WASHINGTON, DC OFFICE:
1517 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE: (202) 225-3826
FAX: (202) 225-3143

COMMITTEE ON FOREIGN AFFAIRS

COMMITTEE ON VETERANS' AFFAIRS

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

PATCHOGUE OFFICE:
31 OAK STREET, SUITE 20
PATCHOGUE, NY 11772
PHONE: (631) 289-1097
FAX: (631) 289-1268

ZELDIN.HOUSE.GOV

FACEBOOK.COM/REPLEEZELDIN
TWITTER.COM/REPLEEZELDIN

Congressman Lee M. Zeldin
First Congressional District of New York

March 2, 2015

The Honorable Michael P. Huerta
Administrator
Federal Aviation Administration
800 Independence Avenue SW
Washington, D.C. 20591

Dear Administrator Huerta:

On behalf of my constituents on the east end of Long Island who have been impacted by the pervasive problem of excessive helicopter noise, I am contacting you to ask the Federal Aviation Administration (FAA) to work immediately toward a solution before this summer. Long Island's East End is one the nation's most scenic destinations, and as we rapidly approach another high season for the tourism economy, the people of these affected communities urgently need a set of effective solutions that will mitigate excessive noise from helicopters approaching the region. My constituents cannot afford to have another season ruined by disruptive noise. I look forward to working with you on this most pressing issue.

Implementing rotating points of entry over land and enforcing minimum altitude

By this upcoming Memorial Day Weekend, it is imperative that the FAA address the unnecessarily low altitude at which these helicopters are descending over the North Fork and those parts of the South Fork when not yet imminently landing. If aircraft are descending over these communities before it is necessary for them do to so, your agency must address this. The 2012 FAA rule implementing the so-called North Shore route for approaching helicopters was successful in mitigating disruptive helicopter noise on other parts of Long Island; however, it has exacerbated the problem on Long Island's Nork Fork. Communities like Riverhead, Southold and Shelter Island, which have chosen not to host a heliport, require immediate relief from the excessive noise created by low flying helicopters. Immediate steps must be taken to assure that the citizens of these affected communities are not negatively impacted during the upcoming high season.

PRINTED ON RECYCLED PAPER

The Town of Shelter Island, through a town ordinance, has banned all commercial helicopter take-offs and landings and yet still bears a disproportionate burden of helicopter noise. This is unacceptable especially considering the availability of water routes that allow pilots to avoid flights over the island. The FAA must immediately put a stop to the unacceptable practice of helicopters intentionally executing low flights over Shelter Island just to allow their passengers to take photos of the historic community.

The current rule requires helicopters transiting Long Island via the Northern Route to remain at or above 2,500 feet mean sea level (MSL). Pilots are permitted to deviate from this altitude requirement at transition points, but we believe these aircraft do not have to descend so soon once transitioning over the North Fork. To mitigate noise, and wherever possible as safety concerns permit, helicopter pilots should remain at or well above 2,500 feet and begin to descend only after they have cleared the North Fork. The current rule does not prescribe actual points of transition, and your agency should investigate why helicopters are bearing down on these communities before it is necessary to do so. This also includes those parts of the South Fork that are not very close to the actual destination of the aircraft. Proper enforcement of the altitude ceiling for aircraft will help mitigate the disruptive noise impact and a clear definition of safe and proper transition points, combined with a rotating schedule, would help mitigate the severe noise impact. Immediate efforts are required that can address transition points and the manner in which these helicopters are descending.

If this option is not successfully pursued, then more drastic measures like an all water route around Orient Point will continue to be demanded with good reason by many of my constituents.

FAA must stand-by assurances made to East Hampton through my predecessor

The East Hampton Airport has recently proposed a set of airport noise restrictions to help mitigate this growing problem. I respectfully request that the FAA standby the assurances it gave to my predecessor, Congressman Tim Bishop, in 2012. Mainly, that the Town would not be subject to the Airport Noise and Capacity Act after December 31, 2014, and could adopt restrictions on the use of their airport without FAA approval. Congressman Bishop's December 2011 letter and the subsequent responses he received in 2012 are attached. In response to Rep. Bishop's second question, the FAA states that "*unless and until the FAA awards a new grant to the town, the FAA will not initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators under 14 CFR, part 16, or seek specific performance of Grant Assurances 22a, 22h, and 29.*" The Town has proposed several local ordinances to regulate aircraft noise at the East Hampton Town Airport which are expected to pass the Town Board on March 19.

