IN THE SUPREME COURT OF IOWA

No. 17-1458
Carroll Co. No. EQCV039422

THE CARROLL AIRPORT COMMISSION (OPERATING THE ARTHUR N. NEU MUNICIPAL AIRPORT),
Plaintiff-Appellee

vs.

LOREN W. DANNER and PAN DANNER,

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR CARROLL COUNTY
HONORABLE WILLIAM C. OSTLUND, JUDGE

APPELLEE'S FINAL BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court using the Appellate EDMS system, which will send notification of such filing to the following:

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/s/ Gina C. Badding
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ROUTING STATEMENT

This case is appropriate for transfer to the Iowa Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(1) and 6.1101(3)(a) because it presents the application of existing legal principles to the issues raised in the appeal.

STATEMENT OF THE CASE

A. Nature of the Case

Loren and Pan Danner are appealing from a district court ruling that granted the petition for abatement of a nuisance filed by the Carroll Airport Commission (Operating the Arthur N. Neu Municipal Airport) and required the removal or modification of a grain leg structure erected by the Danners within protected airport space.

B. Course of Proceedings

On July 23, 2015, the Carroll Airport Commission filed a petition for abatement of nuisance against Loren and Pan Danner. App. 7. The petition alleged the Danners erected a grain leg structure on their farm, the height of which violated applicable federal, state, and local law and constituted an airport hazard. *Id.* The commission requested the immediate removal or modification of the grain leg to conform to the restrictive standards established for the airport. *Id.*

The Danners filed a motion to dismiss the petition for lack of subject matter jurisdiction based on the farm mediation statute, Iowa Code chapter 654A (2015). App. 9. Although the commission did not believe this action required chapter 654A mediation, it consented to proceed with mediation. App. 12, 16. A mediation report and release was subsequently issued, following which the Danners filed an answer to the petition denying its allegations and raising the affirmative defenses of their possession of a building permit, estoppel, and federal preemption. App. 14-17. The matter was set for a bench trial on March 17, 2017. Prior to the trial, the Danners stipulated that their grain leg exceeded the protected area of the airport by 60 feet or more and consequently constituted a violation of the airport's protected airspace. App. 28. The Danners further stipulated they did not apply for a variance prior to the erection of the structure, although after the structure was built they did receive a "no-hazard" determination from the Federal Aviation Administration (FAA). *Id.*

Following presentation of testimony and exhibits at trial, the district court entered a decision granting the commission's petition for abatement of a nuisance. App. 32. The court found the grain leg was an airport hazard and nuisance under Iowa Code sections 329.2 and 657.2(8). *Id.* The court rejected the Danners' affirmative defenses, including their

assertion that the no-hazard determination they received from the FAA preempted the state and local regulations regarding airport hazards. *Id.*

The Danners filed a post-trial motion arguing broadly that under the recent Iowa Supreme Court case of *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017), "mirror image" statutes are preempted by federal law. App. 43. The commission resisted this motion, asserting *Martinez* was not applicable to the issue presented in this case. App. 46-55. The commission also sought an enlargement of the district court's ruling to set forth a date by which the nuisance must be abated with attendant penalties if not completed by that date. App. 41.

The district court entered an order on September 5, 2017, denying the Danners' motion for judgment notwithstanding the verdict and new trial but granting the commission's motion to enlarge. App. 59. Pursuant to this order, the Danners were directed to abate the grain leg nuisance by May 1, 2018, with a per diem penalty of $200 "for each day after May 1, 2018 that the nuisance has not been abated." *Id.* The Danners filed a notice of appeal on September 14, 2017. App. 56.

STATEMENT OF FACTS

The Arthur N. Neu Municipal Airport is located in Carroll County, Iowa, just outside the city of Carroll. App. 28. The airport has been

designated as one of only six “Enhanced Airports” in western Iowa, and it relies to a large extent on federal funding for many of its facility and airport improvements. App. 65, 74 (Tr. 83:9-25; 135:7-12). It has become a regional airport hub in western Iowa, with more activity than all the surrounding county airports combined. App. 66, 67, 74, 75 (Tr. 84-85; 135:14-25; 136:1-25). The future plans for the airport include continued runway expansion and improvements to attract larger and heavier aircraft. App. 77 (Tr. 138:1-25).

