economic development, while taking into consideration the interests of all affected stakeholders. We realize that transportation – and more specifically, our airports – play a vital role in stimulating economic growth in the communities and regions they serve. We further recognize that the FAA must frequently consider many (and sometimes competing) interests in managing the safety and efficiency of our national air transportation system. The Associations, however, are concerned that the proposed OEI changes fail to adequately account for the economic impacts raised in the Weitzman Study. It is not apparent that the agency has thus far considered economic impacts occasioned by the proposed Part 77 changes on either new development projects currently in planning phases, or on existing structures that may become non-conforming if the proposed changes take effect (such as the impact on lenders, insurers, and land use permitting authorities).

As the Weitzman Study explains, the following developments and communities could be impacted should the FAA incorporate OEI procedures into Part 77 rules:

- **Florida, Massachusetts, New York, and Texas** all have more than 50 occupiable buildings that would be affected, and together with California, are home to 51.8% of all existing occupiable affected buildings nationwide. Illinois' buildings escalate the percentage of non-conforming structures under the OEI proposed rule changes to

[25] The Weitzman Group, Inc., Real Estate Consultants, "A Brief Study of the Scope and Possible Effects of The Potential FAA One Engine Inoperative Policy Relative to real Estate Development Rights and Property Values" (Nov. 12, 2012).

[26] *Id.* at 1.

57.3%. Further adding the number of non-conforming buildings in Virginia and Hawaii would escalate the total number affected occupiable buildings in these eight states would comprise two-thirds of all building obstructions in the U.S. and its Territories.

- **Northern Virginia:** Proposed and existing structures that would exceed OEI height criteria under the proposed rule changes include:
  - The Arlington National Cemetery columbarium for cremated remains
  - Several projects in Rosslyn (including Rosslyn Plaza, Sedona, Slate, and 1812 North Moore Street)
  - Wilson School and Fire Station #10 Redevelopment
  - Boeing's new headquarters
  - Eisenhower Gateway Project (near Eisenhower Metro)

- **California:** In California alone, there are 120 existing occupiable obstructions that are affected, and another 787 proposed obstructions.
  - California's existing obstructions total 15.9% of all existing building obstructions nationwide, and its proposed obstructions total 20.2% of all those that are proposed.
  - The average existing occupiable California obstruction exceeds the height limitation by an average of 98.7 feet, while the proposed obstructions exceed the limitation by an average of 117.8 feet.

- **Miami:** In Miami, there are a number of major projects that exceed the proposed height limitations, and more that are presently under construction or recently completed where the policy's effects may hinder the financial success of the development, putting the feasibility upon which investment occurred at risk. Some of the notable potential obstructions are summarized as follows.
  - The Palmer Lake area is located east of Miami International Airport and a byproduct of the creation of the Miami Intermodal Center.
  - Maefield Development's proposed Arsht Center Parking Garage project of a 100', 8-story parking garage, 450,000 square feet of retail space, and 20-story electronic signage billboards.
  - The Casino Miami Jai Alai project was completed last winter, and exceeds the OEI height limitations by approximately 24 feet.
  - Satander Global Property plans to raze the building at 1401 Brickell to construct a 50-story tower on the 2.02-acre site.
  - Resorts World Miami is being proposed for a 30-acre site in downtown Miami by Genting Group. The project would include 5,000 hotel rooms, 700,000 square feet of convention and meeting space, 1,000 residential units, and countless retail stores and entertainment amenities. Resorts World Miami's $3 billion investment would likely be subject to the OEI policy determinations, and because this is a multi-building, multi-phased project, each subsequent phase would be at risk of being limited in height

- Miami World Center is being proposed for development by the Falcone Group and Centurion Partners, with a notable investment made by CIM Group.
- Several projects that have not yet begun construction or are mid-development, but that would likely be affected by the proposed OEI changes, including IconBay, Brickell, Millicento 1100, Brickell CitiCentre and 1101 Brickell with Miami's tallest building, rising 824 feet.

