

⚖️ MINNESOTA LEGAL DEFENSE ⚖️

May 24, 2023

Benjamin Lindstrom
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RE: Advisory Legal Opinion

To Whom It May Concern:

I was retained by Doug Schieffer to evaluate the law and draft a legal opinion regarding his plan to land a “small class” helicopter on the water outside his property on Gull Lake. This plan is described as **Option B** in his public communications.¹

I am an attorney who has practiced in Minnesota for nearly twenty years. My experience includes work as a city prosecutor and a criminal defense attorney. I worked for many years as a municipal prosecutor for the 3rd largest city in Minnesota, and during that time provided advisory opinions on zoning issues. As a defense attorney I have tried over 100 criminal cases to jury verdict, including city and county ordinance violations.

In researching this issue, I reviewed all relevant city and county ordinances, state statutes, and federal laws (and the published rules and regulations which they reference). I reviewed three dozen state and federal appellate decisions and consulted with two different attorneys who are also licensed pilots.

¹ See <https://eglpropertyrights.com/>

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To begin, the United States Government has exclusive sovereignty of airspace of the United States. *See* 49 U.S.C. § 40103(a)(1). As the Supreme Court has ruled, “Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission ... under an intricate system of federal commands.” *Nw. Airlines v. State of Minnesota*, 322 U.S. 292, 303, (1944).

Furthermore, federal law defines “navigable airspace” to include “airspace needed to ensure safety in the takeoff and landing of aircraft.” 49 U.S.C. § 40102(a)(30). Because takeoffs and landings directly affect flight patterns, courts have held that runway use cannot be viewed separately. *See City of Austin v. Travis County Landfill Co.*, 25 S.W.3d 191, 206 (Tex.App.1999); *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86, 90 (1995); *United States v. City of New Haven*, 367 F.Supp. 1338 (D.Conn.1973).

Because of the federal preemption here, local governments cannot impose restrictions on the use of airspace. Even where aircraft noise created an “unpleasant problem” which interfered “with the enjoyment of life and property for people living in areas affected by that noise,” the Minnesota Supreme Court held that state and local governments “may not enact noise regulations which impinge on aircraft operations.” *State by Minnesota Pub. Lobby v. Metro. Airports Comm'n*, 520 N.W.2d 388, 393 (Minn. 1994). The Supreme Court has made clear that local governments are “not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.” *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 640 (1973).

Having established that the relevant local governments (the city of East Gull Lake and/or the county of Cass) do not have the authority to regulate airspace, the next issue that must be addressed is whether either of those

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governments can restrict the use of the public waterway. When a water basin or watercourse is "navigable" under the federal test, the State of Minnesota owns the bed below the natural ordinary low water level. *See Lamprey v. State*, 53 NW 1139 (1893) and *United States v. Holt State Bank* 270 U.S. 49 (1926). The federal test used for navigability is: "when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade or travel are or may be conducted." *State v. Longyear Holding Co.*, 29 NW 2d 657 (1947).

The portion of Gull Lake that Mr. Schieffer intends to use for **Option B** falls under the control of the State of Minnesota and is already home to Seaplane Base identifier M16. Therefore, the laws and regulations of the state already permit the landing of an aircraft on the bay outside his property in Gull Lake.

In conclusion, it is my informed legal opinion that the use of a helicopter in the manner described as **Option B** is lawful and would not violate any existing civil or criminal codes.

Respectfully,



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