Defendants Loren W. Danner and Pan Danner have lived on a farm located just down the road from the airport since 1968. App. 28. They can see the airport from their residence and are familiar with its proximity to them. App. 104 (Tr. 209:18-21). The Danners’ farm is located directly within the airport horizontal zone for height limitations as established by local ordinance. App. 28.

In the summer of 2013, the Danners erected a structure known in the agricultural industry as a grain leg on their farmland. *Id.* The grain leg services three grain bins owned by the Danners and two larger bins owned by Paul Halbur and Martin Halbur. *Id.* The grain leg is less than 10,000 feet horizontally from the approach end of Runway 31 of the airport and is thus within the designated protected airspace for the airport. *Id.* The top of

the grain leg is 126.47 feet AGL (above ground level) and 1413.43 about MSL (mean seal level). *Id.* The protected airspace area above the airport is 1354 above MSL. *Id.* The grain leg thus exceeds the protected area of the airport by 60 feet or more. *Id.* It is located directly within the landing traffic pattern at the airport. App. 89 (Tr. 168:5-12).

The Danners stipulated that their grain leg is located in the protected airspace and that it exceeds the allowable vertical minimum for the protected airspace. App. 28. Any such violation of the airport's protected airspace requires a variance. *Id.* The proper procedure to obtain a variance is to submit an application to the Board of Adjustment, which must then provide a copy of the application to the commission for an opinion as to the aeronautical effects of such a variance. App. 176 (City of Carroll Ord. §171.05); Iowa Code § 329.11. That procedure was not followed by the Danners.

Instead, before building the grain leg, the Danners applied for and received a building permit from Carroll County Zoning Administrator, Carl Wilburn, in January 2013. App. 28. Wilburn granted the Danners an agricultural exemption from all zoning regulations on the same day they made their permit application. *Id.* Although the building permit application states in bold letters that "[a]ll farm buildings or structures are subject to the

Airport Zoning Ordinances which regulates heights and emissions in and around the airport air space as depicted on the attached diagram," no notice of the application or the Danners' permit was given to the Commission. *Id.*; *see also* App. 20. The Commission was accordingly unable to give its opinion as to the aeronautical effects of the grain leg. App. 28.

Construction of the grain leg commenced with soil testing in April 2013. App. 98 (Tr. 190:11-18). The first indication the commission had that a grain leg was being erected was on Thursday, June 6, 2013, when the airport field base operator, Don Mensen, noticed construction cranes on the Danner real estate. App. 28. Commission member, Greg Siemann, also noticed the erected grain leg on Sunday afternoon, June 9, 2013. *Id.* On the following Monday, Siemann contacted Wilburn and the Carroll City Zoning Commissioner, Greg Schreck. *Id.* Wilburn informed Siemann that he had issued the Danners' building permit and agricultural exemption and that he was unaware of the federal, state, and local ordinances concerning the airport zoning regulations.[1] *Id.*

The commission contacted the Danners and informed them that a variance was required for any violation of the airport zoning regulations and

[1] The Carroll County Board of Adjustment subsequently rejected the Danners' after-the-fact application for a variance from these regulations. App. 28.

that the proper procedure to obtain a variance had not been followed. App. 81 (Tr. 148:1-12). The commission further informed the Danners that the Commission would not consent to the violation of its protected airspace. App. 81-82 (Tr. 148:12-25; 149:1:7).

In July 2013, after the grain leg was already erected, the Danners received a Federal Aviation Administration (FAA) "DETERMINATION OF NO HAZARD TO AIR NAVIGATION" letter stating that the structure did exceed obstruction guidelines but would not impose a hazard if appropriate lighting was placed on top of the structure. App. 150. A "MARKING & LIGHTING RECOMMENDATION ** (REVISED)" was issued on November 12, 2013, revising the previously issued lighting requirement to a "red obstruction lighting system," which was subsequently installed by the Danners. App. 154-60. The FAA no-hazard letter specifically warned the Danners that "[t]his determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance or regulation of and Federal, State, or local government body." App. 150; *see also* App. 154, 157.

