Airport Planning Committee,
Noise subcommittee

November 12, 2014

East Hampton Town Board
159 Pantigo Road
East Hampton, NY 11937

Re: Letter, dated November 5, 2014, from McBreen & Kopko

Dear Mr. Supervisor and Town Board Members,

As chair of the Airport Planning Committee, Noise sub-committee, the author of the initial draft of the Request for Proposal for the recently completed phase 1 noise study, I find it necessary to respond to the accumulated falsehoods, misinformation, mis-statements of law and fact, and unsubstantiated claims contained in the letter, dated November 5, 2014, addressed to the Town by the law firm of McBreen & Kopko on behalf of its client, the self-declared "Friends of East Hampton Airport."

I must first take note that, to the best of my knowledge, no one has ever come forward to acknowledge being an organizer, officer, or member of this obscure organization. There are no names or addresses currently listed on its website: http://www.savehto.org/. On its original website, since taken down, it declared itself to be located in New Jersey. That information was rather quickly removed. It appears as though disclosure of any information as to the actual identity of the organization would not serve its interests.

It now has no known physical address. However, some of the links on its website, such as this one, http://www.savehto.org/Saving-Jobs-Colonia-NJ.html, continue to refer to New Jersey. Perhaps it is only a coincidence that the Eastern Regional Helicopter Council, of which Jeff Smith is the executive director, is described here, http://skift.com/2014/11/04/the-tourists-in-helicopters-driving-new-york-residents-crazy/ by a Bloomberg reporter as, "a Colonia, New Jersey-based lobbying group."

I also note that McBreen has copied its letter to Jeff Smith. Together with the apparent location in Colonia, New Jersey, this tends to suggest to me that McBreen's client is in fact either the Eastern Regional Helicopter Council or a front organization operated by the Eastern Regional Helicopter Council, rather than undisclosed "friends" of East Hampton or of its airport. It would be welcome, and helpful in interpreting its claims and the nature of its interest, if the principals of the Friends of East Hampton Airport would identify themselves rather than remain in the shadows.

The claims by McBreen, that the phase 1 noise study,

"was done on the cheap,"

"depended on the wrong data,"

"drew inaccurate conclusions,"

are nothing more than self-serving puffery. McBreen has offered no information of any kind as to what a study of this design ought to have cost, as to what is purportedly wrong with the data itself, obtained from Vector and AirScene, or any contrary fact of any kind that would so much as suggest that the information reported by the study is inaccurate.

McBreen goes on to make a number of completely unsubstantiated claims, such as these:

"helicopters voluntarily increased altitudes more than 1,000 [feet] in 2014"

"The determination on helicopter 'compliance' with voluntary noise mitigation routes is enormously inaccurate because Young Environmental did not account for the fact that routes were changed once again in 2014."

"helicopters were flying at a higher altitude [in 2014] and were creating less noise."

It is possible that helicopters were flying higher in 2014 than in 2013, the latter the period on which the study was based. It is also possible that they were not. It is possible that the total number of noise exceedances generated by helicopters in 2014 was lower than in 2013. It is also possible that it was higher. McBreen has offered no data whatsoever to substantiate its claim. Further, even if this were the case, it has no bearing on the question whether helicopters were complying with voluntary measures in 2013 or in 2014. The study measured their compliance in 2013 based on a defined and disclosed standard. McBreen and the Friends of East Hampton Airport are free to offer contrary information if they have any. They have offered none.

The gist of McBreen's complaint seems to be that the study should have been based on 2014 data. McBreen states,

"Even if the Town believed it could rely on aircraft track data, there is no reason not to have used 2014 data. While 2014 has not yet ended, the only data that is [sic] critical is [sic] summer data and this material as readily available."

As I believe you well know, this is simply false. The RFP for the study was accepted in June. The study was contracted in early July at which time data analysis began. Data for the summer of 2014 did not then exist. Had the study waited for summer of 2014 data, it would have had to commence at least two months later and it would have been difficult if not impossible for the Town to take effective action to reduce noise prior to the 2015 season. The study was in no sense "intentionally misleading," as McBreen claims, for its reliance on 2013 data. It was properly based on the flight track and airport utilization data available at the time.

While it is possible that a similar analysis of data for 2014 would show a somewhat different result, given the very large, documented increase in helicopter traffic from 2013 to 2014 and the large increase in helicopter noise complaints from 2013 to 2014, there is very little likelihood that a new -- and untimely -- analysis of 2014 data would show a material reduction in helicopter noise. It is as or more likely that it would show an increase.

The study counted millions of noise exceedances in 2013 due to aircraft, by class, using East Hampton Airport (defined as noise at any residence, within or outside of East Hampton, in excess of that permitted by the East Hampton Town noise ordinance). Were the most recent helicopter data analyzed, there would still be millions of such exceedances due to helicopter traffic, a basis more than sufficient for the Town to conclude that there exists in fact a serious aircraft noise problem that it wishes to address for the well-being of the community.

Moreover, the appendices to the EIS for the 2010 Airport Master Plan make clear that in 2009, as in 2013 and 2014, a large preponderance of noise complaints were due to helicopters. 2014 presented an opportunity for helicopter operators to demonstrate that voluntary measures as to route of flight would substantially mitigate the problem of helicopter noise as perceived by the community. There is no evidence whatsoever that this indeed occurred, and McBreen has offered none.

