

CRAVATH, SWAIN & MOORE LLP

WORLDWIDE PLAZA
825 EIGHTH AVENUE
NEW YORK, NY 10019-7475

TELEPHONE: +1-212-474-1000
FACSIMILE: +1-212-474-3700

CITYPOINT
ONE ROPEMAKER STREET
LONDON EC2Y 9HR
TELEPHONE +44-20-7453-1000
FACSIMILE +44-20-7860-1150

WRITER'S DIRECT DIAL NUMBER

(212) 474-1922

GEORGE E. ZOBITZ
GEORGE A. STEPHANAKIS
DARIN P. MCATEE
GARY A. BORNSTEIN
TIMOTHY G. CAMERON
KARIN A. DEMASI
LIZABETHANN R. EISEN
DAVID S. FINKELSTEIN
DAVID GREENWALD
RACHEL G. SKAISTIS
PAUL H. ZUMBRO
JOEL F. HEROLD
ERIC W. HILFERS
GEORGE F. SCHÖEN
ERIK R. TAVZEL
CRAIG F. ARCELLA
TEENA-ANN V. SANKOORIKAL
ANDREW R. THOMPSON
DAMIEN R. ZOUBEK
LAUREN ANGELILLI
TATIANA LAPUSHCHIK
ERIC L. SCHIELE
ALYSSA K. CAPLES
JENNIFER S. CONWAY
MINH VAN NGO

KEVIN J. ORSINI
MATTHEW MORREALE
JOHN D. BURETTA
J. WESLEY EARNHARDT
YONATAN EVEN
BENJAMIN GRUENSTEIN
JOSEPH D. ZAVAGLIA
STEPHEN M. KESSING
LAUREN A. MOSKOWITZ
DAVID J. PERKINS
JOHNNY G. SKUMPIJA
J. LEONARD TETI, II
D. SCOTT BENNETT
TING S. CHEN
CHRISTOPHER K. FARGO
KENNETH C. HALCOM
DAVID M. STUART

SPECIAL COUNSEL
SAMUEL C. BUTLER
GEORGE J. GILLESPIE, III

OF COUNSEL
PAUL C. SAUNDERS

STUART W. GOLD
JOHN W. WHITE
EVAN R. CHESLER
MICHAEL L. SCHLER
RICHARD LEVIN
KRIS F. HEINZELMAN
B. ROBBINS KIESSLING
ROGER D. TURNER
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RORY O. MILLSON
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C. ALLEN PARKER
SUSAN WEBSTER
DAVID MERCADO
ROWAN D. WILSON
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MICHAEL A. PASKIN
ANDREW J. PITTS
MICHAEL T. REYNOLDS
ANTONY L. RYAN

November 24, 2014

East Hampton Airport – Noise Pollution Proposal

Dear Mr. Lipper and Dr. Wolf:

You have asked for an assessment of the legality of a proposal (the "Proposal") whereby the Town of East Hampton (the "Town"), upon its opting to assume control on January 1, 2015 of the operations of the East Hampton Airport (the "Airport"), would enact an ordinance intended to reduce the noise experienced by residents of the Town and of neighboring communities.

For the reasons that follow, the Proposal, as described below, fully comports, in our opinion, with existing legal constraints on the ability of localities to regulate airport operations. The Proposal reflects a reasonable and non-arbitrary approach to the reduction of noise pollution and does not improperly discriminate against aircraft or aircraft operators for reasons other than the amount and timing of the noise they generate, individually and in the aggregate.