- **Boston:** In Boston, all of the proposed development on Fan Pier and Pier 4 exceed the prospective height limitations. These projects comprise many billions of dollars of prospective construction as well as existing investment in land and infrastructure. Along with South Station Tower, the Congress Street Hotel, a new dorm for Northeastern University, the expansion of the Berklee College of Music, and the new Liberty Mutual Tower, the affected projects include initiatives that are important to the City of Boston, its institutions, and the continuing development of its sense of place and unique identity.

- **Chicago:** Near O'Hare International Airport in Chicago, projects like the Village of Rosemont's proposed outlet mall and The Park at Rosemont entertainment district exceed the prospective policy's height limitations. The development of these projects are exemplary of efforts to breathe new life into aging suburban locations with new destination-oriented development. Projects like these are important to the local governments, businesses and residents.

- **Phoenix:** In Phoenix, the recently completed $341 million Maricopa County Court Tower downtown exceeds the OEI criteria by over 25 feet, and the recently completed Virginia G. Piper Sports and Fitness Center at the Arizona Bridge to Independent Living would be unable to add any height with roof-top equipment or signage without a new determination. In Tempe, the recently completed First Solar Building at Papago Gateway Center exceeds the height limitations by nearly 80 feet, and any future development in Papago Gateway Center would also likely be impacted. Also in Tempe, Zaremba Group's West 6th Apartments comprise two towers that exceed the policy's limitation by 209 feet at maximum. Further, the following bullet points summarize several proposed projects that may be impacted:
  - The recently completed Hotel Palomar in downtown Phoenix.
  - Future development in Papago Buttes Corporate Park in Tempe.
  - Sky Tower is being proposed for development by Continental Group for a site in Tempe, and at 436 feet tall would exceed the OEI limitations by nearly 217 feet.
  - The third tower to Hayden Ferry Lakeside, being developed by Sunbelt Holdings.
  - The Grand at Papago Park Center, which is a multi-phased, mixed-use development proposed as the final phase to the 350 acre Papago Park Center.

- **New York:** In New York City, there are a number of proposed obstructions mostly comprising modest buildings in Queens, although two particular projects are higher-

profile, representing important new investments in the community or local economy.

- The expansion of the Aqueduct Raceway Casino by the Genting Group.
- The proposed redevelopment of the landmark RKO Keith Theater in Flushing with new retail space and a residential tower.

In sum: Where (as here) an agency's interpretation represents a "change [of] course" from a longstanding regulatory position, it must "supply a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"[27] APA requirements to develop an evidentiary rulemaking record – which must form the basis for regulatory action – are necessary where an agency proposes to "change the rules of the game" [28] and adopt "substantive changes in prior regulations."[29] In the case of the FAA's proposed Part 77 changes to incorporate OEI procedures, the APA, interpretive case law, and EO 12866 compel a rulemaking course of action requiring the agency to consider the economic impacts on real estate and local development interests such as those discussed in the Weitzman Study – and further to prepare a cost-benefit analysis for White House OMB/OIRA review.

II. The FAA is required to satisfy the requirements of the National Environmental Policy Act and conduct a programmatic analysis of the environmental impacts occasioned by the proposed Part 77 regulatory changes.

In the Associations' view, the FAA must comply with NEPA at this time.

NEPA "is our basic national charter for protection of the environment."[30] The statute triggers an environmental review process when agencies undertake "major federal actions significantly affecting the quality of the human environment."[31] NEPA is designed to "prohibit[ ] uninformed, rather than unwise, agency action."[32] It does not mandate or dictate a particular substantive outcome, but requires agencies to take a "hard look" at the environmental consequences of their actions before reaching a final decision:

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[27] *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) (quoting *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970)).

[28] *Sprint Corp v. FCC,* 315 F.3d 369, 374 (D.C. Cir. 2003).

[29] *Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 94 (D.C. Cir. 1997).