Analysis takes time, several months in this case. If the Town must always await new data and re-commence the analysis, it can never take action. It is difficult not to conclude that the real purpose of this claim by McBreen is simply to delay action by the Town. McBreen and Friends of East Hampton Airport are free to undertake their own analysis of 2014 flight tracks and airport utilization in order to demonstrate that there exists such a material difference between 2013 exceedances and 2014 exceedances so as to alter the measures that the Town may wish to take to control noise.

McBreen goes on to claim that,

> "The Report was further rendered meaningless when it concluded that every aircraft operation from a single-engine Cessna to the largest jet or helicopter) in 2013 and 2014 exceeded the Town's noise ordinance."

Again, McBreen offers nothing other than its own incredulity to justify this claim. The conclusion of the noise study is based on the output from the FAA's Integrated Noise Model using the FAA noise profiles for different aircraft types contained in the model. This is the industry standard tool for aircraft noise analysis. The study, rather than using a standardized grid of measurement points, as is common, used the actual GIS data for the location of residences, obtained from Suffolk County. If it is not the case that all aircraft on approach to or departure from East Hampton Airport at some point project noise onto a residence that exceeds the standard set by the Town's local noise ordinance, McBreen can offer results from the INM, likewise modeled on the runway and residence locations at East Hampton, to rebut the conclusion of the study. It offers none.

McBreen also claims that East Hampton Town may not draw conclusions about noise reduction measures it wishes to adopt based on the number of times that aircraft noise exceeds the general, community-wide standard, stating,

> "There is no community in the United States that bases aviation noise restrictions on such measures because federal law has preempted the regulation of aviation noise. The Town's ordinance is irrelevant."

This claim is simply wrong, indeed baseless, as a matter of law.

The FAA's 65 DNL standard, that McBreen wishes the Town to employ, is not at all mandatory for the Town of East Hampton. That standard, adopted by FAA regulations, is employed by the FAA for purposes of its own compliance with the National Environmental Policy Act (NEPA). If an airport proprietor is requesting or requires any action or consent by the FAA, the FAA therefore requires the proprietor to present information according to the FAA's standards, based upon which the FAA itself will then act or refrain from acting. That is all. The National Environmental Policy Act has no application whatsoever to the Town of East Hampton; it is binding only upon federal agencies. The corresponding law that binds the Town is New York State's SEQRA. Likewise, the FAA noise standard, adopted for purposes of its own compliance with NEPA, does not in any way bind a municipal airport proprietor in the exercise of its authority to regulate access to its own airport in the absence of contractual FAA grant assurances that limit local authority. Rather, it binds and applies to the FAA itself.

Nor is local regulation of airport noise federally preempted, as McBreen claims. To the contrary, the FAA itself states that,

> "Airport sponsors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, *and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce*." [Emphasis added.]
>
> http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b_chap13.pdf

This is but the FAA's recognition of the judicially and congressionally recognized "proprietor's exception" that allows a municipal airport proprietor to control access to its own airport for the purpose of protecting the community from noise. *See*, *e.g.*, *National Helicopter Corp*. v. *City of New York*, 137 F3d 81 (2nd Cir. 1998). "Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population."

If McBreen & Kopko and the United States Court of Appeals for the Second Circuit disagree on the law, it is the view of the Second Circuit that prevails.

After December 31, 2014, East Hampton does not require any consent from the FAA to exercise its authority under the proprietor's exception, although it must still of

course comply with the judicially declared standards as to the scope of local authority under the proprietor's exception.

> Specifically, the FAA states that, under the relevant grant assurance,
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> "[T]he FAA interprets the requirement in 49 U.S.C. § 47107(a)(1) that a federally funded airport will be "available for public use on reasonable conditions" as requiring that a regulation restricting airport use for noise purposes: (1) be justified by an existing noncompatible land use problem; (2) be effective in addressing the identified problem without restricting operations more than necessary; and (3) reflect a balanced approach to addressing the identified problem that fairly considers both local and federal interests." *Ibid*.

However, the FAA has agreed that this grant assurance will no longer be enforced against East Hampton after December 31, 2014. East Hampton will then be able to exercise its authority under the proprietor's exception without being further restricted in such exercise by grant assurances. The relevant standards will then be those declared by the Second Circuit Court of Appeals to apply in the absence of grant assurances.

McBreen's claim that exceedances of the local noise standard are "irrelevant" is likewise baseless. Regardless of the FAA's standards for its own compliance with the National Environmental Policy Act, that is a minimum environmental standard, not a maximum. Nothing in federal or state law prevents East Hampton from applying a more stringent standard of environmental protection so long as it is in compliance with the scope of the proprietor's exception as declared by the Second Circuit. For like reason, the FAA was itself permitted to require helicopter traffic to East Hampton to fly the so-called "northern route" although the 65 DNL standard was not applied and was not exceeded. 65 DNL is an FAA policy for its own use. It is not the law.

Exceedances of the local noise standard, as embodied by the local noise ordinance of general application, are noise pollution as defined by our community. The Town may properly consider the extent of such noise pollution in determining whether and how to protect the community from noise.

Sincerely,

David Gruber
Chair, Airport Planning Committee,
Noise sub-committee