

July 28, 2014

Memorandum to: Councilwoman Kathee Burke-Gonzalez

From: Airport Planning Committee, Noise Sub-committee

Re: Fifth Preliminary Findings and Recommendations --  
Airport Legal Issues.

The East Hampton Airport operates within a complex web of local and federal law. A correct understanding of this law is critical to the exercise of the Town's authority as municipal airport proprietor when relevant grant assurances expire on December 31, 2014. We have set forth below what we believe to be an accurate statement of the relevant law, broken down rather minutely into 26 separate points. Our purpose is to ascertain which aspects of law as we understand it are accepted by the Town and its counsel as a basis for action and which are regarded as incorrect or uncertain.

We request that the Town Board ask the Town's Special Counsel on Airport matters to review the 26 points and advise, with respect to each one, whether he agrees with that point, agrees with qualifications, or disagrees. We are not seeking a memorandum of law or even discussion of each point, but simply to know whether there is agreement or disagreement so that we can understand which issues may require further legal research and exploration.

1. Under New York Law, the Town of East Hampton as owner of the Airport enjoys all the standard real property rights appurtenant to holding fee title to the Airport and, as an incorporated municipality under state law, the police powers to impose community noise limits and enforce those limits by the application of civil and criminal penalties, subject to point 2 below.

2. The Town's real property rights and its police powers may be preempted or superseded by federal law and regulation under the supremacy clause of the U.S. Constitution and federal control of navigable airspace (by analogy, comparable to federal control of navigable waterways). This may occur legislatively through enactment of federal statute, administratively through the promulgation of federal regulations, or by judicial application of constitutional provisions such as the interstate commerce clause – the so-called dormant commerce clause doctrine (implied preemption).

3. Congress has affirmatively and extensively preempted state and local regulation of aviation. However, in recognition of the Constitution's protection of property rights and local authority, the courts, including the Supreme Court, and the Congress have recognized a “proprietor's exception” to this preemption allowing a municipal proprietor of an airport to impose reasonable, non-arbitrary, and non-

discriminatory airport access restrictions for the purpose of protecting the community surrounding the airport from aircraft noise.

4. The applicable standard for invocation and application of the proprietor's exception, binding in our jurisdiction, is set forth in the opinion of the U.S. Court of Appeals for the Second Circuit in the case of *National Helicopter Corp. of America v. The City of New York*, 137 F.2d 81 (2d Cir. 1998).

5. The proprietor's exception does not permit any regulation of aircraft while airborne, whether direct or indirect. That remains the exclusive province of the Federal government. For example, the Town cannot condition access to East Hampton Airport upon aircraft observing noise abatement procedures while airborne. Those are necessarily purely voluntary unless imposed by the federal government.

6. The exception, as interpreted by the Second Circuit, does permit the proprietor, subject to the reasonable, non-arbitrary, and nondiscriminatory standard, to impose: (a) limits on days and hours of operation of its own airport, (b) limits on the numbers of operations permitted in a given time period, and (c) limits on numbers of operations or exclusions of particular aircraft types based on how noisy they are.

7. The proprietor can also set a goal of achieving a specific percentage reduction in noise; for example, the Second Circuit in *National Helicopter* approved the City's plan to achieve a 47% reduction in noise using the tools of 6(a), (b), and (c) above.

8. Congress has delegated to the FAA the authority to regulate aviation pursuant to its affirmative preemption of the field and, in addition, has authorized the FAA to enter into contracts with airport owners to fund capital improvements to those airports to promote the existence and maintenance of a national air transportation system. Contracts awarding such grants must contain binding covenants known as "grant assurances" that limit, among other things, the owner's authority under the proprietor's exception to restrict access and limit noise and subjecting the municipality to substantive and procedural requirements in any attempt to manage aviation noise.

9. The Town of East Hampton has, in the past 30 years, contracted with the FAA to receive airport improvement grants and has accepted and agreed to be bound by grant assurances, thereby limiting its powers under the proprietor's exception to control aviation noise induced by the airport.

10. The relevant grant assurances limiting the Town's exercise of its proprietary powers will effectively expire on December 31, 2014 by agreement between the FAA and Committee to Stop Airport Expansion that they will no longer be enforced after that date.

11. After December 31, 2014, the Town will not be required to obtain any prior consent from the FAA to the exercise of its proprietary powers to control airport access under the judicial standard. This includes no requirement of compliance with 14

CFR Part 150 in order to obtain FAA consent as that is not longer necessary.