[30] 40 C.F.R. § 1500.1(a).

[31] 42 U.S.C. § 4332(C).

[32] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 351 (1989).

> NEPA has twin aims. First, "it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process. Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action …. Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action.[33]

The White House Council on Environmental Quality (CEQ) has promulgated detailed regulations to implement NEPA.[34] The FAA has issued its own separate NEPA implementation order (effective since March 20, 2006) that recognizes the supremacy of CEQ's regulations; the agency's 2006 order "implements the mandate of NEPA, as defined and discussed in the CEQ regulations, within the programs of the FAA. *The order is not a substitute for the regulations promulgated by CEQ, rather, it supplements the CEQ regulations by applying them to FAA regulations."*[35]

CEQ's regulations define "major federal actions" – which trigger NEPA processes – to include:

> *[N]ew or revised* agency rules, regulations, plans, *policies or procedures* …. [36]

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[33] *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 97, 100 (1983) (citations omitted).

[34] 40 C.F.R. pts. 1500-1508.

[35] U.S. Dep't of Transp., Fed. Aviation Admin, Order 1050.1E, CHG 1, "National Policy, SUBJ: Envrionmental Impacts: Policies and Procedures," ch. 1 ¶ 9 at p. 1-6 (March 20, 2006) (emphasis supplied). Available at: http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.current/documentnumber/1050.1 (FAA NEPA Compliance Order). The agency believes that Part 77 hazard determinations are merely "advisory actions" that do not rise to the level of "major federal actions." See FAA NEPA Compliance Order, ch. 3, ¶ 301a at p. 3-1. Whether NEPA covers specific hazard determinations posed by particular objects or structures in navigable airspace is outside the scope of these comments. However, based on the plain language of CEQ's governing regulations, NEPA review *is* triggered in the present situation – regarding the FAA's broadly applicable proposed changes to significantly alter existing rules, policies and procedures through the "new" incorporation of OEI considerations into Part 77.

[36] 40 C.F.R. §§ 1508.18(a) (emphasis supplied). CEQ regulations also explain that, for NEPA purposes, "Federal actions tend to fall within" the category of "[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the [APA] …." *Id.* § 1508.18(b)(1). In further direction to agencies, CEQ has stated "[a]n EIS ***must*** be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive." See Q&A 24a, in "Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," available at 46 Fed. Reg. 18,026 (March 23, 1981), and online at http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm (hereafter, "NEPA 40 Questions").

In the Federal Register notice announcing the proposal, the FAA itself styles its contemplated action as one to establish:

> *[N]ew policy* that would consider the impact of one engine out *procedures* in the aeronautical study process conducted under *existing* 14 CFR part 77 criteria ….[37]

Based on the FAA's very own description of its actions, the proposed Part 77 changes fit squarely within CEQ's preeminent NEPA regulations.

The Associations are concerned that the FAA may seek to avoid NEPA's requirements at this juncture – *i.e.,* proposing to change longstanding Part 77 rules – with an eye toward individualized NEPA review when subsequently considering a particular, dedicated OEI surface at an airport as depicted on the Airport Layout Plan (ALP). [38] If the FAA proceeds with its proposed course of action, we agree that NEPA review would be required in defining specific OEI surfaces and ALP approvals. But required environmental reviews later, at a granular level, do not relieve the agency of its obligation to follow NEPA processes *now* – at the *programmatic* level. CEQ's regulations provide:

> Environmental impact statements [EISs] may be prepared, and are sometimes required, for *broad Federal actions* such as the adoption of new agency programs or regulations. Agencies shall prepare statements on broad actions so they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.[39]

CEQ regulations provide further guidance for agencies to prepare programmatic EISs on "broad actions," and suggest that the agency's proposal may be evaluated in terms of geography, "including actions occurring in the same general location," or "generically," by "including actions which have relevant similarities, such as common timing, impacts,

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[37] 79 Fed. Reg. at 23,300, col. 3 (emphasis supplied).