The Town has elected to forego any new Airport Improvement Funds or other forms of funding through FAA-administered airport financial assistance programs. The citizens of the East Hampton community, through their democratically elected Town Board, have chosen to implement regulations that maintain and protect their quality of life.

In closing, I thank you in advance for your prompt attention to this critical issue and I look forward to working with you and your staff as we move forward to solve this issue and on other impactful issues such as the FAA reauthorization. If you require any additional information, please contact Kevin Dowling in my Washington, D.C. office at (202) 225-3826 or at kevin.dowling@mail.house.gov. **Please do not misconstrue anything in this letter as a formal petition for rulemaking. Due to the fast moving nature of this issue and the rapid approach of the high season, I respectfully request a prompt response within 14 business days.**

Sincerely,

Lee M. Zeldin
Member of Congress
Vice-Chairman, Subcommittee on Aviation, House Committee on Transportation and Infrastructure

Enclosure

TIMOTHY H. BISHOP
1ST DISTRICT, NEW YORK

COMMITTEE ON EDUCATION AND THE WORKFORCE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Congress of the United States
House of Representatives
Washington, DC 20515–3201

306 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3826
FAX: (202) 225-3143

31 OAK STREET, SUITE 20
PATCHOGUE, NY 11772
(631) 289-6800
FAX: (631) 289-3180

www.house.gov/timbishop

December 14, 2011

The Honorable Michael P. Huerta
Acting-Administrator
U.S. Department of Transportation
Federal Aviation Administration
800 Independence Avenue SW
Washington, D.C. 20591

Dear Acting-Administrator Huerta,

In response to requests from local organizations and constituents in my district who are concerned with excessive noise from air traffic over Long Island communities, I ask that your office respond to the attached list of questions related to the East Hampton Airport in my congressional district.

If you require additional information regarding the included questions, please feel free to contact Mark Copeland in my Washington, D.C. office at (202) 225-3826.

Sincerely,

Tim Bishop
Member of Congress

Enclosure

CC: Catherine Lang, Deputy Associate Administrator for Airports
Daphne Fuller, Assistant Chief Counsel for Airports & Environmental Law
Randall Fiertz, Director of Airport Compliance, Office of Airports

1. In the absence of FAA grant assurances, are municipal restrictions to mitigate or reduce noise impacts on the surrounding community permissible? If not, under what basis in law does the FAA assert that the Town of East Hampton's proprietary powers are restricted in the absence of specific grant assurances?

2. Barring emergency situations, in the absence of FAA grant assurances, is it correct that a municipal owner of a general aviation airport may do the following things for the specific purpose of protecting the community from noise? If not, please clarify.
   - Limit hours of operation, including imposing curfews or closing on weekends
   - Limit the number of airport operations per day
   - Exclude particular aircraft types based on associate noise levels

3. According to local organizations, 37 out of 39 grant assurances at East Hampton Airport will remain in effect until 2021; however, grant assurances 22a and 22h and 29a and 29b – the assurances that allow the FAA to substitute its view of the need for noise restrictions for that of the Town as airport proprietor – will become unenforceable, by agreement, on December 31, 2014. Is this correct? If not, please clarify.

4. Should the Town of East Hampton apply for and receive additional AIP funds, would the Town by restricted by a new set of grant assurances that would prevent that them from implementing noise reduction policies, such as those that are currently in effect.

5. According to *National Helicopter Corp. of America v. The City of New York*, 137 F. 2d 81 (2d Circuit, 1998), any restriction properly adopted in the exercise of its powers as a proprietor cannot violate the Commerce Clause of the U.S. Constitution and that the proprietor's exception is an exception to federal control of airspace management. Does the FAA agree that use restrictions that are reasonably related to the legitimate local interest in limiting noise are not an unconstitutional interference with either interstate commerce or federal control of the airways?

