

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW
Administrative Law
Spring 2009

Kit Johnson
Visiting Assistant Professor of Law

FINAL EXAMINATION

Limited open-book. Three hours.

Write your exam number here: _____

All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.

Notes and Instructions

1. You may write anywhere on the examination materials — e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
2. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
3. During the exam: You may not consult with anyone — necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
4. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam.
5. Assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the law in the United States, including all rules, procedures, and cases as presented in class, as well as, where appropriate, the theory and history discussed in class. It is appropriate, if you wish, to note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
6. Read all exam questions before answering any of them — that way you can be sure to put all of your material in the right place. Keep in mind: The weight given to each part is specified, but the question structure is provided for organizational purposes only. The questions will not all be given equal weight. Thus, it may be entirely appropriate for one question to be answered with considerable brevity, while another question might require very detailed analysis. You should divide your time proportionately among the questions according to which ones require the most discussion and analysis. Plan ahead to put information where it belongs.
7. Organization counts.
8. Feel free to use abbreviations, but only if the meaning is entirely clear.
9. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please use a separate bluebook for each question.
10. **Computers:** Please clearly label your answers to each question.
11. This exam is “limited open book.” The only materials to which you may refer during the exam, other than this exam booklet, scratch paper provided as part of the exam administration, and any special references specifically authorized by the Dean of Students office, are: (a) the authorized copy of the Administrative Law Wypadki, which will be distributed to you in the exam session, and (b) a “reference sheet,” consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which anything may be written and/or printed, including on both sides, front and back; (c) the statutory supplement which you will find at the end of the exam; and (d) the copy of the Administrative Procedure Act which you have been provided in the exam session. You may not consult or access any other piece of paper, including, but not limited to, a copy of the Administrative Law Wypadki that you have printed out yourself. No materials may be shared during the exam.
12. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
13. Good luck!

The following facts apply to all subsequent parts.

In 2006, Congress passed the Americans For Zeppelins and Airships Act (the “Act”).¹ The Act created the Federal Zeppelin and Airship Administration (“FZAA”), which was given exclusive authority to “develop plans and policy for the development of zeppelin and airship hangers and airfields.” 59 U.S.C. § 40103(b)(1).

Soon after the FZAA was formed, the Administrator published a “policy statement” in the Federal Register saying,

In evaluating whether to approve a petition for the construction of a new zeppelin and airship hanger and airfield, the FZAA shall consider ...

- (A) The location of the proposed hanger and airfield; and
- (B) The effect the proposed hanger and airfield will have on the surrounding community....

The agency did not use notice-and-comment rulemaking to adopt this statement.

On January 1, 2008, The Port Authority for the State of Minnesota petitioned the FZAA to construct a new zeppelin and airship hanger and airfield immediately adjacent to the historic city of Little Grandopolis. The facility would include three zeppelin hangers, each of which would stand 19 stories tall and be as long and wide as three football fields.

Little Grandopolis has a population of 25,000. Every building in the city was either built in the 1830s or earlier, or has been constructed (in accordance with city zoning regulations) to mimic the architecture of that time period. There are no buildings in the city higher than three stories.



At left: A completed zeppelin hangar of the kind the Port Authority for the State of Minnesota hopes to build next to Little Grandopolis.

Photo: [Matti Blume, Zeppelin Hangar, Friedrichshafen \(1X7A4412-HDR\).jpg, CC BY-SA 4.0](#), via Wikimedia Commons

¹ Please note statutory supplement on page 6.

PART I
(60 POINTS: APPROX. 1 HOUR, 48 MINUTES)

On March 1, 2008, the FZAA approves the Port Authority's application without comment.

Citizens for the Preservation of Historic Little Grandopolis ("CPHLG"), a non-profit community organization comprised of Little Grandopolis small-business owners and homeowners, immediately files suit in federal court, challenging the FZAA's approval. You have been hired as litigation counsel for CPHLG. CPHLG's concern is that the proposed airship hanger and airfield will detract from the historic ambience of Little Grandopolis and affect the city's well-established industry of historical tourism.

Question 1

Assume the government moves to dismiss CPHLG's lawsuit on the ground that it lacks standing to bring suit. How should you respond? How would you expect the judge to rule on this motion? Please explain your answer.

Question 2

Assume the government moves to dismiss CPHLG's lawsuit under §701(a)(2). How should you respond? How would you expect the judge to rule on this motion? Please explain your answer.