[38] According to the agency, "approval of proposed changes to the ALP will require consideration of potential environmental impacts under [NEPA]. As part of the NEPA review, the FAA will identify and appropriately address any disproportionately high and adverse impacts on minority and low income populations in accordance with the Executive Order on Environmental Justice." 79 Fed. Reg. at 23,303, col 1.

[39] 40 C.F.R. § 1502.4(b) (citation omitted) (emphasis supplied). CEQ further explains that an environmental impact statement (EIS) "*must be prepared* if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive … In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act … or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS." NEPA 40 Questions, #24a.

alternatives, methods of implementation, media, or subject matter."[40] In general, the NEPA process requires an agency to assess the environmental impacts that may arise from a range of regulatory alternatives (including the alternative of taking "no action"),[41] as well as preparation of a "record of decision" that identifies all of the alternatives considered by the agency. [42] For present purposes, it is pertinent that CEQ guidance explains that the action agency must consider whether its proposed conduct creates "conflict" with local land use plans and policies, "acknowledge and describe the extent of those conflicts," and evaluate whether the federal action will "impair the effectiveness of land use control mechanisms for the area."[43]

Significant environmental impacts are foreseeable consequences of the proposed changes to incorporate OEI procedures into Part 77 criteria. The Weitzman Study explains that "[l]imiting density in the areas affected by the policy change has the effect of pushing development outward, encouraging sprawl, and limiting the amount of space available in core employment, residential, and tourism areas."[44] An interagency partnership between the U.S. Departments of Transportation and Housing & Urban Development, and the U.S. Environmental Protection Agency, has examined and fostered the environmental, social and economic benefits of "sustainable communities" – which commonly encompass higher density developments in and around transportation hubs like airports. According to the DOT-HUD-EPA "Sustainable Communities Partnership":

> Sustainable communities are places that have a variety of housing and transportation choices, with destinations close to home. As a result, they tend to have lower transportation costs, reduce air pollution and stormwater runoff, decrease infrastructure costs, preserve historic properties and sensitive lands, save people time in traffic, be more economically resilient and meet market demand for different types of housing at different price points. Rural, suburban, and urban communities can all use sustainable

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[40] *Id.* § 1502.4(c).

[41] NEPA 40 Questions, # 1a (NEPA requires agency to consider a "range of alternatives" which includes "all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion for eliminating them"); Question 3 (40 C.F.R. § 1502.14(d) requires NEPA alternatives analysis to consider the environmental effects of taking "no action").

[42] 40 C.F.R. § 1502(b) (in cases where an environmental impact statement is prepared, a record of decision must "specify[ ] the alternative or alternatives which were considered to be environmentally preferable").

[43] NEPA 40 Questions, # 23.

[44] Weitzman Study, at p. 3.

> communities strategies and techniques to invest in healthy, safe and walkable neighborhoods ….[45]

Furthermore, the organic principles espoused by the federal Sustainable Communities Partnership provide that more compact development and higher density land uses can result in environmental benefits such as to "decrease household transportation costs, reduce our nation's dependence on foreign oil, improve air quality, reduce greenhouse gas emissions, and promote public health."[46] Federal support toward existing communities through "strategies like transit-oriented, mixed-use development and land recycling—[can] increase community revitalization and the efficiency of public works investments and safeguard rural landscapes."[47]

Likewise, promoting "compact, mixed use development" and "infill development in appropriate locations"[48] are among the smart growth strategies favored by EPA to build resilient communities. Another EPA smart growth report addresses the interactions between land use, transportation, and environmental quality.[49] The report "[p]rovides evidence that certain kinds of land use and transportation strategies can reduce the environmental and human health impacts of development," and EPA finds that:

- Development in and adjacent to already-developed areas can help protect natural resources like wetlands, streams, coastlines, and critical habitat.
- Residents of transit-oriented developments are two to five times more likely to use transit for commuting and non-work trips than others living in the same region.
- In general, the greater the population density of an area, the less the area's residents tend to drive. Doubling residential density across a metropolitan region could reduce household vehicle travel by between 5 and 12 percent.