The erection of the grain leg and its violation of the protected airspace for the airport caused the FAA to issue a NOTAM (notice to

airman) on October 14, 2013, increasing the minimum descent levels for Category A, B, and C approaches to the airport. Ex. 20. The increase in the minimum descent levels means that a pilot approaching the airport now has to come in at a higher elevation in order to make a safe landing or land at an entirely different airport. App. 63 (Tr. 47:12-21). As certified meteorologist John McLaughlin, who is also a commercial pilot, flight instructor, and FAA designated pilot examiner, testified:

> Let's say if the clouds are 550 feet above the ground, now the minimums are 600, you break . . . into your approach at 600 feet, and you say do I see the airport? And the answer would be no, and at that point you either have to take a different approach with lower minimums or go to another airport.

App. 63 (Tr. 47:17-21). The grain leg has thus reduced the utility of the airport and its continued viability as a regional hub for western Iowa. App. 90 (Tr. 169:1-7).

More importantly, the grain leg's protrusion into the protected airspace has made landing at the airport dangerous according to four pilots who regularly use the airport. Don Mensen testified that when a pilot is first learning to fly, they do so without instruments, otherwise known as flying by vision flight reference (VFR). App. 69 (Tr. 87). Pilots flying by VFR will land at the Airport's Runway 31 in a left-hand pattern, which requires a turn "literally right between the Danner grain leg and the Danner silo there" as

depicted on Plaintiff's Ex. 10. Tr. 89. Mensen explained that if the aircraft comes in "slightly wide, you're going right over the top of it," which is a concern if there is an error in the rate of descent or in the event of an emergency. Tr. 89. What is especially scary about the grain leg, according to Mensen, is that as an instructor "I'm on the right seat—I can look right down and see it. As a student or pilot sitting in the left seat, you know, that side of the airplane is going up and he will never see that in the turn." App. 70 (Tr. 90). Mensen testified that two of his students had close calls with the grain leg when landing at the airport in that manner. App. 71 (Tr. 95).

Pilot Kevin Wittrock testified similarly.

> [Y]ou are always looking out your left window, gauging the end of the runway, you know, when you turn base and such. . . . So, I am not looking at the ground in front of me; I am looking at the ground to my left, and that's the significance of it. So, in a perfect world, I'm cleared by 300 feet. If I don't make any mistakes.

App. 72-73 (Tr. 125-26). Wittrock explained that even with the red lighting on the tower,

> It blends into the terrain. And I'll tell you it blends in such that since it's gone up, I mean I know the first time I flew into Carroll at night, it scared me to death. But I've modified the way I really fly it, you know now, just to give myself more clearance because I know it's there. It's hard to see.

App. 73 (Tr. 126).

Pilot and commission member Greg Siemann also testified the grain leg was absolutely a dangerous structure

> [b]ecause you fly right over it on a downwind pattern to Runway 31. You fly right over it, and in fact I've been so concerned about it that I actually don't reduce my altitude below pattern altitude of 800 feet until I'm over. Then I start to reduce altitude because—if I get distracted, my plane is fairly fast. And I don't want a situation where I'm—my mind is on something and I don't want to have to deal with that tower.

App. 82 (Tr. 149). And McLaughlin, who learned to fly at the airport and now uses it on a monthly basis, testified that the grain leg's presence in the protected zone of the airport presents a danger for any emergency situation confronting a pilot or a situation where a pilot is distracted, which McLaughlin testified is a major cause of accidents. App. 64 (Tr. 53). According to all of these pilots, the "grain leg constitutes the type of obstacle that is sooner or later going to kill somebody." App. 84 (Tr. 151).

After considering this evidence, the district court entered a ruling that found the "grain leg constitutes a nuisance under the Iowa Code and the Danners must abate the nuisance by altering or removing the grain leg to comply with the zoning ordinances." App. 32. The court rejected the Danners' various affirmative defenses, including their assertion that the no-hazard letter "they received from the FAA preempt the local regulations regarding airport hazards." *Id.* The court reasoned:

> While the FAA regulations certainly do apply, the local county regulations can also be in effect. The local regulations take a more stringent stance on what a hazard is and how it could affect the air space. If the FAA regulations contained all airport and safety regulations there would be no need for the State to designate zoning powers to the Commission. The Court finds that these regulations in fact work together and the FAA regulations and letter sent do no preempt the local regulations.

Id.