Background

We understand that the Airport is located in and owned by the Town of East Hampton, a community comprising approximately 21,000 full-time and part-time residents. In 1936, the Airport was constructed as part of a Works Progress Administration project. Over the past several years, traffic at the Airport has substantially increased and, with it, the noise generated by the aircraft as they take off

and land. You have prepared the Proposal for the Town to enact as an ordinance supplementing the existing East Hampton Town Comprehensive Plan's provisions on noise pollution. The key terms of the Proposal are:

- Nature of Aircraft
 - To ban all helicopter and seaplane landings and takeoffs at East Hampton Airport.
 - To require all aircraft using the East Hampton Airport facility to meet an established noise level standard appropriate to a quiet rural community.
 - The standard would set limits on both the absolute intensity and the relative duration of the noise generated by an aircraft as it approaches and departs.
- Timing of Operations
 - To restrict airport operations to 9:00am to 5:00pm, seven days a week.
 - To restrict total landings and takeoffs, inbound and outbound combined, during those hours to four (4) per hour.
- Terms of Access
 - To auction landing slots to generate a substantial fund to support the local airport.

Legal Analysis

Regulation of aviation is entrusted to the federal government, and, thus, under the doctrine of federal preemption, federal regulation of aviation displaces state and local regulation on that subject. 49 U.S.C. § 41713(b)(1); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973). An exception, however, is recognized for regulation by local governments that own airports. Although such local government airport "proprietors" cannot regulate the "price, route, or service of an air carrier," *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998), airport proprietors can regulate *access* to their facilities as part of their exercise of "proprietary rights and powers." 49 U.S.C. § 41713(b)(3). Reduction of noise pollution experienced by local residents is a proper subject of access regulation authorized under this

exception.¹ Under this “proprietor exception” a regulation of access to reduce noise levels is permissible if it is reasonable, non-arbitrary, and non-discriminatory. *National Helicopter*, 137 F.3d at 88. Each aspect of the Proposal satisfies this standard.

Restrictions on Nature of Aircraft: One component of the Proposal is its prohibition of the use of the Airport by helicopters and seaplanes. We understand that helicopters and seaplanes create more noise than other aircraft that use the airport, such as prop planes and jets, and that the noise they create is more disturbing to residents than other types of aircraft noise. We are informed, specifically, that helicopters generate far more noise complaints from Town residents than other aircraft, *see Analysis of 2014 YTD Noise Complaints for East Hampton Airport*, prepared by Peter A. Wadsworth (October 30, 2014) (“2014 Noise Complaint Study”)² probably because they generate higher absolute decibel levels, because their relative slowness means that they emit noise for longer periods as they land and take-off, and because the noise they generate has distinctively intrusive features (e.g., percussive sounds at lower frequencies (which propagate over larger distances)). We are informed that seaplanes generate noise on a level comparable to that generated by helicopters. *See Airport Planning Committee, Noise Sub-Committee, Eighth Preliminary Findings and Recommendations – Alternatives for Noise Control for Town Board Considerations*, at 14 (October 28, 2014). *See also SeaAir NY, Inc. v. City of New York*, 250 F.3d 183, 188 (2d Cir. 2001) (upholding restrictions on seaplane landings; “when seaplanes are operated, the ambient noise level is at the top of the typical range”).

As such, their prohibition from use of the Airport is a reasonable, non-arbitrary exercise of the Town’s proprietary power to regulate noise, and does not discriminate against aircraft on any basis other than the noise they create. Unlike the restriction on landings by large (but not small) helicopters struck down in *National*

¹ *National Helicopter*, 137 F.3d at 88 (“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.”); *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991) (“Congress reserved a limited role for local airport proprietors in regulating noise levels at their airports.”).

²<http://www.town.easthampton.ny.us/DocumentsPDF/Airport/AirportNoiseInterim/Analysis2014YTDNoiseComplaintsFINAL.pdf>

Helicopter, an across-the-board ban on helicopters and seaplanes, premised, as it is, upon the inherently noisier nature of these types of aircraft, is not “unreasoned discrimination on account of an aircraft’s size.” *Compare National Helicopter*, 137 F.3d at 91.

With respect to other aircraft using the Airport, such as jets and prop planes, the Proposal calls for the development of noise level standards that all such aircraft must meet. Since the standards would be based solely on objective measures of noise generation, they would exemplify regulations that target noise pollution in a reasonable, non-arbitrary, and non-discriminatory manner.