Well recognized and respected "think tanks" like the Urban Land Institute and Smart Growth America have also studied how transportation-related CO_2 may arise from compact development. These groups have considered how government land use polices may

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[45] See http://www.sustainablecommunities.gov/index.html.

[46] See http://www.sustainablecommunities.gov/aboutUs.html.

[47] *Id.*

[48] US-EPA, Office of Sustainable Communities, Smart Gorwth Program, "Using Smart growth Strategies to Create More Resilient Commuhities in the Washington, D.C. Region" (Nov. 2013), available at http://www.epa.gov/dced/pdf/mwcog-guidebook-final-508-111313.pdf.

[49] US-EPA, Our Built and Natural Environments: A Technical Review of the Interactions Between Land Use, Transportation, and Environmental Quality (2nd ed.), available at http://www.epa.gov/smartgrowth/built.htm.

encourage (rather than dissuade) higher density development and thus play a role in reducing the greenhouse gas emissions that cause climate change.[50]

Of interest to the Associations is any impact of the FAA's proposed action on local laws and programs that allow for transferrable development rights (TDRs). A report by the group, Resources for the Future, estimates that there are at least 140 TDR programs used in communities across the U.S. to manage local development.[51] A common element in many smart growth "tool kits," TDR programs may allow "the exchange of zoning privileges from areas with low population needs, such as farmland, to areas of high population needs, such as downtown areas. These transfers allow for the preservation of open spaces and historic landmarks, while allowing urban areas to expand and increase in density."[52] Similarly, the ability of land owners to transfer air rights above existing or planned buildings might be seriously impacted by the proposed rule, and thus further restrict the positive environmental results from higher density, transit-oriented development.[53] As the American Planning Association has recognized for half a century, "[t]he incentive to develop structures on air rights is a result of two interrelated aspects of urban growth — rising land values and expanding transportation facilities. The effect of these is strongest in the central business district where land values are highest and where transportation systems are generally focused."[54]

In addition, the FAA itself has recognized that:

> When evaluating proposed airport projects, airport noise is often the most controversial environmental impact FAA examines. Airport development actions that change airport runway configurations, aircraft operations

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[50] See generally Urban Land Inst. and Smart Growth America, *et al.*, Growing Cooler: The Evidence on Urban Development and Climate Change (2007).

[51] Margaret Walls and Virginia McConnell, *Transfer of Development Rights in U.S. Communities—Evaluating Program Design, Implementation, and Outcomes* (Sept. 2007), available at http://www.rff.org/rff/Documents/Walls_McConnell_Sep_07_TDR_Report.pdf.

[52] See, *e.g.,* National Ass'n of REALTORS®, *Field Guide to Transfer of Development Rights,* available at http://www.realtor.org/field-guides/field-guide-to-transfer-of-development-rights-tdrs.

[53] See Weitzman Study, pp. 8-9, ¶ 15 ("Out of the 3,851 total existing obstacles reported by the FAA, 757 of them are parts of occupiable buildings. These buildings are located in 46 U.S. States or U.S. Territories, and the average existing non-conforming obstructure exceeds the maximum advisable building height under the policy by over 87 feet. This is roughly the equivalent of an eight or nine story building. In addition to existing structures, there are an additional 3,879 obstacles proposed for development that exceed the policy's height advisories …. These proposed obstacles are located in 52 U.S. States or U.S. Territories, and they exceed the policy's height limitations by an average of nearly 78 feet.")

[54] American Planning Ass'n, Leopold Goldschmidt, *Air Rights,* Information Report No. 186 (May 1964), available at https://www.planning.org/pas/at60/report186.htm (referencing 1964 report).

