

Town of East Hampton

Relations with FAA at the East Hampton Airport

*Prepared for Councilman Stanzione by
Special Counsel to the Town of East Hampton*

1. Is the East Hampton Airport currently subject to federal regulation?

Yes. The Town is subject to obligations known as “grant assurances” which are contractual commitments to the Federal Aviation Administration (FAA). Most grant assurances last for twenty (20) years, meaning that the airport owner is contractually obligated to the FAA for 20 years from the date of its last grant. The Town last took an FAA grant in 2001, which means that it is contractually obligated until 2021. There is no legally acceptable way for the owner of an airport to pay back grants and thereby speed up that timetable.

The grant assurances contain many obligations, including requirements relating to non-discrimination, to protecting nearby land uses from encroaching onto the airport, to preventing erection of hazards to air navigation. There are also obligations related to operating the airport, such as an obligation not to grant an exclusive right to anyone to operate at the airport, a requirement to make the airport available to the public on reasonable terms and conditions, an obligation to allow fixed base operators to run businesses at the airport, and many more.

2. Is it true that all the Town’s grant assurances expire in 2014?

No. The Town is subject to a total of 39 grant assurances. Four of those grant assurances expire on January 1, 2015 but the remainder do not expire until 2021.

In 2005, the FAA signed a Settlement Agreement in litigation brought by several Town residents and a community group. In that Agreement, the FAA agreed not to enforce four of the 39 grant assurances after December 31, 2014. The Town is not a party to the Settlement Agreement.

3. Is the operation of the airport subject to US Constitution, federal and state law?

Yes. Whether or not the airport is subject to grant assurances, the Town must still comply with federal and state law and ultimately the U.S. Constitution. Aviation-related laws impose comprehensive requirements on how airports operate, and whether the Town can restrict use or access to the airport. These laws and the U.S. Constitution are often enforced by the FAA in court but can also be enforced through litigation brought by any person who would be adversely affected.

4. Once the grant assurances no longer apply to the Airport, will the Town acquire complete control over the Airport?

No. There is a common misperception that, when grant assurance obligations no longer exist, an airport is free to operate as it wishes. That is not true. When the grant assurances expire in 2021, the Town would gain only slightly greater control over the Airport than it has today.

All public airports are subject to the requirements of federal law, state law and the U.S. Constitution. These laws and the Constitution limit the ability of an airport owner to restrict access to its airport unless it can meet a fairly high threshold of demonstrating that it has acted reasonably, that the restrictions are necessary to achieve legitimate local needs and that its restrictions are no more stringent than necessary. There has been a lot of litigation over the years about whether airport use restrictions comply with these requirements.

The major distinction between airports that are, and are not, subject to grant assurances and is who enforces the airport's legal obligations: grant assurance obligations are enforced by the FAA, while other legal obligations can be challenged and enforced in federal court by the FAA or by anyone who is affected.

5. So long as the Town is federally obligated, can it impose a curfew or restriction on aircraft or helicopters?

No, not without substantial legal expense, litigation exposure, and costly technical analysis. If an airport is federally obligated, before its proprietor can restrict the use of the airport, it must comply both with the grant assurances and with the Part 161 requirements (named after the section of the Federal Aviation Regulations where these requirements appear). The Part 161 requirements are extensive, time consuming and costly.

The Town cannot restrict operations by the current generation of aircraft (known as stage 3 or 4 aircraft) without FAA approval. If the Town wanted to restrict only the older generation of aircraft or any helicopters (known as stage 1 or 2 aircraft), it could do so without FAA approval but it would first have to satisfy the exhaustive Part 161 study requirements.

Only one airport (Bob Hope Airport in Burbank, California) has ever applied for FAA approval for a restriction on stage 3 or 4 aircraft. The FAA rejected that application. The FAA action was not a surprise given the agency's position in vigorous opposition to *any* airport use restrictions. That airport spent almost \$7 million and took almost a decade in its unsuccessful effort to secure a nighttime curfew.

Only one airport (Naples Municipal in Naples, Florida) has successfully imposed a restriction on stage 1 or 2 aircraft. That effort was also costly and time-consuming. After several years of effort, spending almost \$5 million and defending against several lawsuits (including one brought by the FAA itself), that airport was able to ban the noisiest stage 1 and 2 aircraft.

Since only two airports have ever completed a Part 161 study, it is hard to estimate the time and cost, but the limited past experience suggests that the process would take several years and (even without litigation) could cost millions of dollars.

6. Once the Town is *no longer* federally obligated, can the Town automatically impose a mandatory curfew or similar restriction on aircraft using the airport?

No. The East Hampton Airport must be accessible to the public. Over the course of the last half-century, courts have consistently concluded that the U.S. Constitution imposes significant limitations on the ability of an airport owner to restrict access to its airport.

Constitutional limitations apply regardless of whether an airport is subject to grant assurances. Any restriction on use of an airport must be carefully tailored to a demonstrated need in a particular community; the restriction must be no more restrictive than necessary to achieve that need; the restriction must be applied in a rational manner; and the airport owner needs to have a solid factual basis for its restriction. These constitutional requirements are very similar to the Part 161 requirements. Therefore, a non-federally obligated airport would need to go through many of the same hurdles as a federally obligated airport before it can lawfully impose any restriction. Since the Part 161 requirements were imposed in 1990, no airport has successfully imposed a new use restriction outside the Part 161 process.