Restrictions on Timing of Operations: Another component of the Proposal is the elimination of landings during non-business hours and, within those hours, to no more than four per hour. Both *National Helicopter* and *Global International Airways Corp. v. Port Authority of NY & NJ*, 727 F.2d 246, 250-51 (2d Cir. 1984), recognize the validity of regulations that attempt to reduce “cumulative” noise levels as these do, and to do so in a manner that shifts noise preferentially to periods in which residents are less likely to be at leisure or rest. A total ban on weekend operations was upheld in *National Helicopter* based on the recognition that a municipality may properly “desire to protect area residents from significant noise intrusion during the weekend when most people are trying to rest and relax at home.” 137 F.3d at 90. The same reasoning applies with even greater force here, where the Proposal, while permitting operations during the weekend, merely seeks to shift them to hours in which the noise they generate is likely to be less disturbing and disruptive of leisure activities and sleep. According to a recent study of noise complaints about the East Hampton Airport, the peak times for complaints were Monday, from 7-8 a.m., and Friday and Sunday from 5-6 p.m.

Similarly, the restriction on frequency of takeoff/landings to four/hour is analogous to the “47% Reduction of Operations” restriction upheld in *National Helicopters*, in that it appropriately seeks to reduce the cumulative noise pollutive effect of successive takeoffs/landings. 13 F.3d at 91. Indeed, in upholding the “47% Reduction” in that case, the Court stated that it would be permissible to achieve that reduction through, among other things, a “per hour limit.” *Id.* In the later case, *Sea Air NY, Inc. v. City of New York*, 250 F.3d 183, 188 (2d Cir. 2001), the Second Circuit observed

in upholding municipal restrictions on seaplane flights, “It is reasonable, however, to assume that a reduction of flights will result in a corresponding reduction of noise.”

Terms of Access: A final aspect of the Proposal is for the rights to land aircraft during the airport’s hours of operation be distributed through an auction process to the highest bidder. This aspect also is reasonable, non-arbitrary, and non-discriminatory. It is reasonable for a municipality to fund operations of a public facility by levying fees/tolls upon those who use it. *See Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 714 (1972) (“We . . . regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.”). And in instances in which the public facility is one that, by its nature, cannot be used simultaneously by all those who wish to use it, some practical, non-discriminatory method of allocation must be adopted. Auctioning has been employed in a variety of public contexts, *e.g.*, carbon emissions, telecommunications spectrum, mineral rights. *See* Steven Ferrey, *Auctioning the Building Blocks of Life: Carbon Auctioning, the Law, and Global Warming*, 23 Notre Dame J.L. Ethics & Pub. Pol’y 317 (2009); Brian C. Fritts, *Private Property, Economic Efficiency, and Spectrum Policy in the Wake of the C Block Auction*, 51 Fed. Comm. L.J. 849 (1998-99). From an economic perspective, auctions are considered efficient because they allocate scarce resources to those most likely to derive the greatest utility from them as measured by their willingness to pay. *See* Fritts, *supra*, at 876, 880. They eliminate the practical queuing problems that arise when requests for items at a price fixed in advance exceed the available number of items. *See* Paul Milgrom, *Auctions and Bidding: a Primer*, 3 The Journal of Economic Perspectives 3 (1989) (“when the market clearing prices are highly unstable, posted prices work poorly and auctions are usually preferred.”). And they tend to be less vulnerable to corruption than other methods of distribution. *See id.* (“Public auctions offer fewer opportunities for kickbacks and behind-the-scenes agreements between the seller’s agent and a single buyer than do negotiated

agreements.”). In light of the likelihood that demand for landing/takeoff rights exceeds the supply under the Proposal, the use of an auction to allocate those rights appears to be a reasonable method.

Sincerely,

A handwritten signature in black ink, appearing to read "David Greenwald", written in a cursive style.

David Greenwald

Mr. Kenneth Lipper
Dr. Peter M. Wolf
P. O. Box 1404
East Hampton, NY 11937