The court's analysis of the preemption issue did not change with the Danners' post-trial citation to the recently decided case of *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017), which addressed federal preemption in the context of the federal immigration law. App. 59. The court did, however, grant the commission's request to set a specific date for abatement of the nuisance with corresponding penalties should the nuisance remain in existence after that date. *Id.* The Danners have appealed. App. 56.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THE NO-HAZARD LETTER ISSUED BY THE FEDERAL AVIATION ADMINISTRATION DID NOT PREEMPT AN AIRPORT COMMISSION'S ENFORCEMENT OF LOCAL ZONING ORDINANCES.

A. Error Preservation.

The commission agrees that error has been preserved on the preemption issue raised in the Danners' appeal.

B. Scope and Standards of Review.

A nuisance action may be brought either in law or equity. *Miller v. Rohling*, 720 N.W.2d 562, 567 (Iowa 2006); *see also Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996). Although the petition in this case was filed in equity, the case was tried as a law action given that the district court ruled on objections as they were made at trial. Tr. 15:8-12; 16:1-25; 30:15-17; 43:14-16; *Bacon ex rel. Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997) (noting because the court ruled on objections as they were made, the case was tried at law); *accord Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 24 (Iowa 1982); *see also In re Estate of Boyd*, 634 N.W.2d 630, 635 (Iowa 2001) (finding court's belief at trial that the case was in equity did not preclude determination that the case was in fact at law and reviewable as such).

Under this limited review, the findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 804 (Iowa 1994). Thus, if the judgment of the court is supported by substantial evidence, it will not be disturbed on appeal. *Id.*

C. Statutory Framework.

The Carroll Airport Commission is the duly appointed airport commission vested by the City of Carroll with the control and management of the Arthur N. Neu Municipal Airport. App. 28 (citing City of Carroll Ord. § 27.10). The commission "has all the powers in relation to airports granted to cities under State law except powers to sell the airport." Iowa Code § 330.21. Included within those powers is the exercise of police power to prevent the creation or establishment of an airport hazard. Iowa Code § 329.2.

Section 329.2 expressly declares

> that an airport hazard endangers the lives and property of users of the airport and of occupants of land and other persons in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared:
>
> 1. That the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question.
>
> 2. That it is necessary in the interest of the public health, safety, and general welfare that the creation or establishment of airport hazards be prevented.

> 3. That this should be accomplished, to the extent legally possible, by proper exercise of the police power.

See also Iowa Code § 329.3 (giving municipalities authority to adopt, administer, and enforce zoning regulations for airport hazard areas, which regulations may divide such areas into zones and within such zones, regulate and restrict the height to which structures may be erected for the purpose of preventing airport hazards); Iowa Code § 329.5 (allowing any municipality owning or controlling an airport to maintain actions in equity to restrain and abate as nuisances the creation or establishment of airport hazards).

An airport hazard is defined by Iowa Code section 329.1(2) as

> any structure or tree or use of land which would exceed the federal obstruction standards as contained in 14 C.F.R. § 77.21, 77.23, and 77.25, and which obstruct the air space required for the flight of aircraft and landing or take-off at an airport or is otherwise hazardous to such landing or taking off of aircraft.

See also App. 173 (City of Carroll Ord. 171.01(3)) (adopting same definition of airport hazard).

The federal obstruction standards incorporated in section 329.1(2), as applied to the Carroll Airport, are as follows:

> In order to carry out the provisions of this section, there are hereby created and established certain

> zones that are depicted on the Arthur N. Neu Municipal Airport height Zoning Map. A structure located in more than one zone of the following zones is considered to be only in the zone with the more restrictive height limitations. The various zones are hereby established and defined as follows:
>
> 1. Horizontal Zone. The land lying under a horizontal plane 150 feet above the established elevations, the perimeter of which is constructed by swinging arcs of 10,000 feet radii from the center of each end of the primary surface of Runways 13 and 31, and 5,000 feet for Runways 3 and 21, and connecting the adjacent arcs by lines tangent to those arcs. No structure shall exceed 150 feet above the established airport elevation in the horizontal zone, as depicted on the Arthur N. Neu Municipal Airport Height Zoning Map.

App. 173 (City of Carroll Ord. § 171.02).

