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File No. S-432

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AERONAUTICS:
State Regulations of Intrastate Carriers

Allan F. Landolt, Director
Department of Aeronautics
Springfield, Illinois

Dear Director Landolt:

I have your letter of January 14, 1972, wherein you
state:

"The Department of Aeronautics pursuant to the provisions of the Illinois Aeronautics Act, Chapter 15 1/2, Illinois Revised Statutes is charged with the duty of providing for the protection and promotion of safety of aeronautics within the State of Illinois. To date the Department of Aeronautics has not promulgated any Rules and Regulations pertaining to intrastate air carriers of property and persons. Intrastate air carriers of persons and property are presently certificated as to routes and frequency of service by the Illinois Commerce Commission.

At the present time the Department of Aeronautics is considering, if possible, the adoption

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of Rules and Regulations pertaining to the operations and maintenance of aircraft operated by intrastate air carriers of persons and property within the State of Illinois. Section 22.25 which is a declaration of policy in the Illinois Aeronautics Act states that the Department may establish uniform Rules and Regulations applying to those engaging in aeronautics of every character consistent with their safety and with the safety and rights of others.

The Federal Aviation Administration has adopted Federal Aviation Regulations, and FAR 121, 127 and 135 regulate the operations and maintenance of aircraft which are engaged in intrastate commerce as carriers of persons and property for hire. The Federal Aviation Administration administers and enforces these regulations at the present time.

We, therefore, request your opinion as to whether or not the Department of Aeronautics is authorized by the existing Statute to adopt Rules and Regulations regulating the operations and maintenance of aircraft involved in intrastate carriage of property and persons for hire by air. Further, we would like your opinion as to whether or not the FAA by adopting Rules and Regulations of a similar nature have preempted the field and thereby excluded the Department of Aeronautics from adopting and enforcing the same or similar type of Rules and Regulations."

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Your letter as quoted above poses the following two questions:

1. Is the Department of Aeronautics authorized by the existing Statute (enacted under the Ill. Aeronautics Act, Ill. Rev. Stats. 1971, Chap. 15 1/2, Sec. 22.1 through 22.83, inclusive by virtue of the State authority of the Illinois Commerce Commission, Ill. Rev. Stats. 1971, Chap. 111 2/3, para. 8, 10.3, 10.7, and 10.8) to adopt Rules and Regulations controlling the operation and maintenance of aircraft involved in intrastate carriage of property and persons for hire by air;

2. Has the Federal Aviation Administration by adopting Rules and Regulations of a similar nature preempted the field and thereby excluded the Department of Aeronautics of this State from adopting and enforcing the same or similar type of Rules and Regulations;

In reference to the first question, paragraph 25 of the Illinois Aeronautics Act states in part:

"§25. It is hereby declared that the purpose of this Act is to further the public interest and aeronautical progress by providing for the protection and promotion of safety in aeronautics; by cooperating in effecting a uniformity of the laws

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relating to the development and regulation of aeronautics in the several states; by revising existing statutes relative to the development and regulation of aeronautics so as to grant to a state agency such powers and impose upon it such duties that the state may properly perform its jurisdiction over persons and property within such jurisdiction, may assist in the promotion of a state-wide system of airports, may cooperate with and assist the political subdivisions of this state and others engaged in aeronautics, and may encourage and develop aeronautics; by establishing uniform rules and regulations, consistent, so far as practicable, with federal rules and regulations, in order that those engaged in aeronautics of every character may so engage with the least possible restriction consistent with their safety and with the safety and the rights of others; and by providing for cooperation with the federal authorities in the development of a national system of civil aviation and for coordination of the aeronautical activities of those authorities and the authorities of this state by assisting in accomplishing the purposes of federal legislation and eliminating costly and unnecessary duplication of functions, properly in the province of federal agencies."

Paragraph 26 of the same Act provides:

"§26. The Department shall regulate and supervise aeronautics within this State, subject to the provisions of this Act. The Department is empowered

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and directed to encourage, foster, and assist in the development of aeronautics in this State and to encourage the establishment of airports and other air navigation facilities."

Paragraph 28 states:

"§28. Rules, rulings, regulations, decisions, orders and standards.) In exercising its powers and performing its functions under the laws of this State pertaining to aeronautics, the Department may perform such acts, issue, amend, change, abrogate or rescind such decisions and orders, prescribe such forms, and make, promulgate, and amend, change, abrogate or rescind such reasonable general or special rules, rulings, regulations, and procedure, and establish such minimum standards, as may be necessary, commensurate with and for the purpose of protecting and insuring the general public interest and safety, the safety of persons receiving instruction concerning, or operating, using or traveling in, aircraft, and of persons and property on land or water, and to develop and promote aeronautics in this State. No rule, ruling, regulation, decision or order of the Department shall apply to airports or other air navigation facilities owned or controlled by the Federal Government within this State.