> and/or movements, aircraft types using the airport, or aircraft flight characteristics may affect existing and future noise levels.[55]

In fact, the FAA provides its own detailed noise analyses for incorporation into the broader NEPA analysis for airport projects.[56] However, the FAA has ignored the potential noise impacts resulting from the OEI changes, including the noise from larger aircraft or increased power operations.

To conclude, the agency must not give short shrift to its responsibilities for programmatic NEPA compliance that assesses the environmental, social and smart growth impacts that may result from modifying Part 77 to include OEI procedures. The FAA has a responsibility to comply with NEPA – now, at this stage, for its proposed action to change Part 77 rules.

III. The FAA should conduct an analysis of the Fifth Amendment takings implications of its proposed action on private property rights, to satisfy Executive Order 12630.

The Fifth Amendment to the U.S. Constitution requires that government must pay just compensation when it takes private property for public use.[57] When a government's regulation of land use goes "too far," a property owner may bring a claim in "inverse condemnation" seeking just compensation from the agency that has committed the taking.[58] An on-point executive order requires federal agencies to pause and consider the takings implications of their conduct. EO 12630 directs that government actions (including proposed rule and policy changes) must be "undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment …."[59] This order further states:

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[55] Fed. Aviation Admin., *Environmental Desk Reference for Airport Actions,* Ch. 17 at 1 (Oct. 2007).

[56] *Id.* at 8.

[57] "… [N]or shall private property be taken for public use, without the payment of just compensation." U.S. Const. amend. V.

[58] See, *e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

[59] Executive Order 12630, "Governmental actions and interference with constitutionally protected property rights" § 1(a) (March 15, 1988), available at http://www.archives.gov/federal-register/codification/executive-order/12630.html.

> Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.[60]

To date, the FAA has not given any indication that it has considered the potential takings implications that may arise from incorporating OEI procedures into the Part 77 analysis. As the Weitzman Study explains, the agency's proposal can foreseeably result in: "downzoning" of sites (thereby limiting a property's development potential and value); local entitlement agencies relying on more restrictive FAA hazard determinations to limit otherwise allowable development; and severe diminishment of available of air rights (*e.g.,* OEI procedures might result in determining that nine building stories pose hazards to navigable airspace).[61]

To ensure that the proposal has a "well reasoned basis for fiscal accountability" and meets the other objectives of EO 12630, the Associations respectfully submit that the FAA should assess whether and how its proposed action may raise the specter of a taking. The following constitutional principles are thus relevant:

- A taking may arise under the 3-factor *Penn Central* inquiry that balances: (1) the character of the government's action; (2) the economic impact of the proposed regulation; and (3) the extent to which the regulation interferes with reasonable investment-backed expectations.[62] The U.S. Supreme Court considers the *Penn Central* test the "polestar" of takings jurisprudence.[63] Accordingly, any well-reasoned decision by the agency should recognize and consider the *Penn Central* factors in the context of the building and development projects discussed in the Weitzman Study.

- Categorically, a taking might arise where a government regulation denies all economically viable use of property.[64] In this regard, the "relevant parcel" becomes a key inquiry to decide the scope of the burdened property interest that has

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[60] *Id.* § 1(b).

[61] Weitzman Study at pp. 1-9.

[62] *Penn Central,* 438 U.S. 104, 124 (1978).

[63] *Palazzolo v. Rhode Island,* 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Agency,* 535 U.S. 302, 336 (2002).

[64] *Lucas v. South Carolina Coastal Comm'n,* 505 U.S. 1003 (1992).

arguably been taken.[65] To the extent that air rights or development rights are treated as separate units of property and have their own intrinsic value under TDR programs,[66] they might be wiped-out or drastically devalued under the FAA's proposed action here.[67]

- Government regulation might be a taking under the unconstitutional conditions doctrine through application of the so-called "*Nollan-Dolan*" test, if there is neither an "essential nexus" nor "rough proportionality" between the government's demand and the proposed land use.[68] In gauging takings liability under *Nollan-Dolan*, the FAA would bear the burden to "make some sort of individualized determination" that any building restrictions or servitude caused by the Part 77 rule changes are "related both in nature and extent to the impact of the proposed development."[69]