The parties stipulated that the grain leg exceeds the federal obstruction standards as contained in 14 C.F.R. § 77.21, 77.23, and 77.25 and as adopted by Iowa Code section 329.1 and City of Carroll Ordinance 171.02. App. 28. The parties further stipulated that the grain leg violates the airport's protected airspace. *Id*. It was thus undisputed at trial that the grain leg obstructs the airspace required for the flight of aircraft and aircraft landing at the airport, as further evidenced by (1) the testimony of four experienced pilots, (2) the raising of the minimum descent levels for landing at the Airport, and (3) the FAA lighting requirement. *See* Iowa Code §

329.1(2). The commission accordingly carried its burden to establish the grain leg is an airport hazard and a nuisance it is entitled to abate. *See* Iowa Code § 329.5; *see also* Iowa Code § 657.2(8) (defining a nuisance as any structure "erected within one thousand feet of the limits of any municipal or regularly established airport . . . which may endanger or obstruct aerial navigation").

The Danners have no real quibble with the district court's finding that their grain leg is an airport hazard and nuisance. Instead, their argument focuses on the doctrine of federal preemption based upon the no-hazard letter issued by the FAA in July 2013. That letter, which was issued *after* the Danners built their grain leg, states the FAA "aeronautical study revealed that the structure does exceed obstruction standards but would not be a hazard to air navigation provided" specific lighting requirements were met. App. 150. The majority of courts in the United States that have addressed the question of federal preemption in this context have held that FAA no-hazard letters do not preempt state and local regulations regarding airport hazards.

D. Federal Preemption.

"The federal preemption doctrine derives from the Supremacy Clause of the Federal Constitution." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362

(Iowa 2014). Under the Supremacy Clause, "whether Congress sought to override or preempt any inconsistent state law turns on congressional intent." *Freeman v. Grain Processing Corp*, 848 N.W.2d 58, 75 (Iowa 2014). Preemptive intent may be indicated by Congress "through a statute's express language or through its structure and purpose." *Id.* The Danners have not pointed to any express preemption provision in the FAA, appearing to rely instead upon implied preemption.

"Implied preemption falls into two categories: conflict preemption and field preemption." *Id.* As our supreme court explained in *Freeman*,

> Conflict preemption occurs when a state law actually conflicts with a federal law, especially where it is impossible for a party to comply with both state and federal requirements. A variant of conflict preemption, obstacle preemption, may be found where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Field preemption occurs where the federal law so thoroughly occupies the field that Congress left no room for state law.

Id. (internal quotations and citations omitted).

Any preemption consideration "under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Aeronautics Comm'n v. State ex rel. Emmis Broadcasting Corp.*, 440 N.E.2d 700, 706 (Ind. Ct. App. 1982); *see also Davidson Cnty. Broadcasting, Inc. v. Rowan Cnty Bd. of Comm'rs*, 649 S.E.2d 904 (N.C. Ct. App. 2007) (stating the analysis must begin with "a presumption against

federal preemption"); *accord Huck*, 850 N.W.2d at 363. This is particularly true where the field that Congress is said to have preempted has traditionally been occupied by state police power. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). In such a scenario, there is a presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (citations omitted); *see also Freeman*, 848 N.W.2d at 75 ("The Supreme Court, however, has been particularly reluctant to find federal preemption of state law in areas where states have traditionally exercised their police power.").

Turning then to the applicable federal statutes, the Federal Aviation Act, 49 U.S.C. § 40101, *et seq.*, does recognize "the threat that tall structures may pose to air safety and provides the FAA 'shall, by rules and regulations, or by order where necessary, require all persons to give adequate notice . . . of the construction or alteration, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce.'" *Aeronautics Comm'n*, 440 N.E.2d at 706; *see also* 49 U.S.C. § 40103(b) ("The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of airspace necessary to

ensure the safety of aircraft and the efficient use of airspace."). Pursuant to the above provision, the FAA has promulgated regulations that require each person who proposes construction of structures within a specific proximity to airports to notify the FAA. 14 C.F.R. § 77.11, .13, .15. The FAA then uses this information to make "[d]eterminations of the possible hazardous effect of the proposed construction or alteration on air navigation." *Aeronautics Comm'n*, 440 N.E.2d at 706.