6. In the absence of specific grant assurances, on what basis could the FAA bring suit on the Town of East Hampton for enacting noise reduction policies at the East Hampton Airport, such as limits on hours of operation and imposing curfews or closing on weekends.

7. Does the Town of East Hampton have an FAA approved Airport Layout Plan (ALP)? If so, when was it most recently approved by the FAA?

8. The 65 DNL decibel contour in East Hampton is within the boundaries of the East Hampton Airport itself. Given this fact, are there any conditions under which the FAA would consent to use restrictions in order to reduce noise in the community?

FAA Responses to Questions from Rep. Tim Bishop
East Hampton Airport

Question 1: In the absence of FAA Grant Assurances, are municipal restrictions to mitigate or reduce noise impacts on the surrounding community permissible? If not, under what basis in law does the FAA assert the Town of East Hampton's proprietary powers are restricted in the absence of specific Grant Assurances?

FAA Response: The FAA's role is to advise sponsors subject to Grant Assurance obligations concerning proposed actions to facilitate their compliance with applicable Federal laws (see FAA Order 5190.6B, Airport Compliance Manual). Particularly absent such obligations, the FAA does not typically provide advisory opinions about hypothetical situations. Rather, the FAA provides an opinion when requested by a Federal court and determines on a case-by-case basis whether and to what extent to participate when requested by private parties. See title 49 Code of Federal Regulations, part 9, generally. As a rule, nonfederally obligated airport operators obtain advice from private counsel concerning the scope of their proprietary authority.

The issue presented here relating to the "absence of FAA Grant Assurances" is a novel one, of first impression, because the FAA is a party to a settlement agreement under which two of the nine provisions comprising the economic nondiscrimination Grant Assurance and Grant Assurance 29, with one exception not relevant here, will expire at HTO after December 31, 2014. The FAA further agreed not to enforce the expiring provisions after December 31, 2014. The town of East Hampton will generally otherwise remain grant obligated until 2021. Under the settlement agreement, all grants awarded to HTO after 2005 will include Grant Assurances 22a, 22h, and 29. For purposes of answering this question, it is assumed that no new grants have been awarded and that the town is proposing to restrict access after December 31, 2014.

The FAA's agreement not to enforce means that as of December 31, 2014, unless and until the FAA awards a new grant to the town, the FAA will not initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators under title 14 CFR, part 16, or seek specific performance of Grant Assurances 22a, 22h, and 29.

The FAA's agreement not to enforce also means that unless the town wishes to remain eligible to receive future grants of Federal funding, it is not required to comply with the requirements under the Airport Noise and Capacity Act of 1990 (ANCA), as implemented by title 14 CFR, part 161, in proposing new airport noise and access restrictions. See title 49 United States Code (U.S.C.), § 47524(e). ANCA applies to restrictions affecting operations by any Stage 2 or Stage 3 aircraft (including helicopters) if the restriction was not in effect on October 1, 1990[1] (title 49 U.S.C., § 47524(b), (c)).

[1] Restrictions on operations of Stage 3 aircraft in effect on October 1, 1990, are "grandfathered" and are not subject to the requirements of ANCA (see title 49 U.S.C., § 47524(c)). Amendments to "grandfathered" restrictions that further reduce or limit Stage 3 aircraft operations or affect aircraft safety are subject to part 161 (title 49 U.S.C., § 47524(d)(4)).

Under ANCA, prior to implementing a restriction on Stage 3 aircraft, an airport operator must provide notice to the public. This includes a clear, concise description of the proposed restriction, an opportunity to comment, and an adequate environmental assessment. The airport operator's analysis must provide substantial evidence supporting the following six statutory conditions:

(1) The restriction is reasonable, nonarbitrary, and nondiscriminatory;

(2) the restriction does not create an undue burden on interstate or foreign commerce;

(3) the restriction is not inconsistent with maintaining the safe and efficient use of the navigable airspace;

(4) the restriction does not conflict with a law or regulation of the United States;

(5) an adequate opportunity has been provided for public comment on the restriction; and

(6) the restriction does not create an undue burden on the national aviation system.