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In connection with the foregoing paragraph, you do have, therefore, a distinct mandate on the part of the legislature, granting authority to issue rules and regulations. It has been held that there is no doubt but that the legislature, in the exercise of its police power, may consider the problems and risks that arise in connection with aviation and provide legislation for the securing of a greater degree of safety to those engaged in such method of transportation and to those on land; (People ex rel. Greening v. Bartholf, 388 Ill. 445 (1945)). If a statute purports to further aeronautical progress by promoting safety in aeronautics, by cooperating in obtaining uniformity of the laws of the several states regulating aeronautics and in uniformity with federal rules, and by revising existing statutes relative to the development and regulation of aeronautics, it is so that the State may properly perform its functions relative to aeronautics. (DuPage County v. Harris, 89 Ill. App.

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2d 101 (1967)). Finally, such legislation which confers such power and has for its basic purpose safety in aviation, is in the interest of public welfare and a proper exercise of the public power. People ex rel. Curren v. Wood, 391 Ill. 237 (1945).

Too, it has been held that the jurisdiction of sovereign states to control the airspace above their territories rests on the necessity of the self-protection which is an attribute of sovereignty; (Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300 (1930)) and until it is affirmatively shown that a particular local statute is a burden upon or an interference with interstate commerce or its elements, as it has been defined by the courts, such a statute must be upheld as constitutional in such respect. It has been held that since the state has never surrendered its power reasonably to protect the public safety, a statute which prescribes the minimum altitude of flight for airplanes over congested areas neither obstructs,

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interferes with, nor discriminates against, interstate commerce or any federal rights. People v. Katz, 140 Misc. 46, 249 NYS 719; 8 Am. Jur.2d, Aviation, Sec. 18, at pg. 636.

Following the line of reasoning in the above cited cases and the statute (Ill. Rev. Stat. 1971, Ch. 15 1/2, pars. 22.1 through 22.93 inclusive), my answer to your first question is in the affirmative.

In answer to your second question, it has been held that before enactment of the Federal Aviation Act of 1958 (49 U.S.C. Sec. 1301 et seq.), the power of the federal government was predicated on the authority with regard to interstate and foreign commerce and insofar as federal regulations of air transportation are devoted to the foreign commerce, and bear some reasonable and rational relationship to the subject, they are supreme and may not be denied, although they may include activities which are intrastate in character. (In Re Air Express Co., 76 F. Supp. 684.) In the Federal Aviation Act, Congress

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has expressly provided that the United States possesses and exercises complete and exclusive sovereignty in the air space above all inland waters. 49 U.S.C., Sec. 1508 (a).

However, a reading of the Federal Aviation Act, shows that the Act does not exclude or alter existing state remedies under state law and this conclusion is strengthened by the words of the saving clause of the Act itself; "Nothing contained in the Act shall abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." (49 U.S.C., Sec. 1506). For years where the federal government has not acted in the particular matter, the states may act within their respective jurisdictions. For some purposes, federal regulations are preemptive; Federal licenses, permits or certificates, both of pilots and of aircraft, are regarded as controlling in the interest of uniformity and aeronautical progress and when

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a state (as Illinois does) requires registration of such licenses, permits, etc., it does so merely for its own convenience. The foregoing subject was noted in Rich v. Finley, Mass. 99, 89 N.E. 2d 213, 12 ALR, 2d 669.

It has also been held that the federal regulations of operations of aircraft are not concerned with matters covered by purely local regulations designed to protect the health, welfare, and morals of the inhabitants at the local level, except insofar as necessary to provide for the safety of aircraft in the civil airways. Tatum v. Hallandale, 71 So. 2d 495, (Fla.), 41 ALR 2d 1308; 8 Am. Jur. 2d Aviation, Sec. 18 at pg. 636 (1945).

Also in line with this is the section in our own Illinois Aeronautics Act, (Ill. Rev. Stat. 1971, Ch. 15 1/2, par. 29):

"§29. Conformity to federal legislation and and rules.) All rules, rulings, regulations, orders and decisions prescribed by the Department pursuant to the laws of this State pertaining to aeronautics, shall be kept in conformity, as nearly as may be, with the then current fed-

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eral legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto."

This paragraph indicates that local regulation as well as federal regulation is envisioned insofar as such state regulation is in conformity with, and not inconsistent with or in derogation of, federal regulations which may cover the same activities.

The jurisdiction over the regulation of passage through the air in large part was by inference surrendered by the state to the United States by adoption of the Federal Constitution, (Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 ALR 300 (1930)) but the power of Congress over aerial navigation is not exclusive in all respects. Gardner v. Allegheny County, 382 Pa. 88, 124 A 2d 491; 8 Am. Jur. 2d, Aviation, Sec. 18 at pg. 636.

In a similar case it was held that if the federal

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government has not acted in the particular matter, the states may act within their respective jurisdictions until an act of Congress overrides all conflicting state legislation. Sheboygan Airways, Inc., v. the Industrial Commission, 209 Wis. 352, 245 N.W. 178 (1932).

As can be seen by the above cited cases, the states do have the power to enact regulations concerning aeronautics, even when federal regulation does exist. Your letter gives no indication of the types of regulations you intend to impose. Based upon the assumption that such regulations will be consistent with existing federal regulations, my answer to your second question is in the affirmative.

Yours very truly,

Attorney General