An initial hazard/no-hazard determination is made by a staff member in the FAA's Air Traffic Division, and that decision is final unless the FAA Administrator grants discretionary review. *Id.*; 14 C.F.R. § 77.37. "However, once issued, a hazard/no-hazard determination 'has no enforceable legal effect.'" *Aeronautics Comm'n*, 440 N.E.2d at 706 (citing *Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 966 (D.C. Cir. 1979)). "The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation." *Aircraft Owners & Pilots Ass'n*, 600 F.2d at 967. "Rather, such regulation has been left to the states." *Commonwealth v. Rogers*, 430 Pa. Super. 253 (Pa. Super. Ct. 1993).

The non-binding effect of the FAA's no-hazard determination in this case is demonstrated by the statement in the letter that "[t]his determination concerns the effect of this structure on the safe and efficient use of

navigable airspace by aircraft and *does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body*." App. 150 (emphasis added). In addition, 14 C.F.R. § 77.39(a) states that each no hazard determination "expires 18 months after its effective date." The effective date of the no-hazard letter in this case was July 14, 2013, meaning the FAA's no hazard determination had been expired for a significant period of time prior to the commencement of this lawsuit and the trial herein.

Thus, "although Congress has concerned itself with the potential hazards for air safety created by tall structures, it has purposely left untouched a distinctive part of the subject—the legal enforcement of standards—peculiarly adapted to legal regulation." *Aeronautics Comm'n*, 440 N.E.2d at 706. As a result, state and local governments may legislate concerning such local matters which Congress could have covered but did not. *Id.*; *see also Rogers*, 430 Pa. Super. at 262 ("It is also 'generally recognized that a state, or a municipality acting pursuant to legislative authorization may, in the exercise of the police power, impose restrictions upon the height of buildings and other structures by reasonable and nondiscriminatory regulations where such restrictions have a substantial

relation to the public health, safety, and welfare.'" (citing 8 Am. Jur. 2d, *Aviation*, § 59, at 417)).

The facts of *Aeronautics Comm'n* are very similar to those present here. In that case, Defendant Emmis Broadcasting desired to build a radio station tower within range of an airport. Emmis obtained permission from the FAA for the tower through a no-hazard letter. The state aeronautics commission, however, denied permission for the construction of the tower due to its height under the Indiana High Structures Safety Act. In challenging this decision after the tower was already built, Emmis argued "the federal government's regulation of navigable airspace is so pervasive that Congress has impliedly pre-empted the field, and thus the Indiana High Structures Safety Act, I.C. 8-21-7-1 to 15, which regulates the height of structures near airports, is invalid under the supremacy clause of the United States Constitution." 440 N.E.2d at 706. The Indiana Court of Appeals rejected this argument under the reasoning set forth above, stating as follows: "We disagree because Congress has evidenced a purpose to leave legal enforcement of regulations pertaining to high structures and air safety to state and local governments." *Id.*

A similar result was reached in *Davidson County Broadcasting*, cited earlier. Like *Aeronautics Comm'n*, the petitioners in *Davidson County*

Broadcasting desired to construct a 1350 foot radio broadcast tower on land near a local, private airport. The county board of commissions denied the requested permit under a local zoning ordinance due to the safety problems that could result from construction of the tower near the airport. Because the petitioners had obtained a no-hazard letter from the FAA, they argued that federal regulations of navigable airspace administered by the FAA preempted the local board of commission's authority under its zoning ordinance to regulate the location of the proposed tower. The North Carolina appellate court rejected that argument, accepting the board's argument that "local governments are permitted to make aviation-related land use decisions." *Davidson Cnty. Broadcasting*, 649 S.E.2d at 910.

In reaching this conclusion, the *Davidson County Broadcasting* court noted "a majority of courts in the United States which have considered the issue have held that federal aviation law does not preempt all local or state land use regulation which may affect aviation." *Id.* at 911; *see also Faux-Burhans v. Cnty. Comm'rs of Federick Cnty*, 674 F.Supp. 1172, 1174 (D. Md. 1987) (noting no federal preemption of local ordinances regulating the "size, scope, and manner of operations at a private airport" which are "all areas of valid local regulatory concern" and which do not inhibit "in a proscribed fashion the free transit of navigable airspace"); *Hoagland v.*

Town of Clear Lake, 344 F.Supp.2d 1150 (N.D. Ind. 2004) (holding that local land use regulations regarding use of a heliport are not preempted, and containing a survey of many state and federal cases dealing with the issue of federal preemption and local land use regulations which may affect aviation).