Question 3

Assume the court denies the government's motions to dismiss. You move for summary judgment. Your first argument is that the Act is unconstitutional because it poses a non-delegation problem. How would you expect the judge to rule on this part of your motion? Please explain your answer.

Question 4

Assume the court denies CPHLG's motion regarding non-delegation. The Court then turns to the second basis for your summary judgment motion – your challenge that the FZAA's "policy statement" is invalid because the FZAA failed to promulgate it according to the procedures indicated in sections 553, 556, and 557 of the APA. How would you expect the judge to rule on this part of your motion? Please explain your answer.

Question 5

Assume that while your lawsuit is pending, the FZAA reverses its decision, denies the Port Authority's application, and begins formal rulemaking concerning what factors should be considered in evaluating petitions to build zeppelin and airship hangers and airfields. The government moves to dismiss the lawsuit as moot. Your client is thrilled. You would like to recover your fees and costs. Can you?

PART II
(40 POINTS: APPROX. 1 HOUR, 12 MINS.)

On March 1, 2008, the FZAA denies the Port Authority's application without comment. You are litigation counsel for the Port Authority and immediately file suit in federal court.

Question 6

You file a motion for summary judgment, arguing first that the Port Authority was entitled to the hearing procedures required by sections 554, 556 and 557 of the APA. How would you expect the judge to rule on this part of your motion? Please explain your answer.

Question 7

Assume the judge finds that the Port Authority was not entitled to the hearing procedures required by sections 554, 556 and 557 of the APA. The Court thus reaches the second basis for your motion for summary judgment – that the Port Authority was denied due process of law. How would you expect the judge to rule on this part of your motion? Please explain your answer.

Question 8

Assume your motion for summary judgment is denied in full. The case moves forward to a bench trial, and the judge reaches the merits of the denial of your petition by the FZAA. What standard of review should apply? Please explain your answer.

Question 9

Prior to filing its lawsuit, the Port Authority filed a request seeking all FZAA documents relating to the approval of Port Authority's petition, including any e-mails evidencing meetings or communications between the FZAA and non-FZAA officials about the petition. The FZAA denied the request, in part, arguing that it is in possession of confidential business information – namely, confidential financial statements from several zeppelin and airship manufacturers that the FZAA examined to determine the financial viability of the proposed airfield site. You are considering filing a motion in district court to obtain all material without exception. How would you expect the judge to rule on this motion? Please explain your answer.

Question 10

Assume that after further negotiations with the FZAA, you obtain all of the documents sought. Among the materials produced by the FZAA is this e-mail to Alan Armisten, General Counsel for the FZAA:

Subject: P.A. Minn. App.
From: Mandy Meyers
Date: February 1, 2008
To: Alan Armisten

Looking forward to lunch today at Café Cusine. So much to catch up on!

Best to Julia and the kids.

Mandy

Mandy Meyers
Chief Operating Officer
San Dasota Airfield Commission
2500 World Way, Suite 750
San Dasota, Minnekota
Mmeyers@sandasota.com

The San Dasota Airfield Commission benefited significantly from the denial of the Port Authority's petition since zeppelin travelers in the region will now be forced to use their airfield, located 100 miles away from the Little Grandopolis site. Are there any challenges you can raise based upon this contact? Please explain your answer.

STATUTORY SUPPLEMENT

UNITED STATES CODE ANNOTATED
TITLE 59. TRANSPORTATION
CHAPTER I. DEPARTMENT OF TRANSPORTATION
SUBCHATER 1. ORGANIZATION

59 U.S.C. § 106

(a) The Federal Zeppelin and Airship Administration is an administration in the Department of Transportation.

(b) The head of the Administration is the Administrator. The Administrator is appointed by the President, with the advice and consent of the Senate.

...

(f) (3) Regulations. —

(A) In general. — In the performance of the functions of the Administrator and the Administration, the Administrator is authorized to issue, rescind, and revise such regulations as are necessary to carry out those functions. The issuance of such regulations shall be governed by the provisions of chapter 5 of title 5.

CHAPTER IV. AIRFIELD AND HANGER PROGRAMS

59 U.S.C. § 40103

(b) Development of Hangers and Airfields. —

(1) The Administrator of the Federal Zeppelin and Airship Administration shall develop plans and policy for the development of zeppelin and airship hangers and airfields.

...

(z) Judicial Review —

(1) In any proceeding under this chapter, the Administrator shall grant a hearing before an Administrative Law Judge (“ALJ”), upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

(2) The order of the Administrator shall be sustained if it is supported by substantial evidence when considered on the record as a whole.