12. After December 31, 2014, the Town will no longer be obligated before exercising its proprietary powers to control access to comply with the requirements of the Airport Noise and Capacity Act of 1990 (ANCA), as implemented by 14 CFR Part 161, unless the Town wishes to remain eligible for future FAA grant funds.

13. The only federal regulatory consequence of the Town imposing aircraft access restrictions after December 31, 2014 may be the loss of eligibility to receive future FAA grants, assuming that the Town is not directly or indirectly regulating aircraft while in flight.

14. Absent the authority under grant agreements or delegated to it under ANCA and 14 CFR part 161, the FAA has no independent authority to determine whether properly substantiated and adopted aircraft access restrictions are reasonable, non-arbitrary, and nondiscriminatory, nor does it have the power to determine the permissibility of airport access restrictions under the dormant commerce clause doctrine. Those determinations are the exclusive domain of the federal courts.

15. The nondiscriminatory requirement of the *National Helicopter* standard means that any access restriction must apply equally to all aircraft emitting similar noise patterns and may not be applied by aircraft type or category or other characteristic. For example, such restrictions could not apply to helicopters alone unless the noise pattern determined to be causing the disturbance were unique to helicopters.

16. In the absence of grant assurances, any history of aircraft operators complying with or failing to comply with voluntary schemes of noise abatement will have no bearing on the application of the *National Helicopter* standards so long as the noise problems are demonstrated in a sound record and the restrictions adopted to address those noise problems are reasonably designed to address the problem.

17. There is no necessary amount of noise that the community must accept in the operation of its municipal airport. It is for the community to decide, by its elected representatives, as a matter of policy the relative weight and value that it assigns to quiet on the one hand and to the benefits of aviation on the other, so long as its regulatory scheme is reasonably designed to achieve its desired policy outcome and does not make distinctions or impose restrictions not reasonably directed to that end.

18. In the absence of grant assurances and without the requirements imposed on grant recipients under ANCA and 14 CFR Part 161, the Town has no obligation to apply the FAA's 65 DNL aircraft noise standard. It may apply a local noise standard, provided that standard does not discriminate against aviation.

19. In any litigation challenging the Town's access restrictions, the burden would be on the challenger to show that the Town's restriction is unreasonable and fails to meet the *National Helicopter* standards, whether that challenger is a private party or

the FAA.

20. Any such litigation challenging the Town's aircraft access restrictions, whether by private party or the FAA, could be commenced only in the federal courts where the only admissible arguments would be that the *National Helicopter* standards have not been met or that the restrictions violate the dormant commerce clause doctrine by imposing an unreasonable burden on interstate commerce.

21. Any action by the Town to enforce the airport access restrictions could be taken only in local and state courts and would not be removable to the federal courts.

22. In any such enforcement proceeding by the Town, which would no longer be subject to grant assurances and ANCA, the defendant's only federally based affirmative defense would be violation of the standards of *National Helicopter* or the dormant commerce clause doctrine.

23. An argument against the Town's aircraft access restrictions based on the dormant commerce clause doctrine is highly unlikely to succeed on the merits, whether as an affirmative defense to an enforcement proceeding in state court or as the basis for injunctive relief in federal court, because of the Second Circuit's approach to that doctrine as illustrated in *National Helicopter* and *Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d Cir. 2007, *remanded and aff'd* ), unless it could be shown that access to East Hampton Airport has a material bearing on aircraft operations or routing elsewhere when East Hampton is neither the destination nor the origin of the flight.

24. In any litigation challenging the Town's aircraft access restrictions, it is highly unlikely that a TRO or preliminary injunction would be issued to halt a state court's enforcement of those restrictions.

25. The expenditure by the Town in *Town of Southold v. Town of East Hampton* and the related case of *Francarl Realty Corp. v. Town of East Hampton*, 628 F. Supp. 2d 329 (E.D.N.Y. 2009) is a reasonable proxy for the likely cost of defending airport access restrictions as the issues are similar.

26. There is no precedent for the FAA intervening in a private action to overturn access restrictions imposed by a municipal airport proprietor in the exercise of its authority under the proprietor's exception, although it can be assumed that the FAA would have standing to do so.

Respectfully submitted,

Airport Planning Committee, Noise Subcommittee