Title 49 U.S.C., § 47524(c)(2)(A)-(F).

Although FAA approval is not required for an airport operator to implement a Stage 2 restriction, an airport operator must provide an analysis of the proposed restriction, as well as a public notice and opportunity to comment, at least 180 days prior to the effective date of the restriction. The analysis must include a benefit-cost analysis; a description of alternative measures considered that do not involve aircraft restrictions (including a benefit-cost analysis of such alternatives).

We are responding to the balance of your question because the town is partially grant obligated and it raises an unusual issue. It is well settled that airport operators have limited proprietary authority to restrict access to control noise. Whether or not they have accepted grants from the FAA, they are vested only with the power to promulgate reasonable, nonarbitrary, and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster. *British Airways Board* v. *Port Authority of New York and New Jersey*, 558 F.2d 75, 84 (2d Cir. 1977), *aff'd, as modified*, 564 F.2d 1002 (2d Cir. 1977) (*British Airways I and II*) (see § 3, Authorities and Responsibilities–Legal Framework, Aviation Noise Abatement Policy 2000, 65 Fed. Reg. 43,802-01 (July 14, 2000)).

In the opinion of the FAA, should the town of East Hampton propose any restriction that denies access on fair and reasonable grounds or is unjustly discriminatory at HTO, the aforementioned Federal and constitutional law would provide a basis for aircraft operators to prevail in seeking a declaratory judgment and injunction. This basis is independent of Grant Assurances 22a, 22h, and 29. In such circumstances, the United States would have to determine whether affirmative litigation could and should be initiated on that same basis consistent with the terms of the settlement agreement.

Question 2: Barring emergency situations, in the absence of FAA Grant Assurances, is it correct that a municipal owner of a general aviation airport may do the following things for the specific purpose of protecting the community from noise? If not, please clarify.

- Limit hours of operation, including imposing curfews or closing on weekends;
- Limit the number of airport operations per day;
- Exclude particular aircraft types based on associate noise levels.

FAA Response: See response to Question 1. Any restriction must, consistent with Federal and constitutional law, be reasonable, nonarbitrary, and nondiscriminatory, establishing acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster.

Question 3: According to local organizations, 37 out of 39 Grant Assurance at East Hampton Airport will remain in effect until 2021; however, Grant Assurance 22a and 22h and 29a and 29b – the assurances that allow the FAA to substitute its view of the need for noise restrictions for that of the Town as airport proprietor – will become unenforceable, by agreement, on December 31, 2014. Is this correct. If not, please clarify.

FAA Response: According to the settlement agreement, two of the nine subsections comprising of Grant Assurance 22 (Economic Nondiscrimination) will expire after December 31, 2014, as would Grant Assurance 29 (Airport Layout Plan) with one exception. The two subsections that expire are 22a and 22h. These subsections address access restrictions. The settlement agreement states that the FAA agrees to take no action to enforce Grant Assurances 22a, 22h, 29a, and 29b (except where the town takes an action or proposes to take an action that will adversely affect the safety of the airport) after December 31, 2014. As discussed in detail in response to Questions 1 and 2, the Grant Assurances relating to airport noise and access parallel existing requirements under current Federal and constitutional law. From a legal perspective, airport operators have limited proprietary authority to restrict access as a means of reducing aircraft noise impacts in order to improve compatibility with the local community. This limitation applies to the same degree whether or not the airport operator has accepted grants of Federal funding from the FAA. Should the town and the FAA have a difference of opinion concerning whether proposed restrictions exceed this limitation, it is an open question whether the United States could and would initiate affirmative litigation after Grant Assurances 22a, 22h, and 29 expire in December 2014. The issue in any court proceeding, whether brought by private parties or the United States, would be the same: whether the noise restriction adopted by the town is reasonable, nondiscriminatory, and justified. The assurances, which reflect limitations in applicable Federal and constitutional law, do not "allow the FAA to substitute its view of the need for noise restrictions for that of the town as proprietor."