- As the Federal Register notice for the proposal recognizes, "[t]he FAA is not authorized to grant or deny construction projects …. However, zoning authorities … may be reluctant to permit construction of the structure, given the FAA's determination that it poses a hazard to navigation."[70] Accordingly, in the event that a taking arises as a result of the application of any revised Part 77 rules that incorporate OEI considerations, it is not clear which level of government might bear the responsibility to pay just compensation. Would it be the local land use authority that denies a permit or downzones property? Would it be the FAA, whose rules caused such a permit denial or downzoning where a development project would proceed but for the Part 77 regulatory revisions? The Associations are concerned that the FAA has not considered whether its proposed action might foist upon local

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[65] See, *e.g., Lucas,* 505 U.S. at 1016 n. 7. In determining the relevant parcel, the U.S. Court of Appeals for the Federal Circuit (which has jurisdiction over takings claims against federal agencies) takes a "flexible approach designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1181 (Fed. Cir. 1994).

[66] See *supra* notes 51-54.

[67] Takings cases arise in the context of government regulation that impacts or devalues property and air rights that may be transferred to other development projects. See, *e.g., Suitum v. Tahoe Reg'l Planning Agency,* 117 S.Ct. 1659, 1671 (1997) (Scalia, J., concurring in part and concurring in the judgment) (when a regulation has rendered the property owner's land completely useless, TDRs can serve only to compensate the landowner, not to absolve the agency of a *Lucas*-type categorical taking); *Penn Central,* 438 U.S. at 130 (takings challenge based on the denial of a permit to develop the air space above Grand Central Terminal in New York City).

[68] *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Koontz v. St. John's River Water Mgmt. Dist.,* 133 S.Ct. 2586 (2013).

[69] *Dolan,* 512 U.S. at 391.

[70] 79 Fed. Reg. at 23, 302, cols. 1-2.

governments the burden to litigate takings liability and pay compensation where appropriate. An EO 12630 takings assessment should contemplate and address that scenario.

To be clear, the Associations do not contend that the FAA's proposed action will result in a Fifth Amendment taking in all situations. Nor do we assert that the agency must contemplate detailed factual scenarios where a property owner may assert a viable takings claim. However, we do believe – consistent with the scope of EO 12630 – that the FAA must engage in an appropriate level of analysis that fairly considers situations where the proposed OEI rule changes might go "too far" and infringe on landowners' rights safeguarded by the Fifth Amendment. In this regard, the Associations suggest that the development restrictions identified in the Weitzman Study, and the development and building projects discussed therein, provide a contextual framework for a proper takings analysis that the agency should undertake and include in the administrative record.

[CONCLUSION FOLLOWS ON NEXT PAGE]

IV. Conclusion

- The Associations recommend that the FAA withdraw its proposed action to incorporate OEI procedures into its Part 77 rules for determining hazards to navigable airspace. Such an action is not grounded on any proven concern for the safety of passengers, building occupants, or communities near airports.

- If the FAA presses forward with its proposed action, then it must compile a rulemaking record that includes the Weitzman Study to consider the economic impacts on real estate development rights and property values. It must also complete a robust cost-benefit analysis for review by White House OMB/OIRA, as directed by EO 12866.

- The FAA should conduct an appropriate level of NEPA analysis at this time, to consider the programmatic environmental, social and other consequences of its proposed changes to Part 77 rules.

- The FAA should conduct, and include in the administrative record, an appropriate analysis that considers the Fifth Amendment takings implications of its proposed action consistent with EO 12630.

Thank you for the opportunity to comment on this important issue.

American Hotel & Lodging Association
American Resort Development Association
Building Owners and Managers Association International
CCIM Institute
Institute of Real Estate Management
International Council of Shopping Centers
National Apartment Association
National Association of Home Builders
NAIOP, the Commercial Real Estate Development Association
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