This is in line with a string of cases examining land use regulations that may tangentially affect airspace. For example, in *Gustafson v. City of Lake Angelus*, the Sixth Circuit Court of Appeals was asked to determine whether a city ordinance prohibiting the operation of seaplanes on the surface of a lake was preempted by federal law. 76 F.3d 778, 781 (6th Cir. 1996). The court held it was not, finding that although the "Aviation Act grants to the FAA authority to regulate the use of airspace, . . . this does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use regulations may have some tangential impact on the use of airspace." *Id.* at 789; *see also Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 212 (2d Cir. 2011) (holding that although Congress intended to occupy the field of air safety, it did not intend to preempt "applicable state and local environmental and land use statutes and regulations that impose permit requirements whose impact on

air carriers, if any, is remote"); *Dallas/Fort Worth Internat'l Airport Bd. v. City of Irving*, 854 S.W.2d 161, 168 (Tex. App. 1993) ("When considering the issue of local control of land that is not already part of an airport, courts have not found preemption."). Indeed, as pointed out in *Gustafson*, the FAA regulations have "acknowledged that land use matters within the federal aviation framework are intrinsically local." 76 F.3d at 784-85 (discussing a federal FAA regulation deferring to local zoning ordinances in the establishment of an airport in compliance with a municipality's land use plan).

Outside the context of FAA no-hazard letters but still within the realm of aviation safety, federal courts have similarly not hesitated to find that federal law does not preempt the entire field of aviation safety. For example, in *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), the Third Circuit Court of Appeals considered whether an FAA type certificate that approved a new design for an aircraft preempted a state products liability claim for defective design of the aircraft. The court held it did not, initially relying upon the fact that the FAA "contains no express preemption provision. In fact, it says only that the FAA may establish 'minimum standards' for aviation safety, 49 U.S.C. § 44701." 822 F.3d at 692. The court further noted the FAA "contains a 'savings clause,' which

provides that '[a] remedy under this part is *in addition* to any other remedies provided by law.'" *Id.* (citing 49 U.S.C. § 40120(c)). The existence of the savings clause, according to the court in *Sikkelee*, belies the "argument that Congress demonstrated a clear and manifest intent to preempt state law products liability claims altogether." *Id.* at 693.

The same is true here—it is difficult to see how the FAA could occupy the entire field of aviation safety, which includes airport hazards, where the statute expressly provides that its requirements are "minimum standards" and its remedies are supplemental to any others allowed by law. 49 U.S.C. § 40120(c); 49 U.S.C. § 44701(a); *see also Freeman*, 848 N.W.2d at 82 (noting the existence of a savings clause in the federal Clean Air Act (CAA) "strongly suggest[s] that Congress did not seek to preempt, but [instead] to preserve, state law claims"). As the court in *Freeman* stated, "[t]o imply the ousting of traditional state law remedies such as nuisance by implication in a federal statute, though not impossible, seems at least improbable in most cases." *Id.*

In *Freeman*, the court determined the CAA "statute was structured to promote cooperative federalism." *Id.* at 83. Under such an approach, states are "given the authority to impose stricter standards on air pollution than might be imposed by the CAA." *Id.* "In short, Congress expressly

wanted the CAA to be a floor, but not a ceiling, on air pollution control." *Id.* Similarly, the federal obstruction standards as contained in 14 C.F.R. § 77.21, 77.23, and 77.25, and as adopted in state statutes and local ordinances, are a floor rather than a ceiling, leaving local authorities free to regulate land use within protected airspace as those authorities see fit. *Accord Sikkelee*, 822 F.3d at 694 (noting the issuance of a type certificate by the FAA "is merely a baseline requirement"); *see also* 49 U.S.C. § 44701(a) (requiring the Administrator of the FAA to prescribe "regulations and *minimum standards*" for safety in air commerce).