Question 4: Should the town of East Hampton apply for and receive additional AIP funds, would the town be [by] restricted by a new set of Grant Assurances that would prevent them [that] from implementing noise reduction policies, such as those that are currently in effect.

FAA Response: The settlement agreement specifically states that all grants awarded to HTO after the effective date of the settlement agreement (April 2005) would include Grant

Assurances 22a, 22h, and 29a. By law, any future grant executed by the town must include all Grant Assurances in effect at the time of the grant. The town currently has voluntary noise abatement helicopter routes in effect. We see no reason that a new set of Grant Assurances would prevent continued use of these routes. Nor would new assurances impede any reasonable restriction that complies with other applicable Federal and constitutional law.

The FAA has continuously, consistently, and actively encouraged a balanced approach to address noise problems and to discourage unreasonable and unwarranted airport use restrictions. It is a longstanding FAA policy that all possible measures to reduce noise should be considered before airport noise restrictions are proposed to provide noise relief. An airport operator's efforts at land use control are factors to be considered in determining whether there are nonaircraft restrictions that could achieve noise benefits more effectively than a restriction. The ability of an airport operator to attain the benefits of an access restriction through the exercise of land use control powers may be a factor to be considered in determining the reasonableness of a restriction. Voluntary measures, such as asking flight crews to expedite climbs (safely) or apply airport specific noise procedures, are inherently reasonable elements of a balanced approach. The FAA would encourage HTO to continue to work with aircraft operators to ensure voluntary measures are communicated and implemented, as well as educate users on the importance of participating in such voluntary abatement programs for the mutual benefit of the airport and the community.

Question 5: According to *National Helicopter Corp. of America v. The City of New York*, 137 F. 2d 81 (2d Circuit, 1998), any restriction properly adopted in the exercise of its powers as a proprietor cannot violate the Commerce Clause of the U.S. Constitution and that the proprietor's exception is an exception to federal control of airspace management. Does the FAA agree that use restrictions that are reasonably related [to] the legitimate local interest in limiting noise are not an unconstitutional interference with either interstate commerce or federal control of the airways?

FAA Response: The cited case, to which the United States was not a party, raises issues of Federal authority under the dormant Commerce Clause and implied preemption. Cases invoking these legal doctrines are very fact-specific and the legal issues raised can be complex. Under these circumstances, it would not be appropriate for the FAA to opine hypothetically.

Question 6: In the absence of specific Grant Assurances, on what basis could the FAA bring suit on the town of East Hampton for enacting noise reduction policies at the East Hampton Airport, such as limits on hours of operation and imposing curfews or closing on weekends?

FAA Response: See response to Question 1.

Question 7: Does the Town of East Hampton have an FAA approved Airport Layout Plan (ALP)? If so, when was it most recently approved by the FAA?

FAA Response: Yes, the FAA's New York Airports District Office received a revised ALP and conditionally approved it on September 6, 2011.

Question 8: The 65 DNL decibel contour in East Hampton is within the boundaries of the East Hampton Airport itself. Given this fact, are there any conditions under which the FAA would consent to use restrictions in order to reduce noise in the community?

FAA Response: See responses to Questions 1 and 4. The FAA consents to reasonable, nonarbitrary, and nondiscriminatory restrictions that establish acceptable noise levels for the airport and its immediate environs. Title 14 CFR, part 161, provides detailed information about how the FAA evaluates potential noise benefits in reviewing proposed airport noise and access restrictions. In proposing restrictions, just as it does in proposing measures to increase airport noise compatibility under title 14 CFR, part 150, the town would have the flexibility to supplement day/night average sound level with other noise analyses. As discussed in response to Question 4, the Town should consider measures to reduce noise in the community other than use restrictions. The Town may apply for and receive grants of federal funding to sound insulate homes subject to noise levels below 65 DNL dB. To qualify the Town would have to conduct an airport noise compatibility planning study under Part 150 to explore a range of alternative noise abatement measures and adopt a standard for local land use compatibility lower than 65 DNL dB.