The Danners nevertheless argue that the commission's determination that the grain leg is an airport hazard conflicts with and is an "obstacle to the full purposes and objection of the federal law." AT Br. at 17. To the contrary, the commission's enforcement of federal obstruction standards advances the objective of the FAA to "promote safe flight of civil aircraft in air commerce." 49 U.S.C. § 44701(a). Nor is it impossible to comply with both federal and state or local requirements as is required for the application of conflict preemption. *See Freeman*, 848 N.W.2d at 75. Compliance with the state and local requirements in this case would necessarily result in compliance with the less stringent determination of the FAA no-hazard letter.

In light of the foregoing, the district court was correct in concluding that the FAA no-hazard letter does not preempt the authority of the commission under the applicable state, county, and city laws to regulate the construction of obstructions in the airport's protected airspace and to seek removal of such obstructions after their construction. The Iowa Supreme Court's recent decision in *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017) does not change this conclusion.

In *Martinez*, the Iowa Supreme Court considered the question of whether

> an undocumented noncitizen brought to Iowa as an eleven-year-old child by her parents, educated in Iowa public schools, who has lived in Iowa continuously, who is a mother of four children who are citizens of the United States, and who applied for and was granted deferred action under the Department of Homeland Security's Deferred Action for Childhood Arrivals (DACA) program, may be prosecuted by State authorities for using false documents to obtain federal employment authorization even though federal law pervasively regulates employment of undocumented noncitizens.

896 N.W.2d at 740. The *Martinez* court did not consider the question that is present here, namely whether a "no-hazard" letter issued by the FAA pursuant to federal regulations would preempt application of state and local zoning statutes and ordinances. In fact, the court's decision in *Martinez* focused exclusively on the area of preemption in federal immigration law.

In discussing the issue of preemption in federal immigration law, the *Martinez* court stated that "state mirror-image enforcement *of federal immigration law* was soundly rejected in *Arizona*, 567 U.S. at 410, 312 S.Ct. at 2507." *Id.* at 754 (emphasis added). This is not, however, a blanket statement that *any* state statute that is a mirror image of a federal statute would be preempted by federal law as the Defendants contend in their motion for new trial. Nor would such a statement be consistent with other federal preemption cases issued by the Iowa Supreme Court. *See, e.g.*, *Huck.*, 850 N.W.2d at 368 ("[A]n independent state law cause of action that parallels federal requirements is permissible."); *Freeman*, 848 N.W.2d at 84 ("The notion that a person must comply with parallel state and federal law requirements that may not be uniform is not new to the law."). In addition, the state and local zoning statutes and ordinances at issue here are not mirror images of the federal regulations regarding aeronautical studies and no-hazard determinations. *Compare* 14 C.F.R. §§ 77.31 *et seq. with* Iowa Code ch. 329 *and* City of Carroll Ord. ch. 171.

The other two federal aviation preemption cases cited by the Danners are also inapposite. *See Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004); *Hughes v. 11th Judicial District of Florida*, 274 F.Supp.2d 1334 (S.D. Fla. 2003). In both of those cases, the courts were required to

consider the question of preemption as it related to in-flight aviation safety, not the interplay of airport hazards and local zoning laws invoking the police powers of a state. *Witty*, 366 F.3d at 385 (finding a passenger's claim that an airline was negligent in failing to warn passengers about the risks of deep vein thrombosis while flying was impliedly preempted by federal regulations governing the warnings and instructions that must be given to airline passengers); *Hughes*, 274 F.Supp.2d at 1346 (holding a federal regulation expressly prevented a state from pursuing criminal charges for unlawful alcohol consumption against federally certified commercial pilots operating regularly scheduled commercial flights in interstate commerce).

For the foregoing reasons, the district court was correct in determining the FAA no-hazard letter did not preempt the Carroll Airport Commission from seeking the removal of an airport hazard and nuisance under applicable state, county, and city laws.

CONCLUSION

The district court did not err in granting the Carroll Airport Commission's petition for abatement of a nuisance. The grain leg erected by the Danners is indisputably an airport hazard. The commission's authority to seek removal of the hazard is not preempted by a non-binding

no-hazard letter issued by the FAA, which requires compliance with state and local zoning laws and which expired eighteen months after its issuance. The judgment of the district court should accordingly be affirmed.

REQUEST FOR NONORAL SUBMISSION

The Carroll Airport Commission requests that this case be submitted without oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the actual cost of reproducing the required copies of the foregoing Appellee's Final Brief was $0.00.

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